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Brave new world? Care and custody of children at the Court for Divorce and Matrimonial Causes in mid-Victorian England

PENELOPE RUSSELL[1]

ABSTRACT. *This article considers the accessibility and impact of the mid-Victorian divorce court's new custody powers, by tracing the children of those who petitioned the court within the first two years of the court's establishment and contrasting this with court pleadings and orders. Focusing on the care of children by location as revealed by the census and other sources, this study then deals in more detail with individual cases to illustrate the experience of parties in divorce court processes for child custody. This study generates an original dataset to find that, whereas the majority of resident female petitioners sought a custody order in the petition, only a minority ended up with an order. Three broad issues are addressed: the gendered nature of rights in respect of children on marital breakdown, the implications of legal remedies being accessed through male gatekeepers and the exercise of discretion at the newly opened divorce court.*

INTRODUCTION

The Court for Divorce and Matrimonial Causes heard its first case on 16th January 1858,[2] vested with a power under s.35 of the Divorce and Matrimonial Causes Act 1857 to make interim and final orders for the custody, maintenance and education of any children of parties to a marriage seeking judicial separation, nullity or divorce. The divorce court has been subject to considerable academic scrutiny[3] but less attention has been paid to the custody powers of the new court and any such studies have reached different conclusions. Gail Savage analysed both statistical evidence gathered for the 1912 Report of the Royal Commission on Divorce and a sample of case histories published in the London *Times Newspaper* between 1859 and 1910 and concluded that 'The guilty party … always lost custody of any children involved'.[4] Lawrence Stone carried out an extensive review of marriage, separation and divorce between 1530-1987 and argued that the court exercised its power to allocate

[1] The author is grateful for the archival research skills of Jennifer Davies. All errors and deficiencies are of the author alone.

[2] Henry Kha & Warren Swain, 'The enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates' (2016) The Journal of Legal History 37:3 303, 328.

[3] Gail Savage, 'Intended only for the husband: gender, class and the provision for divorce in England, 1858-1868' in Kristine Garrigan (ed), *Victorian scandals: representations of gender and class* (Ohio University Press 1992); O.R. McGregor, *'Divorce in England'* (Heinemann 1957); R Phillips, *Untying the Knot* (Cambridge University Press 1991); Allen Horstman, *Victorian Divorce* (2nd edn, St. Martin's Press 1985); Colin S. Gibson, *Dissolving Wedlock* (Routledge 1994); Lawrence Stone, *Road to Divorce* (Oxford University Press 1990).

[4] Gail Savage, 'The Operation of the 1857 Divorce Act, 1860-1910 A Research Note' (1982) Journal of Social History 16 103, 106.

custody of children 'with extreme conservatism'.[5] Danaya Wright examined cases, relevant legislation and political writings about the issue of custody between 1700-1890 and referred to the 'court's liberal interpretation of its jurisdiction' and stated that the judges 'embraced the broadly defined discretionary powers granted them under the new act'.[6] In her detailed analysis of the court records from 1858-1866, she concluded that: 'The court readily adopted a rule tying custody to marital fault; thus the spouse at fault for the break-up would most likely lose custody'.[7]

This study builds on existing literature, by being the first to carry out a longitudinal analysis, using multiple record linkage including census data to create a biography for each party who came before the court and any children. By consulting a wide range of primary sources, this study has been able to look behind the court and newspaper documentation to explore the reality, circumstances and consequences for the parties and their children who made use of the new procedures, a topic that has been under-explored to date. Indeed, Danaya Wright has commented her 2004 article that, at that time, there was no way to tell what happened after the proceedings.[8] By using the census and other primary sources, this study aims to fill that gap and to examine not only the exercise of custody powers by the court but also the actual circumstances of the families involved: to glean original insights into the accessibility and impact of the newly established divorce court powers to make orders for custody.

CONTEXT

The mid-Victorian divorce court's broadly defined discretion, limited by neither age nor principle, enabled the court to award custody over any child as the court deemed 'just and proper'.[9] Family law barrister John Fraser Macqueen commented in his 1860 legal treatise that: 'With respect to the

[5] Lawrence Stone, *Road to Divorce* (Oxford University Press 1990) 390.
[6] Danaya Wright, (2002) 'The Crisis of Child Custody' Columbia Journal of Gender and Law 11:1 175, 248.
[7] Danaya Wright, 'Untying the knot: an analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866' (2004) U. Rich. L. Rev. 38 959.
[8] Danaya Wright, 'Untying the knot: an analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866' (2004) U. Rich. L. Rev. 38 949 footnote 228.
[9] Divorce and Matrimonial Causes Act 1857, s 35.

custody, maintenance and education of children, very large powers are conferred upon the Court of Divorce by the Act of 1857'.[10] For the first two years of the court's operation, trials took place before a bench of three judges, headed by the Judge Ordinary,[11] Sir Cresswell Cresswell, who was obliged to develop rules for the exercise of discretion and who later admitted at the trial of Ryder v Ryder in 1861 that 'he had on more than one occasion felt embarrassed in administering the law under this section, an entirely new jurisdiction having been conferred on him, and there being no practice or precedent for his guidance.'[12] Questions of fact were decided by a jury.[13]

The divorce court's unfettered powers to award custody to both male and female parties represented an opportunity to improve the position of women on marriage breakdown as, traditionally, court orders about children upheld the rights of fathers. Stephen Cretney has commented about the Victorian courts that: 'It is certainly true that the Law Reports contain striking illustrations of the principle that the law would uphold the rights of the paterfamilias, the father of the family… and (save only in the case of gross moral turpitude or abdication of his authority) not even the court had a right to interfere with the 'sacred right of a father over his children''.[14] A father's rights were upheld via two legal mechanisms: habeas corpus proceedings in the higher common law courts and wardship proceedings in the equitable Court of Chancery.

The absolute and unqualified right of fathers to child custody was a long established common law principle, originating from early Roman law and linked to property rights and financial benefits.[15] A father could procure the return of his child to him by seeking a writ of habeas corpus because the common law courts considered, even well into the nineteenth century, that a father was entitled to

[10] J F Macqueen, *A practical treatise on the law of marriage, divorce and legitimacy as administered in the Divorce Court and in the House of Lords* (London 1860) 164.
[11] Divorce and Matrimonial Causes Act 1857, ss 8 and 9.
[12] The Hertfordshire Express (26 January 1861) 2.
[13] Divorce and Matrimonial Causes Act 1857, s28.
[14] Stephen Cretney, *Family Law in the Twentieth Century* (Oxford: Oxford University Press 2005) 525.
[15] Jacob Goldstein and C. Abraham Fenster, 'Anglo-American Criteria for Resolving Child Custody Disputes from the Eighteenth Century to the Present: Reflections on the Role of Socio-Cultural Change' (1994) Journal of Family History 19:1 35, 36.

absolute control over his child.[16] A mother could only succeed in habeas corpus proceedings if the father had already forfeited his rights, namely the child was in the custody of a third party and the father was unfit.[17] The common law courts forfeiture rule represented a significant hurdle for a woman seeking custody of her child before the divorce court was established.

In the eighteenth century, wardship proceedings in the Court of Chancery became the common process for determining disputes over children, although the equitable jurisdiction had initially been developed in the Middle Ages to allow for the administration of the property of children who had inherited property upon the death of a parent.[18] In the mid-nineteenth century, the Court of Chancery stopped confining their jurisdiction to cases involving the administration of property[19] and started to consider what would be for the benefit of the child,[20] whilst retaining a narrow conception of its role. The Court of Chancery would on occasion supervise how a father was fulfilling his parental role in terms of maintenance or education for example but would not allow the rights of the mother to supersede the rights of the father.[21] As Susan Maidment has noted: 'In practice Equity would usually only intervene if the father had acted so as to forfeit his right to custody, on similar grounds as at common law. The father's behaviour had to be considered exceptionally culpable' so that he was considered to have forfeited his right.[22]

Prior to the enactment of the Divorce and Matrimonial Causes Act 1857, there had already been one legislative inroad into paternal rights. Parliament had enacted the Custody of Infants Act 1839 which allowed a mother to have custody of her child in certain circumstances. The reform was prompted by the successful campaign of Caroline Norton, who had been deprived of her three children on marriage

[16] Lawrence Stone, *Broken Lives* (Oxford University Press 1993) 14.
[17] Danaya Wright, 'The Crisis of Child Custody' (2002) Columbia Journal of Gender and Law 11:1 175, 196.
[18] John Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) Oxford Journal of Legal Studies 14:2 159, 175.
[19] *In Re Spence* (1847) 2 Ph 247 at 252; 41 ER 937 at 938.
[20] *De Manneville v De Manneville* (1804) 10 Ves 52.
[21] Sarah Abramowicz, 'English Child Custody Law 1660-1839' (1999) Columbia Law Review 99 1344, 1356.
[22] Susan Maidment, *Child Custody and Divorce* (Croom Helm 1984) 112.

breakdown.[23] However, the statute contained two important limitations: custody could only be awarded to a woman where the child was under the age of seven and the woman was not guilty of adultery. In addition, the provisions were applied by the Court of Chancery so applications by mothers under the statute for custody were often unsuccessful. Danaya Wright has summarised the impact of the 1839 legislation as follows: 'Fears of opening the domestic can of worms, or contributing to the breakdown of the patriarchal family, motivated the judges in every case to limit, narrow and constrain the Act until it became nothing more than an expansion of the court's common-law powers over the non-propertied as well as the propertied child'.[24]

The Divorce and Matrimonial Causes Act 1857 received royal assent on 28th August 1857.[25] Under section 35, the newly established divorce court was granted the power to make orders for the custody, maintenance and education of any child of the parties. There was no statutory limit on the discretion of the court, provided the custody order was 'just and proper' in the view of the court, a seemingly historic advance for the rights of women. However, parliament's apparently generous grant of unfettered custody powers to the divorce court must be considered in the context of the intentions of the legislators. Section 35 was buried within legislation presented as purely procedural,[26] intended to save parliamentary time by replacing the cumbersome tripartite system of divorce with a single civil process, so any parliamentary debates naturally focused on the merits of civil divorce,[27] not child custody. In addition, the previously established royal commission on divorce had recommended that the new judicial tribunal should be invested 'with a large discretion in adjusting the rights of parents'[28] but envisaged that any children should be made wards of court, and 'placed entirely under the guardianship and control of the Court of Chancery'.[29] Once the legislation was enacted, the new

[23] Diane Atkinson, *The Criminal Conversation of Mrs Norton* (Random House 2012) 274.
[24] Danaya Wright, 'The Crisis of Child Custody' (2002) Columbia Journal of Gender and Law 11:1 175, 225.
[25] *Parliamentary Debates,* series 3, vol.147, col.2036, 24 Aug 1857 (House of Lords).
[26] Henry Kha & Warren Swain, 'The enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates' (2016) The Journal of Legal History 37:3 303, 328.
[27] Henry Kha & Warren Swain, 'The enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates' (2016) The Journal of Legal History 37:3 303, 318.
[28] The First Report of the Commissioners appointed to enquire into the law of divorce and more particularly into the mode of obtaining divorces a viniculo. BPP, 1852-53, para XLIII.
[29] The First Report of the Commissioners appointed to enquire into the law of divorce and more particularly into the mode of obtaining divorces a viniculo. BPP, 1852-53, para XLIII.

powers did not comprise wardship and were exercised by the newly established divorce court instead. In short, the section 35 power to make orders for custody was justified at the time by the need to give the court sufficient power to do what was 'just and proper' for the child of the parties, not for the benefit of mothers, yet the jurisdiction conferred upon the divorce court was so broadly drafted as to offer a possibility of relief for women deprived of their children.

Such an unfettered discretion presented considerable challenges for a court sitting for the first time in 1858 as the court was subject to competing ideologies of childhood, motherhood and fatherhood. Although Victorian treatment of children can seem shocking when compared with modern sensibilities, by the mid-nineteenth century, there was a reorientation to a more child-centred world, prompted by rising living standards until the late 1870s[30] which meant that parents had greater choice about how to allocate resources within the family.[31] The ascendancy of child welfare is evidenced by the number of reforms to ameliorate child suffering enacted throughout that century,[32] which recognised that children had different needs from adults and required additional protections. Popular culture at this time started to reflect and idealise childhood, by the creation of paintings and engravings showing children at play and the publication of literary fiction written from a child's perspective.[33] Admittedly, campaigners for child welfare reform were motivated by a romantic concept of childhood as a state of innocence,[34] as part of the Victorian middle class ideal linked to notions of respectability and sexual restraint.[35] For example, in the mid-Victorian era, a number of rescue societies emerged[36] who set up specialist homes for children who had suffered sexual abuse ('fallen girls') in order to rehabilitate them and to minimise their 'corrupting influence' on others.[37] Notably, campaigners focused on the protection of innocent young girls who might be led into

[30] William Cornish and others (eds), *Law and Society in England 1750-1950* (2nd edn, Hart Publishing 2019) 76.
[31] Loftur Guttormsson, 'Parent-Child Relations' in Kertzer and Barbagli (eds) *Family Life in the Long Nineteenth Century* (Yale University Press 2002) 265.
[32] These included legislation about child labour in cotton mills and mines in 1833 and 1842 respectively, as well as statutes making provision for elementary education in 1876 and preventing cruelty in 1889.
[33] Sally Shuttleworth, 'Victorian Childhood' (2004) Journal of Victorian Culture 9:1 107, 111.
[34] Louise Jackson, *Child Sexual Abuse in Victorian England* (Routledge 2000) 95.
[35] Louise Jackson, *Child Sexual Abuse in Victorian England* (Routledge 2000) 6.
[36] Edward Bristow, *Vice and Vigilance: purity movements in Britain since 1700* (Gill & Macmillan 1977) 70.
[37] Louise Jackson, *Child Sexual Abuse in Victorian England* (Routledge 2000) 132.

prostitution rather than addressing the underlying economic conditions which forced girls as young as 10 into domestic service.[38] Nevertheless, the new court would have had an awareness of child welfare, even if it was limited to protecting the child from their offending parent's evil influence.[39]

At the same time as the burgeoning child welfare movement, there was a growing identification of women with domesticity[40] which enhanced the status of wives and mothers within the sphere of the home.[41] Caroline Norton, in her 1838 pamphlet campaigning for maternal rights, argued that 'a mother's love is believed to be the strongest tie of nature, and her care to be essential to the well-being of her infant children'.[42] Lloyd Bonfield has commented that: 'The clash between the common law and the developing cult of domesticity, coupled with the notion that women had a significant nurturing role to play, required some modification of the law of child custody'.[43] Thus, even though the divorce court had a clean slate to develop rules for the exercise of discretion, judges were grappling with competing ideologies whereby traditional paternal supremacy was being challenged by maternal ascendancy in domestic matters and a nascent preoccupation with child welfare. This article will explore in detail the impact of the court's development of rules for the exercise of its discretion and will argue that, although custody orders were available to all in theory, access and impact were limited in practice.

METHOD

Subsequent sections of this article consider the care and custody of children of petitioners. Care and custody have different meanings. Care concerns the mundane, everyday domestic lives of children and parents: the social arrangements for children. In this article, care has been defined as involving a

[38] Deborah Gorham, 'The 'Maiden Tribute of Modern Babylon' re-examined: child prostitution and the idea of childhood in late Victorian England' (1978) Indiana University Press 21:3 353, 378.
[39] Marsh v Marsh (1858) 1 Swabey & Tristram 312, 164 E.R. 744.
[40] Leonore Davidoff and Catherine Hall, *Family Fortunes: Mena and women of the English middle class 1780-1850* (rev edn, Hutchinson Education 1988) 183.
[41] John Tosh, *A Man's Place: Masculinity and the Middle-Classs Home in Victorian England* (Yale University Press 1999) 145.
[42] Caroline Norton, 'The Separation of Mother and Child by the Law or 'Custody of Infants' Considered' (Roake and Varty 1838) 15.
[43] Lloyd Bonfield, 'European Family Law' in Kertzer and Barbagli (eds) *Family Life in the Long Nineteenth Century* (Yale University Press 2002) 124.

determination of the person(s) with whom the child is living, on the assumption that that person may be raising the child and attending to their daily needs. By contrast, child custody is authority conferred by law and includes the right to determine issues about the child such as schooling and control over where the child lives, as well as rights over property owned by the child. A husband may still have custody of a child even though he has placed the child in school or has allowed the child to reside with the wife.[44] Thus the legal position of the parents' rights of custody over their child may or may not reflect the day-to-day realities of the child's care and so custody requires separate consideration from care.

This study analysed cases initiated by husbands and wives in 1858 and 1859, where nullity, divorce or judicial separation were sought, and where there were children at the time of petitioning. These sample years were carefully chosen, being the first two years of the court's operation when principles for the exercise of discretion were being developed 'live' as well as a period of great change, with the mid-nineteenth century representing the High Victorian time of greater prosperity and also transition.[45] By limiting the selection criterion to two years, it was possible to provide a full and accurate dataset of the parties and an account of their custody hearings. The sample years resulted in an extensive data set of 536 parties and their children. It enabled a quantitative analysis of the sample's care of the children in the form of 'care tables' as well as qualitative descriptions of parties' life stories to include any custody hearings that took place. The subsequent sub-sections consider the care of children of those petitioning the new court in 1858 and 1859, before going on to consider the custody applications by that sample and any eventual custody orders made to assess the accessibility and impact of the new jurisdiction.

[44] Susan Maidment, *Child Custody and Divorce* (Croom Helm 1984) at 116; Lawrence Stone, *Broken Lives* (Oxford University Press 1993) 312; Caroline Norton, 'The Separation of Mother and Child by the Law or 'Custody of Infants' Considered' (Roake and Varty 1838) 2.
[45] William Cornish and others (eds), *Law and Society in England 1750-1950* (2nd edn, Hart Publishing 2019) 68.

For the purposes of the sample, a maximum age of 16 was adopted. As s.35 of the Divorce and Matrimonial Causes Act 1857 does not specify a maximum age, the court could make a custody order over any child until their majority,[46] namely the age of 21.[47] In fact, within the first 12 months of operation the court established a practice of making custody orders that lasted until the child reached the age of 14.[48] In the case of Marian Ryder (1859 divorce petitioner), for example, Justice Cresswell confined his powers to the children in the family who were under the age of 16 but admitted that there was uncertainty over the position of children aged 14 to 16, because 'The jurisdiction conferred upon him being new, and there being no practice to guide his decisions'.[49]

Although legitimacy was of key importance in the mid-Victorian era for reasons of inheritance and status,[50] this study takes no account of the legal status of each child for the purposes of the sample. Instead, this study seeks to exclude from the quantitative analysis children who were clearly conceived after marital separation or whose paternity was disputed within the proceedings. Inevitably, though, there are grey areas where evidence is lacking. For example, the child of Amelia Elizabeth Heath (1859 divorce respondent) was included in the sample, even though her child Frederick William Heath was born in the same year that the parties separated[51] and always lived with the wife and co-respondent[52]. The court file is lost so it cannot be ascertained whether the husband disputed Frederick's paternity.

This study used multiple source record linkage and keywords to extract data from a number of sources: court documentation (affidavits, court reports, pleadings), law reports, contemporaneous newspaper articles, wills, passenger lists and birth, marriage and death registers as well as census

[46] Stephen Cretney, *Family Law in the Twentieth Century* (Oxford: Oxford University Press 2005) 566 footnote 5.
[47] The age of majority was 21 in England and Wales until the enactment of the Family Law Reform Act 1969 when the age of majority was reduced from 21 to 18 years.
[48] Marsh v Marsh (1858) 1 Swabey & Tristram 312, 164 E.R. 744; *Hyde v Hyde* (1859) 23 JP 471, 29 LJPM & A 150.
[49] The Daily News (21 January 1861) 6.
[50] William Cornish and others (eds), *Law and Society in England 1750-1950* (2nd edn, Hart Publishing 2019) 351.
[51] England Civil Registration Birth Record, 1837-1915, Place: Pancras, London. Registration date: Jan-Mar 1859. Volume: 1b. Page: 102.
[52] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *243*; Folio: *20*; Page: *37*; GSU roll: *542598.*

entries. Most records were available online, with the exception of court orders which were examined at the National Archives in Kew in court book J170. The entries were manually transcribed into a petitioner database for each sample year. Petitioners often did not disclose in the petition whether there were children of the marriage so, after locating the parties in online records, a search was conducted to check for the existence and identity of any children. All children of both parties were traced but, because the study found that most children of a family lived together, they are represented in the subsequent tables by way of their petitioning parent and not individually. A number of parties and children were difficult to trace and this is reflected in the subsequent tables. Common names (such as Evans in Brecon Wales) and imaginative spelling meant that some parties posed a challenge when tracing. Often wives changed their name either because of a fear of violence or to escape the stigma of marital breakdown. For example, Frances Curtis (1858 divorce petitioner) fled her husband, taking her three children with her. A newspaper report of the divorce trial stated that the wife 'came to England under a feigned name, and [the husband] caused placards to be published, offering a reward for her apprehension. He subsequently discovered her residence in England, and the present proceedings were then instituted'.[53]

For the purposes of the care tables, 1861 census data was used where available to determine the whereabouts of each child. If the child could not be found in the 1861 census, the analysis is based on their location with either parent at any other time of their minority, for example as revealed in court documentation or as disclosed in other published material. Inevitably, there are a number of limitations connected with using the census to compile care tables. Census data cannot prove conclusively who was caring for the child for the entirety of the child's minority, being only an indication of the child's whereabouts on the census date. Clearly, the care of a child may not have been static throughout the entirety of their minority. Working class families moved around for economic reasons, although historians have noted that most moves were local and within the

[53] The Kendal Mercury (26 June 1858) 6.

community.[54] For families living in poverty (estimated at two fifths of the working class in 1880),[55] it would have been essential for older children to find work and teenage children may have left their families to find work elsewhere, lodging with a relative or staying with a family as a live-in servant.[56].

DEMOGRAPHIC DATA

The divorce records supply details of 128 (1858) and 140 (1859) petitioners with children under 16 who petitioned for nullity, divorce or judicial separation. The gender division of petitioners was fairly equal: of the 1858 petitioners with children, 67 were men and 61 were women; of the 1859 petitioners with children, 73 were men and 67 were women. The following tables show the numbers of petitioners with children for each sample year, by gender of petitioning parent.

[Insert table 1 and table 2]

Despite there being a similar petitioning sample size for men and women, nearly all of the male petitioners in each sample year filed for divorce whereas the female petitioners were more equally divided between divorce and judicial separation. This difference may be a consequence of the greater obstacles facing women who were petitioning for divorce rather than for judicial separation. To obtain a divorce, a woman had to prove two grounds, namely adultery aggravated by marital offence such as cruelty or desertion of two years,[57] (unlike men who only had to prove one ground namely adultery[58]) whereas to obtain a decree of judicial separation, a woman only had to prove one of those grounds.[59] This difference between the grounds used by male and female petitioners may also suggest that female petitioners with children were seeking to avail themselves of the custody powers of the court, rather than seeking to remarry.

[54] Colin Pooley and Jean Turnbull, *Migration and Mobility in Britain since the Eighteenth Century* (Routledge 1998) 96.
[55] Michael Anderson, *Family structure in nineteenth century Lancashire* (Cambridge University Press 1971) 29.
[56] Colin Pooley and Jean Turnbull, *Migration and Mobility in Britain since the Eighteenth Century* (Routledge 1998) 195.
[57] Divorce and Matrimonial Causes Act 1857, s.27.
[58] Divorce and Matrimonial Causes Act 1857, s.27.
[59] Divorce and Matrimonial Causes Act 1857, s.16.

ANALYSIS OF CARE OF CHILDREN BY PARTY

The following tables show the care of children aged under 16, by the gender of their petitioning parent. Even though men had the power of the law behind them, they still had to make pragmatic decisions about the day to day care of their children, influenced by social standing, family and community support, financial resources and work commitments. The subsequent care tables illustrate the compromises that had been reached within the family, with legal and societal norms assuming that the husband should take charge of children.

[Insert table 3 and table 4]

Tables 3 and 4 show that the majority of the petitioners (both male and female) with children had at least one of their children living with them: 55% and 53% of male petitioners for each sample year and 73% and 76% of female petitioners for each sample year. However, there is a significant difference between care of the children of the women who were petitioners and the care of the children of the women who were respondents. Three quarters of the female petitioners had their children living with them (Table 4), compared to only just over a tenth of the female respondents (Table 3). This disparity may reflect the circumstances of the marriage breakdown and the relative strength of position of the individuals involved as a petitioner had to have resources (financial and emotional) to be able to take charge of the situation by initiating proceedings. Where the wife was petitioning, the marriage may have broken down because the husband was in prison or had deserted (emigrations were very common in the mid-nineteenth century)[60], in which case the wife was left with the children. The fact that the majority of female petitioners had their children living with them may suggest that the presence of those children was a motivating factor to initiate proceedings in order to

[60] Wilbur Shepperson, 'Industrial Emigration in Early Victorian Britain' (1953) The Journal of Economic History 13:02 179.

avail themselves of the court's custody powers, particularly as the court chose to limit the grant of custody orders to petitioners.[61]

Care of children of male petitioners

Prior to the enactment of section 35 of the Divorce and Matrimonial Causes Act 1857, the law recognised only men, not women, as having a sacred right over children and the arrangements for the care of children at that time must be viewed in this context. Subject to the Court of Chancery *parens patriae* jurisdiction,[62] men had the legal right to decide where their child should live and the legal power to remove their child from their current living arrangements. They would not need a court order to obtain custody. As John Tosh said: 'He [the father] decided where they lived, in whose care, and under what religion; he had sole rights over the appointment of a guardian in the event of his early death; he determined their education (if any) and he could take possession of their earnings'.[63]

The reality for most women in mid-Victorian England was that if their marriage broke down because they had met another man, they were not able to keep their children, despite their traditional role of care-giver.[64] In the case of Alfred Rowe (1858 petitioner), the wife lost her two children once her affair was discovered by a policeman.[65] The wife was sent away to her mother's house in disgrace and had to leave her two children behind with her husband, even though they were only aged two and four.[66] Men did not suffer the same fate. For example, Robert Heweth (1859 petitioner) removed his children from his wife's care and placed them with his mistress. The husband alleged in his divorce petition that upon separation in 1857 he had taken the children from the wife upon finding out that she

[61] Marsh v Marsh (1858) 1 Swabey & Tristram 312, 164 E.R. 744.
[62] Sarah Abramowicz, 'English Child Custody Law 1660-1839' (1999) Columbia Law Review 99 1344, 1356.
[63] John Tosh, *A Man's Place: Masculinity and the Middle-Class Home in Victorian England* (Yale University Press 1999) 158.
[64] Leonore Davidoff and Catherine Hall, *Family Fortunes: Mena and women of the English middle class 1780-1850* (rev edn, Hutchinson Education 1988) 281; Michael Anderson, *Family structure in nineteenth century Lancashire* (Cambridge University Press 1971) 77.
[65] Worcestershire Chronicle (30 November 1859) 4.
[66] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *2172*; Folio: *72*; Page: *32*; GSU roll: *542929*. Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *2089*; Folio: *72*; Page: *40*; GSU roll: *542916*. Census Returns of England and Wales, 1871; Class: *RG 10*; Piece: 3067; Folio: *59*; Page: *34*.

was a 'common prostitute'.[67] The wife filed an answer in the divorce proceedings alleging that the marriage had broken down because of the husband's affair with a woman called Mary Ann Morris, a servant and then the husband's steward on board his steam ship.[68] In her answer, the wife sought a decree of judicial separation but did not seek a custody order. By 1861, the three older children were living with the husband's new partner Mary Ann Morris in Hull.[69] They were named in the census as boarders. In summary, most of the women in this sample were forced to leave the children behind if embarking on a new relationship at the time of marriage breakdown whereas the men were not.

The majority of male petitioners for each sample year had at least one of their children living with them (55% and 53% in each sample year): about one half went on to live with a new spouse while the children were dependant. Otherwise, they lived with extended family or on their own with a housekeeper or servants. A sizeable minority of male petitioners for each sample year did not have any of their children living with them (29% and 35% in each sample year). Some of these male petitioners may have had to work away from home for long periods of time so had to make pragmatic decisions about the care of the children, leaving them with a new partner, family or even the wife. William Simpson (1858 petitioner) stated in his petition: "I having to continually to be absent from home at night on duty as a coast guardsman it was on the sixth day of November 1846 agreed between me and my said wife that in consideration of her continuing to take charge of the two children of our said marriage I should make her an allowance after the rate of seven shillings a week."[70] The two boys Herbert and John can be seen living with the wife, her mother and a half-sister in Cornwall for the rest of their lives from 1851 onwards.[71] Thus, there is evidence of cooperative parenting within the sample although this was sometimes undermined by the court. For example, in the case of George Phillips (1859 petitioner) upon separation in 1852 the two year old son lived with the wife and the two older

[67] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: H48, Appellant: Robert Heweth, Respondent: Elizabeth Heweth, Type: Husband's petition*; J 77/23/H48.*
[68] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: H48, Appellant: Robert Heweth, Respondent: Elizabeth Heweth, Type: Wife's answer*; J 77/23/H48.*
[69] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *3583*; Folio: *60*; Page: *21*; GSU roll: *543156.*
[70] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: J77, Appellant: William Simpson, Respondent: Elizabeth Simpson, Type: Husband's petition*; J 77/49/S32.*
[71] Census Returns of England and Wales, 1861; Class: *HO107*; Piece: *1882*; Folio: *85*; Page: *45*; GSU roll: *221031.*

daughters lived with the husband.[72] This decision may have been influenced by the age and gender of the children as it was assumed that a very young child should be cared for by their mother.[73] However, at a hearing of the wife's application for alimony in 1860, when the son was aged eight, Justice Cresswell ordered that he should live with the petitioner husband, despite there being no evidence that either party was seeking this.[74] In the 1861 census the husband can be located with the daughters and his second wife but the wife and son cannot be located.[75]

About a fifth of the male petitioners (19% and 17% in each sample year) allowed their child to live with the wife or the wife's family. In four of the 25 cases, infidelity was alleged to have led to the marriage breakdown and the child was born after the separation of the parents so paternity may have been a factor. In any event, cases where the children went on to live with the wife and new partner were not the norm and may have reflected the strength of character of the parties involved. For example, in the case of George Buckingham (1859 petitioner), the marital breakdown was ascribed to 'the wife … saying that she could do better without him' and taking their two-year-old son to move in with her new partner, a publican.[76] The wife of William Stringer (1859 petitioner) displayed similar determination to improve her position. In the 1851 census, the husband's occupation is given as printer and compositor.[77] The husband started divorce proceedings in 1859, alleging that the wife had started cohabiting with Dickson Stringer in 1854, probably his cousin and also a printer (pressman), having two children of their own.[78] The wife alleged in her answer that one of the parties' four children had died and that the husband had treated her with unkindness: 'The respondent did accordingly leave the house of the petitioner, taking with her her three children and went to the house of her father, Mr William Terry, a fruit salesman…The respondent maintained herself and her three children by her own industry and labour in working at the millinery and dress making industry…The

[72] The Western Daily Press Daily News (19 November 1859) 4.
[73] *De Manneville v De Manneville* (1804) 10 Ves 52.
[74] The Western Daily Press Daily News (19 November 1859) 4.
[75] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *1739*; Folio: *69*; Page: *4*; GSU roll: *542860.*
[76] The Morning Advertiser (17 January 1860) 6.
[77] Census Returns of England and Wales, 1851; Class: *HO107*; Piece: *1563*; Folio: *120*; Page: *9*; GSU roll: *174796.*
[78] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: J77, Appellant: William Stringer, Respondent: Susannah, Type: Husband's petition*; J 77/49/S67.*

petitioner never came to this respondent to see her or their three children… except on one occasion'.[79] The wife and the co-respondent kept the children[80] and went on to marry in 1867.[81] Thus, the wife of William Stringer did manage to keep the children despite being the respondent in the divorce.

Care of children of female petitioners

Three quarters of female petitioners had at least one of their children living with them: 73% and 76% of each sample year. The women who were petitioning the court were more likely to be in a strong position having a new partner, family support or an occupation such as running a business. About one quarter went on to remarry while the children were dependent. An example of running a successful business is Harriet Linsted (1859 divorce petitioner) who ran a taxi firm in Brighton and kept her children. Court pleadings state that the husband moved out of the family home in 1844;[82] the 1851 census shows the three surviving children Harriet aged 17, Samuel aged 14 and William aged seven living with the wife in Brighton.[83] The wife's occupation is given as 'professional rubber' (manager of horse traps). Ten years later, in the 1861 census, the children were still living with the wife and she was still working as 'fly proprietor' in Brighton, with the two sons being drivers and employing another two drivers.[84] In 1862 the wife married one of the drivers, John Bailey Avey (fly master) who was 17 years her junior.[85] Thereafter the wife and her second husband lived with one of the sons and his family.[86] The wife's resourcefulness enabled her to keep her children.

About a quarter of the female petitioners (27% and 24% in each sample year) did not have any of their children living with them. Presumably, women would choose to keep their children if they could, so it

[79] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: J77, Appellant: William Stringer, Respondent: Susannah, Type: Wife's answer*; J 77/49/S67.*
[80] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *329*; Folio: *93*; Page: *26*; GSU roll: *542616*
[81] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: *P78/ALF/046.*
[82] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: L28, Appellant: Harriet Linsted, Respondent: William Linsted, Type: wife's petition*; J 77/32/L28.*
[83] Census Returns of England and Wales, 1851; Class: *HO107*; Piece: *1646*; Folio: *665*; Page: *33*; GSU roll: *193551.*
[84] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *598*; Folio: *27*; Page: *8*; GSU roll: *542669.*
[85] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: *P79/JNJ/027.*
[86] Census Returns of England and Wales, 1871; Piece: *1072*; Folio: *120*; Page: *55*. Census Returns of England and Wales, 1881; Class: *RG11*; Piece: *1076*; Folio: *125*; Page: *65*; GSU roll: *1341254.*

may be illuminating to suggest possible reasons for these petitioners' children living elsewhere. Some of the children in the sample lived with relatives who could offer better prospects although it is not possible to ascertain how happy the wife was this arrangement. For example, the nine and ten year old daughters of 1858 divorce petitioner Mary Chandler lived with their uncle who was a curate in Leaminster[87] instead of with her in Cheltenham[88]; the nine year old son of 1859 divorce petitioner Sarah Robson lived with his paternal grandfather's ship-broking family in Durham[89] rather than with her in London.[90]

Financial realities may have played a part. Options for women on divorce in the mid-Victorian era were stark. At this time, the legal doctrine of coverture meant that a married woman could not hold property in her own right and alimony was not a realistic option for most: the court had been vested with the power of granting spousal maintenance but only if it could be secured,[91] so orders for maintenance were limited to property-owning families. The most vulnerable women were not able to obtain an order for maintenance from the court, regardless of the extent of their need and the ability of their husband to pay. Other options for women were limited to charity or the Poor Law (workhouse). This meant that, for some, they were not able to keep their children, even if the husband was prepared to acquiesce in the overriding of his custody rights. An example of the vulnerability of mid-Victorian women is Marie Geney (1859 divorce petitioner). She alleged in her petition that after her husband moved out, he 'refused to contribute in money more than a few shillings towards the support of your petitioner and her children'.[92] By 1861, the two daughters were now living with the husband and his family (all French teachers) in Winchester, Surrey,[93] whereas the wife is lodging in a multiple occupation house and working as a dressmaker.[94]

[87] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *2220*; Folio: *26*; Page: *4*; GSU roll: *542938.*
[88] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: MS 10091 238 PT1.
[89]Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *3771*; Folio: *37*; Page: *67*; GSU roll: *543184*
[90] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: *P87/JNE1/016.*
[91] Divorce and Matrimonial Causes Act 1857, s.32.
[92] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: G37, Appellant: Marie Augustine Josephine Geney, Respondent: Auguste Feliz Geney, Type: wife's petition*; J 77/20/G37.*
[93] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *460*; Folio: *52*; Page: *28*; GSU roll: *542642.*
[94] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *66*; Folio: *53*; Page: *29*; GSU roll: *542567.*

In a working class family, older children could provide essential financial support to the household by working[95] or by caring for younger siblings, thereby enabling the wife to work. Indeed, many wives in this study went on to live with adult children years after the marriage breakdown. However, for women with only young children, considerations were different. To keep young children, women needed financial resources, either through family, a new partner or employment, as well as the cooperation of the husband. For example, Helen Warren (1858 divorce petitioner) was not able to keep her daughter living with her because of her work as a live-in servant in Chelsea London[96] and so arranged, after desertion by her husband in 1848, for her three year old daughter to live in Devon with her mother.[97]

As well as financial concerns, personal safety would have played a part in a woman's decision not to live with their children. Harriet Barr (1859 divorce petitioner) fled the home in Bridlington to escape violence and was forced to leave her children behind [98] but was able to return to Bridlington to live with her older children once the husband had died seven years later. The wife's petition states that 'On the 19th day of September last your petitioner made her escape from the said Mark Barr's house' and says that her children 'are now resident with their father at Bridlington Bay aforesaid'.[99] At the time of separation, the youngest child Julianna was aged eight.[100] The 1861 census shows the wife staying with her sister and brother-in-law who both ran a public house in Hull.[101] Once the husband died in 1866,[102] the wife returned to Bridlington to live with the daughters as shown in the 1871 census[103] and then with one of the daughters (who has then married) as shown in the 1881 census.[104]

[95] Deborah Gorham, 'The 'Maiden Tribute of Modern Babylon' re-examined: child prostitution and the idea of childhood in late Victorian England' (1978) Indiana University Press 21:3 353, 356.
[96] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: G37, Appellant: Helen Warren, Respondent: Frederick Warren, Type: wife's petition*; J 77/57/W5*
[97] Census Returns of England and Wales, 1851;Class: *HO107*; Piece: *1871*; Folio: *649*; Page: *9*; GSU roll: *221019.*
[98] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: G37, Appellant: Harriet Barr, Respondent: Mark Barr, Type: wife's petition*; J 77/3/B62.*
[99] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: G37, Appellant: Harriet Barr, Respondent: Mark Barr, Type: wife's petition*; J 77/3/B62.*
[100] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *3613*; Folio: *76*; Page: *14*; GSU roll: *543161.*
[101] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *3588*; Folio: *92*; Page: *1*; GSU roll: *543157.*
[102] *England & Wales, Civil Registration Death Index, 1837-1915. Name of deceased: Mark Barr. Age: 50. Date of death: Sept 1866. Place of death registration: Bridlington Yorkshire. Volume: 9d. Page: 178.*
[103] Census Returns of England and Wales, 1871; Piece: *4812*; Folio: *79*; Page: *1.*
[104] Census Returns of England and Wales, 1871; Class: *RG11*; Piece: *679*; Folio: *6*; Page: *5*; GSU roll: *1341158.*

Perhaps the wife was afraid of the husband and did not dare to live with any of her children while the husband was alive.

ANALYSIS OF CUSTODY APPLICATIONS

To apply for custody, the petitioner was expected to make the request in the prayer of the petition for divorce, judicial separation or nullity.[105] The data revealed by this study demonstrates a significant gender difference in line with the relative legal positions of men and women. Very few resident male petitioners stated in the prayer that they were seeking an order for custody (two in 1858 and three in 1859), compared with half of the resident female petitioners (59% in 1858 and 49% in 1859). This is notable because the majority of both male petitioners and female petitioners had their children living with them. However, this gender difference reflects the legal position: a woman could only improve her position in relation to custody by obtaining an order from the court whereas a man would be advised not to risk his advantage by giving the court jurisdiction over custody. As Macqueen advised in 1858: 'Where the husband obtains the divorce, his legal authority over the children will of course be continued in him. Therefore it is, in truth, only where the wife is complainant that this jurisdiction is likely to be exercised'.[106]

If a woman wanted to keep her children, she had to have a custody order in order to protect her position: if the husband initially agreed that the children could live with the wife, he could change his mind; if the husband was living abroad, he could return; and if the husband was in jail, he could be released. The wife's retention of her children was not assured even if a Deed of Separation had been entered into, because the husband could regain custody or deny contact whenever he chose as such a deed was considered void by the courts.[107] Thus Macqueen advised that: 'Unless the wife feels

[105] F Macqueen *A practical treatise on the law of marriage, divorce and legitimacy as administered in the Divorce Court and in the House of Lords* (London 1860) 167.
[106] F Macqueen *A practical treatise on divorce and matrimonial jurisdiction under the Act of 1857* (London 1858) 80.
[107] Vansittart v Vansittart (1858] 44 E.R. 984.

disposed to trust to the husband's honor, if she wishes to be secure of the custody of her children, she must repair to the Divorce Court'.[108]

Despite the legal position, a significant proportion of the resident female petitioners did not apply for a custody order in the petition even though the children were living with them: 41% in 1858 and 51% in 1859. Perhaps these women considered it unlikely that the husband would try to remove the children and wanted to keep matters amicable because the husband had agreed to cooperate in the main suit. For example, in this study, Margaret Smith (1859 petitioner) sought a decree of judicial separation but did not seek an order for custody over her baby daughter Harriett,[109] despite the fact that Harriett was living with her. They were both staying with the husband's family in Longton Staffordshire (the father-in-law was a chemist there)[110] while the husband was also living in Longton working as a grocer.[111] The husband had kept their other child, a son called Charles aged 10.[112] She alleged that the husband was violent to her with threats to kill and had infected her with syphilis, affecting her pregnancies and causing their other four children to die.[113] It is difficult to know whether she was afraid of his reaction if she dared to mention custody in the petition or she felt that a custody order was not needed, perhaps because she had the protection of the husband's family and thought it unlikely that the husband would try to remove a baby from her.

In the case of Amelia Dyer (1858 divorce petitioner) the three children of the marriage may have been the children of her lover, Captain William Adam, whom she went on to marry promptly once the final decree was pronounced.[114] The paternity of all the children of the marriage must be doubted. The

[108] F Macqueen *A practical treatise on the law of marriage, divorce and legitimacy as administered in the Divorce Court and in the House of Lords* (London 1860) 166.
[109] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: D19, Appellant: Margaret Smith, Respondent: William Smith, Type: wife's petition*; J 77/49/S57.*
[110] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *1937*; Folio: *8*; Page: *10*; GSU roll: *542890.*
[111] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *1942*; Folio: *84*; Page: *21*; GSU roll: *542891*
[112] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *1942*; Folio: *84*; Page: *21*; GSU roll: *542891.*
[113] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: D19, Appellant: Margaret Smith, Respondent: William Smith, Type: wife's petition*; J 77/49/S57.*
[114] City of Westminster Archives Centre; London, England; *Westminster Church of England Parish Registers*; Reference: *STG/PR/7/50.*

parties were married in 1834[115] but no children were born until 1843, by which time the wife and Captain Adam had already met. (In answer in previous consistory court proceedings in 1849 whereby the wife was seeking a separation, the husband says that he introduced Captain Adam to his wife seven years previously in 1842.)[116] Captain Adam treated all the boys as his own. In the 1851 census they are described as his sons and have his surname, even though two of the boys were born before the end of the wife's first marriage.[117]

ANALYSIS OF CUSTODY ORDERS

This section considers the custody orders made by the Court for Divorce and Matrimonial Causes in the sample cases. These orders were made over the first four years of the court's operation. For the petitions filed in 1858, the court made 12 orders for custody and for the petitions filed in 1859, the court made 15 orders for custody. Almost all of the custody orders were made in favour of women.[118] Again, this is unsurprising given the respective legal positions of men and women. Such orders were only made where the matter proceeded to trial. In the 1858 petitions, of the 24 applications for custody, only 15 are known to have proceeded to a trial; in the 1859 petitions, of the 23 applications for custody, only 17 are known to have proceeded to a trial. The rest were abandoned through death or reconciliation. The following table shows the outcome of the custody applications where a trial took place.

[Insert table 5]

[115] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: D19, Appellant: Amelia Helen Dyer, Respondent: Robert Thomas Swinerton Dyer, Type: wife's petition*; J 77/13/D19.*
[116] *Consistory Court of London:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: D19, Appellant: Amelia Helen Dyer, Respondent: Robert Thomas Swinerton Dyer, Type: husband's answer*; J 77/13/D19.*
[117] Census Returns of England and Wales, 1861; Class: *HO107*; Piece: *2018*; Folio: *523*; Page: *1*; GSU roll: *87421.*
[118] Of the 1858 petitions, 11 out of 12 custody orders were made in favour of women; of the 1859 petitions, 14 out of 15 custody orders were made in favour of women.

From table 5, it can be seen that, for each sample year, at the subsequent trial the court granted more than half of the applications for custody. Although refusal to make a custody order was rare, a fair proportion of the requests made in the petition were not dealt with at trial namely where custody was not contested by the respondent husband and the matter was not pursued by the wife's barrister at the trial.

Custody refused at trial

In the 1858 sample cases, only three of the petitioner applications for custody were refused and in the 1859 sample cases none of the petitioner applications for custody were refused. These early refusals were blamed on the fact that initially any order for custody could not be varied. An Amending Act of 1859 allowing variation was not passed until 13th August 1859.[119] Macqueen explained the court's initial reluctance as follows: 'Suppose the Court, by the decree, to have given the custody to the wife obtaining the divorce; but then suppose that she subsequently addicts herself to profligate courses or suppose she marries again, and that her second husband proves cruel to the children of the marriage dissolved by the divorce. In such a case the Court could not, under the Act of 1857, interfere.'[120]

In the case of Jane Seymour (1858 judicial separation petitioner), the divorce court refused to make a custody order because the wife had not sought custody in the petition although she had specified custody in the accompanying affidavit.[121] Justice Cresswell also dismissed the wife's fears that the husband may return to claim the children because he had emigrated to Australia.[122] The wife's affidavit for custody stated that she had recently inherited a significant sum of money from her late father and she was afraid that her husband would return to England to claim that money and the

[119] An Act to make further provision concerning the Court for Divorce and Matrimonial Causes 1859, s.4.
[120] F Macqueen *A practical treatise on the law of marriage, divorce and legitimacy as administered in the Divorce Court and in the House of Lords* (London 1860) 165.
[121] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: S1, Appellant: Jane Seymour, Respondent: James Edward Seymour, Type: wife's petition and wife's affidavit*; J 77/48/S1.*
[122] Seymour v Seymour (1859) 1 Swabey & Tristram 333.

children from her.[123] However, Justice Cresswell said: 'The children are in the mother's custody, and the husband is in Australia, and not very likely to interfere with them.'[124] In any event, the wife's fears turned out to be well-founded as the husband did return. In the 1861 census, the husband and wife can be seen back living together with the children and another child who was born in 1860.[125] The husband called himself in the census a 'proprietor of houses'. By the following census, the couple were separated again and five of the seven children were with the wife, living in St. Pancras.[126] Perhaps the wife or older children were able to stand up to the husband to secure his removal. In the 1871 census, the husband is shown to be living on his own (a boarder in Marylebone) with an occupation of a perfumer's traveller.[127] He died in 1888.[128]

Although it could be argued that the court was only operating under a disability which was quickly resolved by the Act permitting variation, the concerns of the court about making final custody orders without power of variation reveal judicial nervousness about using the new jurisdiction to sever ties between father and child. In the case of Grace Robotham (1858 divorce petitioner), Justice Cresswell expressed his concerns as follows: 'circumstances may change; the mother may remarry; and it may not be desirable that the stepfather should have the control of them; the father may return in altered circumstance, and be able and willing to maintain and educate them'.[129] In the case of Frances Curtis (1858 divorce petitioner), the court initially granted interim custody to the wife for a period of three months but was not prepared to make a final order because of the inability to vary the order. Justice Cresswell suggested that 'application may be made to the Lord Chancellor, whose more ample powers will enable him to deal with them now and hereafter in a manner more consistent with their advantage and the rights of their parents.'[130] Sadly, for the wife, on the subsequent application to the Court of Chancery, her application for an order for custody was refused, despite the husband's history of

[123] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: S1, Appellant: Jane Seymour, Respondent: James Edward Seymour, Type: wife's affidavit*; J 77/48/S1.*
[124] Seymour v Seymour (1859) 1 Swabey & Tristram 333.
[125] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *129*; Folio: *75*; Page: *25*; GSU roll: *542578.*
[126] Census Returns of England and Wales, 1871; Piece: *235*; Folio: *39*; Page: *23*.
[127] Census Returns of England and Wales, 1871; Piece: 155; Folio: *74*; Page: *28*.
[128] England & Wales, Civil Registration Death Index, 1837-1915. Volume: 1a. Page: 454.
[129] Robotham v Robotham (1858) 1 Swabey & Tristram 190.
[130] Curtis v Curtis (1858) 1 Swabey & Tristram 192.

mental illness, because the court held that there was no jurisdiction to transfer custody from the father to the mother merely for the benefit of the child and, on the facts, the forfeiture standard was not met.[131] Yet subsequent census data shows that, regardless of the court's decision, the children remained living with the wife in Lyme Regis.[132] The wife is given as head of the household and fundholder. The husband lived in Westminster with servants.[133]

Custody granted at trial

By June 1858, Justice Cresswell was acknowledging the extent of the powers of his newly established court:

> 'There is a great difference between an application to this Court and to the Court of Queen's Bench. The Queen's Bench would, by virtue of its jurisdiction, on writ of habeas corpus, have the children brought before it and deliver them to the father, unless very strong grounds were shewn to the contrary… The application here is not to enforce the common law rule, but to the discretion of the Court.'[134]

However, the court chose to adopt the rule, taken from the Custody of Children Act 1839, that custody would only be given to the party adjudged to be innocent in the main suit. The Divorce and Matrimonial Causes Act 1857 did not require this: section 31 only stated that the court 'would not be bound' to pronounce a decree to a petitioner found guilty of adultery. The court justified the adoption of the innocence rule by reference both to the rights of the innocent parent and also to the welfare of the child. For example, in the case of Sarah Suggate (1858 judicial separation petitioner), Justice Cresswell justified the grant of custody to her, the injured party, 'as an act of justice towards the

[131] Re Curtis (1859) 28 LJ 458 97.
[132] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *1370*; Folio: *25*; Page: *10*; GSU roll: *542802*.
[133] Census Returns of England and Wales, 1861; Class: *Rg 9*; Piece: *52*; Folio: *94*; Page: *57*; GSU roll: *542564*
[134] Spratt v Spratt, 164 E.R. 699 (1858).

petitioner, and for the advantage of the children.'[135] In short, the court was prepared to acknowledge that the interests of the child could be a factor in its decision-making but not (yet) a decisive factor.

Almost all of the custody orders granted by the court maintained the status quo ensuring that the children could remain living with their mother. The court dealt with litigants from a broad spectrum of socio-economic backgrounds[136] and the cases in this study suggest that, when considering innocence, the court was not influenced by wealth, social standing or occupation, being more persuaded by an appearance of respectability, linked to the Victorian disapproval of sexual excess[137] and influenced by the temperance movement and evangelicalism.[138] An example is the case of Harriot Brown (1859 judicial separation petitioner) in which the court awarded custody of the children to her, a launderess.[139]

When deciding whether or not to grant a custody order, the long term financial and inheritance prospects of the children were not an explicit consideration, although they may have influenced the court in a case involving particularly wealthy parents. In addition, the cases in this study do not reveal any discernible pattern between a child's inheritance prospects within the father's family and the grant or denial of a custody order to the mother. It seems that, once variation was possible, the court was prepared to make a custody order, even if this could have a long-term impact on the children's prospects within the father's family. For example, custody was granted to Elizabeth Cox (1859 divorce petitioner) who worked as a music teacher[140] whereas her husband had been a proprietor of

[135] Suggate v Suggate, 164 E.R. 828 (1859).
[136] Gail Savage, 'Intended only for the husband: gender, class and the provision for divorce in England, 1858-1868' in K.O.Garrigan (ed) *Victorian scandals: representations of gender and class* (Ohio University Press 1992) 22. Penelope Russell, 'Re-tying the knot? Remarriage and divorce by consent in mid-Victorian England' (2019) American Journal of Legal History 59(2) 257.
[137] Michael Mason, *The Making of Victorian Sexuality* (Oxford University Press 1994) 7.
[138] Danaya Wright, 'Policing sexual morality: Percy Shelley and the expansive scope of the *parens patriae* in the law of custody of children' (2012) Nineteenth-Century Gender Studies 8:2 11 para 38.
[139] The Morning Post (19 April 1859) 7.
[140] The Morning Chronicle (22 January 1861) 8.

houses and land,[141] his father having died before the marriage.[142] The divorce was granted on the basis of the husband's adultery and desertion.[143]

An order for custody was expressed by the court to be a temporary measure, until the child could make up their own mind or either party sought variation, yet there is no doubt that an award of custody could have a long-term impact on the fortunes of affected children. For example, in the case of Elizabeth Boynton (1858 divorce petitioner), twenty years after custody was granted to the wife in 1861, the son was held in police custody and convicted of fraud. He had tried to profit from family connections, by pretending he owned Haisthorpe Hall in Bridlington even though it was owned by his father, Captain Boynton.[144] At that time, the son was working as a journalist, living at Hanover Square, London with his wife and a lodger[145] and may have been prompted by the fact that his paternal grandmother had settled money on the children of his father's later marriage.[146] A contemporary newspaper report of the fraud trial in August 1882 stated that Captain Boynton gave evidence at trial that 'He certainly had not seen his son for the last twenty years'.[147]

It is clear why women who were respondents would not apply for custody as it was extremely rare for custody to be awarded to a respondent. By way of example, none of the female respondents who applied for custody in 1858 were successful but more than half of the female petitioners who sought a custody order at trial were successful. The one respondent who was awarded a custody order was Susannah Cubley (1859 divorce respondent). She and her husband ran the Tankard Public Inn in Lambeth.[148] The husband alleged in his petition that they separated in 1859 when the wife began

[141] Census Returns of England and Wales, 1851; Class: *HO107*; Piece: *1495*; Folio: *383*; Page: 49; GSU roll: *87826-87827.*
[142] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: *P90/PAN1/097.*
[143] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: C45, Appellant: Elizabeth Cox. Respondent: George Cox. Type: wife's petition*; J 77/9/C45.*
[144] The Beverley Weekly Recorder and General Advertiser (23 September 1882) 5.
[145] Census Returns of England and Wales, 1861; Class: *RG11*; Piece: *107*; Folio: *80*; Page: *15*; GSU roll: *1341024.*
[146] The Beverley Weekly Recorder and General Advertiser (23 September 1882) 5.
[147] The Bridlington Free Press (26 August 1882) 2.
[148] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: C50, Appellant: John Francis Cubley. Respondent: Susannah Cubley. Type: husband's petition*; J 77/9/C50.*

cohabiting with the co-respondent.[149] The wife admitted the adultery with the co-respondent but alleged in her answer that she had been forced to seek his protection because of the husband's cruelty and 'frequent threats to cut her throat and also the throats of her damned children as he called them'.[150] The wife's answer points out that the husband had given incorrect details of the children in his petition: 'There have been issue of the said marriage not only four children as in the said petition mentioned but such four children and one other child to wit three sons and two daughters of whom two only are now living'. Her answer gives details of the two surviving children: John Francis Cubley aged eight years and Alfred James Cubley aged eight months. On separation, the husband kept John aged eight and the wife took Alfred who was a baby. The divorce court made a custody order that the baby should continue to live with the wife, even though the wife was the respondent and she had admitted the adultery.[151] The court made no enquiry about the welfare of John, the elder child, aged eight. John's whereabouts thereafter cannot be traced and he is not shown in the census to be living with the husband in 1861.[152] The husband died in 1865;[153] the wife died in the workhouse in 1868.[154] Alfred was discharged from the workhouse at age 12, three years after the death of his mother.[155] He went on to marry at the age of 23 in 1882, his occupation being given as cellar man, living in Brixton.[156]

If a woman wanted the protection of a custody order, she had to be the petitioner in divorce, judicial separation or nullity proceedings but starting proceedings was particularly difficult for women, given their legal and economic position. To start proceedings, a woman needed savings or the support of family or a new partner, or (in case of working class families) the wages of older children. For middle-class women or working class women with young children not able to work, the obstacles would have been particularly great. It must also be noted that the petitioners at the court only

[149] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: C50, Appellant: John Francis Cubley. Respondent: Susannah Cubley. Type: husband's petition*; J 77/9/C50.*
[150] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: C50, Appellant: John Francis Cubley. Respondent: Susannah Cubley. Type: wife's answer*; J 77/9/C50.*
[151] Sun (London) (2 February 1861) 4.
[152] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *353*; Folio: *40*; Page: *1*; GSU roll: *542621.*
[153] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: *DW/T/0534.*
[154] London Metropolitan Archives; London, England; *London Church of England Parish Registers*; Reference Number: *CBG/322.*
[155] London, England, Workhouse Admission and Discharge Records 1764-1930.
[156] Index of England Select Marriages 1538-1973, *Brixton, Surrey, England*; Marriage date: *11 February 1882*; Film Number: *2214953.*

numbered in the hundreds and were insignificant when compared to the size of the population, with historian Lawrence Stone concluding that Victorian England was essentially a 'non-divorcing society'.[157] The court only sat in London so geography and costs would present significant hurdles to many. Petitioning the divorce court to obtain a custody order was not an option available to most women in England in the mid-Victorian era so the adoption of the innocence rule by the court represented a significant limitation upon the exercise of this new right to seek custody. The impact of the innocence rule was longstanding, influencing the outcome of cases until the late 1940s.[158]

Custody not dealt with at trial

Instead of refusal, the bigger risk for a woman petitioner was for her application for custody not to be dealt with by the court. This was a threat because, if the husband sought the return of the children, she would have to acquiesce and then file a new application for custody and, for most women, the cost of a fresh application and trial would have been unaffordable. The court chose not to concern itself with the custody of children unless pressed to do so in the trial. When the number of custody orders is contrasted with the number of women with resident children, the court's reluctance to grant custody orders of its own volition is stark: of the 1858 petitioners there were 44 such women and of the 1859 petitioners there were 51 such women. Out of these women with children, only 11 orders for custody were made in 1858 and 14 orders in 1859. The court only used its custody powers when asked to do so in the petition and at trial.

Just because a woman succeeded in the main suit did not mean that a custody order would be made in her favour because, while many women succeeded in the main suit, few custody orders were made. In her study of newspaper reports of divorce trials between 1859 and 1910, Gail Savage concluded that 'The guilty party often had to pay court costs and always lost custody of any children involved.'[159]

[157] Lawrence Stone, *Road to Divorce* (Oxford University Press 1990) 387.
[158] Stephen Cretney, *Family Law in the Twentieth Century* (Oxford University Press 2005) 577.
[159] Gail Savage, 'The Operation of the 1857 Divorce Act, 1860-1910 A Research Note' (1982) Journal of Social History 16 106.

For the cases considered in this study, commenced in 1858 and 1859, the guilty party was not always made subject to a custody order and, if the guilty party was a man, he would not lose custody as he would retain his privileged position and would not lose custody rights enforceable in other courts.

The difficulty for women was that custody rights were accessed through male gatekeepers. Macqueen advised that, for the court to grant a custody order, the applicant's barrister must make an oral application at the divorce trial.[160] So, whether the custody application was dealt with depended on the motivation of the barrister and the determination of the woman litigant to prompt her barrister. In the case of Caroline Moore (1859 judicial separation petitioner), the wife obtained a custody order because her barrister Mr Searle presented to the court an application for alimony and custody of the three children, saying that a form of consent had been signed by the respondent and filed at court.[161]

A helpful description of the conduct of proceedings is also given in a newspaper report of the trial of Jane Davies (1858 divorce petitioner) where the wife's barrister chose not to press for a custody order and the wife did not insist: 'Dr Spinks, for the petitioner, applied to the court to pronounce the dissolution of the marriage, for alimony, and for the maintenance of the children and their custody by the mother. Dr Deane, QC, addressed the court for the respondent, with respect to the amount of alimony claimed… which was ultimately fixed at £65 a year. The application for the custody of the children was not pressed and the court pronounced for the dissolution'.[162] Thus, a custody order was not made even though the children were living with the wife and she had sought such an order in the petition.[163] Perhaps the barrister considered that the risk of removal by the husband was low and the order for alimony represented approval by the court of the arrangements and so was sufficient.

[160] F Macqueen *A practical treatise on the law of marriage, divorce and legitimacy as administered in the Divorce Court and in the House of Lords* (London 1860) 167.
[161] The Daily News (11 December 1859) 7.
[162] The Star of Gwent (9 July 1859) 9.
[163] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: D25, Appellant: Jane Davies, Respondent: John Davies, Type: wife's petition*; J 77/13/D25.*

A further possibility is that in some cases the wife may have been advised not to draw the issue of custody to the attention of the judge at trial because it was feared that the arrangements for the education of the children would not satisfy the court. In addition to awarding custody, the court was vested with the power to make orders for the maintenance and education of any children of the parties. When enacted, the powers within section 35 were envisaged as akin to wardship yet, in the divorce trials of this study, the court only explicitly considered arrangements for education of the children of the parties if asked to make an order for custody under section 35. Maurice Swabey commented in his 1859 legal treatise that the court would take into account the funds for support and education of the children when deciding custody issues.[164] There are no cases in this study where custody was stated to have been refused because of a lack of provision for support or education. This could suggest that there was filtering of cases, where parties may have been advised not to seek custody at trial because appropriate arrangements were not in place. Macqueen stated that the education of a child was 'infinitely more critical' than custody and maintenance, presumably because of society's preoccupation with status and respectability.

For the purposes of negotiation, upper class women could be pressured into withdrawing an application for custody. An example is Harriett Crommelin (1858 divorce petitioner) who initially requested custody in her divorce petition but her petition was heavily amended by hand during negotiations and the application for custody was deleted.[165] No custody order was made even though some of the children were living in this country with the wife,[166] the husband having emigrated to Australia. At a directions hearing on 31st January 1859, it was agreed that the husband would file an answer admitting the allegations of adultery and desertion to be made in an amended (watered down)

[164] M. C. Merttins Swabey, *The Act to Amend the Law Relating to Divorce and Matrimonial Causes in England: The Divorce Act Amendment Act, 1858 and the Legitimacy Declaration Act, 1858* (London 1859) 63.
[165] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: C13, Appellant: Harriett Ann Crommelin, Respondent: Thomas Lake Crommelin, Type: wife's petition*; J 77/8/C13.*
[166] Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *591*; Folio: *132*; Page: *13*; GSU roll: *542667;* Census Returns of England and Wales, 1861; Class: *RG 9*; Piece: *996*; Folio: *53*; Page: *18*; GSU roll: *542734.*

petition,[167] so that the case could proceed to full trial at which the decree would be made. The wife had initially sought custody in the prayer of her petition but it seems that the wife's priority was to divorce without delay as she went on to remarry very soon after the decree was pronounced.[168] No doubt the wife's barrister considered that the risk of the husband reclaiming the children was low as he was settled in Australia and perhaps all were concerned to protect the children's long term financial interests by preserving the relationship between the children and the wealthy and powerful Crommelin family.

CONCLUSIONS

The Court for Divorce and Matrimonial Causes, newly opened in January 1858, was awarded a broad and unprecedented jurisdiction to make orders for the custody of any children of the marriage. This is significant because, in the mid-nineteenth century, a woman needed the protection of a custody order, as otherwise her husband would be within his legal rights to seize the children without notice. The majority of the petitioners in this study (both men and women) had their children living with them. Despite this apparent equality, there is a significant difference between the male and female experiences of custody rights upon marriage breakdown: half of the female petitioners with children living with them sought custody in the petition, whereas virtually none of the men did. This reflects the legal position: a woman could only improve her position by obtaining a custody order from the court whereas a man would be advised not to risk his advantage by giving the court jurisdiction. The women needed a custody order, whereas the men did not.

Seeking a custody order was clearly a motivating factor for the petitioning women in this study. Danaya Wright calculated upon the basis of the divorce records that fewer than 35% of petitioning

[167] *Court for Divorce and Matrimonial Causes:* Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: C13, Appellant: Harriett Ann Crommelin, Respondent: Thomas Lake Crommelin, Type: order for directions*; J 77/8/C13.*
[168] London Metropolitan Archives; London, England; *Saint Mary, Islington, Register of marriages*; Reference Number: P83/MRY1.

women with underage children sought a custody order in the petition.[169] This study can confirm that percentage and also show that, by widening the sources, the percentage of applications was much higher for the petitioning women who had children living with them (59% in 1858 and 49% in 1859). These women chose to seek the protection of a custody order and managed to do so, yet the court adopted practices that limited access to that protection for others. Custody would only be awarded if three requirements were met: firstly that the applicant was the petitioner in the main suit, secondly that a request was made in the prayer of the petition and thirdly that the application was presented orally at trial. Of the 1859 cases, all who met these three conditions were granted a custody order. This automatic grant of custody in certain circumstances represented a significant, albeit temporary, advance for those few women who managed to petition the court but it was not an advance for all women and not necessarily an advance for child welfare. The court sought to develop rules for the exercise of discretion, choosing to link the grant of custody to marital fault, by the adoption of the innocence rule. An examination of the facts of individual cases reveals the discriminatory and adverse effects of this rule. The court would not grant custody to a woman respondent and so women who could not afford to petition the court could not acquire a custody order protecting their position. In other words, the protection of a custody order was denied to the majority of women.

Compared to the Court of Chancery, the willingness of the divorce court to depart from the forfeiture rule and to overrule paternal dominance in favour of mothers in matters of custody may, at first sight, seem liberal. Indeed, the willingness of the Court for Divorce and Matrimonial Causes to grant custody orders to qualifying women is remarkable when compared with jurisprudence emanating from other courts, with the Court of Chancery by contrast maintaining the forfeiture standard.[170] A woman would be guaranteed a custody order if she met the court's criteria but her ability to do so relied on the husband's cooperation. Applications for custody were made by women (not men), by petitioners (not respondents) and protective in the sense that they already had the children living with

[169] Danaya Wright, 'Untying the knot: an analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866' (2004) U. Rich. L. Rev. 38 956.
[170] Re Agar-Ellis (1883) 24 Ch. D. 317.

them and wanted to preserve the status quo. In other words, the husband had to yield custody in the first place for the woman to acquire it. Thus, a woman's ability to keep her children and to petition the court was dependant what the husband wanted and what financial support was available to her, either from husband, older children, kin, new partner or community. In short, access to the mid-Victorian divorce court must be viewed in the context of the financial realities and life choices available to women at that time. Regardless of academic debates about the extent and availability of women's employment,[171] there is no doubt that women in the Victorian era suffered impediments which limited their ability to retain custody of children and to access court remedies.

Even for those women who did manage to petition the court, there was no guarantee of a custody order because such rights were accessed through male gatekeepers. The majority of the female petitioners who had their children living with them sought custody in the petition but did not succeed in obtaining an order: in 1858, 44 female petitioners had at least one of their children living with them, of whom 24 requested custody in the petition and of whom only 11 obtained a custody order. Gail Savage has written that, according to newspaper reports, custody was awarded to the winner[172] but, in the sample cases considered in this study, a custody order was not always made at trial. Just because a woman succeeded in the main suit did not mean that a custody order would be made in her favour: many women succeeded but few custody orders were made. If custody was not drawn to the attention of the court at the final hearing by the woman's barrister, custody would not be dealt with, even if there was a request in the prayer of the petition.

Despite society's growing preoccupation with child welfare, the legal position of the parties in respect of their children was ignored by the court, unless the application for a custody order was presented by the applicant's barrister at trial. No enquiry was made by the court as to whether a custody order was

[171] Amanda Vickery, 'Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History' (1993) The Historical Journal 36:02 383.
[172] Gail Savage, 'The Operation of the 1857 Divorce Act, 1860-1910 A Research Note' (1982) Journal of Social History 16 103, 106.

needed. Court proceedings were inquisitorial only as to the guilt or collusion of parties: in 1860 parliament established the Queen's Proctor who had the power to investigate any allegations of collusion and, if found, rescind the decree.[173] The court made, at best, only a limited enquiry as to a child's welfare in its exercise of the discretion bestowed by parliament, considering the arrangements for the custody, maintenance or education of children if invited to do so. Macqueen justified the court's inertia by the lack of resources, describing the court's duty of inquiring into and regulating custody as 'a very onerous and difficult duty cast upon a Court without officers'.[174] Even where the court was invited to consider the arrangements for the children, the court's determinations were informed by the outcome of negotiations between barristers, and not any independent evidence gathered by the court.

The limited enquiry and narrow focus of the court when deciding custody is in stark contrast to the reality of caring for children as revealed by this study. About a quarter of the women petitioners (27% in 1858 and 24% in 1859) and the great majority of the women respondents (83% in 1858 and 86% in 1859) did not have any of their children living with them. Many of these petitioners and respondents had fled the home to escape violence, only able to return to care for the children if the husband deserted or died. In addition, many of the women in this study had insufficient means of support, exacerbated by the inability of the court to award unsecured alimony and the limitations of state provision (as the workhouse required the separation of mothers and children). Consequently, many of the women had no choice but to stay with family members, who could not or would not accommodate the children too, perhaps unwilling to challenge the husband's authority over his children. Other women in this study entered domestic service when the marriage ended and arranged for relatives to look after their children, although some carried out paid work from home, as a launderess for example, and others managed to secure a position in a school (as governess or housekeeper) where the children could board. A number of the women in this study later remarried, but most of those women

[173] Matrimonial Causes Act 1860, s.5.
[174] J F Macqueen *A practical treatise on the law of marriage, divorce and legitimacy as administered in the Divorce Court and in the House of Lords* (London 1860) 165.

who had embarked on the new relationship before or at the time of the marriage breakdown were expected to elope and leave their children behind. Notably, against this backdrop of the reality of children's lives, the court chose in any custody deliberations to focus on the innocence of parties, ignoring even allegations of violence if the perpetrator were the petitioner.

The divorce court framed the exercise of discretion in terms of protecting the child from their offending parent's evil influence[175] and it would be many years before the welfare of the child was the first and paramount consideration, unencumbered by parental rights and interests,[176] taking into account the child's wellbeing and happiness. This weak and narrow conception of welfare, detached from any court-led enquiry into the circumstances of the child, further disadvantaged female respondents. Despite the broad discretion conferred by statute and the court's inquisitorial role in the main suit, the court's conception of its role in relation to children was limited to establishing marital fault and approving arrangements for the maintenance and education of the children. Although a wider consideration of welfare was unlikely in the mid-Victorian period, the failure of the court to acknowledge economic or practical realities presented a real hurdle for the women who were doing the caring and sought legal recognition of their role. Provided procedural formalities were complied with, the court simply granted applications for custody in response to applications made at trial by petitioners' advocates and did not engage in a holistic court-led determination of what would be in the best interests of the child. The court's limited conception of its role subordinated child welfare and compounded gender disadvantage, minimising the impact of the new custody jurisdiction and representing a missed opportunity to improve conditions for women and children in mid-Victorian England.

[175] Marsh v Marsh (1858) 1 Swabey & Tristram 312, 164 E.R. 744.
[176] Guardianship of Infants Act 1925, s.1.