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## **The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience**

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# The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience

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## Abstract

*This article reviews the Australian experience since 2006, when the Parliament amended the Family Law Act 1975 to require courts to consider shared care arrangements under certain circumstances when parents live apart. The Australian legislation has been controversial, but also much misunderstood. The article explains the background to the Australian legislative reforms and places them in the context of international developments. It reviews the substantial body of research on the outcomes of those reforms, challenging some myths and correcting some misunderstandings. There were certainly problems with the Australian legislation. However, there have also been demonstrable benefits from the Australian reforms as a whole. The article concludes with recommendations for how governments can achieve the payoffs, and avoid the pitfalls, in such legislative reform.*

# The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience

## PART I: INTRODUCTION

### The issue

Should legislation encourage shared parenting? This is the latest debate in the long-running argument that has been occurring around the world on the shape of legislation governing post-separation parenting arrangements. Many jurisdictions, including Australia, have gone a long way down this track. Others, such as England and Wales,<sup>1</sup> and Hong Kong,<sup>2</sup> are currently in the midst of debate on this issue, with concerns being expressed by some that any change to the existing law will lead to serious adverse consequences.<sup>3</sup> Of course Canada had its own vigorous debates on law reform in this area more than a decade ago.<sup>4</sup>

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<sup>1</sup> Family Justice Review, *Final Report*, (November 2011) (hereafter, 'Norgrove Report'); House of Commons Justice Committee, *Operation of the Family Courts* (HC 518-1, June 2011); Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A system with children and families at its heart*, (Feb. 2012); Department for Education and Ministry of Justice, *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* (June 2012); House of Commons Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, (HC 739, December 2012).

<sup>2</sup> Labour and Welfare Bureau, *Child custody and access: whether to implement the 'joint parental responsibility model by legislative means*, Hong Kong Special Administrative Region Government, 2011.

<sup>3</sup> See e.g. Felicity Kaganas, "A Presumption That 'Involvement' of Both Parents is Best: Deciphering Law's Messages" (2013) 25 *Child & Family Law Quarterly* 270 at 291-2.

<sup>4</sup> Parliament of Canada, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* (1998); *Government of Canada's Response to the Report of the Special Committee on Child Custody and Access: Strategy for Reform* (1999); Dep't of Justice, *Putting Children First: Final Federal-Provincial-Territorial Report on Custody and Access and Child Support* (2002); Bill C-22, An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Judges Act and to amend other Acts in consequence, 2<sup>nd</sup> Session, 37<sup>th</sup> Parliament, 2002. For commentary see e.g. Nicholas Bala, 'A Report from Canada's 'Gender War Zone': Reforming the Child

## The language

One of the many complications in answering this question is the sometimes confused use of the language of ‘shared parenting’, or ‘shared care’. There is no set definition of what shared care means, but there is widespread agreement that it need not mean equal time. In the academic and professional literature, a common minimum definition is 30% of nights per year.<sup>5</sup> In some jurisdictions, the definition is set by legislation. In Utah, for example, joint physical custody is defined to mean that the child stays with each parent overnight for more than 30% of the year.<sup>6</sup> In Australia, shared care is defined as 35% of nights or more per year for each parent as a result of changes made in 2008 to the child support legislation.<sup>7</sup> In Canada, ‘shared custody’ is defined in the 1997 Federal Child Support Guidelines as at least 40 percent of the time with each parent.<sup>8</sup>

However in the recent debates about minor changes to the Children Act 1989 in England and Wales, the term ‘shared parenting’ has been used to mean almost any arrangement that does not involve sole custody to one parent while denying access to the other. In this usage, it may mean nothing more than joint parental responsibility (a fundamental feature of the Children Act 1989 from its inception) and some regular contact. An amendment made to the Children Act in 2014 provides that where a parent can be involved in the child’s life in a way that does not put the child at risk of suffering harm, the court should presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare.<sup>9</sup> A reform of this kind was originally promoted as a means of encouraging ‘shared parenting’.<sup>10</sup>

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Related Provisions of the Divorce Act’, (1999) 16 *Can. J. Fam. L.* 163; M. Laing, ‘For the Sake of the Children: Preventing Reckless New Laws’, (1999) 16 *Can. J. Fam. L.* 229; Jonathan Cohen and Nikki Gershbain, ‘For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact’ (2001) 19 *Can. F.L.Q.* 121; Susan Boyd & Claire Young, ‘Who Influences Law Reform? Discourses on Motherhood and Fatherhood in Legislative Reform Debates in Canada’, (2002) 26 *Studies in Law, Politics & Society* 43; E. Hughes, *The Language and Ideology of Shared Parenting in Family Law Reform: A Critical Analysis*, (2003) 21 *Can. Fam. L.Q.* 1; Susan Boyd, ‘Walking the Line: Canada’s Response to Child Custody Law Reform Discourses’, (2004) 21 *Can. Fam. L. Q.* 397.

<sup>5</sup> Margo Melli & Patricia Brown, ‘Exploring a new family form – the shared time family’ (2008) 22 *Int. J. Law, Policy & Family* 231; Belinda Fehlberg, Bruce Smyth, Mavis Maclean & Ceridwen Roberts, ‘Legislating for shared time parenting after separation: a research review’ (2011) 25 *Int. J. Law, Policy & Family* 318.

<sup>6</sup> Utah Code § 30-3-10.1.

<sup>7</sup> *Child Support (Assessment) Act* 1989 (Cth).

<sup>8</sup> Federal Child Support Guidelines, SOR/97-175, s.9.

<sup>9</sup> Children and Families Act 2014, s. 11.

<sup>10</sup> See Department for Education and Ministry of Justice, *Co-operative Parenting*, above n.1.

However, it is little more than a presumption in favour of some kind of contact between the non-resident parent and the child in the absence of risk factors.

The difficulty with the use of the language of ‘shared parenting’ in this way is that ‘shared parenting’ is understood by some as being synonymous with ‘shared care’ while others mean merely the equivalent of joint legal custody. The consequence is that even when two people on opposite sides of this debate use the same language, they seem to mean quite different things by it.

### **The practicalities of shared care**

In considering the value of laws that seek to encourage shared parenting, it is worth exploring the extent to which such laws can bring about significant shifts in terms of the physical care of children. The reality is that substantially shared care of children will always be a minority post-separation parenting arrangement, and one which comparatively few parents can sustain for many years after they separate. Australian research has shown that some families try shared care soon after separation but change to another care arrangement in the course of time.<sup>11</sup>

The most obvious requirement for shared care to occur is that the parents live within a reasonable proximity of one another. What that means will no doubt depend on whether the parents are living in a relatively small town or in a major urban centre. Driving time, and availability of school transport, is perhaps a better indicator of proximity than distance. Proximity is hard to sustain in the aftermath of parental separation:<sup>12</sup>

Proximity is a precondition for shared care, and such an arrangement may work for a while. However, if the family home has to be sold, or it is not possible for the parents to afford two homes in the area where once they had only one, one or both parents will have to move to an area where housing is cheaper. In Australia’s major cities, those areas tend to be on the edges of the city or beyond it, and so separation has a centrifugal effect on many parents, scattering them through economic necessity from the more central areas of a city to its outer edges or beyond. If one parent is tied to their original location because of work commitments or other such factors, the economic consequences of the separation may mean that parents come to live some distance from one another.

Lack of suitable accommodation for the children may also limit the capacity of the non-resident parent to have the children stay overnight. Shared parenting requires a certain level of financial wellbeing for the parents to be able to afford two adequate homes for the children,

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<sup>11</sup> Judith Cashmore, Patrick Parkinson, Ruth Weston, Roger Patulny, Gerry Redmond, Lixia Qu, Jennifer Baxter, Marianne Rajkovic, Tomasz Sitek & Ilan Katz, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government, Attorney-General’s Department* 37-40, 139-40 (2010).

<sup>12</sup> *Ibid* at 139-40.

together with sufficient furnishings, toys and computer equipment that children will feel at home in both places.<sup>13</sup> For some parents that may not be achievable.

Another factor is work schedules. There are many non-resident parents for whom the traditional residence/contact model is the only realistic option. Fathers or mothers whose orientation towards the world of work makes it difficult to take on the primary care of children for significant periods, especially during school holidays, are likely to recognize the sense in a traditional residence/contact arrangement if the other parent does not have the same level of work commitments.

Practically, then, shared care is likely to be only for the comparatively few, and in many cases will represent a transition stage from parenting together to parenting apart. Sooner or later, the outcome of the search for cheaper housing, changes in work location, repartnering, children's needs or choices and a multitude of other factors in the lives of either parent or the children, may lead the shared care arrangement to be no longer appropriate or feasible. Whatever else law may do, it can do little to change these practicalities.

### **The emotion**

Despite the fact that substantially shared care is feasible only for comparatively few, legislating to encourage 'shared parenting' has become a very significant issue for emotional, ideological and political reasons. For some men's groups it is the prize;<sup>14</sup> for some women's groups it represents defeat, or at least a significant burden on maternal autonomy.<sup>15</sup> Advocacy groups tend to present their cases in terms of Nirvana or Apocalypse. The issue arouses passionate debate. For these reasons, the path of careful policy making must be one of dispassionate analysis of the evidence together with an awareness of the socio-economic realities of life after separation. However sorting out evidence from advocacy is not necessarily straightforward.

This Article will consider in detail the evidence from Australia which reformed its laws in 2006 to provide significant encouragement to shared parenting arrangements, including equal

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<sup>13</sup> In the Canadian context, see Department of Justice, *Child Custody Arrangements: Their Characteristics and Outcomes* (2004), ch.5.

<sup>14</sup> Miranda Kaye & Julia Tolmie, "Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law", (1998) 12 *Austl J Fam L* 19 at 33. In Canada, see the Canadian Equal Parenting Groups Directory, at <http://www.canadianequalparentinggroups.ca/>

<sup>15</sup> See, e.g., Susan Boyd, 'Autonomy for Mothers? Relational Theory and Parenting Apart', (2010) 18 *Feminist Legal Studies* 137, 150 ("The responsibility cast upon mothers to ensure contact between children and fathers can be both a burden and a constraint on maternal autonomy.").

time. However first it is necessary to put the Australian experience – and indeed the Canadian legislation – into an international context, by examining the enormous changes that have occurred in the law across the western world in the last thirty or so years, and by examining the extent to which, in other jurisdictions, the law encourages shared parenting.

## **PART II: THE TRANSFORMATION OF THE LAW OF POST-SEPARATION PARENTING**

### **The indissolubility of parenthood**

In the last thirty years, profound changes have occurred in family law all around the western world. The model on which divorce reform was predicated in the late 1960s and early 1970s has irretrievably broken down. Under that model, the parents' legal divorce necessarily required a divorce between them not only as partners but also as parents. Only one of the two parents could continue in that role after the divorce, and would be awarded 'custody', while the other's role would be no more than a visiting one in most cases. The future upbringing of the child depended on a choice between two alternatives, the home of the mother or the home of the father. It followed that the marriage breakdown marked the dissolution of the nuclear family. Parental authority was awarded to the custodial parent and there was a strong differentiation between the role of the custodial and non-custodial parent.

This model of the post-separation family has gradually been displaced by a new concept of post-separation parenting, one which French sociologist Irène Théry called the idea of the "enduring family". Separation and divorce is not the end of the family, but a "transition between the original family unit and the re-organisation of the family which remains a unit, but a bipolar one."<sup>16</sup> This idea of post-separation parenting typically involves the refusal of a choice between parents in favor of joint parental authority, although in some cases still, sole custody will be seen as appropriate.<sup>17</sup>

Change has occurred only very gradually in family law around the western world, but the relentless march of progress has been in this direction.<sup>18</sup> The age of sole maternal custody – as a norm at least – is over. The default position across the western world is that the breakdown of

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<sup>16</sup> Irène Théry, 'The Interest of the Child' and the Regulation of the Post-Divorce Family' (1986) 14 *Int'l. J. Soc. L.* 341, at 356.

<sup>17</sup> Patrick Parkinson, 'Violence, Abuse and the Limits of Shared Parental Responsibility' (2013) *Family Matters*, no 92, 7.

<sup>18</sup> These international trends are reviewed in Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* (2011).

the intimate relationship of parents does not end their joint responsibilities towards their children. As Margo Melli has written: “Today, divorce is not the end of a relationship but a restructuring of a continuing relationship.”<sup>19</sup>

### **From joint legal custody to shared parenting**

That process began in the early 1980s with the movement towards joint legal custody. Courts and legislatures began to respond to a shift in emphasis from the need of the child to have an attachment to one “psychological parent” to a need for children to maintain relationships with both parents.<sup>20</sup> Pressure for a legal presumption that the court should award joint legal custody was particularly strong in the United States. The joint legal custody movement also affected practice in Canada.<sup>21</sup>

The movement towards joint custody reached its zenith as a legislative reform movement in the United States in the late 1980s. Since then, in other jurisdictions there has been a move onwards to different language entirely, which reflects a different understanding of post-separation parenting. This may be observed in the new language of parenting plans in a number of US States,<sup>22</sup> led by Washington State as long ago as 1987.<sup>23</sup> Legislative change in Canada has come much more recently. The law changed in Alberta in 2003<sup>24</sup> and British Columbia with effect from March 2013.<sup>25</sup> Both statutes utilise the language of ‘guardianship’ and ‘parenting time’, rather than custody.

The change is not merely linguistic, for central to such reforms is the notion that parental responsibility continues after parental separation, unaffected by changes in the parental relationship except insofar as parental agreement or court orders changes that situation.<sup>26</sup>

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<sup>19</sup> Marygold S. Melli, ‘Whatever Happened to Divorce?’, [2000] *Wis. L. Rev.* 637, 638; see also Bren Neale & Carol Smart, ‘In Whose Best Interests? Theorising Family Life Following Parental Separation or Divorce’, in *Undercurrents Of Divorce* 33, 35–37 (Shelley Day Sclater & Christine Piper eds., 1999).

<sup>20</sup> The work of Wallerstein and Kelly was perhaps most influential in bringing about a shift in emphasis: Judith Wallerstein & Joan Kelly, *Surviving The Breakup* (1980).

<sup>21</sup> See generally Susan Boyd, *Child Custody, Law, and Women’s Work* (2003).

<sup>22</sup> See e.g. Mont. Code Ann. § 40-4-234; N.M. Stat. Ann. § 40-4-9.1; TN Code § 36-6-404.

<sup>23</sup> Wash. Rev. Code § 26.09.181. Washington State law requires each of the parents on divorce to propose a parenting plan, and if agreement cannot be reached, a plan can be determined by the court.

<sup>24</sup> Family Law Act 2003.

<sup>25</sup> Family Law Act 2011.

<sup>26</sup> See e.g. British Columbia’s Family Law Act 2011, s.39.



Similar developments have occurred in Europe. In England and Wales, the Children Act 1989 provided that each parent has “parental responsibility” and retains that responsibility after the marriage breakdown. Instead of making a custody order giving to one parent, to the exclusion of the other, a bundle of rights and powers to make decisions about the welfare of the child, the new law provided that court orders should focus on the practical issues, in a way similar to the approach taken in the ‘parenting plan’ jurisdictions of the United States. The Children Act introduced the new terminology of ‘residence’ and ‘contact’ orders. Scotland passed legislation using similar terminology and concepts, in 1995.<sup>27</sup> The Children and Families Act 2014 makes further reforms to the law in England and Wales, replacing residence and contact orders with “child arrangements orders” regulating with whom a child is to live, spend time or otherwise have contact.<sup>28</sup>

Developments along the same lines have occurred in France, where the law is now based upon a principle of “coparentalité”.<sup>29</sup> By legislation passed in 1993,<sup>30</sup> the Civil Code was amended to remove the language of “custody”.<sup>31</sup> It was replaced with the language of “parental authority”. The legislation provided that parental authority is to be exercised in common<sup>32</sup> and that parental separation does not change this.<sup>33</sup>

In many other European jurisdictions, the law has also been amended to encourage or provide for continuing joint parental responsibility after divorce. A common legislative approach which has had the effect of encouraging joint custody has been one of non-intervention. Instead of allocating custody as one of the matters to be dealt with in granting a divorce, joint custody is deemed to continue after separation unless one parent seeks a court order to the contrary. This is the position in the Scandinavian countries as well.<sup>34</sup> A similar approach has been adopted in Germany by the Gesetz zur Reform des Kindschaftrechtes, 1997, which amended the Civil Code to provide that the parents have joint parental responsibility

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<sup>27</sup> *Children (Scotland) Act 1995*, s. 11.

<sup>28</sup> *Children and Families Act 2014*, s. 12.

<sup>29</sup> Frédéric Vauvillé, ‘Du principe de coparentalité’, (2002) 209 *Les Petites Affiches* 4. The “coparentalité” principle is also examined by Hugues Fulchiron in ‘L’Autorité Parentale Renouée’, (2002) *Répertoire du Notariat Deffrénois* 959.

<sup>30</sup> Loi 93-22, 1993-01-08, modifiant le code civil, relative à l’état civil à la famille et aux droits de l’enfant et instituant le juge aux affaires familiales, available at <http://www.legifrance.gouv.fr>.

<sup>31</sup> In French, “la garde.”

<sup>32</sup> C. Civ. art. 372 (Fr.).

<sup>33</sup> C. Civ. art. 373-2 (Fr.).

<sup>34</sup> Eva Ryrstedt, ‘Joint Decisions — A Prerequisite or a Drawback in Joint Parental Responsibility?’ (2003) 17 *Austl. J. Fam. L.* 155.

during the marriage. Unmarried parents may agree to joint parental responsibility by formal declaration.<sup>35</sup> This joint responsibility continues after separation unless the court orders otherwise on the application of one of the parties.<sup>36</sup>

### **Legislative support for shared parenting**

The abandonment of the idea of sole custody as a ‘winner takes all’ approach to the breakdown of the parental relationship was just the first phase of the revolution that has been occurring in post-separation parenting. There is now a growing trend towards legislative encouragement for courts to give serious consideration to shared parenting in disputed cases, in situations other than where there are issues of domestic violence or child abuse.<sup>37</sup>

In most jurisdictions, to be sure, legislatures have resisted the temptation to be too prescriptive. Courts have retained the flexibility to try to discern what will be in the best interests of the child in each case. As Fehlberg et al note:<sup>38</sup>

Overall, the legislative trend has been more clearly and consistently towards encouraging both parents to be actively involved in their children’s lives post-separation, including maximising contact, rather than specifically towards legislating for shared time.

An example of this is the long-standing position under Canada’s Divorce Act which provides that “the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.” (*Divorce Act* 1985 s.16(10)).<sup>39</sup>

However, the boundary line between ‘maximising contact’ and shared time is an exceedingly unclear one. Some statement of principle go a long way towards promoting shared parenting. For example, Illinois law provides that:<sup>40</sup>

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<sup>35</sup> Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1626 (Ger.).

<sup>36</sup> BGB § 1671.

<sup>37</sup> Helen Rhoades, ‘The Rise and Rise of Shared Parenting Laws’, (2002) 19 *Can. J. Fam. L.* 75; Margaret Brinig, ‘Does Parental Autonomy Require Equal Custody at Divorce?’ (2005) 65 *Louisiana L. Rev.* 1345.

<sup>38</sup> Fehlberg et al, above n.5, pp. 319-320.

<sup>39</sup> For criticisms, see Cohen and Gershbnain, above n.4.

<sup>40</sup> 750 Ill. Comp. Stat. 5/602(c).

Unless the court finds the occurrence of ongoing abuse...the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child.

Another example of the trend towards shared parenting is the law in Iowa, where the legislative formulation of policy is that:<sup>41</sup>

“The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.”

The law provides for a presumption in favour of joint custody,<sup>42</sup> and if joint custody is awarded, then “the court may award joint physical care to both joint custodial parents upon the request of either parent...If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.”<sup>43</sup> There is a similar provision in Maine.<sup>44</sup>

Another example is Florida, where the law states the public policy of the State as being “to encourage parents to share the rights and responsibilities, and joys, of childrearing” despite parental separation.<sup>45</sup> Amendments to the law in 2008 provided that the court must approve a parenting plan which includes provisions about “how the parents will share and be responsible for the daily tasks associated with the upbringing of the child” and “the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent”.<sup>46</sup> In cases

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<sup>41</sup> Iowa Code § 598.41(1)(a).

<sup>42</sup> Iowa Code §598.41(2)(a) and (b).

<sup>43</sup> Iowa Code § 598.41(5)(a).

<sup>44</sup> See also Maine: 19A Me. Rev. Stat. § 1653(2)(D)(1): "If either or both parents request an award of shared primary residential care and the court does not award shared primary residential care of the child, the court shall state in its decision the reasons why shared primary residential care is not in the best interest of the child."

<sup>45</sup> Fla. Stat. Title VI, 61.13(2)(c)(1).

<sup>46</sup> Fla. Stat. Title VI, 61.13(2)(b). There was also a Bill (Senate Bill 718) to amend the law in 2013, creating a presumption that equal time was in the best interests of the child in certain circumstances, which passed the legislature with significant majorities in both Houses. It was vetoed by the Governor. The Bill also made significant retrospective changes to alimony law, and this was the Governor's expressed reason for the veto. See James Roxica, 'Gov. Scott vetoes bill to end permanent alimony', News Herald, May 2 2013 at [www.newsherald.com](http://www.newsherald.com) (accessed May 27<sup>th</sup> 2013).

of violence or abuse, the court may make an order for sole parental responsibility.

### **The move towards equal time: North America**

What about shared care? While there is a consensus that shared care is contra-indicated in cases where there are safety concerns, and for infants and pre-school children, in other cases, the new frontier is working out ways of achieving substantially shared parenting time to the extent that the logistics of the parents' circumstances allow.

In a number of jurisdictions, there has been pressure for change from fathers' groups based upon the idea that for parents to be treated equally, there ought to be a presumption that children should spend an equal amount of time with each parent after separation. Some US legislatures have responded to that issue by explaining that joint custody does not mean necessarily that there is entitlement to an equal time arrangement.<sup>47</sup> British Columbia has adopted a similar approach in its new law, stating that<sup>48</sup>

In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed...

(b) that parenting time should be shared equally among guardians.

By way of contrast, Louisiana is one jurisdiction that has responded affirmatively, if somewhat ambiguously, to the idea of promoting equal time. In that jurisdiction, there is a presumption in favor of joint custody.<sup>49</sup> In determining what the arrangements for joint parenting should be, the courts are instructed that "to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally."<sup>50</sup> This may be little more than a rhetorical flourish, however, as the Court is also required to identify a "domiciliary parent" who is the parent with whom the child "shall primarily reside".<sup>51</sup> Thus while including a presumption in favor of equal time arrangements on the one hand, Louisiana law also assumes that there will always be a primary caregiver.

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<sup>47</sup> See e.g. Idaho Code § 32-717B(2); Tex. Family Code §153.135; Utah Code §30-3-10(1)(d); N. M. Stat. § 40-4-9.1 (L)(4).

<sup>48</sup> Family Law Act 2011 (BC) s.40.

<sup>49</sup> Art. 132 of the Civil Code provides: "If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.

In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent."

<sup>50</sup> Civil Code Ancillaries 9-335 A(2).

<sup>51</sup> Civil Code Ancillaries 9-335 B.

In Oklahoma, the legislation states:

“It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage, provided that the parents agree to cooperate and that domestic violence, stalking, or harassing behaviors ...are not present in the parental relationship. To effectuate this policy, if requested by a parent, the court may provide substantially equal access to the minor children to both parents at a temporary order hearing, unless the court finds that shared parenting would be detrimental to the child.”

The presumption in favor of substantially equal access does not carry through to the legislative requirements governing final orders.<sup>52</sup>

Arizona is another jurisdiction with strong shared parenting norms. It amended its laws in 2012 to provide that consistent with the best interests of the child, (and in the absence of risk factors such as a history of violence, child abuse or substance abuse), “the Court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time”.<sup>53</sup> How the parenting time of both parents is ‘maximized’ no doubt depends on the circumstances, including how far they live apart from one another and what constraints work schedules impose.

### **The move towards equal time: developments in Europe**

Agitation for an equal time presumption has also been occurring in parts of Europe.<sup>54</sup> In France, an intermediate position has been adopted in response to these pressures. Two commissions were established to advise the Government concerning possible reforms to the law of parental authority in the 1990s. One took a sociological view, under the presidency of Irène Théry.<sup>55</sup> The other focused more on legal issues under the presidency of Françoise Dekeuwer-

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<sup>52</sup> Okla. Stat. §43-110.1. This provision is confined to temporary orders. See *Redmond v Cauthen* (2009) Ok Civ App 46; 211 P.3d 233 (Ct. Civ. App.). There is neither a legal preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody when making final orders: Okla. Stat. §43-112 C(2).

<sup>53</sup> Arizona Rev. Stat. 25-403.02B.

<sup>54</sup> In Britain see, e.g., Ann Buchanan & Joan Hunt, ‘Disputed Contact Cases in the Courts’, in *Children and Their Families: Contact, Rights and Welfare* (Andrew Bainham, Bridget Lindley, Martin Richards & Liz Trinder eds., 2003) at 371, 380; Bob Geldof, *The Real Love that Dare Not Speak its Name*, in the same volume at 171.

<sup>55</sup> Irène Théry, *Couple, Filiation et Parenté Aujourd’hui: Le Droit Face aux Mutations de la Famille et de la Vie Privée* (1998).

Défossez.<sup>56</sup> Dekeuwer-Défossez recommended that the notion of principal residence should be removed from the Code because it led judges to refuse shared residence arrangements when such arrangements would not have been contrary to the child's best interests.<sup>57</sup>

The consequence of these proposals for reform, and subsequent governmental consideration, was legislation on parental authority passed in 2002. This legislation was intended to promote alternating residence arrangements. Mme Ségolène Royal, the Minister for Family Affairs, indicated in the legislative debates that the reform's purpose was to encourage the parents to reach agreement on the principle of alternating residence, arguing that it had the advantage of maintaining parity between them.<sup>58</sup> However, in the Senate, concerns were expressed about the imposition of an alternating residence arrangement on parents without their agreement.<sup>59</sup>

In the result, a compromise position was adopted. Article 373-2-9 of the Civil Code now provides, as a result of the 2002 amendments, that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option.

In Belgium, the law was amended in 2006 to provide encouragement for alternating residence - indeed that emphasis was expressed in the title of the legislation.<sup>60</sup> A decade earlier, in a law of 13 April 1995, Belgium had enacted reforms similar to France adopting the principle of 'coparentalité' and endorsing as a norm the notion of continuing co-parental authority (*autorité coparentale*) which is unaffected by parental separation. The language of 'custody' was removed from the law. The law of 18 July 2006 provides that when parents are in dispute about residency, the court is required to examine "as a matter of priority", the possibility of ordering equal residency if one of the parents requests it to do so. The proviso is that if the court considers that equal residency is not the most appropriate arrangement, it may decide to order

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<sup>56</sup> Françoise Dekeuwer-Défossez, *Rénover Le Droit De La Famille: Propositions Pour Un Droit Adapté Aux Réalités Et Aux Aspirations De Notre Temps* (1999).

<sup>57</sup> *Id.* at 82.

<sup>58</sup> Assemblée Nationale, session of Jun. 14, 2001, J.O. 15 Juin 2001, Bebat Ass. Nat. at 4251. For an examination of parental agreements since the March 4, 2002 reform, Olivier Laouenan, *Les Conventions sur L'autorité Parentale Depuis la Loi du 4 Mars 2002*, 28 J.C.P. (2003).

<sup>59</sup> Rapport Sénat, 71, Session Ordinaire 2001-2002, 18.

<sup>60</sup> The Act of 18 July 2006 is entitled "*Loi tendant à privilégier l'hébergement égalitaire de l'enfant dont les parents sont séparés et réglementant l'exécution forcée en matière d'hébergement d'enfant*" ("Law tending to favour equal residency for children of separated parents and regulating enforcement (in child residency matters)").

unequal residency.

This is not the same as saying that there is a presumption in favour of equal time. An equal time arrangement is not presumed to be in the best interests of the child; nonetheless, according to Belgian law, it is the first option that ought to be considered when parents cannot agree on the arrangements.<sup>61</sup>

### **PART III: THE AUSTRALIAN LAW REFORMS**

This international context helps to put the Australian reforms of 2006 and 2011 into perspective. These reforms certainly went further towards encouraging shared parenting than some countries, but not as far as some other jurisdictions.

The reasons why perhaps Australia has been the subject of so much attention in other English-speaking countries is first, that there was a significant level of opposition to both the 1995 and 2006 Australian reforms from advocates and academic writers, and so from an overseas perspective it may have appeared as if the Australian experience has been overwhelmingly negative.

Secondly, because Australia has invested so much into evaluation of its reforms, it has a much richer body of data than is available anywhere else in the world. The family law reforms in Australia in 2006 have become a focus of attention precisely because we know so much about the community experience and professional perceptions concerning the operation of the legislation. This body of research is unprecedented in its size and scale. The research involved some 28,000 respondents in a number of different studies. This provided a wealth of information on what was happening in the Australian community both before and after the 2006 reforms.

It will be argued that both positive and negative lessons can be learned from the Australian experience. To focus only on the negatives is to present a partial and inaccurate picture which does not assist the sensible development of public policy in other countries that look to Australia for a better understanding of the payoffs and pitfalls of such legislation. Both the payoffs and pitfalls need to be analysed in a balanced and nuanced way with proper attention to the evidence.

#### **The background to the 2006 amendments in Australia**

The 2006 changes to the law in Australia followed on from reforms that occurred in the mid-

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<sup>61</sup> For research on the impact of these changes see An Katrien Sodermans, Koen Matthijs, and Gray Swicegood, 'Characteristics of joint physical custody families in Flanders' (2013) 28 *Demographic Research* 821.

1990s. The Family Law Reform Act 1995 adopted an approach that was similar in many respects to the reforms enacted in England and Wales by the Children Act 1989.<sup>62</sup> The legislation provided that all parents have parental responsibility irrespective of whether they had ever married or had lived together. The separation of the parents – or indeed the fact that they had never lived together – made no difference to the parental responsibility that they acquired as a consequence of biological parenthood. They may not continue to be partners, but they continued to be parents subject to the effect of any court order diminishing or removing parental responsibility (Family Law Act, 1975, s.61C). The Court was able to make orders about residence and contact, as well as specific issue orders. ‘Contact’ was the equivalent, in Canada, of ‘access’. The Family Law Act as a result of the 1995 reforms also stated as principles that “children have the right to know and be cared for by both their parents” and have a “right of contact, on a regular basis”, with them.

The 1995 legislation did not only make changes to the language of the law. It also introduced numerous provisions concerning domestic violence. The court was instructed to take account of any history of family violence in determining what parenting arrangements would be in the best interests of the child. It should also endeavour to ensure that parenting orders do not expose a parent or other family member to an unacceptable risk of family violence, subject to the paramountcy of children’s best interests. Other provisions sought to deal with conflicts or potential conflicts between the terms of restraining orders and orders concerning contact between the non-resident parent and the children.

There is some controversy about whether the 1995 reforms had much impact. One view is that they did little more than to change the language of the law.<sup>63</sup> Another view is that the changes were seriously detrimental to women. It has been argued, for example, that the legislative provisions enacted in 1995 concerning the child’s right to contact represented a significant change and that this right to contact ‘trumped’ the provisions concerning violence.<sup>64</sup> In fact there had long been a pro-contact culture in family law, and the notion of contact as a right of the child was well established in the case law. For example, Samuels JA, of the NSW Court of Appeal, wrote in a 1977 case that it was only in exceptional circumstances, and upon solid grounds, that a father should be denied contact with his child. Denying access, he noted,

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<sup>62</sup> John Dewar, ‘The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared – Twins or Distant Cousins?’, (1996) 10 *Austl. J. Fam. L.* 18.

<sup>63</sup> Richard Chisholm, ‘Assessing the impact of the Family Law Reform Act 1995’, (1996) 10 *Austl. J. Fam. L.* 177.

<sup>64</sup> See e.g. Helen Rhoades, ‘The ‘No-Contact Mother’: Reconstructions of Motherhood in the Era of the ‘New Father’ (2002) 16 *Int. J. Law, Policy & Family* 71 at 82 (“concerns about the effects of domestic violence have been displaced by a desire to maintain contact”).



“may well have grave consequences for the child’s future development”.<sup>65</sup> In a concurring judgment, another judge wrote that access is a right of the child, not the parent, anticipating the children’s rights focus of the 1995 legislation by nearly 20 years.<sup>66</sup>

Some research also presented a bleak picture of the outcomes of the 1995 reforms.<sup>67</sup> However, this was largely based on qualitative data, the study was not peer-reviewed, and there was reason to question the reliability of the research findings.<sup>68</sup> Perhaps for this reason the research did not have much of an impact on public policy in Australia, although it had more traction overseas (particularly in Canada<sup>69</sup>).

While, in the years after 1995, women’s groups who had opposed the changes continued to express significant concerns,<sup>70</sup> the message that resonated most strongly politically was that the 1995 legislation had failed to make much difference to the prevailing norms concerning parenting after separation. Fathers’ groups continued to campaign for further change. Those complaints struck a chord with backbench members of the Coalition government, and in 2003, the then Prime Minister, John Howard, asked the Family and Community Affairs Committee of the House of Representatives to examine, inter alia, whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a

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<sup>65</sup> *Cooper v Cooper* (1977) FLC 90-234 at 76,250.

<sup>66</sup> Moffitt P in *Cooper v Cooper* (1977) FLC 90-234 at 76,253.

<sup>67</sup> Helen Rhoades, Regina Graycar & Margaret Harrison, *The Family Law Reform Act: The First Three Years*, Final Report. Sydney: University of Sydney and the Family Court of Australia.

<sup>68</sup> No peer-reviewed articles resulted from this study. A shortened version of the executive summary was published in the ‘Family Law Update’ section of the journal *Family Matters* (no 58, Autumn 2001, 80) with an invitation to readers to comment. Critiques of the methodology and findings were then published in the following issue of the Journal. See Lawrie Moloney, ‘Researching the Family Law Reform Act: A Case of Selective Attention?’ *Family Matters* no 59, Winter 2001, 64; Patrick Parkinson, ‘A Plea for Greater Rigour in Socio-Legal Research’ *Family Matters* no 59, Winter 2001, 77. The authors’ response to these criticisms was published at p.68. Other research also had limitations. A study was conducted in Brisbane based upon interviews with four people in each of four professional groupings in that city involved in family law work: John Dewar and Stephen Parker, ‘The Impact of the New Part VII Family Law Act 1975’ (1999) 13 AJFL 96. While the research led the authors to some interesting insights, the findings, so far as they purported to describe the impact of the legislative changes, were not generalisable given the very small and unrepresentative sample of interviewees.

<sup>69</sup> Rhoades, above n.37; Helen Rhoades & Susan Boyd, ‘Reforming custody laws: a comparative study’ (2004) 18 *Int. J. Law, Policy & Family* 119.

<sup>70</sup> The views of these women’s groups are summarised in Susan Armstrong, ‘We told you so ...’ Women’s legal groups and the Family Law Reform Act 1995’, (2001) 15 *Austl. J. Fam. L.* 129. For similar arguments see also Regina Graycar, ‘Law reform by frozen chook: Family law reform for the new millennium?’ (2000) 24 *Melbourne University Law Review* 737.

presumption could be rebutted.

The Committee, consisting of both government and opposition members, delivered a unanimous report six months later.<sup>71</sup> Committee members favoured significant reform of the law in order to get away from what they saw as the standard pattern of contact for non-resident parents of every other weekend and half the school holidays. This, they dubbed the 80-20 rule, on the basis that it gave non-resident parents approximately 20% of the time with their children. In the end, the Committee concluded against a legislative presumption of equal time. However, it considered that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time”.<sup>72</sup>

The Committee also heard very clearly the concerns of women’s groups about the issue of domestic violence. It wrote:<sup>73</sup>

The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse.

This was the basis for several recommendations. The Committee proposed that in the statement of principles for the legislation, there should be a specific reference to a child’s right to preservation of their safety.<sup>74</sup> The Committee also recommended a winding back of the notion that parental responsibility should continue unaffected by separation, unless the court turned its mind to the issue and made orders reducing or removing a biological parent’s authority in relation to parenting. The effect of the Committee’s recommendations was that the Court needed to turn its mind to the issue of continuing parental responsibility in every case, and to decide whether or not to make an order for what it called “equal shared parental responsibility”. The term ‘equal shared parental responsibility’ was a linguistic formulation to emphasise the equality of the parents. The Committee recommended that there should be a presumption against shared parental responsibility in cases of entrenched conflict, family violence, substance abuse or child abuse.<sup>75</sup>

In the period between the time that the Parliamentary Committee reported at the end of 2003,

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<sup>71</sup> The Family and Community Affairs Committee of the House of Representatives, *Every Picture Tells a Story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Parliament of Australia, Dec 2003) (hereafter, *Every Picture*).

<sup>72</sup> *Ibid*, p.30.

<sup>73</sup> *Ibid* p.26.

<sup>74</sup> *Ibid*, p.28.

<sup>75</sup> *Ibid* p.41.

and the enactment of the legislation in 2006, the Government's position evolved further as it sought to satisfy the different interest groups. Nonetheless, in broad terms, the legislation as enacted in 2006 reflected the intentions and recommendations of the Committee.<sup>76</sup> The legislation passed through Parliament with the support of the opposition Labor Party, which, within 18 months, was to form government.

### **The changes made by the 2006 amendments in Australia**

The legislation amending the *Family Law Act 1975* was the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The Australian legislation is not prescriptive, but it does encourage consideration of a greater level of time-sharing between parents in appropriate cases than the traditional norm of contact every other weekend and during school holidays. It made a variety of changes – to the law concerning parental responsibility, and to the factors the court should consider in determining the best interests of the child. It also introduced a requirement that the court consider certain options for shared parenting time. About the same time, reforms to the child support scheme were announced, which had, as one objective, the reduction of strategic bargaining over shared parenting in order to gain some collateral financial advantage in terms of child support.<sup>77</sup> The two reforms were designed to work together.<sup>78</sup>

#### *Parental responsibility*

The Parliament did not enact a presumption *against* equal shared parental responsibility in

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<sup>76</sup> For another analysis of the genesis of the 2006 reforms, see Richard Chisholm, 'Making it Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Austl. J. Fam. L.* 143.

<sup>77</sup> The idea that child support issues drive many parents' negotiations about parenting time is a widely held perception among family lawyers. However, there is mounting empirical evidence that most parents either have no knowledge of how parenting arrangements affect financial gains and liabilities, or operate on the basis of misinformation. For a review of the literature see Bruce Smyth and Bryan Rodgers, 'Strategic Bargaining over Child support and Parenting Time: A Critical Review of the Literature' (2011) 25 *Austl. J. Fam. L.* 210. For recent Australian data, see Bruce Smyth, Bryan Rodgers, Vu Son, Liz Allen and Maria Vnuk, 'Separated Parents' Knowledge of how Changes in Parenting-time can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre-/post-reform Comparison' (2012) 26 *Austl. J. Fam. L.* 181.

<sup>78</sup> The reforms, implemented in 2008, sought to eliminate the 'cliff effects' of the previous law, in which a non-resident parent's child support liability reduced substantially at 30% of overnights and again at 40% of overnights. Under the new formula, there is a standard reduction in child support for parents who have 'regular care' of the child, which is defined as between 14% and 34% of overnights. Above this, the arrangement is described as 'shared care', but the formula is so designed that between 34% of nights and 50-50 care, the changes to child support liabilities change very gradually, reducing a little with each percentage increase in overnights with the minority care parent. The effect is that arguing over one night here or there will make little practical difference to the child support liability. See further, Patrick Parkinson, 'The Future of Child Support', (2007) 33 *University of Western Australia Law Review* 179.

cases of violence, abuse or entrenched conflict, as the Parliamentary Committee had recommended. It did nonetheless go most of the way to implementing the spirit of that recommendation. It did so by stating that the presumption in favour of equal shared parental responsibility is not applicable in cases where there is reason to believe there is a history of violence or child abuse: s.61DA. Parental responsibility is defined as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children”: s.61B. Shared parental responsibility involves a duty to consult on major long-term issues (s.65DAC), which are defined so as to include issues about education, religious upbringing, the child’s health, the child’s name and “changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent”. In practice, the position was not much different from the meaning and effect of parental responsibility under the 1995 legislation as interpreted by the subsequent case law.<sup>79</sup>

### *The twin pillars*

Central to the 2006 amendments are what have been called the ‘twin pillars’ of supporting the meaningful involvement of both parents, and protecting children from harm.<sup>80</sup>

One of the objectives of the 2006 amendments is to ensure that “children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child”: *Family Law Act 1975* s.60B. This is importantly balanced by another objective contained in s.60B and reflected in other aspects of the legislation: the need to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on one parent’s involvement with the child.

The way that the legislation is structured, there is certainly a strong emphasis on maintaining the involvement of both parents where it is safe to do so, reflecting these objectives. This does not translate at all into a presumption of shared parenting, and still less, equal time. The most that the legislation imposes by way of presumed outcome is the rebuttable presumption in favour of equal shared parental responsibility.

Under the legislation, the best interests of the child is of course the paramount consideration in determining parenting arrangements for children when the parents live apart: s.60CA. However, in making that determination about what is best for the child, the 2006 amendments introduced two primary considerations. The first is the “benefit to the child of having a

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<sup>79</sup> *B v. B* (1997) FLC ¶92-755.

<sup>80</sup> *Mazorski v Albright* (2007) 37 FamLR 518.

meaningful relationship with both of the child's parents.” The second is “the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.” This mirrored two of the objectives contained in s.60B of the Act. There are then a large number of other factors that are described as “additional” considerations.

One practical expression of the requirement to consider the benefit to the child of a meaningful relationship with both parents is that when deciding cases in which it is appropriate to make an order for equal shared parental responsibility, judges must consider making an order for equal time if this is in the best interests of the child and reasonably practicable: s.65DAA. If that is not appropriate, it must go on to consider the option of “substantial and significant” time. That is time which is not only at weekends and in school holidays but also during the school week, giving the parent an opportunity to be involved in the child’s daily routine and occasions and events that are of particular significance to the child or the parent.

Thus while an order for equal shared parental responsibility says nothing, per se, about how time is allocated between parents, what follows from it is a duty imposed on judges to at least *consider* whether some kind of shared care arrangement might be appropriate in the circumstances of the case. This, together with misunderstandings of the new law in the media, may well have contributed to an impression among some members of the Australian public that because judges must *consider* equal time, there is accordingly a default presumption of equal time, or at least that fathers have a very high prospect of success in the courts if that is what they seek. That is not an impression which is justified by the legislation, but it has undoubtedly led to some public confusion,<sup>81</sup> and to some shared care arrangements that are not at all satisfactory for children.<sup>82</sup>

Although the *Family Law Amendment (Shared Parental Responsibility) Act 2006* was not a triumph of legislative drafting,<sup>83</sup> its general intent was clear enough. It was summarised by the Full Court of the Family Court of Australia as follows:<sup>84</sup>

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<sup>81</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*. Canberra: Commonwealth of Australia, 2009; Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu et al, *Evaluation of the 2006 Family Law Reforms* 304-05 (2009) (hereafter, Kaspiew et al).

<sup>82</sup> Fehlberg et al, above n.5.

<sup>83</sup> Lawyers and judges found the legislation both complex and cumbersome, making it harder to give advice and write judgments: Kaspiew et al, pp. 361-66.

<sup>84</sup> *Goode & Goode* (2006) FLC 93-286 at [72].

In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.

The Australian Parliament enacted some amendments to the legislation in 2011 to address concerns in particular about domestic violence, and to delete relatively unimportant provisions that had caused anxiety.<sup>85</sup> Now, in the evaluation of what arrangements are in the best interests of the child, greater weight is to be given to the need to protect children from harm than to the benefit to the child of a meaningful relationship with both parents.

However, these amendments do not alter the emphasis in the legislation on encouraging the involvement of both parents in children's lives following separation where the child will benefit from a meaningful relationship with both of them and in the absence of safety concerns. The 2006 amendments to the law remain substantially unaltered.

#### *Obligations of lawyers, mediators and counsellors*

There was another aspect of the 2006 legislation that deserves mention, for it was a unique element of those amendments. It imposed obligations on lawyers, mediators and counsellors to discuss certain options for parenting arrangements with their clients. The typical way in which legislation is drafted in other common law jurisdictions is that the legislature instructs judges on how they should determine the issues for that very small group of parents who are unable to settle their disputes by agreement or compromise, with others being guided by lawyers' perceptions of how a judge *might* decide the case on which the parent seeks advice. The Parliamentary Committee in 2003 saw legislation as a means of reaching a wider group than lawyers and judges. It saw legislation also as a means of reaching those parents who at some level may be influenced by the law in resolving their disputes, but who do not go to trial. It sought to do so in a more direct way than simply relying on normative messages to emanate from the judges in those cases that go to trial. The Committee wrote:<sup>86</sup>

Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is accessible to the general public and well understood by those who offer assistance under it.

The 2006 legislation gave effect to this recommendation by requiring lawyers, mediators and

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<sup>85</sup> *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*; Patrick Parkinson, "The 2011 Family Violence Amendments: What Difference Will They Make?" (2012) 22 *Australian Family Lawyer* 1.

<sup>86</sup> *Every Picture*, p.39.

counsellors to advise their clients that they should consider the options of equal time, and substantial and significant time: s.63DA. Parliament thus sought to reach the majority of families through their professional advisers and through mediators with the intention that the content of discussions in mediation would be informed by the types of parenting arrangement being promoted in the statute.

#### *A revolution in the service system*

The Australian Government did not only change the law in 2006. It also brought in a comprehensive package of reforms to the entire family law system, involving new services and processes. Parents were mandated to attempt ‘family dispute resolution’ – that is, mediation - before being permitted to file an application for parenting orders in court, unless exempted because of issues of violence or abuse, or because otherwise the case is deemed not suitable for mediation: s.60I.

Mandatory mediation before filing was supported by the creation of Family Relationship Centres (FRCs). The FRCs are community-based services funded by the Australian Government, which seek to provide support to parents going through family difficulties, in particular, those who have either separated from the other parent or who are contemplating separation. FRCs provide information, advice, referral and mediation. There are 65 centres all over the country, with one servicing approximately every 300,000 of the population. They operate both in major cities and regional areas.<sup>87</sup>

The FRCs emerged as a strategy for reform of the family law system as the result of debates about other recommendations made by the Parliamentary Committee in 2003.<sup>88</sup> The first fifteen centres were established in July 2006. Another 25 were opened in July 2007. The remainder opened in 2008.

The FRCs operate in accordance with guidelines set by the Government.<sup>89</sup> However, they are

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<sup>87</sup> See generally, Patrick Parkinson, “The Idea of Family Relationship Centres in Australia”, (2013) 51 *Family Court Review* 214. For an evaluation of the FRCs see Lawrie Moloney, Lixia Qu, Ruth Weston and Kelly Hand, ‘Evaluating the work of Australia’s Family Relationship Centres: Evidence from the first 5 years’ (2013) 51 *Family Court Review* 234. On relationship to legal services, see Lawrie Moloney, Rae Kaspiew, John De Maio and Julie Deblaquiere, ‘Family Relationship Centres: partnerships with Legal Assistance Services’ (2013) 51 *Family Court Review* 250.

<sup>88</sup> Patrick Parkinson, ‘Keeping in Contact: The Role of Family Relationship Centres in Australia’, (2006) 18 *Child & Fam. L. Q.* 157.

<sup>89</sup> Commonwealth of Australia, *Operational Framework for Family Relationship Centres*, Revised version, June 2011.

run by non-government organisations with experience in counselling and mediation, selected on a tender basis, and with professional staff. Although run by different service providers in different localities, the FRCs have a common identity and logo for the public.

While FRCs have many roles, including support for parents in intact families, a key purpose is as an early intervention initiative to help parents work out post-separation parenting arrangements and manage the transition from parenting together to parenting apart. They were designed to act both as an initial response service and as the triage unit for family breakdown. FRCs seek to help parents who are separating or have separated to access the different services they may need to assist them during this difficult period; they provide educational programs for parents on keeping the children in focus after separation, and they offer free or at least heavily subsidized mediation.

The FRCs are there to help resolve disputes not only in the aftermath of separation, but also in relation to ongoing conflicts and difficulties as circumstances change. The FRCs are thus about organising post-separation parenting, but they are much more than this. They are also intended to be the gateway to services which will help people cope with the emotional sequelae of relationship breakdown and to address issues such as domestic violence. Mainly this is by referral to appropriate services that may assist them. This might include relationship counselling, or services to address more specific problems such as gambling, alcohol addiction, financial problems, or anger management.

Central to the concept of the FRC network is that the centres should be highly visible and accessible. The organisations which were chosen to establish each Centre were required to find a location that is central for the community being served, being in the places that people go to for their shopping and other business needs.

The Family Justice Centres in British Columbia, which are free, community-based mediation centres,<sup>90</sup> and the Justice Access Centres in Nanaimo and Vancouver, provide the closest analogies to the FRCs internationally, but in design the FRCs are more holistic. The FRCs are about much more than mediation, although that is a primary focus of their work.

One of the aims of the FRCs is to achieve a long-term cultural change in the pathways people take to resolve disputes about parenting arrangements after separation. The concept behind the FRCs is that when parents are having difficulty agreeing on post-separation parenting arrangements, they have a relationship problem, not necessarily a legal one. If no other solution can be found, the dispute may need to go to an adjudication by someone who can make a

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<sup>90</sup> See further the Ministry of Justice website, at <http://www.ag.gov.bc.ca/family-justice/help/counsellors/index.htm>



binding decision; but it should not be seen as a legal issue from the beginning.<sup>91</sup>

As a result of these significant changes in the service system, family dispute resolution is community-centric rather than court-centric. It is independent of the family justice system, although connected in a cohesive way with that system, and has a prominent place in the suite of services available to support families.

#### **PART IV: RESEARCH EVIDENCE ON THE AUSTRALIAN REFORMS**

The most valuable data on the 2006 reforms came from the comprehensive evaluation of the Australian Institute of Family Studies (AIFS). A further study examined the experience of parents a year on, providing further insights into the way in which parents adjusted over time, and how parenting arrangements changed even in a 12 month period.<sup>92</sup>

Other research was also commissioned, for example a study on shared care.<sup>93</sup> Reports were also published in relation to issues concerning the law of parenting after separation, although these relied on submissions that recorded people's perceptions of problems rather than research that could provide objective evidence about those problems.<sup>94</sup>

The AIFS report produced a vast amount of information and it is of course possible for that research to be read in different ways depending on what aspects are emphasised.<sup>95</sup> Indeed, different emphases and perspectives are represented in the research findings themselves, with family relationship professionals generally having a more positive view of the 2006 reforms than family lawyers. The tendency, particularly in Britain, has been for negative readings of that

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<sup>91</sup> A parenting dispute is of course one in which the parents' perceptions of legal norms may have some influence on their positions and expectations from the beginning. This does not mean that the problem requires a legal solution.

<sup>92</sup> Lixia Qu & Ruth Weston, *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies, 2010.

<sup>93</sup> Cashmore et al, above n. 11.

<sup>94</sup> Australian Law Reform Commission & New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, (2010); Hon Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department, Canberra, 2009); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, Canberra: Commonwealth of Australia, 2009.

<sup>95</sup> For a largely negative reading based on a few findings from the research, see John Dewar, 'Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia' (2010) 24 *Austl. J. Fam. L.* 139.

research evidence to be dominant.<sup>96</sup> The Norgrove Committee, which recommended major changes to the family law system in England and Wales, was strongly influenced by such negative readings, but also made some factual errors of its own.<sup>97</sup> It is important therefore that other readings and interpretations of the evidence be heard.

A starting point is with the ‘consumers’ of the system, separated parents. From their perspective, the reforms were generally positive. Most parents overall reported that they were satisfied with the parenting arrangements. Most indicated that they communicated with each other on issues concerning their child once a week or more often, although that level of communication had diminished somewhat by the second wave of interviews a year later.<sup>98</sup> The report on the wave 2 interviews with parents indicated that most parents considered that their arrangements were flexible and worked well for each parent and the child.<sup>99</sup>

There were many other positive findings from the evaluation, but it also identified certain difficulties and challenges.

### **Reduced filings in court and increased use of mediation**

There was particularly strong evidence of the benefits of requiring most parents to attempt mediation, combined with the availability of free mediation in the Family Relationship Centres, which opened in stages between 2006 and 2008. The total number of applications for final orders in children’s matters (including cases where there were also property issues) fell from 18,752 in 2005–06 to about 12,815 in 2010-2011,<sup>100</sup> a fall of 32% over the five years following 2006.

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<sup>96</sup> House of Commons Justice Committee, *Operation of the Family Courts* (HC 518-1, June 2011); Norgrove Report, above n.1; Helen Rhoades, ‘Legislating to promote children’s welfare and the quest for certainty’ (2012) 24 *Child & Fam. L. Q.* 158.

<sup>97</sup> See further, Patrick Parkinson, ‘Meaningful reform to the Children Act 1989: Learning from the Australian experience’ Sydney Law School Research Paper No. 12/41: <http://ssrn.com/abstract=2083974>.

<sup>98</sup> Qu & Weston, above n. 92, p. 156.

<sup>99</sup> Ibid, p. 159.

<sup>100</sup> Figures calculated from Federal Magistrates Court of Australia Annual Report 2010 – 2011, pp.28-29; Family Court of Australia, Annual Report 2010 – 2011 p.49. The Federal Magistrates Court report gives a total number of applications for final orders and then the percentages of these that are attributable to children’s matters and children and property matters respectively. The figures for this court are therefore worked out as a percentage of all applications for final orders and subject therefore to rounding. The Family Court’s annual report provides the precise numbers. In 2011-12, the total number of applications for final orders in children’s cases was about 12,898, a very slight increase on 2010-2011 figures, suggesting that the decline in applications has now bottomed out.

One of the concerns which has been expressed in England about giving any legislative support to the inclusion of both parents in children's lives after separation is that it will increase litigation. Within the government, it was expected that with the major changes to the law in 2006, there would at least be a temporary surge. However, mandatory mediation before filing was not introduced until July 2007. In the first year after the reforms were introduced, filings were actually lower than in 2004-05.<sup>101</sup> In this period, only 15 Family Relationship Centres were operative, and were receiving clients on a voluntary basis.

In the three years following the introduction of the reforms to the family law system in 2006, the use of counselling and mediation services by parents during and after separation increased from 67% to 73%, while recourse to lawyers diminished to a corresponding degree.<sup>102</sup> Client satisfaction with relationship services was high.

While the AIFS report indicated that the family dispute resolution initiatives were working well, there were issues about whether there was sufficient awareness of the grounds for exemption by those referring to these services. There were also concerns about whether cases involving an incapacity to mediate were being screened out of mediation sufficiently.<sup>103</sup>

### **Levels of shared care**

One of the objectives of the Parliamentary Committee was to encourage greater levels of shared care by requiring at least *consideration* of arrangements that provide for time with the non-resident parent other than just at weekends and in the school holidays. To what extent did that occur and was this impact more positive than negative in terms of children's wellbeing? In this regard, the evidence requires very careful evaluation.

### *The role of law in affecting social change*

Confident assertions about what the outcomes of legislative reform have been ought to be treated with great caution. The vast majority of parenting arrangements are resolved without adjudication by a judge. The AIFS research indicated that less than 3% of parents who had sorted out their parenting arrangements nominated courts as the main pathway for doing so.<sup>104</sup>

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<sup>101</sup> Kaspiew et al (p.306) report indicates that nationally, from July 2004-June 2005, there were 19,188 applications filed involving children's matters. In 2006-07, the year after introduction of the amended legislation on July 1 2006, there were 18,880 applications.

<sup>102</sup> Kaspiew et al, p. 50.

<sup>103</sup> Lawrie Moloney et al, "Mandatory dispute resolution and the 2006 family law reforms: Use, outcomes, links to other pathways, and the impact of family violence", (2010) 16 *J. Family Studies*, 192.

<sup>104</sup> Kaspiew et al, p. 66.

One cannot know, in most cases, what motivated parents to agree between themselves on the arrangements that they did. They may indeed have had quite different motivations for settling.

The law may influence outcomes at a number of different levels. It may influence how judges decide, how people settle on the basis of what they think or fear judges might decide, or arguably, by stimulating an erroneous ‘folk law’ of what people believe the law to be, which at some level affects people’s decisions about parenting arrangements.

#### *Judicial decision-making and shared care after 2006*

In terms of judicial decision-making, the clearest influence of legislative reform in a negative sense would be if judges, on a regular basis, indicated that prior to 2006, they would have done *x*, while after 2006, they have decided *y*, compelled to that result even though they do not think it is in the best interests of the child. There is absolutely no evidence that this has happened, and it is unlikely it would be the case, for Australian judges continue to have a very broad discretion, and remain guided by the lodestar of what is in the best interests of the child as the paramount consideration.

The legislative encouragement to consider shared care may nonetheless have affected judicial perceptions of what is in the best interests of the child. That is, judges, influenced by the legislative considerations, and required to give reasons for their decisions that address those considerations, may reach a different conclusion to the one they might have been inclined towards prior to 2006. One reason for such a change in judicial attitudes may have come about from encouragement to think in a less binary way about the options for parenting arrangements after separation.

In the Australian legislation, there is now a range of options for court orders in modern parenting disputes. No longer are judges asked to make a stark and binary choice between “custody” for the mother and “custody” for the father, with “access” being given to the losing parent. Now there is a spectrum of choice, with options at either end of that spectrum reflecting the old sole custody norms. In any given case, various options could reasonably be said to be in the best interests of a child, and judges might reach different outcomes by reference to that test on the same evidence about the circumstances of the children and family. It may well be that the 2006 legislation opened up for judges a wider range of possibilities for parenting orders than they might have been inclined to consider prior to its enactment, particularly as a consequence of the requirement to consider ‘substantial and significant time’ – an arrangement which involves the non-resident parent spending time with the child at periods other than at weekends and school holidays. There is certainly evidence, from statements of the judges themselves, that the legislation has had an effect on outcomes by changing the process of their decision-

making.<sup>105</sup>

There is also some evidence from the AIFS study that there has been a very substantial increase in shared care orders in contested cases since 2006. Indeed, the figure has been widely reported that just over a third (33.9%) of all judicially determined cases involved orders for shared care of at least 35% of nights per year for each parent.<sup>106</sup> This represented a very substantial increase compared to cases decided prior to 2006.<sup>107</sup>

Much has been made of this one-third figure as an indication that judges are often making inappropriate decisions.<sup>108</sup> The figure, however, requires more careful examination. The statistics from the AIFS evaluation on judicially determined cases after 2006 show that 12.6% of all orders in children's cases gave each parent at least 35% of nights per year.<sup>109</sup> In the majority of these cases, so the researchers reported, the level of contact was not defined.<sup>110</sup> It was either specified to be as agreed between the parents or not dealt with at all (presumably because the case involved other issues).<sup>111</sup> Only 98 cases out of 253 met the research team's criteria for analysis. The figure of one third of cases involving shared care refers only to this group of 98 cases out of the 253 files examined, that is, about 32 cases in total.<sup>112</sup>

Other, more recent data on judicially determined cases in the Family Court of Australia do not show the same increase in substantially equal time arrangements (45-55% of nights for each parent). Smyth et al (in press) found that in the five years following the introduction of the legislation, rates of substantially equal time were never higher than 10% of cases in which parenting arrangements were determined by the judge. In the period that parallels the AIFS data collection, (2007-09) only 6-7% of such cases involved orders for substantially equal time. The data sets are different (the AIFS study included data from the Federal Magistrates Court and used a broader definition of shared care), but suggest the possibility at least that the AIFS findings represent a statistical anomaly as a consequence of the relatively small number of cases

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<sup>105</sup> *Bryans and Franks-Bryans* [2007] FamCA 377 at para 70; *Eddington and Eddington* [2007] FamCA 1299 at para 52; *M and S* (2007) FLC 93-313 at 81,385.

<sup>106</sup> Kaspiew et al, pp. 125, 133.

<sup>107</sup> *Ibid*, p.133.

<sup>108</sup> See e.g. Fehlberg et al, above n.5 at 328.

<sup>109</sup> Kaspiew et al, pp. 125, 133.

<sup>110</sup> Kaspiew et al, p. 125,

<sup>111</sup> This seems very surprising, but it is not possible independently to reassess data that was obtained from a reading of court files.

<sup>112</sup> Kaspiew et al, p. 125, Table 6.4.

examined.<sup>113</sup>

What is happening then in this small number of cases where judges order shared care arrangements? Prior to 2006, essentially there were just two choices: a residence order in favour of the mother or a residence order in favour of the father. Joint residence orders were very unusual indeed.<sup>114</sup> After 2006, there were three choices: primary care to the mother, primary care to the father, or shared care. It appears that given the requirement actively to consider that third option, judges who hitherto would have opted for either maternal or paternal care, are now more inclined to the view that shared care is in the best interests of the child, based on all the evidence available. There is no evidence that any of the 32 or so decisions that the AIFS evaluation identified as involving judicially determined shared care arrangements were inappropriate decisions about the best interests of the children in those cases. In none of these cases where shared care was ordered, was the judge compelled to that conclusion or directed to it by the legislation. Judges have a broad discretion still to determine what is in the best interests of the child since it is the paramount consideration.

Nor is there any evidence in the AIFS study that in any of these cases where shared care was ordered, there had been a history of violence or any concerns expressed by either parent about his or her safety or the safety of the children in the other parent's care.<sup>115</sup>

It is true, of course, that the families which end up needing a judicial decision about parenting arrangements are often those where there are issues of violence, abuse, addictions, mental illness and other issues concerning parenting capacity. They are also more likely to have high levels of conflict.<sup>116</sup>

Even in this group though, it needs to be considered whether shared care is the best option where there are serious issues about the mother's parenting capacity and about the safety of the children in her care, but where removal entirely from the mother would not be in the best interests of the children. An order for shared care may be a way of moderating the risk to the

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<sup>113</sup> Bruce Smyth et al, "Legislating for shared-time parenting: Insights from Australia?" (2014) 77 *Journal of Law and Contemporary Problems*.

<sup>114</sup> For example in 2000-01 only 2.5% of residence orders in the Family Court were for joint residence: *Every Picture Tells a Story* p.22.

<sup>115</sup> The Family Justice Review in England and Wales somehow gained the idea that in approximately a quarter of judicially determined cases involving orders for shared care, "these arrangements involved children with a family history entailing violence and a parent concerned about the child's safety" (Family Justice Review, Final Report, 2011, p. 140, fn 111). However, the belief has no foundation: Parkinson, above n.97.

<sup>116</sup> Ruth Weston, Lixia Qu, Matthew Gray, John De Maio, Rae Kaspiew, Lawrie Moloney, & Kelly Hand, 'Shared Care Time: An Increasingly Common Arrangement?' (2011) *Family Matters*, no 88, 51.

children and providing them with some stability, while still giving the mother a prominent role in her children's lives. It may, therefore be wrong to jump to the conclusion that shared care is a risk to children where there are safety concerns. It might be the best option in a bad situation, and preferable to a transfer of primary care to the father.

#### *Shared care in the general population of separated parents*

Judicially determined cases are just a drop in the ocean of all parenting arrangements reached in any given year between parents who do not live together. What is happening in the general population?

The AIFS evaluation, based on interviews conducted in 2008, found that overall, amongst people who had separated since 2006, 16% had a shared care arrangement of 35% of nights or more. Seven percent had an equal time arrangement.<sup>117</sup> On these statistics, among the parents who had separated since 2006, 93% did not adopt an equal time arrangement and 84% did not adopt an arrangement within the wider Australian definition of 'shared care'. While there may well have been an increase in substantially shared care among newly separated parents, the trend had nonetheless been seen for many years before this, albeit from a low base.<sup>118</sup> The jury remains out on whether there has been an acceleration of the pre-existing trend towards shared care as a consequence of the 2006 reforms. Some data suggests otherwise.<sup>119</sup> New evidence indicates that after a jump in shared care arrangements among newly separated parents between 2006 and 2009, the rates have settled back to around the levels seen in 2006. That is, the effect of the changes to the law (and to child support in 2008) seem to have produced only a temporary spike in shared care levels in the general community.<sup>120</sup>

Other research indicates that shared care arrangements are the least likely parenting arrangement to have resulted from litigation, according to mothers' reports.<sup>121</sup>

There is simply not either an abundance or an epidemic of shared care in Australia (depending on one's point of view). Where shared care arrangements are made, mostly the

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<sup>117</sup> Kaspiew et al, p.119.

<sup>118</sup> Cashmore et al, above n.11; Weston et al, above n.116.

<sup>119</sup> One set of data, there has been a steady increase in shared care arrangements since the 1990s, but the rate of acceleration in growth in shared care did not change after the 2006 reforms: Kaspiew et al, 2009, pp.131, 134; Weston et al, above n.116. What cannot be known is whether the rate of increase would have slowed but for the 2006 reforms.

<sup>120</sup> Smyth et al, above n. 113.

<sup>121</sup> Cashmore et al, above n.11, pp. 63-64.

parents have not been involved in litigation. Across the population of separated parents, including those who separated many years ago, the preponderance of the evidence is that levels of shared care in Australia are relatively low. In 2006-07, nearly 8% of children who had a parent living elsewhere had a shared care arrangement of 35% of nights or more with each parent. 4% were in an equal time arrangement.<sup>122</sup> Other data indicates that 11% had a shared care arrangement involving 30% of nights or more each in 2009-10 and this percentage has remained stable in the subsequent two years.<sup>123</sup> The figures for many European and North American jurisdictions are much higher.<sup>124</sup>

Nonetheless, it is reasonable to suggest, from all the available evidence in Australia, that the legislation contributed to an increased awareness and acceptance of shared care arrangements as a viable and 'normal' option for parenting after separation. There is evidence also from the AIFS research that the requirement to consider arrangements for 'substantial and significant' time, that is, time that is not just at the weekends and in school holidays, is playing a valuable role in shifting community attitudes.<sup>125</sup> The legislation has encouraged consideration of how non-resident parents who live close to the other parent could be involved in looking after their children during the school week, for example, taking children to after-school activities or having care on non-weekend days which fit well with the parents' different work schedules.

The AIFS research found that the majority of parents who had a shared care-time arrangement thought that it was working well for both the parents and the child, although mothers who had concerns about the safety of the children in the other parent's care were more likely to be negative about shared care arrangements.

### **Concerns about violence and abuse**

Despite the bipartisan approach adopted in the Parliament, the legislation did not pass without strong opposition from women's groups, and criticisms from academics and legal professionals. Central to those concerns was that the legislation, taken as a whole, placed too much emphasis on encouraging the involvement of non-resident parents, and too little on protecting women from the risk of violence and abuse.<sup>126</sup> The problem of domestic violence has thus taken centre

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<sup>122</sup> Cashmore et al, above n. 11, p. 18.

<sup>123</sup> Smyth et al above n.113.

<sup>124</sup> Parkinson, above n.17, pp. 91-97.

<sup>125</sup> Kaspiew et al, p.365.

<sup>126</sup> There were various concerns expressed about the likely effects of the legislation. One of them, for example, was that women in particular may feel pressured into accepting an inappropriate parenting arrangement when they have significant safety concerns for themselves or their children because they feel the system is weighted in



stage in campaigns against changes to the law which promote joint custody, shared parenting and greater contact between non-resident parents and children. Typically, in the criticisms of a pro-contact culture which exposes women and children to a risk of violence, there is no differentiation between patterns of intimate partner violence, and only violence against women is addressed as an issue. This reflects international trends<sup>127</sup> and certainly has its parallels in Canada.

### *The spectrum of violence*

One of the problems in developing evidence-based policy in this area is that a great diversity of circumstances is included within the one definition of a ‘history of family violence’. Violence is a pervasive and common problem in intimate relationships. Family violence and abuse is one reason why parents separate, so it is unsurprising to find that many separated parents report such a history. The Australian Institute of Family Studies in its evaluation of the 2006 reforms, found that 26% of mothers and 17% of fathers reported being physically hurt by their partners. A further 39% of mothers and 36% of fathers reported emotional abuse defined in terms of humiliation, belittling insults, property damage and threats of harm during the course of the relationship.<sup>128</sup>

The social science evidence has now established clearly that there are different patterns of family violence and much violence occurs in the context of people losing control in the course of domestic arguments.<sup>129</sup> The AIFS study found that a history of family violence does not

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favour of involvement by the non-resident parent. See e.g. Zoe Rathus, ‘Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future Under the New Family Law System?’, (2007) 21 *Austl. J. Fam. L.* 87. Another was that a clause in the legislation that required the court to give consideration to “the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent” would deter women from making allegations of family violence: Tracey de Simone, ‘The Friendly Parent Provisions in Australian Family Law – How Friendly Will You Need to Be?’, (2008) 22 *Austl. J. Fam. L.* 56. See also Armstrong, above n.59; Regina Graycar, ‘Family law reform in Australia, or frozen chooks revisited again?’ (2012) 13 *Theoretical Inquiries in Law* 241.

<sup>127</sup> For a review of the debates in four countries, see Peter Jaffe & Claire Crooks, ‘Partner Violence and Child Custody Cases: A Cross-National Comparison of Legal Reforms and Issues’, (2004) 10 *Violence Against Women* 917. See also Michael Flood, “‘Fathers’ Rights” and the Defense of Paternal Authority in Australia’, (2010) 16 *Violence Against Women* 328.

<sup>128</sup> Kaspiew et al, p. 26.

<sup>129</sup> Janet Johnston & Linda Campbell, ‘A Clinical Typology of Interparental Violence in Disputed-custody Divorces’, (1993) 63 *American Journal of Orthopsychiatry* 190; Nancy Ver Steegh, ‘Differentiating Types of Domestic Violence: Implications for Child Custody’, (2005) 65 *Louisiana Law Review* 1379; Stacey Williams & Irene Frieze, ‘Patterns of Violent Relationships, Psychological Distress, and Marital Satisfaction in a National Sample of Men and Women’, (2005) 52 *Sex Roles* 771; Joan Kelly and Michael Johnson, “Differentiation

necessarily impede friendly or cooperative relationships between the parents following separation. In a survey of some 10,000 parents, 16% of mothers who reported being physically hurt by their ex-partner during the course of the relationship reported friendly relationships at the time of the interview, and a further 23.5% reported having a cooperative relationship. While others reported distant or conflictual relationships, only 18.5% reported a continuing fearful relationship. Fifty-five per cent of mothers and 50% of fathers who reported emotional abuse by their ex-partner during the course of the relationship reported friendly or co-operative relationships by the time of interview.<sup>130</sup>

It follows that a history of violence or emotional abuse does not mean, per se, that parents cannot develop co-operative relationships after separation without ongoing safety concerns.

#### *System capacity for addressing violence and safety issues*

The AIFS report indicated that while the family law system has some way to go in being able to respond effectively to issues of violence, abuse, mental health problems and addiction, there was also evidence that the 2006 changes had improved the identification of families where there were issues about family violence and child abuse.

Furthermore, a majority of respondents in all professional categories thought that “the need to protect children and other family members from harm from family violence and abuse is given adequate priority” in the family law system. However, a substantial minority in each professional category felt otherwise.<sup>131</sup>

Many reasons might be advanced for the difficulty in dealing adequately with issues of abuse and violence – the inherent limitations involved in seeking to restrain violent behaviour in families by means of court orders, the cost and difficulty of litigation, the restrictions on availability of legal aid, the need to prove the violence or abuse in the face of denial, the frequent absence of corroborative evidence, the division of responsibility in Australia between state and federal systems, the attitude of judges, or the legislation.

Of all these possible causes, undoubtedly the loudest voices were those saying the legislation was responsible, and that yet more changes to the legislation are the answer. In the aftermath of the 2006 reforms, advocacy groups argued that the reforms had led to an increased risk of

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Among Types of Intimate Partner Violence: Research Update and Implication for Interventions” (2008) 46 *Fam. Ct. Rev.* 476; Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (2008).

<sup>130</sup> Kaspiew et al, pp. 31-32.

<sup>131</sup> Kaspiew et al, p.236.

exposure of women and children to violence and abuse.<sup>132</sup> The government was urged to make further legislative amendments. To what extent can these concerns be substantiated?

There is no reliable research evidence to indicate that the 2006 amendments have had the effect of putting any woman, man or child at greater risk of violence or abuse as a consequence of provisions in the legislation than they would have been had the 2006 amendments not been passed. The most comprehensive study, by the AIFS evaluation, certainly produced no data to this effect. Nor is there any evidence of systemic failure by the courts to take proper account of issues of domestic violence when the evidence is presented to them, although no doubt there are individual cases where people might legitimately take different views of the strength of the evidence or have reached different conclusions from the trial judge. Even one of the fiercest critics of the 2006 legislation, who predicted that it would make it harder to protect children from violence and abuse, conceded in a 2009 article that in such cases, “courts appear to be making careful, sensitive, and for the most part, protective and appropriate orders.”<sup>133</sup>

This is not surprising. The 2006 legislation did much to address the issue of family violence, building upon substantial legislative action in 1995. The 2006 amendments made it clear that the presumption of equal shared parental responsibility does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in abuse of the child or family violence (s. 61DA(2)). The legislation also states (s. 60CG):

In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order...does not expose a person to an unacceptable risk of family violence.

That is, the Court must consider specifically how to protect mothers (and other family members) from violence when making arrangements about the children.

#### *Shared care in cases where there are safety concerns*

One of the major issues arising out of the AIFS evaluation is that families in which a parent had safety concerns were no less likely than other parents to indicate that they had shared care-

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<sup>132</sup> Submissions to this effect were made to a review by a former Family Court judge and are summarised in his report: Chisholm, above n.94.

<sup>133</sup> Renata Alexander, ‘Behind Closed Doors: Family Violence Cases under the Family Law Act Outlined and Analysed’ (2009) 20 *Austl. Fam. Lawyer* 1 at 12. See also Renata Alexander, ‘Moving Forwards or Back to the Future? An Analysis of Case Law on Family Violence under the Family Law Act 1975 (Cth)’, (2010) 33 *UNSW L. J.* 907.

time arrangements,<sup>134</sup> although there was a slight diminution in these safety concerns over time.<sup>135</sup> These statistics do not relate to judicial decisions or court orders. They come from a general population survey of 10,000 people who had separated after 2006. To what extent might this be attributed to the effects of the legislation?

The AIFS study provides some detail about these shared care arrangements made in the context of a parent's safety concerns. One of the surprising findings from the AIFS research was that many more fathers than mothers in shared care arrangements held concerns about their children's safety. Around one in four fathers and one in ten mothers with shared care-time arrangements indicated that they held safety concerns for themselves or the children as a result of ongoing contact with the other parent.<sup>136</sup> Not all these concerns related to family violence or child abuse perpetrated by the other parent. The safety concerns could also be about harm inflicted or that might be inflicted by someone apart from the other parent, such as a new partner or a relative, or because the parent engages in activities with the children that the other parent does not consider to be safe for them.<sup>137</sup> Nonetheless, 44% of fathers with safety concerns, and 42% of mothers with such concerns indicated that they had been physically hurt by their partner. Most of the remainder reported some emotional abuse.<sup>138</sup>

How did these shared care arrangements come into being, and what might be assumed about the effects of the legislation in this respect? Of all the mothers and fathers who had safety concerns, between 41% and 42% had resolved the parenting arrangements mainly by discussion with the other parent.<sup>139</sup> Others had used counselling, mediation or family dispute resolution services. Lawyers were seen as the main means of sorting out arrangements by 15–18% of fathers and mothers. Courts were the main pathway to resolution of the dispute for only 15% of fathers and 8% of mothers.<sup>140</sup>

As was noted above, the AIFS evaluation found that overall, amongst people who had separated since 2006, 16% had a shared care arrangement of 35% of nights or more and 7% had an equal time arrangement.<sup>141</sup> If, as the AIFS found, those with safety concerns had shared care

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<sup>134</sup> Kaspiew et al., at 233.

<sup>135</sup> Qu & Weston, above n.92, p.101.

<sup>136</sup> Kaspiew et al., at 233.

<sup>137</sup> Kaspiew et al, p.166.

<sup>138</sup> Kaspiew et al, p.32.

<sup>139</sup> Kaspiew et al, p.232.

<sup>140</sup> Ibid.

<sup>141</sup> Kaspiew et al, p.119.

arrangements at about the same rate as those who did not have safety concerns,<sup>142</sup> then extrapolating from the AIFS data, it would seem that the numbers of fathers and mothers with safety concerns who had shared care arrangements resulting from court involvement was vanishingly small.

Indeed it is inherently unlikely that courts would make orders for shared care where there are significant safety concerns. The Australian family law judiciary is largely a specialist bench. The great majority of judges who hear children's cases were appointed to the Family Court or to the Federal Circuit Court after years of legal practice in family law. Many of them have backgrounds in legal aid work or as lawyers for children. There is much in the legislation that directs them to take account of a history of family violence and to give great weight to the protection of children from harm. The law does not require the judges even to consider a shared care arrangement unless they intend to make an order for equal shared parental responsibility. The presumption of equal shared parental responsibility does not apply when there is reason to believe there has been any history of violence or abuse.

It is nonetheless a problem that many shared care arrangements in the community involved situations where one or both parents had concerns about the safety of their children in the other parent's care, even if almost none of these seem to have been ordered by courts following a trial. It is also a problem if the parents are in entrenched conflict whether or not there are current safety concerns.<sup>143</sup> Shared care represents a compromise between competing claims for primary care, and so it is unsurprising that many of these problematic arrangements are made between parents in conflict, often through mediated agreements which are not child-focused.

### **Lessons from Australia: The Payoffs and Pitfalls**

If reform is contemplated, what lessons then can be learned from the Australian experience, and what are the pitfalls to avoid?

#### *1. The importance of alignment with community values*

It is important that, as far as possible, the law of the land commands confidence and general acceptance. The disaffected and disgruntled may be repeatedly assured that the law is fine as it is, but they can only be told for so long to 'eat cake'. Even if legislation is only amended to state principles and values that align with the case law, that may in itself improve public confidence in the family justice system.

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<sup>142</sup> Kaspiew et al, p.233.

<sup>143</sup> Jennifer McIntosh & Richard Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation', (2008) 14 *J. Family Studies* 37.

One of the beneficial aspects of the Australian legislation is that the emphasis which is given to the involvement of both parents in children's lives even after relationship breakdown is strongly in accord with community values. The AIFS evaluation reported:<sup>144</sup>

"The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals."

In Canada, it may be that both provincial and federal legislatures need to consider afresh what messages the law sends concerning the importance of both parents in children's lives after parental separation, and whether the law should be made clearer in affirming that while the parent-parent relationship may be dissoluble, they remain tied together by the indissolubility of parenthood. That message is not enhanced in Canada by continuing usage of the language of custody and access, since that language remains associated with making a binary choice between the parents after separation, notwithstanding the option of 'joint custody'.

## 2. *Legislation as community education*

Another important concept that emerges from the Australian law reform experience, is the value of legislation speaking beyond the judges to the community at large, and providing norms to help parents and their advisers settle disputes, rather than just listing factors for judges to consider in the small number of cases which require a judicial resolution. That is the way of the future, even if the Family Law Act in Australia is not a good example of coherent messaging due to the complexity of its provisions.

Former family Court judge, Richard Chisholm has posited that the population of parents who separate can be divided into three groups when it comes to thinking about how legislation concerning post-separation parenting should be written.<sup>145</sup> There are those who litigate, those who sort out their parenting issues without reference to the law at all, and a group in the middle, who at some level or another, engage with the family law system in resolving their disputes, at least through lawyers and mediators.

The assumption which underlies the approach of drafting legislation for judges to decide cases is that others can thereby "bargain in the shadow of the law".<sup>146</sup> However, the cases decided by judges are utterly atypical. In Australia, only about 6% of all parenting cases that are

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<sup>144</sup> Kaspiew et al, p. 365.

<sup>145</sup> The Hon Justice Richard Chisholm, 'Softening the Blow - Changing custody to Residence', Paper given at the Third World Congress on Family Law and Children's Rights, Bath, England, 2001.

<sup>146</sup> Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', (1979) 88 *Yale Law Journal* 950.

commenced in the courts end up in a judgment following a trial.<sup>147</sup> Decision-making in children's cases is also highly discretionary and fact-driven. Litigants cannot bargain in the shadow of the law if the law casts no shadow.

It may well be that the parents who litigate to trial are the least likely candidates to make shared parenting work; however, the law cannot just be written for this small minority. While some parents will make their own arrangements without reference to legal norms, others can be assisted to develop a well-functioning shared parenting relationship if there is enough guidance in the legislation supported by opportunities for education and dispute resolution. Through its Family Relationship Centres, Australia has developed a community-centric approach to family dispute resolution rather than a court-centred approach in which mediation is offered as an exit ramp off the litigation freeway. In these centres, education is provided about developing child-focused parenting arrangements and mediation is offered either free of charge or at a very low cost.

Such a community-centric approach needs to be supported by carefully drafted legislation that provides norms and guidelines which can help shape the way people view what it means for parents to live apart.<sup>148</sup> Children's cases cannot be dealt with by rules, but there are general principles that can be articulated in legislation to provide a framework for discussions in mediation and negotiations between lawyers. Examples of general statements of principle that might usefully be included in legislation and which can also be referred to by the courts in deciding contested cases are that children have a right to maintain relationships with parents and other family members who are important to them, unless this is detrimental to their wellbeing; that children have a right to protection from harm; that children who have formed a close relationship with both parents prior to the parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, except when restrictions on contact are needed to protect them from abuse, violence or continuing high conflict; that parenting arrangements for children ought to be appropriate to their age and stage of development; and that parenting arrangements for children should not expose a parent or other family member to an unacceptable risk of family violence.

Legislation can be a means of providing greater encouragement of shared parenting if it is directed to the community, not to the judges. Requiring family dispute resolution practitioners to raise with parents the option of a substantially shared care arrangement is much more

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<sup>147</sup> Data provided by the Family Court, *Every Picture*, at p.7.

<sup>148</sup> In the US context, see Margaret Brinig, 'Substantive Parenting Arrangements: The Tragedy of the Snipe Hunt' (2013). Notre Dame Legal Studies Paper No. 1321. Available at SSRN: <http://ssrn.com/abstract=2233667>.

appropriate than requiring judges to consider it in litigated cases. The place to shift the sole custody paradigm is in the lower conflict cases, not the most high conflict cases.

### *3. Guidance on when shared care is, and is not, appropriate*

What can be done to make it less likely that parents will agree on shared care as a compromise when the relationship between them is highly conflicted and levels of cooperation are poor?

The Australian legislation sought to address the issue of deterring inappropriate shared care arrangements by requiring that a shared care arrangement must be ‘reasonably practicable’ and providing guidance on when that might be so. Judges are required to consider the proximity of the parents’ homes, the capacity of the parents to implement a shared care arrangement, their ability to communicate with one another, and the likely impact of the shared care arrangement on the child: s.65DAA. This can be used by mediators and lawyers to ‘reality test’ the practicability of a proposed shared parenting arrangement.

This may be contrasted with the position in other jurisdictions that provide no such guidance. In England and Wales, for example, the Family Justice Review reported that there was a considerable body of opinion in favour of retaining the very limited guidance contained in the Children Act 1989 through the child welfare ‘checklist’.<sup>149</sup> The ‘welfare’ checklist is a useful but somewhat generic list of factors that applies in both public law and private law cases. Such a checklist may well be sufficient in a world in which most conflicts about parenting after separation are determined by judges, or settlements are reached in the shadow of the law.

After the global financial crisis, many countries are facing serious financial difficulties which have resulted in a reduction in all kinds of government-funded services. Demands for more money for lawyers and courts are not likely to be well-received by governments pressed with many competing demands, and for which family law is a low priority. Britain, for example, has made very substantial cuts to legal aid and the provision of free legal advice in family law matters as a consequence of the need to reduce the budget deficit.<sup>150</sup> In the context of significant cuts to legal aid, where parents who once would have received significant publicly-funded legal assistance will be left to resolve issues for themselves with limited guidance, laws need to be drafted differently. Having clearer guidance on factors to consider in making parenting arrangements may assist in resolving private law matters, not least in assessing when shared care is, and is not, an appropriate option.

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<sup>149</sup> Family Justice Review, *Final Report*, 2011.

<sup>150</sup> Ministry of Justice, *Reform of Legal Aid in England and Wales: the Government Response* (2011).



Another option to deter inappropriate shared care arrangements is to go back to a strong sole custody or sole residence norm in which fathers can only expect to get primary residence or shared care when the mother is demonstrably unfit. There are no doubt some who would like to turn back the clock in this way to another age when divorce meant the end of the family unit, with only vestigial ties remaining between parents, and when the family formed by unmarried parenthood was a mother-child dyad;<sup>151</sup> but that old order has irretrievably disappeared. The idea that while marriage may be dissoluble, parenthood is not has now become very widely accepted, and the trend seems an irreversible one.

If there were a strong sole custody norm, that would certainly allocate most of the bargaining chips in negotiation to mothers and make it less likely that they would feel a need to compromise by agreeing on some form of shared care. However, it would need to be combined with sufficient legal aid provision to assist impecunious mothers to assert their claim for sole custody in the face of a competing application by the father. The rapid rise in litigation on parenting after separation has overwhelmed family justice systems in many countries. This, combined with the long-term financial issues facing governments as a consequence of high debt levels and ageing populations, together make it unlikely that generous legal aid for litigation can be expected in the future; and it is doubtful that many parents feel comfortable navigating the legal system on their own.

In the light of this, the Australian approach of detailing in legislation the conditions that make a shared care arrangement reasonably practicable and beneficial to the child seems wiser than insisting that almost no guidance is needed other than that the requirement to make children's interests paramount. The kind of guidance that might be appropriate in legislation would be to the effect that arrangements for substantially shared care should not be made unless they are reasonably practicable and likely to benefit the child, taking account of the distance between the parents' homes, the level of conflict between the parents, the ability of the parents to communicate and to cooperate, and the age and developmental needs of the child.

*4. Emphasise the importance of maintaining children's relationships with both parents and with others who are important to them*

The Australian legislation properly emphasises the rights of children to maintain a relationship with both their parents and others who are important to them, unless this is contrary to their best interests: s.60B. This states an important principle. However, it is important that this principle is not overstated or too widely applied. The emphasis must be on maintaining children's relationships with parents, not creating them. There are particularly difficult issues

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<sup>151</sup> Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*. New York: Routledge, 1995.

when parents have never lived together. Can the parents develop a cooperative joint parenting relationship when they have never known what it is to live together and raise the child as a couple? Is it to be presumed that children will benefit from a relationship with a parent whom they do not know through the intimacy of the daily child-care tasks that occur naturally in most intact families?

This is an area where Australian law fails to make adequate distinctions. In 1995, principles were introduced that “children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together” and that they “have a right to spend time on a regular basis with both their parents” (s.60B). Many disputes in the family courts in Australia concern infant children of parents who have never lived together. Non-resident biological fathers may in many cases represent potentially important social capital to children if a relationship can be established and maintained, but it ought not to be presumed that children will benefit from a joint parenting relationship when there is no history of family life between the parents.

#### *5. Avoid presumptions about time*

The Australian Parliamentary Committee in 2003 was clear in its recommendation that there should be no legal presumption in favour of equal time, or indeed any other pattern of post-separation parenting. However, the legislation came to be understood by some parents as giving rise to a de facto presumption of equal time, and this had various negative effects with some shared care arrangements being made in circumstances where such an arrangement was not appropriate. The distinction between considering the option of equal time and considering it as a preferred option was just too subtle for many in the population to grasp.

Shared parenting might be an optimal arrangement for some families if it could be managed, but the logistics and expense of doing so may mean it is out of the reach of many separated parents. For these reasons, there can be no one-size-fits-all policy for post-separation parenting.

The Australian legislation was helpful in emphasising the need to consider time with each parent outside of weekends and school holidays, and to require lawyers and mediators to explore these options with clients. The notion of ‘substantial and significant time’ has been useful in encouraging more creative and child-centred arrangements than the standard formula of time at alternate weekends in cases where it is possible for parents to share some of the mid-week parenting duties even though they are not living together. The requirement to consider equal time, however, was too easily misunderstood as a presumption, and in mediation this is unlikely to be helpful. Guidelines or presumptions that feed into an agenda of parental rights or adult

notions of equality are antithetical to the development of child-focused arrangements. In this respect, the new law in British Columbia has got it right in stipulating that there should be no presumption of equal parenting time.<sup>152</sup>

#### *6. Avoid bifurcation in the law of parenting after separation*

The 2006 amendments to the Family Law Act in Australia adopted an approach that had not been recommended by the Parliamentary Committee or any expert body. Two primary considerations were enunciated, one involving the maintenance of relationships with parents that are meaningful to the child, the other involving protection from harm. Prof. Richard Chisholm has argued that this bifurcation is unfortunate:<sup>153</sup>

Good parenting can be compromised by other things in addition to violence and abuse. A parent may be disabled from responding properly to a child's needs by reason of adverse mental health, or physical health. A parent may be indifferent to a child, and leave the child unattended for long periods; or seriously neglect the child. A parent may lack the necessary dedication and skills to respond to the special needs of a severely handicapped child. Parents may each be capable and willing parents in many ways, but the conflict between them might be such as to distress and damage the children. In these and many other situations, difficult issues may arise in determining what arrangements will be best for children, even though the problems might not fall within categories such as 'violence' or 'abuse'.

For these reasons it may not help in the identification of the child's best interests if the law appears to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse.

He observed that it may well be appropriate to state these themes as part of the general principles or objects of the Act, but not as primary considerations in determining what is in the best interests of a child. To do so may obscure too many other issues that compromise good parenting.

### **CONCLUSION**

No doubt in Canada, the debates will continue about promoting shared parenting through legislative reform. There is much benefit in drawing upon the experience of other jurisdictions to inform such debates. There is much turbulence in family law around the world as legislatures struggle with the very rapid and significant changes occurring in family life and in ideas about appropriate family structures. There can be little doubt that the age of sole custody as a norm is long since over and that to be acceptable across the population, laws need to emphasise the

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<sup>152</sup> Above, n. 48.

<sup>153</sup> Chisholm, above n. 94 at 128.

importance of both parents in children's lives after separation in the absence of safety concerns, high conflict, or other countervailing factors. That is different from promoting shared care as an option. The practicalities of shared care mean that it is probably limited to the few; but shared parenting, more widely understood, ought to be a norm, as it has become through much of the western world. Canada's Divorce Act, in this respect, looks dated.

The Australian experience of family law reform was undoubtedly a mixed one, but that is probably true of most jurisdictions around the world in this very difficult, and complex, area of social policy. There are lessons that can be learned from the Australian experience, which can assist in drafting more sophisticated laws that will promote positive reform, including, where appropriate, the shared care of children.