SUBMISSION TO THE STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

Patrick Parkinson* and Judy Cashmore§
University of Sydney

This submission addresses the first of the Terms of Reference in relation to: (i) what ... factors should be taken into account in deciding the respective time each parent should spend with their children post separation, and in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; given that the best interests of the child are the paramount consideration.

1. The research evidence on contact arrangements in Australia

The most common living arrangement for children following the separation and divorce of their parents in Australia, the UK and the US is to live with their mother.[1] In 1997, 978,000 children under 18 in Australia were living with one of their biological parents while their other parent lived elsewhere – in most cases,

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* Professor of Law, University of Sydney

§ Associate Professor, Faculty of Law, University of Sydney.

Prof. Parkinson is a specialist in family law and Dr Cashmore is a child psychologist who has written widely on issues of children and the law. Prof. Parkinson and Dr Cashmore together lead a research team based at the University of Sydney's Faculty of Law on issues concerning family law and children.

[1] Jan Pryor and Bryan Rogers, *Children in Changing Families: Life After Parental Separation*, Blackwell, Oxford, (2001).

this was the result of relationship or marriage breakdown.[2] Nearly 88% of these children lived with their biological mother, mostly with their mother alone; 12% lived with their father, again mostly with their parent alone. Less than half of these children (42%) saw their other parent – mostly their father – at least fortnightly, and more than a third (36%) saw their other parent rarely (once a year or less) or never. Only 3% of children lived in a shared care arrangement in which each parent cared for the child at least 30% of the time.[3]

A nationally representative survey of more than 1000 separated parents found strikingly similar results.[4] This research, presented by one of us earlier this year, indicated that 36% of Australian children whose parents were not living together had not seen their father in the last twelve months. A further 17% had day only contact. Just under half the fathers (48%) had the children to stay overnight.

Nearly three-quarters (74%) of non-resident fathers wanted more contact with their child, with 55% indicating that they felt there was nowhere near enough contact. This level of dissatisfaction was evident across the range of levels of contact, other than where shared parenting arrangements (defined as a minimum of 30% of the days or nights each year) were in place. Indeed, 72% of the non-resident fathers who rarely or never saw their child believed that they had nowhere near enough contact. The research indicated that only a small

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[2] Australian Bureau of Statistics (1998). *Family Characteristics Survey 1997*. Cat No. 4442.0 AGPS, Canberra.

[3] Ibid. Similarly, fewer than 4% of parents registered with the Child Support Agency last year had equal (or near equal) care of their children (Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003).

[4] P Parkinson & B Smyth, "When the difference is night & day: Some empirical insights into patterns of parent–child contact after separation". Paper presented at the 8th Australian Institute of Family Studies Conference, Melbourne, 2003: http://www.aifs.gov.au/institute/afrc8/papers.html#p. The data came from the Household Income and Labour Dynamics in Australia survey (HILDA). Interviews were conducted with 13,969 members of 7,682 households. This is the first wave of a longitudinal study and it includes questions on contact arrangements.

proportion of non-resident fathers appear to be disinterested in contact or had emotionally disengaged from their children. This is consistent with the earlier findings of the Australian Institute of Family Studies.[5]

The desire for more contact was not confined to fathers. In addition, 41% of resident mothers wanted increased contact between their children and the non-resident father, with 26% saying that there was nowhere near enough contact. Very few mothers said there was too much contact.

Significantly, it is also clear that most children want continuing contact with their fathers after their parents separate [6] and many want more contact with their non-resident parent than their arrangements allow.[7] In an as yet unpublished study, we have also found that about half the adolescents interviewed said they wished they could spend more time with their non-residential parent. In a number of cases, children recognised the constraints associated with their parent's work and other commitments, but several children complained about their father's unwillingness to spend enough time with them or to do more interesting things. When asked what was fair or unfair about their contact arrangements, the most common reason for saying the arrangements were fair was that they could see

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[5] The Australian Institute of Family Studies found that 41% of fathers contacted in a random telephone survey of divorced parents in 1997 indicated that they were dissatisfied with the residence arrangements for the children. Two thirds of this group wanted to be the primary residence parent, the remaining third wanted to have equal time with their children. On average this was about five years after the divorce. The study also indicated a very high level of dissatisfaction with levels of contact: B. Smyth, G. Sheehan, & B. Fehlberg, "Patterns of parenting after divorce: A pre-Reform Act benchmark study" (2001) 15 *Australian Journal of Family Law* 114.

[6] Walczak, Y. & Burns, S. (1984). *Divorce: The child's point of view.* Harper and Row, London; Mitchell, A. (1985). *Children in the middle: Living through divorce.* Tavistock Publications, London.

[7] McDonald, M. (1990). *Children's perceptions of access and their adjustment in the post-separation period.* Family Court Research Report No. 9.

their non-residential parent when they wanted to. The most common reason for saying they were unfair was that they did not have enough time with their father, or in two cases, with their mother. For example:

> I can see him when I want to or when I need to. (17, male)
>
> Don't get enough time, two days out of two weeks [isn't enough]. (13, male)
>
> If my father has things to do at the time when I visit, he cuts the visit short. (15, female)
>
> Because he lives too far away, I can only get up there once every year or two years. (17, female).

There are a number of reasons why contact may not be more frequent and therefore may not satisfy the children, the non-residential parent, or the residential parent involved. These include an acceptance of standardised and formulaic contact arrangements whether or not they are regarded as optimal; other commitments by children and the non-residential parent, including re-partnering by the non-residential parent; relocation, and the expense associated with contact when the parents live some distance apart. [8]

The standard contact order has typically involved children spending "every other weekend and half the holidays" with the non-residential parent. How common that is now and the extent to which it continues to be seen as appropriate by lawyers, judges and court counsellors is not clear but the common weekly/fortnightly contact pattern reported by Smyth and Ferro (2002) and evident in the 1997 ABS figures suggests that it is still widespread.[9]

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[8] Another factor is whether the parents were ever married to one another. Marriage typically facilitates higher levels of investment in the parental relationship. Parkinson & Smyth (2003), for example, found that 68% of fathers remained in contact with the children if the parents had been married. Where parents had not been married, the figure dropped to only 56%.

[9] This traditional contact arrangement was based on earlier ideas about the primacy of the infant-mother relationship at a time when fathers typically had little involvement in their children's lives. As fathers become more involved with their children in intact families, there is some evidence that they are remaining more involved with their children after the parents separate. In

Re-partnering by either parent may reduce the frequency of contact but re-partnering by the resident parent also appears to increase the extent to which children stay overnight with their non-residential parent.[10] One reason why re-partnering may have this effect is that it is often associated with geographical moves. Non-resident fathers who re-partner are more likely to live further away from their children than fathers who have not re-partnered. The same is true for re-partnered mothers compared with single mothers.

Income levels may also be a factor in determining whether more frequent contact is possible and whether children stay overnight. Non-resident fathers with overnight contact with their children had significantly higher incomes and more bedrooms than those with day-only contact. They also reported significantly higher levels of satisfaction with their relationship with their children than fathers who had day-only contact.

The critical issue for the Committee is whether any alteration in the law to include a "presumption of joint custody" could bring about any change in these factors and increase the amount of contact between children and their non-residential parent (primarily fathers), and whether it is in the best interests of children to change the law in this way. As the analysis above shows, there are many factors associated with contact arrangements that the law cannot influence.

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addition, the earlier understanding of attachment theory has been challenged by more recent developmental research. See Kelly JB & Lamb ME "Using Child Development Research to Make Appropriate Custody and Access decisions for Young Children" (2000) 38(3) FCCR 297 at 305.

[10] Parkinson and Smyth (2003), above n. 4: Two thirds (66%) of single resident mothers reported that fathers had contact with their children, compared with around half (51%) of re-partnered resident mothers. A similar pattern was also reported by non-resident fathers: 80% of single non-resident fathers reported seeing their children compared with 61% of fathers who had re-partnered.

2. Misunderstandings about 'joint custody'

This Inquiry has its origins in a decision by the Government, announced by the Prime Minister, to look at the possibility of a rebuttable presumption of joint custody. In an interview with Alan Jones on 20 June, he elaborated on what he meant by this. He said:

> "We're looking at an inquiry at a parliamentary level into the concept of what's called a rebuttable presumption of joint custody. While that sounds a mouthful, what it means is that the better arrangement is that a child be in the joint custody of both the mother and the father. That obviously means that an arrangement about shared residency and so forth will need to be instituted..."

Later, he said that:

> "historically we have adopted the view that when a marriage breaks up, a relationship breaks up then the courts have got to decide between the mother or the father for custody. It's only in very rare circumstances that other arrangements are ordered... The situation at the moment is that the presumption is that custody will be given to one or the other. What we're looking at is to alter that so the presumption is that it will be a shared arrangement unless circumstances suggest otherwise and that is turning the existing arrangement, as it were, on its head."

The concept of a rebuttable presumption of joint custody comes from the United States. However, in the media coverage following the Prime Minister's comments, it is apparent that this concept as it is found in some states in the USA has been much misunderstood. For example, writing in the *Sydney Morning Herald* and the *Melbourne Age*, (20.6.03), Bettina Arndt indicated that a presumption of joint custody means that "divorcing parents will share equal care of their children, unless there are strong reasons against it" and that the system "operates widely in the US". As we will seek to show below, this is not the case. It doesn't operate in any State in the US, although the laws of one or two States do tend in that direction.

Not only has there been a lot of misunderstanding about what the notion of a rebuttable presumption of joint custody means in the USA, but there has been a great deal of misunderstanding about current Australian law. The level of misunderstanding is perhaps reflected in the fact that this is an Inquiry into "child custody arrangements". The Parliament abolished that terminology in 1995 in enacting the Family Law Reform Act. There is no such thing as child "custody" in Australia any more, and a residence order is not at all its equivalent. The change in 1995 was more than semantic.

Whatever the position may have been historically (and on this the Prime Minister's comments are correct), it is not the case now in Australia that "the courts have got to decide between the mother or the father for custody". Nor is it true, as the Hon Senator Len Harris told the Senate in his Second Reading Speech when introducing his Family Law Amendment (Joint Residency) Bill last year that a "child walks into the Family Court with two parents, and walks out with only one." The fundamental principle of Part VII of the Family Law Act is that when they are living together, both parents are responsible for the children and that this position remains unchanged after separation and divorce. The Family Law Act could hardly make this clearer when it says in section 60B(2):

The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

(a) 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

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children.

The objectives of Part VII of the Family Law Act already promote the notion of shared parenting after separation. What the law does not do is to provide any

presumptions about how children's time ought to be divided between the parents other than that children should have regular contact with both parents.

3. What is meant by joint custody in the United States and how is Australian law different?

a) The different meanings of joint custody

One of the problems with the notion of joint custody in the United States is that it can mean almost anything. There are great variations in its usage and meaning across the United States. The position is well-summed up by law professor, Ann Estin, now of the University of Iowa, who has written:[11]

> "[I]n practice "joint custody" is not a single, unitary category...Joint custody sometimes refers to sole legal custody in one parent combined with some form of shared residence. This arrangement allows parents to "share access to children and child-rearing responsibilities," and, depending on the time-sharing provisions, may permit frequent and prolonged contact. While some monitoring can occur with this pattern, it does not give the nonprimary parent a right to control or even to participate in decisions concerning the children. Alternatively, divorced parents might have joint decisionmaking authority, while the children reside primarily (or almost exclusively) with one of them. This allows the nonprimary parent a greater measure of authority, but not much opportunity for a relationship with the children. At the other extreme, joint custody is sometimes understood to imply an equal division of both decisionmaking and residence...
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> When all of these variations are included, the "joint custody" terminology becomes primarily symbolic. Of course, symbols are important in this setting. Many people care deeply about the words we use for these categories in family law, and these concerns have led legislatures and academics to replace the old vocabulary of "custody" and "visitation" with a series of new terms: "parental functions,"

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[11] Ann Laquer Estin, "Bonding After Divorce: Comments on Joint Custody: Bonding and Monitoring Theories", (1998) 73 *Indiana Law Journal* 441, 442.

"access," "parenting time," and so on. In this area, words matter so much that "joint custody" in name only seems to be sufficient in many cases."

Because of the very varied meanings of joint custody (from just joint legal responsibility with a standard residence/contact arrangement through to equal time residency arrangements), generalisations across the United States about 'joint custody' and any claims about its benefits are highly problematic. For example, the claim which has been made in the Australian media that the introduction of joint custody laws is associated with a reduction in divorces rests on extremely shaky foundations.[12]

Despite these variations in usage, generally the core meaning of joint custody is that parents are jointly responsible for the children and share decision-making authority on at least some issues. It is not always the case in joint custody arrangements in the United States that the parents have equal decision-making authority. In some jurisdictions, despite a joint custody order, the primary caregiver has the primary power to make decisions, but is subject to challenge in the courts by the other parent. In other jurisdictions, the court may specify that some decisions must be jointly made while all others can be made by each parent acting alone when the children are in his or her care.

An award of joint custody in itself, says nothing about how much time a child will spend with each parent, although it is assumed that each parent will see the child for a significant period of time. That issue has to be resolved in the detail of a joint custody order.

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[12] The one reputable article on this of which the authors are aware is M Brinig and FH Buckley, "Joint Custody: Bonding and Monitoring Theories", (1998) 73 *Indiana Law Journal* 393. The commentaries on the article published in the same issue suggest some significant reservations about the authors' interpretation of the available data. Another paper can be found on the websites of shared parenting advocacy groups. It was delivered as a conference paper to one such organisation but does not appear to have been published in a peer-reviewed journal.

b) Different language, same arrangements

Because an 'order of joint custody' doesn't, in itself, say anything about how much time the children will spend in the care of each parent, adopting a "rebuttable presumption of joint custody" would not necessarily have any impact upon how parents, counsellors, lawyers and courts structure parenting arrangements after separation.

This can be illustrated by exploring how the same practical arrangements could be given completely different labels in different jurisdictions. Suppose that the parents have agreed that both will retain parental responsibility after divorce. The children will primarily reside with their mother. They will stay with their father every other weekend from Friday after school and he will take them to school on Monday mornings. They will also stay with him for half the school holidays. Special arrangements are made about Christmas Day, birthdays and other special events.

In Australia, this would probably be characterised as a residence order in favour of the mother and a contact order in favour of the father. However, there is no reason in principle why it should not be characterised as a residence order in favour of the mother on school nights, every other weekend and half the school holidays and a residence order in favour of the father every other weekend and half the school holidays. That would be a joint residence order.

In many jurisdictions in the United States, those arrangements would be characterised as a "joint custody order". They would probably be characterised as an arrangement for joint physical custody and joint legal custody. Other jurisdictions in the United States would simply embody this agreement in a "parenting plan". Others still would characterise the agreement in terms of "parenting time". The mother and father would have "parenting time" in accordance with the agreed schedule and each would be responsible for the care of the child and for the day to day decision-making associated with that care when he or she had "parenting time".

Language matters, and committee members may have a strong preference for one linguistic formulation over another. The important point to note however, is that whatever linguistic formulation is adopted, the actual arrangements are precisely the same.

It follows that adopting what in some American States is called a rebuttable presumption of joint custody would make no necessary difference to actual parenting arrangements in the Australian context.

c) The differences in reform pathways between the United States and Australia

To understand further the difference between the law in Australia and the law concerning joint custody in the United States, it is necessary to go back a little into the history.

(i) The common law meaning of custody

When the Family Law Act was passed in Australia in 1975, 'custody' had its common law meaning. That is, custody involved all the powers and responsibilities involved in caring for the child other than those powers which were classified as powers of 'guardianship'. These were few and far between, and involved such matters as consent to marriage. Both parents were legal guardians but only one parent had 'custody'. That is, one parent was generally designated as the custodian while the other was limited to having access rights, together with the vestiges of guardianship responsibility. 'Custody' included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child's education and religion.[13] This was fairly typical also of the approach in other Western countries.

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[13] Anthony Dickey, *Family Law* (1st ed, Law Book Co, Sydney, 1985) pp. 265-66.

The early 1980s saw a movement towards joint 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.[14]

(ii) The joint custody movement in the United States

Pressure for a legal presumption that the court should award joint custody was particularly strong in North America,[15] but it was also experienced in other western countries. Joint custody generally meant joint parental responsibility, together with liberal visitation rights for the non-resident parent. One parent was still awarded physical custody, designated the primary domiciliary parent, or able to decide the child's 'primary residence'.

All states in America authorise joint custody or its equivalent as an option, but only 11 States and the District of Columbia now have a presumption in favour of joint custody. Other states have a presumption in favour if the parties agree to it, but it hardly needs a legislative presumption to require courts to accept what the parties have agreed between themselves.

In a number of jurisdictions, such as California and Illinois, there are specific legislative provisions to the effect that there is no presumption either in favour or against joint custody or any other legal arrangement. In others, the focus is on the best interests of the child and the issue of joint custody, apart from being an option available, is not specifically addressed.

The idea of a rebuttable presumption of joint custody was really a 1980s phenomenon and should be regarded now as outmoded. The incidence of such

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[14] The work of Wallerstein and Kelly was perhaps most influential in bringing about a shift in emphasis: J. Wallerstein and J. Kelly, *Surviving the Break Up* (Basic Books, New York, 1980).

[15] Andrew Schepard, "Taking Children Seriously: Promoting Co-operative Custody after Divorce" (1985) 64 *Texas Law Review*, 687.

presumptions has declined since the end of the 1980s, with certain states such as Utah repealing joint custody presumptions. States which have engaged in major revision of their parenting statutes more recently than the 1980s have, like Australia, moved beyond the language of sole or joint custody entirely.

More modern legislation has language similar to Australia, in talking about 'parental responsibility' rather than 'custody'. There are also some other interesting approaches. The law in a number of states now requires parents to draw up, or for the court to settle a 'parenting plan' about how the children will be cared for after separation. This avoids the notion that there has to be an allocation of a bundle of rights called 'custody' and 'visitation'. Other American jurisdictions such as Colorado, have adopted the language of 'parenting time'. A new Bill in Canada, currently before the Canadian Parliament, adopts this language as well.

(iii) The distinction between joint legal custody and joint physical custody

In a number of states, a distinction is made in the legislation between joint legal custody and joint physical custody. In California's Family Code, for example, the definitions are as follows:

> 3002. "Joint custody" means joint physical custody and joint legal custody.
>
> 3003. "Joint legal custody" means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.
>
> 3004. "Joint physical custody" means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents...
>
> 3085. In making an order for custody with respect to both parents, the court may grant joint legal custody without granting joint physical custody.

The definition of joint physical custody in Missouri is similar. Section 452.375(3) of the Revised Statutes provides that 'joint physical custody' means "an order awarding each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents. Joint physical custody shall be shared by the parents in such a way as to assure the child of frequent, continuing and meaningful contact with both parents".

As these laws indicate, joint physical custody is defined as meaning that the children will spend significant periods with each parent; but there is no presumption that it will be equal time. In recent years, a common definition of joint physical custody is that it means 30% of the time or more, but this is not a formal or official definition. One leading text on child custody in the United States explains the usual options:

> "In cases of joint physical custody in which the child has a primary residence with one parent, the other parent might spend more time with the child than is provided by a traditional visitation schedule through a variety of ways including: extra weekend time, long summer vacations, more than half of holiday vacations, weekday afterschool time, weeknight dinners, and overnight stays on some school nights."[16]

The distinction between joint physical custody and joint legal custody is a very important one. Research in California for example, at the end of the 1980s found that while 79% of orders were for joint legal custody, less than 20% were orders for joint physical custody.[17] Similarly, a study of decrees in Wisconsin which

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[16] J Atkinson, *Modern Child Custody Practice* Vol 1 (2nd ed, looseleaf, - July 1992) at 6.5.

[17] R Mnookin, E Maccoby, C Albiston and C Depner, "Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?" in S Sugarman and H Kay (eds) *Divorce Reform at the Crossroads* (Yale UP, 1990) 37 at 59. It is sometimes thought that California had a joint custody presumption in the 1980s. In fact, it is not at all clear that California ever had a joint custody presumption – intentionally at least. However, people presumed there was such a presumption until amendments were made in 1988, because the legislature named joint custody first in the list

tracked changes between 1980 and 1992 found that by 1992, 81% of orders were for joint legal custody, but only 14.2% were orders for joint physical custody.[18]

The significance of the distinction can also be seen for example in the law in Florida. Florida has a presumption in favour of joint custody but a presumption *against* equal time sharing in its case law. For example, in *Hosein v Hosein*,[19] the Florida District Court of Appeal stated:

> "Although the trial court has broad discretion under section 61.121, Florida Statutes (1997), to "order rotating custody if the court finds that rotating custody will be in the best interest of the child," there is a presumption that rotating the primary residence is not in the best interest of the child.
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> Florida courts have identified several factors that a trial court should consider in determining whether the circumstances overcome the presumption against rotating the primary residence: (1) the age and maturity of the child; (2) whether the child is in school; (3) the proximity of the parents' residences; (4) the child's preferences; (5) the disruptive effect of the rotation on the child; (6) the reasonableness of the period of time spent with each parent; (7) the relation of the periods of custody to divisions in the child's life, such as the school year; and (8) the parents' attitudes towards one another or how their attitudes will be perceived by the child."

(d) Australia's reform pathways

In Australia, legislative reform took a different path from the United States. The Parliament responded to the demand for joint parental responsibility not by creating a presumption of joint custody but by amending the relevant definitions. In 1983 the *Family Law Act* 1975 was amended to redefine custody so that it

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of options. The 1988 amendment made it clear that there was no presumption for or against any particular kind of custodial arrangement.

[18] M Melli, P Brown and M Cancian, "Child Custody in a Changing World: A Study of Post-Divorce Arrangements in Wisconsin" (1997) 3 *Univ. of Illinois LR* 773.

[19] 785 So.2d 703 , Taylor J at 704 (Fla.App. 4Dist. 2001) (references omitted).

referred to the day to day care and control of the child, and carried with it the right and responsibility to make decisions concerning the daily care and control of the child, while guardianship was given an expanded meaning so as to refer to responsibility for the long-term welfare of the child. This carried with it all the powers, rights, and duties of parenthood other than those involved in the daily care and control of the child.[20] Either parent could exercise these powers in relation to long-term decision-making. The assumption was that if they failed to agree, recourse could be made to the court to resolve the issue.

Since the joint legal custody movement of the 1980s, and its variants elsewhere, there has been a further shift in thinking and in the legal structures surrounding post-separation parenting. The *Children Act* 1989 in England was perhaps a pioneer in the Western world. On the recommendation of the Law Commission of England and Wales, the language of custody, guardianship and access was abolished. In its place, 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, court orders should focus on the practical issues. Where will the child live? What contact arrangements need to be put in place? These orders are known as residence and contact orders. Where there is a dispute about a particular aspect of parental responsibility such as schooling or medical treatment, it can be dealt with by making a specific order in relation to that issue.

In Australia, reforms were enacted in 1995 to similar effect. There are differences between the *Family Law Reform Act* in Australia and the *Children Act* in England,[21] but the basic principle is the same. Parental responsibility continues

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[20] The new definitions were then to be found in s.60A of the *Family Law Act*. The Act has since been amended substantially (see further below).

[21] J Dewar, "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared – Twins or Distant Cousins?" (1996) 10 *Australian Journal of Family Law* 18.

after marriage breakdown subject to the effect of any court order.[22] There is a duty to consult on major issues.[23] Like the *Children Act* 1989 in England and Wales, the Court may make orders about residence and contact, as well as specific issue orders.[24] All parents have parental responsibility irrespective of

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[22] Section 61C of the Family Law Act 1975 expresses this principle clearly:

61C. (1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force...

[23] In *B v B* [1997] FLC ¶92-755 at p 84,217, Nicholson, Fogarty and Lindenmayer JJ stated that:

"In the absence of a specific issues order we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters, and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated.

As a matter of practical necessity either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like."

[24] The starting point for the process of reform in Australia was a report by the Family Law Council in 1992. The Council advocated a shared parenting approach. It wrote:

"[T]he terminology of the custody/access arrangement has its roots in the notion of ownership of children. It contains adversary notions of winning and losing and frequently has the effect of substantially devaluing one parent's contribution. Many parents who "lose" custody finally abandon their parenting role altogether, leaving one parent, usually the mother, to cope alone. The children of separated parents are more vulnerable than their counterparts who retain a relationship with both mother and father. They are also more likely to be living in poverty.

In two parent families, the implicit assumption is that both parents ultimately have equal status and equal responsibility in relation to the children. However, when the couple separates, the custody and access arrangement militates against the continuity of this assumption."

Family Law Council, *Patterns of Parenting after Separation* (AGPS, Canberra, 1992), paras 4.35-4.36.

whether they have ever married or lived together. The *Family Law Act* also makes clear that "children have the right to know and be cared for by both their parents" and a "right of contact, on a regular basis", with them. Australian law already strongly endorses the principle of shared parenting, subject to the overriding consideration of what is in the best interests of each child.

4. Do any jurisdictions have an equal time presumption?

If Australia were to adopt an equal time presumption in terms of the residence of children, it would be embarking on a hitherto untravelled path. As far as we are aware, there is no jurisdiction in the world that has such a law. It must be remembered that in the context of the *Family Law Act* in Australia, such a presumption would apply in respect of all parents and children, not just those parents who were once married or lived together for a substantial period. It would apply in situations where the child was conceived through a one night stand, or where the parents split up before birth, as long as parentage is accepted or proven. It would apply also in situations where a child was conceived through vaginal intercourse but with the understanding that he or she was to be brought up by a lesbian couple and the father was to have no parental involvement. [25]

There is only one American jurisdiction, Louisiana, which has anything close to an equal time presumption. Another, Oklahoma, encourages equal time arrangements in making temporary orders. Many others express objects and principles similar to those in the Australian *Family Law Act* about the importance of sharing parenting and having regular contact with the non-resident parent, but do not indicate any presumption in favour of a particular time-share. Texas has created default contact arrangements by statute taking account of the distance between the two homes.

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[25] See eg. *ND and BM* [2003] FamCA 469.

(a) Louisiana

The law in Louisiana is worth exploring in some detail because it is the closest law that we are aware of to the presumption the Committee is considering. In Louisiana, there is a presumption of joint custody. 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."

It follows that while in most situations where a couple have divorced, there will be an award of joint custody, there will be situations where children are placed in the sole custody of one parent and the non-custodial parent will have far fewer rights than he or she has under Australian law.

The meaning of joint custody is then further spelt out in the Civil Code Ancillaries at 9-335. It needs to be quoted in full.

> **9- 335. Joint custody decree and implementation order**
>
> A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
>
> (2) (a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
>
> (b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.
>
> (3) The implementation order shall allocate the legal authority and responsibility of the parents.

B. (1) In a decree of joint custody the court shall designate a domiciliary parent except when there is an implementation order to the contrary or for other good cause shown.

(2) The domiciliary parent is the parent with whom the child shall primarily reside, but the other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents.

(3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

These provisions appear contradictory, and indeed they are. They result from amendments being made at different time periods without attention being paid to the overall coherence of the legislation. Section A(2)(b) says that to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally. However, section B(1) and (2) stipulate that the court *shall* designate a domiciliary parent, and that the domiciliary parent is the parent with whom the child shall *primarily reside* (our emphasis). The other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents. That, despite the differences in language, is not dissimilar to s.60B of the Family Law Act which states that children "have a right of contact, on a regular basis, with both their parents".

How can these two statements be reconciled, given that the court is required to designate a primary residential parent with whom the child will primarily reside, and who has legal powers not dissimilar to sole legal custody? A leading family law expert in Louisiana, Prof. Katherine Spaht, writes that "the principal provision is para. B which establishes the default 'implementation plan'. That default plan designates a "domiciliary parent", defined as the parent with whom the child primarily resides. That definition would make co-domiciliary parents and equal physical custody an oxymoron." She explains further that the section

about the physical custody of children being shared equally was inserted as an amendment. The "legislative history of the language suggests the language is purely hortatory."[26]

She advises that the typical pattern of physical custody to the non-domiciliary parent in a joint custody arrangement is two weekends a month and 6 weeks to 2 months during the summer. In a sole custody arrangement, the norm is one weekend a month and two weeks over the summer. However, there are one or two judges who are inclined to equal time arrangements in contested cases and others who will divide the children's time 55%-45% between two parents.

(b) Oklahoma

The relevant law in Oklahoma provides strong encouragement to shared parenting at the time of making temporary orders. However, it does not carry this through to final orders. The provision is as follows:

> **§43-110.1. Shared parenting - Policy.**
>
> 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. To effectuate this policy, if requested by a parent, the court shall provide substantially equal access to the minor children to both parents at a temporary order hearing, unless the court finds that such shared parenting would be detrimental to such child. The burden of proof that such shared parenting would be detrimental to such child shall be upon the parent requesting sole custody and the reason for such determination shall be documented in the court record.

The term 'substantially equal access' is not further defined.

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[26] Prof. Katherine Spaht, personal communication to Prof. Parkinson, 7th July 2003.

c) Encouragement of shared parenting in other States

It is more common to find States which have legislative statements encouraging shared parenting (meaning more than joint legal responsibility) but without being prescriptive. New Mexico's joint custody legislation (40-4-9.1.) provides that the "parenting plan shall include a division of a child's time and care into periods of responsibility for each parent" and that "each parent shall have significant, well-defined periods of responsibility for the child". The law in Missouri (Revised Statutes 452.375) provides:

> "The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child, and that it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children, and to resolve disputes involving their children amicably through alternative dispute resolution. In order to effectuate these policies, the court shall determine the custody arrangement which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact with their children so long as it is in the best interests of the child."

As will now be apparent, the formula of 'frequent and continuing contact' or words to like effect is a recurring theme in the shared parenting legislation we have examined from the United States. This formulation has been used in California since 1979, and the laws of a number of other jurisdictions are similar.

In certain states, the principle that both parents should remain involved in their children's lives is expressed in terms of 'maximum contact'. For example, the Iowa Code provides at 598.41:

> "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 formulation in Illinois (s.602) is that

> Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, 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. There shall be no presumption in favor of or against joint custody.

These formulations demonstrate that there are a range of other legislative strategies which could convey a message about the goal which courts, in the few cases they decide, and lawyers and counsellors in the much greater number of settlements they influence, should pursue in structuring post-separation parenting in the absence of violence or abuse.

5. Would a joint custody presumption increase shared parenting?

Is there any evidence that the emphasis on 'joint custody' or 'frequent and continuing contact' in the United States has led to a greater proportion of shared parenting arrangements than in Australia? It is hard to assess this because any generalisation about America is unwise given the great variations in the laws and practice of different states and because there are few comparable figures available in Australia.

There can be no doubt that there has been a significant growth in the numbers of joint physical custody arrangements. Prof. Melli and her colleagues reported that in Wisconsin, the incidence of joint physical custody increased from 2.2% to 14.2% between 1980 and 1992.[27] Their most recent research, not yet ready for

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[27] Above, n.18.

publication, indicates that the proportion of shared parenting arrangements has now reached more than 20%.[28] They define a shared parenting arrangement as involving at least 30% of the time with each parent.

In their 1997 article, they drew an important distinction between equal time arrangements and unequal time arrangements. The average figures for 1980-1992 were 6.3% equal time arrangements and 5% for unequal time (in over 80% of which, the mother was the primary residential parent). The unequal time arrangements were usually between 30% and 39% of the time to the parent who was not the primary caregiver. They found significant differences between these two groups. The equal time arrangement families appeared to have sorted out this arrangement fairly amicably. The unequal time families were much more likely to have reached such a compromise after protracted legal conflict. This group also had the highest incidence of returns to court of any of the custody arrangements in the study. [29]

It is important, however, to look beyond court orders to the actual arrangements in place. Mnookin et al[30] looked at the difference between the court orders and the actual arrangements based on interviews with the families. Defining dual residence as four or more overnights per fortnight (104 nights per year), they found that more than half of all joint physical custody arrangements did not in fact end up as such in practice. Nearly 40% of joint physical custody awards resulted in mother-residence arrangements while 13% resulted in father-residence arrangements. Conversely, some families in which the mother was awarded sole physical custody ended up in practice as dual residence families. Overall, they found that 16% of their sample ended up having dual residence arrangements in practice.

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[28] The latest figures come from Prof. Margo Melli, presentation at the North American Regional Conference of the International Society of Family Law, Eugene, Oregon, June 2003.

[29] Above n. 18.

[30] Above, n. 17.

There is no comparable data in Australia, based on interviews with people who have court orders and in which the research is conducted within a year or two after the divorce. Parkinson and Smyth's research on actual contact arrangements[31] draws upon a much more diverse population. This was a survey of a nationally representative sample of all biological parents, and not a survey of divorced couples who have received court orders on separation, as in the US studies. Furthermore, it is a snapshot at a moment in time of contact arrangements, some of which may relate to separations many years ago. That research found that when daytime only and overnight contact figures are combined, 16% of children who see their fathers do so on at least 30% of the days of the year. The figure for overnight stays is 7%. These figures exclude the children who do not see their fathers at all, but arguably this makes the figures more comparable to the American research (in which court orders were being sought to resolve residence and contact arrangements after separation). It may be that the levels of overnight contact are not as high in Australia as in these American jurisdictions. However, since the levels of contact are significantly affected by re-partnering, and evidence from many quarters indicates that father-child contact after separation diminishes over time, it may be that the figures for Australia would be not dissimilar if research were to be conducted on actual arrangements within two or three years of the divorce.

In conclusion to this discussion of American law versus Australian law:

- The notion that some American States have a rebuttable presumption that children will spend equal time with each parent is simply a misunderstanding of what Americans mean by joint custody, although one or two States have legislative language which appears to encourage equal time sharing.
- The concept of a rebuttable presumption of joint custody utilises outmoded language and concepts which date from the 1980s. More modern family law

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[31] Above, n.4.

statutes, including Australia, have abolished this language and the concept of "custody" entirely.

- A quite common arrangement in which children reside primarily with one parent but stay with the other every other weekend and for half the school holidays could be characterised in different jurisdictions as a residence and contact order, a joint residence order, a joint custody order, a parenting plan or a parenting time order.
- There has been a significant increase in the incidence of shared parenting arrangements in the United States. The same is true of Britain and Australia.

6. Should equal time sharing be presumed to be in the best interests of children?

The real issue is not whether there should be a "rebuttable presumption of joint custody" but whether there should be any presumptions or starting points in relation to whether children should have a primary caregiver and home, and how much time they should spend with each parent when they are not living together.

a) The importance of fatherhood

While fathers typically do less caregiving and interact less with their children than mothers do, they can play a very important role in children's lives. When fathers are involved in nurturing, monitoring, and supporting their children, they have a positive impact on their cognitive and social development and on their behaviour and emotional regulation.[32]

After parents separate, children continue to need and benefit from the continued and active involvement of both parents, beyond the economic support they

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[32] See Lamb, Michael E. (1997). *The role of the father in child development* (3rd ed). John Wiley & Sons, New York.

provide, in cases other than those involving persistent conflict, violence or abuse.[33]

While much of the literature has focussed on the *frequency* of contact between non-residential parents (mainly fathers) and their children, it is now clear that it is not the amount of time so much as the quality of the parent-child relationship and the level of involvement that is important. Based on a meta-analysis on 63 studies of contact, Amato and Gilbreth reported that frequency of contact does not appear to be associated with better outcomes for children.[34] However, emotional closeness, and in particular, what they called authoritative parenting, is highly beneficial to children. Authoritative parenting included helping with homework, talking about problems, providing emotional support to children, praising children's accomplishments, and disciplining children for misbehaviour. Amato and Gilbreth concluded that "how often fathers see children is less important than what fathers do when they are with their children."

There may, however, be a certain minimum amount of time (including blocks of overnight stays) that is necessary to foster and maintain a 'real parenting' relationship. Several writers (and some contact fathers) have expressed concern that the lack of overnight stays and contact arrangements such as the standard

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[33] For reviews of the literature see Jan Pryor and Bryan Rogers, *Children in Changing Families: Life After Parental Separation,* Blackwell, Oxford, (2001); Joan Kelly, "Legal and educational interventions for families in residence and contact disputes" (2001) 15 *Australian Journal of Family Law* 92; Robert Emery, "Post-divorce Family Life for Children: An Overview of Research and Some Implications for Policy" in Ross A Thompson & Paul R Amato (Eds.), *The Post-Divorce Family: Children, Parenting and Society,* (Sage: Thousand Oaks, Cal, 1999), 7; M Lamb, K Sternberg, R Thompson, "The effects of divorce and custody arrangements on children's behavior, development, and adjustment" (1997) 35 *Family and Conciliation Courts Review* 393; Joan Kelly, "Current Research on Children's Post-divorce Adjustment—No Simple Answers" (1993) 31 *Family and Conciliation Courts Review* 29; F Furstenberg and A Cherlin, *Divided Families: What Happens to Children When Parents Part* (Harvard UP, Cambridge, Mass, 1991).

[34] P Amato & J Gilbreth, "Nonresident fathers and children's well-being: a meta-analysis" (1999) 61 *Journal of Marriage and the Family,* 557.

alternating weekend thwarts the development of a meaningful post-divorce parenting role for fathers. [35] When fathers have only brief or relatively infrequent contact with their children, and have limited experience in a care-taking role before the separation, they are less likely to feel confident and comfortable about disciplining their children and are more likely to try to make the visits 'fun' and entertaining. As Thompson and Wyatt argue,

> "Divorced from the routines, settings and everyday activities of the child's usual life, a visiting relationship with the nonresidential parent quickly becomes constrained and artificial, making it easier for fathers and their children to drift apart as their lives become increasingly independent." [36]

Indeed, the artificiality of the contact relationship may help to explain why some fathers disengage from their children after separation and divorce.

While clearly the opportunities for non-residential parents to be actively involved in parenting are more available when children spend more time with them and stay overnight, this does not necessarily mean equal time or shared residence arrangements. Adequate and appropriate contact, but not specifically equal time, is a necessary but not sufficient condition for a real parenting role and a close parent-child relationship.

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[35] One US study (after the Amato and Gilbreth meta-analysis) found a curvilinear relationship between father–child contact and the level of young people's distress some time after the divorce. Young people who saw their fathers one to three times a month – close to the standard arrangement - reported more distress than those who saw them more frequently (weekly) or less frequently (several times a year). One explanation for this finding is that infrequent contact means that young person adapt to not having their fathers around, but those with middle-range contact were less able to resolve their feelings about their fathers means (see Pryor & Rodgers, 2001, p. 215.)

[36] Thompson, R. A. & Wyatt, J. M. "Values, policy, and research on divorce: Seeking fairness for children". In R. A. Thompson, & P. R Amato (Eds .), *The postdivorce family: Children, parenting, and society.* (Sage, Thousand Oaks, CA, 1999) p. 222.

The issue in this inquiry is not, however, whether an equal time arrangement is a feasible or beneficial option for some families. The issue is whether it should be the default rule – the presumed arrangement for all children following separation and divorce, unless there are good arguments (such as the best interests of the child) in a particular case against it.

The main problem with this proposition is that we know very little as yet about the small minority of families in which this arrangement operates.[37] But what we do know means that it is quite illogical to generalise from this small selective group of families, which have generally come to these arrangements by agreement, to other families who are unable to agree on the arrangements for the children and are coming to the court to resolve their disagreement. What we do know suggests that shared care may work for some families but it is unlikely to be practical and certainly not optimal except in a minority of families where a number of conditions make it possible.

b) What might be required to make an equal time arrangement workable?

There are certain obvious conditions for equal time arrangements to work. First, it requires the parents to have adequate housing to provide two homes for the children. That means two households with sufficient bedrooms for the children to sleep comfortably and sufficient furnishings, toys and other such needs. In a recent study by the Australian Institute of Family Studies, based on interviews conducted in 1997, the median value of net asset wealth as reported by women and men on separation (excluding superannuation) was $124,101.[38] In most

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[37] Smyth, B., Caruana, C. & Ferro, A. (2003) Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting. Paper presented at Australian Social policy Conference, Sydney, July 2003.

[38] G Sheehan & J Hughes, *Division of Matrimonial Property in Australia*, Research Paper no 25, (Australian Institute of Family Studies, Melbourne, 2001).

divorces, there is simply not enough property to go around to recreate in two households the equivalent of what the family had in one.

Secondly, it is unlikely to be workable unless parents live quite close to one another, so that children have continuity in terms of their schooling, out-of-school activities, and seeing their friends. In the aftermath of separation, partly because of the financial effects of separation, it may be very difficult for both to afford to live in the same area, even with one parent in the rental market. Divorce tends to bring about a shift by at least one parent if not both to areas of lower housing costs; in the big cities, these areas are often on the perimeter of the city or beyond. These are the practical, uncomfortable realities of divorce. Even if the parents are living in the same area at first, as time goes on, re-partnering, job demands and other life circumstances may well pull them in different directions.

Thirdly, an equal time arrangement requires a lot of co-operation and communication. The logistics are not easy to manage. Children may forget to bring a school uniform, or homework books from one house to another, and these issues have to be resolved without blaming the children. There may also be differences in parenting styles and routines which need to be addressed. Goodwill, trust, and a business-like working relationship help considerably. Divorce may involve extreme levels of estrangement between the parents, and there are some parents for whom an equal time arrangement would not be a workable compromise. Where there has been serious domestic violence or child abuse, shared parenting is obviously contra-indicated.

Fourthly, it requires both parents to be in a position to take on caring responsibility. Parents do not participate equally in parenting in the majority of intact families. Although there have been great changes in women's workforce participation in the last twenty years, the growth has been mainly in part-time work for mothers with children. Parents still tend to specialise, with mothers organising work around children when they are young, frequently working part-time and close to home, while fathers tend to invest in the workplace, often

commuting considerable distances. It can be difficult to alter these patterns after separation. Smart and Neale's research in Britain found that some fathers did adjust to divorce by making a new commitment to parenting.[39] They left the workforce or adjusted the extent of their workforce participation in order to invest in a relationship which they felt could not be sustained without a substantial new investment of time and energy. All the fathers in shared care arrangements in the focus groups reported by Smyth, Caruana and Ferro (2003) had reduced, flexible work arrangements and all the mothers were in paid work.[40] However, this is not possible or practicable for many men. In families in which the patterns of responsibility for child-rearing involved fathers in significant care-giving before the separation or in which fathers are able to change their workforce commitments, the opportunity for greater involvement after separation and divorce is obviously greater.

c) In the best interests of children?

Apart from the feasibility of equal time arrangements, the other critical issue is whether in any given situation it is in the best interests of the children. How do children fare in these arrangements and what is their experience of it? Under what circumstances should any presumption for shared parenting be rebutted?

Much of the literature comparing the outcomes for children in joint versus sole custody for children is US based, and includes joint legal custody as well as joint physical custody. The conclusions are varied, with some studies and reviews indicating better outcomes for children in joint custody arrangements, and others arguing that parenting patterns and the level of conflict between the parents are more important than the family structure.[41]

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[39] Smart, C. & Neale, B. (1999). *Family Fragments?* Cambridge: Polity Press, Ch 3.

[40] Above, n.37.

[41] For reviews of the literature, see Bauserman R. (2002). Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review. *Journal of Family Psychology*, 16, 91-102; also Smyth, Caruana & Ferro (2003) n. 36; Bender, W.N. (1994). Joint custody: The option

A recent meta-analysis by Bauserman (2002) systematically reviewed 33 studies, 22 of which were unpublished doctoral theses, and concluded that "children in joint physical or legal custody were better adjusted than children in sole-custody settings". [42] He went on to conclude that these results were "consistent with the hypothesis that joint custody can be advantageous for children in some cases, possibly by facilitating ongoing positive involvement with both parents".[43] Bauserman also concluded, however, that "selection bias cannot be ruled out. Parents who have better relationships prior to, or during, the divorce process may self-select into joint custody, such that quality of parental relationship is confounded with custody status".[44] He suggests that further research is necessary to control for selection bias by, for example, separating voluntary and court-imposed joint custody.

Given the various different meanings of 'joint custody' in the United States, and the problems of combining joint legal custody samples with joint physical custody samples in analysis, little can be drawn from such reviews to support a particular policy position in Australia. In particular, such research can tell us very little about whether there should be any presumption in favour of equal-time shared parenting for all families following separation and divorce.

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of choice. *Journal of Divorce and Remarriage, 21,* (3-4), 115-131; Brotsky, M., Steinmen, S., & Zemmelman, S. (1991). Joint custody through mediation: A longitudinal assessment of the children. In J. Folberg (Ed.), *Joint Custody and Shared Parenting* (physical punishment. 167-176). New York: Guildford Press.

[42] Bauserman (2002) found no statistical difference between joint legal and joint physical custody so collapsed these groups. As Smyth, Caruana & Ferro (2003) point out, "this is partly explained by the fact that two thirds of the studies involving joint legal custody also involved substantial parent-child contact (>25% of time)".

[43] Bauserman, R. (2002), p. 91.

[44] Bauserman, R. (2002), p. 99.

Braver and O'Connell's (1998) conclusions about a presumption of joint residence are consistent with this view:

> "Unfortunately ... there is simply not enough evidence available at present to substantiate routinely imposing joint residential custody. ...
>
> While it is recommended that the children have substantial contact with both parents ... it is not necessary that this time be split exactly down the middle. Joint *legal* custody and *substantial* contact – though not necessarily exactly equal – with both parents appears to be an ideal solution for most children." [45]

d) Voices of children and young people

The other critical issues in relation to children's best interests are how children experience such arrangements and the extent to which they are involved and have any say in the arrangements. While parents may be happy to share the time and the parenting responsibility between them, it is the children who have to live in two different households and move from home to home, each with their own physical, emotional and psychological space.[46] They have to adjust to the "different routines, different codes of behaviour, different expectations" and different moods in each household as well as the practical aspects of "getting from one place to another, organising clothes, toys, school work" etc.[47] While some children said they had become used to it and it was second nature to them, others like Colette (13) indicated that they wanted to be 'normal'.

> "I just want to be normal ... it feels like I haven't got a proper home really. Whenever anyone asks me for my phone number or address or something I always give them two and they're like, "Which one do I phone?" and I don't know and they're like, "Well which one are you at the most?" and I don't know that either 'cos [my parents have] got this stupid thing that ... most of the week I'm at one house and the most of the next week at the other house. And I always have to ask them

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[45] Braver, S. & & O'Connell, D. (1998). *Divorced Dads: Shattering the myths.* New York: Tarcher/Putnam, (p 223-234).

[46] Smart, C. , 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July, 2001, available at http://familycourt.gov.au/papers/html/smart.html.

[47] Smart, p. 5.

where I'm going to be. I've always hated it. I always get in trouble at school as well 'cos I don't have the right books sometimes and stuff." [48]

Clare (11), however, said that she really liked having time with both families:

"I really like it. Because I don't spend too long with [each] family, not that I mind spending ages with them. And I don't spend not enough time with them, I spend about the right amount of time. I miss my family a bit but I kind of ... I still want to see them every other week. I don't just have to spend years with one family missing the other family and wishing I was there." [49]

Smart found that the majority of children in shared residence were acutely aware of how important the equal apportionment of time was for their parents, and in many cases, felt responsible for ensuring 'fairness' between their parents. Smart argues that being shared on a fifty-fifty basis can become 'uniquely oppressive' for some children.[50] As 14-year-old Matt said:

"**Matt** (14): It's just a drag really for me.

Q: What's the worst thing about it?

Matt: Just not being able to settle down in one place for longer than one night. ... It's just my room. Really it doesn't ever feel lived in as it would if I was at one house all the time, that's it really. ...

Q: ... If you had a completely free choice, what would you like to do?

Matt: I'd like to stay in one place.

Q: How do you think [your mum and dad] would react if you said 'Can we try something different?'

Matt: I don't know, they'd probably like go mental about the amount of time I was spending at each house. ... I'd just feel under pressure not to say anything. ... They'd fight over every day. ... They argue over like, whoever had had like one *long* day or something. It's just relentless. I wish they would stop it I suppose."

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[48] Smart, 2001, p. 7.

[49] Smart, 2001, p. 8.

[50] Smart, C. (2002), 'From Children's Shoes to Children's Voices' *Family Court Review*, 40, 307 – 319 at 314.

Children's experience of time, which tends to change with age, also needs to be taken into account. Young children may need more frequent transitions than older children because they are less able to tolerate separations for more than a few days at a time.[51] Six-year-old Adam, for example, said: I want to have 3 days at each house:

> "Cos I'm missing my mum and my dad too much. It feels like I'm living at one house for two weeks. ... When they first split up and it was like "I really don't want this" - to spend a whole week at each house - 'cos in holidays it's really hard for me 'cos when I was in Ireland I missed my dad too much. I was crying." In this case, his parents listened to what he was saying and changed the arrangements so that he spent shorter spells away from each parent."[52]

This raises the other factor that needs to be taken into account – not least because it may have a significant impact on the way that children adjust to and feel about their living arrangements - is whether children have any say in the way they are arranged.[53] There is now increasing interest in and evidence that children's involvement in these decisions predicts how satisfied they are with them.[54]

Children may not want equal time with each parent. They may have been much closer to one parent than the other before separation, respond negatively to one parent's disciplinary practices, or feel uncomfortable with a parent's new partner. For example, in the words of some adolescents in our recent research:[55]

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[51] Kelly & Lamb, 2000.

[52] Smart, 2001, p. 11.

[53] Cashmore, J. (2003). Children's participation in family law matters. In C. Hallett & A. Prout (Eds.) Hearing the voices of children: Social policy for a new century (pp. 158-176). London: Routledge, Falmer Press.

[54] For example, in our recent research on children's views about post-separation parenting we have found that having some choice and control over the contact arrangements (being able to see their non-residential parent) and having enough time with them predicted how fair adolescents thought their contact arrangements were. This paper has yet to be submitted for publication.

[55] As above, this paper has yet to be submitted for publication.

It depends what the parents are like. If one parent is unstable, it would be quite stupid to make it equal.

It should be up to the child. If they like their dad more, they should be spending most of their time with him but if they like their mother more, they should be there.

Half and half; spend one week with one parent and one week with the other provided they live near each other and the kid is happy doing it.

We need to listen carefully to the voices of the children. There is a danger that the pressure for reform of laws about parenting after separation will lead to changes which will aim at achieving fairness between the parents rather than fairness to the children. The arrangements also have to be flexible to accommodate children's changing interests and activities. There is no such thing as one preferred arrangement or rigid formula, nor can there be one formula for all of childhood.

7. Why is there a demand for a rebuttable presumption of equal time sharing?

The numbers of families for whom an equal time arrangement is optimal may be more than the 5%. It may be more than 10%, but it is likely that it will only ever be a minority of separated families for whom it is workable, and often only for a certain period of time.

a) Strengthening the negotiating position of fathers

Why then do people want there to be a presumption in favour of an arrangement which is currently only practiced by a very small minority of families after separation, and only ever likely to be suitable for a small minority of families? Discussions with advocates of an equal time sharing presumption, as well as

emails and letters received, would appear to indicate that the main motivation for wanting an equal time presumption is to increase the negotiating power of fathers in relation to parenting arrangements after separation. The predominant emphasis is on fairness to fathers, with an assumption that because children need both parents, therefore an equal time arrangement is likely to be in the best interests of the children. There seems to have been little focus on what shuttling between homes means for children, and about children's need for stability and security.

There can be no doubt that a presumption of equal time, or some such similar presumption, would greatly increase the bargaining power of fathers where the parties were not in agreement about the arrangements for the children. Its effect would be that an equal time arrangement is what fathers are entitled to unless they agree that the children should live with the mother more than 50% of the time, in which case they will probably be able to dictate the terms of contact arrangements. The only alternative to acceptance of this will be for mothers to bear the burden of litigation in order to overcome the presumption.

While there is currently no presumption in law in favour of mothers, in practice mothers are still more likely to be the resident parent than fathers, although this is changing.[56] Indeed, there has been a substantial increase in residence arrangements making fathers the primary caregiver over the last ten or fifteen years. Most such arrangements are reached by consent. Whereas 20 years ago, mothers would typically have sole custody of all the children in about 80% of orders made in the Family Court (mostly by consent), the percentage has now dropped to about 70%.

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[56] A US survey of judges also found that the judges exhibited continuing indications of maternal preference despite gender neutral child custody laws. See Stamps, L. (2002). Maternal preference in child custody decisions. *Journal of Divorce & Remarriage,* 37 (1-2) 1-11.

The question for the Committee, and the Parliament, to consider is whether the burden and expense of litigation should be placed on a parent who seeks to argue against an equal time arrangement rather than the present situation where there are no presumptions and where the child's best interests are paramount. It is important to understand the effect that a legal presumption will have.

b) Law and the use of presumptions

To have a presumption in favour of an equal time arrangement flies in the face of normal legal practices about the use of presumptions. Presumptions are generally used in the civil law to reduce the need to prove things which conform to common experience. (There is a presumption of innocence in the criminal law for different reasons.)

For example, we presume that if a person buys shares or property in the name of someone unrelated to them, the intention is that the other person is meant to hold the assets on trust for the person who paid the money. However, if the assets are placed in the name of the wife or their child, the presumption is that it is a gift. Such presumptions conform to common experience. People are not usually generous to strangers or acquaintances except through charities, but they do frequently confer benefits on their wives or husbands or children. Similarly, the law presumes that if a child is conceived in a marital relationship, the husband is the father of the child in the absence of evidence to the contrary.

The importance of presumptions is that they place the burden of litigation on a party who is seeking to prove something which is not the norm in common experience, although it might of course be the case. Some children are born from adulterous relationships, for example. A man asserting paternity of a child born to a woman who was, at the time of conception married to another, will have the burden of litigation to prove that. If the law presumed that children who were born into marital relationships were not the children of the husband, and no husband was recognised as the father of the children born to the wife unless his paternity was proved to the satisfaction of a court, then fathers would have to go

through the expense of DNA testing to prove what is, in common experience, the case.

c) Likely consequences of adopting a presumption in favour of equal parenting arrangements

If, despite all the arguments to the contrary, the Parliament were to adopt a presumption in favour of equal parenting arrangements, the burden of litigation would be placed on the parent who believes that an equal time arrangement is not appropriate for the child. This could have a number of disastrous consequences:

- A substantial increase in the use of lawyers in resolving parenting disputes, since a parent who does not think an equal time arrangement is appropriate will have to prove this in court;
- A substantial increase in demand for legal aid;
- An undermining of mediation, since the law will not be neutral in terms of what arrangement might be best for the children;
- The potential for an order in favour of primary residence to the mother to be traded off against reductions in child support through a child support agreement;
- A substantial increase in litigation with further pressure being placed on a court system which is not coping now with the number of disputes which it is called upon to resolve;
- A worsening of the financial situation of parents after divorce because substantial sums have to be spent on legal fees.

These are all likely consequences of such an arrangement. It is also possible that such a presumption will work against some fathers who, under the present law are given residence orders in their favour. When fathers are the primary residential parents, there tends to be significant contact with the mothers. One would expect that courts faced with an equal time presumption would be inclined

to make an equal time arrangement in such cases rather than placing the child primarily with the father.

For all these reasons, we believe it would be highly irresponsible to go down the path of a presumption of equal time sharing arrangements. Having said this, there would be some beneficial outcomes of such a proposal. There can be little doubt that men who genuinely desire more contact with their children than they are able to negotiate under existing arrangements would be able to achieve better outcomes. Where both parents have a great deal to offer the child, it will no doubt be beneficial to the child to have increased contact with the non-resident parent. The question is whether these benefits could be achieved by other means which do not carry the same likely detriments.

8. Reforming the Law: The Field of Choice

a) The limits of law reform

One of the premises involved in establishing this inquiry is that the answer is somehow to change the law. Although a great deal of anger is directed against the Family Law Act, the Family Court and the Child Support Agency - particularly by fathers about residence orders, contact arrangements and child support - the reality is that the problems are caused in the first place by relationship breakdown. To blame the family law system for the pain and distress so often caused by relationship breakdown is like blaming the health system for sickness, the welfare agencies for poverty, or the police for crime. The family law system is a response to a societal ill, not the cause of it. It may be far from a perfect system, but to expect the family law system somehow to undo the damage caused by divorce and ameliorate all the loss associated with it is to ask it to do a job which is beyond it.

Family law is about distributing loss. When it is not possible for the children to live in the same household with both parents, neither parent will have as much time with the children as he or she had during the intact marriage. When one household is divided into two, neither party to the marriage can keep as much of the property as they enjoyed during the marriage. Working out how to divide those different kinds of losses fairly is enormously difficult. This is the third parliamentary inquiry on family law and child support in about 12 years. Major reforms in post-separation parenting were introduced only eight years ago by the *Family Law Reform Act 1995*. In recent years there has been a Family Law Amendment Bill either in Parliament or being prepared by the Attorney-General's Department almost constantly. There may be changes which can be made, new directions which can be tested. This submission is neither against reform nor defending the status quo.

However, it may be that the time has come to look beyond the family law system as "the problem" and beyond legal changes as a solution. Over the last 30 years, we have sown the wind in terms of the revolution in attitudes to sex, procreation and marriage. We are now reaping the whirlwind. The societal problems which this has caused are problems that no law can resolve. There may be ways that the family law system can distribute losses more fairly. There are certainly ways in which the processes involved in resolving family law disputes can be improved. However, unless we look at government policy (or the lack of it) on family life as well as family law, we are unlikely to do much to stem the tide of unhappiness associated with relationship breakdown.

b) Failures of law reform to stem criticism

Why do changes to the Family Law Act and the Child Support legislation so often fail to stem the tide of anger and disappointment about these issues? The main reason is that the pain, bitterness and anger people feel is often the result of divorce itself, rather than the rules which are put in place. Divorce means losses in terms of standard of living, and for most people, a reduced amount of time with the children, together with the need to continue to liaise with the parent

from whom one is estranged about contact issues. For many problems we hear about, there are legal remedies. An example is grandparents' contact rights. The law requires no amendment in terms of giving grandparents a right to access the courts to seek contact orders. The issue is not the legal remedies but the fact that it is necessary to utilise them in order to see one's grandchildren that is the problem. Utilising the courts is difficult, stressful and costly.

There are other reasons also why law reform measures do not necessarily reduce criticism and complaint. Firstly, it is much easier to redistribute loss than to ameliorate it. Amending the child support formula is a clear example. The less money non-residential parents pay, the less money residential parents receive. Any adjustment to the formula creates an equal number of winners and losers. The challenge is to maintain a principled approach to the formulation of child support obligations rather than a pragmatic and political approach.

The second reason why reforms so often fail to alleviate criticism is because too much attention is paid to the law and too little to the processes. Because the law is more visible, easily understood and capable of alteration, attention is focused on the rules and principles which courts apply in the very few cases which reach trial rather than on the processes by which cases are managed and settled, the great majority of which don't reach trial.

If the Committee were to examine the waiting times to get a trial date in children's matters, for example, it would discover that in certain parts of the country, it can be 18 months between filing and final hearing in the Family Court. The Federal Magistrates Court, which was established to be quicker, simpler and cheaper than the Family Court, tends to be quicker, but waiting times in this court also are blowing out, especially in certain parts of the country.

These waiting times for a final hearing then mean that pressure is placed on interim hearings, but the Family Court has had to limit these to a relatively cursory examination of the claims and counter-claims without the opportunity to

test the evidence. This is a major reason for dissatisfaction in how the court deals with allegations of serious domestic violence. It does not have the resources both to reduce the waiting list for final hearings and to deal adequately with interim applications. Court funding in this area has simply not kept pace with the massive increase in litigation in family law (another phenomenon which can also be seen in other countries).

Another issue in terms of processes is when there are serious and credible allegations of child abuse. Child protection is a fundamental responsibility of government, but in Australia there is an unresolved issue of *which* government, state or federal, is responsible. The result is that a considerable number of serious child protection concerns are not investigated at all. These major problems were examined in detail in the Family Law Council's report, *Family Law and Child Protection* (2002). While the Government has, quite properly, supported the Family Court's excellent initiative in Project Magellan, that project can do no more than improve case management within the existing structures and frameworks. The fundamental problems of a lack of agreement about whether this is a State and Territory responsibility or a Commonwealth responsibility, remain unresolved. The Family Law Council proposed a comprehensive plan to deal with these issues, including the establishment of a federal child protection service to investigate child protection concerns arising in family law cases that have not been investigated by the state and territory authorities, and to provide an evaluation for the court. The Government has yet to announce its response to this recommendation. The Attorney-General has recently announced that a working party of the Standing Committee of Attorneys-General will examine some of the Council's other recommendations concerning the need to avoid duplication of court action.

Another area where processes matter more than the substance of the law is in contact enforcement. Many of these disputes arise from the estrangement and lack of communication of embittered former spouses, and benefit from specialist services to high conflict families. There are very few such specialist services

around the country. Other disputes can be resolved by counselling. Some others require rigorous enforcement. It ought to be a national standard that when disputes arise over contact orders, there is a counselling appointment or case conference to work out what is going on within 10 working days and if a court hearing is needed, it should happen within a month. Such processes should be accessible without the need for lawyers unless a matter is being listed for trial for a punitive response. These sorts of post-order disputes need speedy responses or they escalate. That requires increased resources and different structures to be devoted to these disputes. 'Law reform' may be much cheaper, but it is not necessarily going to resolve the underlying problems.

c) What then is the field of choice in terms of shared parenting?

A number of options could be considered. Some of them may be able to be enacted together.

1. Require courts to consider the option of a substantially equal time arrangement in cases where both partners are seeking a residence order.
2. Replace the term "contact" with "parenting time".
3. Replace the relevant provisions in s.60B concerning children's right to contact with both parents, with a legislative statement to the effect that it is presumed to be in the best interests of the child that both parents remain actively involved in the children's lives after separation unless there is a history of violence or abuse, and that parenting time should be allocated accordingly. This formulation has been deliberately limited to marriage breakdown and people who have lived together because if they have not been living together, then a presumption that a shared parenting arrangement is in the best interests of the child would not be appropriate. Some children are born into single parent households with limited involvement from the other biological parent from the start.
4. Provide further education and training for judges, magistrates, lawyers and counsellors about the more recent understandings of child development

research and interpretation of attachment, especially in relation to the challenges to the orthodox view of contact arrangements. [57]

5. Enact a legislative requirement, fully costed and funded by the Treasury, that in cases where there are allegations of domestic violence or child protection concerns, the matter shall be investigated and a determination reached within 3 months.

6. Resolve the issue of responsibility for child protection investigations in family law matters between State and Commonwealth governments and put structures in place to ensure that all serious child protection concerns are properly evaluated.

7. Establish an expedited process for interventions to resolve post-order conflicts, including counselling and case conferencing, and arbitration where appropriate, together with enforcement processes and robust responses for dealing with vexatious litigants.

8. Expand counselling services for high conflict families.

9. Establish a comprehensive review of the resources needed between the Family Court and Federal Magistrates Court to enable the timely and proper resolution of children's matters both at interim stages and in terms of final hearing.

10. Review the allocation of responsibility between the two courts for the resolution of parenting disputes so that they complement each other's role rather than competing.

11. Monitor and evaluate these changes.

The changes may well do much, but ultimately, if we are to do something about the problem of divorce we have to do something about parents' attitudes to

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[57] Altobelli, T. (2003). *Contact cases: Have we been getting it wrong?* Paper presented to Family law Practitioners' Association of Western Australia 14th Weekend Conference 2003. See also Kelly & Lamb, 2000.

marriage and divorce. As Thompson and Wyatt (1999) point out, we need to abandon the fiction, and "disabuse parents of the fiction that divorce allows them to make a 'clean break' of each other when children are involved" – except when abuse and violence are involved. As Thompson and Wyatt (1999) state:

> "Responsible postdivorce parenting requires that adults do several things together. They must coordinate their lives to enable children to maintain satisfying relationships with each parent, negotiate child support arrangements that inevitably involve accommodations to the changing needs of children and other family members, communicate concerning decisions that affect children's well-being, and occasionally meet congenially on special occasions (like graduations, weddings, and other special events) for the benefit of their children. The realization of these responsibilities surprises many divorcing parents with the discovery that although they seek to end a marital relationship with a spouse, they must nevertheless maintain a future relationship with the parent of their children... although divorce ends a marriage, it does not end the family." [58]

One way to achieve this may be to provide further support and funding to subsidise programs to prevent marriage breakdown, as well as education and counselling to help parents understand their responsibilities as post-divorce parents and to manage the 'etiquette' of post-divorce parenting.

Whatever we do about redistributing loss between mothers and fathers or relationship breakdown, we urge that those losses are not redistributed to children. Our laws must be fair, but if choices have to be made – and they have to be – then fairness to children, informed by a proper understanding of child development and children's needs, must be the top priority.

Patrick Parkinson
Judy Cashmore
August 2003

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[58] Thompson & Wyatt, 1999, see n. 36, p. 225.