

Submission No: 833

Date Received: 8-8-03

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1st August 2003

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House, Canberra ACT 2600
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Dear Committee

This letter is a submission to the Committee's inquiry into the Child Custody Arrangements Inquiry.

MY BACKGROUND

I am a father of three girls. The girls' mother and I separated about 6 years ago, after 10 years of marriage. At that time we agreed that we would share equally in the parenting of our children, at that time aged 5, 7, and 9.

This has worked out well for all concerned, and equal shared-parenting has prevented many of the hardships and problems I have seen in so many cases where the usual sole-custody regime has been imposed.

I will briefly outline some of the issues my family has worked through as it illustrates how beneficial shared parenting can be for all concerned.

When we separated, I first sought advice from a family lawyer. I told the lawyer that I would like to share the parenting, but she told me that the Court rarely supports applications for joint custody (she quoted a most disheartening statistic to reinforce her message) and that it was her duty to advise all her family law clients to apply for sole residency. Even if I wanted to share the parenting equally, she explained, a sole custodian gains many advantages – total control of the children, getting to “call the shots” with the other parent, larger share of the property division, child support, and government financial support. I was shocked! I had hoped for assistance in formalising a shared-parenting agreement, yet the lawyer was “duty bound” to advise me that this was not in my best interests!

Subsequently, my wife and I agreed that the children would best be served by both of us continuing to share parenting of our girls. This had the immediate benefit of being able to reassure the girls that our separation would not diminish their relationship with either of their parents. Although upset that their parents were going to divorce, their grief was short lived.

With the help of a mediator, we drew up a mutually agreed parenting plan and child support agreement, which we registered with the Family Court at nominal cost. Because we were sharing the parenting equally, there was no argument about child support or property division; it was obvious that these should be shared equally. We established a bank account in the children's name into which we both pay an agreed amount each month. This account is then used to pay for all child-related expenses, other than food and entertainment. This mutually agreed financial arrangement has worked well to this day, although the Child Support Agency had some trouble coming to terms with it. (I will explain this further below).

The girls' mother moved into a house about 10 minutes' drive away and the girls enjoyed decorating their new bedrooms and making themselves at home. It was agreed that they would switch homes by getting off the train after school at the appropriate station, which meant there was no need for me or their mother to do the dreaded "handover".

The sharing arrangement was initially week-about. However, before long it became clear that this was not the optimum arrangement for us, the parents or for the girls. The main problem was after-school activities, such as dance classes, which required that their dance clothes be moved between houses each week. It also required me and their mother to regularly exchange information about what was going on next week and so on. After some discussion, we settled on a better routine, which solved this problem, and which continues to this day. The girls spend Monday and Tuesday with me, Wednesday and Thursday with their mother, and the intervening three days alternate. This means that weeknight commitments such as dance would always be launched from the same house and that continuity of contact with teachers, transport rosters, and so on were locked in to one parent or the other. It also means that the children (and their friends) can predict exactly which house they will be at on any Monday through Thursday in the future.

Another important benefit of this arrangement is that both parents secure two days a week to themselves. With a week-about or even month-about arrangement, it is almost impossible to enrol in a night-time course, join a theatre group, or whatever.

For me and my family, starting out with the presumption of equal shared parenting has had many benefits, including:

- Minimal distress for the children
- No disruption to children's school or social routines
- Obviated argument and resentment about child support and property division
- Averted costly and destructive court proceedings
- Forced us to maintain a working relationship between us as parents
- Facilitated both parents to pursue further education and full-time employment
- Circumvented potential resentment that could occur if one parent feels marginalised
- The children do not have to struggle with divided loyalties
- Because the children spend ample time with each parent, they do not feel guilty if they make arrangements to be elsewhere sometimes, such as staying with friends
- Schools, doctors etc recognise both parents equally

TERM OF REFERENCE: What other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent.

My first observation is that the words "other factors" in the Terms of Reference must mean "other than the best interests of the child". This meant implies that spending equal time with both parents is not in the child's best interests, and is an excellent illustration of the unwritten presumption that underpins our family law system. I cannot understand why this Enquiry did not simply ask "Is a presumption that children will spend equal time with each parent in the best interests of the child?". By their choice wording, the Committee seems to be starting out with a prejudiced view.

I have been reading, with some alarm, the arguments against the proposed rebuttable presumption of equal shared parenting. As one of many parents who have experienced the many benefits of shared parenting, I cannot understand why there is such a backlash against what to me seems to be a position that barely needs stating; the "presumption that children will spend equal time with each parent". For me, arguing the case FOR this proposition is like being asked to argue why we should assume that men and women should have equal employment opportunities, or why indigenous Australians should be allowed to vote.

Surely we don't need a lot of research to establish that, other than in exceptional circumstances, children want to stay connected to both parents, parents want to stay connected with their children, and such ongoing connection is good for all concerned.

I have observed that over my lifetime attitudes and roles in marriage parenting have changed dramatically, and family law provisions have not kept pace. Families and relationships are now quite different from what they were in 1975 when the last significant changes were made to the Family Law act.

Edward Kruk, Associate Professor of Social Work, University of British Columbia, has conducted extensive research into post-divorce parenting. He believes that shared parenting is the best outcome for separated families, and that family mediators need to actively promote this.

He has published widely in this field, and I attach as Appendix 1 to this submission his recent work, *Autonomy, Equality and Harm Reduction: A Proposed Model of Canadian Child Custody Law Reform*. I have chosen this paper because it draws on new data which has emerged over the past 5 years.

As you will see from the following abstract, this paper succinctly and authoritatively covers exactly the issues under consideration and is essential reading for the Committee:

During this five-year period, important new data on children, families and divorce have appeared, and are summarized here, including: (1) new data on the distribution of child care tasks and responsibilities in Canadian families, (2) studies comparing child and family outcomes in joint and sole custody families, and (3) the emergent perspective of adult children of divorce reflecting upon their experiences and preferences growing up as children of divorce. These data support an approach to child custody based on parental

autonomy and equality as the most salutary for children's well-being. Second, building on this research foundation, we propose a new model of child custody determination and post-divorce parenting – a "harm reduction" framework.

Kruk concludes that "As the living arrangement most closely resembling the majority of pre-divorce families, and coinciding with emerging models of marriage and parenthood, shared parenting is regarded by many as the healthiest and most desirable arrangement for the majority" and his paper details how this can be fostered.

REBUTTAL OF ARGUMENTS AGAINST SHARED CARE

Advocates of sole custody have recently raised a number of objections against the proposed change of policy. The "Positive shared parenting" website <http://www.positivesharedparenting.org> provides a good summary of the principal objections to a rebuttable presumption of equal parenting time, and I would like to respond to these arguments based on my own experience and observation.

Claim: it privileges the rights of adults over those of children.

I hope that this Enquiry does not degenerate into a battle between the "rights" of men, women and children. Assuming, however that the proponents of this argument imply that the present system of presumed sole-custody does not in any way "privilege the rights of adults over those of children" by arguing that the proposal for sharing would do so! Of course, the present presumption of sole custody privileges the rights of (usually) the mother over those of children or other family members.

I repeat, however, my view that shared parental responsibility is the issue, not mothers' or fathers' rights.

In my own case, the shared-care arrangement we established far better meets the needs of my children than the alternative primary-carer model.

Claim: it denies children the right to unique consideration of their needs and wishes, which change over time

I see this claim as entirely misdirected. It is the present presumptive sole custody system to which this very serious objection actually applies. A move to a presumption of shared parenting will better provide children with a unique consideration of their needs and wishes and is far more likely to adapt to change over time.

Under the present system, there is a presumption that on separation, the mother will become sole custodian and the father will become a once-a-fortnight visitor. Gender-neutral legislation notwithstanding, that is the reality of the expectation. It is the outcome in the vast majority of cases. As a direct result of this typical outcome, the relationship between child and “contact parent” also typically deteriorates over time. And these typical outcomes continue to occur despite a wide acceptance that a close relationship with both parents is beneficial to children, and that the option to have a close relationship is also what children desire.

Many people, mainly fathers, do not bother to challenge the present presumption of sole custody although the majority would like to have a more significant parenting role. In practice, the children’s needs get scant consideration in establishing the post-separation parenting arrangements, the default assumption being automatically adopted. The current expectations are akin to the days when it was assumed (even though not written into law) that when a woman finished school she would marry and become a housewife. That was the expectation. It was based on presumptions of sole spheres of responsibility for women and men. It was legitimately challenged because it failed to provide flexibility and social justice in rapidly changing social circumstances. Sharing and equality needed to be formally enshrined as principles of law before individual women gained “the right to unique consideration of their needs and wishes” in determining their life course.

If a presumption of equal parenting were to become enshrined in the system, on separation the expected outcome would inevitably change. Both parents would be obliged to consider their children’s needs and wishes more so than now, and if the matter came to court the court would make such consideration its priority too.

One corollary of children’s needs and wishes being more seriously considered under the new default regimen will be that far more support and assistance for parents to work out a viable parenting plan will need to occur. However this should not be a new concept for the Family Court, as this was the original intention of Senator Murphy’s reforms. Sadly, the Family Court has been moving away from assisting parents to emphasise sharing over recent years. A clear restatement of purpose would need to accompany the change to a presumption of shared parenting – a refocussing of effort within the existing support services for separating parents and their families.

I would like to specifically highlight the issue of **the changing needs of children over time**. The present system effectively closes the door on future flexibility by establishing a sole-custody regime that is difficult to change. In the worst case, it results in loss of relationship with the non-custodial parent, which is rarely rebuilt. Sole custody, with typically every second weekend contact, works poorly even when children are young, but gets worse as time progresses. As children get older, they become more independent and they need more flexibility. The

“obligation” to spend precious time with the contact parent starts to become a source of legitimate resentment for the child, who might have to forego social opportunities that clash with a rigidly enforced “dad’s weekend”.

In my case, where the children spend half their time with me, their weekends are not particularly important father-daughter time, so they don’t need to worry about their social lives impacting on our relationship. Furthermore, equal shared parenting dictates that both parents live within range of the children’s school and hence their social contacts can also be maintained irrespective of which parent they are staying with at any time. My girls frequently have ballet concerts to attend, sleepovers, or outings with friends on weekends. These would be both emotionally and geographically difficult were they “visiting” me every so often, as opposed to the present 50-50 arrangement.

As my girls get older, their needs and wants change, and in the future I expect they will drift away from the 50-50 arrangement, moving freely between parents at whim. The important thing is that they have spent their formative years in close relationship with both parents. Bonds have been established that would otherwise never have been possible.

Also, from time to time, circumstances arise where the parenting arrangement needs to be changed temporarily, for example if either the children’s mother or I go on holiday, away on business or whatever. Because the children are equally at home at both houses, this can easily be accommodated without inconveniencing or distressing them. As with a two-parent household, the children have a “backup” parent to deal with situations as they arise. This is not usually possible in sole-parent situations.

Claim: it is not evidence-based, but is driven by narrow ideological and political interests
Some of the literature presented on the “Positive Shared Parenting” website presents “evidence” that children are not disadvantaged by sole mother custody. In fact, some of the research cited points out that, for example, “girls who are raised with *any* adult male in their home, including their fathers, also are far more likely to be raped in their home, to get married while still teenagers, and to not get a college education.”

There is a huge body of evidence that children want significant time with both parents, that both parents want significant time with children, and that the present sole-custody system results in enormous emotional harm to children and parents. Society is changing very rapidly. The last decade alone has seen rapid changes in employment patterns, relationship structures and family and societal norms. Any “evidence” more than 10 years old must therefore be taken with a large grain of salt.

This brings me back to my previous point, that we can argue “evidence” forever, but ultimately the decision must be ideological: do we as a society believe that it is “right” for children to have close relationships with both parents, wherever possible? These are not “*narrow ideological and political interests*”. They are **broad** ideological and political interests. The majority of Australians support them. The proponents of the status-quo, sole custody, are no less motivated by “*narrow ideological and political interests*” than anyone else.

Claim: it will expose abused mothers and children to more danger.

I would agree that it **could** have this undesirable outcome, and of course all care need to be taken to ensure that this does not happen. But to oppose change on these grounds is as logical as saying that the women of Afghanistan should not be allowed to attend school because it might expose them to the danger of being attacked by religious extremists.

According to AIFS figures, physical or emotional abuse is cited as the cause of marriage breakdown in less than 10% of cases. So, even if all cases of alleged abuse were automatically rebutted, shared parenting would be acceptable in 90% of cases.

I also believe that the present sole-parent regime exposes children to more danger since a single parent is less able to provide safety for their child than two parents working together (provided of course that the parents are not themselves a danger to the child). For example, in my case, both the children's mother and I are fully aware of our children's social circles, school situation, and so on, so either of us can be called upon in case of emergency.

There are also some cases where a sole parent can abuse their children and the other parent may not be aware of the abuse or can do little to intervene. In a shared parenting situation this is much less likely to happen as the second parent provides valuable monitoring of their children's emotional state and wellbeing.

Furthermore, I expect the extreme stress of being a sole parent can often precipitate psychological or physical child abuse. Being a parent only half the time is much more manageable. The conflict that often occurs between parents when one parent is denied the amount of parenting time he/she desires is also obviously harmful to children.

I support the Positive Shared Parenting Coalition's call for establishment of "a national child protection service for the family law system to assist the courts in the investigation of safety issues where violence or abuse is alleged" and that "the service should also be able to investigate and review the outcomes for children following orders which expose the child to risk of violence, abuse or other harm arising from the orders".

Claim: it will disadvantage parents who have sacrificed careers and education to be a stay-at-home or primary carer.

To the contrary, parents who have made this "sacrifice" are presently denied the opportunity to take up education and/or career by becoming sole parents. My ex-wife used her 50% free time to enrol in further education. Having care of the children half the time enables her to have a full-time job without the stress of being sole parent and employed.

I have been able to arrange my working life around the 50% of the time that my children are not with me, enabling me to work full-time and be a fully involved father.

Surely mothers or fathers who have been stay-at-home parents for their young children deserve and would welcome any opportunity to move to a less demanding, shared parenting role, particularly if formally supported by existing services.

Shared parenting allows both parents to earn a living, improving parental self-esteem and reducing the number of children being raised in families where going to work is not modelled, often leading to a 'poverty trap'.

Claim: it will provide some parents with opportunities to reduce their child support obligation, while not leading to more equitable sharing of core parenting work

I do not understand this argument. If children are spending half their time with each parent, there will inevitably be 50-50 sharing of core parenting work, i.e., time, energy and care. It is illogical to even suggest otherwise. Of course a good case can be made for an equitable obligation on each parent to support the children financially. Also, see my comments on child support below.

Contrary to this claim, the present system actually encourages custodial parents to limit contact to maintain payments above the threshold values that define sole, major, shared, substantial contact. For example, if the child is permitted to spend 145 days of the year with the paying parent, the custodial parent receives fully 50% more child support than if the child spends an extra day (146 days)

Shared parenting obviates a financial motivation to manipulate child contact for financial gain.

Claim: it ignores evidence that shared residence works for only some families and can be disruptive and distressing for young children in particular

Of course shared residence will not work for all families. Sole parenting certainly doesn't work for all families either. However having a rebuttable presumption of shared care will encourage parents to explore the possibilities and seek ways to make it work. At present only a tiny minority of children enjoy shared care post-separation. Moving to such a presumption will increase that figure, by how much is yet to be seen.

Rejecting the change on the basis that it only works for some families is akin to saying no women should be allowed into the fire brigade because it doesn't work out for some.

Shared residence can and should be less disruptive and distressing for children than the sudden loss of one parent that is currently the default. In my case, the children were minimally disrupted by our divorce. Having two homes is a slight inconvenience, but has its upside as well. They quite like having two bedrooms to decorate etc. They also have different facilities at each home which adds up to more choices for them. **However the key advantage is that their relationship with both me and their mother continued uninterrupted and they were spared the distress of having to choose between parents, or of having only limited contact with one or the other.**

Claim: it will increase litigation and prolong instability and uncertainty for parents and children.

Much of the litigation presently involves contact/residence disputes. If most parents were sharing the child-raising equally, almost all of these disputes would be avoided. Parents who are caring for their children half the time do not feel starved of contact with them and will not rush to the Family Court to argue about whether the children spend an extra night with them on their birthday, or whatever.

As for stability, moving from a single family to two-household situation is not destabilising, especially when compared to the shock of one parent suddenly disappearing from their life except for the occasional weekend visit. If one of the parents moves a long way away from the other, contact visits become particularly destabilising as the child must travel and be outside their usual environment during those times.

The transition from single household to shared parenting can be smooth and avoid the upset and uncertainty that children presently face when either an uncontested move to sole custody is made or when a custody battle results from differing parental desires.

If shared parenting becomes the legal, and hence societal expectation, parents preparing for separation will at least attempt to make their plans with this in mind, averting, for example, inflicting unnecessary trauma on the children by intentionally relocating far away from the previous family home.

TERM OF REFERENCE: In what circumstances could such a presumption (that children will spend equal time with each parent) be rebutted?

Some critics of the proposed presumption seem to mistakenly believe that the proposal would mean forcing parents to care for their children against their wishes.

Of course, this is a terrible misrepresentation.

This is how it could work:

- If both parents agree that care will be shared, they go ahead and do so.
- If one parent wants to share but the other wants sole custody, the dissenting parent will need to convince the Court that the other parent should be excluded in the child's best interest
- If both parents want sole custody, the Court will need to decide which will better serve the child's best interest
- If both parents agree to a residence/contact arrangement, counselling will be provided to ensure that the agreement is being freely entered into, and if after exploring all the issues the couple still want this, it will be accepted by consent as it is at present.

The provisions of section 68F of the Family Law Act spell out "how a court determines what is in a child's best interests". This list is fine, except that it is currently used as the benchmark for rebuttal of the presumption of sole custody. When a rebuttable presumption of shared parenting is enacted, these same provisions can be applied for that new purpose.

TERM OF REFERENCE: In what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

Again, the provisions of section 68F can be applied to resolve this issue. I believe that the problem of contact with other persons, such as grandparents, will be greatly mitigated by the introduction of the presumption of shared parenting, since sole custody is the lever that is all too frequently used to prevent others having contact. If children are spending half their time with each parent, it is no longer possible for one parent to control whether the children visit grandparents, for example.

TERM OF REFERENCE: whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

The present formula makes little sense. As mentioned above, the present system actually encourages custodial parents to limit contact to maximise payments. In the example I cite above, one extra day results in 50% less child support payable.

If child support is to be an inverse function of care time, it should be a continuous function, not stepped in this absurd manner.

The flaws of the present formula are too numerous to list here, and I will leave that to others more experienced with the system. Fortunately for me and my family, I have not been troubled by such matters. By sharing parenting equally, we have short-circuited any arguments about child support. It is obvious that if the children are spending equal time with each parent, both parents should share costs equally. A secondary benefit of such an arrangement is that payments are transparently being applied to child costs. This prevents resentment over paying "child support" which is in part actually spousal maintenance.

If both parents are contributing to the children's costs through a separate bank account, as in my case, it is easy to substantiate the cost of children. It is feasible and desirable in such circumstances to gear payments to the actual needs of the children, rather than some estimate which may be way too high or way too low.

When a rebuttable presumption of shared parenting is introduced the Child Support Agency will need to be reformed significantly, as their present mindset is in line with the current sole-parent presumption. This was evidenced in my case by the CSA's inability to register an agreement which actually reflected child support rather than spousal payments. CSA cases require a "payer" and a "payee". In my case both parents are payers, and the children are the payee. In spite of several phone calls and letters, the CSA has never, to my knowledge, resolved this anomaly. This is but one small example of the prevailing mindset and another illustration of the many benefits that would flow from a formal statement that shared parenting is the preferred situation.

SUPPORT AND ASSISTANCE

Many separating couples will need to be supported through the transition to shared parenting. Family Court counselors and mediators will need to redirect their attention from deciding who "wins the children" to helping couples work out their shared-parenting plan, make whatever changes in their lives might be required to facilitate this, and maybe provide some parent education.

Professor Kruk studied this subject in depth, and his findings are presented in the paper I attach as Appendix 2: "PROMOTING COOPERATIVE PARENTING AFTER SEPARATION: A THERAPEUTIC / INTERVENTIONIST MODEL OF FAMILY MEDIATION"

I urge the Committee to read this short paper in its entirety, however the key points are:

- Mediation needs to include a much stronger educative and advocacy component, and to assume an affirmative stance in promoting and facilitating the development of cooperative shared parenting arrangements.
- Mediators also need to pay greater attention to the durability of parenting agreements, and the need for parents to continue to improve their ability to cooperate and negotiate with each other after divorce.
- Mediators must provide education, advocacy, support and troubleshooting, with a period of follow-up to assist parents not only to share the parenting of their children, but to do so in a cooperative manner.

Kruk fleshes out this proposal presented in *Divorce and Disengagement: Patterns of Fatherhood Within and Beyond Marriage*, Fernwood Publishing; 1993. I highly recommend this book, as well as Kruk's "Mediation and Conflict Resolution in social work and the Human Services, Nelson-Hall, Chicago 1997.

OVERCOMING HOSTILITY

One of the most common criticisms of presumption of shared parenting is that it only works if the parents are co-operative and on good terms. It is, of course, preferable for all concerned that hostility between parents be minimised, and I believe that having a presumption of shared parenting will have just such an effect. Parents who are sharing the care:

- Have a high incentive to be civil to each other
- Do not have added hostility resulting from being denied contact with their child
- Have plenty of time off from child-care duties
- Are too busy looking after the children to be at war with each other

This subject is discussed in detail in Kruk's article I referred to previously (see appendix below).

It must also be acknowledged that a high incidence of hostility surrounds many residence/contact situations. It could equally well be argued that sole residence only "works" when there is a high level of co-operation between the parents.

CONCLUSION

I note that the Terms of Reference speak of "a presumption that children will spend equal time with each parent". Specific terms such as "joint", "physical", "legal" are avoided. These finer points of any proposal will need to be resolved once the decision is taken to adopt the general principle as stated in the terms of reference. In any discussion of the merits of this proposal, it will be important to carefully define the legal foundation on which "children will spend equal time with each parent". However, the principal of a rebuttable presumption of equal time with each parent is as necessary as our well-established rebuttable presumption of innocence.

Such a monumental shift of attitude will not be easy or quick. However it is Parliament's role to set the standards of behaviour to which citizens should aspire, and in due course society will move in that direction.

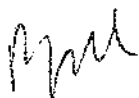
Shared parenting will indeed require closer cooperation between sometimes hostile parents, but the fact that both parties might not like the course they are obliged to take is no more a reason to shy away from high expectations in this situation than in any other area of law.

Shared parenting will require resources that presently do not exist to help separating parents make a transition with different expectations. In many cases constructive counselling support will be required. In the first instance, parents will need help to decide how they wish to embark on shared parenting. Positive encouragement and practical examples of parenting plans will be needed. Some may need ongoing guidance as they make adjustments to their lifestyle and as the children get older.

The Family Law Pathways report specifically commented that many separated parents lack "the skills or networks to deal with forthcoming issues. Ongoing support is vital for some parents".

As the number of families undertaking shared parenting increases, the number of sole parent beneficiaries will decrease, and expenditure on legal aid, Federal Magistrates Court, and the Family Court will drop, freeing up funds to be applied to supporting parents in their new roles.

Thank you for the opportunity to put my views to your Committee. I would be delighted to answer any questions or to appear at a public hearing.



Peter Vogel