

SENATE INQUIRY INTO THE PROVISIONS OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005

SUMMARY

- Current practices of the Family Court are outdated and leave children, fathers, mothers, and grandparents unhappy with the decisions. The Family Court guided by its “experts” is perpetuating the stereotypes of fathers working and mothers staying at home looking after children.
- The vast majority of divorces do not involve violence.
- There is growing evidence that sole maternal residence exposes children to unacceptable risks of child abuse.
- There is also growing evidence that shared parenting is seen by children after a divorce as the most acceptable alternative after the two natural parent family.
- The Australian community overwhelmingly support equal parenting time after divorce.
- The legislation needs to give the Family Court clear direction from the community.

The Current Situation

- For the last 30 years or so since the introduction of the Family Law Act the children of separated parents almost invariably have been growing up living with Mum and at best visiting Dad.
- The Australian Institute of Family Studies report based on the 2004 census showed that
 - o 88% of children live with their mother after separation
 - o contact with the non-residential parent is
 - 33% once a weekend or fortnight
 - 16% daytime contact only
 - 10% during school holidays only
 - 7% 2-4 times per year
 - 25% little or no contact
 - o Only 6% of children live in a shared care situation
- At least half of the deaths of separated fathers can be attributed to their treatment by the family law and child support systems.¹
- “Children report the loss of daily contact with one of their parents as the worst part of their parents’ separation.”²
- Sole custody leaves serious problems for children.
 - o [Feelings of Loss and Abandonment](#)
 - o [Loyalty Conflicts and Separation Anxiety](#)
 - o [Unhappiness and Depression](#)
 - o [Emotional Victimization](#)³

¹ Family Law Reform Association NSW Inc, ‘Inquiry into Child Custody Arrangements in the Event of Family Separation 2003’, submission 551 to H of R (n 3). The Family Law Reform Association NSW Inc refers to fathers groups for their statistic.

² Rodgers, B and Pryor, J. (1998) Divorce and Separation: The Outcomes for Children. (Joseph Rowntree Foundation, York) cited in Hale, A and Aplebaum, B (2006) Another Look at Shared Parenting: The Family Court and Equal Time. Submitted for publication.

³ Joint Parenting Association <http://www.jointparenting.org.au/solecustodyoutcomes.htm>

Family Court of Australia

- The Family Court rarely makes orders for children to live in a shared parenting situation as stated by Justice Rowlands AO:⁴
 - o “The Family Court rarely makes orders for children to be physically shared by their parents and the reasons for this reluctance may be found in a number of decisions. They follow the general tenor of expert evidence provided to the Court by child psychiatrists, psychologists, social workers and Family Court counsellors.” ...
 - o “Current law in Australia firmly incorporates a concept of shared legal parental rights and responsibilities ... which include arrangements for schooling and elective medical treatment ... so that each parent has parental responsibility for their children in the absence of a Court order to the contrary.” ...
 - o And looks to the legislation for its direction - “We await the law giver. If the law changes so will the Court’s approach.”
- The proposed requirement of the Court to “consider” making an order that the child spend “substantial”, or even “equal” time with both parents doesn’t go far enough given the 30 year tradition of opposition by the “experts” who advise the courts.
- It is widely known within the divorce industry and within the community as a whole that the Family Court does not enforce its own orders. Indeed family lawyers counsel clients on the basis of it and so the cycle continues.

Shared Parenting

- The children want to spend equal time with their parents.
- Children in joint-custody settings have fewer behavioural and emotional problems, have higher self-esteem, and better family relations and better school performance than children in sole custody (usually with the mother). ...Children in joint-custody arrangements are virtually as well adjusted as those in the intact families, “probably because joint custody provides the child with an opportunity to have ongoing contact with both parents.”⁵
- “Joint physical custody, insofar as it allows them to continue their relationship with both parents is what children want.”⁶
- When adolescents were asked how parents should care for children after divorce, the most common answer was *equal or half and half*. Half also said they wanted more time with their non-resident parents.⁷
- Women want to be free to pursue their own careers and relationships.
- Shared Parenting would reduce the welfare bill both through Centrelink and Child Support Agency.

Domestic Violence

- The vast majority of divorces do not involve violence.
- In a recent Australian study only 5.6% of the people interviewed reported being either perpetrators or victims of violence with only 2.1% reported being assaulted but not committing assault.⁸

⁴ Justice Alwynne Rowlands AO, Recent developments in shared parenting and joint custody: A personal view from the Court. A presentation at the 14th Annual Family Law Masterclass Conference, Sydney, 10 May 2005.

⁵ Bauserman R. (2002) Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review. *Journal of Family Psychology* 16(1): 91-102

⁶ Luepnitz D. A. (1982) *Child Custody: A Study of Families After Divorce*. Lexington Books: Massachusetts. p 46 & 47

⁷ Parkinson P, Cashmore J and Single J (2003) *Adolescents' Views on the Fairness of Parenting and Financial Arrangements After Separation*. Faculty of Law, University of Sydney

- o "Men were just as likely to report being physically assaulted by their partners as women. Further, women and men were about equally likely to admit being violent themselves.
- o Men and women report experiencing about the same levels of pain and need for medical attention resulting from domestic violence.
- o Violence runs in couples."
- "Women were more likely than men to use one or more acts of physical aggression and to use such acts more frequently."⁹ And "to throw something at their partners, as well as slap, kick, bite, punch and hit with an object."¹⁰

Safety of Children

- There is an increased risk for all forms of child abuse for sole maternal custody¹¹
- The incidence of abuse is almost non-existent in single-father-headed households.¹²
- "The relative risk of child sexual abuse in a female single parent household is over seven times the risk in a two natural parent family."¹³

Community Attitudes

When parents break up, should 50/50 custody of kids be the norm?

Results

91% of respondents said YES.

8% of respondents said no.

1% of respondents said I don't know.

Insight: Who Gets the Kids?" - SBS - 23/03/2004

<http://www.sbs.com.au/insight/content.php3?comingup=1>

Should separated parents be required by law to share equally the custody of their children?

Results

82% of respondents said YES.

18% of respondents said no.

The Sunday Program: "Caught in the Middle". - the NINE network - 07/03/2004

<http://sunday.ninemsn.com.au/sunday/voterresults.asp>

⁸ Headey B, Scott D, and de Vaus D (July 1999) Domestic Violence In Australia: Are Women and Men Equally Violent? 2(3) Australian Social Monitor pp 57-62

⁹ Archer, J. (2000) Sex differences in aggression between heterosexual partners: A meta-analytic review. Psychological Bulletin, 126, 651-680.

¹⁰ Archer, J. (2002) Sex differences in physically aggressive acts between heterosexual partners: A meta-analytic review. Aggression and Violent Behavior, 7, 213-351.

¹¹ Ditson J., and Shay S (1984). Use of A Home-Based Microcomputer To Analyse. Community Data From Reported Cases On Child Abuse and Neglect. Child Abuse and Neglect. 8: 503-509

¹² Anderson E. (1990) Mothers More Violent Than Fathers. A News Release Based On A Review of Statistics From The Texas Department of Human Services (1987-1988). Texas Children's Rights Coalition, Austin Texas.

¹³ http://www.jointparenting.org.au/increased_risk_of_child_abuse.htm

FEDERAL POLL: Which Federal issue do you think needs the most attention in 2004?

Results

184 National security 4.2%

70 Superannuation 1.6%

2723 Child custody 62.6%

53 Childcare 1.2%

349 Tax 8%

162 Universities 3.7%

212 Home affordability 4.9%

424 Medicare 9.7%

80 Economy 1.8%

95 Unemployment 2.2%

Daily Telegraph: - 26/03/2004

<http://www.dailytelegraph.news.com.au/story.jsp?sectionid=676160&storyid=679678>

Divorce Rates

- “Divorce rates declined nearly four times faster in high joint custody states, compared with states where joint physical custody is rare. As a result, the states with high levels of joint custody now have significantly lower divorce rates on average than other states. States that favored sole custody also had more divorces involving children. These findings indicate that public policies promoting sole custody may be contributing to the high divorce rate.”¹⁴

Rebuttable Presumption of Equal Parenting Time

- This is a very misunderstood term outside legal circles. It is best seen as a default or starting position in the cases where parents cannot agree.
- If there is any good reason why the presumption should not apply then it is not binding on court or parents.
- Proven violence or child abuse will automatically preclude a presumption of equal (or even shared) parenting time.
- Already over 50 per cent of couples currently sort out their own post-divorce arrangements with little or no recourse to the law ... and this trend is set to continue.¹⁵
- With the introduction of the Family Relationship Centres the number of couples looking to the Family Court should reduce dramatically.
- A rebuttable presumption would in all likelihood decrease waiting time for court because there would be no need to argue for basic contact.
- Parents will know that they have to agree on a variation, eg 60/40 or 80/20, if they do not want to have to convince a court.
- Parents who agree to something other than equal time will not proceed to court.
- Equal time reduces the workload of the Child Support Agency.
- Equal time frees up both parents to develop their social networks and work options.
- Equal time would force some fathers to consider, perhaps for the first time, the overall responsibilities of fatherhood rather than just paying someone else to raise their kids.
- An overall increase in the time fathers get to spend with their children is in the best interests of the children.

¹⁴ Kuhn, R and Guidubaldi, J Child Custody Policies and Divorce Rates in the US. a presentation at the 11th Annual Conference of the Children's Rights Council, Washington DC, October 23-26 1997.

¹⁵ Green, M The myths about shared parenting. On Line Opinion, 3 February 2006.
<http://www.onlineopinion.com.au/view.asp?article=4126>

ANOTHER LOOK AT SHARED PARENTING THE FAMILY COURT AND EQUAL TIME

By Andrew Hale and Barry Aplebaum

THE PRESENT STATE OF SEPARATED FAMILIES IN AUSTRALIA

Since the introduction of the *Family Law Act* in 1975 children of separated parents have grown up living with mums and visiting dads on weekends. The Australian Institute of Family Studies, based on the 2004 census, reported on children from separated or divorced parents, as follows: 88% of children live with their mother after separation; 33% see the non-residential parent once a weekend or a fortnight, and of them, 16% have only daytime contact; 10% see the other parent only during school holidays; and, 7% make contact 2-4 times a year. Finally, 25% of children have little or no contact with the other parent. These figures represent the stark picture of non-intact Australian families. Only 6% of children are in a shared care arrangement.

For fathers, in particular, this has been an emasculating experience. The template adopted by the Family Court, and demonstrated in the 2004 census, deprives fathers of the everyday experiences needed to build a close relationship with their children. They have been shut out of a fatherhood involving routine activities, and transformed into 'Disneyland dads'.

Despite the wide ambit of the Family Law Act, the Court has been reluctant to order equal time between parents.¹ Justice Alwynne Rowlands conceded the court's reluctance, stating this cautious approach was based on evidence provided to the Court by child psychiatrists, psychologists, and social workers, who evaluate the child's best interests.² In a typical case, the Court adopts the evidence of the independent expert witness, who prefer a prime residence with one parent, and visits to the other for between 3 to 5 nights each fortnight. The court appears to have accepted a doctrine that children form a primary attachment, usually to their mother, and secondary attachments, usually to their father and significant others. The primary attachment is sacrosanct, and must not be disrupted, else developmental damage be caused to the child. Such evidence to the Court results in orders being made in favour of mothers, notwithstanding the gender neutral tenor of the Family Law Act.

We suggest that after critical examination of the theory, the present parenting template cannot be justified on the basis of preservation of a primary attachment, and that upon a child reaching school-age, week-about residence may be desired by the child, and promote his/her healthy development, and involve parents.

PROPOSED CHANGES: SHARED PARENTAL RESPONSIBILITY BILL (2005)

The law regarding parenting orders for separated parents may change radically, if the Federal Government enacts the *Family Law Amendment (Shared Parental Responsibility) Bill (2005)*. Following Recommendation 5 from the FCAC Report³, s65DAA of the Bill compels the Court to consider making an order that the child spend substantial time with both parents. This requirement is subject to the wishes of the parents, any abuse towards the child, and whether

¹ *In the Marriage of Halfiger and Halfiger-Knoll* (1990) 13 Fam LR 786 at 790 per Hay J; *Hall v Fordyce* (unreported) per Kay J; *T v N (Shared residence)* [2001] FMCA Fam 222.

² Justice Alwynne Rowlands AO, 'Recent developments in shared parenting and joint custody: A personal view from the Court', a presentation at the 14th Annual Family Law Masterclass Conference, Sydney, 10 May 2005. At p 9 of the extracts, His Honour states 'it is fair to say that the history of shared parenting within the Court has been one of caution'.

³ Australia, House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, 2003, Parl Paper 12, para 2.86.

such an order is 'reasonably practicable'⁴. The Committee that reported on the exposure draft of the Bill ensured replacement of 'substantial time' with 'equal time'⁵. Legislation will mandate the Family Court, and Child and Family Specialists advising separating couples, to consider shared parenting.

Critically, the Bill does not (contrary to some commonly held views) legislate a 'presumption of shared parenting' or a 'starting-point of shared parenting'. It does mandate the Court to consider such an order; and it requires lawyers, mediators and parents do likewise⁶. As noted in the FCAC report, equal time, shared parenting is not intended to be ordered in every case, or even a majority of cases. However, the Bill appears to encourage an increase in shared parenting arrangements.

If enacted, the Bill may precipitate an enormous cultural change in the legal system and the community. Such a change will be for the better; shared parenting ought be ordered more frequently.

THE CASE FOR SHARED PARENTING

The outlook for separated fathers is grim. Young separated men in Australia are ten times more likely to die by suicide than through a car accident⁷; the Family Law Reform Association NSW Inc has suggested that at least half of the deaths of separated fathers can be attributed to their treatment by the family law and child support systems⁸. Children are advantaged by active participation of a healthy father.

While opposition to shared parenting is stronger among mothers than fathers, it is notable that this opposition focuses on younger children below six years of age, and lessens as the child grows older⁹. Studies by Castleman and Reed (2003), and Castleman, Reed, Allen, and Coulthard (2003) suggest a strong desire among young Australians for more egalitarian parenting, with both males and females wishing to take part in child raising and family life¹⁰. This is the generation of the future, and the law should endeavour to accommodate them.

An increase in the incidence of shared parenting may decrease the perception that family law favours mothers over fathers, a common complaint of "dads groups"¹¹.

Shared parenting may have an effect on divorce rates. In Australia, about 80% of separations

⁴ *Exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, s65DAA(2).

⁵ Australia, House of Representative, Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 2005, Parl Paper 197, see para 2.59.

⁶ *Exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, s65DAA(1). This consideration is subject to certain factors already mentioned above; see also H of R (n 3), at para 2.44.

⁷ Tony Miller, founder of Dads in Distress Inc, on the company's website.

⁸ Family Law Reform Association NSW Inc, 'Inquiry into Child Custody Arrangements in the Event of Family Separation 2003', submission 551 to H of R (n 3). The Family Law Reform Association NSW Inc refers to fathers groups for their statistic.

⁹ A Horin, 'Degrees of Separation: Mothers Give Equal Parenting the Thumbs Down', *Sydney Morning Herald*, 27 May 2004 [Internet – <http://www.smh.com.au/articles/2004/05/26/1085461837878.html>]. (Accessed 9 December 2005.)].

¹⁰ T Castleman and R Reed, '“One day to have my own family...”: ideas about a successful life from early career professionals in a longitudinal study', a presentation at the 8th Australian Institute of Family Studies Conference, Melbourne, 12-14 February 2003; R Reed, M Allen, T Castleman and D Coulthard, "“I mean, you want to be there for them”: Young Australian professionals negotiating careers in a gendered world' (2003) *Australian Journal of Labour Economics* 6(4), 519-536.

¹¹ H of R (n 3) at para 1.6, citing Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future For Families Experiencing Separation*, xxxv 115p.

are initiated by women, who presently expect to enjoy the residence of the children. Kuhn and Guidubaldi (1997)¹² report that US States with high levels (>30%) of 'joint physical custody awards' in 1989/90, when compared to the other States, showed significant declines in divorce in following years, up to 1995. In fact, the divorce rates in the former States dropped nearly four times as much.

The reason for this effect may be related to economic factors, such as reduced child support payments¹³, and mothers' reluctance to spend substantial periods without the company of their children.

Perhaps the best reason to encourage shared parenting is to limit the detriment caused to children by the absence of their fathers. Sadly, children report the loss of daily contact with one of their parents as the worst part of their parents' separation¹⁴. Psychologically, children living with just one parent are 3 to 4 times more likely to have emotional or behavioural problems¹⁵, and account for 84% of teens requiring psychiatric hospitalisation¹⁶. When their father is absent, children tend to have lower self-esteem¹⁷, and are more likely to drop out of school¹⁸, suffer depression¹⁹, feel different from other children at school²⁰, be involved in accidents²¹, and to attempt and commit suicide²². When children have 'no father', they are more likely to develop criminal, delinquent, and violent behaviour²³. Daughters with absent

¹² R Kuhn and J Guidubaldi, 'Child Custody Policies and Divorce Rates in the US', a presentation at the 11th Annual Conference of the Children's Rights Council, Washington DC, October 23-26 1997.

¹³ Dads in Distress Inc (2003), submission 974 to H of R (n 3); R Kuhn and J Guidubaldi (n 12).

¹⁴ B Rodgers and J Pryor, *Divorce and Separation: The Outcomes for Children* (Joseph Rowntree Foundation, York, 1998).

¹⁵ N Zill and CA Schoenborn, 'Developmental, Learning, and Emotional Problems. Health of Our Nation's Children, United States, 1988' (1990) *Advance Data* 190, 1-18.

¹⁶ SA Hewlett, *When the Bough Breaks: The Cost of Neglecting our Children* (HarperPerennial, New York, 1992).

¹⁷ Davidson, *Life Without Father: America's Greatest Social Catastrophe* (1990), Policy Review; L Kurtz, 'Psychosocial Coping Resources in Elementary Schoolage Children of Divorce' (1994) *American Journal of Orthopsychiatry* 64, 554.

¹⁸ United States, US Department of Health and Human Services, National Centre for Health Statistics, *Survey on Child Health*, Washington DC (1993); RB McNeal Jr, 'Extracurricular Activities and High School Dropouts', (1995) *Sociology of Education* 68, 62-81.

¹⁹ S Kasen et al., 'A Multiple-Risk Interaction Model: Effects of Temperament and Divorce on Psychiatric Disorders in Children' (1996) *Journal of Abnormal Child Psychology* 24, 121-150; DB Kandel, E Rosenbaum and K Chen, 'Impact of Maternal Drug Use and Life Experiences on Preadolescent Children Born to Teenage Mothers' (1994) *Journal of Marriage and the Family* 56, 325-340.

²⁰ IL Cohen, 'Children As Property and Fathers as Part Time Babysitters: Restoring the Birthright of Children From Divorced Homes' (2004), an article to Dads In Distress Inc [Internet – http://www.dadsindistress.asn.au/information_babysitter.html]. (Accessed 9 December 2005.).

²¹ L Remez, 'Children Who Don't Live With Both Parents Face More Behavioral Problems' (1992) 24(1) *Family Planning Perspectives* 41; DA Dawson, 'Family Structure and Children's Health and Well-Being: Data from the 1988 National Health Interview Survey on Child Health' (1991) *Journal of Marriage and the Family* 53(3) 573.

²² SA Hewlett, *When the Bough Breaks: The Cost of Neglecting our Children* (HarperPerennial, New York, 1992); US Department of Health and Human Services (n 18).

²³ AW Siegmann, 'Father Absence During Early Childhood and Antisocial Behavior' (1966) 71(1) *Journal of Abnormal Psychology* 71; United States, US Department of Justice, *Prisoners in 1997*, Bureau of Justice Statistics Bulletin NCJ 170014 (1998); HB Biller, *Father, Child and Sex Role* (DC Health, Lexington, 1971), p66; N Vaden-Kiernan, N Lalongo, J Pearson and S Kellam, 'Household Family Structure and Children's Aggressive Behaviour: A Longitudinal Study of Urban Elementary School Children' (1995) 23(5) *Journal of Abnormal Child Psychology* 553; Wisconsin Department of Health and Social Services, Division of Youth Services, *Family Status of Delinquents in Juvenile Correctional Facilities in Wisconsin*

fathers are more likely to have difficulties with other men in their lives²⁴, to fall pregnant out of wedlock²⁵, and – ironically – to divorce²⁶. Sons are described as less masculine, and more dependent²⁷.

Finally, shared parenting will aid in the reduction of 'father disengagement'. This syndrome occurs when fathers either fail to establish any significant contact with their children following separation, or establish contact that gradually fades away. A UK and Canadian study involving 160 divorced fathers found that the significant cause of father disengagement was the dynamic interplay of their treatment by the legal system – its adversarial process, as well as lawyers' predictions of the outcome of custody disputes – and psychological factors including a sense of unfairness, the feeling of being a 'visitor' and the pain caused by the shortness and superficiality of contact visits²⁸. In short, the phenomenon is one of 'defeated dads'²⁹.

Shared parenting will enable parents, particularly fathers, to play a dynamic, involved role in their children's lives, and to build relationships based on everyday experiences, that will sustain parent and child in the long-term. The need for change is real; in the value-laden words of Prime Minister John Howard, 'far too many young boys are growing up without proper male role models'³⁰.

LIMITATIONS TO SHARED PARENTING

Opposition to shared parenting lies partly in the belief that mothers are not only better at raising children than fathers, but deserve so to do. A study by Lyn Craig³¹ illustrates that, in intact Australian households, women still spend three times longer with children than men. Further, mothers are more engaged in routine child-care, physical care, and spend more time alone and devoted to the child³². Add to this the argument that many mothers have sacrificed their careers and education to be a stay-at-home mum, and a picture emerges of an experienced caregiver who has both contributed, and sacrificed, more. By contrast, fathers ought not claim shared parenting after separation, because they never really shared parenting before separation.

Another perceived concern with shared parenting is the instability created by children having to routinely swap homes. The clothes, books, sporting equipment, and homework the child will need, as well as sporting and social events he/she needs to attend, will have to be

(April, 1994); JL Sheline, BJ Skipper, and WE Broadhead, 'Risk Factors for Violent Behavior in Elementary School Boys: Have You Hugged Your Child Today?' (1994) 84 *American Journal of Public Health* 661.

²⁴ EM Hetherington, 'Effects of Father Absence on Personality Development in Adolescent Daughters' (1972) 7(3) *Developmental Psychology* 313; EW Hetherington and RD Parke, *Child Psychology: A Contemporary Viewpoint* (4th ed, McGraw-Hill, New York, 1995).

²⁵ EM Hetherington (n 24); CW Metzler et al, 'The Social Context For Risky Sexual Behaviour Among Adolescents' (1994) 17(4) *Journal of Behavioural Medicine* 419.

²⁶ EM Hetherington (n 24); S McLanahan and L Bumpass, 'Intergenerational Consequences of Family Disruption' (1988) 94(1) *American Journal of Sociology* 130.

²⁷ LA Beaty, 'Effects of Paternal Absence on Male Adolescent's Peer Relations and Self-Image' (1995) 30 *Adolescence* 873; EM Hetherington, 'Effects of paternal absence on sex-typed behaviors in Negro and white preadolescent males' (1966) 4(1) *Journal of Personality and Social Psychology* 87.

²⁸ E Kruk, *Divorce and Disengagement: Patterns of Fatherhood Within and Beyond Marriage* (Fernwood Publications, Halifax NS, 1993) cited by Australia, Australian Institute of Family Studies, *Parent-child Contact and Post-Separation Parenting Arrangements*, Research Report 9 (2004), p35.

²⁹ Id.

³⁰ Australia, House of Representatives, *Parliamentary Debates* (24 June 2003) 17278.

³¹ L Craig, 'Do Australians share parenting? Time-diary evidence on fathers' and mothers' time with children' (2003), presentation at the 8th Australian Institute of Family Studies Conference, Melbourne, 12-14 February 2003.

³² Id.

routinely managed. In a week about arrangement, this can be quite a challenge³³.

Further, it has been suggested that children need one stable home³⁴. To this end, a 'substantial split', ensuring that there is still a primary home, may be easier to manage than two homes.

An absolute limitation to shared parenting is where it exposes mothers and children to actual violence or serious abuse from the father. If violence or abuse of children is proved, week-about residence is impossible, and even contact ought be limited, so as to ensure children's safety. Another concern is that shared parenting will unnecessarily expose children to high levels of parental conflict, or to the mental health problems of one of the parents.

If a parent prioritises his/her needs over the child's, for example, by seeking residence to spite the other party; or makes a child feel like a lodger at his house, for example, where the father's work is overflowing into the child's room, or where the father spends late nights in the office, a shared parenting regime will have limited success, as indeed will the present residence/contact orders. Whatever arrangement adopted requires parents to have a real commitment to parenting.

It is apparent that shared parenting is not a one-size-fits-all approach. This is reinforced by the fact that a child's personal experience of shared parenting may be unpredictable. One child may enjoy being able to live with both parents, while another feels like a nomad; one enjoys feeling wanted and loved by both parents, while another is burdened by an emotional responsibility to both mum and dad; one enjoys a structured week or month-about arrangement, while another sees it as inflexible. In short, successful shared parenting will depend upon the facts of each case.

For many parents, the nature of the modern workplace means that shared parenting is just not practical. Men are 'working the longest hours they've ever worked', says Pru Goward³⁵, adding that 'in the end, a guy who is working 60 hours a week does not want the kids'. If this is the case, then any real increase in shared parenting depends upon changes to workplace arrangements, not extra consideration by Family Courts.

For these, and reasons unique to couples, shared care will not be adopted by all parents. No doubt some fathers and mothers will decide that a prime residence and weekend contact are practical, and maintain, relationships.

OVERALL RECOMMENDATIONS

Shared parenting is increasingly considered as a realistic option by separating families; children are conscious of it as an option, and they, as well as fathers are encouraging a change in culture. The arrangement works better if certain factors are present, but their absence ought not rule against it, and merely suggest caution in it's consideration. These recommendations are not "rules of law", but rather common-sense suggestions.

1. Communication and cooperation

This is the ability of both parents to communicate and cooperate in the joint care of their child.

³³ A Horin, 'Degrees of Separation: Mothers Give Equal Parenting the Thumbs Down', *Sydney Morning Herald*, 27 May 2004 [Internet – <http://www.smh.com.au/articles/2004/05/26/1085461837878.html>]. (Accessed 9 December 2005.)].

³⁴ R Bauserman, 'Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review' (2002) 16 *Journal of Family Psychology* 91, cited by Australian Institute of Family Studies (n 28), p 19.

³⁵ C Banham, 'Enforcing Custody Rule Won't Work, Says Goward', *Sydney Morning Herald*, 27 October 2003 [Internet – <http://www.smh.com.au/articles/2003/10/26/1067103270697.html>]. (Accessed 9 December 2005.)].

Several cases have cited this as important to shared parenting³⁶.

We submit this requirement is not strictly needed. Rather than open communication and cooperation between the parents, an absence of outright conflict is sufficient. In a report to the Australian Institute of Family Studies (2004)³⁷ discussing the qualities of parents presently opting for 50/50 care, the authors observed that all that was needed was, at the least, an ability 'to maintain a "business-like" working relationship as parents' (p 29). Indeed, it is suggested that a consequence of shared parenting may be an increase in communication between parents, as a simple matter of necessity.

Even moderate amounts of conflict may not impede a successful shared parenting arrangement, provided that the parents insulate the children from conflict. This was further suggested in the AIFS report³⁸. In particular, where this conflict is predominantly arising out of litigation, consideration should be had to the possibility that conflict will subside once the legal fighting ends, and the parties get down to parenting.

To insist on an absence of conflict, may encourage it. If a father wants shared parenting, and the mother does not and believes the court's fallback order will be prime residence to her, she may promote conflict and be unco-operative, to provide evidence for the court to reject shared parenting. Conflictual issues, eg. extra curricular activities, can be dealt with by the court making orders in respect to those specific issues, and giving decision making power to a particular parent, rather than by adjusting time between the parties.

It is recommended that the Courts attach less weight to cooperation and communication than in the past.

2. Flexibility

Flexibility requires an ability in both parties to assent to alterations in the parenting arrangement, if the child so desires. This may include allowing the child to 'pop in' to the other parent, even though it is not 'their turn', or even to agree to one parent having more residence time than the other, if the arrangement isn't working perfectly. The importance of flexibility in shared parenting was raised by the AIFS report and cited in the FCAC report³⁹. It answers the problem that shared parenting is not a one-size-fits-all approach. For this reason, it is recommended that flexibility be encouraged.

3. Compatible parenting

Compatible parenting operates on two levels. First, it involves both parents sharing similar attitudes to the child's day-to-day upbringing, such as their attitudes towards discipline, homework, health, diet and sleeping patterns. Courts have regarded this as a relevant factor when ordering shared parenting⁴⁰.

It is recommended that, where parenting is not completely compatible, the Courts allow room for separated parents to reach a compromise. Often, in intact families, parents reach a compromise where, for example, one parent acts as disciplinarian and the other as mediator. Indeed, such differences serve to enrich a child's upbringing. One parent may stress the importance of education and the other of recreation; one may encourage more sleep and the other less sleep; one may encourage more nutritional food and the other a more relaxed diet. Provided the child is in the care of a loving parent, one parent ought not be disqualified from spending substantial time with the child simply because of a different parenting style to the

³⁶ *T v N (shared residence)* [2001] FMCA Fam 222; *L v P* [2002] FMCA Fam 206; *In the Marriage of Forck and Thomas* (1993) FLC 92-372; *Padgen, In the Marriage of* (1991) FLC 92-231.

³⁷ Australian Institute of Family Studies (n 28).

³⁸ *Ibid* at 29.

³⁹ *H of R* (n 3) at para 3.13..

⁴⁰ *T v N (shared residence)* [2001] FMCA Fam 222; *L v P* [2002] FMCA Fam 206; *H, In the Marriage of* (1994) 19 Fam LR 165 .

other.

Second, compatible parenting involves both parents showing similar ambitions for the child regarding, for example, religious adherence, cultural identity and extra-curricular activities.

It is recommended that little weight be attached to this issue. Instead, the requirement ought be that each parent supports the child in whatever ambition he/she undertakes. What is important is that the child is in the care of two loving parents.

4. Proximity of the two households

Significant weight must attach to this factor. A child moving between two households must do so within the support of his/her school, place of worship, sporting, peer and social groups.

5. Parents' ability to care for the child

Each parent must be able to adequately care for the child when he/she resides with them, by providing emotionally and physically for the child. The required standard of care is over and above that of a contact parent. Further, both parents must ensure that the child can feel at home at their respective houses. It is not satisfactory for the child to feel like a 'lodger' at one parent's home.

It is submitted that if, prior to separation, a parent worked away from home, ought not be interpreted as implying a lack of parenting ability. Intact families commonly delegate roles, for example, one parent works and the other stays at home with the children. After separation, partnership roles are no longer applicable, and each partner must assume new roles.

6. Child's wishes

It is recommended that significant weight be afforded to the child's wishes. This is relevant in deciding whether to establish shared parenting and, if the arrangement is in place, make any alterations. Listening to the child's needs will enhance flexibility and encourage communication between the parties.

Clinical psychologist, Vincent Papaleo, opines children between 6-12 years 'highly value rules and fairness'⁴¹. He adds that, because of these values, 'it is very common for children in this range to talk about the fairness of a shared residence program'⁴². Anecdotal experience suggests that children are seeking shared parenting, as they love their parent's equally.

7. The risk of violence or abuse

The risk to children of physical violence or sexual or emotional abuse is unacceptable. The presence of an unacceptable risk means the Court will not order shared parenting, and this safeguard is in the new shared parenting Bill⁴³ and the present legislation⁴⁴.

CONCLUSION

The Shared Parenting Bill, if passed, will mark a significant cultural change in the way that Family Law treats fathers. Counsellors and the courts are invited to critically examine the attachment doctrine underpinning the present template. We submit that greater uptake of shared parenting will meet needs of children, and ensure participation of both parents.

When children wish it, and their separated parents are emotionally and physically able to

⁴¹ Vincent Papaleo, 'Developmental Considerations in Contact and Residence Disputes', p 17.

⁴² Ibid at 18.

⁴³ *Family Law Amendment (Shared Parental Responsibility) Bill (2005)*, s65DAA(1) and s61DA(2).

⁴⁴ *Family Law Act*, s68F(2)(g), (h), (i).

provide for them, and geographically proximate, shared equal time between households is practical and desirable. The arrangement is obviously fair, and encourages co-operation for the benefit of the children. It would be a proud achievement of this legislation, if after separation, more children continued to have a meaningful and loving relationship with both their father and mother.