

A rebuttable presumption

Introduction

- 2.1 This chapter considers the issues raised by the question in the terms of reference about creating a rebuttable presumption that children should spend equal time with each parent after separation. As Chapter 1 confirms, the question is asked on the basis that the best interests of the child remains the paramount consideration but asks what else is relevant to deciding the time each parent should spend with their children.
- 2.2 The committee's view of a presumption is that it provides a preferred starting point of parental equality for negotiation of potential parenting arrangements after separation outside the courts. It would also be a starting point for court consideration of the same questions when negotiation has been unsuccessful. The presumption is rebutted by evidence or circumstances that make the preferred starting point inappropriate for the family concerned.

Is time the real issue?

- 2.3 Much of the evidence to the inquiry has reflected a perception that the terms of reference were in effect leading to imposition of equal time arrangements, except when it is proved to be inappropriate.
- 2.4 What has become apparent to the committee during its inquiry process is that many separated parents – mostly fathers but also mothers – feel excluded from their children's lives following separation. What parents want is to be more involved and for many the equal time argument has become the vehicle for pursuing the connection that their children are entitled to. This has turned the debate away from the benefits for children

of a positive and caring relationship with both parents to all the arguments about why equal time will or will not work.¹

- 2.5 The committee believes that the focus must be turned back to the primary issue of how to ensure both parents can, and will, remain involved in caring for their children after separation.

A focus on the majority of families

- 2.6 The committee believes that a review of the parenting aspect of family law involves looking for strategies to support the needs and aspirations of the vast majority of separated families, where it will be in the child's best interests that both parents continue to be positively involved in their lives. This will include those parents who make their own arrangements either on their own or with a degree of help from the system. The committee acknowledges that there is also a significant minority of families who live with family violence, substance abuse or child abuse or for whom conflict is so entrenched they are incapable of agreement about matters affecting their children. For these families genuine and positive shared parenting may not be possible.
- 2.7 The committee firmly believes that violence is totally unacceptable behaviour, especially within families. Children should not be exposed to violence either directly or indirectly. The negative impact of family violence on children's emotional stability and future development is widely accepted.²
- 2.8 In developing a new approach, the emphasis should be on enabling the majority of families and children to grow up with meaningful and positive relationships. In so doing, care needs to be taken to ensure that families and children subject to abuse are not exposed to further risk.

Problems with the current system

Confusion

- 2.9 The Pathways Report described the complexities in the current family law system, its disconnectedness, its cost and delays.³ The principles on which

1 National Network of Women's Legal Services, sub 1024, pp 5-7; Domestic Violence Service of Central Queensland, sub 1358, p 4; Women's Legal Service Victoria, sub 19, p 6.

2 Federation of Community Legal Centres, Violence against Women and Children Working Group, sub 1026, pp 5-6; Australian Domestic & Family Violence Clearinghouse, sub 1630, pp 4-7.

3 Family Law Pathways Advisory Group. *Out of the maze: Pathways to the future for families experiencing separation: Report of the family Law Pathways Advisory Group*: Commonwealth

it operates are not well understood. These findings have been confirmed during this inquiry. Many who provided evidence have outlined their dissatisfaction with their own outcomes, how long it took to get them, the money they have spent and the anger and hurt that remains in their lives.⁴

Unmet expectations

- 2.10 The *Family Law Reform Act of 1995* was said to have intended to create a rebuttable presumption of shared parenting⁵ but the evidence to the inquiry clearly indicates that this is not reflected in what is happening either in the courts or in the community.
- 2.11 Section 60B of the Family Law Act (FLA) sets out the importance of a child's right to continue to know and be cared for by both parents, but the predominant outcomes in post separation parenting do not support this.
- 2.12 'Custody' and 'access', terms rejected in that reform to eliminate any sense of ownership of children have merely been replaced by 'residence' and 'contact'. Behaviour has not changed and there is still a common winner/loser scenario. Many individual submitters have said they have acted on legal (and other) advice which appears to have perpetuated this scenario.

Residence orders

- 2.13 Out of court negotiated outcomes have favoured sole residence because they have been influenced by community perceptions, by experience of women as primary carers⁶ and by perceptions and outcomes in court decisions. This has been illustrated by suggestions in evidence to the committee that there is an 80-20 rule in the courts.⁷ This is the perception of a common outcome of, usually, the mother with sole residence and the father with alternate weekends and half the school holiday contact. The committee explored this perception with various witnesses during its hearings. From organisations such as the Family Court of Australia (FCoA) and legal services this drew the response that there is no such rule, although they acknowledged that the perception can influence private

Departments of the Attorney-General and Family and Community Services, Canberra, July 2001, pp 10-11.

4 These issues were common themes in many of the submissions from individuals, individual witnesses and community statements.

5 Duncan P, *House of Representatives Debates*, 21/11/95, p 3303.

6 See Chapter 1; Women's Economic Think Tank, Women's Electoral Lobby, YWCA of Australia & Children by Choice, sub 742, p 3; The National Council of Jewish Women of Australia, sub 302, p 2.

7 Witness 2, transcript Robina, 4/9/03, p 10.

negotiations and will often be influential in decisions to settle.⁸ On the other hand, there was a strong community feeling the '80-20 rule' was being used as a barrier to more parenting time with children. Evidence at hearings from individuals, community statements and audience reactions reinforced this view.⁹

2.14 According to data (Figure 2.1) provided by the FCoA from a survey of a large sample of 2000/01 cases across 3 registries undertaken for the assistance of this inquiry, residence is awarded to mothers in 78.4% of consent applications, 75.7% of cases that settle after commencement of litigation and in 69.2% of cases which are tried. Fathers are therefore 'more likely to be the resident parent where the matter goes to trial'.¹⁰ With respect to contact orders (Figures 2.2, 2.3 and 2.4), the findings of the survey were that in just over 40% of consent applications contact was awarded to the non-resident parent (both fathers and mothers) at the level of 51-108 days. This went up to 50% for settled matters and over 70% when determined by a judge.¹¹ This shows that something close to '80-20' is the most common outcome, a justifiable confirmation for the perception of a rule to that effect.

2.15 Sole residence, whether it be with the father or the mother, is still the result for the majority of separating families, whether this is agreed or ordered by a court. Statistics published by the FCoA demonstrate that since the introduction of the reforms in 1995, the incidence of orders for substantially shared parenting has declined.¹² In 1994-95 5.1% (680) of custody orders were for joint custody. In 2000-01 only 2.5% (329) of residence orders were for joint residence.¹³

8 For example: Family Law Foundation (Walters J), transcript 26/9/03, p 42; Aboriginal Legal Service of Western Australia (Brajcich T), transcript, 26/9/03, p 55; Family Law Council (Dewar J), transcript, 17/10/03, p 3; National Association of Community Legal Centres (O'Brien L), transcript, 20/10/03, p 73.

9 For example: Witness 1, transcript Coffs Harbour, 27/10/03, p 10; Witness 2, transcript Gunnedah, 27/10/03, p 15; Kevin, transcript Gunnedah, 27/10/03, p 49.

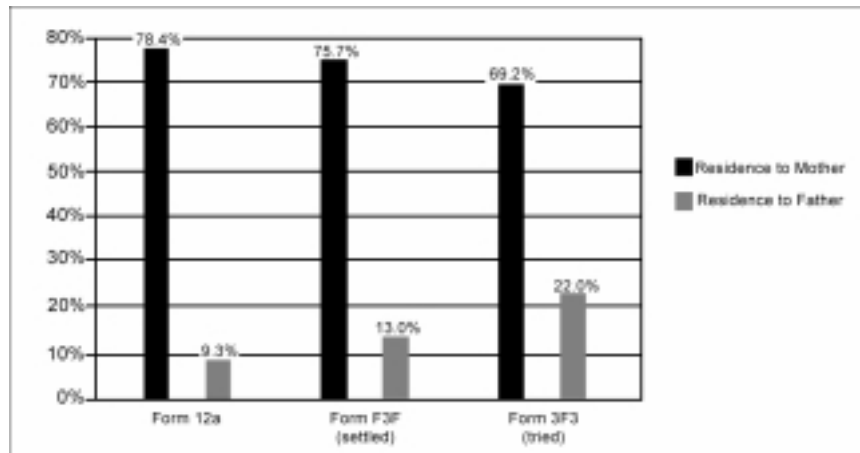
10 Family Court of Australia, sub 1550, p 8.

11 Family Court of Australia, sub 1550, pp 12-14.

12 Joint residence is where the order is for each child to spend some time residing with each parent.

13 Family Court of Australia website, viewed 12/12/03, www.familycourt.gov.au/court/html/residence_orders.html 2000-01 data includes Federal Magistrates Court.

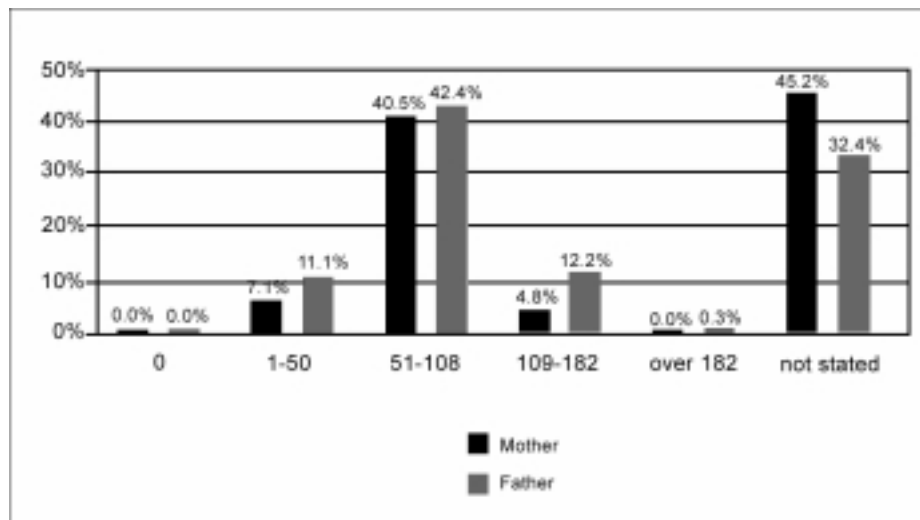
Figure 2.1 Residence to Parents by Type of Application Made 2002-2003



Note: These categories do not sum to 100%. For the purposes of clarity this figure does not depict cases in which the outcome was that the child would live with someone other than a parent, with both parents or residence was split

Source: Family Court of Australia, sub 1550, p 8.

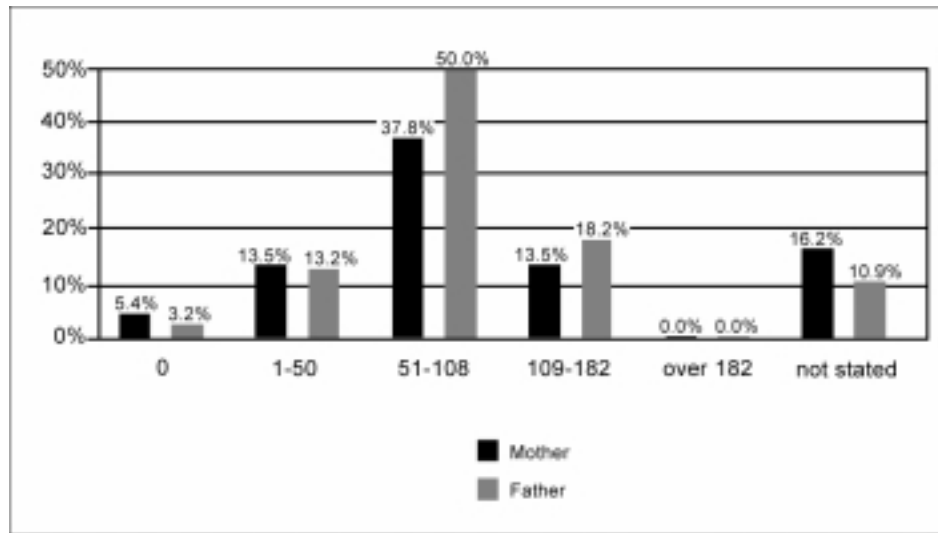
Figure 2.2 Contact Agreed in Consent Applications – 2002-2003



Note: This figure depicts the contact agreed to be granted to the non resident parent. The categories do not sum to 100% due to rounding and code errors.

Source: Family Court of Australia, sub 1550, p 12.

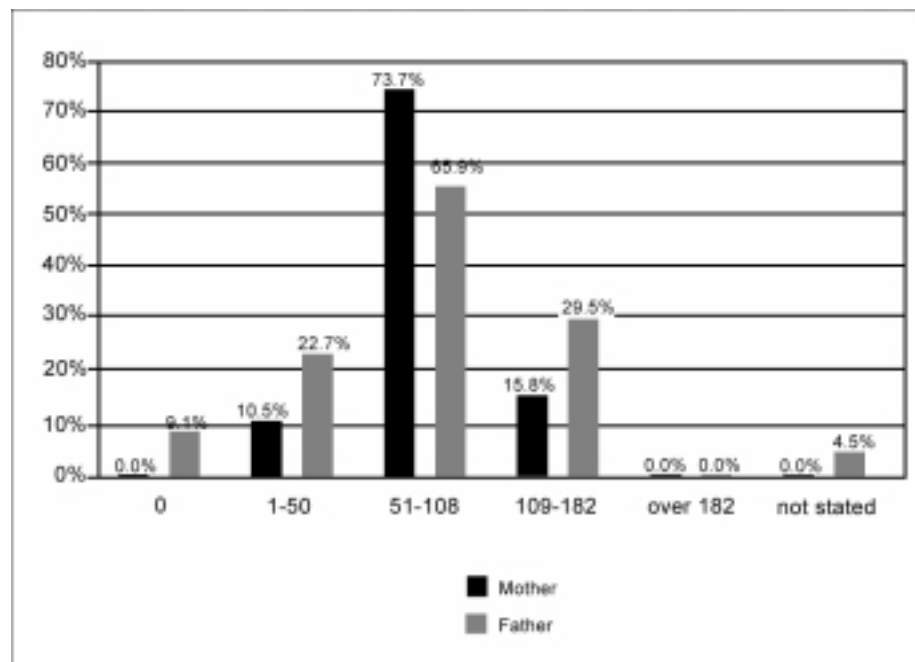
Figure 2.3 Contact Agreed to in Settled Applications – 2002-2003



Note: This figure depicts the contact agreed to be granted to the non resident parent. The categories do not sum to 100% due to rounding and coding errors.

Source: Family Court of Australia, sub 1550, p 13.

Figure 2.4 Contact Ordered Judicially Determined Matters – 2002-2003



Source: Family Court of Australia, sub 1550, p 14.

- 2.16 The importance of both parents in children's lives has been a key issue for this inquiry. However, in the case of fathers, as indicated above contact time of itself does not guarantee that they will have a positive impact.¹⁴ But:
- ... 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.¹⁵
- 2.17 Child Support Agency statistics about care arrangements within its client population, referred to in Chapter 1 also confirm that shared care is rare (4.1% at May 2003).¹⁶
- 2.18 Dissatisfaction does not appear to be confined to those who have pursued their case to a judicial decision. Many have exhausted their resources (financial and emotional) or just given up feeling bitter and resentful of the process and outcomes. The committee also heard from some who had been through costly court processes leading to a judicial decision that did not resolve the situation. Some of these subsequently negotiated a reasonable outcome through other avenues.¹⁷

Conclusion

- 2.19 The committee believes that the current experience with sole residence orders results from the distinctions between residence and contact both in the legislation and in community perception. To overcome the common '80-20' outcome, language around shared post separation parenting needs to be devised which is neutral and reflects assumptions that children will be given maximum opportunity of spending significant amounts of time with each parent.

Best interests of the child

- 2.20 The emphasis on the best interests of the child as the paramount consideration is widely supported in principle but most individuals who have come before the committee focussed on their own needs. A real child focus is not yet a reality in the system or in the behaviour of separating families. Opportunities for children's voices to be heard in the context of decisions that affect them are limited, both in the community and family

14 See also: Manly-Warringah Women's Resource Centre Ltd, sub 555, p 5.

15 Parkinson P & Cashmore J, sub 743, p 26.

16 Department of Family and Community Services, sub 1251, p 14.

17 Grant, transcript, 24/9/03, p 100; Jan, transcript, 25/9/03, p 46; Witness 2, transcript, 25/9/03, p 10.

setting and the court context.¹⁸ A separate legal representative can be appointed for children in court proceedings¹⁹ to advocate in the child's best interests, but how the role is fulfilled is still variable²⁰ and they are appointed in a minority of cases. Young adults who met with the committee stressed that in their view the 'child representative' in their own cases had not represented their view, nor from their perspective their best interests, as well as they had expected.

- 2.21 There may be scope for increased appointment of child representatives, resources permitting, but this may need to be accompanied by redirection of the role they play. Since 1995 this question of better and more involvement of children and improved focus on their position has been given more attention by researchers and practitioners but it is still a developing field.²¹

Family violence and child abuse

- 2.22 In evidence to the committee many women and women's groups raised concerns about the impact that a presumption of shared residence would have in the lives of women and children who are victims of family violence and child abuse. In that discussion they also raised concerns about deficiencies in the way the current family law system deals with cases where there are serious issues of risk. The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse.
- 2.23 The current legislation recognises that family violence and child abuse are factors that exclude or severely impact on the potential for positive shared parenting. Along with substance abuse these are important aspects for

18 Family Services Australia, sub 1023, pp 13-16; Witness 1, transcript, 26/9/03, pp 2-8; This was also borne out by informal discussions the committee had with young people in Melbourne on 12/11/03.

19 Family Law Act 1975, s 68L.

20 Family Court of Australia, sub 751, p 45; The Court has recently published guidelines for Child Representatives on its website:
http://www.familycourt.gov.au/html/child_representative.html

21 McIntosh J, Child-inclusive divorce mediation: Report on a qualitative research study, *Mediation Quarterly*, vol 18, no 1, Fall 2000, p 55; Mackay M, *Through a child's eyes: Child inclusive practice in Family Relationships Services: A report from the Child Inclusive Practice Forums, held in Melbourne, Brisbane, Newcastle, Adelaide and Sydney from August to September 2000*, Department of Family and Community Services, Canberra, May 2001, ix 49p.

consideration of what is in the best interests of the child.²² The impact of living with violence on the welfare of children is well documented.²³

- 2.24 The interaction between protection orders in State and Territory magistrates courts and family law proceedings has been examined by the Pathways Report and is further addressed in Chapter 4 of this report. Many submitters have drawn attention, however, to cases where despite the safeguards outlined in the legislation, children and adults continue to be exposed to risk even after court intervention.²⁴ Australians Against Child Abuse said:

It is disgraceful that children in cases that involve child abuse and family violence have to wait for long periods. It is not unusual for children in those situations to wait four, five or six months, in our experience.²⁵

- 2.25 The National Council for Single Mothers and Their Children Inc added to this concern by drawing attention to the problems which arise from the division of federal and state responsibilities:

We know that the Family Court does not deal with violence and abuse in a very effective manner. The Family Court itself has acknowledged that in terms of research which has been done. This has shown that because there are federal jurisdictions in the Family Court and state jurisdictions in relation to child protection, there are serious gaps in the ability of the Family Court to deal with child abuse and domestic violence. Cases are not being adequately investigated and evidence is not able to be provided to the court about the extent of exposure to children of abuse ...²⁶

- 2.26 On the relationship between family violence, substance abuse, child abuse and shared parenting, rebuttal of any presumption in cases of 'proven' history of family violence, substance abuse or of child abuse was a unanimously held view in the inquiry. The question of how allegations are dealt with are addressed in Chapter 4.
- 2.27 The impact of a finding of violence between the parents on future contact between the perpetrator and the child is a critical issue raised by many in this inquiry. Through many submissions and form letters women's groups

22 Family Law Act 1975, subs 68F(2).

23 McIntosh J, Thought in the face of violence: A child's need, *Child Abuse & Neglect*, 26, (2002), pp 229-241.

24 Briggs F, sub 1152, 3p; Dawn House Inc, transcript, 25/9/03, p 25; Kaye M, Stubbs J & Tolmie J, Domestic violence and child contact arrangements, *Australian Journal of Family Law*, 17, (2003), pp 93-133.

25 Australians Against Child Abuse (Tucci J), transcript, 28/8/03, p 14.

26 National Council for Single Mothers and Their Children (Hume M), transcript, 24/9/03, p 19.

and others have advocated for the adoption in Australia of provisions like those introduced into the New Zealand Guardianship Act in 1995. For example, in evidence the Immigrant Women's Speakout Association of New South Wales said on the New Zealand approach:

... The New Zealand legislation is a very progressive one and does protect women and children that are in a situation of domestic violence. It recognises that witnessing domestic violence in itself is damaging to children – the length of witnessing domestic violence and perpetrating domestic violence or being a victim of domestic violence in your own relationship when you grow up ...²⁷

- 2.28 In summary, these amendments provide that when there has been a finding of violence against a parent, they are presumed to be an unsafe parent and if seeking contact or residence have to prove to the court that the child will be safe.²⁸ The exclusion of a violent partner from the child's life should be assessed on individual circumstances providing the child is not placed at risk.

Conclusion

- 2.29 The committee is of the view that there is a need to add to the principles of Part VII of the FLA, set out in subsection 60B(2) a specific reference to a child's right to preservation of their safety.

Shared parenting

- 2.30 Differences of language used in this debate about similar concepts causes confusion. Concepts need to be clearly defined to avoid misunderstandings. Chapter 1 has outlined the framework and language of the existing legislation for post separation parenting arrangements in Australia.
- 2.31 There have been many submissions that have drawn the committee's attention to legislation in the various states of the USA and other countries as examples for Australia to consider.²⁹ Many of these start with concepts

27 Immigrant Women's Speakout Association of New South Wales (Mazzone M), transcript Blacktown, 1/9/03, p 25.

28 The New Zealand approach provides a two stage process for parenting disputes involving allegations of violence. The first deals with the allegation of violence and the second with the parenting issue.

29 Lone Fathers' Association (Aust) Inc, sub 1051, pp 11-12; Joint Parenting Association, sub 1153, pp 36-38; Family Court of Australia, sub 751, pp 55-56; Parkinson P & Cashmore J, sub 743, pp 18-23; Attorney-General's Department, sub 1257, pp 21-22.

of 'joint custody' but it means different things in different contexts.³⁰ Failing to distinguish between legal and physical custody skews the arguments about experiences with, or the prevalence of, a joint custody presumption.³¹ Joint physical custody does not usually mean equal division of care. Some submissions point out that in reality (but with one possible exception³²) no jurisdiction in the English speaking world has created a rebuttable presumption of equal time.³³ However, there is a common emphasis on shared parental responsibility (joint legal custody) with some specifying a preference for shared physical care arrangements that divide time children spend with each parent in substantial proportions (from 30 to 50%).

Parental Responsibility

- 2.32 Joint decision making is a key feature of sharing parental responsibility in most overseas jurisdictions.³⁴ Shared decision making needs to be viewed and supported as a valued part of post separation parenting. How much time children should spend with each parent, is a separate consideration.
- 2.33 Section 61C of the FLA specifies that parental responsibility lies with each parent. In practice this is often ignored. The parent with residence usually assumes the power because this is the practical outcome of living arrangements rather than as the result of legal exclusion. In fact courts do not pay attention to shared responsibility because this is the 'ordinary position'.³⁵
- 2.34 The committee is committed to an approach which is based on a principle that both parents should remain involved in their children's lives and maximises the time children spend with each parent. For example the Iowa Code 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

30 Attorney-General's Department, sub 1257, p 21; Australian Institute of Family Studies, sub 1055, p 9.

31 Shared Parenting Council of Australia, sub 1050, p 51; Lone Fathers' Association (Aust) Inc, sub 1051, p 12.

32 The one exception appears to be Louisiana. See Parkinson P & Cashmore J, sub 743, p 18.

33 Attorney-General's Department, sub 1257, pp 21-22; Parkinson P & Cashmore J, sub 743, p 18; Family Court of Australia, sub 751, pp 53-57.

34 Ryrstedt, E. Joint decisions – A prerequisite or a drawback in joint parental responsibility?, *Australian Journal of Family Law*, 17, (2003), p 155.

35 Family Court of Australia (Chisholm J), transcript, 10/10/03, p 21.

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.³⁶

- 2.35 The committee has considered the concept of 50/50 shared residence (equal time), raised by the terms of reference, in the context of the evidence referred to above. It has concluded that the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. They should start with an expectation of equal care. However, the committee does not support forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent. Rather, the committee agrees that, all things considered, each parent should have an equal say on where the child/children reside. Wherever possible, an equal amount of parenting time should be the standard objective, taking into account individual circumstances.

Conclusion

- 2.36 The committee's understanding of shared parenting is what is often referred to as 'joint legal custody'. It encompasses shared responsibility as recognised by the Family Law Act and shared decision making about the major aspects of child rearing. Shared parenting of this kind promotes and enables continued involvement of both parents in the lives of their children. With respect to shared decision making, there are many circumstances where the law currently attaches the responsibility to either parent rather than both. Shared parenting will in these situations mean a requirement to consult rather than a requirement that the parents are jointly responsible.
- 2.37 A particular practical impact of shared parenting which parents and others will need to consider is the fact that normal practices around information sharing after separation will need to change. If parents are to share responsibilities around a child's health, they will both have to have access to medical records and Medicare information. If they are to share in the child's educational development, schools will need to make reports and other school activity information routinely available to both parents.

Parenting time

- 2.38 The committee believes there is clearly a need to examine ways in which the time children spend with each parent after separation can be
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36 Parkinson P & Cashmore J, sub 743, pp 22-23.

maximised. The committee also believes that shared residence arrangements should become the norm, wherever practicable, rather than the current emphasis on sole residence.

- 2.39 Two aspects of an equal time template have been highlighted. First, there are dangers in a one size fits all approach to the diversity of family situations and the changing needs of children. Secondly, there are many practical hurdles for the majority of families to have to overcome if they are to equally share residence of children. Many have pointed to the increased risk of exposure of children to ongoing conflicted parental relationships³⁷ and the instability that constant changing would create for children. Family friendly workplaces are rare³⁸, as are the financial resources necessary to support two comparable households³⁹. Some parents lack the necessary child caring capabilities. Distance between households creates problems for transport and for schooling. Second families can also bring complications. Indigenous families' approach to parenting does not fit with the expectations of equal time.⁴⁰
- 2.40 Some have talked about the factors that support successful equal sharing, such as cooperative relationships, geographical proximity, prior sharing of parental care, good communication, agreement about matters relevant to the child's day to day care, parental commitment to the arrangement and to a focus on the child's interests.⁴¹ The more these characteristics exist, the more likely a shared arrangement will be workable and positive for the child.
- 2.41 In all this discussion about when equal time will work, and when it will not, there are no black and white answers. The committee heard from a number of people who appear to have been able to manage arrangements of equal or close to equal care in spite of poor communication between parents and even where there has been significant conflict or hard fought court cases.⁴² On the other hand, Dr McIntosh said there is a line to be drawn somewhere in that scenario to ensure that shared arrangements where the conflict is high are not more damaging to the children. Dr McIntosh concludes:

37 McIntosh J, transcript, 20/10/03, pp 6-7.

38 Human Rights & Equal Opportunity Commission, sub 1052, p 17.

39 Harding A, transcript, 3/11/03, p 15.

40 Top End Women's Legal Service (Hughes C), transcript, 25/9/03, p 35; Family Court of Australia, Indigenous Family Consultant Program (Akee J), transcript, 5/9/03, pp 40-41.

41 Family Law Section of the Law Council of Australia, sub 1021, pp 6-7; Family Court of Australia, sub 751, p 25; Relationships Australia, sub 1054, pp 16-17.

42 Grant, transcript, 24/9/03, p 100; Martin, transcript, 24/9/03, p 96; Jan, transcript, 25/9/03, p 46.

The findings ... are unequivocal, and unapologetic regarding parental conflict and impacts on child development. Yes, children are strong, yes, development is robust, no, divorce does not have to be damaging, yes, parents basically want the very best for their children; and, yes, enduring parental conflict places the odds against all children, in all families.⁴³

- 2.42 The AIFS states that ‘... Each child and each family circumstance is unique, so you need to take each case on its merits’. Decision making rules should encourage ‘... different and more creative ways that parents can arrange care, so that, if parents separate, they can look at different ways of doing things...’⁴⁴

Conclusion

- 2.43 A key part of the committee’s view of shared parenting is that 50/50 shared residence (or ‘physical custody’) should be considered as a starting point for discussion and negotiation. The committee acknowledges that there is a weight of professional opinion that stability in a primary home and routine is optimal for young children in particular. The objective is that in the majority of families, parents would consider the appropriateness of a 50/50 arrangement in their particular circumstances taking into account the wishes of their child/children and that each parent should have an equal say as to where the children reside.
- 2.44 In the end, how much time a child should spend with each parent after separation, should be a decision made, either by parents or by others on their behalf, in the best interests of the child concerned and on the basis of what arrangement works for that family.

Relocation

- 2.45 Some of the most difficult cases that family law courts have to deal with are those that involve questions of parental relocation following separation and how this impacts on the child’s relationship with the other parent. As the FCoA has pointed out in its submission:

... The opportunities which separation provides for parents to re-partner, to reframe their lives and to put distressing experiences behind them makes them a particularly mobile population.⁴⁵

43 McIntosh J, Enduring conflict in parental separation: Pathways of impact on child development, *Journal of Family Studies*, vol 9, no 1, April 2003, p 76.

44 Australian Institute of Family Studies (Smyth B), transcript, 13/10/03, pp 11, 25.

45 Family Court of Australia, sub 751, p 39.

- 2.46 The Court pointed out that decisions in these cases will, like other parenting cases, be made on the basis that the best interest of the child is the paramount consideration. The case of *B and B*⁴⁶ which examined the impact of the 1995 amendments on this question confirmed this. Evidence to the inquiry pointed to the fact that geographic distance is a factor that works against shared physical care of children.⁴⁷ Relocation obviously creates that distance.
- 2.47 Shared parental responsibility will necessarily constrain the ability of separated parents to move freely. Moving interstate, overseas or even across to another side of a city is an important decision in the life of the child as well as the parent and should be decided jointly. If the parents cannot agree on it their recourse is to seek a decision by a court. Whilst the best interests of the child remains paramount it is not the sole consideration according to the Full Court of the Family Court⁴⁸. 'To the extent that the freedom of a parent to move impinges upon those interests, that freedom must give way'.

Conclusion

- 2.48 The committee believes truly shared parental responsibility will inevitably mean that relocation of one parent, whether the primary carer or the other parent, should be less of an option.

Steps to shared parenting

- 2.49 Essentially the concept of shared parenting the committee has in mind is structured with a number of levels:
- The first is where fully shared decision making is appropriate. It comprises joint decisions about all aspects of post separation parenting, including jointly deciding where the child will live and how much time they will spend with each parent. This is the vision for post separation parenting in the future.
 - The second level has joint decision making as the substance of the arrangement but where certain aspects, such as the time they will spend with each parent is separated from joint responsibility and assigned to one or other parent for reasons either agreed between them, or imposed by an external decision maker, and incorporated into a parenting plan (see below).

46 *B and B (Family Law Reform Act 1995)* (1997) FLC 92-755 at 84,176, see Family Court of Australia, sub 751, p 17.

47 Top End Women's Legal Service (Hughes C), transcript, 25/9/03, p 36; Cashmore J, transcript, 13/10/03, p 35.

48 See Family Court of Australia, sub 751, Appendix 2, p 68.

- The third level would be applicable to families where issues like entrenched conflict, family violence, substance abuse or child abuse mean that joint parental decision making is not possible at the time of separation. A presumption against shared parenting may include referral to parenting programs, anger management, supervised contact services and the like. These opportunities are discussed further in Chapter 3.
- The final level of last resort would be where the circumstances are such that a child would not be safe in the care of a parent as a consequence of past family violence or serious child abuse, including sexual abuse. In such a case, a court may need to determine that contact between the child and that parent should not occur at all for the foreseeable future.

Conclusion

- 2.50 It is the committee's view that such a four part structure would enable a variety of post separation parenting outcomes that reflect the unique circumstances of each family and at the same time maximise the opportunity for ongoing involvement of both parents in their child's life.

Ways of increasing shared parenting

Create a rebuttable presumption

- 2.51 Legal experts explained to the committee when a rebuttable presumption in law is usually relevant and how it works.

Typically a legal presumption is applied where a fact is to be established and rather than impose the costs of proving this fact when it is almost certainly the case, the law says 'take this fact as a given, subject to proof of facts to the contrary which rebut the presumption'.⁴⁹

- 2.52 In the present context, the Attorney-General's Department stated that:
- should an equal time presumption be introduced into the Family Law Act, one possible outcome of its operation could be that it would effectively replace the principle that the best interests of the child are the paramount consideration ...⁵⁰

But this is not at all clear.

Justice Chisholm stated because this would be a new kind of approach to family law legislation:

49 Family Law Council, sub 1400, p 6.

50 Attorney-General's Department, sub 1257, p 19.

... the introduction of such a presumption would be likely to lead to litigation to work out what it meant and how it related to other provisions of the Act ...⁵¹

2.53 The Attorney-General's Department has said:

Presumptions in legislation work best where they represent the norm or usual situation. ... presumptions of law are convenient methods of proving elusive facts...⁵²

2.54 As noted above, only a very small percentage of separated families have equal time arrangements in place. It has been argued that there would be a significant increase of litigation as a result because the majority would not fit the presumption.⁵³ Others have argued that a presumption would have the opposite effect because it would eliminate the need for litigation for those who currently feel they have to argue against sole residence in order to get the level of contact they seek.⁵⁴

2.55 These arguments relate to the specific presumption that was put to the committee by the terms of reference. They are less relevant to a presumption that both parents share in responsibility for their children. In fact this is the presumption that some have indicated is already implicit in sections 60B and 61C of the FLA. The committee has heard in evidence that in many people's experience this implied presumption is ignored. It has concluded that to increase the chances of truly shared parenting it needs to be made more explicit in the FLA. The committee has concluded from this that the provisions in the FLA need to be further amended to give this intention greater emphasis.

Reinforcing the intention of Parliament

2.56 As discussed above, the disappointment with the implementation of the 1995 reforms to the FLA has been a failure in practice, particularly in court outcomes, to match the expectation of Parliament for shared parenting. The committee believes that the Parliamentary intention could be significantly reinforced if courts were required to consider the presumption of shared responsibility in each case that they consider. Whilst the committee acknowledges that Parliament cannot dictate what orders courts will make, the legislation can provide guidelines for the

51 Chisholm J, sub 1620, p 3.

52 Attorney-General's Department, sub 1257, p 19.

53 This point has been made in numerous submissions; eg. Attorney-General's Department, sub 1257, p 20; Family Law Section of the Law Council of Australia, sub 1021, p 2; Family Law Council, sub 1400, p 13; National Association of Community Legal Centres, sub 836, p 1.

54 Shared Parenting Council of Australia, sub 1050, p 27.

exercise of judicial discretion. Courts can also play an educative role in terms of the legislative intent.

Conclusion

2.57 When courts are making parenting orders under Part VII of the FLA they should be required to provide parties with an explanation of the meaning of shared parental responsibility. This direction could be incorporated into section 61D.

Parenting plans

2.58 If it is assumed that the majority of families will start from a position of equally shared responsibility for their children, the next question has to be, how will that impact on the practical arrangements for the care of the children. Parenting plans were first recommended by the Family Law Council's Report in 1992⁵⁵ as a way to shift the focus of post separation parenting away from who is the better parent towards cooperation around sharing parental responsibility.

The idea of parenting plans has essentially grown out of attempts to resolve the sole custody versus joint custody debate.⁵⁶

2.59 Parenting plans assume a joint decision making capacity and responsibility to sort out and agree upon such things as the physical care of the child, including where they should live and how much time they should spend with each parent, as well as how the parents will allocate their decision making. A parenting plan can be as detailed or as general as the parties to it require, depending on their capacity to communicate and be flexible. For example, a parenting plan may state:

- how much time children will spend with each parent;
- all the practical arrangements to make this work;
- who will be responsible for making decisions about certain listed things;
- that on some specific issues those decisions will be made jointly; and
- when the parents cannot agree, what will happen to resolve the difference, such as referral to mediation, arbitration or to the courts.⁵⁷

2.60 The Family Law Council has more recently recommended that the provisions for registration of parenting plans in the FLA be repealed.⁵⁸

55 Family Law Council, *Patterns of parenting after separation : A report to the Minister for Justice and Consumer Affairs prepared by the Family Law Council, Canberra*, AGPS, Canberra, April 1992, 66p.

56 Family Law Council, April 1992, p 38.

57 This is not intended to be a comprehensive list, purely illustrative of the concept.

This was primarily because this process was cumbersome and made them too inflexible, confusing and unpopular with family lawyers.⁵⁹ But they also concluded that parents should be encouraged to develop them, particularly with a mediator, as a means of ensuring the best interests of the child, minimising conflict and taking responsibility, using the legal system as a last resort.⁶⁰

- 2.61 The advantage parenting plans have over consent orders is that the latter often lead to subsequent expensive disputes over matters of detail. This can be avoided if the detail stays in a plan which can be amended and negotiated over time.
- 2.62 The binding intentions of the content could be reinforced by requiring courts or other bodies who are called upon to either enforce or vary a parenting plan to be required to have regard to its terms and intent. Registration may therefore be useful, provided the process for doing so is simple and does not compromise flexibility.

Conclusion

- 2.63 Many witnesses before the committee have said that parenting plans can play a role in helping parents to cooperatively manage their responsibilities.⁶¹ The committee sees parenting plans as part of the package in support of a rebuttable presumption of shared parenting. Mechanisms for putting them in place are discussed in chapter 4.

Consult the children

- 2.64 The committee considered research about the benefits for children and their long term welfare of having both parents involved in their lives.⁶² Several people have also advocated strongly for children to be given a

58 Family Law Council, National Alternative Dispute Resolution Advisory Council, *Letter of advice to the Attorney-General on Parenting plans*. Family Law Council and NADRAC Secretariats, Canberra, March 2000, vii 16p appendices.

59 Family Law Council, NADRAC, Mar 2000, p 15.

60 Family Law Council, NADRAC, Mar 2000, p 15.

61 For example: Muswellbrook Women's and Children's Refuge Inc, transcript Gunnedah, 27/10/03, p 40; Witness 1, transcript Coffs Harbour, 27/10/03, p 4; Law Council of Australia (Dewar J), transcript, 17/10/03, p 11; Parkinson P, transcript, 13/10/03, p 34; Shared Parenting Council of Australia (Greene G), transcript, 24/9/03, p 74.

62 Bauserman R, Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review, *Journal of Family Psychology*, vol 16, no 1, (2002), pp 91-102.

greater say about what parenting arrangements they want.⁶³ Research shows children respond positively to being consulted.⁶⁴

- 2.65 Some caution has been expressed about laying the responsibility on children to make choices. There are now well researched models for consulting with children which take this into account but enable their views to be influential.⁶⁵

Conclusion

- 2.66 The committee believes that a requirement to consult with children on these issues may well encourage decision making based on their needs and attachments rather than parental needs.⁶⁶

Education and support

- 2.67 Many coming before the committee have agreed that there is a need for community education about the objectives of the current family law legislation and the benefits for children of cooperative and involved parenting both before and after separation.⁶⁷ For example:

... a community education and awareness campaign to educate the wider community about the benefits of children having quality relationships with both parents and extended family members, such as grandparents, following separation. ... The aim would be to shift community expectations of parenting after separation. Of course, the community includes the workplace, and we hope that they would listen as well ...⁶⁸

- 2.68 Individuals' actions are often influenced by what they perceive as the norm in the community. An education strategy could provide the opportunity for government to promote the preferred parenting model, including the use of parenting plans and to have an impact on behaviour.
- 2.69 The committee heard a number of examples of successful shared parenting.⁶⁹ But it may not come easily to everybody, especially if the
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63 Family Services Australia, sub 1023, p 11; Relationships Australia, sub 1054, p 27; Eyre Peninsula Women's & Children's Support Centre, sub 1163, p 1.

64 Family Services Australia, sub 1023, p 11.

65 McIntosh J, *Child Inclusive Divorce Mediation: a Report on a Qualitative Research Study*, Mediation Quarterly, vol 18, no 1, p 55.

66 Family Services Australia, sub 1023, p 18.

67 Central Coast Domestic Violence Committee, transcript, 26/10/03, p 27; Moloney L, transcript, 20/10/03, p 21; Family Law Council (Dewar J), transcript, 17/10/03, pp 7-8; Top End Women's Legal Service (Hughes C), transcript, 25/09/03, p 42; Bill, transcript, 25/09/03, pp 46-47.

68 Relationships Australia(Gibson D), transcript, 20/10/03, p 27.

69 For example: Witness 3, transcript Blacktown, 1/9/03, pp 39-46.

separation has been painful or acrimonious. There is a different call on parenting skills after separation.

... It is not that the separating population have worse parenting skills; it is that separation imposes an assault on parenting capacity and it is conflict that drags parents down and compromises sorely their ability to be attuned to their children's needs ...⁷⁰

- 2.70 Making decisions jointly usually needs effective communication and problem solving skills. Increased access to parenting support services may also increase the capacity for shared parenting for those who are having difficulty dealing with the additional stresses of separation.⁷¹ This is discussed further in Chapter 3.

Conclusions

- 2.71 Despite the intentions of the Family Law Reform Act of 1995, shared parenting and shared physical care have not become a reality for the vast majority of separated families. There are still winners and losers and children are still treated as the spoils of divorce and separation. Whilst legislation cannot make people behave reasonably or be good parents, it can provide them with a template within which to develop their own approaches to their parenting responsibilities. The principles of the 1995 reforms remain relevant today. The committee believes that shared parental responsibility needs to become the standard. It believes that this can be achieved at least in part by making specific adjustments to the legislation.
- 2.72 It would be dangerous to impose inflexible models in legislation which impacts on the private lives of the whole diversity of Australian families. Flexibility acknowledges the diversity of family circumstances. The committee believes that a preferred starting point might encourage maximum parental involvement.
- 2.73 Legislation will not achieve all this on its own and may need to be supported by a range of other initiatives.

Is changing the Family Law Act enough?

- 2.74 Legislation can have an educative effect on the separating population outside the context of court decisions, if its messages are clear, it is

70 McIntosh J, transcript, 20/10/03, p 6.

71 Relationships Australia, sub 1054, p 25.

accessible to the general public and well understood by those who offer assistance under it. Most separating families reach agreements themselves, some with more help than others. Many will do this within the framework provided in legislation, many will be influenced by perceptions of what that framework is. It is important that the perceptions match the framework if the intended outcomes are to be achieved.

- 2.75 The committee has concluded that this divergence between the provisions of the Act and community perceptions about it is where the 1995 reforms appear to have failed in achieving a shared parenting presumption.
- 2.76 Many submitters have offered proposals for legislative amendment which would increase the possibility of shared parenting outcomes. The committee has found these suggestions helpful and taken account of them in drawing together the recommendations below.⁷² The committee has made some suggestions for drafting the legislative amendments. It also commends to government the suggestions made in submissions for further consideration.⁷³
- 2.77 The committee has also concluded that community perception of legislation is as critical to its success as its actual content. Any legislative change which the government decides to implement may therefore need to be accompanied by community and professional education. This has been a common practice in other areas of law reform, such as taxation and health.
- 2.78 Such a strategy should set the community standard of substantially shared post separation parenting along with ways to measure achievement against that standard.

Retrospectivity

- 2.79 Most of the individuals who contributed to this inquiry have already been through separation or divorce. Many have either made arrangements under the current system or have court orders already in place. The committee is concerned that there may be an expectation that outcomes from this inquiry will be able to make an automatic difference to their situations.
- 2.80 Given the dynamic nature of families and the capacity for any court orders to be reviewed and varied when there has been a change in circumstances, the committee does not propose retrospective reforms. Clearly existing

72 See in particular Family Law Council, sub 1400, 25p; Parkinson P & Cashmore J, sub 743, 46p; Aboriginal Legal Service Western Australia, sub 1141, 9p.

73 Key documents are: Family Law Council, sub 1400, 25p; Aboriginal Legal Service of Western Australia, sub 1411, 9p; Parkinson P & Cashmore J, sub 743, 46p.

court orders should not be overturned or amended without agreement between the parties or application to the courts to vary them. All the courts who have submitted to this inquiry have raised concern about the impact of legislative change on their workloads, and that there are signs of this already apparent since the announcement of this inquiry.⁷⁴ Legislative change may create a serious increase in workload for the courts whether the provisions are specifically retrospective or not.

- 2.81 The committee considers that there will need to be a range of possible mechanisms which will enable people to re-negotiate their arrangements in light of the recommended reforms, preferably without the need to return to the courts. The committee strongly believes that the legislation should not be amended without government also addressing the system issues discussed in Chapter 4.

Recommendation 1

- 2.82 **The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility, as the first tier in post separation decision making.**

Recommendation 2

- 2.83 **The committee recommends that Part VII of the *Family Law Act 1975* be amended to create a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse.**

Recommendation 3

- 2.84 **The committee recommends that Part VII of the *Family Law Act 1975* be**

74 Family Court of Western Australia, sub 1111, p 2; Family Court of Australia (Nicholson CJ), transcripts, 10/10/03, p 7; Federal Magistrates Court, sub 741, p 2.

amended to:

- provide that the object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents are given the opportunity for meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child;
- define 'shared parental responsibility' as involving a requirement that parents consult with one another before making decisions about major issues relevant to the care, welfare and development of children, including but not confined to education – present and future, religious and cultural upbringing, health, change of surname and usual place of residence. This should be in the form of a parenting plan;
- clarify that each parent may exercise parental responsibility in relation to the day-to-day care of the child when the child is actually in his or her care subject to any orders of the court/tribunal necessary to protect the child and without the duty to consult with the other parent;
- in the event of matters proceeding to court/tribunal then specific orders should be made to each parent about the way in which parental responsibility is to be shared where it is in the best interests of the child to do so; and
- in the event of matters proceeding require the court/tribunal, to make orders concerning the allocation of parental responsibility between the parents or others who have parental responsibility when requested to do so by one or both parents.

Recommendation 4

2.85 The committee recommends that Part VII of the *Family Law Act 1975* be further amended to remove the language of 'residence' and 'contact' in making orders between the parents and replace it with family friendly terms such as 'parenting time'.

Recommendation 5

2.86 The committee recommends that Part VII of the *Family Law Act 1975* be further amended to:

- **require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, develop a parenting plan;**
- **require courts/tribunal to consider the terms of any parenting plan in making decisions about the implementation of parental responsibility in disputed cases;**
- **require mediators, counsellors, and legal advisers to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable; and**
- **require courts/tribunal to first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.**

Recommendation 6

2.87 The committee recommends that the Commonwealth Government develop a wide ranging, long term and multi level strategy for community education and family support to accompany legislative change and to promote positive shared parenting after separation, as was recommended by the Family Law Pathways Advisory Group.

