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# Custody battle

The House of Representatives Family and Community Affairs Committee is conducting a six-month inquiry into 'child custody' arrangements in the event of family separation. The inquiry will look at whether, in the event of separation, there should be a presumption that children will spend equal time with each parent; and, if so, in what circumstances such a presumption could be rebutted. The inquiry will also look at child support payments, and grandparents' rights of contact. *About the House* asked Patrick Parkinson to examine some of the issues.

When he announced the establishment of the House of Representatives inquiry in June, the Prime Minister expressed concern that many boys growing up in single parent families lack male role models both at home and in school until their teenage years.

There is reason to be concerned.

My research this year with Bruce Smyth of the Australian Institute of Family Studies on data arising from the Household Income and Labour Dynamics survey found that 36 per cent of Australian children whose parents were not living together had not seen their father in the last 12 months. A further 17 per cent had day-only contact. Only 48 per cent had the children to stay overnight. This was a study of more than 1000 separated parents, and of course it includes parents who were never married and had not lived together. Thirty-two per

cent of divorced fathers had not had contact with their children in the last 12 months.

Nevertheless, it is in one way curious that the parliament should establish an inquiry into 'child custody arrangements', for the very concept of child custody no longer exists. 'Custody' is an old-fashioned and outmoded concept. Typically in the past, one parent had 'custody' while the other had 'access'. At common law, custody included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child's education and religion. An access parent was still a legal guardian, but that meant little.

The terminology of custody and access was abolished by the *Family Law Reform Act 1995*. The Family Law Act now provides that whatever happens to the relationship of

husband and wife (or de factos), they remain parents. The Act says children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development (and that includes grandparents). The Family Court or the Federal Magistrates Court will make orders about the practical issues of residence and contact if people cannot agree between themselves; but in the great majority of cases, both the parents retain parental responsibility.

So it is not the case now in Australia that the courts have to decide between the mother or the father for custody. Nor is it the case, as Senator Len Harris told the Senate when introducing his *Family Law Amendment (Joint Residency) Bill* last year, that a "child walks into the Family Court with two parents, and walks out with only one".

If we abolished the idea of custody in 1995, why are politicians now talking about introducing a "rebuttable presumption of joint custody"? The concept comes from the United States. Joint custody really began as an alternative to the common law concept of sole custody in which the custodial parent has almost all the decision-making power as well as the day-to-day care of the child. A joint custody order signals that both parents have legal responsibility for the child and should be involved in the child's upbringing after separation. In that sense, the Family Law Act in Australia gives parents "joint custody" automatically, although it may be necessary for a court to modify that position, and to restrict or prevent contact, if it is necessary for the safety and wellbeing of a child.

American law does not go as far as our Family Law Act. All the American states have joint custody or its equivalent as an option. Eleven states make it a presumption that it is in the best interests of the child to have joint custody after divorce even if the parents don't agree. In a number of other states, such as California and Illinois, there are specific legislative provisions to the effect that there is no presumption either in favour or against joint custody or any other legal arrangement.

Why then should lobby groups advocate joint custody in Australia? The reason is that it is often confused with sharing the day-to-day care of the child equally. For example, Bettina Arndt, writing in the Sydney Morning Herald and the Melbourne Age (20 June 2003) indicated that a presumption of joint custody means that "divorcing parents will share equal care of their children, unless there are strong reasons against it" and that the system "operates widely in the US".

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This is simply not the case. Generally, a joint custody order in America indicates only that both parents will continue to have substantial involvement in the life of the child. In most cases, one parent is still designated as the primary caregiver and has physical custody, but the other has substantial contact. Typical orders for residence and contact in Australia—for example, that the non-resident parent should have the child to stay for two nights every other weekend and half the school holidays—would normally be characterised in the United States as a joint custody order.

It is possible for the courts in the US also to make an order for 'joint physical custody'. Most joint custody orders are not for joint physical custody. For example, a study of decrees in Wisconsin found that in 1992, 81 per cent of orders were for joint legal custody, but only 14.2 per cent were orders for joint physical custody. Similar results were found in California. However, even a joint physical custody order does not necessarily provide for an equal time arrangement. It means normally that the child should live with each parent for significant periods of time. Normally if a parent sees the child for at least 30 per

cent of nights, then it is classified as a 'shared parenting' or 'joint physical custody' arrangement.

There are one or two states which go further. For example, Louisiana has an exhortation in its law that "to the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally". However it is only an exhortation. Louisiana law also requires that the Court should nominate a parent with whom the child primarily resides, and that in practice is still what happens in most cases. Oklahoma encourages courts to allow substantially equal access when making temporary orders, but not long-term ones. These states are the exception, not the norm, in America.

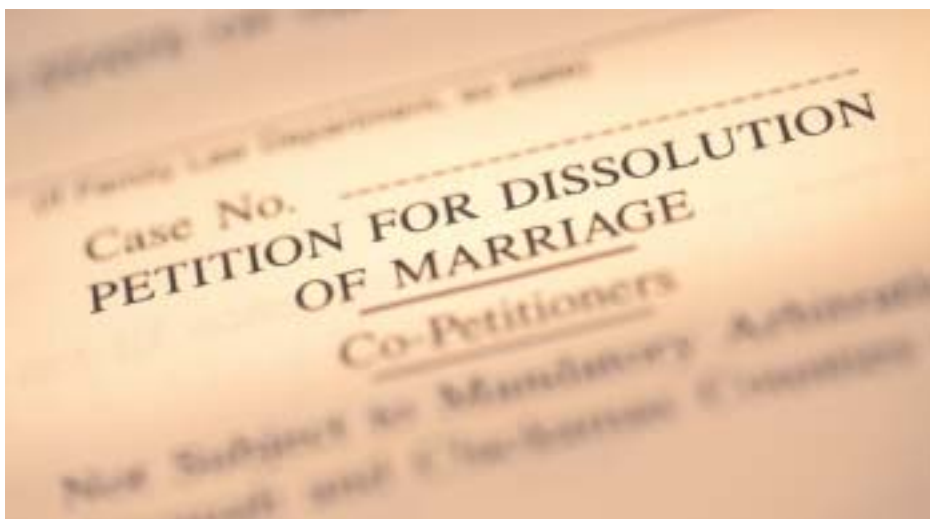
To the best of my knowledge, there is not a single jurisdiction in the world which has a *presumption* in favour of equal time arrangements. Is it a good idea even so? That will be one issue for the inquiry to consider. The issue at hand, however, is not whether an equal time arrangement is a feasible or beneficial option for some families; the issue is whether there should be a starting-point presumption in favour of this.

Such a presumption means that in the event of conflict, a parent must argue against such an arrangement rather than arguing for it. Conventional wisdom until

households with sufficient bedrooms for the children to sleep comfortably and sufficient furnishings, toys and other such needs. In a study by the Australian Institute of Family Studies, based on interviews conducted in 1997, the median value of net asset wealth of couples on separation (excluding superannuation) was \$124,101. In most divorces, there is simply not enough property to go around enabling re-creation in two households the equivalent of what the family had in one.

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

Thirdly, an equal time arrangement requires a lot of cooperation. The logistics are not easy to manage. Children may forget to bring a school uniform, or homework books from one house to another, and these issues have to be resolved without



now has been that most children are best off with a primary home and caregiver while having substantial contact with the other parent. Often this is the only feasible arrangement.

Certainly equal time arrangements work well for some families, and they are increasingly common. There are four obvious conditions for such an arrangement to work. Firstly, it requires the parents to have adequate housing to provide two homes for the children. That means two

blaming the children. There may also be differences in parenting styles which need to be addressed. Goodwill, trust, and a business-like working relationship help considerably. Divorce may involve extreme levels of estrangement between the parents, and there are some parents for whom an equal time arrangement would not be a workable compromise. Where there has been serious domestic violence or child abuse, shared parenting is obviously contra-indicated.

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uncomfortable with a parent's new partner. We need to listen carefully to the voices of the children. There is a danger that the pressure for reform of laws about parenting after separation will lead to changes which will aim at achieving fairness between the parents rather than fairness to the children.

For all these reasons, a presumption of equal time sharing is unlikely to fit well with the circumstances of a large majority of families after separation. If the law creates a legal presumption that one kind of arrangement is best when in the great majority of cases a different arrangement will be best, it is just a recipe for increased conflict, frustration and litigation.

This doesn't mean there are no other options for the government and parliament to promote change for the better. Children need both their parents, and we need to find ways to encourage non-resident parents, the majority of whom are fathers, to remain connected with their children and involved in their lives whatever happens to the relationship with the other parent. The psychological research indicates it is best for children after separation to have the active involvement of both parents in cases other than those involving persistent conflict, violence or abuse. This means more than being a visiting parent. It is not taking children on outings every other weekend that makes the difference after divorce; it is continuing to be involved in actually parenting the children. That means having them overnight, guiding, disciplining, helping with homework, taking the children to sports activities—and yes, having lots of fun as well.

The Family Law Act already encourages both parents to remain actively involved after divorce, but if parliament considers that such legislative statements are insufficient, then the law could be further amended. For example, the law could state that it is presumed to be in the best interests of the child that both parents remain actively involved in the children's lives after separation unless there is a history of violence or abuse, and that parenting time should be allocated accordingly. That is not a presumption of equal time parenting, but it expresses the

same spirit in a more flexible way. Courts could also be required to consider the option of a substantially equal time arrangement in cases where both partners are seeking a residence order.

More important, however, than changes to legislation is to look at the processes for resolving conflicts. Court resources over the last 15 years have simply not kept pace with the massive rise in conflict over children's issues requiring court involvement. Waiting lists for trial in some parts of the country are as long as 18 months in the Family Court. While the Federal Magistrates Court has been a great initiative, waiting periods are lengthening there also. Because the courts are overloaded, they cannot deal properly with interim applications. This means that serious issues about women and children's safety may receive only a cursory examination unless the case reaches a full trial. The courts do not have any capacity to conduct an independent examination of serious child protection concerns, and can only rely upon the findings of state and territory child protection services in a minority of cases. Processes for enforcement of contact orders are too cumbersome, expensive and time-consuming, despite changes to the law three years ago. In terms of grandparents' desire to have contact with their children, the law itself needs no amendment, but the processes to get a legal order are so expensive and take such a long time that it is easy to see why grandparents are frustrated and angry.

There is an old saying that a stitch in time saves nine. Nowhere is this more true than in parenting disputes where early targeted assistance can in many cases resolve communication failures and avoid the need for matters to go to trial.

In addition to tackling the difficult issues of structuring parenting arrangements after separation, the committee has also been asked to consider afresh the formulae for calculating child support. Child support is another area of great public controversy. All the available research indicates that child support is very important indeed for children's wellbeing. A recent study by the Australian Institute of Family Studies found that child support made the difference between being in poverty or not for a significant number of mothers and children. It did not appear to cause significant hardship for payers on an objective assessment, although it did for a small number.

There are no easy answers to the question of whether the child support formulae work fairly. The system must be simple enough to administer by reference to people's reported taxable income in most cases. Adjustments

Fourthly, it requires both parents to be in a position to take on caring responsibility. Parents do not participate equally in parenting in the majority of intact families. Although there have been great changes in women's workforce participation in the last 20 years the growth has been mainly in part-time work for mothers with children. Parents still tend to specialise, with mothers organising work around children when they are young, frequently working part-time and close to home, while fathers tend to invest in the workplace, often commuting significant distances. It can be difficult to alter these patterns after separation. Some fathers do so. However, for many devoted fathers such a significant change in their investment in the workplace and career is not possible. The patterns of responsibility for child-rearing which were established in the intact marriage continue after divorce.

These are all reasons why an equal time arrangement may not be feasible. There is also the critical issue of whether in any given situation it is best for the children. Very young children need a stable environment in order to ensure secure attachments. This usually means having a primary home and caregiver. Older children vary in their reaction to equal time arrangements. Some may be enthusiastic, saying they have two homes. Others may find it hard to put down roots if they are shuttling between homes. Children may also not want equal time with each parent. They may have been much closer to one parent than the other before separation, respond negatively to one parent's disciplinary practices, or feel

can be made on an individual basis by means of the system for review by child support review officers. In determining whether the child support system is fair, the committee could look at five issues.

1. Should the obligation apply to all biological parents or should courts have the power to exempt a person from an obligation in exceptional circumstances and in the interest of justice?
2. Should the formula be based upon income-sharing (as at present) or cost-sharing? In a cost-sharing system, a child's reasonable needs are determined and the cost allocated between the parents according to their respective incomes. At present, child support is calculated

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normally as a proportion of the liable parent's income after allowances, and up to a ceiling. In a cost-sharing system, lower income liable parents would bear a higher proportion of the costs and high income liable parents would pay a lower proportion of their income.

3. Should the level of child support be more tiered? The government introduced a bill in 2000 which would have reduced the level of child support paid by parents who had contact for between 10 per cent and 29 per cent of nights per year. Currently child support reduces at 30 per cent. The bill failed in the Senate. There is now an inconsistency between the child support scheme and family tax benefit.
4. Should the formula take account of the income of a recipient's new partner? For example, if the mother marries a man with a high income, she may not need

nearly as much child support to look after the children as when she was a single parent, but that is not factored in.

5. Should any further grounds for making departure orders be added to the existing list? One issue, for example, is that the formula takes no account of the housing costs of the liable parent. The formula operates by taking a fraction of gross income after making allowance for a component of self-support. However, the disposable income of a liable parent in Sydney or Melbourne where housing costs are very high is likely to be much less than for a liable parent in a small country town. In the larger cities, the costs of commuting to work are also

significant factors in determining disposable income. These factors could be considered in an application for a review, but the applicant must be able to show 'special circumstances'. The case for allowing a departure from the formula is perhaps greatest where the recipient parent has received the house free of a mortgage as a result of the divorce settlement.

This inquiry has generated very high expectations in some quarters that the committee will 'solve the problems'. We need to face the reality that it is much easier to redistribute the emotional and financial losses experienced by men and women on divorce than to ameliorate them. Marriage breakdown is at the heart of the problem. Over the last 30 years, we have sown the wind in terms of the revolution in attitudes to sex, procreation and marriage. We are now reaping the

whirlwind. The societal problems which this has caused are problems that no law can resolve. There may be ways that the family law system can distribute losses more fairly. There are certainly ways in which the processes involved in resolving family law disputes can be improved. However, unless we look at government policy (or the lack of it) on family life as well as family law, we are unlikely to do much to stem the tide of unhappiness associated with relationship breakdown. In particular, we need to look at how we can encourage marriage (as opposed to de facto relationships which have much higher break-up rates). We also need to provide more help to parents to remain married.

In many ways amending the law is much easier than tackling these issues, but law reform will be the answer only if the law is the problem. The real problems are much less easily fixed and will require a significant commitment by the government. They are sufficiently serious however, that such a commitment ought to be a very high priority. ■

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*The views expressed in the article are those of the author. The article should not be read as reflecting the views of any member of parliament, particularly those of the members of the House Family and Community Affairs Committee.*

#### Links & contacts

Public hearings and community forums are scheduled to be held in every state and territory. Transcripts of these, and copies of some written submissions to the inquiry, are available on the inquiry website. The committee is due to report by the end of 2003.

Visit: [www.aph.gov.au/house/committee/fca](http://www.aph.gov.au/house/committee/fca)  
Phone: (02) 6277 4566

*Continued from page 8 - Intelligence methods under fire*

When asked by the committee chairman David Jull (Member for Fadden, Qld) whether he thought the government had "sexed-up" the intelligence assessments it was given, Mr Wilkie agreed.

The terms of reference of the inquiry also include investigating the accuracy of the assessments made by Australia's intelligence agencies in relation to the existence of weapons of mass destruction in Iraq, in light of the lack of weapons found so far.

Former United Nations chief weapons inspector Richard Butler outlined the weapons inspection programs he had been involved with during the 1990s. He told the inquiry there were four possible reasons why weapons had not been found in 2003.

He said they had either been destroyed, hidden in Iraq, moved to another country or "they haven't been found because they don't exist, and didn't".

Mr Butler also said he could have offered useful advice to the government and Australian intelligence agencies in the run-up to war, but he was never consulted, despite being asked for his opinion by American and British agencies.

The Committee is required to report its findings by 2 December. ■

#### Links and contacts

Visit: [www.aph.gov.au/house/committee/pjcaad](http://www.aph.gov.au/house/committee/pjcaad)  
Phone: (02) 6277 2360  
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