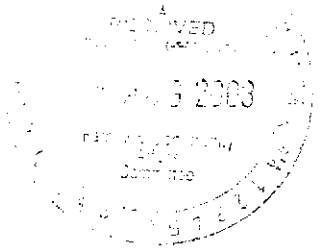
# SUBMISSION TO THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS



The focus of my submission is the need for the incorporation of a rebuttable presumption of joint physical custody in Australian family law. It relies primarily on my own direct experience as a parent both within an intact marriage and after separation and divorce.

I am presently the custodial father of a school age child. Because I have directly experienced all three custody models - the kind of joint physical custody that prevails in an intact relationship and operates without formal agreement or court order; the joint physical custody that comes from a residence - residence order courtesy of a defended hearing in the Family Court of Australia; and sole custody courtesy of a second defended hearing in the Family Court - I feel well-placed to offer an informed and practical perspective on the matter under discussion.

Let me begin by commending the Federal Government's inquiry for at long last placing the issue of joint physical custody on the political agenda. It is my strong hope and expectation that this inquiry will make up for the failure of the government's earlier Family Law Pathways report to properly address the issue of joint physical custody.

Although an accompanying document, 'Analysis of Submissions', admits that "the most mentioned issue in submissions was that of the concept of shared residence as a default for separating couples"[1] it was well and truly fudged in the body of the report:
"The Advisory Group recommends that the family law system..... be designed to maximize the potential for families to function cooperatively in the interests of the child after separation. In doing so it would ensure fair and equitable treatment for all, with particular attention to the ongoing parenting roles and support needs of both parents".[2]

"The Advisory Group..... considers that more can be done to support an environment that promotes positive family roles for men after separation."[3]

I referred in my introduction to the 'kind of joint physical custody that prevails in an intact relationship and operates without formal agreement or court order.' It is that phase of my experience which I wish now to discuss.

I was always an involved and devoted father (and have met many such over the years). I was there during pre-natal classes. I was there in the delivery room. Breast feeding aside, I was never second fiddle to my wife as a parent. My involvement was facilitated by the shorter working hours that came with my job as a teacher, and it is my belief that a joint physical custody arrangement implies the need for more flexible work structures.

At this stage in my parenting career joint physical custody, though never expressed as such, was the norm, as it is in every intact relationship. Our daughter had free and equal access to both of us and thrived on our presence and attention. There came a day, however, when my wife unilaterally decided that things were going to change.

During our daughter's fourth birthday my wife threw in her part-time job as a nurse, purchased an airline ticket for herself and our daughter, informed me that she'd fallen in love with a man she'd met interstate, and readied herself to fly off into the sunset with child in tow before the week was out. I was expected simply to fall in line with her plans and resign myself to the loss of my daughter. My wife made it abundantly clear that nothing I could say or do would sway her from her course. Given certain developments over the years I could resign myself to her leaving. I could not, however, resign myself to losing the day-to-day involvement I had had with my daughter since birth.

I offered to buy her out of the matrimonial home 50-50, suggested she use the proceeds to buy a place nearby (where, if she wished, he could join her) and, for the sake of our daughter, asked her to agree to a week-about custody arrangement. My thinking was child-focused: our daughter had enjoyed the fruits of joint physical custody during our marriage, and I wanted as much of that pre-existing joint parenting as possible to be preserved after separation. A child's love and need for both parents doesn't always get the respect it deserves, however, and my proposal for week-about custody fell on deaf ears.

Faced with my wife's intransigence, and with the day of departure drawing near, I had little choice but to see a solicitor. This resulted, via a local court, in a restraining order preventing her from taking our daughter interstate. My wife raised the stakes by pushing the matter to a interim residence hearing in the Family Court where she informed the registrar that she intended moving interstate and sought sole custody. The hearing resulted in a residence-contact order in my favour. She then sought review of my interim residence order but dropped this on the day it was to be heard for an expedited final hearing. This took place some months later.

To position herself for maximum advantage in the final hearing, she indicated just prior to the hearing that she'd abandoned plans to move interstate but still insisted on sole custody. On learning of her stated intention to remain in Sydney, I proposed joint physical custody on a week-about basis. On the weekend before we were due to appear in court I phoned her and repeated my offer of a 50-50 property split and 50-50 joint physical custody. To no avail.

How to explain her adamant refusal to accept joint physical custody? It cannot be put down to her own personal makeup. Other factors were at work. She knew that, simply as a mother, she could go into a defended hearing from a position of strength. I believe that we are dealing here with a culture of maternal entitlement, and that the sole custody model and the alternate weekend access model (usually reserved for fathers) is a reflection of this. This culture of maternal entitlement works against a reasonable acceptance by some/many(?) mothers of joint physical custody.

As American writer, Wendy Swallow, put it in 'Breaking Apart: A Memoir of Divorce':: *"Divorce, because it threatens the fabric of society, is rarely treated as a private matter. My divorce was a social issue, an opportunity to make a stand, to fight for women's rights. While most of my close women friends understood what had happened, many female acquaintances were shocked to discover that I had given up partial custody to Ron. As a woman, I was weak and capitulating if I didn't fight for my kids and make the son of a bitch pay. It was assumed that I had been wronged, and that someone - my ex - should make reparations. It was a strangely contradictory feminist message: You deserve half of everything your husband has because the law is gender neutral, but don't forget, you're the mother. Don't give up the kids - you are entitled to them."*

*"There is nothing as unnatural as an unnatural mother. By fighting for joint custody, Ron got to be a hero. By agreeing to joint custody, I became something just short of reptilian - a mother who would give up her children; and woman after woman urged me fight, to push for sole custody, the cost be damned. It was as if, by capitulating, I had let down the feminist movement in general and them in particular. When I spoke to people about Ron's rights, about his need for his children and the need for our children to be with both parents, they shook their heads. It'll never work, they said. The child will be too split, they'll be caught between you. It's a terrible idea. They need to be in one house and they need to be with you. These friends would look at me, their eyes smoky with fear. Because if I gave in, someday they might have to as well."*[4]

"Don't give up the kids - you are entitled to them." And so some/many(?) mothers insist on sole custody to the clear detriment of their children. Their children came into the world with two parents, but must make do after separation with one, the other reduced to mere visitor status in their lives. They, of course, pay a price for this sense of entitlement with children from single-parent families represented in higher than average numbers across the various social pathologies. And the message to society at large is: fathers are an optional extra - they don't really matter. The great value of a rebuttable presumption of joint physical custody after separation is that it should send a clear message that the Australian community takes seriously the need of children for a meaningful, regular and substantial relationship with both parents.

Some of the critics of the concept who have emerged of late have, in effect, mounted a defense of the alternate weekend model and the culture of maternal entitlement that has emerged from it by suggesting that: "from the child's perspective, the critical issue is how much they are loved and cared about by both parents. That's, in the end, more important than specifying a number of days in advance."[5] Or that, "It is insulting to them (children) to continue to portray good parenting as measurable in hours and minutes of 'contact' time".[6] Would we accept, however, the proposition that it doesn't matter if dad (or mum) is always working late and only gets home after the kids have gone to bed, so long as he loves them? Why then accept it after separation? Vital human relationships do not exist in a vacuum. To nourish them, to express one's love and care for a child requires a reasonable period of time spent with that child - which leads us back to some form of genuine shared care a.k.a. joint physical custody.

Another approach to defending maternal entitlement and ignoring the need of children for two parents has been to sterotype the concept of joint physical custody as rigid, prescriptive and inflexible: "Fifty/fifty. Split down the middle. One-size-fits-all."[7] This caricature conveniently ignores the fact that 50/50 is merely a starting point before other variables are factored in, not least being the constraints of work. The balance may be 40-60, or even 30-70. Anything less, however, and the quality of a child's relationship with the absent parent is diminished.

A key lesson from both my first and second (of which later) substantive hearings was the seeming inability of family court counsellors and judges to properly understand the concept of joint physical custody. And I say this as one of the few litigants who finally emerged (barely 3 - 4% according to the figures) with a residence-residence order.

Take the family court counsellor, for example: "Nothing emerged," he wrote in the Family Report in the leadup to the hearing, "which could offer the court a recommendation in favour of either parent in terms of the capacity of each to care for the child". This surely implied joint physical custody and he did in fact conclude that "some form of shared care arrangement may be appropriate". However, the best he could come up with was this: "For example if _____ were to see her father on alternate weekends, and one or two days in between, during school term, and if she were to reside with him during school holidays she would spend equal time with both parents." If such a proposal had been taken up by the judge my contact with my daughter over a school fortnight would have been reduced to a miserable 4 nights. And how would one parent feel if every school holiday were monopolized by the other?

Although the logic of his finding - that we had an equal capacity to care for our child - dictated an endorsement of my week about custody proposal, the legal culture in which he operated drew him ineluctably towards the old standard for fathers: alternate weekend contact. The line "For example, if _____ were to see her <u>father</u> on alternate weekends ...." gave the game away.

What he didn't understand was that joint physical custody implies equal input by both parents into a child's personal development. That means that <u>both</u> parents have to participate in the full range of everyday parenting activities: from picking up and dropping off at school to cooking meals; from shopping to helping with homework; from participation in sporting activities to reading bedtime stories. His notion of shared care would have meant being excluded from participation in my daughter's life during the school week, despite my being better equipped as a teacher to help her in that area, and so effectively deny me the role of day-to-day carer that I'd had since her birth.

The judge, although appreciative of my desire to continue playing an equal role in my daughters life, likewise found it impossible to break free from the association between fathers and weekends and seized on the counsellor's suggestion: "There is little to choose in this case between the parents, " he wrote in his judgment, "but I am conscious of the evidence given by the counsellor that there is a slight preference for the wife in the

situation that the child should reside with her during the school term and with the husband at other times." The counsellor's "For example if _____ were to see her father on alternate weekends...." was taken by the judge as a preference. Would he have done the same if the counsellor had written: "For example if _____ were to see her mother on alternate weekends...."? The question, however, is academic because the legal (and social) culture in which both Family Court judges and counsellors operate would not have allowed it.

And just as the counsellor couldn't bring himself to draw the obvious conclusion of week-about joint physical custody from his recognition that we were equal capacity parents, the judge couldn't find it in him to draw the same obvious conclusion from his finding that there was 'little to choose in this case between the parents'. "This is a case", he wrote, "where there is certainly some level of communication that is higher and more acceptable than is often seen in cases such as this. The proposal of the husband would in my view be dependent upon that level of communication not only being maintained but increased. The proposal of the husband has at its very heart an ability of the parents to communicate freely with each other when day-to-day matters and activities arise that would normally be dealt with by parents in the one household, and with the child moving between the two households would have to be dealt with at a level that I believe would need to be one above civility. I am not satisfied that an arrangement of week about with all the pressures that that would bring to bear would survive having regard to the relationship between the parties. Further, I am persuaded by the evidence of the counsellor that the child would be better spending term time in one place rather than splitting the term time between both parents. This is, however, a case where I am firmly of the view that each parent should have an order for residence in his or her favour. I am of the view that the orders that best serve the needs of this little girl are that she should spend the week during term time with her mother. I am, however, firmly of the view that she should spend far more time with her father than alternate weekends. I am of the view that in order, however, to balance things for this little girl as best can be done that she should not spend every weekend with the husband. What I will order is that the husband will have the child live with him for 3 weekends in every 4 weekend cycle." He then went on to order that my daughter reside with me for all of the April and September school holidays and for 3 weeks of the Christmas holidays. This regime amounted to 42% of contact time to my wife's 58% - a form of joint physical custody, but not the week-about arrangement I'd hoped for and not an arrangement that truly reflected the spirit of joint custody. The judge, it seems, was unable to break free from the judicial tendency to automatically associate fathers with weekends. In addition, he compounded his lack of imagination by invoking one of the great myths of joint custody - that both parents must evince a high level of cooperation for it to work.

The essence of the judge's contention was that for the most obvious form of joint custody (week-about, or 3 days in week one, followed by 4 in week 2) to be ordered a level of communication "above civility" was required. An even more conservative judge, as we shall see later would simply have assumed that because a couple are before him the relationship between the parities must be so conflictual that joint custody, in any form, is simply out of the question. When it comes to defended hearings the judiciary lazily tend

to view both parties as equally unreasonable, as more focused on destroying each other than on the best interests of the child.

An example of this regrettable tendency came in the context of the current media debate on joint custody from Alastair Nicholson, Chief Justice of the Family Court: "What is not always understood is that many couples sort out differences over their children between themselves. Most of the remainder achieve resolution with the assistance of court mediators or external counsellors. The remaining 5% participate in defended hearings in which decisions about their children are made by a judge.....such cases are totally unrepresentative and generally represent the most difficult of parenting disputes and, I believe, form the basis of the latest campaign."[8]

The received 'wisdom' of the supposed incompatibility between couples in conflict and joint physical custody crops up in superficial journalism devoted to showcasing the prejudices of those in the divorce industry who fear losing out if meaningful family law reform is introduced: "If the proposed changes were not so serious, they would be hilarious", says a family law specialist who does not wish to be identified. "Let's not kid ourselves here," he says. "A large number of parents go through acute emotional stress at the time of the breakdown of the marriage. To try to pretend that these two people can cooperate in a difficult logistical exercise on a week-by-week basis is just fantasy-land stuff".[9]

Two intractable parties? Not in my case. Let me be clear about this: all it takes to come before a judge of the Family Court is for one, repeat one party, for reasons already discussed, to dig her heels in and insist on sole custody and the perks that go with it, while forcing the other party, who is committed to salvaging as much as possible of the father-child relationship from the wreckage of his marriage, to appear before a judge.

The Australia Law Reform Commission recognizes this : "the use of 'intractable' could imply that both parities are 'responsible' when in fact one party may be responding reasonably to the very unreasonable actions of the other".[10]

What chance have you got? Anyone who forces you into court because they selfishly insist on sole custody in complete disregard for your relationship with your children and their need for an equal relationship with both parents is not given to communication. In such circumstances any civility on your part represents a triumph of self-restraint. So, for a judge to insist on a degree of communication above civility before he'll endorse week-about joint physical custody is to rule it out completely as an option. Adopting a position of joint physical custody at a hearing is not taken by a judge, so far as I can tell, as a sign of a party's reasonableness and unselfishness in the face of the other party's unreasonableness and selfishness. It is instead ignored - or maybe even seen as a sign of weakness - and the conflict introduced into the relationship between the parents by the other party's intransigence is not only not censured, but allowed to dominate the hearing and determine its outcome.

By resorting to the old chestnut that parental conflict precludes joint physical custody the judge was either unaware of, or chose to overlook, the fact that it is the prospect of one party getting sole custody, and the other being reduced to mere visitor status, of one being deemed a winner, and the other a loser, in the custody stakes that promotes conflict between separating couples. The alternate weekend model so favoured by the Family Court at present needs to be recognized for what it is: a destructive and conflict-ridden extreme based on a winner - loser mentality utterly antithetical to the best interests of the child.

Think about it. Where is the likelihood of conflict in a situation where a school-age child enjoys week-about joint physical custody? The child is picked up by one parent after school on a Friday afternoon and remains with that parent for a week before being dropped off at school on the following Friday morning. The child is then collected by the other parent that afternoon for their weekly period of contact. The parents' paths need never cross. Arrangements can be made with the school for duplicate handouts, notices and reports, reducing the need for interpersonal communication to a minimum. And, on those occasions when such communication is required, but there is perhaps a reluctance to reach for the phone, there's always the low-tech note in the school bag or the high-tech e-mail. At any rate, once the non conflictual joint physical custody regime is in place, there is every reason to believe that reasonable communication will follow. To quote Wendy Swallow again:

*"The days without my children were still painful, hard to enjoy because of the guilt layered beneath the quiet. The trade-offs with Ron were tense and we were liable to flare into arguments because we were both still too raw to speak to each other easily. Inevitably, however, we each had information we needed to share with the other, a reminder about a field trip form, or a question about a missing sweatshirt, and then the exchange would start. The divorce books warned against sharing custody with any angry spouse, and I could see what they meant.*

*"Yet occasionally one of us would crack through the armour of defensiveness each of us wore when we were together, and we would ask how the other was doing: then out would spill the anguish of missing the boys. The only thing that made me feel human about agreeing to the trial of joint custody was the genuine sadness Ron conveyed about his days alone. No one understood that better than I did. Ron was still the only person on earth who felt the same way I did about David and Jesse, and despite our differences I could feel that bond still holding there beneath it all. An anchor. I didn't realize yet how precious that would turn out to be."*[11]

I shall return to this matter later, in the context of my own case.

Another aspect of the judge's determination was his notion that term time should be spent in one place. He advanced no reasons for this, however. Presumably it was a reflection of the idea (parodied by Justice Nicholson as: "You've got a situation where they (the parents) live on the other side of cities and many children become very unsettled being

batted backwards and forwards like a ping pong ball."[12]) that children cannot adapt to living in two homes on a more or less equal basis.

There is no reason to believe that, providing both homes are within reasonable proximity of each other (a sine qua non of joint physical custody) as they must be for the child to attend a particular school, and both are properly fitted out for student purposes, the child will not adapt. Remember that joint physical custody presupposes the equal involvement of both parents in every aspect of their children's lives including schooling.

Having obtained a residence-residence order from a judge of the Family Court (albeit an odd arrangement as I've explained), I proceeded to exercise contact with my daughter for 3 nights (Friday, Saturday and Sunday) per week for 3 consecutive weeks. Because she'd started kindergarten that year I'd collect her from school on a Friday afternoon and return her to school on a Monday morning. She effectively had two homes and moved without fuss or stress between them. She felt secure in the knowledge that both her father and mother were permanent and equal fixtures in her life. Most importantly joint physical custody met the need she had at this difficult and stressful phase in her life for a secure relationship with both parents.

Unfortunately, this phase of joint physical custody lasted barely 3 months. I was informed by the mother in a letter that a "change of circumstance" had occurred in her life that required a departure interstate with child - and this despite her telling the judge that she no longer harboured any desire to move interstate.

The matter, of course, was returned to the Family Court. It came before a different judge who pronounced sensibly that my wife had undergone a change of mind rather than a change of circumstances and promptly dismissed her application to relocate interstate.

She decided to move anyway leaving our daughter with me on the assumption that she'd get her way in a second 'final' hearing which took placed some 7-8 months later. Note that, in such circumstances, sole custody didn't automatically fall to me. No, the whole question of custody had to be thrashed out again. This time, however, the other party was living interstate and joint physical custody was, therefore, not an option.

I imagine that part of my wife's strategy was to apply pressure on our daughter, by means of her absence, to tell another court counsellor in yet another family report that she wanted to live with her mother. It didn't work out that way, however, because, although missing her mother acutely (despite school holiday contact visits), our daughter was adamant that she wanted both parents in her life. I'm reminded again of Wendy Swallow's experience where she writes: *"One day David comes home from school and says that his friend Stephen doesn't get to live with his dad; in fact, he only sees him in the summer. This is the first time he understands that some kids of divorced families don't get to live with both parents, and he is horrified. I count it as a bookend to my conflict over joint custody and finally let myself off the hook."*[13]

Suffice it to say that the second 'final' hearing resulted in my obtaining sole residence. The issue of joint physical custody, however, did arise at one point during the proceedings and served to confirm for me how alien to the current closed judicial mindset the arrangement is.

My wife's barrister was trying to suggest that I was somehow hostile to contact between mother and daughter. I, therefore, raised my former support for joint physical custody by way of indicating just how seriously I took the need for contact between the two. The judge chipped in at this stage averring that "shared residence is a matter on which different judges take different views." This was news to me. I responded, "But it (the fact of my joint physical custody position first time around) does indicate, your Honour, that I firmly believe that _____'s mother is important to her, just as I would hope that her mother realizes that her relationship with me is important to her. There is a balance."

"Just returning to sharing for one moment", replied the judge, oblivious to the point I'd made, "Sharing works fine if the parents are getting on well, but of course it is axiomatic that the parents who come before me are never getting on well. There is a massive sieve that has been applied to your case and to all other cases before it is plain that they have got to go before a judge who forces some decision on the parties, and parties like that in my view can never - well so far I have never seen a case where I thought that sharing would work in such circumstances and Justice _____ (he of the first 'final' hearing) has the same view". Back to the old judicial fallacy already discussed: that two people at legal loggerheads rules out a joint physical custody outcome. And that, I'm afraid, is the official line of the Family Court as presently constituted.

My own case raises the obvious incompatibility between joint physical custody and relocation. One way of undermining a court-ordered joint physical custody outcome, should a rebuttable presumption of joint custody be incorporated into Australian family law, is for the - shall we say - uncooperative party to relocate sufficiently far away from the other party to make joint physical custody unworkable.

To guard against this possibility additional legislation will need to be introduced that would limit parties with joint physical custody from relocating. At first blush this might seem an intolerable infringement on a person's freedom of movement. However, as American writers Ross Parke and Armin Brott sensibly point out: "When people have children they have an obligation to put their children first, not themselves. Sometimes that means making sacrifices. It would be okay for a mother to move a child away from the child's father only if the father-child bond is worthless."[14] The obvious way to protect a parent-child relationship from this kind of unilateral disruption would be to place the onus on any parent wishing to opt out of a joint physical custody regime by relocating to show that the relocation is proposed in good faith and is in the best interests of the child. In much the same way, where children have enjoyed equal access to both parents within an intact relationship, the burden of proof for this to change after separation should fall squarely on the shoulders of the parent who wants to claim sole custody.

As an advocate for joint physical custody my submission would not be complete without a discussion of the sole custody model as both my daughter and I have experienced it since the conclusion of the second 'final' hearing two years ago.

With respect to my daughter, let me say that she is generally a happy, loving and vital child. She performs well at school. She has a supportive network of friends and neighbours that she has grown up with. She has the continued stability that comes with living in the matrimonial home. And she has the bedrock benefit of the loving bond we both share. She visits her mother four times per year, flying unaccompanied interstate, and talks to her mother twice a week on the phone. She writes to her mother, and her mother writes to her.

There are times, however, when her resilience fails. There are times when she needs but cannot enjoy, her mother's physical presence. There are times when she dissolves in tears at the thought of her mother's absence. There is a void in her heart that only the presence of the missing parent can fill. Although I have no doubt that were the situation reversed, she would feel the same way about me, the bottom line is that she deserves and needs, like every other child, the physical presence, the loving touch, and the daily care of both parents.

With regard to myself as a custodial parent I say simply that, although buoyed by the joyful presence and loving affection of my daughter, and my unswerving commitment to her well-being, the burden of sole parenting weighs heavily. It is beyond me why anyone would push for sole custody if they could have joint physical custody. I guess where that occurs we're in cutting-off-the-nose-to spite-one's-face territory.

Finally, who better to conclude this submission than my poster girl for joint physical custody, Wendy Swallow: *"It has taken me years, but over time I've managed to make peace with the statistics about children of divorce. Despite the dire predictions, the boys appear to be doing fine. They are sweet and friendly. They are doing better in school than I ever expected. They are usually respectful, and always loving, and seem busy with their buddies and their sports. I've learned that the numbers don't have to be a manifest destiny, that, in fact, I can make them not be true if I work at it hard enough. I've met many other divorced people and what I've found is that I have many advantages that put me and my children on the outer fringe of the data. I have a good job and a viable income, which means I have choices. I am lucky to have Ron on the other side, someone who shares my values about many critical issues, from education to religion. The boys know what it looks like to have a father fold laundry, just as they've seen me struggle with the lawn mower. I'm lucky to co-parent with someone who tries, again and again , to get it right, to do it better. We've been able to afford good counseling, and we've caught many problems before they've become unmanageable. I have a safety net of family and friends. My children know they live inside a thick web of loving bonds and that their father and mother are woven together, for better or for worse, as long as they live. Because I've finally let go of the divorce fantasy that Ron would someday vanish off the planet and leave us alone. The thought that my children might lose their father, in*

*fact, would be the worst thing that could happen to us. Because then we really would be alone."*[15]

Bring on the presumption!

1. Family Law Pathways Report p53

2 Family Law Pathways Report, Executive Summary 3

3. Family Law Pathways Report, Executive Summary 11

4. Wendy Swallow, 'Breaking Apart - A Memoir of Divorce' pgs 164, 166

5. Lawrie Maloney quoted in 'Degrees of Separation' Gary Tippet and Ian Munro, The Age, 28/6/03

6. Liz O'Brien, National Association of Community Legal Centres

7. Adele Horin, 'One size does not fit all, especially kids', Sydney Morning Herald, 21/6/03

8. Alastair Nicholson, 'The Child's Rights Come First', The Age, 21/6/03

9. Gary Tippet and Ian Munro, 'Degrees of Separation', The Age, 28/6/03

10. Australian Law Reform Commission, 'Complex Contact Cases and the Family Court', pg 11

11. 'Breaking Apart' p167

12. Daily Telegraph, 7/7/03

13. 'Breaking Apart' p 287

14. Ross Parke and Armin Brott, 'Throwaway Dads' p 183

15. 'Breaking Apart' p287