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LAW REFORM FOR SHARED-TIME PARENTING AFTER SEPARATION

Reflections from Australia

Shared-time parenting is an emerging family form in many Western countries. Legislative reform in Australia in 2006 introduced a presumption of “equal shared parental responsibility” and a requirement that courts explicitly consider the making of orders which provide for children to spend “equal time” or “substantial and significant time” with each parent. These reforms occurred in the context of an already increasing prevalence of shared-time parenting arrangements. In this article, we highlight key changes to family law legislation in Australia over the last four decades which evidence an increasing emphasis on the involvement of both parents in a child’s life after separation. We then turn to demography, identifying some common characteristics of families who adopt shared-time parenting arrangements and exploring the prevalence and incidence of shared-time arrangements, in particular, considering whether prevalence and incidence appear to have been affected by legislative reform. The article concludes by offering some reflections for other countries on the Australian experience of legislating to encourage shared parenting in the broadest sense.

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I. Introduction

1 Shared-time parenting¹ – where children spend equal or near-equal time with each parent (variously named as “joint physical custody”, “shared custody”, “shared care”, “shared residence”, “alternating residence” and “co-parenting”) – appears to be increasingly popular in many Western countries.² The US has been at the forefront of shared-parenting research, policy and practice for many years. More recently, however, other countries, such as Australia, Belgium and the Netherlands, have legislated to encourage shared-time arrangements after separation.³ The latest international research suggests that children can benefit from such arrangements, but there can also be risks.⁴

2 Despite international research interest in this emerging family form, fundamental gaps in our knowledge remain. Indeed, as noted recently by Natalie Nikolina:⁵

[It] is unclear how co-parenting should be defined; if, and how often, it occurs; how the courts should deal with it; what effect it has on children’s well-being; and thus also what the best course of action for the legislator would be in dealing with co-parenting ...

3 Politics and policy, of course, have their own imperatives. Indeed, policy reforms rarely come out of the empirical sciences, with interest groups representing parents or other kinship groups (such as grandparents) often influencing the policy process in some way.⁶ Not surprisingly, legislating for a presumption or an expectation of equal or shared-time arrangements remains a highly charged and contested issue.

1 The present authors use this phrase to reflect the emphasis on time in the 2005 amendments to the Family Law Act 1975 (Cth).

2 See, eg, Council of Europe, *Equality and Shared Parental Responsibility: The Role of Fathers* (Doc 13870, 14 September 2015), the summary of which is available at <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22022&lang=en>> (accessed 27 June 2018): “States are called upon to introduce or, as appropriate, to make greater use of shared residence arrangements, which are often the best way to preserve contact between children and their parents.”

3 Bruce M Smyth, “Special Issue on Shared-Time Parenting after Separation” (2017) 55(4) *Family Court Review* 494.

4 Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, “Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children” in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

5 Natalie Nikolina, *Divided Parents – Shared Children* (European Family Law vol 39) (Intersentia, 2015) at pp 2–3.

6 Bruce Smyth, “A 5-Year Retrospective of Post-separation Shared Care Research in Australia” (2009) 15(1) *Journal of Family Studies* 36.

4 The growing popularity of shared-time parenting reflects broader social, cultural and legislative change, including (a) women's greater participation in paid work, (b) greater knowledge of the importance of meaningful father involvement, (c) growing appreciation that children generally benefit from an ongoing supportive relationship with both parents after separation, (d) the increasing use of dispute resolution procedures that encourage co-operative co-parenting, (e) greater enforcement of child support, (f) reductions in child support under shared-time arrangements, and (g) divorce laws that increasingly encourage shared parenting in the broadest sense, largely as a result of lobbying by fathers groups.⁷

II. Australian family law system

5 Australia's family law system is a federal (that is, national) system. Family law decision-making in Australia is mainly exercised by what we will call the "family courts", namely, the specialist Family Court of Australia (and the Family Court of Western Australia in that state), and the Federal Circuit Court of Australia (formerly the Federal Magistrates Court), which now deals with around 80% of children's cases.

6 In Australia, unlike in some other countries, divorce is not intrinsically linked to decision-making about care of children⁸ and/or redistribution of assets, liabilities and financial resources ("property settlement"). Australian law requires couples to be separated for at least 12 months prior to obtaining a divorce and the process of obtaining a divorce is, for most couples, a simple, quasi-administrative process. Court orders can be sought, or agreed arrangements can be formalised in relation to both property settlement and the care of children – either before or after⁹ obtaining a divorce. It is noteworthy that separating *de facto* partnerships have almost identical rights and responsibilities under Australian law, and are able to access the same legal processes as married couples. In addition, Australia has a well-developed administrative system for the financial support of children whose

7 Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, "Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?" (2014) 77(1) *Law and Contemporary Problems* 109.

8 That said, a divorce order will only take effect if a court has declared that it is satisfied that proper arrangements have been made for the care, welfare and development of any children of the marriage who are under the age of 18: see s 55A of the Family Law Act 1975 (Cth).

9 There is, however, a time limit for making an application for orders relating to property settlement. Such applications must be made within 12 months of a divorce order, though the court can grant leave to make an application out of time: see s 44(3) of the Family Law Act 1975 (Cth).

parents do not live together, administered by the Department of Human Services (“DHS”).

7 Yet another distinctive feature of the Australian system is that parents who agree on arrangements for their children can apply for “consent orders” to the Family Court of Australia or the Family Court of Western Australia (although not to the Federal Circuit Court) without having commenced proceedings.¹⁰ Consent orders are made by registrars after the parties provide information about the proposed orders and why they would be in the children’s best interests.

8 Since 2006, the Australian legal system has also required that parties to a dispute in relation to the care of children attempt to resolve that dispute through alternative dispute resolution processes such as mediation.¹¹ Certificates verifying participation in “family dispute resolution” can be issued by registered “family dispute resolution practitioners”. At the time that this requirement was introduced, the Commonwealth government also established a network of Family Relationship Centres that are subsidised to provide a limited amount of family dispute resolution service to families at no or minimal fee. Rae Kaspiew, Lawrie Moloney, Jessie Dunstan and John De Maio reported a substantial reduction in court applications for orders relating to children in the period following the introduction of mandatory mediation and the family relationship centres, stating “across all courts, applications for final orders in children-only and children-plus-property cases (children’s matters) declined by 25% from 2004–2005 to 2012–2013”.¹² Recent Australian research alludes to the potential value of mandatory mediation, though the value of a certificate process is less clear.¹³

A. *Evolution of Part VII of Family Law Act*¹⁴ (“FLA”)

9 The FLA is the legislative centrepiece of Australian law relating to the care of children after separation. It applies to children born of marriages throughout Australia, and to children born of *de facto* partnerships (and to parents who have never lived together) in all

10 Family Law Rules 2004 (Cth) r 10.15(1)(b).

11 Family Law Act 1975 (Cth) s 60I. There are exceptions to this requirement, such as urgency and cases where there is a history of child abuse or family violence.

12 Rae Kaspiew, Lawrie Moloney, Jessie Dunstan & John De Maio, *Family Law Court Filings 2004–05 to 2012–13* (Research Report No 30, February 2015) at p 7.

13 Bruce Smyth, Wendy Bonython, Bryan Rodgers, Elizabeth Keogh, Richard Chisholm, Ross Butler, Robyn Parker, Matthew Stubbs, Jeromey Temple & Maria Vnuk, *Certifying Mediation: A Study of Section 60I Certificates* (CSR Working Paper No 2/2017, November 2017).

14 Family Law Act 1975 (Cth).

Australian states and territories other than Western Australia.¹⁵ The FLA has, since its inception, provided that a court's decision about the care of a child should always have, as its paramount consideration, the best interests of the child. Evolution of legislation has, over time, increased the direction provided to courts in determining what is in a child's best interests. That direction has had an increasing emphasis on the ongoing involvement of both a child's parents.

10 Since its introduction in 1975, there have been three major reforms of Pt VII of the FLA – the Part which governs decisions about the care of children. In its earliest incarnation, the FLA included no guidance as to how a determination as to a child's best interests should be made. Orders made under this Act provided for one or both parents to have “custody” of a child, which encompassed decision-making responsibility and primary physical care of a child. Unless it was deemed to not be in the child's best interests, the other parent would have “access” orders made in his or her favour, which provided for him or her to spend time with the child on a regular basis.

(1) *The 1995 reforms*

11 In 1995, a major reform of the FLA¹⁶ took place, introducing a list of “factors”¹⁷ that a court should consider in making a determination about a child's best interests. These factors included matters such as (a) the nature of the child's relationships with each of the parents, and other relevant adults and children, (b) the capacity of each parent to provide for the child's needs, and (c) how the child's wishes should be taken into account. No direction was provided as to the relative importance of each of the factors. The 1995 amendments also introduced the clause defining the object of the Part and the principles underlying it¹⁸ which asserted that a child has the right to know and be cared for by both parents.

12 The 1995 amendments also introduced new terminology into the legislation and severed the link between decision-making and primary physical care. Under the new legislation, “parental responsibility” (that is, decision-making responsibility for the child) might be assigned to one or both parents. Distinctions could also be made between “long term” decisions (such as decision-making

15 In Western Australia, the Family Law Act applies to children born of marriage. Decisions about children born of *de facto* partnerships and to parents who have never lived together are governed by the Family Court Act 1977 (WA).

16 Family Law Reform Act 1995 (Cth).

17 See s 68F of the Family Law Act 1975 (Cth), which was later repealed by Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

18 Family Law Act 1975 (Cth) s 60B.

about the child's schooling, religious upbringing, and emergency and non-emergency medical treatment) and "short term" decision-making (that is, day-to-day parenting decisions such as what a child wears and eats, and what activities they engage in on a daily basis). The court could also make a "residence" order in favour of one or both parents, which would indicate who the child would live with (or if made in favour of both parents, the times at which the child would reside with each parent). The court could also make "contact" orders which would indicate when the child would spend time with the other parent (and also the times that the child would spend with either or both parents outside the normal routine, such as during school holidays and on special days such as birthdays and religious festivals).

(2) *The 2006 reforms*

13 In 2006, yet another substantial reform of the FLA came into effect.¹⁹ Like the 1995 reforms, these amendments enhanced the direction provided to judicial officers in making decisions about a child's best interests²⁰ and introduced new terminology. They also sharpened the distinction between decision-making and care of a child. Since 2006, family law courts in Australia have, rather than making a "residence" or "contact" order in favour of a parent, been making orders that provide for children to "live with" (formerly termed "reside") or "spend time with" (formerly termed "contact") each of their parents. The language of "parental responsibility" has been retained, but as part of the increasing emphasis on shared parenting, the FLA now includes a presumption that it is in a child's best interests for his or her parents to have "equal shared parental responsibility"²¹ (though there are circumstances relating to abuse and family violence in which the presumption does not apply).

14 Since 2006, the process by which a court makes decisions about parental responsibility and a child's care and living arrangements has been complex. The court's first step is to determine whether the presumption that it is in a child's best interests for his or her parents to have equal shared parental responsibility applies, and then if it does apply, whether it is upheld, or rebutted. If an order is made for a child's parents to have equal shared parental responsibility, the court is then required to consider the possibility of making an order for the child to spend equal time ("50/50") with each parent.²² In making this decision, the court is required to consider two questions – first, whether such an

19 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

20 See paras 14–16 below.

21 Family Law Act 1975 (Cth) s 61DA.

22 Family Law Act 1975 (Cth) s 65DAA(1).

arrangement would be in the child's best interest and, second, whether such an arrangement would be reasonably practicable.

15 If the court determines not to make an order for a child to spend equal time with each parent, then the court is required to consider making an order for the child to spend "substantial and significant time" with each parent.²³ "Substantial and significant time" is defined within the FLA.²⁴ That definition provides, in essence, that a child's time with a parent is "substantial and significant" if it includes weekend and holiday periods as well as days that are not weekends or holidays, and enables the parent to be involved in the child's daily routine and in events of significance to the child (and for the child to be involved in events of significance to the parent). In determining whether to make an order for a child to spend "substantial and significant time" with each parent, the court must consider the same two questions: whether this will be in a child's best interests; and whether it will be reasonably practicable.

16 At numerous points within the decision-making process, the court is required to make decisions about whether a particular arrangement will be in a child's best interests. The 2006 reforms also amended the list of factors that the court must consider in making such a determination.²⁵ The list of factors is now hierarchical, including two "primary considerations" and a longer list of "additional considerations". The first of the primary considerations, namely, "the benefit to the child of having a meaningful relationship with both of the child's parents" was a new addition to the FLA in 2006, while the second primary consideration, "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence" was, arguably, a restatement of factors that had been contained within the list prior to 2006.

17 The 2006 reforms significantly increased the emphasis on shared parenting, as evidenced by a presumption in favour of "equal shared parental responsibility", a requirement that the court actively consider an "equal time" or if not that then a "substantial and significant time" living arrangement, and the inclusion of the "meaningful relationship with both parents" factor as a primary consideration in determining a child's best interests. Among the general population in Australia (and, anecdotally, among some less-informed lawyers), the 2006 reforms were believed to have introduced a presumption in favour of equal-time living arrangements. While this is an overstated

23 Family Law Act 1975 (Cth) s 65DAA(2).

24 Family Law Act 1975 (Cth) s 65DAA(3).

25 Family Law Act 1975 (Cth) s 60CC.

misunderstanding of the effect of the reforms, it is an interpretation which has likely impacted on the behaviour of parents making decisions in the shadow of the law since 2006.

(3) *The 2011 reforms*

18 The third major reform of Pt VII of the FLA²⁶ was passed in 2011, but came into effect in 2012. This tranche of legislative changes introduced, among other things,²⁷ a clause within the list of factors used to determine a child's best interests requiring that the primary consideration of protecting a child from harm should be given greater emphasis than the primary consideration of a child having a meaningful relationship with both of the child's best parents.²⁸ This amendment arguably reduced the emphasis on shared parenting, although only in situations where there is a risk of harm to a child.

B. Evolution of child support legislation

19 Over the past four decades, there have also been significant reforms to legislation governing financial support for children after separation. While these reforms do not influence judicial decision-making in relation to the care and living arrangements for children, they may impact decision-making of some parents, whose financial circumstances are affected by the physical care arrangements of their children.

20 When the FLA came into effect in 1975, a separated parent with primary care of a child was able to apply for "child maintenance" orders, requiring the other parent to provide ongoing financial support for the child. The quantum of support was discretionary and both creation of the obligation to pay, and enforcement of that obligation, required litigation. The inadequacy of many child maintenance orders, combined with the uncertainty and prohibitive costs of pursuing and enforcing such support meant that many primary carers of children were living with very little or no financial support from the child's other parent.²⁹

26 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

27 Other significant changes were (a) the introduction of an expanded definition of family violence, (b) the repeal of the colloquially named "friendly parent provision" – a provision that required the court to consider, in determining a child's best interests, the extent to which each parent had facilitated a relationship with the other parent, and (c) the repeal of a provision mandating a costs order where the court is satisfied that a party made a false allegation or statement.

28 Family Law Act 1975 (Cth) s 60CC(2A).

29 Ministerial Taskforce on Child Support, *In the Best Interests of Children – Reforming the Child Support Scheme* (May 2005).

21 This situation changed dramatically with the introduction of the child support scheme in 1988. The scheme, underpinned by the Child Support (Assessment) Act 1989³⁰ (“CSAA”), and the Child Support (Registration and Collection) Act 1988,³¹ provides for an administrative, formula-based assessment of child support.³² From its inception, the formula has taken into account how many nights a child spends in each parent’s care and the relative taxable incomes of each parent. The scheme also includes a Child Support Agency (“CSA”) – a government-funded body tasked with administering the scheme, and, importantly, enforcing payment. The scheme further includes mechanisms for parents to agree to alternative arrangements, or for the quantum of child support to be calculated differently, if the formula does not operate fairly (for reasons such as a parent’s taxable income being an inadequate representation of the parent’s financial circumstances).

22 In 2008, the child support scheme was the subject of substantial reform³³ – the centrepiece of which was the introduction of a new and more complex formula. A criticism of the old formula had been that there was too stark a jump (or “cliff effects”) between the financial support provided in “primary carer” arrangements and “shared care” arrangements. This resulted in two undesirable outcomes: (a) an arguably inequitable financial burden on parents who had care of the children for substantial periods, but not enough to meet the CSAA definitions of “substantial care” or “shared care”; and (b) a financial disincentive for primary carer parents to agree to their children spending increased time with the other parent.

23 In summary, in the four decades since the passing of the FLA in 1975, there has been an increasing emphasis on the ongoing involvement of both parents in a child’s life. These changes have been accompanied by changes within legislation governing financial support of children after separation, which has both increased the level of financial support that parents living elsewhere provide to their children, and evolved into a scheme which enables recognition of living arrangements in which care of children is shared between their parents.

30 Cth.

31 Cth.

32 The discretionary child maintenance provisions in the Family Law Act remain in force and provide a mechanism for financial support for children to be sought when it cannot be sought under the child support scheme. The most common circumstances in which the child maintenance provisions are now used are when support is sought for children who are over the age of 18 and have a continuing need for financial support due to special needs, or participation in tertiary education.

33 Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006 (Cth).

III. Demography of shared-time parenting in Australia

A. Key characteristics of shared-time families

24 One of the clearest findings in Australian and broader international post-separation parenting literature is that shared-time families share a number of demographic characteristics that distinguish them from the broader population of separated parents.³⁴ They are more likely than other separated families to have higher levels of education, high (typically dual) incomes and to have primary school-aged children.³⁵ Compared to parents with less equal divisions of parenting time, they tend to live closer together and have more flexibility in their work hours.³⁶ Fathers in shared-time families have frequently been actively involved in the care of their children before separation.³⁷ Shared-time parenting is far more difficult to achieve when there are practical impediments such as the parents living a long distance from each other, or one parent being a shift worker. Most separated parents who establish shared-time arrangements respect each other, co-operate, are able to communicate in ways which avoid or contain conflict, are able to compromise, and have arrangements that are flexible and child-

34 Marsha Kline Pruett & Carrie Barker, “Joint Custody: A Judicious Choice for Families – But How, When, and Why?” in *The Scientific Basis for Child Custody Decisions* (Robert M Galatzer-Levy, Louis Kraus & Jeanne Galatzer-Levy eds) (Wiley, 2nd Ed, 2009); Bruce M Smyth, “Special Issue on Shared-Time Parenting after Separation” (2017) 55(4) *Family Court Review* 494.

35 However, see Daniel R Meyer, Maria Cancian & Steven T Cook, “The Growth in Shared Custody in the United States: Patterns and Implications” (2017) 55(4) *Family Court Review* 500 and Sofie Vanassche, An Katrien Sodermans, Charlotte Declerck & Koen Matthijs, “Alternating Residence for Children after Parental Separation: Recent Findings from Belgium” (2017) 55(4) *Family Court Review* 545.

36 Howard H Irving & Michael Benjamin, “Shared Parenting: Critical Review of the Research Literature” in Howard H Irving & Michael Benjamin, *Family Mediation: Contemporary Issues* (Sage Publications, 1995); Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Australian Institute of Family Studies, *Parent–Child Contact and Post-separation Parenting Arrangements* (Bruce Smyth ed) (Research Report No 9, 2004).

37 Howard H Irving & Michael Benjamin, “Shared Parenting: Critical Review of the Research Literature” in Howard H Irving & Michael Benjamin, *Family Mediation: Contemporary Issues* (Sage Publications, 1995); Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

focused.³⁸ Shared-time arrangements are often agreed to privately, without the use of lawyers or the courts.³⁹

25 The characteristics of shared-time families (both before and after separation) make positive outcomes more likely than in other separated families.⁴⁰ The tendency of parents with shared-time arrangements to report that their children are doing well⁴¹ and that the arrangements are liked by them and their children⁴² are to some extent, therefore, unsurprising. This selection (class) effect is sometimes

38 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Marsha Kline Pruett & Carrie Barker, "Joint Custody: A Judicious Choice for Families – But How, When, and Why?" in *The Scientific Basis for Child Custody Decisions* (Robert M Galatzer-Levy, Louis Kraus & Jeanne Galatzer-Levy eds) (Wiley, 2nd Ed, 2009); Australian Institute of Family Studies, *Parent–Child Contact and Post-separation Parenting Arrangements* (Bruce Smyth ed) (Research Report No 9, 2004).

39 Howard H Irving & Michael Benjamin, "Shared Parenting: Critical Review of the Research Literature" in Howard H Irving & Michael Benjamin, *Family Mediation: Contemporary Issues* (Sage Publications, 1995); Helen Rhoades, Reg Graycar & Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (University of Sydney & Family Court of Australia, 2000); *Parent–Child Contact and Post-separation Parenting Arrangements* (Bruce Smyth ed) (Research Report No 9, 2004).

40 Robert Bauserman, "A Meta-analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce" (2012) 53(6) *Journal of Divorce and Remarriage* 464.

41 Robert Bauserman, "A Meta-analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce" (2012) 53(6) *Journal of Divorce and Remarriage* 464; Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Beata Jablonska & Lene Lindberg, "Risk Behaviours, Victimization and Mental Distress among Adolescents in Different Family Structures" (2007) 42(8) *Social Psychiatry and Psychiatric Epidemiology* 656; Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

42 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Howard H Irving & Michael Benjamin, "Shared Parenting: Critical Review of the Research Literature" in Howard H Irving & Michael Benjamin, *Family Mediation: Contemporary Issues* (Sage Publications, 1995); Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Thoroddur Bjarnason *et al*, "Life Satisfaction among Children in Different Family Structures: A Comparative Study of 36 Western Societies" (2012) 26(1) *Children & Society* 51; Marsha Kline Pruett & Carrie Barker, "Joint Custody: A Judicious Choice for Families – But How, When, and Why?" in *The Scientific Basis for Child Custody Decisions* (Robert M Galatzer-Levy, Louis Kraus & Jeanne Galatzer-Levy eds) (Wiley, 2nd Ed, 2009).

overlooked when advocates for shared-time claim that positive outcomes for children are caused by shared-time arrangements.⁴³

26 However, for some families with shared-time parenting plans, these arrangements exist in an environment of entrenched high levels of parental conflict. They may even be the result of such conflict.⁴⁴ While the typical, co-operative shared-time families tend to choose shared time and have flexibility in those arrangements, the highly conflicted group sometimes have shared time imposed by a court and tend to have more rigid arrangements⁴⁵ – at least to start with. In these families, shared-time parenting may reflect a need to resolve the dispute more than a focus on the children’s needs.⁴⁶ Some disputes, of course, may be grounded in a parent’s belief that shared time is indeed in his or her child’s best interest and thereby a response to the child’s needs.

B. Prevalence and incidence

27 Shared-time arrangements – variously defined and operationalised – appear to be on the rise in many Western countries,⁴⁷ especially in the state of Wisconsin, US, where “shared [physical] custody” now accounts

43 Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, “Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?” (2014) 77(1) *Law and Contemporary Problems* 109.

44 John Eekelaar, Eric M Clive, Karen Clarke & Susan Raikes, *Custody after Divorce: The Disposition of Custody in Divorce Cases in Great Britain* (Centre for Socio-Legal Studies, Wolfson College, 1977); Rae Kaspiw *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Eleanor E Maccoby & Robert H Mnookin, *Dividing the Child: Social & Legal Dilemmas of Custody* (Harvard University Press, 1992).

45 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General’s Department* (Social Policy Research Centre, University of New South Wales, 2010); Jennifer McIntosh *et al*, *Post-separation Parenting Arrangements and Developmental Outcomes for Infants and Children: Collected Reports* (May 2010).

46 John Eekelaar, Eric M Clive, Karen Clarke & Susan Raikes, *Custody after Divorce: The Disposition of Custody in Divorce Cases in Great Britain* (Centre for Socio-Legal Studies, Wolfson College, 1977); Carol Smart, “Equal Shares: Rights for Fathers or Recognition for Children?” (2004) 24(4) *Critical Social Policy* 484.

47 See, *eg*, Nicholas Bala *et al*, “Shared Parenting in Canada: Increasing Use But Continued Controversy” (2017) 55(4) *Family Court Review* 513, Anne-Rigt Poortman & Ruben van Gaalen, “Shared Residence after Separation: A Review and New Findings from the Netherlands” (2017) 55(4) *Family Court Review* 531, Sofie Vanassche, An Katrien Sodermans, Charlotte Declerck & Koen Matthijs, “Alternating Residence for Children after Parental Separation: Recent Findings from Belgium” (2017) 55(4) *Family Court Review* 545 and Ragni Hege Kitterød & Kenneth Aarskaug Wiik, “Shared Residence among Parents Living Apart in Norway” (2017) 55(4) *Family Court Review* 556.

for half of all divorce cases.⁴⁸ This is also the case in Sweden.⁴⁹ A central thread running through much of the international research on shared parenting is that shared-time arrangements are exercised mainly by well-educated, adequately resourced, co-operative former partners, though this may be changing in some places towards more demographic diversity, such as in Belgium and Wisconsin, US.⁵⁰

28 In Australia, since 2008, shared-time arrangements refer to post-separation parenting arrangements where children are in the care of each parent for at least 35% of nights each year.⁵¹ There are at least four relatively recent sources of data that shed light on the prevalence and incidence of shared-time arrangements in Australia: (a) administrative data from the DHS child support program; (b) survey data based on national random samples of separated parents; (c) administrative data from the Family Court of Australia; and (d) a content analysis of family court records⁵² conducted by the Australian Institute of Family Studies (“AIFS”). Each of these datasets captures trends in quite different subsets of the separated-parent population (including high-conflict cases). Specifically, (a) and (b) represent the broader population of separated families in Australia, while (c) and (d) typically encompass families in higher levels of parental conflict (including entrenched parental hatred).⁵³

29 Australia is fortunate to have multiple nationally representative datasets, which enable findings to be triangulated across studies.⁵⁴ The CSA data are remarkable for the fact that they provide longitudinal data on the vast majority of separated families and capture changes that occur in and over time. This is in contrast to many other countries that must rely on court records or mediation agreements, which may not reflect parents’ actual arrangements.

48 Daniel R Meyer, Maria Cancian & Steven T Cook, “The Growth in Shared Custody in the United States: Patterns and Implications” (2017) 55(4) *Family Court Review* 500. It is important to note that shared custody is defined as 25% of nights with each parent.

49 Natalie Nikolina, *Divided Parents, Shared Children* (Intersentia, 2015).

50 Bruce M Smyth, “Special Issue on Shared-Time Parenting after Separation” (2017) 55(4) *Family Court Review* 494.

51 Prior to the child support scheme changes of 2008, “shared care” was defined as at least 30% of nights with each parent.

52 All three family law courts were sampled – Family Court of Australia, Federal Circuit Court of Australia and Family Court of Western Australia.

53 Bruce M Smyth & Lawrie J Moloney, “Entrenched Postseparation Parenting Disputes: The Role of Interparental Hatred” (2017) 55(3) *Family Court Review* 404.

54 “Triangulation” refers to the use of data from different sources, methods, countries, etc, to enable cross-validation of a source, thereby increasing the confidence in a set of findings.

(1) *Administrative data from the Child Support Program*

30 The DHS child support program caseload represents the most comprehensive sampling frame in Australia of separated parents with at least one dependant child: around 85%–90% of all separated parents in Australia are registered with the program.⁵⁵ It receives updated information (including changes in income and parenting time) from several sources: annual tax returns; government-income support/family benefit reporting requirements by clients; and updated information from clients themselves (for example, about parenting time), often in response to the Department’s periodic assessment notices that are sent to each parent annually or when a major change in circumstances has been reported by one or both parents.

31 Recent administrative population data from the DHS⁵⁶ indicate the proportion of children in shared-time arrangements in recently separated families almost doubled from a low base of 9% in 2002–2003 to 17% in 2014–2015.⁵⁷ It is noteworthy, that there was no marked increase in shared-time arrangements among this broad cross-section of the separated-parent population following the amendments of 2006, nor was there a marked decrease in the incidence of shared time following the introduction of family violence amendments in 2011. Indeed, if anything, since the amendments of 2006, shared-time arrangements have largely plateaued at around 17%. Bruce M Smyth and Richard Chisholm have speculated that the apparent lack of direct impact of each legislative change may in part be a result of two contemporaneous developments. The first development is the emerging body of Australian research about shared-time parenting, and the related increase in knowledge of the professionals (including lawyers) who assist separating families. The second development is the introduction of 65 Family Relationship Centres around Australia and the expansion of family and relationship support services. These services increased access to professional advice for separating families, including information about the benefits and risks of shared-time parenting in different contexts. In combination, these developments may have meant that shared-time

55 Parliament of Commonwealth of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (December 2003) at p 127. The present authors speculate that because shared-time families are more likely to self-administer their financial arrangements for children (*ie*, be in the 10–15% that are outside the Child Support Agency system), the incidence estimates cited are likely to be lower-bound estimates.

56 For consistency, the same shared-time parenting threshold (at least 30% of nights with each parent) is used for all time periods, even though different parenting time adjustment thresholds for child support were introduced after 1 July 2008.

57 Bruce M Smyth & Richard Chisholm, “Shared-Time Parenting after Separation in Australia: Precursors, Prevalence, and Postreform Patterns” (2017) 55(4) *Family Court Review* 586.

parenting has been adopted in a more informed manner, rather than as a “one size fits all” response to a perceived legislative prescription.⁵⁸ Another possibility is that “the 2006 legislation caught the wave of shared parenting rather than caused it”.⁵⁹

(2) *Surveys of post-separation parenting arrangements*

32 AIFS has a long history of providing reliable data on patterns of parenting after separation and the well-being of separated families. An *Evaluation of the 2006 Family Law Reforms* conducted by the Institute, drawing on a random sample of 10,000 recently separated parents registered with CSA found that 16% of children were in a shared-time arrangement.⁶⁰ This point-in-time estimate snaps with the child support administrative data.

33 It is important to note that in a recent Australian survey, shared-time arrangements were most common among 5–11-year-olds (26%), and least common among the zero to two-year-olds (8%), and 15–17-year-olds (11%). These trends likely reflect the differing developmental needs of children of varying ages.⁶¹ The importance of developmental considerations is becoming a topic of increasing interest, and whether a child can be too young for shared-time arrangements remains an ongoing lively debate.

(3) *Administrative data from the Family Court of Australia*

34 Trends in the general population are not necessarily reflected in trends for particular subgroups, such as high-conflict families. Between April 2007 and September 2012, the Family Court of Australia collected information for each financial year about orders specifying the time

58 Bruce M Smyth & Richard Chisholm, “Shared-Time Parenting after Separation in Australia: Precursors, Prevalence, and Postreform Patterns” (2017) 55(4) *Family Court Review* 586 at 586.

59 Bruce M Smyth & Richard Chisholm, “Shared-Time Parenting after Separation in Australia: Precursors, Prevalence, and Postreform Patterns” (2017) 55(4) *Family Court Review* 586 at 593; see also Alexander Masardo, “Negotiating Shared Residence: The Experience of Separated Fathers in Britain and France” in *Regulating Family Responsibilities* (Jo Bridgeman, Heather Keating & Craig Lind eds) (Routledge, 2011).

60 Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) at p 119.

61 See paras 55–57 below. See also Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) at p 119. Bruce Smyth, Bryan Rodgers and Vu Son reported similar parenting time estimates in a large cross-sequential study of child support based on different samples of separating parents. These data have not been published.

children were to spend with their parents.⁶² Orders can be divided into three types, based on the circumstances in which they were made: (a) judicially determined orders; (b) orders made by consent after proceedings have commenced (“consent after proceedings”); and (c) orders made by consent on request. The families represented by this data are, arguably, living in higher conflict than the broader samples reported above as they have required court intervention. This court intervention has been at varying levels, from those who require the security of formalisation to those who require a third party to make a decision.

35 Smyth, Chisholm, Bryan Rodgers and Vu Son reported trends in the making of orders in the Family Court of Australia for “approximately equal amounts of time” (defined as between 45 and 55% by the court).⁶³ Near-equal shared-time arrangements were ordered by judges in 10% or less of cases in the five years after the legislative changes: increasing from 6% of cases in 2007–2008 to 10% in 2009–2010, but then declining sharply to just 3% of cases in 2011–2012.⁶⁴ In consent after proceedings orders, the incidence of near-equal-time arrangements was around one in five cases in 2007–2008 and 2008–2009, then fell to 14% in 2009–2010, then to 13% in 2010–2011, but rose again to 17% in 2011–2012 (the most recent available data to date).⁶⁵ By contrast, consent by request orders for near-equal time barely changed, remaining at 20% for all years other than 2008–2009 (19%).⁶⁶

36 In summary, each of these types of orders (and likely distinct populations) display different patterns over time. From the lowest to highest levels of conflict: consent orders by request for near-equal time

62 Orders did not necessarily spell out the times involved, as where an order provided for a child to live with one parent and spend “such additional time as the parties might agree” with the other.

63 Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, “Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?” (2014) 77(1) *Law and Contemporary Problems* 109. Over the past five years, there has been a marked decrease in the number of Family Court of Australia parenting cases (the most complex and difficult cases), and an increase in the number of Federal Circuit Court applications for final orders in family law matters. It is possible, therefore, that the prevalence of shared-time arrangements in the two courts may reflect, to some extent, differences in the nature of the cases coming before each court.

64 Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, “Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?” (2014) 77(1) *Law and Contemporary Problems* 109 at 136.

65 Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, “Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?” (2014) 77(1) *Law and Contemporary Problems* 109 at 137.

66 Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, “Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?” (2014) 77(1) *Law and Contemporary Problems* 109 at 139.

in the Family Court of Australia remained flat; consent orders after proceedings bore the shape of an inverse bell; and judicially determined orders over time remained low and followed a mild bell curve.

(4) *Content analysis of court files*

37 As part of its extensive evaluations of the family law amendments of 2006 and the family violence amendments of 2011, AIFS conducted a detailed analysis of court files from (a) the Sydney, Melbourne and Brisbane registries of the Family Court of Australia, and the Federal Circuit Court, and (b) the Family Court of Western Australia.⁶⁷ These registries, along with the Family Court of Western Australia, administer the bulk of all applications filed nationally.⁶⁸ Shared-time parenting was defined as 35–65% of time with each parent (based on post-2008 child support rules) in the AIFS analyses. This data is thus not comparable with the Family Court administrative data described above.⁶⁹

38 Once again, each court resolution pathway had its own distinctive pattern. Judicially determined cases yielded the lowest incidence of children in shared-time arrangements: 13% in 2006–2008, then dropping to 9% in 2009–2010, and remaining at a similar level (10%) in 2012–2014. The relatively low and consistent incidence suggests that in recent years, Australian family courts have been reluctant to order shared-time arrangements in the face of entrenched high-conflict and safety concerns. In marked contrast, the percentage of children in shared-time arrangements in consent orders by request show a relatively linear increase: from 16.5% in 2006–2008, to 21.6% in 2009–2010, to 26% in 2012–2014.

39 However, potentially the most interesting pattern is that of the consent orders after proceedings. In 2008–2010, 13% of children were in shared-time arrangements as a result of consent orders after proceedings commenced. The incidence of shared-time parenting among this group of children then almost doubled (24%) in 2009–2010 but then almost halved again (14%) in 2012–2014. Acknowledging that caution is

67 Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Rae Kaspiew *et al*, *Court Outcomes Project* (Australian Institute of Family Studies, 2015).

68 Rae Kaspiew *et al*, *Court Outcomes Project* (Australian Institute of Family Studies, 2015).

69 For detailed technical information on the samples, time periods and data limitations, see Bruce M Smyth & Richard Chisholm, “Shared-Time Parenting after Separation in Australia: Precursors, Prevalence, and Postreform Patterns” (2017) 55(4) *Family Court Review* 586.

needed in drawing strong inferences between legislative change and research findings, Smyth and Chisholm wondered whether:⁷⁰

[The] up–down pattern in shared-time arrangements among consent orders after proceedings might reflect (a) new and renewed interest in the pursuit of shared-time in the aftermath of the shared parenting amendments; followed by (b) a change in attitude by the court and legal professionals bargaining in the law’s shadow – in part influenced by the rapidly emerging Australian evidence base after 2006.

(5) *Summary*

40 Studies examining the incidence and prevalence of shared-time parenting in Australia suggest that there has been a gradual increase in the proportion of children in a shared-time arrangement, plateauing at around 17% over the past decade. This gradual increase does not appear to have been impacted by the legislative reforms that occurred in 2006, 2008 or 2011. This pattern in the general population masks complexity that only becomes evident on inspection of the small but important subset of the family law court population.

41 Four clear findings emerge. First, based on the AIFS cross-sectional survey data, the proportion of children in shared-time arrangements varies by age – a curvilinear relationship that may align with children’s developmental needs.⁷¹ Second, the more volatile patterns of incidence of shared time among families that engage with the family law courts raise the possibility that legislative change is more likely to impact higher conflict families than the general population. Third, and not surprisingly perhaps, shared-time parenting is least common among families who need a judge to make a decision. Fourth, separated families with shared-time arrangements remain in the minority in Australia.

70 Bruce M Smyth & Richard Chisholm, “Shared-Time Parenting after Separation in Australia: Precursors, Prevalence, and Postreform Patterns” (2017) 55(4) *Family Court Review* 586 at 598.

71 For a good discussion of developmentally appropriate parenting plans, see, eg, Robert E Emery, *Two Homes One Childhood: A Parenting Plan to Last a Lifetime* (Avery, 2016); Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, “Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children” in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

IV. Shared-time parenting: Benefits and risks

42 For Robert Emery,⁷² shared-time parenting is the “best and worst” possible arrangement for children after separation depending on logistics and resources, how parents get along, and the extent to which the parenting arrangements are responsive to children’s developmental needs and temperament. But before examining some of the benefits and risks of shared-time arrangements, it is important to note several limitations of much of the shared-time parenting research. To begin with, as noted above, selection effects are prevalent in this area. Second, most studies are cross-sectional rather than longitudinal (association does not mean causation), and rely on self-reports frequently from a single source (meaning, “reporter bias”), most commonly the mother. More broadly, there is a lack of definitional and methodological consistency between studies, with Smyth, Jennifer E McIntosh, Emery and Shelby L Higgs Howarth describing the literature as being a “conceptual and methodological quagmire”.⁷³ As a result, it is difficult to compare and connect the findings from multiple studies, which is essential to the development of a reliable evidence base to inform decision-making.

43 Given the piecemeal nature of the recent shared-time parenting literature, little can be said with any certainty about the elements of shared-time arrangements that independently determine risk or benefit to children. This makes for a complex predictive context to guide decision-making in individual cases.

A. Benefits

44 Many of the claimed benefits of shared-time parenting appear to be real. Parents with shared-time arrangements tend to report that their children are doing well and that they and their children like the arrangements.⁷⁴

72 Robert E Emery, *The Truth about Children and Divorce: Dealing with the Emotions So You and Your Children Can Thrive* (Penguin, 2006) at pp 163–164.

73 Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, “Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children” in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016) at p 124.

74 Robert Bauserman, “A Meta-analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce” (2012) 53(6) *Journal of Divorce and Remarriage* 464; Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General’s Department* (Social Policy Research Centre, University of New South Wales, 2010); Beata Jablonska & Lene Lindberg, “Risk Behaviours, Victimization and Mental Distress among Adolescents in
(cont’d on the next page)

45 Specifically, one perceived benefit of shared-time parenting is that it increases the longevity and quality of the relationship between a child and each of his or her parents (and wider kin). Shared-time parenting creates an opportunity for both parents to maintain or establish a meaningful relationship in all aspects of the child's life.⁷⁵ It encourages long-term and deeper relationships between parents and children⁷⁶ and may reduce the likelihood of non-resident parents (mostly fathers) disengaging from their children's lives.⁷⁷

46 A further benefit of shared-time parenting is the respite it provides for each parent,⁷⁸ which in turn increases the capacity of

Different Family Structures" (2007) 42(8) *Social Psychiatry and Psychiatric Epidemiology* 656; Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

75 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Belinda Fehlberg, Bruce Smyth & Liz Trinder, "Parenting Issues after Separation: Developments in Common Law Countries" in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Routledge, 2014); Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, "Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children" in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

76 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Belinda Fehlberg, Bruce Smyth & Liz Trinder, "Parenting Issues after Separation: Developments in Common Law Countries" in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Routledge, 2014); Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, "Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children" in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

77 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Belinda Fehlberg, Bruce Smyth & Liz Trinder, "Parenting Issues after Separation: Developments in Common Law Countries" in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Routledge, 2014); Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, "Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children" in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

78 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (Social Policy Research Centre, University of New South Wales, 2010); Belinda Fehlberg, Bruce Smyth & Liz Trinder, "Parenting Issues after Separation: Developments in Common Law Countries" in *Routledge Handbook of Family Law and Policy* (John Eekelaar & Rob George eds) (Routledge, 2014); Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, "Shared-Time

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parents to provide for the child's emotional and practical needs. Shared-time arrangements, moreover, send children the important message that "families are forever"; help children to feel they have two "homes"; and affirm non-resident parents' self-identity as a "parent" (rather than being a "visitor").⁷⁹

47 William V Fabricius, in the US context, has suggested that there is an emerging consensus that 33% of time with each parent after separation at minimum is required to maintain and develop meaningful parent-child relationships.⁸⁰ It is important to note, however, that there is no evidence that a linear relationship exists between child outcomes and the amount of time a child spends with each parent. It seems axiomatic that some time is needed but the existence of a blanket minimum parenting-time threshold remains highly contested and lacking in empirical support. It is also acontextual.

B. Risks

48 By contrast, the potential benefits of shared-time arrangements may be outweighed in some instances by risks that arise, or are exacerbated, under certain conditions. These conditions include (a) high levels of entrenched interparental conflict (particularly where hate-driven conflict by one parent to the other is present), (b) where a parent has safety concerns, and (c) where one of the children is an infant or very young.

49 There is ongoing lively debate about whether shared-time arrangements are appropriate in the presence of entrenched high levels of interparental conflict. Most studies suggest that the interests of children post-separation are generally best served when children can maintain continuing and frequent contact with both parents who co-operate and communicate in a climate of no (or minimal)

Parenting: Evaluating the Evidence of Risks and Benefits to Children" in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

79 Meyer Elkin, "Joint Custody: In the Best Interest of the Family" in *Joint Custody and Shared Parenting* (Jay Folberg ed) (The Guilford Press, 2nd Ed, 1991) at pp 12-13.

80 William V Fabricius, Sanford L Braver, Priscila Diaz & Clorinda E Velez, "Custody and Parenting Time: Links to Family Relationships and Well-Being after Divorce" in *The Role of the Father in Child Development* (Michael E Lamb ed) (Wiley, 5th Ed, 2010).

interparental conflict.⁸¹ However, in a recent Australian longitudinal study, Kaspiew *et al* found:⁸²

[While] previous experience of family violence and current conflictual or fearful relationship between the parents were associated with poor outcomes for children, analysis of parents who participated in the LSSF W1 2008 (Longitudinal Study of Separated Families, Wave 1) suggest that, one to two years after separation such negative dynamics were not more or less damaging for children in some care time arrangements than for children in other arrangements.

50 More recently, Smyth and Moloney,⁸³ drawing on an article by Steven Demby,⁸⁴ have argued that the term “high-conflict” can oversimplify the nature of destructive family dynamics, and that shared-time parenting may not be feasible or appropriate when “entrenched parental hatred” is present. In short, the tendency for conceptual lumping of high conflict means that different studies and measures may miss its pernicious effects, especially when a culture of hatred is fostered by a parent to draw in children.

51 Fabricius has argued that the strong relationships with both parents that result from shared time can act as a protective buffer for children in high-conflict families.⁸⁵ Moreover, Alexander Masardo has argued that parallel parenting can provide a means by which to ameliorate the adverse effects of high levels of parental conflict, at least in the short term.⁸⁶ However, it is questionable whether a strong relationship with both parents can be maintained in the more severe emotional climate of entrenched interparental hatred.

52 A second likely impediment to child-responsive shared-time arrangements is the presence of safety concerns. These concerns commonly arise from issues such as family and domestic violence,

81 Jan Pryor & Bryan Rodgers, *Children in Changing Families: Life after Parental Separation* (Wiley, 2001).

82 Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) at pp 269–270.

83 Bruce M Smyth & Lawrie J Moloney, “Entrenched Postseparation Parenting Disputes: The Role of Interparental Hatred” (2017) 55(3) *Family Court Review* 404.

84 Steven Demby, “Interparent Hatred and Its Impact on Parenting: Assessment in Forensic Custody Evaluations” (2009) 29(6) *Psychoanalytic Inquiry* 477.

85 William V Fabricius, Sanford L Braver, Priscila Diaz & Clorinda E Velez, “Custody and Parenting Time: Links to Family Relationships and Well-Being after Divorce” in *The Role of the Father in Child Development* (Michael E Lamb ed) (Wiley, 5th Ed, 2010) at p 228.

86 Alexander Masardo, “Managing Shared Residence in Britain and France: Questioning a Default ‘Primary Carer’ Model” in *Social Policy Review 21: Analysis and Debate in Social Policy, 2009* (Kirstein Rummery, Ian Greener & Chris Holden eds) (The Policy Press, 2009) at p 204.

mental health issues (including personality disorders), and alcohol and substance abuse issues. These issues often co-exist.⁸⁷

53 More specifically, family violence remains a core business of family law courts in Australia, with a substantial proportion of cases exhibiting “a history of relevant and severe family violence”.⁸⁸ In Australia, Kaspiew *et al* found that where mothers reported safety concerns in relation to their children or themselves, child well-being was reported to be lower when children were living in a shared-time arrangement than when they were living mostly with their mother.⁸⁹ This finding is consistent with data reported by Judy Cashmore *et al*.⁹⁰

54 In addition, following the violence amendments of 2011, data from a recent Australian study noted a decline in shared-time orders in cases involving allegations of family violence, child abuse, or both, with the greatest reduction among cases where consent orders were obtained after proceedings were commenced.⁹¹ This offers circumstantial evidence that the family violence amendments of 2011 may have influenced the incidence of court-ordered shared-time arrangements in the context of safety concerns, thereby exhibiting a clear indication of the prioritisation of safety.

55 Finally, the appropriateness of shared-time arrangements for infants and young children remains highly contested.⁹² On the one hand, Richard A Warshak has argued that the early introduction of frequent overnights with both parents is a protective factor against father absence as it increases the father’s commitment to the child, and allows a child–

87 Lixia Qu & Ruth Weston, *Parenting Dynamics after Separation: A Follow-Up Study of Parents who Separated after the 2006 Family Law Reforms*, Attorney-General’s Department (December 2010).

88 Rae Kaspiew *et al*, *Court Outcomes Project* (Australian Institute of Family Studies, 2015) at p 95; Lawrie Moloney *et al*, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (Research Report No 15, 2007).

89 Rae Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) at p 270.

90 Judy Cashmore *et al*, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General’s Department* (Social Policy Research Centre, University of New South Wales, 2010).

91 Rae Kaspiew *et al*, *Court Outcomes Project* (Australian Institute of Family Studies, 2015) at p viii.

92 Richard A Warshak, “Social Science and Parenting Plans for Young Children: A Consensus Report” (2014) 20(1) *Psychol Pub Pol’y & L* 46; Jennifer McIntosh, Bruce Smyth & Margaret Kelaher, “Responding to Concerns about a Study of Infant Overnight Care Postseparation, with Comments on Consensus: Reply to Warshak” (2015) 21(1) *Psychol Pub Pol’y & L* 111; Samantha Tornello *et al*, “Overnight Custody Arrangements, Attachment, and Adjustment among Very Young Children” (2013) 75(4) *Journal of Marriage and Family* 871.

parent relationship to be built. Warshak asserted that there is insufficient evidence of adverse outcomes for children who have frequent overnights with each parent during infancy and early childhood.⁹³ On the other hand, there is emerging evidence that shared-time parenting may pose developmental risks for infants and very young children.⁹⁴

56 Developmental theories about attachment and emotion regulation suggest that frequent overnight separation from an infant's primary attachment figure is generally detrimental to the child's development. These theories are supported by empirical studies of infants (that is, up to 12 months of age) who spend regular overnights (that is, one night per week or more) away from their primary attachment figure.⁹⁵ These studies have found that these infants have significantly greater difficulty in regulating their own emotions.⁹⁶ McIntosh, Smyth and Margaret Kelaher reported that these infants "were more fretful on waking up and/or going to sleep, had greater difficulty amusing themselves for a length of time, more often cried continuously in spite of several minutes of soothing and more often cried when left to play alone" when compared to infants who spent one to three overnights per month away from their primary carer.⁹⁷ At the same time, they noted a raft of limitations regarding their study.

57 McIntosh, Smyth and Kelaher's study also investigated the impact of frequent overnight separation from a primary carer for young children. They found that frequent overnight separation (that is, ten or more overnights per month) correlated with decreased capacity for self-regulation of emotion in two to three-year-old children, but not in

93 Richard A Warshak, "Social Science and Parenting Plans for Young Children: A Consensus Report" (2014) 20(1) *Psychol Pub Pol'y & L* 46.

94 Jennifer E McIntosh, Bruce Smyth & Margaret Kelaher, "Overnight Care Patterns Following Parental Separation: Associations with Emotion Regulation in Infants and Young Children" (2013) 19(3) *Journal of Family Studies* 224; Carol George, Judith Solomon & Jennifer McIntosh, "Divorce in the Nursery: On Infants and Overnight Care" (2011) 49(3) *Family Court Review* 521; Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, "Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children" in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016).

95 Jennifer E McIntosh, Bruce Smyth & Margaret Kelaher, "Overnight Care Patterns Following Parental Separation: Associations with Emotion Regulation in Infants and Young Children" (2013) 19(3) *Journal of Family Studies* 224; Carol George, Judith Solomon & Jennifer McIntosh, "Divorce in the Nursery: On Infants and Overnight Care" (2011) 49(3) *Family Court Review* 521.

96 See, eg, (2011) 49(3) *Family Court Review* 415.

97 Jennifer E McIntosh, Bruce Smyth & Margaret Kelaher, "Overnight Care Patterns Following Parental Separation: Associations with Emotion Regulation in Infants and Young Children" (2013) 19(3) *Journal of Family Studies* 224.

four to five-year-old children, when compared with children in the same age groups who spent some (or fewer) overnights away from their primary carer (that is, one to nine nights per month).⁹⁸

58 In summary, shared-time arrangements – or indeed any parenting arrangement – can confer benefits for children, but can also involve risks, especially in the context of safety concerns, entrenched parental hatred, or where children are infants or very young. Drawing on McIntosh and Smyth’s earlier work,⁹⁹ Smyth, McIntosh, Emery and Higgs Howarth suggested five key domains be considered when weighing up the risks and benefits of shared-time arrangements for children: (a) safety and emotional security with each parent; (b) parenting quality and the parent–child relationship; (c) factors relating to the individual child (or siblings); (d) the nature and exercise of the parenting arrangements; and (e) practical issues such as financial resources and job flexibility.¹⁰⁰

V. Discussion and reflections

59 Shared-time parenting (variously defined and operationalised) appears to be on the rise in many Western countries. Australia is an interesting case study in so far as even though it legislated to encourage shared-time parenting in 2006, the prevalence of shared time in the general population of separated parents appears to have plateaued around 17%. The extent to which this levelling-out is related to the rapidly emerging Australian evidence base on shared-time parenting, along with the expansion of family and relationship support services, remains unclear.

60 It would be unwise to attempt to generalise Australia’s experience to other countries given the diversity of social, legislative, policy and demographic contexts. Some tentative “take-home” messages, nonetheless, warrant brief mention.

98 Jennifer E McIntosh, Bruce Smyth & Margaret Kelaher, “Overnight Care Patterns Following Parental Separation: Associations with Emotion Regulation in Infants and Young Children” (2013) 19(3) *Journal of Family Studies* 224.

99 Jennifer E McIntosh & Bruce M Smyth, “Shared-Time Parenting: An Evidence-Based Matrix for Evaluating Risk” in *Parenting Plan Evaluations: Applied Research for the Family Court* (Kathryn Kuehne & Leslie Drozd eds) (Oxford University Press, 2012) at pp 180–181.

100 Bruce M Smyth, Jennifer E McIntosh, Robert E Emery & Shelby L Higgs Howarth, “Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children” in *Parenting Plan Evaluations: Applied Research for the Family Court* (Leslie Drozd, Michael Saini & Nancy Olesen eds) (Oxford University Press, 2nd Ed, 2016) at pp 162–163.

A. *Fundamental knowledge gaps remain*

61 The benefits and risks of shared-time parenting remain controversial in Australia as elsewhere. Clarity over benefits and risks is hampered by conceptual and methodological challenges. As such, Australia is still some way from a coherent set of guidelines for when shared-time arrangements may be feasible, appropriate, and culturally sensitive. Although international studies are potentially instructive, a lack of definitional and methodological consistency between studies remains, making it difficult to compare and connect the findings from various studies, which is essential to the development of a reliable evidence base to inform decision-making.

B. *Legislative change can lead to confusion on the ground*

62 In 2006, Australia created a presumption of equal shared parental responsibility and compelled courts to consider ordering “equal time” or “substantial and significant time” parenting arrangements. The 2006 legislative changes appear to be an attempt to move away from a “one home, one authority” model in which one parent (typically the mother) has all or virtually all the responsibility and authority for children while the other parent has minimal (if any) involvement in his or her children’s lives. The legislative changes appear, however, to have led, at least initially, to some confusion among both parents and their legal representatives: equal shared parental responsibility was interpreted by many to mean “equal time”.

63 Concerns regarding the use of a legal number (“equal time” – that is, 50/50) in the legislation remain, not least around fears that it may give parents a *standard* over which to fight. Shared time, it is argued, can foster co-parenting and provide the best position from which to be child responsive. It can also encourage a “child-halving” and “spreadsheet parenting” mentality rather than fostering co-operative co-parenting, and child-responsive arrangements. Therefore, while arguably, it can work well in many instances, it is not without its problems and challenges.

C. *Shared time is not a homogenous experience*

64 Families who have shared-time arrangements are, typically, better resourced and more co-operative than the general separated-parent population. However, there are some high-conflict families for whom shared-time arrangements have been adopted as a compromise position, or imposed by the court. It is important to recognise that the benefits and risks of shared-time parenting may operate quite differently for the children in some families than in others.

V. Conclusion

65 The Australian story of shared-time parenting remains a work-in-progress. Australia is in the enviable position of having amassed a considerable amount of recent empirical research on the benefits and risks of shared-time arrangements. We know that shared-time arrangements can work well for children and young people, in particular, where separated parents are able to co-operate and communicate in ways which avoid or contain conflict and where arrangements are flexible and child-focused. That said, the extent to which such arrangements can “work” for children in the context of ongoing high parental conflict and/or when children are very young (under four years) remains hotly contested. Further research is urgently needed in these two important areas of policy and practice.
