

## **TRENDS IN CHILDREN'S CASES: SHARED PARENTING, RELOCATION AND PARENTAL AUTONOMY**

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### **Introduction**

In the discussion paper "A new approach to the Family Law system" issued by the Australian Government on 10 November 2004, various changes to the law are proposed to support shared parenting. It is worth setting out the introduction to this part of the discussion paper:-

The government supports shared parenting and wants people to reach agreements about parenting and wants people to reach agreements about parenting rather than use the courts. Where a matter does need to go to court, the government wants to ensure that the option of shared parenting is considered by judges and magistrates when making parenting orders.

As recommended by the committee, the government proposes to amend Section 60B of the *Family Law Act* to make one of the objects of the Act: *to ensure that parents are given the opportunity for a meaningful involvement in their children's lives to the maximum extent consistent with the best interests of the child.*

The government also proposes to strengthen the underlying principles, already in the *Family Law Act*, of children having a right to be known and cared for by both parents and a right of contact on a regular basis with both their parents and other people significant to them. The new provisions would refer to the right of children to spend time on a regular basis, and communicate on a regular basis, with both parents (and other people significant to their care, welfare and development). This right would always be subject to the best interests of the child. As recommended by the committee, the proposed provision would also refer to the need to protect children from physical or psychological harm.

The proposals include:-

- § making equal shared parental responsibility (meaning that parents share the key decisions in a child's life, regardless of how much time the child spends with each parent - including decisions about a child's education, religion, health and where they live) the starting point under the *Family Law Act*, by making it a rebuttable presumption, though the best interests of the child would still be the most important factor and decisions would still be made on the circumstances of each case;
- § excepting from the application of that rebuttable presumption cases where there is violence or child abuse or entrenched conflict, in which case there would be a rebuttable presumption against equal shared parental responsibility where the court is

satisfied that there is evidence of the violence, abuse or entrenched conflict;

§ imposing an obligation on parents to consult each other in making key decisions about their children;

§ without imposing a rebuttable presumption of equal shared parenting time, requiring the court to consider substantially shared parenting time where both parents want half or more of the time with their child and the case does not involve, violence, child abuse or entrenched conflict.

One of the issues raised by the discussion paper for submissions is how “entrenched conflict” should be defined; one of the thesis of this paper is that “entrenched conflict” in the absence of abuse or violence should not exclude a case from the rebuttable presumption of equal shared parental responsibility, nor from the requirement to consider substantially shared parenting time.

The proposals in the discussion paper, which are likely to become law some time in 2005, represent a further step in the evolution of attitudes to parenting after marriage breakdown. One of the features of that evolution has been the trend towards shared parenting. That trend does not sit entirely comfortably with two other developments: the tendency to give considerable weight to the freedom of movement of an applicant for relocation, and the emergence of the principle of parental autonomy. This paper seeks to establish a principled basis for resolving these tensions and issues.

### **The road to shared parenting**

The traditional custody/access model for post-separation parenting had its roots in the notion of ownership of children. It contained adversary notions of winning and losing, and frequently had the effect of substantially devaluing one parent’s contribution. Many access parents finally abandoned their parenting role all together, leaving one parent - usually the mother - to cope alone. The children of single divorced parents are more vulnerable than

their counter-parts who retain a relationship with both mother and father, and are also more likely to be living in poverty.<sup>1</sup>

By 1980, Wallerstein and Kelly were reporting that nearly all children in their sample “longed and wished for more frequent visits with their fathers”, and that the only children reasonably satisfied were those who could bicycle over to the father’s house several times weekly, and where such frequent visits had the approval of both parents. In 1985, Mitchell in the United Kingdom concluded after interviewing 111 children of divorced parents that uncertainty about access caused more unhappiness for children than the question of with which parent they should live. The desire of children - have contact or greater contact with their non-custodial parent was reported in numerous other studies during the 1980s.<sup>2</sup>

The Family Law Council proposed that although once a family broke up there were practical reasons why arrangements between parents could not result in equal status in equal responsibility for both, it was a desirable goal that the parent accepted the lesser role in relation to the children should still be encouraged to play an important role in the decision making process in relation to those children. One means identified of moving beyond the perceive limitations of custody/access arrangements was to either encourage or pressure joint custody status after separation.<sup>3</sup>

Then available research, based on small samples, suggested that children in joint custody were neither confused by differences in parental values, nor by living in two homes, though some were stressed by having to travel long distances between homes.<sup>4</sup> Another found that many non-custodial parents but no joint custodians had lost contact with their children; many custodians, but no joint custodians, reported feeling overwhelmed or “burnt out”; and no joint custody fathers had stopped supporting their children financially, while many non-custodian

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<sup>1</sup>Patterns of Parenting after Separation, Family Law Council discussion paper, April 1991, [5.24].

<sup>2</sup>Murch, 1980; Luepnitz, 1982; Santrock et al, 1982; Walczak & Burns, 1984; Ochiltree & Amato, 1985. Jacobsen, 1978 suggested that the more time lost with the non-custodial parent, the greater the mal-adjustment in the child

<sup>3</sup>Patterns of Parenting after Separation, [5.28-5.29].

<sup>4</sup>Steinman, 1981.

fathers had. This researcher concluded that joint custody at its best is superior to single parent custody at its best.<sup>5</sup>

The discussion paper noted that California, the first State in America to introduce joint custody legislation, had resiled from its pre-existing presumption of joint custody and now had neither a preference or a presumption for or against joint legal custody, joint physical custody or sole custody, allowing the court and the family the widest discretion to choose a parenting plan which was in the best interests of the child or children.<sup>6</sup> The Family Law Council concluded that only three relatively sound findings had emerged:-

1. Children of divorced parents do better when contact is maintained with both parents;
2. Children are adversely affected when there is continuing conflict between their separated parents; and
3. Children are adversely affected when separation causes a family to live below the poverty line.

The studies were thought to point to a need for continued regular contact between both parents and the children, but no necessarily more or equal time; both parents to exercise their responsibilities in making major decisions together regarding their children; and discouragement of conflict between parents. However, joint custody was said not to have been found to ameliorate conflict and, in that sense, not to have been positively proved to be beneficial.<sup>7</sup>

### **The traditional approach**

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<sup>5</sup>Luepnitz, 1982.

<sup>6</sup>Patterns of Parenting after Separation, [5.35].

<sup>7</sup>Patterns of Parenting after Separation, [5.36-5.37].

Although there is a substantial body of research and opinion to the effect that, at least where parents are co-operative, shared parenting regimes are preferable from the perspective of the children, generally speaking the courts have imposed a shared parenting regime only where it has been supported by both parents. Traditionally, in England and in this country, the courts have taken the view that the best interests of children are served by having one home. That is ordinarily reflected in a residence/contact order - formerly a custody/access order - the children living primarily with one parent, and having contact with the other.

The view that shared parenting orders should be made only in exceptional cases, and that ordinarily children should reside with one party and have contact with the other, is reflected in the judgment of Butler-Sloss LJ, approving Connell J, in *A v A (Minors)*:<sup>8</sup>

Shared orders are not appropriate in normal, conventional circumstances where parents are separated. They should only be made where there is something unusual about the case which justifies making such an order in the best interests of the child or children concerned. The court will wish to see whether there is something which will be to the positive benefit of the children arising out of such a shared order before finding the circumstances to be so unusual as to justify the making of such an order. Of course, it almost goes without saying that the court must, in considering whether or not to make such an order, be guided by the *Children Act* 1989 and in particular s.1(1), treating the children's welfare as the court's paramount consideration, and the matter set out in the welfare checklist.

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The usual order that would be made in any case where it is necessary to make an order is that there will be residence to one and a contact order to the other parent. Consequently, it will be unusual to make a shared residence order. But the decision whether to make a shared residence order is always at the discretion of the judge in the special facts of the individual case.

One of the reasons why the English courts have been reluctant to make a shared residence order is that it is thought that such an order might lead to a child being confused about his or her true home base; but it is implicit even in the above passages that a shared parenting order may be made where it is clearly in the best interests of the child.<sup>9</sup>

### **Early Australian developments**

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<sup>8</sup>*A v A (minors)* [1994] 1 Fam LR (Eng) 669, 672-673, 677-678; see also *Re: H* [1995] 2 Fam LR (Eng) 883, 888.

<sup>9</sup>*A v A (Minors)* [1994] 1 Fam LR (Eng) 669 at pp 672-673, 677-678; *Re H* [1995] 2 Fam LR (Eng) 883 at pp 883, 888 .

A more adventurous approach was seen in Australia, even in the early years of the *Family Law Act*. In *Gronow v Gronow*,<sup>10</sup> Murphy J in the High Court recognised the potential benefits of shared parenting, much as they are advanced today:

In some cases, despite some switching back and forth, joint custody may be a desirable solution where the parents live near one another, so that schooling and other behaviour patterns are not disrupted. The theory is that, although some adaptation of all hands is necessary, the child does not suffer deprivation of one parent, which is only slightly mitigated by access which itself may lead to artificial relationships and problems worse than those of joint custody (see Foster & Freed, 'Joint Custody: A Viable Alternative?', *Trial*, vol. 15, No 5, May 1979 at p 27, and cases and articles referred to).

This approach was not rejected, although its initial reception was cautious, if not cool. In *Cullen & Cullen*,<sup>11</sup> Watson SJ said:<sup>12</sup>

The movement of authority indicates that as a matter of principle the concept of joint custody espoused by the *Family Law Act* as appropriate within the functioning marriage should at least activate the mind of a judge deciding a contested custody and/or care and control issue ... Nevertheless the principle contains its own goal of idealism ... The choice between joint and sole custody is a decision very much within the discretion of the trial judge. Provided he has regard to the desirability that a child's relationship with *both* parents shall be as viable and as meaningful as possible, the exercise of his discretion can rarely be subject to challenge.

Strauss J said:<sup>13</sup>

... the normal situation under the Act is that where both parties live together or where the parties do not take recourse to the Court, they have the joint custody. However, where the parties have separated and have sought the intervention of the Court, by far the more 'normal' situation is that one of the parties has been granted the sole custody, unless they have consented to an order for joint custody ...

The determination whether an order for joint custody or sole custody should be made is a matter for the discretion of the Judge who hears the matter, and no principles should be laid down which fetter that discretion unnecessarily ... As I have already tried to say, in my view, at this stage, nothing should be done by the Full Court to fetter the discretion of the trial judges as regards their attitudes to joint custody. It should not be regarded as 'the normal order' or 'the normal situation' after curial intervention. If the parties submit the question for determination by the judge, he must consider and determine it as one of the possible options. But the matter goes no further than this.

The suggestion, that a divorced spouse who has the care and control of a child but not the sole custody, must consult the former spouse before he or she is entitled to move home even within the metropolitan area, is in my opinion quite unacceptable. One of the main objects of the Act

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<sup>10</sup> (1979) FLC ¶90-716, 78,856.

<sup>11</sup> (1981) FLC ¶91-113.

<sup>12</sup> (1981) FLC ¶91-113, 76,844.

<sup>13</sup> (1981) FLC ¶91-113, 76,847, 76,851.

is to bring about a situation in which people are free to make a new life for themselves. They often remarry. If a projected move interferes seriously with existing access arrangements, then the other party should be informed of it in advance, irrespective of whether there is a joint custody order or a sole custody order. However, as a general rule, a divorced party should be left to order his or her own life without interference from the other party or from the Court, so long as the parent who has the control of the child does all that may reasonably be expected to be done by him or her for the child in all the circumstances.

Bell J said:<sup>14</sup>

... once the Court is seized of the matter in which the parties are endeavouring to seek sole custody of a child of the marriage, a joint custody order should not be forced upon the parties by a decree of the Court...

Mackeigan CJNS in *Zwicker v Morine* (NS) (1980) 16 RFL (2nd) , opined that the matters which the court should have before it when considering a joint custody application would include, and he was not attempting to be exclusive, the following:

1. that each of the parties accepts that the other is a fit parent to have custody of the children; and
2. that each of them is persuaded that he or she can co-operate with each other.

Further, I would think that there should be evidence of a third matter before the trial Judge and that is that each of the parties can agree on the matters referred to by Nygh J in *McEearney and McEearney* (1980) FLC ¶90-866 and in *Chandler and Chandler* (1981) FLC ¶91-008.

Notwithstanding what I have said before, a consideration of joint custody should not be removed from any judge's mind in coming to his decision. It may be that on hearing the evidence and seeing the parties and their witnesses he comes to the opinion that in all the circumstances a joint custody order would promote the interests of the child and if such joint custody appears a tolerable alternative it merits careful consideration along with the alternatives of sole custody to one or other parent. It should not be rejected out of hand and must remain in the discretion of the Judge, his taking into consideration the facts, to make such an order.

In *H & H-K*,<sup>15</sup> consent orders for joint custody had been made and the child had adapted well to the arrangement of spending seven nights a fortnight with each parent. In making a shared parenting order, Kay J said that the case presented one of the rare occasions when a shared parenting order was more appropriate than a sole custody order - because of: the child's young age; the geographic proximity of the parents' homes; the wife's mother being a focal point for both parties; and the child already having learnt to accept such an arrangement and to function adequately under it.

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<sup>14</sup>(1981) FLC ¶91-113, 76,852.

It has also been said, in Australia, that shared residence is not generally appropriate where there are incompatible parenting values and tension and distrust between the parties.<sup>16</sup>

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<sup>15</sup>(1990) FLC ¶92-128.

<sup>16</sup>*H & H* (1994) 19 Fam LR 165; *Forck & Thomas* (1993) 16 Fam LR 516; FLC ¶92-372.

## The 1995 Reforms

The 1995 reforms represented a further shift towards shared parenting.

One of precursors of these reforms was the Family Law Council's discussion paper, issued in April 1991, "Patterns of Parenting after Separation".

Another significant progenitor of the 1995 reforms was the Convention on the Rights of the Child ("CROC").

CROC provides, by Article 9(3):-

States parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Australia's ratification of CROC creates a legitimate expectation that decisions will be made having regard to the principles espoused in CROC.<sup>17</sup> In particular:-

§ the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law.<sup>18</sup> In particular, the court should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty;<sup>19</sup>

§ in cases where a convention has been ratified by Australia but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in

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<sup>17</sup>*Teoh* (1995) 183 CLR 273.

<sup>18</sup>*Mabo v Queensland [No.2]* (1992) 175 CLR 1, 42; *B and B* (1997) FLC ¶92-755, 84, 223.

<sup>19</sup>*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38; *B and B* (1997) FLC ¶92-755, 84, 223.

order to help resolve an ambiguity in domestic primary or sub-ordinate legislation;<sup>20</sup>

§ in the exercise of a discretion and where the domestic law upon its proper construction permits it, regard may be had to an international obligation or agreement which has been ratified by Australia, but not otherwise incorporated into domestic law and where the domestic law is not ambiguous.<sup>21</sup>

The position of CROC in the area of Family Law is strengthened by *Family Law Act*, s.43(c) which by mandatory direction provides that the court, in the exercise of its jurisdiction, must have regard to the need to protect the *rights of children* and to promote their welfare.<sup>22</sup> In *B & B*, the court rejected the Attorney-General's submission that s.43 could not be interpreted as applying to CROC, and thought it difficult to see how CROC could be considered not to be relevant.<sup>23</sup> In this respect, the rights of children are not static, and s.43(c) is not frozen in time. There is no better starting point for those rights than a convention like CROC which has received almost universal international endorsement and is a declared instrument appearing in the schedule to the *Human Rights and Equal Opportunity Act* ("HREOA").<sup>24</sup> Even in the absence of statutory recognition in HREOA and s.43(c), the court could still have regard to the convention.<sup>25</sup> Indeed, CROC is entitled to special significance because it is almost an universally accepted human rights instrument and thus has much greater weight than an ordinary bi-lateral or multi-lateral treaty not directed at such ends.<sup>26</sup>

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<sup>20</sup>*Murray v Director Family Services, ACT* (1993) FLC ¶92-416, 81, 255-256; *B and B* (1997) FLC ¶92-755, 84, 224.

<sup>21</sup>*Murray v Director Family Services, ACT* (1993) FLC ¶92-416, 81, 255-256; *B and B* (1997) FLC ¶92-755, 84, 224.

<sup>22</sup>*B and B* (1997) FLC ¶92-755, 84, 226 [10.7].

<sup>23</sup>*B and B* (1997) FLC ¶92-755, 84, 226 [10.9-10.13].

<sup>24</sup>*B and B* (1997) FLC ¶92-755, 84, 227 [10.14].

<sup>25</sup>*B and B* (1997) FLC ¶92-755, 84, 227 [10.16-10.17].

<sup>26</sup>*B and B* (1997) FLC ¶92-755, 84, 227 [10.19].

In any event, *Family Law Act*, s.60B reflects CROC,<sup>27</sup> and s.60B and other sections introduced by the *Family Law Reform Act 1995* rely upon CROC as a source. Particularly this is so in respect of s.60B.<sup>28</sup> The *Family Law Act* identifies guiding principles consistent with CROC. Thus, pursuant to s.60B of the Act (emphasis added):-

- (1) The object of this part is to ensure that children receive adequate and proper parenting *to help them achieve their full potential*, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
  - (a) *children have the right to know and be cared for by both their parents*, regardless of whether their parents are married, separated, have never married or have never lived together; and
  - (b) *children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development*; and
  - (c) *parents share duties and responsibilities concerning the care, welfare and development of their children*; and
  - (d) *parents should agree about the future parenting of their children*.

In the context of these rights and principles, it is to be remarked that proposals which provide for less than shared parenting will deny or diminish children's to know and be cared for by both their parents, and to have contact on a regular basis with the non-residence parent, and exclude the non-residence parent from any meaningful role in their parenting - other than the payment of child support.

The 1995 amendments reflected an intended shift in favour of shared. In *B & B: Family Law Reform Act 1995*,<sup>29</sup> the Full Court said:-

In relation to s.64B, we should refer to one further matter. We have referred to a residence/contact regime. We agree with the submissions of the Attorney-General that it is open to the court in an appropriate case to make a residence/residence order as the appropriate regime. Indeed there are many cases where such orders are desirable, reinforcing as they do the shared parenting responsibility concept contained in the new legislation. On the other hand, a residence/contact order should not be seen as a second best option. Rather, we think it

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<sup>27</sup>*B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755, [10.1-10.46].

<sup>28</sup>*B and B* (1997) FLC ¶92-755, 84, 228 [10.21].

<sup>29</sup>(1997) 21 Fam LR 676, 731-2; FLC ¶92-755, 84,218.

should be used in circumstances where the contact is of relevantly short duration, particularly where there is no overnight aspect.

However, that intention has not been reflected in the results: there have been still fewer successful applications for shared parenting orders since 1995 than before.

Although the interests of the welfare of children have been fundamental in the case for shared parenting, it would be a mistake to think that other factors were not also at play. In its submission to the House of Representatives Standing Committee on family and community affairs, the Australian Institute of Family Studies said:-

Notions about parenting after separation are grounded in attitudes and beliefs about marriage and the roles of men and women as partners and parents. The change in nature of family life and patterns of women's and men's workforce participation has meant that the parenting roles, expectations and responsibilities of mothers and fathers - whether in intact families or separated families - are in transition. These social and attitudinal shifts have prompted re-evaluation of the previously accepted post divorce (maternal) "sole custody" model of parenting towards encouraging co-parenting after separation.<sup>30</sup>

The committee reported that evidence to the committee time and time again reinforced that view.<sup>31</sup>

More venial or mercenary considerations probably also have some influence: the implications for rates of child support of "substantial contact" and "major contact" provide a financial incentive for shared parenting.

But those considerations should not obscure the compelling case, from the perspective of the

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<sup>30</sup> Australian Institute of Family Studies Submission, p1.

<sup>31</sup> Every Picture tells a Story, report of the Standing Committee on Family and Community Affairs, 29 December 2003, [1.35].

welfare of children, for shared parenting. Several recent studies are in this respect illuminating.

In “Young Adults’ Perspectives on Divorce Living Arrangements”,<sup>32</sup> Fabricius and Hall concluded:-

There is increasing consensus that the perspectives of children need to be taken into account in decisions made by divorcing parents and the courts and that young adults who have lived through their parents’ divorces can be an important source of information about children’s perspectives. In this study, the authors assessed the perspectives of 820 college adults from divorced families on the issues of children’s living arrangements after divorce. Respondents wanted to have spent more time with their fathers as they were growing up, and the living arrangement they believed was best was living equal time with each parent. The living arrangements they had as children gave them generally little time with their fathers. Respondents reported that their fathers wanted more time with them but that their mothers generally did not want them to spend more time with their fathers.

Kelly and Wallerstein (1977) had reported that young children viewed typical alternate weekend contact arrangements as severely inadequate, and that older children also wanted easy access and frequent contact. In 1998, Wallerstein and Lewis reported on a longitudinal follow-up of the perspective of those children, now that they were adults. They found that many of their respondents reported that their access schedules with their fathers had been too disruptive and too inflexible, and that in such cases they got little enjoyment or benefit from access in the way of enhanced relationships with their fathers. As adults they feel strongly now, as they did then, that their wishes should have been taken into account, and they remain angry and resentful that they were not. Wallerstein and Lewis argue that the child’s voice is too often not heard in decisions about living arrangements and contact.

Fabricius and Hall’s participants were students in an introductory psychology course at a

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<sup>32</sup>Fabricius, WV and Hall, JA, Family and Conciliation Courts Review, Vol 38 No.4, October 2000,

large south-western USA State university. There 344 male participants and 485 female participants, from divorced families. The results are summarised in the following table:-

<b>Living Arrangements</b>	<b>Men Mean</b>	<b>Men No.</b>	<b>Women Mean</b>	<b>Women No.</b>
What they had	2.32	339	1.98	481
What they wanted	3.13	135	2.62	180
What their mothers wanted	2.01	140	1.86	214
What their fathers wanted	3.06	144	3.39	210
Their beliefs about what is best	3.58	341	3.54	478
Divorced mother's beliefs	2.10	82	1.65	114
Divorced father's beliefs	4.40	82	4.43	114

The scale ranges from 0 equals primary residence with mother and minimal or no contact with father, to 8 equals primary residence with father and minimal or no contact with mother, with 4 equals equal times spent with each parent.

Notable findings are:-

- § men reported a significantly greater amount of time spent with their fathers (mean equals 2.32) than did women (1.98);
- § men reported that they wanted significantly greater amounts of time with their fathers (3.13) than did women (3.62);
- § both men and women wanted significantly more time with their fathers than they actually had. Where as almost half (48%) reported actual living arrangements in one of the two lowest categories of seeing their fathers - either minimally or not at all, or only some of the time - 48% reported that they had wanted one of the two categories of seeing their fathers a lot or living equal amounts of time with each parent;
- § both male and female participants reported a significant difference between how much time their fathers wanted with them (3.25) and how much time their mothers wanted their fathers to have (1.92). 40% reported that their mothers had wanted them to see their fathers either minimally or not at all, or only some of the time. On 7% felt that their mothers had wanted them to spend equal amounts of time with each parent.

Many fewer fathers than mothers were perceived to have wanted the three lowest categories of father involvement;

§ there was no significant difference between the actual living arrangements participants reported they had, and what they reported their mothers wanted them to have, for either men or women;

§ 70% of participants felt that the best living arrangement for children was equal amounts of time with each parent. A further 18% preferred to live with their mother but had substantial overnight periods with their father.

The two categories of living arrangements that participants most wanted to have were to live equal amounts of time with each parent (70%) and alternatively to see their fathers a lot (18%). These desires for more time with their fathers stemmed from a childhood in which they spent generally little time with them, and in which they perceived substantial disagreement between their parents on the issue. They believed that the best living arrangement for children was equal time with each parent. As the authors point out, the application of these results to individual cases must have caused to be based on an assessment of individual children and their particular circumstances which may or may not make equal living arrangements appropriate. But one significant use of these findings is for professionals to share them with parents, to make parents aware of the lasting feelings their children are likely to have about the living arrangements they will give them.

In “Child Adjustment in Joint Custody Versus Sole Custody Arrangements”, a meta-analytic

review,<sup>33</sup> Bauserman meta-analysed studies comparing child adjustment in joint physical or joint legal custody with sole custody settings, including comparisons with paternal custody and intact families where possible. He found that children in joint physical or legal custody were better adjusted than children in sole custody settings, but no different from those in intact families. More positive adjustment of joint custody children held for separate comparisons of general adjustment, family relationships, self-esteem, emotional and behavioural adjustment, and divorce specific adjustment. Joint custody parents reported less current and past conflict than did sole custody parents, but this did not explain the better adjustment of joint custody children. The results are consistent with the hypothesis that joint custody can be advantageous for children in some cases, possibly by facilitating ongoing positive involvement with both parents.

Bauserman noted that there was an ongoing debate between proponents and opponents of joint custody, since the 1970s. Arguments in favour of joint custody had focussed on benefits for the child of maintaining relationships with both parents; opponents had argued that joint custody disrupts needed stability in a child's life and could lead to harm by exposing children to ongoing parental conflict.

The goal of his review is to locate and meta-analytically integrate reports of child adjustment that directly compared children in joint custody and in sole custody settings following divorce. His hypothesis was that on average children in joint custody arrangements would demonstrate better adjustment than children in sole custody arrangements. A secondary goal

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<sup>33</sup>Bauserman, R, *Journal of Family Psychology* 2002, Vol 16 No.1, 91-102.

was to examine how theoretically relevant characteristics of participant populations and studies might moderate the relationship between custody arrangements and outcomes: for example, some critics of joint custody had expressed concern that that arrangement should expose children to ongoing parental conflict, resulting in more stress and adjustment problems.

The review incorporated only studies which had included groups of children living in joint legal or physical custody and control groups in maternal or sole custody arrangements, and which reported the statistical outcome of some test comparing psychological or behavioural adjustment between the two groups. Studies that reported only qualitative descriptions of different groups, or that reported the adjustment of a joint custody group without a sole custody control, were excluded. Ultimately, 33 studies, some published and some unpublished, were included. In other words, this was an impressive and powerful analysis and review of the available literature. The combined sample size was 1,846 sole custody and 814 joint custody children.

The author concluded from the results that children in joint custody were better adjusted, across multiple types of measures, than children in sole (primarily maternal) custody. This applied to both joint legal and joint physical custody and appeared robust. This finding is consistent with the hypothesis that joint custody can be beneficial to children in a wide range of family, emotional, behavioural and academic domains. Joint custody children showed better adjustment in parental relations and spent significant amounts of time with the father, allowing more opportunity for authoritative parenting.

Bauserman concluded:-

It is important to recognise that the results clearly do not support joint custody as preferable to, or even equal to, sole custody in all situations. For instance, when one parent is clearly abusive or neglectful, a sole custody arrangement may be the best solution. Similarly, if one parent suffers from serious mental health or adjustment difficulties, a child may be harmed by continued exposure to such an environment. Also, some authors have proposed that in situations of high parental conflict, joint custody may be detrimental because it will expose the child to intense, ongoing parental conflict (eg, Johnston et al, 1989). However, this last argument may be applicable mainly to extremes of parental conflict. Some research indicates that joint custody may actually work to reduce levels of parental conflict over time, meaning that whatever risk exposure to parental conflict involves will be reduced (Bender, 1994).

In Australia, Smyth, Caruana and Ferro in “Some Whens, Hows and Whys of Shared Care”,<sup>34</sup> interviewed 56 separated parents - 27 mothers and 29 fathers - on a range of issues related to parent/child contact. They covered five different patterns: 50/50 shared care (eg “week about”), medium range contact (less than 110 nights per year), daytime only contact, holiday only contact, and little or no contact. The results are qualitative rather than quantitative.

They concluded:-

1. Little is known about parents who opt for 50/50 care of their children, how these arrangements are structured, and how well they work. The available data suggests that their arrangements are often logistically complex, and that those who opt for shared care appear to be a relatively distinct sub-group of separated parents.
2. A number of conditions appear necessary to make shared care a viable option, including:-

- (a) geographical proximity;

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<sup>34</sup> Australian Institute of Family Studies, 2003.

- (b) the ability of the parents to get along in terms of a businesslike working relationship as parents;
- (c) child focussed arrangements (with children kept “out of the middle”, and with children’s activities forming an integral part of the way in which the parenting schedule is developed);
- (d) a commitment by everyone to make shared care work;
- (e) family friendly work practices, especially for fathers;
- (f) a degree of financial independence, especially for mothers; and
- (g) a degree of paternal competence.

But they add not all of those conditions must be met, and in 3 of the 12 families the parents did not get along and were not able to keep the children “out of the middle” during parental conflict. Virtually all the parents in question had adopted a shared care arrangement from the outset without involvement with the legal system.

### **Conditions for shared parenting**

Generally speaking, criterion for shared parenting are said to include:-

1. That the parents live in reasonable proximity so that the children can move easily from one home to the other.
2. That both parties are capable of and available to care for the children.
3. That the parties can communicate and co-operate each with the other.

As to the first two considerations, there is little if any argument. As to the third, however, it should not be seen as essential. Similarly, the presence of “an entrenched conflict” short of violence or abuse should not be seen as inconsistent with shared parenting.

The literature, while supporting the view that it is undesirable for children to be exposed to conflict, does not make good the proposition that such exposure is increased in a shared parenting setting. True, there is more potential for conflict in a shared parenting setting than in a no contact setting, but it is difficult to see why there is anymore potential for conflict in a shared parenting setting than in a conventional alternate weekend contact setting. That is particularly so if the change overs take place after school.

Moreover, “conflict” is very much a perception of the parties; and many who believe that they have a highly conflictual divorce in truth have much less conflict than the intractable cases that we sometimes see. It is very easy for the natural wish to have nothing to do with the ex following separation to be manifested as a refusal or inability to communicate, and it is very easy for one party to create a situation in which communication and co-operation becomes very difficult. Providing equal parenting time with both parents of itself is likely to

take a substantial amount of heat out of the dispute. Children ought not be denied the benefits of shared parenting just because one of their parents refuses to communicate with the other.

### **Relocation**

The phenomena of the late 1990s which have become known as “relocation” cases have attracted widespread interest and attention. Many have decried the denial of the freedom of movement of the applicant in cases where relocation is refused. Reference is commonly made to the position in various of the United States - in particular, California - where the residence parent is prima facie entitled to relocate.

Relocation cases almost inevitably involve a discretionary judgment based on weighing and balancing the competing interests of the applicant (including freedom of movement, and the pursuit of a new life and happiness and fulfilment in a new place), the respondent (in particular, in maintaining contact with the child), and the child (in, on the one hand, maintaining a relationship with the respondent, and, on the other, in having a residence parent who is secure, happy and fulfilled). Generally speaking, the more important and stronger in any individual case the relationship is with the respondent, the more difficult it will be to relocate. In cases where relocation is permitted, great weight is typically placed not just on freedom of movement, but on the importance for the child of the residence parent feeling secure, happy and fulfilled.

In relocation cases, Applicants often invoke their “freedom of movement” under the *International Covenant on Civil and Political Rights*. Unless it be argued - which could not

be sustained - that the consequence of the *International Covenant on Civil and Political Rights*, Article 12, is that the Court must always permit international relocation, its only significance can be that freedom of movement is a relevant, even important, consideration. It cannot be elevated to the same level as, let alone above, the statutory “paramount consideration”, namely the best interests of the child.

And insofar as the *International Covenant on Civil and Political Rights* is of relevance, at least equally so is the *United Nations Convention on the Rights of the Child*, which was ratified by the Commonwealth Executive in 1990 and entered into force for Australia on 16 January 1991. On 22 December 1992, the Commonwealth Attorney-General, pursuant to *Human Rights and Equal Opportunity Commission Act*, 1986 (Cth), declared the Convention to be an international instrument relating to human rights and freedom. Article 3(1) provides:-

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9(3) recognises the right to maintain personal relations and direct contact with both parents, notwithstanding separation.<sup>35</sup>

In *B & B*,<sup>36</sup> the court recognised that freedom of movement, significant as it might be, must take a subsidiary place to the paramount consideration of the best interests of the child.<sup>37</sup>

To the extent that in the past the interests of the child have been identified with those of the welfare of the custodial or residence parent, that sits ill with the policy of s.60B. Moreover,

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<sup>35</sup>See note 11, supra.

<sup>36</sup>(1997) 21 Fam LR 676; (1997 FLC ¶92-755).

recent research points to maintenance of a relationship with both parents being more important than the emotional health of the parents.<sup>38</sup>

The House of Representatives Committee recognised that there was a tension between facilitating relocation on the one hand, and shared parenting on the other. It accepted that affording greater emphasis to the importance of shared parenting would necessarily lead to a reduction in the ability of ex-spouses to relocate. This is consistent with the approach of the court in *B & B*, in holding that freedom of movement must give way to the best interests of the child.

Arguments in favour of facilitating relocation tend to refer to the Californian approach, where the residence parent is prima facie entitled to relocate; and to the English authorities, which have adopted a more liberal view in favour of relocation, given primacy to the residence parent.

### **Overseas relocation**

Overseas relocation cases do not involve, relevantly, only the question of residence: they involve also a question as to whether, notwithstanding the prima facie position established by s.65Y and 65Z, the applicant parent ought to be permitted to depart from Australia with the child, not just temporarily but permanently. Such proceedings are not in respect of residence alone. In addition to residence, the Applicant seeks an order (pursuant to s.65Y and/or s.65Z) that she/he be permitted to leave Australia with the child to live overseas on a permanent basis. Because these cases involve a proposed international relocation, the impact of s.65Y means that an additional issue arises, which did not arise in *AMS v AIF*.<sup>39</sup> In such cases, it is quite correct to categorise that part of the application as one for “permission to relocate”.

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<sup>37</sup>*B & B: Family Law Reform Act, 1995* (1997) 21 Fam LR 676; (1997 FLC ¶92-755, 10.43-10.46).

<sup>38</sup>R. Bauserman, “Child Adjustment in Joint-Custody versus Sole-Custody Arrangements: A Meta-Analytic Review”, *Journal of Family Psychology*, 16:1 (2002).

The starting point is quite different as a matter of law. In contrast to relocation within Australia (which is *prima facie* lawful), relocation to a place outside Australia is prohibited, with criminal sanctions, unless the other party agrees, or the court permits it: *Family Law Act*, s.65Y, 65Z. That in such a case - unlike in *AIF v AMS* - involving proposed *international* relocation, a separate issue arises, is apparent from the circumstance that, assuming that the Respondent consented at the outset to an order that the child reside with the Applicant, it would still be necessary for the Court to consider whether an order should be made pursuant to s.65Y.

Thus these cases relevantly give rise to at least these issues:-

1. *With whom should the child reside.* This issue itself involves analysis and consideration of the proposals of each of the parents for the children.
2. *Whether an order should be made under s.65Y permitting the Applicant to take the child from Australia, permanently.* This necessarily involves a consideration of whether the child's best interests would be served by that course.
3. *Whether an injunction should be granted restraining the Applicant from changing the place of residence of the child.* This, too, necessarily involves consideration of whether the child's best interests would be served by such a course.

### **Parental autonomy**

Somewhat in tension with the paramountcy principle is the growing acceptance of the principle of parental autonomy.

In *VR v RR*,<sup>40</sup> the Full Court said:-

[28] The overall framework of the legislation can be seen to provide

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<sup>39</sup>(1999) 199 CLR 160. Cf, in particular, per Gaudron J, at [93].

<sup>40</sup>(2002) FLC ¶93-099.

that both parents have parental responsibility for the child but that a court may take away or diminish an aspect of parental responsibility if it is “proper” to do so.

- [29] Whilst the word “proper” connotes a very wide area of discretion, in our view it is clear from the legislative scheme that any intervention by the court in the due performance of an aspect of parental responsibility, that seeks to interfere with or diminish the responsibility of either parent to care for the child in the manner that parent deems appropriate, should be made only where the court is the view that the welfare of the child will be clearly advanced by that order being made.
- [30] In our view it is not the role of the court to identify and then seek to determine every matter that is in issue between two estranged parents who cannot agree on the way their child is to be raised. The court should only interfere in the way in which a parent proposes to raise a child to the extent that the welfare of the child requires interference.
- [31] The concept of parental autonomy has frequently been discussed in the context of limiting the State’s interference with the way a parent raises their child. In the Unites States of America in *Re Phillip D* 92 Cal App 3d 796, Caldecott J said: “Parental autonomy is not ... absolute. The State is the guardian of society’s basic values. Under the doctrine of *parens patriae* the State has a right, indeed a duty, to protect children. State officials may interfere in family matters to safeguard the child’s health, educational development and emotional well-being. One of the most basic values protected by the State is the sanctity of human life. Where parents fail to provide their children with adequate medical care, the State is justified to intervene. However, since the State should usually defer to the wishes of the parents, it has a serious burden of justification before abridging parental autonomy by substituting its judgment for that of the parents”.

The court referred to dicta in several authorities, including *AMS v AIF*,<sup>41</sup> in which Kirby J said: “Courts recognise that unwarranted interference in the life of a custodial parent may itself occasion bitterness towards the former spouse or partner ...”,<sup>42</sup> and also to a learned work in which the author had said: “Each parent has the right to his or her own private life and territory and to raise the

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<sup>41</sup>(1999) FLC ¶92-852.

<sup>42</sup>(1999) FLC ¶92-852, 86,041.

children without unreasonable interference from the other parent”.<sup>43</sup> The court

then concluded:-

- [36] In our view there is much to be said for extending that parental autonomy principle to disputes between separate parents. We think it is a sound principle that the court, when determining issues of parental responsibility should avoid unnecessary interference with the powers delegated to each of the parents.
- [37] In this case importantly, by his introductory orders the trial judge ordered that the husband have sole responsibility for the day-to-day care, welfare and development of the children whilst the children were having contact with him. Normally we would perceive that the grant of such power would leave to the husband all of the decisions concerning where the children should go during such a contact period and what activities they undertake whilst with him. This is, of course, subject to the caveat that the court in an appropriate circumstance could place limits upon that contact if it was of the view that those limits were appropriate for the protection of the welfare of the children.

Later, the court said:-

- [59] Absent evidence that the welfare of the children requires the imposition of some restriction in the way that the husband chooses to parent his children when they are with him we see no reason to place any further limitation upon the husband than that imposed by limiting the duration of the trips he may make with the children each year. We see no reason to restrict him from taking the children to continental Europe if he chooses to do so. While we are sympathetic to the Wife’s desire to shield the children from what she sees as possible harm arising from their parents’ ability to afford extensive and expensive holidays, her value system is not inherently more important to the children than that of their father. Absent clear evidence that the two systems cannot function in tandem, the court ought not buy into these lifestyle debates between parents unless the welfare of the children demands that one system be chosen over and above the other. No such evidence is present in this case.

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<sup>43</sup>Isolina Ricci, *Mom’s House, Dad’s House - Making Two Homes for your Child*, 2nd Edition, Simon and Schuster, New York, 1997, p11.