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Legal Presumption That Children Spend Equal Time With Separated Parents In Australia: A Flawed Reform Proposal?

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"There is a simple solution to all complex human problems; and it is wrong."

In 2003, the Australian government established an inquiry into whether there should be a legal presumption that children in separating families should spend equal time with their parents; and in what circumstances that presumption should be rebutted.

This short article will argue that the answer to the first question is already clear around the world. There should be no such legal presumption of equal parental time in Australia. For persuasive reasons, every other country in the world has rejected such a presumption.

Why did the Australian government write the wrong solution into their question?

Current situation in Australia

In Australia each year there are approximately 50,000 married couples who divorce. At a guess, there may be another 5,000 couples, who have lived together without formally marrying, who separate. About half these separating families have children (totalling about 50,000 children per year) under 18 years at the time of divorce or separation. A key fact to remember in Australia (and in other places) is that over 90% of parents *decide by agreement* upon the living arrangements for their children. The majority of these "agreeing" parents do not know or care about what "the law" states. They try to agree, and adjust, with varying degrees of success, to what is best for the children, and what fits into the busy lives of the parents.

In over 80% of separating families, the parents agree that the children will spend the *majority* of overnight stays with their mother. Conversely, in less than 20% of separating families, children spend the majority of overnight stays with their fathers. This is clearly *not* because of what "the law" says, but because parents agree to that arrangement due to the pressures from established social roles of mothers and fathers. For example, more married males than married females have full-time jobs; continuous career paths; weekly pay packets. More married females than married males have part-time jobs; therefore more flexibility to care for sick children; continuity from birth in caring for children; and immediate overnight care of children during the crisis of a marriage breakdown. Therefore, in over 80% of families, the agreed division of parental labour and roles *during* the marriage is likely to continue by agreement *after* a marital separation. To repeat, the *Family Law Act* is not the cause of entrenched patterns of behaviour and role division as between the majority of husbands and wives in Australian society. (No doubt some people would like to change gradually some of these patterns of behaviour, for example, by increasing the time fathers spend with children during marriage.)

Notably (although there are no statistics to show this), it seems that *very few* (less than 1%) of the over 90% of "agreeing and separating parents" decide upon *equal* time between mum's house and dad's house. Why is this? Some speculative reasons are suggested later. But again it raises the question – why should law reform in Australia seriously suggest a presumptive rule of equal time, when perhaps 99% of Australian parents, by their own agreements, state that equal time does not work for them? Are legislators wiser about parenting than over 99% of separating parents?

Arguably, any proposed law reform should focus on the less than 10% of separating and conflicted families who do not reach agreement; not upon the more than 90% of families who reach agreement about their children.

Highly conflicted families

For the less than 10% of divorcing or separating couples who cannot agree, and instead obtain a judicial order about how should parenting time be allocated, what is the current "law"? The court must decide based on the "best interests of the child" (*Family Law Act 1975,* s.60B(1); 65E, 68F). That criteria of the best interests of the child cannot be shortcut by alleged presumptions in favour of mothers, or biological parents, or a homemaking parent, or a wealthy parent, or equal time to both parents (*Norbis v Norbis* (1986) FLC 91-712).

As every child is different, the use of a 50/50 rule, or "joint custody", or equal time presumption would be an abuse of the court's responsibility to make decisions which are best (in the limited circumstances available) for each child. In practice, there have only been a few tiny judicial decisions since 1976 where parents in litigious conflict have been awarded equal time with their children. The judicial reasoning is clear – first, parents in high conflict have not demonstrated the joint ability to co-operate about the many day-to-day decisions necessary as children move so regularly from house to house. Secondly, there is no evidence available to show that children of any age flourish when spending half their days or weeks in one household, and then half in another.

Thus if there is no evidence that "agreeing" parents like equal parenting time, or that in high conflict families children flourish with equal parenting time, why even consider making this a presumptive legal rule? Perhaps a well-organ-

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ised minority of fathers from conflicted families, or who do not want to pay child support, or who have been traumatised by the "loss" of time with their beloved children, have lobbied the Australian government to undertake a misguided enquiry? A more realistic enquiry question would be: "How can Australian parents, particularly fathers, be encouraged and enabled to be better parents, and spend more mutually enriching time with their children". This more realistic question obviously has complex answers.

Arguments against equal parenting time

Here is a summary of the arguments against any rule or presumption of equal parenting time. Some of these arguments have also been used by children even where parents *agree* to equal parenting time.

(1) A presumption of equal parenting time encourages parents to revert to "rights talk". "I have an equal right to see my children – it is only fair (to whom?)" becomes a popular claim. However, for at least 50 years in Australia courts and child psychologists have accepted that children are not chattels to be split based on parental needs. Parents have *duties* (not rights) to try to be effective parents. Highly conflicted parents love "rights talk".

(2) One size does not fit all. Equal time *may* work with a few children between say 6 and 10 years of age. It will not work once those children become teenagers and want flexibility. Again, high conflict parents do not have the communication skills and trust to re-negotiate "equal time" almost every week with children who need "flexibility".

(3) A 50/50 "rule" or presumption inevitably means that there will be less consultation with children. Children will be told, and made to feel guilty if they object, that "this is the law". All modern understanding of children's health emphasises increasing amounts of consultation with children as they grow older on decisions which affect them, obviously including place of residence.

(4) A 50/50 presumption provides a highly conflicted and angry parent with an easy bargaining chip to reduce his or her responsibility to pay child support. "I will keep the children for 50% of the time, which I am entitled to, unless you reduce your claim for property or child support." Or a new bargaining chip arises in relocation cases, "You cannot move to Melbourne, as I have a right to equal time".

(5) For many children, equal time at mum's house and dad's house becomes boring and stressful. Friends, proximity to school, toys, homework and clothes tend to accumulate at one house, not two. Then children need to acquire unusual strength and skills to tell one disappointed parent that for the time being they want to stay with the other parent. Additionally, where mum's house and dad's house are far apart, equal time becomes impractical or involves exhausting weekly travel for children.

(6) Most importantly, an equal parenting time presumption suddenly raises unrealistic expectations amongst many fathers. For three years after the introduction of a new equal time rule, grieving fathers (and some mothers) will flood the courts with applications based upon the false rhetoric, "Now I have an equal right to see my children". After three years of expense, delay, and anguish for many Australian families, an appeal court will definitively rule (again) that there are no presumptions, only best interests of the child. Any other result would be contrary to the *United Nations Conventions on the Rights of the Child* (Article 1), common practice in all western countries, and worldwide psychological research on children in conflicted families. This predictable cycle of raised and dashed expectations occurred between 1995 and 1997 in Australia when a misguided s.60B was inserted into the Family Law Act. Section s.60B includes aspirational words such as "children have the right to be cared for by both their parents"; and "children have a right of contact, on a regular basis, with both their parents". This section appears to have doubled the applications filed in the Family Court for two years, exacerbated conflict in some already stressed families, increased expenditure on legal fees, and failed miserably to increase long term contact between fathers and children in highly conflicted families. Worse still, the new rule clearly left some children of the highly conflicted families in short-term care of some parents (mainly fathers) who were abusive and unsuitable as care-givers[1]. In B and B (1997) FLC 92-755 the Full Court of the Family Court held that the new word "right" in s.60B if read in isolation was misleading. "Rights" are always subject to the overriding test of what is in the best interest of the child.

Conclusion

The price of liberty is eternal vigilance. The price of making sound residential decisions for children of highly conflicted families includes eternal vigilance of recycled and simplistic reform solutions.

Discussion points

If your mother and father separated, and lived in different suburbs (say 20 kms apart):

(1) How would you like to structure each week or month so that you could see them both?

(2) Why would that arrangement suit you?

(3) What hurdles/problems/bumps can you predict with your planned structure?

(4) How might those hurdles/problems/bumps be overcome for you? - for a 7 year old child? for a 15 year old child?

Further reading

(1) Justice R. Chisholm, Reforming Custody Law: Recent Australian Experience (http://www.familycourt.gov.au/papers/index.html

(2) Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (New York; Free Press, 1973).

(3) Family Law Council, Statistical Snapshot of Family Law 2000-01 (June, 2002).

1 See H. Rhoades, R. Graycar and M. Harrison, The Family Law Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations. University of Sydney and the Family Court of Australia, 1999).

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