

A rebuttable presumption of joint custody

Research vs ideology in the battle over our children

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Equal time parenting: in the best interests of the child or the parents?



There is an increasing public interest in fatherhood. This is both concomitant to and a reaction against the widespread awareness that feminism has brought about the roles which women adopt as both mothers and paid workers.

In June 2003, fatherhood was the focus of media attention over whether the Family Court of Australia is biased against men in determining residency of and contact with children after separation or divorce. This was followed by an announcement by Prime Minister Howard of a parliamentary inquiry into whether a 'rebuttable presumption of joint custody' should be introduced, that is, that children 'should spend equal time living with each parent unless there are strong reasons against it'.¹ The terms of reference for the Inquiry also cover whether the child support formula works fairly for both parents and when the court should order that grandparents have contact with their grandchildren.² A record 1500 submissions were made to the Inquiry. The Inquiry's report is due to be handed down on 31 December 2003.

An ideological push?

There is every sign that the changes proposed to the *Family Law Act 1975* (Cth) have been brought about by ideology rather than evidence-based law reform. The Prime Minister is reported to have identified the custody issue as a 'hot button issue' in the electorate which is being pursued to gain votes, while being dressed up in language about caring for Our Children.³ Although the terms of reference for the inquiry are carefully worded so as to be gender neutral, it is clear that the impetus for the proposed law reform comes from influential fathers' rights groups with a conservative agenda to rid women of perceived power within the family law system. Supporter of the presumption, Federal NSW Liberal backbencher Ken Ticehurst has been quoted as saying that the divorce rate has been successfully lowered in United States where the rebuttable presumption of joint custody has been introduced.⁴ Behind this statement is support for a proposition that women (who are statistically most likely to initiate divorce) will remain in bad marriages to live with their children full time, in preference to leaving and living with their children half of the time.

Another reason for introducing the presumption is to appease the many vocal fathers' groups and individual men who have consistently lobbied against the levels of child support paid by non-resident fathers to resident mothers since the introduction of the child support scheme by the federal government in 1989.⁵ The child support scheme shifted financial responsibility for impoverished children and their custodial parents (as they were then termed) from the state to the non-custodial parent.⁶ This has undoubtedly placed a heavy burden on many fathers. However, the reaction of fathers' rights groups has been to argue for a connection between child support payments and the amount of time fathers spend with their children. By introducing a rebuttable

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presumption of equal time (a term preferred to the outmoded 'joint custody' used in the terms of reference for the Inquiry) they argue that child support payments made by fathers can be reduced or stopped altogether. For example, Rodney Hardwick, National President of DADs Australia, argued before the Inquiry:

Let us say for argument's sake that we had fifty-fifty parenting and I was looking after my child 50 per cent of the time and my former partner was looking after the child 50 per cent of the time; what child support would I have to pay? I am looking after the child 50 per cent of the time. I am paying for half the costs. School fees are met equally. All of the external activities are going to be met equally because if they fall in my week, I pay for them. It is as simple as that.⁷

This is a seductive argument based on principles of formal equality.⁸ However, it runs contrary to the stated object of the *Child Support (Assessment) Act 1989* (Cth) that children share in 'the standard of living of both their parents, whether or not they are living with both or either of them' (s 4(2)(d)). This means that even under an equal time arrangement, a parent who earns substantially more than the other should still be liable for child support so that the children do not move between a 'rich' and a 'poor' house. There is continued evidence of the disparity in wage earnings between men and women (in February 2002, female employees still earned just 66% of the average male weekly earnings)⁹ and of the significant financial hardship after divorce experienced by women (and the children who live with them) compared to men.¹⁰ Consequently, if the introduction of a presumption of equal time was to mean that there is a massive decrease in the amount of child support paid by fathers nationally, then many children in equal time arrangements will experience a substantial drop in their standard of living from the house of their father to that of their mother. This cannot be in the best interests of these children and hints at the extent to which pressure from men's groups on financial issues is driving law reform rather than evidence of what is best for children.

The existing law

As a society we can go a lot further in encouraging closer relationships between fathers and their children. But the rebuttable presumption proposed by the Prime Minister is not the answer. Proponents of the change argue that the present family law regime effectively implements an automatic presumption of residency with mothers.¹¹ However the present legislative framework does not prevent and even encourages fathers to take a greater role in their children's care after separation. Stated objects within the *Family Law Act* are that 'children have a right to know and be cared for by both parents' (s 60B(2)(a)) and that 'parents share duties and responsibilities concerning the care, welfare and development of their children' (s 60B(2)(c)). Section 61C(1) states that each parent has 'parental responsibility' for a child, meaning each has the 'duties, powers, responsibilities and authority' for their children. The parental responsibility of each parent does not diminish after determining a particular care arrangement for children (s 61D(2)). Fathers are increasingly being awarded residency of their children within the Family Court¹² which suggests that as more men are taking a greater role in actively caring for their children, courts and separating couples are increasingly factoring this into their decision-making. Any legislative changes to the law relating to fatherhood must focus on father and child relationships *before* as well as after

separation to ensure that we are not pushing new forms of parenting on families which are not ready for such change.

The need for empiricism

The introduction of a rebuttable presumption of equal time has been termed 'the most extensive reform of the law relating to children since the introduction of the *Family Law Act* in 1975'.¹³ Such reform must not be based on ideology alone, but on firm empirical evidence that introducing such a legislative change would be in the best interests of all Australian children. Not enough reliable research exists to suggest that a presumption of equal time will be in the best interests of enough children to support implementing it. Some of the available evidence is outlined within this article.

It is acknowledged that those who favour the introduction of a rebuttable presumption of equal time also rely on credible empirical research to suggest that children in equal time arrangements are better adjusted than children who reside with one parent only.¹⁴ It is clear that joint residence can be a beneficial arrangement for some families and for these families may be a successful way of increasing fathers' involvement in their children's parenting after separation. However all of the available evidence — even that relied on by supporters of the presumption — shows that an equal time model is not beneficial for *all* families.¹⁵ The ability to rebut the presumption will be an inadequate protection for such children. This model is not in their best interests. Equal time should instead be viewed as one model amongst many of post-separation parenting and should not be presumed to apply to all separating families.

Research into equal time arrangements

Research into the operation of equal time arrangements is limited and little is known about how these arrangements are structured and how well they work.¹⁶ A clear need exists for further research in this area, particularly Australian research that consults children.

The only Australian research into the operation of equal time or near equal time arrangements was conducted in 2003 by the Australian Institute of Family Studies (AIFS).¹⁷ The study concluded that equal or near equal time arrangements could work, but that a number of conditions had to be present for equal time to be a viable and successful option for the families interviewed (although not *all* of the conditions had to be met). These were:

- geographical proximity [of the parents' houses];
- the ability of parents to get along in terms of a business-like working relationship as parents;
- 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);
- a commitment by everyone to make shared care work;
- family-friendly work practices- especially for fathers;
- a degree of financial independence- especially for mothers; and
- a degree of paternal competence.¹⁸

This research highlights parental co-operation as the key to equal time arrangements, as almost all of the factors listed above depend on the existence of a fair degree of parental collaboration. Positive patterns of family dynamics were the norm, although not uniform throughout the research group.

Other studies in other countries have concluded that a number of factors, in addition to those listed above are necessary for successful equal time arrangements: major organisational skills, on the part of the parents and children;¹⁹ the need for duplication of some daily items such as furniture, clothes, toys and computers and money to pay for these;²⁰ equal involvement of parents in childcare prior to divorce or separation;²¹ frequent changeovers for very young children;²² and a smaller number of children.²³ An example of an equal time arrangement working well is recounted by Tom, as 12 year-old participant in a United Kingdom study:

TOM (12): It's worked out really well. I don't think there could be any better arrangement than this.

Q: So what is it that you think makes it work so well?

TOM: I think it's because even though mum and dad don't love each other they're still very kind to each other and they get on really well, even when we swap over and things.²⁴

British researchers Carol Smart, Bren Neale and Amanda Wade conducted three landmark studies interviewing children about their experiences after their parents' separation or divorce in the United Kingdom in the 1990s.²⁵ Although not focussing exclusively on children in equal time arrangements, these are the only studies known to interview children (rather than parents or professionals) involved in equal time arrangements. To date, there has been no equivalent Australian study.

Smart, Neale and Wade suggest that the successful outcomes of equal time parenting, 'may depend far more upon the characters, personalities, resources and values of the parents and children involved than in one particular form of post-divorce parenting.'²⁶

Unworkability of equal time arrangements for many families

For some families, the equal time model will be unworkable, as they find they are not able to achieve the conditions that are important for the successful implementation of this parenting arrangement. For these families, a different model of post-separating parenting will be necessary.

Even a rebuttable presumption of equal time normalises a model of post-separation family life which the research suggests is difficult to achieve. The model may be rebuttable, but it is still preferred to others, putting implicit pressure on families to adopt this state-sanctioned model. Families who attempt to implement the equal time model but find it unworkable may find that it puts undue stress on all family members. Parents, and perhaps children who have attempted the equal time model but find it impracticable may experience a sense of failure as they have not lived up to a model of family life that is presented as 'the norm'. This would be an unacceptable consequence of implementing a rebuttable presumption of equal time.

Increase in litigation?

Additionally, unnecessary engagement with the legal system and litigation may result from the introduction of the presumption. If the equal time arrangement becomes unworkable within a family, parents will be forced to rebut the presumption and amend their parenting plan by consent or, if there is disagreement between the parents, in Court through litigation.

A rebuttable presumption of equal time is unlikely to lead to an increase in the number of equal time arrangements

In 1997, 3% of Australian children with a natural parent living elsewhere, lived under an equal time or near equal time care arrangement.²⁷ A presumption of equal time will be unlikely to lead to more families achieving the necessary conditions for successful equal time care arrangements for children.

The chief factors identified in the AIFS study for successful equal time parenting are a co-operative 'business-like working relationship' between the parents, a shared commitment to equal time parenting and an ability to focus on the children when making care arrangements. Parents who fit these criteria are likely to be able to agree to an equal or near equal time arrangement without the need for a presumption, given appropriate encouragement. This is because the qualities which the research suggests will lead to successful equal time arrangements are similar to the qualities which permit parents to agree to their own post-separation children's arrangements.

Parents who are capable of a business-like working relationship, with appropriate encouragement, can be assisted to reach an equal time or near equal time residency agreement under the present family law regime. Couples must be made more aware of the full range of post-separation parenting arrangements encouraged under the present Act. It is in these families that equal time agreements are most likely to succeed. There is no need for the introduction of an additional presumption to encourage these parents to make equal time agreements.

The introduction of a rebuttable presumption of equal time will not assist those families to reach an equal time arrangement where both parents are unable or unwilling to attain a business-like working relationship, do not have a shared commitment to equal time parenting or an ability to focus on their children's interests when making residency arrangements. If these families are pressured or forced to implement an equal time arrangement through a rebuttable presumption, the research suggests that the equal time arrangement is unlikely to be successful. In such a situation, one parent will apply to the Court to have the presumption rebutted or both will agree to a more suitable parenting arrangement. Thus there is unlikely to be an increase in the numbers of families using equal time arrangements through the introduction of the presumption.

An equal time arrangement may not be in the best interests of children

The paramount consideration, under the current *Family Law Act* when determining care arrangements for children is the best interests of children. The best interests standard must remain the overriding consideration when determining post separation children's arrangements. Spending equal time with each parent will not be in all children's best interests. The single most important determinant of whether a post-separation care arrangement is in the best interests of a child is the quality of relationships within the family rather than the amount of time the child spends with both parents.

Clear evidence exists to suggest that a focus on apportioning equal time with both parents may not be in the best interests of many children. Carol Smart argues that the

majority of children whose parents share their care know how important the apportionment of their time is for their parents. However for some children, a requirement that they spend equal time with both parents can become ‘uniquely oppressive’.²⁸ By dividing the child’s time equally into two shares, Smart and her colleagues found that the child’s time became heavily invested with emotional significance. Children in this situation who were sensitive to their parents’ wishes, were reluctant to ask for a change in the care arrangements when they became unsuitable. Such children, ‘found that they had to take a stand against a powerful philosophy, which insists that equal shares are fair, and also against the emotional strain of upsetting the balance between their parents’.²⁹ The following exchange between an interviewer and Matt, who is 15 years old and has been in an equal time arrangement for five years, illustrates this situation:

MATT (15): It’s just a drag really for me.

Q: What’s the worst thing about it?

MATT: Just not being able to settle down in one place for longer than one night ... It’s just my room. Really it doesn’t ever feel lived in as it would if I was in one house all the time, that’s really ...

Q: If you had a completely free choice, what would you like to do?

MATT: I’d like to stay in one place. [When mum and dad were together] it was more settled, it just seemed more calm and peaceful ...

Q: How do you think [your mum and dad] would react if you said ‘Can we try something different?’

MATT: I don’t know, they’d probably go mental about the amount of time I was spending at each house ... I’d just feel under pressure not to say anything ... They’d fight over every day ... They argue over, like, whoever had had like one long day or something. It’s just relentless. I wish they would stop it I suppose.³⁰

If some children living under an equal time arrangement find that as they grow up they would like to change their living arrangements but cannot express this wish, then a presumption of equal time is not in their best interests. Matt’s living arrangements seem to be more about his parents’ interests than his. In such cases, an equal time arrangement ‘can be just as debilitating for children as those cases where one parent refuses to allow children to see the other parent or to spend meaningful time with them’.³¹

This does not mean that an equal time arrangement will silence all children. It will silence those who feel that they cannot negotiate the emotional consequences of the time pressures created by their parents, and that depends on the kind of pressures created by parents for their children and the personality of each child. For children in this pressured situation, a law which establishes a presumption of equal time creates an additional societal expectation — of being a son or daughter by carefully measured equality. Defying such an expectation is a burden too great for some children to shoulder and they will acquiesce quietly and unhappily, as Matt has done.

Rebuttability not enough

Even if equal time is merely used as a starting point for negotiating post-separation parenting arrangements, Smart’s research suggests that some children may be reluctant to express their wish to alter this arrangement— to rebut the presumption— for fear of upsetting their parents.

One of the factors the Family Court must presently consider under s 68F of the *Family Law Act* when determining the best interests of a child is ‘any wishes expressed by the child.’ Any care arrangement which inhibits children from expressing their wishes risks decision-making which is not in a child’s best interests. This suggests that the ability to rebut the presumption may not protect all children.

Even if a child in equal time care is able to articulate his or her desire to shift arrangements but the parents are unable to agree between themselves to the change, the costs of litigating in the Family Court or Federal Magistrates’ Service or even mediating at a community-based centre to rebut the presumption may be prohibitive, leaving the child in a situation which is clearly not in their best interests.

Quality of parenting

Smart, Neale and Wade’s research establishes that it is the quality of parenting that matters when determining whether particular care arrangements are in the best interests of children, not whether children spend equal time with each parent. ‘[T]he key element of success was not equal time but the equal caring.’³² The way that parents sustained and managed their relationship with each other and with their children was crucial to outcomes for children through family transitions.³³ For Tom, quoted above, his care arrangement was positive because his parents visibly maintained a ‘kind’ relationship with each other, but Matt endured an unsatisfactory arrangement because he didn’t want to inflame a relationship where his parents already argued relentlessly. The fact that both boys had equal time care arrangements was no predictor of whether their best interests were maintained. It was the quality of family relationships that mattered.

Mandating a particular arrangement of post-separation parenting defined by time is not going to guarantee that parenting arrangements are in the best interests of children. Smart, Neale and Wade conclude:

We found that co-parenting [an equal time split], from the perspective of children and young people, was not intrinsically better or worse than living with one parent and seeing the other regularly, occasionally or never. What mattered to them was the quality of their relationships.³⁴

Equal time may become a competing principle to the best interests standard

There is a danger that equal time will become a competing consideration to the best interests of the child standard in making decisions about the care of children.

A standard of equal time has the danger of misleading parents, judges and registrars — those who make decisions about the care of children — away from a focus on quality of parenting and toward a focus of equality of time. US Psychologist Sanford Braver, a strong advocate for fathers’ increased involvement in their children’s parenting, argues that an equal time arrangement (known in the US as ‘joint physical custody’) is not necessary to facilitate fathers’ involvement in their children’s lives.

While it is recommended that the children have substantial contact with both parents, which includes time at home, time driving to and from as well as sharing the child’s extracurricular activities, time feeding and clothing the child, time monitoring homework, and time spent with the child and his or her friends, it is not necessary that this time be split exactly down the middle ... A parent overly concerned that he see his child exactly the

same amount of time as his ex-spouse becomes more of an accountant than a parent.³⁵

The use of an equality presumption risks eclipsing the best interests standard when making child residency decisions. The equal time presumption involves measurement of the child's time and involves comparison between the portions received by each parent. This is a comparison that will invite parental conflict, as no child's time can be divided exactly evenly. Such measurement moves far away from the real issues behind ensuring that children's best interests are met — the quality of time a child spends with each parent and the quality of the relationship established and maintained through spending time together. Smart comments that, 'sometimes the insistence on an exactly equal division of time between parents seems a long way away from the best interests of their children'.³⁶

If the introduction of the presumption is a response to lobbyists concerned about the amount of child support that men are paying nationally, then it is apparent that a focus on equality of time is about the parents' interests rather than children's.

Conclusion

There is no doubt that there are manifold problems within the existing family law system and that we must further reassess the role of fathers within our society. However introducing a rebuttable presumption of equal time is a back-end solution — attempting to address the issues of fathers' involvement in their children's lives after separation, rather than establishing healthy patterns of parenting when children are born. Instead, available research suggests that we need a policy focus on quality parenting and the availability of flexible care arrangements for children from birth to adulthood. We need to examine how the conditions identified for successful equal time arrangements can be introduced for in-tact as well as separated families: flexible work practices for men as well as women, real wage parity for women; education about quality parenting and widely available information about how to make equal time arrangements work. Law reform in the area of family policy must be motivated by research into families and children rather than by populist ideology if it is to be in the best interests of our children.

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