Bargaining over children

From presumptive practices to child-focused litigation

The current Parliamentary Inquiry into a "rebuttable presumption" of 50:50 residency taps an aspiration by many children and adults for more meaningful child–parent engagement following separation and divorce. But rather than endorse pre-emptive assumptions about family structure, the inquiry should begin with the child's interests and work outwards.

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The Australian Government *Inquiry into child custody arrangements in the event of family separation* "seeks to address community concerns about the operation of contact and child support arrangements for separated families, and reflects the Government's commitment to ensuring that, to the greatest extent possible, children have the benefit of the love and care of both their parents when a couple separates"(Australian Government 2003a).

The broad objective is consistent with section 60B (1) of the Family Law Act, which aims to ensure that "children receive adequate and proper parenting to help them achieve their full potential", and that "parents fulfill their duties and responsibilities concerning the care, welfare and development of their children".

The inquiry is concerned in the first instance with the factors that should be taken into account in deciding how much time each parent should spend with their children post-separation. The more problematic part of this question is contained in the question: "whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted". The inquiry is also concerned with the status of other people significant to the child, and with the workings of the child support formula.

All these issues are important and inextricably linked. However, this article focuses mainly on the 50:50 residency starting point because, although it may seem a logical solution, the thinking that supports *presumptive* decision making reveals a great deal about the adult-oriented ways in which we continue to approach the "best interests of the child".

Presumptive and non-presumptive decision-making processes

Presumptive decision-making principles over children formally reflect the cultural preoccupations of a given time. At various times, these concerns have focused on issues of morality, biology, ownership and inheritance, particular social or psychological factors, or a reward for prior parenting services (Moloney 2002). It is not immediately clear where the idea of 50:50 residency sits on this spectrum of preoccupations, although from a political perspective there appears to be a general consensus that dissatisfaction with post-separation outcomes is an issue frequently raised by constituents (Australian Government 2003b).

The Family Court endorsed a shift to *non*-presumptive decision-making principles in the first year of its existence in cases such as *Jurss v Jurss* (1976) and *Raby v Raby* (1976). The High Court further endorsed this approach in *Gronow v Gronow* (1979). Since that time, appeals

against any presumptive principles that may have crept into decision-making in family law have generally succeeded. There is little reason to believe a presumption in favour of 50:50 residency would not meet a similar fate. Even if judges initially claimed support of amended legislation in making such decisions, the tension between this starting point and key child-inclusive principles enunciated in several articles of the United Nations Convention on the Rights of the Child would lead inevitably to a challenge.

The return to presumptive decision-making being considered by the Parliamentary Inquiry highlights an issue at the heart of litigation over children. Non-presumptive approaches to decisions about children are consistent with the "no fault" aspect of modern family law. No fault divorce is in turn a response to changed perceptions about family structure. No longer seen as an institution of social control, marriage has been increasingly regarded as a vehicle for developing and nurturing close personal relationships (Beck 2000).

Children's interests, which remain the paramount consideration in post-separation disputes (Chisholm 2000), are also described under section 68F (2) largely in terms of the maintenance of quality *relationships,* preferably with each parent and possibly with other significant carers. We have, in a sense, traded external stabilities for internal satisfactions. In so doing, we have created a problem for legal processes, which are more at ease with questions of structure or agreed upon "facts" than with the assessment of the strength and importance of human ties.

Dickey (1997: 388-391) has summarised the Family Court's shift to non-presumptive principles in parenting cases as follows: determination of the best interests or welfare of the child now depends on the particular facts and circumstances of each case; consequently, no result in a particular case can act as a precedent for another case; no commonly recognised factors (such as status quo) can be elevated to a principle; and no commonly recognised factors such as unusual religious beliefs can lead to a prima facie presumption of parental unfitness.

Key patterns of post-separation parenting

It is clear that support for a presumption of 50:50 residency post-separation comes from a desire to promote change in a particular direction. Fewer than 3 per cent of children who had a natural parent living elsewhere in 1997 were categorised by the Australian Bureau of Statistics (ABS 1998) as being in shared care arrangements. Similarly, the Child Support Agency (2003) listed fewer than 4 per cent of parents registered with them in the shared care category.

The definition of shared parenting by both the Australian Bureau of Statistics and the Child Support Agency is tied to the number of *nights* spent with each parent. However, Parkinson and Smyth (2003) found that the figures look different if sleep-overs *as well as* "daytime only" contact are counted. In their study of 1024 cases, they found that on these expanded criteria, and after leaving out the one-third of fathers who have little or no contact with their children after separation, "shared time" arrangements (defined in this case as in excess of 109 days *or* nights per year) occurred in 16 per cent of the cases sampled. This translates to 10–11 per cent of *all* post-separation cases – a considerable minority.

The Australian Bureau of Statistics (ABS 2000) reported that approximately 84 per cent of single-parent households in Australia were headed at that time by women, and 16 per cent by men. The Family Court figures in its most recent annual report notes that the overall rate of residence orders in favour of fathers increased from 15.3 per cent in the mid 1990s to 19.6 per cent in 2000-2001.

In two studies of fully litigated Family Court parenting cases, men were "successful" in their applications 31 per cent of the time (Horwill and Bordow 1983; Bordow 1994). Moloney (2001) found a "success" rate for fathers of 40 per cent in a sample of closely contested cases that was subjected to intensive qualitative analysis. However, Moloney also found that when fathers were "successful" in litigated cases, the result was more strongly determined by judicial perceptions of women falling short of a traditionally articulated maternal role than any perceived parenting capacity in the fathers. Indeed, fathers were rarely mentioned in most of the judgements, except in the context of their breadwinning roles, or in association with female supports (mothers, partners etc.) who might assist them. Moloney concluded that litigation outcomes, simply expressed as percentages, tell us little about the question of neutrality in decision making.

The continuing legacy of the motherhood principle

It is interesting to note that the declaration of gender neutrality came about in Australia, as it did in the United States, before the availability of formal evidence that men

were capable of providing good quality parenting. For example, when Michael Lamb published his first edition of *The Role of the Father in Child Development*, he found that: "Social scientists in general and developmental psychologists in particular, doubted that fathers had a significant role to play in shaping the experiences and development of their children, especially their daughters" (cited in Lamb 1997: 1).

As Weitzman (1985) points out, gender-neutral decision-making principles about children in the United States reflected adult oriented concerns that addressed adults' constitutional rights. Some feminists (Uviller 1978) also supported gender neutrality in children's cases in family law on ideological grounds that were, again, adult focused.

The gender-neutral principles established in the early Family Court judgements in Australia were never challenged on the grounds of an absence of scientific evidence. From an adult perspective, men would have had no reason to challenge gender neutrality as it formally afforded them equal status with women. Women, on the other hand, have had little incentive to challenge gender-neutrality because, by and large, the principles have been honoured in the breach.

Although contrary to the legal principles established in the 1976 and 1979 cases cited above, the Court's de-facto presumption favouring mothers has, broadly speaking, conformed with public sentiment. For example de Vaus' (1997: 9-10) survey of 8,845 respondents across three samples found that: "A large majority of respondents stressed that caring for young children should take priority over work for mothers, and the majority supported the traditional breadwinner role of men and family role for women. They believed that a family suffers if a mother works full-time."

It might be argued, therefore, that despite its formal stance of gender neutrality, the Court has been reflecting a dominant gendered set of public opinions about parenting.

In the same survey, however, de Vaus (1997:10) also found that: "The clearest and most consistent finding is that there is a marked generation gap in family values, with older people holding more traditional views than younger people."

When this latter finding is linked to Parkinson and Smyth's detailed analysis of shared parenting, noted earlier, and the increases in the percentage of father-headed single-parent households, difficult questions arise for a decision-making body such as the Family Court. The challenge to find ways to move from a de facto maternal preference regime to a truly non-presumptive starting point becomes increasingly pressing.

OPTIONS FOR PARENTING PLANS FOR SCHOOL AGE CHILDREN

Nights in four-week cycle

1 EVERY OTHER WEEKEND — **4/28**
(Friday 6 pm to Sunday 6 pm)

- 12 days separation from non-resident parent (NRP) too long for many children
- NRP–child relationship diminishes in importance to child
- NRP less involved in school, homework, projects
- Residential parent (RP) has little time off from parenting
- May be beneficial when NRP has angry/rigid/inept parenting style

2 EVERY OTHER WEEKEND PLUS MIDWEEK VISIT — **4/28**
(Friday to Sunday and every Wednesday 5 pm – 8 pm)

- No more than 7 days separation between NRP and child
- Transitions to/from RP residence permit conflict
- NRP describe short visit as too rushed – no time to settle in
- NRP has little time for help with/supervision of homework
- May be only option when nrp has early work hours

3. EVERY OTHER EXTENDED WEEKEND — **6/28**
(Friday to Monday 8 am)

- More expansive weekend for NRP and child
- NRP picks up/drops off child at school or daycare
- Opportunity for parent conflict reduced
- One less transition for child
- Not workable if NRP lives too far from child's school

4 EVERY OTHER WEEKEND PLUS MIDWEEK OVERNIGHT — **8/28**
(Friday to Sunday, Wednesday 5 pm to Thursday am)

- No separation from NRP greater than 6 days
- NRP involved in homework during midweek
- Transition at school avoids Wednesday evenings conflict
- NRP has opportunity for bedtime and waking rituals
- RP has regular, weekly evening off-duty
- Can add Monday evening visit after RP weekends
- Children with difficult temperaments may not tolerate overnight in mid-week

5. EVERY OTHER EXTENDED WEEKEND PLUS MIDWEEK OVERNIGHT — **10/28**
(Friday to Monday is, Wednesday 5 pm to Thursday am)

- Same pattern as no. 4 above, except longer weekend
- Additional overnights on weekends creates 36 per cent timeshare

Nights in four-week cycle

- NRP must assume more responsibility for schoolwork
- Opportunities for face-to-face parent conflict in front of child eliminated if use school or day care pick-ups and drop-offs
- NRP has more time for child's activities, projects

6. EVERY OTHER WEEKEND WITH SPLIT MIDW — **14/28**
(Friday to Monday is, alternating weeks; Monday after school to Wednesdays is with Parent A; Wednesdays after school to Friday are with Parent B)

- 2-2 – 5-5 pattern of contacts with each parent
- All transitions at school or day care avoid conflict
- Consistent location of midweek residence each week
- Five days between contacts works for most at age 5 and up
- Both parents fully involved in child's work and play
- Child is fully set up at each residence (clothing/school)
- Children generally more satisfied with shared arrangements
- May not work for child with difficult temperament or learning disabilities, particularly if parenting styles are very different or inconsistent

7. EACH WEEKEND SPLIT AND MIDWEEK SPLIT — **14/28**
(Friday 5 pm to Saturday 5 pm or Sunday am; Saturday 5 pm or Sunday am to Monday am; Midweek split residence as above in no. 6)

- No separation from either parent is greater than 3 days
- More appropriate for preschool children than no. 6
- More often an interim schedule until child is aged 5 or 6
- More transitions

8. EVERY OTHER WEEK — **14/28**
(Friday after school to following Friday am)

- 7-day separations are difficult for children younger than 6 or 7 years
- eliminates face-to-face parental conflict
- minimum number of transitions per month
- parent and child can "settle" into routines, activities
- change in residence each week may complicate lessons, daycare arrangements
- adolescents may desire two week or monthly blocks of time

Prepared by **DR JOAN KELLY,** researcher and clinician, and reprinted with her permission. The schedules are not intended as guidelines. Rather, they present options and examples for professionals and parents which highlight developmental and divorce research.

Key systemic problems in maintaining a true non-presumptive stance

The Family Court suffers from a deep-seated systemic problem in maintaining a formal non-presumptive approach to decision making in parenting disputes. Non-presumptive approaches support unique outcomes, which in turn recognise the uniqueness of *each* child's needs in *each* family. Citing Alfred Lord Tennyson in the case of *Mallet v Mallet* (1984), the High Court recognised this legal problem of "the wilderness of the single instance".

This tension in modern family law contributes to what Herring (1999) has called "strained reasoning," which he believes to be a feature of many Family Court parenting judgements. In pragmatic terms, the question is whether judges can seriously be expected to fulfill their obligations under section 68F (2) to consider the 13 broadly stated categories, in a manner that *truly* reflects the principles outlined above by Dickey (1997). Decision-making theory (Connolly, Arkes and Hammond 2000) would suggest that except in cases in which one parent is judged to be dangerous or otherwise unacceptable, the requirements of this section are such that judges are almost certain to fall back on a limited number of (probably covert) principles. This indeed is what the research cited above suggests that judges do.

There is no doubt that family courts in Australia and elsewhere have struggled to find a comfortable middle ground between predictability and individual interpretations of the best interests of the child. The proposed rebuttable presumption would ease this tension. The core difficulty is that it would also overtly endorse a regime of positional bargaining over children.

Returning (again) to the voice of the child

From a child-focused perspective, a presumptive starting point of 50:50 residency formalises the commodification of children. By *beginning* our deliberations with a "fairness to parents" presumption and effectively seeing children as goods to be shared, we tackle the problem from the wrong end. We are supported in this by conventional litigation processes, which begin with depositions from *adult* litigants about mainly *adult* concerns and then struggle to find ways of incorporating the child.

Much has been written about the "voice of the child" in family law and considerable progress has recently been made in more actively incorporating children's needs and children's voices into facilitative processes such as mediation and conciliation (see, for example, www.childrenfocus.org). In terms of incorporating children's voices into *litigation* processes, however, progress has been painfully slow. At the first National Conference on Children and Family Law, Broun (1985), a senior family law practitioner, demonstrated that from a legal perspective the formal representation of children presents significant systemic problems within an adversarial system of litigation. Despite thoughtful analyses since that time (for example Chisholm 1999), despite the aspirations of the Family Law Reform Act, and despite modest progress on the question of legal representation of children (Keogh 2000), those problems largely remain.

A presumptive (albeit rebuttable) starting point with respect to where and with whom children *should* live after parental separation inevitably diminishes the dignity of each child. It would be an important missed opportunity if the present inquiry did not encourage movement in the direction of child-focused and even child-inclusive processes in litigation that would treat each child as an individual and also enhance post-separation parenting practices. Significant steps already taken in *facilitative* dispute resolution processes have had the active support of the Attorney General's Department (2003). The inquiry presents an opportunity to re-think *litigation* processes in ways that are also driven not by an adult's sense of fairness, but by what we know children need at this time. If we were to take this opportunity, what would the starting principles be?

From a child's perspective, what constitutes good practice?

From a psycho-social perspective, there is unequivocal evidence that children do well after parental separation when conflict is kept under control (McIntosh 2003) and when opportunities are created for both former partners to exercise "authoritative parenting" (Amato and Gilbreth 1999). Authoritative parenting is primarily a *relationship* dimension whereby the parent offers the child both support *and* containment. This combination of support and containment, first outlined by Baumrind (1968), has been identified as a key resource for child development across a range of family structures.

Authoritative parenting is best achieved within a regime of cooperative post-separation parenting. But it can also be satisfactorily managed in a "parallel parenting" arrangement (Kelly and Moloney 2002) – that is, in a regime in which ex-partners focus on their parenting, but have little interaction with each other. Authoritative parenting begins to unravel when the conflict that frequently surrounds separation and divorce, escalates or develops into entrenched conflict. A critical issue with respect to this group is the extent to which the decision-making process itself, whether facilitative or litigious or something in between, either supports (or even inflames) the conflict, or actively attempts to counteract or reduce it.

From the child's perspective, dispute resolution procedures need to be such that at a minimum, they do not jeopardise future opportunities for authoritative parenting by *both* parents. How, then, can litigation procedures simultaneously arrive at responsible solutions and leave ex-partners and their children with the sense of dignity they need in order to continue in effective parent–child relationships?

Good child-focused facilitative procedures such as conciliation invite attention to parenting *processes* from the perspective of each child's needs. On the other hand, traditional litigation favours positional statements, especially claims about amounts of time.

Of course, good parenting practice requires that *adequate time* be spent between parent and child. For example, "every second weekend" orders or agreements generally reinforce a "visitor" model of parenting, which makes authoritative parenting very difficult to achieve (see Joan Kelly's *Options for Parenting Plans,* boxed inset on p. 58) On the other hand, the *amount* of time each child needs with each parent will vary as developmental needs change and as activities beyond the immediate family increase.

Children (and their parents) need structure and stability, more so at some stages of their lives than at others. Time-based arrangements often need to be agreed upon or ordered so that at least a default position is clear. Variations on the default position will then be a function of the level of cooperation between former partners and the increasing capacity of each child to negotiate his or her own arrangements. From a developmental perspective, however, processes are more important than structure.

What *happens* between parents and their children is more important than the time spent per se. But here we strike the obvious difficulty that the law's only currency in parenting disputes is the allocation or withholding of amounts of time.

If we saw children as objects – if we did not view them as increasingly autonomous human beings, the law could simply require that they share their time equally (or in some other pre-determined way) between post-separation households. On the other hand, if we take seriously the United Nations Convention on the Rights of the Child, as the 1995 Reform Act attempted to do, we are forced to the conclusion that we must take children's needs, perceptions and attachments firmly into account. And with increasing age and maturity, we must listen increasingly carefully to children's own articulation of those requirements.

As Kelly's *Options for Parenting Plans* demonstrate, there are and need to be multiple solutions to the question of how to structure post-separation parenting. Kelly notes that each solution has reasonably predictable global strengths and weaknesses for children of differing ages and developmental stages. Just as importantly, each solution will have strengths and weaknesses that are unique to each child within each family situation.

It is important to remain focused on the fact that what is being aimed for is a continuing satisfying and supportive relationship between each child and each parent, and to support processes most likely to achieve that aim.

Although it presents a challenge, there is ultimately no reason why beginning with the child and working outwards could not be achieved in litigation processes, in ways that parallel what happens in contemporary *child-focused* facilitative practices (Kelly 2003) and *child-inclusive* facilitative practices (McIntosh 2000). Current family law regulations that seek to reduce the impact of adversarial processes by, for example, limiting the amount of past material that can be incorporated into affidavits, are a gesture in the right direction, but do not go to the heart of the issue.

Child-focused litigation: making a start

If practices based on child focused or child inclusive principles were adopted, it would be incumbent on parents to present to a judge or adjudicator, material that outlined a proposed structure for *each* child, located firmly in the context of demonstrating how that structure was designed to meet each child's needs. The focus of such a presentation would be on plans around parent-child *interactions*. The structure itself (how the time is to be shared) would have relevance only with respect to how it links to a capacity to support good parenting processes.

In such a system, ambit positional claims by parents would be firmly discouraged. The key question to which the Court would be encouraged to return again and again, would be: "How do you plan to parent your child (ren) and how do you intend to link this plan with your former partner's plan to parent the child(ren)"?

Thus the language of litigation would focus on proposed parenting arrangements rather than "residence", "primary care", "contact", "access" or "visitation" – all of which serve win/lose ways of thinking that commodify children and inevitably diminish the status of one of the parents. In such a system, formal consideration along the lines noted by Chisholm (1999) would also be given to the appropriateness of input into the adjudication process from one or more of the children.

Procedures such as this contrast with current adult-oriented adversarial practice in which structure is at the centre of the debate, and processes evolve as best they can once structure is decided. They do not, of course, relieve the adjudicator of the obligation of making a decision if such processes do not lead to a resolution beforehand. However, *beginning* with statements that link each child's needs, perceptions and attachments to proposed structural arrangements better satisfies the aims of the Family Law Reform Act and the aspirations of the United Nations Convention on the Rights of the Child. It is also more likely to result in arrangements in which parenting after separation is shared, not necessarily (probably not even normally) 50:50, and not according to a pre-determined (albeit rebuttable) formula, but in ways that are satisfying to children and to both their parents.

In the *Journal of Family Studies* (Moloney, in press). I expand on a number of the issues raised here. I also tease out some of the implications of adopting processes that begin with each child's needs, perceptions and attachments and work outwards from there, even when litigation is the only dispute resolution option.

In that article, I elaborate further on the Court's obligation:

- in the light of what we know about the impact of entrenched conflict on children, to oversee processes that do not make decisions at the expense of contributing to an escalation of conflict;
- in the light of what we know about the importance of authoritative parenting, to take seriously the benefits to children of experiencing ongoing nurturing from *both* parents or significant carers and, on this basis, to allocate sufficient time for this to happen;
- in the light of what we know about the devastating impact of violence and abuse perpetrated against children and former partners, to earmark cases in which such allegations are made, and adopt timely proactive investigative and related procedures along the lines suggested by *Magellan* (Brown et al. 2001) and *Columbus* (Murphy et al. 2003), with a view to early determination and recommendations for future action; and
- in the light of what we know about the impact of poverty and the costs associated with parenting children, to build into time allocation orders a realistic assessment of their financial impacts.

Conclusion

There can never be simple or formulaic answers to a significant number of post-separation parenting disputes. Similarly, an article of this length cannot hope to do the question justice. Nonetheless, it is important to remain focused on the fact that what is being aimed for is a continuing satisfying and supportive relationship between each child and each parent, and to support processes most likely to achieve that aim. Litigation will remain problematic for children while it continues to begin with adult-oriented claims about structure. Children need a systemic overhaul of litigation processes. Those who doubt this need look no further than the ambit claims that all too often feature in conventional litigation processes – from the very first solicitor's letter sent to the respondent or the "opposing" solicitor, to the letter in reply, through to affidavits that detail a plethora of minor parental "misdemeanors" over the years of a marriage.

That having been said, it is also acknowledged that a percentage of cases will continue to require what Elster (1989) had called "Solomonic Judgements", that challenge the limits of legal knowledge and legal processes, and that defy solutions that might be offered by research-based knowledge or conventional human wisdom. For example, what should a judge do when a case of altruistic surrogacy turns sour, as it did in *Re Evelyn*? Or how should a judge respond when a mother in a lesbian relationship suggests that the man she calls the "sperm donor" has no place in the child's life, as happened in the tragic case of *Re Patrick*?

There is a sense in which the final arbiters of a small group of near impossible cases must simply do the best they can. Although we can learn from such cases, we should not assume that they necessarily provide guidance and structural solutions for future action. They might. But perhaps the dictum that hard cases make bad law applies to post-separation disputes more than to disputes in any other area of human conflict. Where children's relationships with parents and significant carers are concerned, law should not presume from the outset how those relationships are to be constrained.

It is to be hoped that the inquiry might be willing to look beyond the superficial, to an understanding that the proposed 50:50 residence presumption is largely adult-oriented, inappropriately focused on structure and, for most separating families, unrealistic. Perhaps the proposal was meant to be largely aspirational. If that is the case, and if it succeeds in focusing attention on the fact that too many children miss out on receiving what *both* parents or other significant carers can offer them after separation, then the inquiry will have been a worthwhile development.

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