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Caring for children after parental separation: would legislation for shared parenting time help children?

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Introduction

In recent years, interest in sharing parenting has grown among parents who no longer live together, following divorce or separation, but where both wish to spend time with their children. Shared time is different from and additional to sharing legal responsibility. But as well as this informal development arising from agreements made between separating parents, there are now demands for legislation to promote shared parenting in cases which go to the family courts. This is due in large part to growing pressure from fathers' groups.

In July 2010, Brian Binley MP introduced a Private Member's Bill, the Shared Parenting Orders Bill, to provide for the making of shared parenting orders for litigating parents who could not agree about parenting arrangements. This bill aims to create a legal presumption that shared parenting orders should be the default arrangement unless certain exceptions apply. It will be debated in the House of Commons later this summer. More recently, at the end of March 2011, Charlie Elphick MP introduced a second Private Members' Bill, the Children's Access to Parents Bill which had some comparable objectives.

As part of its work, the Ministerial Task Force on Childhood and the Family is looking at various ways of encouraging agreements about shared parenting and the Family Justice Review's interim report this

spring, also considered the issue. However the report argued "no legislation should be introduced that creates or risks creating the perception that there is an assumed parental right to substantial shared or equal time for both parents".

This paper starts from the viewpoint that evidence fully supports the benefit to children of having a meaningful relationship with both parents after separation. The great majority of separating parents make their own arrangements for their children without reference to courts or lawyers. The minority who cannot agree and seek legal help are encouraged to negotiate or mediate and reach an agreed solution. If they are unable to do so and ask the court to make a decision, currently this decision will be taken according to the Children Act 1989, with the welfare of each individual child as the paramount consideration in making any order.

The purpose of this paper is to examine the state of knowledge about legal ordering of shared parenting. The aim is to inform debate about whether additional legislation promoting shared parenting time would be helpful to the children of the small group of parents who are highly conflicted and often have many other difficulties. Mothers and fathers who make consensual private arrangements would not be directly affected. Particular attention is given to recent research from Australia, where family law reform in 2006 has moved towards much greater emphasis on encouraging shared parenting.

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The current legal position

The present legal position in England and Wales is set out in the Children Act (England and Wales) 1989. This requires any court making a decision affecting the care and upbringing of a child to give paramount consideration to the welfare of that child. The issue of having any presumption about contact was discussed in Parliament in 2006 in relation to the Children and Adoption Act. The government, after extensive discussion of the research evidence, took the view that the paramount principle of the welfare of the child of the Children Act should be upheld: that is, each case should be considered on the facts and any decision should be made in the best interests of that child at that time.

The Children Act also requires that a court should only make an order where it is in the interests of the child to do so. Parents retain their legal parental responsibility after separation. They are expected to make their arrangements privately, and not to seek an order from the courts about their arrangements for their children unless they are in an intractable dispute.

The Consultation Paper 10/12 issued by the Ministry of Justice in January 2011 proposes removing contact and residence cases from the scope of legal aid except where parties are involved in domestic violence proceedings. This means parents will either arrange matters themselves, litigate in person or pay for legal advice. Lack of legal aid is likely to have a differentially adverse impact on mothers who typically have lower incomes than fathers to pay for legal advice and heavier child care responsibilities.

Defining shared parenting

Definitions of shared parenting time vary widely. In the UK shared parenting generally refers in debates to an equal division of time of children with either parent. It has no legal status and is totally different from the legal term, *parental responsibility*.

In the US (where much of the relevant research has been conducted) the terms 'joint physical custody', 'dual residence', 'alternating residence', and 'shared physical placement', are all used to describe shared time arrangements. But these rarely mean 50/50 timeshare arrangements – instead, the research generally defines shared parenting time as an arrangement when children are with each parent between 30% and 50% of the time.

Australian legislative and research definitions of shared care reflect a similar range of time-sharing arrangements. The Family Law Act 1975, refers to 'equal' time but also to 'substantial and significant time' which does not require equality to mean shared care. Most of the recent Australian research defines shared care as children spending 35–65% of nights with each parent.

The way in which 'shared care' is defined is important, not least because prevalence is affected by the definition adopted. For example, prevalence will be higher if shared care is defined as each parent having care of the child for at least 35% of the time, rather than meaning there must be a 50/50 split. Prevalence will also be higher if the definition is cast in terms of *time* overall rather than just *nights*.

Background

Parenting after separation

After their parents' separation, most children spend time with each parent by some sort of mutual agreement about arrangements. Almost all parents find it difficult to make and/or maintain these arrangements but in only a small proportion of cases [10%] are the courts involved. Currently, most children spend a majority of their time with one parent, usually the mother, called the 'resident parent'. But there is a lot of variation in how often the other parent – the 'non-resident parent' – actually sees his or her children. Arrangements between parents vary from the absence of any contact through the more usual arrangements of mid-week contact and alternate weekends and time in the school holidays with the non-resident parents (usually father) to the recently emerging pattern of shared care with substantial amounts of time spent with the 'non-resident' parent. Current estimates are about 3% of separated parents make arrangements to share child-care more or less equally. But that means that, in the vast majority of families, one parent, usually but not always the mother, has primary responsibility for child-care.

Sharing care for children on a 50/50 basis (or thereabouts) means that children have two residences, one with each parent and move between them, usually splitting the week part-way through the school week to achieve this

though there are other variants e.g. one week with mother, the next with father. It requires a considerable degree of co-operation between separated parents to maintain this arrangement satisfactorily and like all arrangements it is liable to need re-negotiation as children get older and needs of children and parents change. It is sometimes argued by non-resident parents that this split is fairer to children and parents – especially non-resident parents (mostly fathers).

But is a proposal which is advanced to remedy the injustice and pain felt by some non-resident parents right for children, whose interests under current law are paramount? What are the implications of legislating that this should be the default option for parents who cannot reach agreement but instead litigate to seek a decision from a family court? Legal regulation of shared parenting is currently rarely needed, because most parents who make these arrangements have done so by agreement. In contrast, parents who seek an order from the court are inevitably those with the highest levels of conflict and have not been able to reach agreement.

All this makes any proposal to legislate for shared parenting time for litigating parents a highly charged and contested issue. It is also a very important issue as any legislative change, however subtle, may have far-reaching consequences for all children and their separating parents, since parents often reach agreements in the 'shadow of the law', as advised by solicitors. More broadly, separating parents' ideas about how to arrange their parental care could be affected if new legislation were to be framed in terms

The extent of shared parenting – Evidence from *Understanding Society*

Understanding Society is a nationally representative survey of 40,000 households in the UK. The first wave in the first year of the survey [2009] interviewed 22,265 adults in 2009 and 619 parents were identified as having a dependent child living apart from them [483 men and 136 women] – that is, to be ‘non-resident parents’. This group of parents will comprise a wide cross section ranging from those who agree arrangements for children amicably with former partners to those who were or continue to be very conflicted and litigated about contact and had decisions made for them by the courts. It is also likely to undercount non-resident fathers as they are known to be less likely to volunteer in a survey that they have children they rarely or never see (Peacey & Hunt, 2008). The parents were asked how often they had contact with their non-resident child/ren. Their responses could not be checked with their former partner as this survey did not interview both parents.

Frequency of contact with children by parents who live elsewhere, percentages (weighted), according to non-resident parents

How often contact child outside household	Sex of non resident parent		Total
	Male	Female	
Never	13.9	10.0	13.2
A few times a year	10.9	8.1	10.3
Once a month or less	4.2	6.2	4.6
Several times a month	12.8	14.2	13.1
About once a week	20.6	13.4	19.2
Several times a week	22.2	20.6	21.9
Almost everyday	12.0	25.4	14.6
Shared care 50/50	3.4	2.0	3.1
Total	100	100	100

Not surprisingly, the table shows very few ‘non-resident’ parents reporting 50/50 shared care but about a third of fathers, 33.2%, and nearly a half, 46%, of non-resident mothers reported significant periods of contact, that is almost every day or several times a week. It is striking that non-resident mothers were more likely to report higher levels of contact almost every day than non-resident fathers (25.4% compared with 12%).

The study also shows that just over half [51.3%] of non – resident parent who see their child/ren at least a few times a year also have their child stay over night on a regular basis

Frequency non-resident child(ren) stays with the respondent (for those who responded that they have contact with their child(ren) at least a few times a year), percentages (weighted)

Regularity with which child stays with non-resident parent according to non-resident parent	Sex of non-resident parent		Total
	Male	Female	
Regular basis	52.6	45.8	51.3
Irregular basis	18.3	16.5	17.9
Not at all	29.2	37.7	30.9
Total	100	100	100

Ermisch, J., Iacovou, M and Skew, A. J. (2001). Additional data provided by A. J. Skew.

These are the most recent figures about the incidence of shared care in the UK, because they are based on a representative sample, rather than a sample of self-selected people. However it is possible that the figure for 50/50 shared care may be a slight under-estimate as 50/50 parents may not see themselves as non-resident and so not answer this question.

of adult rights rather the current Children Act focus on the needs of children.

Most people agree that it is good for children to maintain continuing and regular contact with both parents when they cooperate and communicate and have low levels of conflict (Ahrns 2004; Hunt & Roberts 2004; Johnston et al 1989; Lamb 2005; Pryor & Rodgers 2001; Ricci 1997; Shaffer 2007). But valuing and facilitating the on-going role of both parents in their children’s lives in most cases is different from *legislating for shared time in litigated*

cases. So the focus in this paper is on what the key UK and international research tells us about the benefits and risks of *legislating for shared time for parents who appear before the family courts*. Australian data are presented in some detail because changes introduced there in 2006 go further than most other countries in compelling substantially shared care among litigating families, and have influenced the drafting of the current UK proposals; they have also been the subject of detailed research and evaluation which we will summarise here.

The growth of shared parenting

In many western countries shared time arrangements have been steadily increasing over the past decade without legal interventions, particularly amongst cooperative separated parents. This reflects broader social and cultural change, including women's greater workforce participation and increasing involvement of fathers in their children's daily lives. However, the pace of change within families is less rapid than we might like to think; it is still very much a minority of parents who share care equally, even in 'intact' families where parents live together. Despite the gradual increase in shared time arrangements post separation they remain unusual, both in countries

without legislative intervention like the UK and in countries that have legislated to encourage it (Tables 1 and 2).

So far most jurisdictions have not legislated for shared time (Table 2). Overall, the legislative trend has been towards encouraging both parents to be actively involved in their children's lives post separation and maximising contact within a framework that focuses on children's needs, rather than specifically toward legislating for a particular quantum of shared time. But governments in western countries are increasingly pressured to legislate for shared time. As Table 2 also shows, in the last 3-4 years many countries have seen proposals to legislate to encourage shared parenting among this group. Developments in England and Wales have followed this trend.

Table 1. Prevalence of shared parenting time: Recent international estimates¹

Country	Author(s)	Year	Sample	Definition (% of nights)	Estimate	~50/50
United Kingdom	Ermisch et al	2011	General population	~ 50/50	–	3.1%
Sweden	Lundstrom	2009	General population sample	~ 50/50	–	28%
Australia – new CSA cases	Smyth	2009	CSA cases – new	≥ 30%	17%	–
Australia – overall CSA cases	Smyth	2009	CSA cases – overall	≥ 30%	12%	–
Australia – AIFS survey	Kaspiew et al	2009	CSA cases – post 2006	≥ 35%	16%	7%
USA	Melli & Brown	2008	Divorce applications	≥ 30%	~ 20%	–
Wisconsin, USA	Melli & Brown	2008	Divorce applications	≥ 30%	32%	22% ²
Washington State, USA	George	2008	Divorce applications	≥ 35%	34%	16% ³
Arizona, USA	Venohr & Kaunelis	2008	Divorce applications	–	–	~15%
Canada	Swiss & Le Bourdais	2009	General population	–	–	9-15% ⁴

Notes

- 1 Studies are not directly comparable as they are based on different populations. Care is also needed because the unit of analysis varies across studies (eg children; parents; households), as does the source of reports;
- 2 This estimate was reported by Brown and Brito (2007); they estimate unequal shared care splits at 9%
- 3 Parenting plans filed in dissolution cases and *where there are no risk factors*; the extent to which these plans reflect reality is unknown;
- 4 Unit of analysis is children.

Table 2. Legislative considerations of shared parenting time

Country	Year enacted/ considered	Parameters
Australia	2003–2005	Presumption of ‘equal shared parental responsibility’ except where there is violence or abuse. If court orders equal shared parental responsibility, shared time must be considered (Family Law Act 1975 (Cth) ss 61DA, 65DAA)
US examples (see further: Parkinson, 2011)		<i>Note: Note joint or shared custody reflects shared parental responsibility and does not equal shared care unless time or physical custody is explicitly mentioned</i>
Wisconsin	1999	Court orders must maximize time with each parent, unless child would be endangered (WIS. STAT. § 767.41(4)(a)2)
Iowa	1997, 2004, 2005	Presumption of ‘joint custody’ and when this is ordered, court may order ‘joint physical care’ if a parent asks for it. If court declines it must give reasons (IOWA CODE § 598.41(2)(a) and (b) and 598.41(5)(a); to similar effect see Maine: 19A ME. REV. STAT. § 1653(2)(D)(1))
Louisiana	1993, 1995	Presumption of ‘joint custody’, and when this applies courts are directed that physical custody should be shared equally to the extent this is feasible and in the best interests of the child. BUT ‘domiciliary parent’ with major decision making powers is also assumed, so some contradiction in the legislation. (CIVIL CODE ANCILLARIES 9–335 A(2) & B)
California	1979	Presumption of joint custody? (Doubt as to whether this was in fact the case, intentionally at least: Parkinson, 2011)
	1988	Legislative amendment clarifying that no presumptions operate in favour or against particular parenting arrangements (CAL. FAM. CODE § 3040(b)).
	1994	‘Joint custody’ ordered only if parents agree.
Pennsylvania	2009	House Bill 463 proposes to introduce a presumption of joint legal and physical custody. The Bill was referred to the Committee on Judiciary in February 2009.
Canada		
Federal level (married parents)	Considered 1998–2002	Not recommended (Rhoades & Boyd 2004).
State level (cohabitees)	More recent debate, e.g. British Columbia (B.C.)	Current White Paper proposal to amend B.C. Family Relations Act may have shared time implications (although not governmentt intention) (Boyd 2010a, Boyd 2010b).
France	2002	Legislation enacted which was intended to promote shared time arrangements (‘alternating residence’) (Article 373–2–9 of the Civil Code; Parkinson 2011).
Belgium	2006	When parents disagree about residence, court must examine ‘as a matter of priority’ the possibility of ordering equal residency if one parent asks for it. (Titled ‘Law tending to favour equal residency for children of separated parents and regulating enforcement in child residency matters’; Parkinson 2011).
Sweden	1998; modified 2006	1998 changes allowing courts to order joint parental responsibility against wishes of one parent (in effect also opening the possibility of shared time when not agreed) were modified in 2006 by new provision that courts consider parents’ ability to cooperate before deciding whether the responsibility should be shared or sole (Swedish Parental Code; Ryrstedt 2003; Singer 2008).
New Zealand	Considered 2000	Private member’s Shared Parenting Bill was defeated at its first reading on 10 May 2000. The Care of Children Act 2004 provides that in determining parenting arrangements, the best interests of the child are the paramount consideration and has a greater emphasis on shared parental involvement post-separation than the previous Guardianship Act 1968, and this appears to have blunted the arguments for shared time amendment.

Note: Table 2 reflects shared time legislative developments, not judicial interpretive approaches.

When do children with separated parents do best?

Research shows that the best interests of children after parental separation are most strongly connected to the quality of parenting they receive, the quality of the relationship between their parents, and practical resources such as adequate housing and income – not to any particular pattern of care or amount of time (Irving & Benjamin 1995a; Lye 1999; Moyer 2004; Pryor & Rodgers 2001; Shaffer 2007; Smyth & Wolcott 2003).

Amato and Gilbreth's (1999) rigorous statistical review of 63 studies on parent–child contact and children's well-being found that the *quality* of contact is more important than the *frequency* of contact. Good outcomes for children were more likely when non-resident fathers had positive relationships with their children and had an 'active parenting' approach, including both warmth and setting boundaries.

Of course, time is needed to sustain close relationships, and for a range of reasons non-resident parents may not always be willing to spend time even when it is in children's best interests. It has also been suggested that children benefit when non-resident fathers are actively involved in their children's daily activities (Dunn, Cheng, O'Connor & Bridges 2004; Whiteside & Becker 2000; see also Lamb & Kelly 2001). But evidence shows that there is no single optimal amount of time that benefits children, as families are different, and much depends on the pre-existing patterns before any divorce or separation. What is clear is that there is **no empirical evidence showing a clear linear relationship between the amount of shared time and improving outcomes for children** (Smyth 2009; Shaffer 2007).

In some of the public debate, much has been made of the claim that '[a]n emerging consensus is that ... a minimum of one third time is necessary to achieve [the benefits of two involved parents] and that benefits continue to accrue as parenting time reaches equal (50–50) time' (Fabricius et al 2010: 227–28) but the evidence offered does not support this claim. Only one study (Braver with O'Connell 1998) is cited in support and this involved parents with shared legal parental responsibility rather than shared time arrangements providing no basis for conclusions about shared parenting time.

Bauserman's (2002) US review comparing joint and sole custody is frequently used as evidence that children in shared time arrangements are significantly better off than those in sole custody. However, his review does not distinguish between 'consensual' and court-imposed shared time, and most of the studies relied on were unpublished student theses. Bauserman's analysis was also unable to deal with 'self-selection' effects – meaning that, as a group, families who voluntarily opt for shared time tend to have characteristics that make positive outcomes for their children more likely, independent of their parenting arrangements (Bruch 2006; Emery et al 2005).

Workable shared parenting time: what helps?

Research shows shared time arrangements work well when they are child-focused, flexible and cooperative. They are almost always arrived at by private agreement without involvement of lawyers or the courts (Irving & Benjamin 1995a; Rhoades et al 2000; Shaffer 2007; Smyth 2004).

Parents with such mutually agreed arrangements may change their particular arrangements to accommodate their children's evolving needs and wishes. These families are not typical of the broader separating population. Their characteristics include: having further education, being socio-economically well-resourced, having some flexibility in working hours, living near each other and fathers who have been involved in children's daily care prior to separation and children of primary school age (Irving & Benjamin 1995a; Masardo 2009; McIntosh et al 2010; Singer 2008; Shaffer 2007; Smyth 2004).

Children's views of shared time arrangements vary but are broadly consistent with these research findings. They are more likely to feel positive when shared time arrangements are flexible and child-focused, when their parents get along and when they have input into decisions about the details of their living arrangements (Cashmore et al 2010; Haugen; 2010; McIntosh et al 2010; Neale et al 2003). Such arrangements are not typically achieved through litigation.

Children's experiences of moving between homes are influenced by a similar range of factors. According to a recent Australian study frequent moves between households bring added practical and emotional difficulties in terms of having to pack up and move from house to house. But the level of difficulty depended on a range of factors including distance between homes, frequency of moves, level of conflict between parents and the child's personality and preferences (Cashmore et al 2010; Haugen; 2010; Tucker, 2006).

However, shared time families are not a single, homogenous group. The research suggests that in jurisdictions without legislation it is mainly cooperative, flexible parents who opt for shared time (e.g., Smart & Neale 1999; Smyth 2004). But UK research shows that some parents with high ongoing conflict use it too.

Co-parenting, then, is not necessarily the product of shared commitment to its ethos but may represent an uneasy compromise or deadlock in a context where neither parent has managed to assert authority over the other. (Smart & Neale 1999: 60)

Making sense of the research

There are no large-scale UK studies specifically on shared parenting time – most of the research has been undertaken in the US and more recently in Australia. For good summaries of the early US studies, see: Irving and Benjamin (1995a); Moyer (2004); Pruett and Barker (2009); and Shaffer (2007). Table 3 sets out the five key reviews of post-separation parenting arrangements and children's wellbeing.*

While the research base is growing, 'the shared care literature remains difficult to navigate' (McIntosh 2009: 392). Caution needs to be exercised (see further Johnston 1995; Trinder 2010a; 2010b,) given (a) the complexity of children's post-divorce adjustment (Lee 2002), and (b) the variety of methodologies used, the lack of comparison groups, and the small, ad hoc and non-representative samples employed in most early studies (Gilmore 2006; Shaffer 2007; Smyth & Wolcott 2003). Also, much of the joint custody literature conducted in the US has conflated joint physical custody with joint *legal* custody (Ellman et al 2010; Shaffer 2007). Furthermore, research has been dominated by the views of mothers and fathers; few studies consider children's or third party (eg teachers') perspectives, much less actual outcomes for children.

At a more fundamental level, studies have failed to tease out differences between different groups of shared care families particularly between those with privately agreed shared time arrangements and those whose arrangements have resulted from litigation; or between shared parenting arrangements that involve equal time compared with unequal time arrangements. Research has generally identified factors pointing against workable, beneficial shared time (eg safety concerns) but has not clearly linked these back to the mechanism by which the arrangement was reached (eg parental discussion, lawyer negotiation, mediation, litigation).

Internationally, some large-scale cross-sectional studies have also been undertaken* but because parents with shared care are typically self-selected into a consensual arrangement and comprise a small select group, shared care is frequently found to be associated with good outcomes and high rates of satisfaction — as reported by parents (Cashmore et al 2010). Shared time arrangements arrived at in a climate of high on-going conflict and litigation do not produce the same results (see next two sections). Differential reporting by men and women adds another layer of complexity in the interpretation of results.

Equal (or near-equal) parenting time has been found to be one of the most fluid patterns of care, typically converting into more traditional arrangements, which is perhaps not surprising given the logistical and relational challenges of shared time. Cross-sectional studies, however, cannot examine the shifts in parenting arrangements over time or identify the characteristics that might lead some families to move into shared parenting time and other families to move out of this arrangement. They also cannot capture changes in children's wellbeing due to changes in patterns of care. Longitudinal studies currently underway in Australia* will go some way toward addressing these issues. For now, much remains unknown about the long-term impacts of shared parenting.

**An additional detailed table (Table 4), which summarises key international studies of shared parenting after separation with full references, can be found in the accompanying Family Policy Briefing 7b on the Oxford website www.spi.ox.ac.uk.*

Table 3. Reviews of post-separation parenting arrangements and child wellbeing

Author(s)	Focus	Type of review	Geographical coverage	Sample	Study coverage (year studies published)
Amato & Gilbreth (1999)	Non-resident fathers and children's wellbeing	Meta-analysis	Mostly US studies	63 studies comprising 100 independent samples	1979-1997
Bauserman (2002)	Child adjustment in joint vs sole custody	Meta-analysis	Largely (unpublished) US studies	33 studies	1980-2001
Whiteside & Becker (2000)	Parental factors and young children's post-divorce adjustment	Meta-analysis	Mostly US studies	12 studies comprising 17 unrelated samples	1970-1994
Irving & Benjamin (1995a)	Review of shared parenting research	Narrative	Mostly US studies	38 studies	1978-1993
Pruett & Barker (2009)	Review of joint custody research	Narrative	Mostly US studies	41 studies	1979-2005

When is shared time difficult for children?

Research shows that the factors which make shared parenting time hard for children (meaning that the stress and burden outweighs the benefits for them) are essentially the opposite of those that facilitate it, notably high on-going parental conflict, family violence and abuse, and rigidity. Early indications of these factors began to emerge from US research in the mid-1980s (eg Steinman 1983; Elkin 1997).

There is recent and increasing evidence that shared time arrangements present particular risks for children in three main contexts. These are

- when mothers express on-going 'safety concerns',
- where there is high on-going parental conflict and
- when children are very young – or some combination of these.

Safety concerns

Recent Australian research has found that where mothers report safety concerns, child well-being is lower regardless of the care arrangement, but that the position is worse for children in shared time arrangements than in more traditional contact arrangements (Kaspiew et al 2009). In the study's sample of 10,000 recently separated parents registered with the Child Support Agency, a significant minority of mothers and fathers with shared time arrangements (16–20%) expressed safety concerns for themselves and their children (Kaspiew et al 2009). Although self-defined by participants in the study, most parents who reported 'safety concerns' also described physical or emotional abuse by the children's other parent [though there is no independent corroboration of this]. A similar link between lower child well-being and mothers' safety concerns was found in another recent Australian study (Cashmore et al 2010).

High on-going conflict

There is strong evidence that high on-going post-separation parental conflict is damaging for children (Cummings & Davies 1994; Emery 1982; Fabricius & Luecken 2007; Grych & Fincham 1990; McIntosh 2003; Reynolds 2001; Shaffer 2007). There is also growing evidence that shared time arrangements involving ongoing high levels of parental conflict are more damaging than other parenting arrangements with entrenched high conflict.

A recent Australian study identified a link between shared time arrangements involving high conflict and poor outcomes for children (McIntosh et al, 2010). It focused on a high conflict sample and found that:

Children's experience of living in shared care over 3–4 years was associated with greater difficulties in attention, concentration and task completion by the fourth year of the study. Boys in *rigidly* sustained shared care were the most likely to have Hyperactivity/Inattention scores in the clinical/borderline range.

The study also found that children in shared time arrangements reported higher levels of parental conflict than other children and were more likely to report feeling caught in the middle of the conflict. Across this high conflict sample, children in shared time arrangements were the ones least happy with their parenting arrangements and most likely to want to change them. For example, 43% of children in continuous shared care arrangements said they wanted more time with their mother (compared with 7–21% of children in other arrangements: McIntosh et al 2010: 49).

We also know that children often feel responsible for their parents' happiness, believe they should share themselves and want to avoid parental conflict. As a result, children who are unhappy with their shared time arrangements may be very reluctant to raise the possibility of changing those arrangements (Cashmore et al 2010; Haugen 2010; Neale et al 2003; Singer 2008; Tucker 2006).

It has been suggested that to avoid harm to children in shared time arrangements, parental conflict needs to at least be 'contained' (see, for example, Emery et al 2005). At a minimum this requires 'passive cooperation', not 'demonising' the other parent in front of children or using children as 'messengers' or 'spies' (Smyth, Caruana & Ferro 2004).

When parental acrimony is high (ie parents lack respect for each other as people and as parents), conflict also tends to be high and on-going (McIntosh & Long 2006). Under these conditions, children are likely to be 'caught and used' in any conflict (Johnston et al 1989: 579) and shared time arrangements are particularly likely to be harmful to them. 'Parallel parenting' (where separated parents have minimal interaction with each other, including the avoidance of direct handovers) is sometimes suggested as a means of containing high parental conflict but clinicians generally agree that parallel parenting places additional strain on children (Ricci 1997: p 116; Seddon 2003; Tucker 2006; see also Birnbaum & Fidler 2005).

Very young children

There has been debate, particularly in the US, about whether shared parenting is developmentally risky for infants and young children (Solomon & George 1999; Kelly & Lamb 2000; Warshak 2000; McIntosh et al 2010). Recent Australian research, drawing on national random samples found

[R]egardless of socio-economic background, parenting or inter-parental cooperation, shared overnight care of children under four years of age had an independent and deleterious impact.... (McIntosh et al 2010: 9)

This finding challenges the view that cooperation and goodwill are enough to make shared time 'work' regardless of children's developmental stage. It is particularly worrying that even in cases with parental cooperation, very young children could be adversely affected by overnight agreements. These new data suggest that shared care has special risks for children under 4 years of age.

Shared finances and shared parenting?

Any discussion of shared parenting time raises important questions about money. Does legislating for shared parenting time encourage more strategic bargaining over parenting time, child support and property division? Does shared time encourage fathers to financially support their children (Fabricius et al 2010)? Or is it a means of minimising child support liability and gaining access to a larger property settlement (Fehlberg et al 2009; Haugen 2010; Singer 2008; Singer & Reynolds 1987–88)? To what extent do parents trade off time, money and property (for example, do some mothers not pursue child support or a property settlement in order to avoid fathers seeking shared time)? Where reductions in child support payments occur at different thresholds of parenting time, will parents focus on the financial implications of reaching these thresholds rather than on their children's welfare?

Researchers have just begun to explore these questions, which are not easy to answer empirically, mainly because motivations are often complex and hard to assess. However, recent Australian research suggests that negotiation and trade-offs between children, money and property occur across the board, including in cooperative circumstances, and that they may undermine or facilitate positive on-going relationships (Fehlberg et al 2010). In the UK, Bell et al.'s study of links between parenting time and money suggested that parents often sought to avoid conflict by making child support concessions (Bell et al 2006).

Another question is whether the tendency of shared time arrangements not to last and for children to 'drift' back to primary mother care over time (Kaspiew et al 2009;

Maccoby & Mnookin 1992; McIntosh et al 2010; Juby et al 2005; Smyth et al 2008) means that property settlements reached when shared time is in place will result in longer-term economic disadvantage for separated mothers and children and increased social security costs.

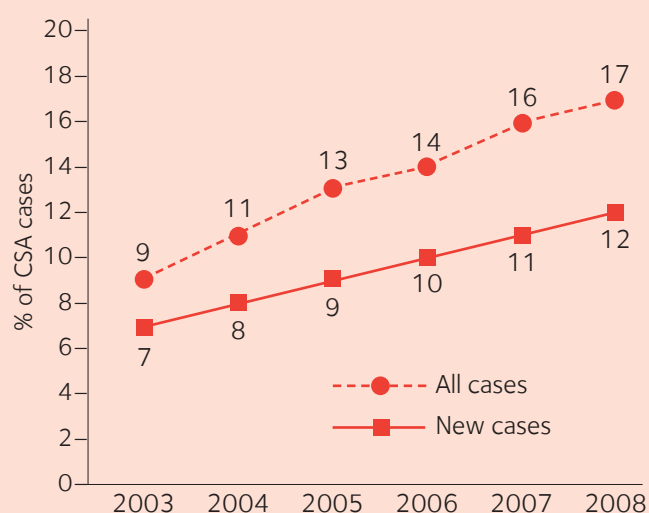
In Britain an important question is whether legislating for shared time might prove costly for government at a time of significant financial pressure (Masardo 2009). Would it lead to interplay between shared time and sharing of government income support payments for families (a concern which has also arisen in Australia (Carberry 1998) and Sweden (Singer 2008))? Might public housing costs increase due to the need to house children residing with both parents, despite it now being clear in the UK that the provision of public housing is matter for the local authority and residence orders should not be used as means of putting pressure on the authority to allocate housing in a particular way (*Holmes-Moorhouse v London Borough of Richmond upon Thames*, paras 17 and 39, [2009] UKHL 7 (4th February 2009))? And are there wider public policy implications in the context of a strong social inclusion agenda?

Currently there is little research on the financial implications of shared parenting. The research that has been done suggests that, consistent with research findings in the child support context (Melli 1999), shared time does not necessarily lead to fathers providing greater financial support for their children (Fehlberg et al 2010; Singer 2008). Qualitative evidence suggests that mothers in shared time arrangements often carry more of the responsibility than their former partners for management of children's daily lives, including paying school-related expenses, medical and dental costs (Cashmore et al 2010; Fehlberg et al 2009; Lacroix 2006).

Legislating to encourage shared parenting time: The Australian experience

As in the UK, the majority of separating parents in Australia do not go to court, and of those who do, only a small minority have judge-determined arrangements (around 10% of those who file for final orders in the Family Court of Australia). Moreover it is well-documented that family violence and safety concerns, mental health problems, and issues related to drug, alcohol and other addictions feature frequently in families using Australia's family law system (Kaspiew et al 2009). Families that reach courts often have other underlying problems which help explain why they can't reach agreement in the first place. This may not bode well for children, given the various "shared parenting" signposts now in the legislation.

Figure 1. Prevalence of shared parenting in Australia: 2003-2008



Source: Customised table from the Australian Child Support Agency (Smyth 2009)

Most parenting arrangements however are reached mainly through discussion between parents (Kaspiew et al 2009). In the broader separated parent population, shared time arrangements have continued to gradually increase post-2006 but remain unusual (around 12% – see Table 1). As Figure 1 shows there was no spike in shared time arrangements in the general population of separated parents after the 2006 shared parenting changes. Rather, the most significant increase in incidence has been in litigated cases, which although a small slice of the separating population are of significant concern because they are likely to be characterised by high on-going parental conflict – a contra-indicator of workable shared time (discussed later in this paper) – along with the range of associated problems just noted.

Background to the 2006 shared parenting changes

Australia introduced significant reforms which encouraged shared parenting for litigating parenting into its family law in 2006 (Family Law (Shared Parental Responsibility) Act 2006 (Cth)). The explicit reason for reform was concern about 'father absence' – around one quarter of the one million children under 18 with a parent living elsewhere in Australia sees that parent less than once a year or never (Australian Bureau of Statistics 1998, 2004, 2008). While the changes were the result of formal and detailed inquiry and consultation, politically, fathers' groups played a key role in prompting these review processes and in shaping the amendments (Parkinson 2010; Rhoades 2006).

Notably the shared time provisions went further than had been originally recommended on the basis of the substantial evidence (including research evidence) gathered by the parliamentary inquiry process. This was apparently due to the influence of fathers' groups in the very final stages of the parliamentary process (Rhoades 2006).

Evaluating the changes: the Australian research

A large research program was funded by the Australian Government to monitor the impact of the 2006 changes. As a result, evidence about shared parenting time was gathered in Australia after rather than before the 2006 changes. By far the largest study is the AIFS Evaluation (Kaspiew et al 2009), which was funded by the Australian Government as part of the 2006 family law reform package.

Key findings

Three key findings in relation to the post-2006 Australian research on shared time are of particular relevance to the current UK context.

- 1 There has been a marked increase in judicially imposed shared time.
- 2 Complex legislation has led to professional and community misunderstanding that the law says, 'The starting point is shared time'. While professional views vary, family lawyers are most likely to emphasise that this has encouraged: (a) increased focus on parents' (especially fathers') rights over children's best interests; and (b) increased reluctance of mothers to disclose violence and abuse.
- 3 The research about parents' and children's actual experiences of shared time arrangements suggests mixed outcomes.

Increase in judicially imposed shared time

Before the Australian 2006 changes it appeared that shared time was mainly used by a small minority of parents who parented cooperatively with the resources to make it workable, with a gradual increase in incidence over the past decade (Figure 1; Smyth 2004).

However, following the changes, a marked increase in shared time arrangements has occurred in judicially determined cases (Family Court of Australia 2009; Kaspiew

Australian Legislative Framework

In Australia, like the UK, the central principle underpinning the law on private law parenting disputes is that ***the child's best interests are the paramount consideration***. However there have been significant changes in how these interests are interpreted and operationalised.

The **Family Law Act 1975 (Cth)** established that the determination of the child's welfare (or best interests) was a matter of wide judicial discretion. Judges were required to consider a range of factors set out in the 'best interests checklist'.

In **1995 amendments to the Family Law Act** included the introduction of objects and principles which stated that, except where contrary to their best interests, children have the right to know and be cared for by, and spend time with, both their parents. The current Binley Bill includes similar provisions for England and Wales. The 1995 Australian reforms also vested 'parental responsibility' (authority, duties and powers) in each parent, similar to the current UK position.

The 1995 changes led to more emphasis in family law decision-making on the importance of father-child contact (Rhoades et al 2000). However, as in the UK, 'father absence' in a significant minority of separated families continued (Smyth 2004, 2009).

The background to the 2006 shared parenting changes was that in 2003 the House of Representatives Standing Committee of Family and Community Affairs inquiry to

consider 'joint custody' found against the introduction of a presumption of equal time parenting (Commonwealth of Australia 2003). The government then released an Exposure Draft of proposed legislation which moved away from the recommendations of the earlier inquiry and sent this to the House of Representatives Legal and Constitutional Affairs Committee for review. That Committee also rejected a 50/50 presumption but expressed 'sympathy with the submissions' of fathers' groups and recommended changes that brought the amendments closer to what fathers had wanted (Rhoades 2006).

These proposals for legislative change formed part of a major overhaul of the entire family law system, including wide-ranging procedural changes (most notably, the introduction of compulsory pre-filing mediation in most cases as well as new services and 'less adversarial' court processes) and a new child support scheme.

The **2006 shared parenting changes** operate as two interrelated steps. First, a presumption that equal shared parental *responsibility* is in the best interests of children was introduced. The presumption does not apply in cases involving family violence or child abuse, and can be rebutted by evidence that equal shared parental responsibility would not be in the child's best interests. Second, when a court decides to make an order for equal shared parental responsibility, it must also consider whether it would be in the best interests of the child and 'reasonably practicable' to order *equal time or substantial and significant time* with both parents.

et al 2009), rising from 4% to 34% of cases. This is of concern because of the high level of conflict typically associated with fully litigated cases, and research evidence that workable shared time is more likely when parents operate cooperatively and flexibly. Also, allegations of family violence and/or child abuse are being raised in a majority of judicially determined cases (Kaspiew 2005; Kaspiew et al 2009; Moloney et al 2007).

Given the characteristics of the litigating population the viability of court-imposed arrangements is also questionable. The evidence suggests that shared time arrangements reached by parents outside formal dispute resolution processes may be more durable than other shared parenting arrangements. A recent study found that when shared care arrangements were in place prior to mediation, they were twice as likely to last as shared care arrangements put in place for the first time in mediation (McIntosh et al 2010).

Consistent findings on a smaller scale were evident in a British in-court conciliation study (Trinder et al 2006). Durability is not an inherently 'good' or 'bad' thing, as change may be responsive to the child's changing needs or indicate continuing conflict and upheaval. But the evidence suggests that shared time negotiated by parents without recourse to litigation appears to be more workable and more long-lasting.

Some early work in Britain (Eekelaar et al 1977) and the US (Gardner 1991; Singer & Reynolds 1987-88; Maccoby & Mnookin 1992) suggested that shared time orders might be made by judges as a compromise solution between warring parents. Maccoby and Mnookin considered their 'most disturbing finding' to be the tendency for shared time

court orders to be 'used by high conflict families to resolve disputes' (p 159) There are some indications in recent qualitative research that shared-time-as-a-compromise in high conflict cases is occurring in Australia (Fehlberg et al 2009) and also in Sweden (Singer 2008) following legislative change encouraging shared time.

More broadly, Australian researchers have observed that post-2006, '[i]t is increasingly evident that shared care families are not a homogenous group' (McIntosh et al 2010: 98; see also Smyth 2009), meaning that that shared time arrangements now appear less uniformly consensual and cooperative. The AIFS Evaluation found that:

there is a significant minority of children in shared care-time arrangements who have a family history entailing violence and a parent concerned about the child's safety, and who are exposed to dysfunctional behaviours (Kaspiew et al 2009, Summary report: 11).

Approximately one quarter of the shared time arrangements described by parents separating post-2006 in the AIFS Evaluation were in this category (Kaspiew et al., 2009).

Legislative confusion and resulting risks

The research consistently identifies three risks flowing from the Australian experience of legislating to encourage shared parenting time.

Mixed messages

As in the current bill before Parliament the 2006 Australian changes grafted a shared parenting goal onto an existing

'best interests' framework. The legislative goals were not clearly stated and the drafting added significant layers of complexity. This has produced considerable confusion for decision-makers, family law professionals and families themselves (Chisholm 2009; Fehlberg et al 2009; Kaspiew 2009), including families who go nowhere near a court but negotiate in the shadow of the law (Mnookin & Kornhauser 1979).

The Australian experience suggests significant dangers in even subtle legislative encouragement toward shared time arrangements, such as references to 'equal' and 'time', which give litigating parents something new and concrete to fight about. A further problem is that although the legal starting point is equal shared parental *responsibility* or decision making, not *time*, drafting complexity has encouraged the distillation of a simple message: that is that the law now says there is a starting point of equal *time* (Chisholm 2009; Fehlberg et al 2009; Kaspiew 2009). Given that the greatest increase in shared time arrangements has occurred in fully litigated cases, there is some basis for this belief.

Parental rights vs children's welfare

The AIFS Evaluation found that the 2006 legislative changes have encouraged more fathers to seek shared time and more mothers to feel pressured into agreeing to it (Chisholm 2009, Fehlberg et al 2009; Kaspiew et al 2009). These findings were based on the perceptions of legal professionals and, family mediators. Legal professionals were particularly likely to mention the difficulty involved in shifting client (especially father) expectations and achieving child-focused outcomes following legislative change. According to AIFS, a 'common view' among legal professions 'was that negotiation and litigation had become more focused on parents' "rights" rather than children's best interests and needs' (Kaspiew et al 2009: 216). Qualitative research, based on interviews with fathers and mothers, supports these views (Fehlberg et al 2009).

Disclosure of violence and abuse

Research has consistently indicated that mothers have felt discouraged from disclosing family violence and child abuse concerns partly because of their belief that there is a legal starting point of shared time, so there is no point disclosing violence – particularly given problems of proof and the risk of being viewed as an 'unfriendly parent' (Bagshaw et al 2010; Chisholm 2009; Fehlberg et al 2009; Kaspiew et al 2009).

Relevant here is the dual emphasis in the 2006 changes on the benefit to the child of having a 'meaningful involvement' with both parents and recognising family violence. These two key legislative objectives often compete for priority in litigated cases.

The Australian Government has now recognised that the right balance has not yet been achieved in this legislation. There is currently a bill before the Parliament to amend the Family Law Act 1975 to prioritise the safety of children over meaningful relationships, encourage people to disclose evidence of family violence and child abuse and help members of the public and family law professionals to understand, disclose and act on family violence and child abuse (Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011)

Divergent views and experiences: Fathers, mothers and children

Australian research shows that most parents express satisfaction with shared time arrangements (Cashmore et al 2010; Dickenson et al 1999; Kaspiew et al 2009). However, this overall finding conceals significant differences within the group. Thus parents are more likely to be satisfied than children (Cashmore et al 2010; McIntosh et al 2010) and fathers are more likely to be satisfied than mothers (Cashmore et al 2010; Fehlberg et al 2009; Kaspiew et al 2009; McIntosh et al 2010).

Mothers' satisfaction also varies according to the circumstances, e.g. declining where there is high conflict, safety concerns or shared care has been court-imposed (Cashmore et al 2010; Fehlberg et al 2009; Kaspiew et al 2009) while fathers express satisfaction with shared time even where there is continuing high conflict (McIntosh et al 2010). Children's dissatisfaction with inflexible shared time arrangements that involve high ongoing parental conflict appears more consistent with mothers' views (McIntosh et al 2010).

Most research, however, hinges on adult's reports of children's well-being. A careful reading of recent Australian research findings on children's well-being suggests that positive conclusions about shared time arrangements are being drawn out of data that more clearly suggest mixed outcomes (Kaspiew et al 2009; Cashmore et al 2010). The AIFS Evaluation concluded that children in shared time arrangements were doing 'no worse' or 'marginally better' than children in other arrangements (p 273) but the evidence for this conclusion was based solely on fathers' reports, and did not take account of mothers' views, children's views or other objective measures (such as teachers' reports).

In contrast mothers' reports indicated no difference between shared time and primary mother residence. Moreover teachers' reports suggest that children seemed to be doing best in primary mother residence (Kaspiew et al 2009). Research also shows that apparent advantages for children's well-being when in shared time have more to do with other factors associated with consensual shared time, such as socio-economic resources and parental characteristics (Cashmore et al 2010).

Key Points:

Other things matter more than counting time.

Research consistently finds that the best interests of children are closely connected to parental capacities and skills and to practical resources, such as adequate housing and income. The quality of relationships between parents and between parents and their children, as well as the level of resources, are more important determinants of children's well-being than equal or near equal parenting time.

Positive outcomes for children in shared time are more to do with the characteristics of families who choose this arrangement than any legal requirement.

There is no research evidence establishing a clear link between shared time and better outcomes for children. Indeed, there is no clear evidence that any particular post separation parenting arrangement is most beneficial to children. Rather, there is consistent evidence that positive outcomes for children in shared time arrangements have more to do with the fact that families who choose shared time tend to be well-resourced and parent cooperatively, flexibly, and without reference to lawyers or courts.

Shared time is workable for some families but risky for others.

Any parenting arrangement can be good or bad for children, depending on the circumstances. There is mounting evidence, however, that shared time is more risky for children than other parenting arrangements where there

are safety concerns, where there is deeply entrenched inter-parental conflict and/or when children are very young. These circumstances are likely to be evident in cases where legislation needs to be used to make a decision. Ironically, legislation promoting shared time seems likely to be most directly applied in contexts where shared time is least likely to be beneficial for children.

Responding positively to social change: Is legislation necessary?

Society and families are ever changing and there has been a move toward more child-focused ways of fostering children's best interests post-separation. While shared parenting time is one of many possibilities, there is no research evidence for *legislating to prioritise* shared time for litigating parents over other parenting arrangements.

The more crucial project is to identify ways to assist separated parents to think carefully about arrangements that will best serve their children's changing needs, and to put those above their own views (Chambers 1984: 480).

Questions needing further information before considering legislation

- 1 Does legislating for shared time assume that one size fits all across all families?
- 2 Should legislation focus on establishing a single default agreement or should it do more to encourage parents to focus on the needs of their children?
- 3 Given how little is known, should we not focus on finding out more about shared care in Britain, including children's experiences of shared care?
- 4 Are the conditions that characterise 'workable' shared time achievable by most separating parents in the UK? If not, does legislating for shared time send a message to parents that if they don't take this approach they are not 'good' parents?
- 5 What are the resource and process implications for the family law system (including child support), and broader network of government services, of legislating for shared parenting time? Will legislating for shared time result in increased claims and thus increased pressures (including costs) to the family law 'system' at a time when reductions
- in the scope of legal aid are expected to make heavy demands on courts dealing with litigants in person?
- 6 Are litigating parents in the UK more likely to enter shared time arrangements as a result of legislative change? If so, what sort of on-going support and resources would be available to make their shared time arrangements 'workable'?
- 7 What checks, balances, and resources would need to be put in place to ensure that legislating for shared time did not result in increased exposure or risk of victims (including children) to family violence and abuse?
- 8 What sorts of information, advice and support about post-separation patterns of care would better assist separated families to reach the best arrangements they can for their children?

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Summary

Parents in England and Wales who separate retain parental responsibility and are expected to make private arrangements for the care of their children. This is often difficult, but though parents often seek legal advice, it does not usually require court intervention for arrangements to be agreed.

A small minority (about 10%) who cannot agree child parenting arrangements may be encouraged to see a mediator or counsellor. If they need further help from a lawyer they will be encouraged to negotiate, but if all else fails and they go to court, the judge will encourage them to reach agreement. As a last resort, the judge may be required to adjudicate.

Under the Children Act (England and Wales) 1989 the judge /court will only make an order if it is better for the child than no order, and in doing so will be guided by the welfare of the child rather than any set of presumptions relating to the rights of adults. In some of these cases there are domestic abuse or parenting capacity issues which may require social services to intervene.

There is widespread support for the view that usually children benefit from a meaningful and ongoing relationship with both parents after separation, though that is not invariably so.

Some fathers do not pursue contact with their children, and may lose contact altogether very quickly (about one third).

Others have sporadic contact. Others agree to follow the pattern of contact midweek and staying over on alternate weekends with a longer period during school holidays, or have other patterns of care in which they spend significant amounts of time with their children but the mother is still the 'resident parent' spending more time with the children.

A small group of separated parents in the UK (about 3%) say they share the care of their children equally.

There is now pressure from fathers' groups for legislation to promote substantially shared parenting as a presumption, even when both parents do not agree, along the lines of the changes made in 2006 in Australia.

This paper reviews the evidence on legislating for shared time parenting, especially the Australian experience of this. It reports serious difficulties with legislating for shared care especially in litigated cases, but also in privately agreed cases. The changes have resulted in increased use of family law services as fathers have misunderstood the legislation to mean that they have a right to equal time, and to an increase in court imposed shared parenting orders. This has led to an increased focus on father's rights over children's best interests, and has increased the reluctance of mothers to disclose violence and abuse. As a result additional legislation has now been presented by the government to the Australian parliament to deal with the safety issues.

This evidence indicates the need for caution before following the Australian approach of legislating to encourage litigating parents to share parenting after separation.



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Family Policy Briefing 7 continues the tradition of independent, research-based commentary on family policy issues initiated under the Family Policy Studies Centre which closed in 2001. FPSC published 17 Family Briefing Papers between 1996 and 2000 which are available on www.fpsc.org.uk Family Policy Briefings are now based in the Oxford Centre for Family Law and Policy (OXFLAP) in the Department of Social Policy and Intervention. Family Policy Briefings are available for £5 from the Department or may be downloaded from the Department's website.