Parenting after separation and the gender war
There can be few areas of law or public policy where there is as much conflict and turbulence as in the law concerning parenting arrangements after separation. Lobby groups abound—some representing single mothers, others representing non-resident fathers. These debates about family law are often presented in terms of a gender war (Bala, 1999; Kay 2002; Mason, 1999; Whitehead & Bala 2012) in which women’s interests are pitted against the claims of “father’s rights” groups (Collier, 2009; Kaye & Tolmie, 1998). Both sides claim to have children’s interests in mind.

The conflict between the different lobby groups has resulted in a kind of trench warfare in which huge battles are fought over the text of the legislation on parenting after separation. Like the battles of the First World War, every hundred metres of gain by men’s groups in altering the language of legislation—however symbolic or trivial—is seen as a loss by women’s groups. Conversely, gains by women’s groups are mourned as a loss to fathers. As a result of these conflicts, Western countries, at least, seem to be caught in an endless pattern of reform or pressure for reform in family law, with periods of fierce debate followed by periods when there is a temporary cessation of hostilities. The law is often being reformed, but less often improved.

Australia has not been immune from this turbulence. While advocates on one side of the debate or the other may be able to view this turbulence only through the prism of the gender war, there is another way of seeing it. The law on parenting after separation has shifted fundamentally and irreversibly to an acceptance that although the relationship between the parents may be at an end, their lives continue to be bound together by their continuing obligations as parents, and parliaments now seek to reconcile divergent interests and concerns within that context (Parkinson, 2011). Accepting that there will not be a reversion back to a norm of sole custody (with the custodian being almost invariably the mother) can open up possibilities for a new consensus about the law on parenting after separation, one in which there is a proper recognition that in certain
situations, including, but not limited to, cases involving serious safety concerns, a sole parental responsibility order will be appropriate. It is possible to move beyond the gender war, and to craft better legislation as a result.

The abolition of custody
The reason for this transformation in the law is that the model on which divorce reform was predicated in the late 1960s and early 1970s has irretrievably broken down. This model was based on the premise that dead marriages should be given a decent burial and that it should be possible for the parties to get on with their lives and start afresh once decisions had been made about financial matters and custody. In the divorce law at that time, issues about property and custody were dealt with by a once-and-for-all process of allocation (Parkinson, 2011). If the parties could not reach their own agreement, then the court allocated the property. The court also allocated the children (Schepard, 2004, pp. 3–4). Typically, the courts would award “custody” to one parent, usually the mother, and grant “access” or “visitation” to the other.

There was little difference in this respect between common law countries and the civil law countries of Western Europe. “Custody” included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child’s education and religion. Both parents were legal guardians at common law, but this meant little, because the powers that were classified as powers of “guardianship” included only such matters as consent to marriage of a minor and inheritance rights in the event of his or her untimely death. Since maternal custody was the predominant pattern, fathers were frequently relegated to a peripheral role in their children’s lives.

The history of family law reform across the Western world in the last thirty years has been one of moving away from that model of parenting after separation. This has been for a variety of reasons, but not least what is known now about children’s wishes and needs in the absence of violence and high conflict (Parkinson, 2011).

In England and Wales, for example, a radical reconceptualisation of post-separation parenting occurred with the Children Act 1989. The philosophy of that legislation is that parental responsibility continues after separation as it existed before the relationship breakdown, subject to any orders to the contrary by the court (Smart, 1997). In France, the law is based upon a principle of coparentalité (Fulchiron, 2002; Vauvillé, 2002). By legislation passed in 1993 (Loi 93–22), the Civil Code was amended to replace the language of custody with “parental authority”. A similar approach was adopted in Germany in 1998, which amended its Civil Code to provide that parents have joint parental responsibility during marriage and unmarried parents may agree to joint parental responsibility by formal declaration. There is a similar position in the Scandinavian countries, with joint parental responsibility continuing unless there is litigation (Parkinson, 2011).

In North America, many jurisdictions still use the language of custody, though joint legal custody is the norm. However, some US jurisdictions have adopted an entirely different language to describe parenting after separation. Washington State led the way as early as 1987 (Ellis, 1990). The law in that state requires each of the parents on divorce to propose a parenting plan, and if agreement cannot be reached, a plan can be determined by the court (Wash. Rev. Code § 26.09.181). The plan needs to include a “residential schedule”, which designates in which parent’s home each minor child shall reside on given days of the year, including provision for holidays, birthdays and other special occasions (Wash. Rev. Code § 26.09.184(6)). Thus, the law avoids the assumptions
inherent in the language of custody that one parent has the primary responsibility, while
the other is assigned a marginal, visiting role.

Tensions about law reform in Australia
Australia, in 1995, followed the emerging trends in Europe and elsewhere. It was
particularly influenced by changes to the law in England and Wales. While there were
differences between the Children Act 1989 and the 1995 reforms (Dewar, 1996), broadly
the concepts, language and architecture of the two laws were similar.

To a significant extent, the Family Law Reform Act 1995 offered semantic rather than
substantive change. The language of custody and access was replaced by “residence” and
“contact”, following the Children Act formulation. As in the Children Act, the philosophy
of the Family Law Reform Act 1995 was that while separation and divorce terminated
the relationship between formerly intimate partners, it did not affect their relationship
as parents except to the extent that the practicalities of living apart required it, or that
court orders diminished the responsibility of one of them. The language of the 1995 Act
was carefully chosen to educate the parents in a different way of thinking (Chisholm,
1996). They had responsibilities; children had rights. Children were not to be seen as the
possessions of their parents.

The 1995 reforms were very modest and relied to some extent on exhortation to
bring about a change of hearts and minds (Chisholm, 1996). For example, parents were
encouraged to agree rather than litigate. Even still, the reforms were mired in controversy,
and critics made dark predictions of adverse consequences (Armstrong, 2001; Graycar,
2000). The legislation would create a pro-contact culture, it was said, and would place
women and children at greater risk of violence (e.g., Behrens, 1996).

In fact there had long been a pro-contact culture in family law. Samuels JA, of the NSW
Court of Appeal, wrote in Cooper v Cooper (1977) FLC 90–234, 76,250 that it was only
in exceptional circumstances, and upon solid grounds, that a father should be denied
contact with his child. Denying access, he noted, "may well have grave consequences
for the child's future development". In a concurring judgment, the President of the NSW
Court of Appeal (Moffitt P) quoted with approval a statement of an English judge in 1993
to the effect that access is a right of the child, “and that no court should deprive a child
of access to either parent unless it is wholly satisfied that it is in the interests of that child
that access should cease, and that is a conclusion at which a court should be extremely
slow to arrive” (Wrangham J in M. v M. (1973) 2 All ER 81, 85).

Thus the case law anticipated the pro-contact and children's rights focus of the 1995
legislation by 20 years. There was nothing at all revolutionary in the principles enacted
in s 60B of the Family Law Act that children “have the right to know and be cared for
by both their parents” and that they “have a right to spend time on a regular basis with,
and communicate on a regular basis with, both their parents and other people significant
to their care, welfare and development.” That restated longstanding judicial orthodoxy.

Shared parenting and family violence
One of the main arguments that has been recycled in various countries is that the more
that legislation supports and encourages the involvement of non-resident parents, the
more it exposes women to the risk of violence and abuse (Jaffe & Crooks, 2004).

However, the issue of protecting women and children from violence has not proved
effective as an argument against laws that recognise the indissolubility of parenthood, nor
against having any provisions in legislation that encourage the continuing involvement
of non-resident parents. One reason is the lack of an evidence base for the supposed connection between laws that encourage the involvement of non-resident parents in their children’s lives, and an increased risk of violence. There is simply no evidence for a linear relationship between the time that non-resident parents spend with their children, and a greater incidence of post-separation violence towards the primary caregiver. Another reason is that politicians have responded to concerns about violence and abuse—logically enough—by strengthening the provisions in the legislation addressing those issues.

That happened with the 1995 legislation in Australia, which had a great deal to say about violence. This contrasted with the complete absence of reference to family violence as a significant issue for parenting decisions in the pre-1995 law. The court was instructed to take account of any history of family violence in determining what parenting arrangements would be in the best interests of the child. It was also required to endeavour to ensure that parenting orders do not expose a parent or other family member to an unacceptable risk of family violence, subject to the paramountcy of children’s best interests. Other provisions sought to deal with conflicts or potential conflicts between the terms of restraining orders and orders concerning contact between the non-resident parent and the children.

The 1995 legislation was thus a genuine attempt by the parliament to respond to the competing concerns of the different lobby groups. Those who had prophesied serious adverse consequences for women sought to demonstrate the negative effects from the law based mainly on their interpretation of qualitative data (Rhoades, Graycar & Harrison, 2000); but the evidence for any relationship between the 1995 reforms and adverse consequences for women was less than compelling. The most that could be said with confidence was that there was evidence of a greater reluctance to deny contact on an interim basis. For these reasons, perhaps, the research largely failed to gain traction with the government.

The 2006 reforms
Instead, the message that resonated most strongly politically was that the 1995 legislation had failed to make much difference to the prevailing norms concerning parenting after separation, and that further reform was needed. Consequently, the next reform to family law (which took place in 2006) further strengthened the emphasis in the law on the importance of both parents being in children’s lives.

This was the consequence of a major report from the Standing Committee on Family and Community Affairs of the House of Representatives in 2003. It had been asked by the then Prime Minister to examine 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 committee, consisting of both government and opposition members, delivered a unanimous report (Standing Committee on Family and Community Affairs, 2003). Committee members favoured significant reform of the law in order to get away from what they saw as the standard pattern of contact for non-resident parents of every other weekend and half the school holidays. This they dubbed the 80–20 rule, on the basis that it gave non-resident parents approximately 20% of the time with their children. In the end, the committee concluded against a legislative presumption of equal time; however, it considered that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time” (p. 30).
The committee (2003) also heard very clearly the concerns of women’s groups about the issue of family violence. It wrote:

The committee agrees that violence and abuse issues are of serious concern and is mindful of the need to ensure that any recommendations for change to family law or the family law process provide adequate protection to children and partners from abuse. (p. 26)

This was the basis for several recommendations. The committee (2003) proposed that in the statement of principles for the legislation, there should be a specific reference to a child’s right to preservation of their safety (p. 28). The committee also recommended a winding back of the notion that parental responsibility should continue unaffected by separation unless the court decided otherwise. The committee recommended that there should be a presumption against shared parental responsibility in cases of entrenched conflict, family violence, substance abuse or child abuse (p. 41). The parliament implemented the spirit of that recommendation by stating that the presumption in favour of equal shared parental responsibility is not applicable in cases where there is reason to believe there is a history of violence or child abuse (s 61DA). Consequently, the 2006 amendments require the judge, in litigated cases, to turn his or her mind to the question of whether both parents should retain parental responsibility.

**Shared care and the changes made by the 2006 amendments**

The legislation amending the Family Law Act 1975 was the Family Law Amendment (Shared Parental Responsibility) Act 2006. The legislation is not prescriptive, but it does encourage consideration of a greater level of time-sharing between parents in appropriate cases than the traditional norm of contact every other weekend and during school holidays.

One of the objectives of the Family Law Act now, is to ensure that “children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child” (s 60B). This is importantly balanced by another object of the legislation, the need to protect children from physical or psychological harm due to being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on contact by one parent. These objects are translated into primary considerations in determining what is in the best interests of the child (s 60CC(2)). These two primary considerations have been called the “twin pillars” of the law (Mazorski v Albright (2007) 37 FamLR 518). Further amendments in 2011 have clarified the prioritisation to be made between these two considerations.

One practical expression of the requirement to consider the benefit to the child of a meaningful relationship with both parents is that when deciding cases in which it is appropriate to make an order for equal shared parental responsibility, judges must consider making an order for equal time if this is in the best interests of the child and reasonably practicable (s 65DAA). If that is not appropriate, it must go on to consider the option of “substantial and significant” time; that is, time that is not only at weekends and in school holidays but also during the school week, giving the parent an opportunity to be involved in the child’s daily routine and occasions and events that are of particular significance to the child or the parent.
The duty on judges to at least consider whether some kind of shared care arrangement might be appropriate, together with misunderstandings of the new law in the media, may well have contributed to an impression among some members of the Australian public that there is a default presumption of equal time, or at least that fathers have a very high prospect of success in the courts if that is what they seek. That is not an impression that is justified by the legislation, but it undoubtedly led to some public confusion (Family Law Council, 2009; Kaspiew et al., 2009, pp. 304–305), and to some shared care arrangements that are not at all satisfactory for children (Fehlberg, Millward, & Campo, 2009).

The 2011 amendments to the Act modify the emphasis on the involvement of both parents only a little. The requirement to consider equal time and substantial and significant time remains, but in the evaluation of what arrangements are in the best interests of the child, greater weight is to be given to the need to protect children from harm than to the benefit to the child of a meaningful relationship with both parents. There is also a new, and expansive, definition of family violence (Parkinson, 2012).

The Australian reforms in international perspective
While, like the 1995 reforms, the 2006 changes aroused huge opposition—based again on the argument that encouraging non-resident parents to spend more time with their children would expose women to a greater risk of violence—the legislative changes reflected an emerging international trend. In most jurisdictions, to be sure, legislatures have resisted the temptation to be too prescriptive. Courts have retained the flexibility to try to discern what will be in the best interests of the child in each case. As Fehlberg, Smyth, Maclean, and Roberts (2011) noted:

Overall, the legislative trend has been more clearly and consistently towards encouraging both parents to be actively involved in their children’s lives post-separation, including maximising contact, rather than specifically towards legislating for shared time. (pp. 319–320)

However, Australia is far from alone in requiring courts at least to consider shared care arrangements. A number of other jurisdictions now have legislation that gives some encouragement to consider shared care arrangements where there are no issues of violence or abuse.

France offers one example. Following amendments in 2002, Article 373–2–9 of the Civil Code provides that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option (Fulchiron, 2002).

In Belgium, the law of 18 July 2006 provides that when parents are in dispute about residency, the court is required to examine “as a matter of priority”, the possibility of ordering equal residency if one of the parents requests it to do so. If the court considers that equal residency is not the most appropriate arrangement, it may decide to order unequal residency. An equal time arrangement is not presumed to be in the best interests of the child; nonetheless it is the first option that ought to be considered when parents cannot agree on the arrangements.

There are not dissimilar provisions in certain American jurisdictions. An example is Florida, where the law states the public policy of the state as being “to encourage parents to share the rights and responsibilities, and joys, of childrearing”, despite parental
separation (Fla. Stat. Title VI, 61.13(2)(c)(1)). The court must approve a parenting plan that includes provisions about “how the parents will share and be responsible for the daily tasks associated with the upbringing of the child” and “the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent” (Fla. Stat. Title VI, 61.13(2)(b)). In cases of violence or abuse, the court may make an order for sole parental responsibility. Arizona amended its laws in 2012 to provide that—subject to the best interests of the child, and in the absence of risk factors such as a history of violence, child abuse or substance abuse—“the Court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time” (Arizona Rev. Stat. 25–403.02B).

Finding the middle ground

There is no future in arguments that say encouraging the involvement of both parents in children’s lives through legislation will expose women and children to a greater risk of violence. Successive Australian parliaments have responded to this argument not by winding back the emphasis in the law on the involvement of both parents but by enacting stronger and stronger legislative provisions that address, or purport to address, the issue of family violence. The 2011 amendments to the Family Law Act were no different from the 1995 and 2006 reforms in this respect. The government retained almost all the essential elements of the 2006 reforms while making changes largely at the margins (Parkinson, 2012). The recognition in legislation of the indissolubility of parenthood appears to have strong recognition on both sides of the political spectrum in Australia.

The issue of violence against women is one of great importance, but the middle ground is to be found in articulating more clearly the circumstances when parenthood ought to be dissoluble, rather than resisting the historic transformation in the law of parenting after separation. In that way, the law can avoid too simplistic a bifurcation where the only issue that might stand in the way of court orders for substantially shared care is if there is a proven history of family violence. As Chisholm has argued, good parenting can be compromised by other things in addition to violence and abuse (Chisholm, 2009, p. 128).

While marriage and other intimate relationships may be dissoluble, parenthood is not. Where the balance is to be found between competing considerations in determining the best interests of children remains a matter of legitimate argument; but there can be no return to the old norm of sole custody.

References


