WHERE WILL THE CHILDREN LIVE?
Arrangements for separated families in Australia

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Over the past two decades the focus on children in the separation and divorce process in Australia has increased. Additional attention to children's needs culminated in the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth), which introduced large scale reforms to the *Family Law Act* 1975 (Cth) in the provisions relating to children's issues. The Amendment Act promotes cooperative parenting and resolution of post separation living arrangements by settlement and without litigation. It strongly advances private ordering and avoidance of litigious solutions. The Amendment Act purports to 'represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.'[1] This article seeks to summarise the results of a recent pilot study into post separation living arrangements from the perspective of those subjected to the arrangements — the children. The study investigated how living arrangements, both court ordered and informal, impacted on the lives of the children, and how they had affected the children's relationships with their parents, siblings and friends. This study suggests that there is considerable movement in children's living arrangements during the course of their childhood and that the formality of court orders had very little effect on post-separation living arrangements for children.

Methodology

This was a small pilot study. The aim was to obtain qualitative data from those who had had firsthand experience in dealing with their parents' separation and the subsequent arrangements that were necessary to put in place in order for them to get on with their lives in the aftermath of family breakdown. The researchers[2] were interested in the views of the 'service users' of post separation agreements, both formal and informal. As the study only involved a small number of participants, it is impossible to make wide ranging conclusions. However, certain themes were apparent in the research data and are reported here.

Participants

This study involved 19 people who were recruited from the students and younger members of staff from various Monash University campuses in Melbourne. Volunteers from separated families were recruited by advertisement across all four University campuses. Most were students between 18 and 25 years old. Young participants were chosen because we expected that their memories of living arrangements while children would still be relatively fresh. The only limitation which was placed on participation was that the interviewee be over 18 years of age. No cull of participants took place. We also interviewed a small number of staff members who were between 28 and 35 years of age who, despite the advertised age limitations, put themselves forwards to participate and claimed fresh memories of their childhood living arrangements. These participants are included in the sample as they were asked the same questions and were treated exactly the same as the younger participants. It should be noted that their results did not differ in any significant way from the younger participants. Thus, their results are included in the general findings.

Obviously, this study is based on a very limited sample that, coming from an exclusively University population, does not represent a general demographic of Australian society. Further, we only interviewed one member of each family — no interviews took place of the participants' siblings (if any) or parents, which meant we were only hearing one person's view in a family. It is quite possible that parents did not disclose information about court orders to children or that the participants' siblings had quite different recollections and impressions of the family's post-separation arrangements. We also acknowledge the limitations imposed by the frailty of human memory. Memories can be skewed by various factors or simply be wrong. This may also have influenced our results.

Research interview

Semi-structured interviews were conducted with each participant about the workability and their level of satisfaction regarding their family's post-separation living arrangements.

Participants were asked the following questions:

- How old were you when your parents separated?
- Do you remember any discussion taking place about where or which parent you (and your siblings) were to live after the separation? Were you involved in these discussions?

  Were you subject to court-ordered living arrangements? If so, were you involved in any way in the court hearing by giving written or oral evidence, or being interviewed by a counsellor or lawyer?

  If you did give evidence in any way, do you think your views were taken into account in the court order?

REFERENCES

1. Shared Responsibility Act Explanatory Memorandum, House of Representatives, Parliament of the Commonwealth of Australia, 2005.

2. The researchers were the author and Sophie Mariole, then Associate to Justice Dessau of the Family Court of Australia.

- If you were subject to court ordered arrangements, what were they? Were you (and/or your siblings) happy with them?
- If you were subject to court ordered arrangements, were they obeyed by both your parents? By you (or your siblings)?
- If court ordered arrangements were breached by one of your parents, did the other parent try to enforce them? Were you involved in any way in such proceedings?
- If you were subject to court ordered arrangements, do you think they were 'successful' from your perspective? Do you believe your parents/siblings would have thought them successful?

The interviews were semi structured, in that these questions often then led to further discussion between the researcher and participant. Each interview took place face-to-face with a member of the research team and generally took 45 to 60 minutes. Males represented 31.5 per cent of the sample (6/19) and females 68.5 per cent (13/19). The interviews were all conducted in the second half of 2007 and the first half of 2008.

Results

The results were organised around two main questions:

- Are informal living arrangements more 'workable' than court orders from the perceptive of the children affected by them?
- Are court ordered living arrangements more respected and upheld by separated families and, if so, what are the consequences for the arrangement's 'workability'?

It was discovered that 37 per cent (7/19) were subjected to court ordered living arrangements. There were several consistent themes in participants' comments about the workability of their living arrangements, whether they were court ordered or informal. These consistent themes related to the level of their involvement in the discussions as children; the fluidity and flexibility of their arrangements; the desire to spend more time with the non-resident parent (usually the father)[3] and a strong need to be as even-handed as possible with both parents.

The names of the participants have been changed for this article.

Involvement in the discussions

Fifty three per cent (10/19) of the participants stated that they were actively involved in any discussion relating to living arrangements. These are also similar figures to those discovered by Cashmore and Parkinson.[4] The majority of this sample was very young when separation occurred and there appeared to be a tendency to purposefully exclude younger children from these discussions. Again, this is consistent with other research findings.[5] There was no discernable difference in decision-making participation between the group that had court-ordered arrangements and those who were subject to informal living arrangements. Children's involvement with their own living arrangements also changed over time — the older the children became, the more they participated in the decision making and the more influence they had on the outcome:

> ... when we were younger, like I was only eight or nine, I really just did what I was told. As we grew older, it was convenient for us to do different nights and see dad when it was mutually convenient for us both. I don't think that the arrangement was imposed on us. — Nathan

Tina responded to the question 'Were you involved in the decision making process?' by saying:

> Absolutely. It was very much put to my brother and I, and essentially my brother chose not to go and I changed my arrangement over time. So it was very much in our court, not so much for my sister because she was five, so it was just kind of set up for her.

Our participants' comments were consistent with the conclusions of other studies as to what age professionals deem children's views to be important and thus to be factored into decision-making.[6]

The age at which children are involved in discussions is also very important. In this study, 68.5 per cent (13/19) of the separations occurred when the children were younger than 10 years old (of this group, three were under five years old at separation). Some participants felt that they were given too much responsibility at a young age and would have been have happy to have been given more direction and less say:

> For me it was difficult because I don't think a child of eight years should be given the choice to decide, I didn't know what the best decision was to make. At the time, sure, it was great, but as an adult I look back and think that it would have been much more beneficial if my parents had been more not forceful, but stricter and given me more structure, I think it would have worked out with more of a balance. — Larissa

Fluidity of arrangement

One of the main themes that emerged was the fluidity of arrangements, both informal and court-ordered. Most children simply voted with their feet when they became old enough to do so, leaving one household for another or altering the amount of time spent with each parent to suit their own convenience. These decisions were usually based on considerations that arose from outside interests, such as proximity to schools, being with friends or pursuing sporting interests:

> For the first few years it was very much that I lived at my dad's house and saw my mum irregularly. When I got to year 12, I really wanted to focus on study, so I actually went and stayed with my mum during the week, Monday through Thursday because there was nobody there in the house, so I could focus and do my study, and then the weekends I'd go home to my dad's place. After year 12, I went back to the prior arrangement. — Tina

This flexibility was not altered by the formality of court orders. It appears that when circumstances required it, formal court orders were simply ignored by children and parents alike:

> When it came to year 12, my dad said: 'Look, I don't want to have to say that we're going to go by court orders or anything, you can come here whenever you want and if you don't want to come here then just tell me and I won't expect you'. So I didn't go to dad's as often because I had study to do, so I stayed with mum. — Jack

3. These findings were similar to those of Judy Cashmore and Patrick Parkinson (2008) 'Children's and parents' perceptions on children's participation in decision-making after parental separation and divorce' (46) 1 *Family Court Review* 91.

4. Ibid [93].

5. Vanessa May and Carol Smart, 'Silence in Court? Hearing children in residence and contact disputes' (2004) 16 *Child and Family Law Quarterly* 305; Cashmore and Parkinson above n 3.

6. See Gwynn Davis and Julia Pearce, 'The Welfare Principle in Action' (1999) 29 *Family Law* 237.

It appeared that the issue of quality rather than quantity of time [with the non-resident parent] was more important to the participants in this research

Of the interviewees, 63 per cent (12/19) had altered their original arrangement; some were altered many times during the years as the children grew up.

> For the first six years it was every second weekend and then when I was 12 I spent Wednesday nights with my father and when I was 15 I went when I wanted to. — Cadence

> It was informal; yeah it had its own sort of mind. He'd start ringing us the older we got, and ask whether we wanted to come over this weekend and we'd say yeah or sorry we can't. As we got older we got a say in it. — Adam

Time with the non-resident parent

It has already been noted that there appeared to be much flexibility of living arrangements amongst those interviewed — a factor which did not seem to be affected by the presence of a formal court order. Despite this apparent fluidity of arrangements, a strong theme emerged of participants feeling that not enough time had been spent with the non-resident parent. This surprised the researchers, given the apparent disregard for the notion of fixed arrangements, either by informal agreement or court order. Many of the participants expressed regret that they did not share their formative years with the non-resident parent and stated that it has affected their adult relationships with that parent. In 74 per cent (14/19) of interviews, the non-resident parent was the father:

> If I could change things I would have wanted to have spent more time with my Dad. It screwed me up for a long time. I sort of blame my Mum for it, for always making us feel guilty about it, but I don't think she did it on purpose. She did make an effort. They both made an effort. We went to therapy and stuff together. I still like him as a person, but I think there is too much in the past that has happened, it's too late now. He doesn't know who I am and I don't know who he is. I would like to actually spend time with him but it's too hard. — Zara

> I knew my dad did miss my brother and I because he didn't get to see us that often, it was only just every second weekend and my brother and I did want to see him a lot more, and we were thinking why can't we spend a week with mum and a week with dad. We definitely would have preferred that, but I think in mum's opinion, she was thinking more about hurting dad and making him feel bad and in turn it was actually affecting my brother and I. — Jack

However, it appears that arrangements which attempted to establish a frequent routine of staying with both parents for short periods was very disruptive for the children. Forty-two per cent (8/19) of the interviewees had to move regularly between both parents' houses in a given week, or on a 'week about' system. Of these, most described it in negative terms — describing it as 'a hassle', 'a pain' and 'annoying'.

> It was always a bugger having to get all our stuff from dad's on a Sunday night to go back and stay at mum's. — Nathan

> We had to bring everything on the Friday and pack it all up on Sunday or Monday morning. I think it did work smoothly in the end but during my teenage years, I wanted to be with my friends or wanted to do things of my own and I had this obligation to go. I was living in two houses and had to keep track of two things, it was just a bit more time consuming. — Sharon

> Living out of a bag gets quite annoying — Serge

> It's really hard to transport your whole life to another person's house and especially during school it was just impractical. — Jacinta

> Having to pack a bag every week was a pain in the bum. I think my brothers felt the same. I think it probably caused a lot of tension. — Jill

Again, the researchers found this quite surprising, given the fact that these arrangements were much more objectively 'fair' in that they provided the child with substantially equal time with both parents. However, the participants generally commented that the disruption to their lives far outweighed the benefit of this time sharing arrangement. It appeared that the issue of quality rather than quantity of time was more important to the participants in this research.

Desire for even-handedness

Another theme that emerged from the interviews was the participants' desire to be 'even-handed' over the course of their childhood in creating relationships with both parents. Even if they didn't feel particularly close to one parent or the other, they were anxious to try to be fair to them in terms of opportunities to spend time with them. It was an underlying theme of many of the interviews and appeared to be quite a strong concern. It did not appear to be based on how much actual time that was spent with the non-resident parent, but lack of opportunity to build up a strong and permanent relationship.

> I would have liked more contact with my mum. It would have been good if she was closer. It would have been nice if we'd spent more time with her. — Amber

> It was always bad for dad because he didn't have access to us when he wanted to and she tried to get restraining orders and did different things depending on who was involved at her life at the time. — Hailey

Discussion

Contrary to the expectations of the researchers, there was no discernible difference between the participants' experience of court sanctioned or court ordered arrangements and those that were devised between the parties on an informal basis. From the children's perspectives, the outcomes were very similar in terms of where they lived and how and when they spent time with the non-resident parent. These participants' views broadly fit with other studies that have reported similar parenting outcomes between court ordered and privately ordered arrangements.[7] Further, participants in the study all reported fluid arrangements which changed over time whether they had been court sanctioned or not. It simply did not seem to matter to the children whether a court had been involved in the determination of their living arrangements or whether it had come about informally.

It appears that, in most situations, living arrangements were determined by practicality and not by any legal process. Perhaps, as Wasoff suggests,[8] there is in reality not a large difference between 'agreements' between parties and court orders — often an agreement is the outcome of very pragmatic considerations for both parties. Despite the fact that it is not imposed by a court, often an agreement for post-separation living arrangements will not resemble the faultless vision of a tailor-made, consensual arrangement freely entered into for the benefit of all parties. By comparison, it is often more likely to be a negotiated document hammered out by parties, operating in fear of the risks of increasing legal costs, the potential for lengthy litigation and the possibility of receiving a court order imposing a regime which suits neither of them.

The outcomes of this study appear to provide some support for the current family law policy that the involvement of both parents in the children's lives is positive in situations where there is no strong conflict between parents. This is evidenced by various comments from the participants wishing that they had had more time and a stronger relationship with the non-resident parent. Many of them reflected that now they had reached adulthood, they had only just begun to develop a relationship with their non-resident parent and they expressed feelings of regret that they have been unable to develop this relationship as children. This is not an endorsement of every species of shared parenting arrangement, however. Back-and-forth arrangements were consistently commented upon the negative by those subject to them. It is, however, an endorsement of the current policy of shared parental responsibility and the continued involvement in the lives of children of the non-resident parent. The recent evaluation of the 2006 family law reforms by Kaspiew et al[9] has also found that parents have accepted this message from the 2006 amendments:

> While most parents (separated and non-separated) agreed that the continuing involvement of each parent was beneficial for the children ... there was an increase in the proportion providing strong agreement with the statement in 2009 compared to 2006.[10]

One of the strongest themes to come through from the research was the feeling amongst participants that if the non-resident parent (usually the father) had remained involved in decision-making and discussions regarding their children's lives that this would have given the children more opportunity to develop and sustain a relationship with that person. In other words, it was not a question of time spent with the non-resident parent, but of the opportunity to stay involved with their lives and to interact with them on a regular basis.

> Now he's just a stranger ... he doesn't know really what we do, he doesn't know anything about our lives; it's sort of like talking to a stranger off the street. — Zara

> We weren't really close, our relationship was alright — we didn't fight, but we didn't know each other very well. — Lauren

This theme supports the literature which has found over and over again that contact between children and the parent they do not live with is about quality of time spent and not quantity.[11] Indeed, this was recently commented upon by the Family Court in *Loddington and Derringford (No 2), 2008* [12] where the court suggested that the concept of what is a 'meaningful relationship' between a parent and a child will depend on the age and stage of the child and the quality of time spent with both parents.

Accordingly, one needs to question the thrust of the 2006 amendments to the *Family Law Act* which focused so much on time being spent between children and their parents rather than the quality of relationships that are able to be developed between children and the parents they no longer live with. Indeed, McIntosh's research supports the view that the amount of time a child spends with the non-resident parent (usually the father) is no predictor of whether a quality relationship will be developed between them.[13] While it is impossible for a child to develop a relationship with a parent that they never see, the amount of time spent with each parent is only one factor in developing a positive relationship between them.

There is growing research which identifies the pitfalls of shared parenting regimes.[14] In high conflict separations, shared care may not be appropriate and may lead to behavioural problems in children, including hyperactivity and problems with attention and focus. [15] A detailed analysis of shared care is beyond the scope of this article. Even in this small study, however, almost all participants involved in shared care arrangements described moving back and forth frequently between parents in negative terms. Participants found the constant moves to be very disruptive to their lives. It is not possible from the data collected here, however, to determine whether the frequent moves were disruptive to the children's relationships with their parents. The conclusion appears to be that shared care arrangements may be appropriate for some families but it is certainly not a 'one size fits all' solution. Indeed, for the participants in the study, the older they got, the more they looked for the stability of living in one household with one parent — despite the fact that they later acknowledged the detrimental effect

7. See Fran Wasoff, 'Mutual Consent: Separation agreements and the outcomes of private ordering in divorce' (2005) 27 (3–4) *Journal of Social Welfare and Family Law* 237.

8. Ibid [247].

9. Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (2009).

10. Ibid [134].

11. Paul Amato and Joan Gilbreth 'Non-resident fathers in children's well-being: A Meta Analysis' (1999) 61 *Journal of Marriage And The Family* 557; Mary Whiteside and Betsy Becker, 'Parental factors and the young child's post-divorce adjustment: A Meta-Analysis with implications for parenting arrangements' (2000) 14 *Journal Of Family Psychology* 5.

12. *Loddington and Derringford (No 2)* [2008] FamCA 925 per Cronin J.

13. Jennifer McIntosh and Richard Chisholm, 'Cautionary notes on the shared care of children in conflicted parental separation' (2008) 14(1) *Journal of Family Studies*, 37.

14. Jennifer McIntosh, Caroline Long and Yvonne Wells, 'Children beyond dispute: A four year follow up study of outcomes from child focused and child inclusive post-separation Family Dispute Resolution' (2009); Bruce Smyth, 'A 5-year retrospective of post-separation shared care research in Australia' (2009) 15(1) *Journal of Family Studies*, 36–59.

15. McIntosh and Chisholm, above n 13.

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such arrangements had on their relationship with the other 'non-resident' parent. These relationship and logistical problems suggest that parents who are involved in making shared care arrangements should be encouraged to explore options that do not require children to bounce back and forth every few days. Options might include longer stays with each parent, 'bird-nesting', or allowing for flexible arrangements based on schools, friendships, etc.

Conclusion

Family law policy considerations should not regard informal post-separation living arrangements as a panacea — the evidence from this research indicates that fluidity of movement and satisfaction in living arrangements is very individualistic amongst the children of separated families and does not necessarily rely on whether the arrangements were made informally between the parents or were court-ordered. The success or otherwise of post-separation living arrangements depend strongly on the ages and stages of the children subject to them.

This study also raises issues of the perception of how important it is to have informal post-separation arrangements when formal court orders seemed to provide a similar framework and were not seen by the children subject to them (or their parents) as impeding the possibility of changes to their arrangements. Whether the arrangements were court ordered or consensual appear to have had no impact on the level of commitment to them, once they were put in place. Changes in living arrangements occurred over time in both categories of families — those subject to court orders and those where arrangements were informal and consensual, with no discernible difference between the two categories. In situations where the family was subject to court orders and living arrangements subsequently changed, participants did not report any memories of court approval for such changes being sought. Thus, it appears that both parents and children of these families were complicit in rearranging their lives and simply ignoring court ordered arrangements by mutual agreement. Family law practitioners have usually assumed that their clients will be more committed to a living arrangement which is 'home grown' and not imposed by an external authority such as a judge. Theoretically, families which have created their own informal arrangements without court interference are able to shape the agreement in ways that fit their individualistic needs and thus the arrangements should be more durable and respected by all family members. This study did not bear out this assumption. From the children's perspectives, the existence of a court order or a consensual agreement made virtually no discernible difference in the way their separated families organised their lives over time.

Although a small pilot study, these findings have long-term implications for family law policy. In time, it will be necessary to undergo a much larger review of post-separation living arrangements in light of the 2006 amendments. Further major research is required in order to ascertain whether living arrangements entered into by parties attending Family Relationship Centres and other non-court settings are more durable and workable over time than court directed arrangements. A much larger study is required along these lines in order to determine whether family law policy is moving the right direction for the benefit of not only the parties involved in the separation, but the entire family.

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