Sharing
the Care of the Children:
A Viable Option or Just Not Workable?

Simon Creek, Family Law Director
Natalie Dimmock, Senior Associate
Owen Lenegan, Articled Clerk
HHG Legal Group - Hedson Henning & Goodman

Introduction

1. If you have heard it once, you have heard it a million times – "why can't I have the children 50/50?" The answer to the question is not as simple as the legislation would have us all believe. The advent of the *Family Law Amendment (Shared Parental Responsibility) Act* in 2006 saw the arrival of significant changes to the Family Law system. Three years on, the long-term significance of those amendments, particularly in relation to the issue of "shared care", is really only just emerging.

2. What is clear is that in utopia, equal shared care of the children would be a sound ideal[1]. What is equally clear, however, is that a growing body of evidence, including long-term statistical reviews undertaken by the Family Court of Australia, now suggest that 50/50 care may indeed be as former Family Court Judge, John Fogarty, predicted, "just not workable"[2]. Such a view is reinforced by the research conducted by McIntosh and Chisholm on separated couples with children in shared care arrangements. Their report[3] should be mandatory reading for all family law practitioners.

3. Equal shared time with the kids is not an easy issue to navigate. It is natural for parents to want to spend more time with their children, but at what cost? Parents and practitioners alike must consider whether such an arrangement is practical and, more importantly - in light of the potential impact on the children – is it in the best interests of the child[4]? Too often clients appear to "make their demands"[5] with little thought or planning as to how shared care (let alone equal time) would actually work at a practical level. Sharing the care of the children is all very nice if mum and dad live next door to each other, the new partners socialise and play golf together on Sundays and the gaggle of kids all play happy families and skip down the road to the tune of the "Brady Bunch" theme song. Sadly, in my experience, such matters are rare beasts, if not altogether mythical.

H and H[6] - the Forerunner to the Legislation

4. In *H and H*, Ryan FM looked at pre-reform Australian cases as well as jurisprudence from England and Canada for guidance in identifying relevant factors in making Orders as to shared care. The factors that the Court identified were as follows:

   a. The parties' capacity to communicate on matters relevant to the child's welfare;
   b. The physical proximity of the two households;
   c. Whether the homes are sufficiently close such that the child can maintain their friendships in both homes;
   d. The prior history of caring for the child ie whether the parties have demonstrated that they can implement a 50/50 living arrangement without undermining the child's adjustment;
   e. Whether the parties agree or disagree on matters relevant to the child's day to day life and the likelihood that they would be able to reach a reasonable compromise;
   f. Whether the parents share similar ambitions for the child eg religion, culture and extra-curricular activities;
   g. Whether they can address, on an ongoing basis, the practical considerations that arise with the child living in two homes;
   h. Whether or not the parties respect the other party as a parent;
   i. The child's wishes and the factors that influence those wishes;
   j. Where siblings live; and
   k. The child's age.

5. Needless to say, the list is not exhaustive but when taken with the later s60CA and s60CC in the amended *Family Law Act 1975*, does provide some useful guidelines in deciding the suitability of shared parenting arrangements. It is notable that many of the factors identified in H and H have now been codified and included as mandated

legislative considerations under s65DAA.

The Legislation[7]

6. A 2008 article in the Queensland Bar Association's Journal, Hearsay,[8] commented that the changes to the Act chiefly arose from a growing concern about the absence of fathers in young children's lives. It goes on to comment that "in theory, shared care is a wonderful aspiration. Until the Act was amended, fathers were predominantly relegated to alternate weekends and half-holidays...Dad could be the weekend parent with few rules and lots of fun, whereas Mum became the school-night disciplinarian..."

7. Legislating an increased input from fathers was but one option to remedy the perceived problem and arguably fails to take into account the practical considerations of such input, and the potential impact on the child.

8. The (amended) Act provides for and/or says:

   a. "a presumption of equal share parental responsibility";
   b. if that presumption is not rebutted, then the Court is required to consider 'equal time' as the first possible outcome in a cascading suite of parenting arrangements;[9] and
   c. if the Court finds that equal time is not reasonably practical or not in the child's best interests, it must then consider "substantial and significant" time.

9. Specifically, section 65DAA(5) says that the Court should consider the following issues when determining the reasonable practicality of the child spending equal time with each parent:

   a. how far apart the parents live from each other;
   b. the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents;
   c. the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind;
   d. the impact that an arrangement of that kind would have on the child; and
   e. such other matters as the. Court considers relevant.

10. Other factors that the Court may take into account are those set out in s60CC(3), which include:

   a. the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (s60CC(3)(c)); and
   b. the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (s60CC(3)(i)).

The legislation is in – now (so) what?

11. The 'Hearsay'[10] article refers to Australian Bureau of Statistics research that indicates that 2 - 3% of post-separation children lived in shared care in 1997. By 2003, that percentage of children had doubled to 6%. Early 2008 statistics indicate a smaller increase to around 7% of children living in shared care arrangements, although Child Support Agency statistics indicate this figure may be on the rise[11]. The authors go on to comment "Professor Smyth observes that the most striking thing about the debate over shared care is the focus on numbers - the "*mathematizing*" of parenting time". By reducing parenting time to a sequence of numbers (eg, 9 / 5, 8 / 6 nights per fortnight), the "focus is squarely upon the *quantity* of time as opposed to the *quality* of time".

12. Hand in hand with the mindset of mathematizing parenting time is the mathematizing of financial entitlements relating to that parenting time. All of us have had clients with a

pathological aversion to the CSA website calculator and complex excel-based matrices designed to maximise the property settlement entitlements that they receive from their former partner. The fiscal motivations behind many parents desire for shared time arrangements is a concerning, and largely unforeseen, consequence of the 2006 amendments. Allocation of time does not necessarily equate to a good parenting experience for the child.

13. In support of the above view, in *Matthews & Kennedy*[12] His Honour Altobelli FM pointed out that the "temporal configurations of what provides a meaningful relationship for a child is not a *"one size fits all"* concept". The age, developmental level of the child and the level of relationship between the parent and child are all relevant factors in how the Court determines the level of benefit a child will draw from having a meaningful relationship with that parent. No matter how hard they try, the government, and the Court, cannot make a parental relationship *"meaningful"* by judicial or legislative intervention.

14. The preoccupation with numbers referred to above is not only that enjoyed by the ABS, the government bean counters and the social science researchers, but also by welfare agencies such as Centrelink. The Family Assistance Office[13] has a most entertaining view of shared care of what it blithely calls "an FTB child"[14]. I have replicated a couple of paragraphs below for your reading pleasure:

> 2.1.1.25 Shared Care of an FTB Child
>
> ***Summary***
> Two or more adults who are not members of the same couple (1.1.M.50) and who care for an FBT child can each be eligible for FTB for that child at the same time, provided each adult cares for the child between 35% and 65% of the assessment period (1.1.A.110). A determination must be made regarding the percentage of FTB to which an individual is entitled in respect of the FTB child. Once a determination has been made to share FTB for a child, eligibility for FTB is continuous for each person, regardless of which person actually has the physical care of the child at any given point in time.
>
> Where there are two carers and the minimum percentage of care rule is not met for one of them, FTB will be paid to the primary carer as if they were providing 100% of the care.
>
> If there are three or more carers, and one of the carers is not eligible for FTB because they have less than 35% care, the percentage is divided between the remaining eligible carers. It may be fair to divide the remaining percentage equally between the other carers. However, in some circumstances, it may be more equitable to divide the remaining percentage, according to the time spent with these remaining carers.
>
> ***Example:*** *Danielle cares for her child Naomi for 60% of the assessment period. Peter has 36% care for the assessment period and Claudia (Peter's mother) has 4% care. Claudia is not eligible for FTB. Under the terms of their family law order (1.1.F.10) Danielle's pattern of care does not change relative to when Claudia has care. However, Peter also shares the time he has with Naomi with his mother. In this case it is reasonable to increase Peter's percentage of care to 40% (36% + 4%), while Danielle's percentage remains at 60%. Peter will receive 35% of FTB while Danielle will receive 65%.*

15. Leaving aside the mathematizing of care arrangements, what is most telling about the viability of any shared care arrangement is whether the arrangement stays in place once agreed to or imposed by Court Order. Research indicates that after a 12 month period, only 50% of children who were in a shared care arrangement were still

in shared care[15]. That is to say, half of every shared care arrangement imposed by Court Order are simply not workable in a practical sense and are altered, either by the Court or by the parties themselves as a matter of necessity[16].

16. McIntosh and Chisholm's research[17] indicates that shared care is a viable arrangement for the select few where:

    a. the parents live close together;
    b. the parents get along;
    c. child-focused arrangements are in place;
    d. everyone is committed to making the arrangements work;
    e. both parents have family-friendly work practices;
    f. shared confidence that the Father is a competent parent; and
    g. there is financial comfort (particularly for women).

17. Given the nature of the relationship between parents who find themselves separated, most parties do not fall into the above category, and yet often have shared care arrangements in place (as agreed or imposed) thereby risking poor outcomes for their children, including increased mental health issues and high emotional distress[18]. It is worth noting as well that attachment theory needs to be carefully considered where very young children are in shared care arrangements and their developmental needs are not fully taken into account. All too often parents are keen to impose their own preferences in terms of time spent with the child, ignorant of psychological and developmental ramifications.

18. An analysis of 2007-2008 statistics indicates that:[19]

    a. In 17% of litigated cases, the Family Court made Orders that the children spend more than 50% of time with their father;
    b. Where parents came to an early agreement, it was agreed in 8% of cases that children spend more than 50% of time with their father;
    c. In 60% of litigated cases, the Family Court made orders that the children spend more than 50% of time with their mother;
    d. Where parents came to an early agreement, it was agreed in 68% of cases that the child spend more than 50% of time with their mother;
    e. In 15% of litigated cases, the Family Court made orders for 50/50 care between parents; and
    f. Where parents came to an early agreement, the parents agreed on a 50/50 care arrangement in 19% of cases.

19. What is interesting is that when the Court has fully considered the circumstances of a case and applied the considerations under s60CC and 60CA, it only awards 50/50 care 17% of the time. Clearly the Court recognises that in the vast majority of cases (83%), it is simply not practical and/or in the child's best interests to live in a shared care arrangement.

20. In a third of litigated cases, the Family Court ordered that children spend 30% or less time with their father. Some of the main reasons for such orders include; abuse and family violence, entrenched conflict, distance/transport/financial barriers, mental health and substance abuse. These issues are worth noting as they apply equally to parents in terms of issues impacting upon the children and should be considered by the family law practitioner when advising the client.

Considerations and Conclusions

21. With all of the above said, a client comes to see you for advice and says the magic phrase, "I want my kids 50/50". What are some of the issues to canvass with them? Assuming that there are no issues with regard to the parties having equal shared parental responsibility, the annexed checklist for use with clients[20] may provide some assistance, although it is heavily

caveated by the fact that every client's circumstances are different and unique to a greater or lesser extent.

22. As we all know, the Family Court's paramount consideration in relation to children's issues are the children's best interests. It should be the parents' foremost consideration as well but unfortunately, sometimes this is not the case. The experienced practitioner may be able to steer the client away from shared care as an option if it is clear that their answers to the questions attached indicate that the Court is unlikely to grant such an arrangement for various reasons or practicality of its potential impact on the child.

23. Ultimately, shared time arrangements can and do work for some and we have all had clients who find themselves in circumstances that support 50/50 arrangements. However, as evidenced by independent studies and the Family Court's own statistics, approximately half of all shared time arrangements quickly disintegrate as they were not practical to begin with. As practitioners we must be careful to ensure that a client's desire for shared time comes from the 'right place'. That is, that the motivation for shared time is congruent with the child's best interests and not their own preferences, desire to irritate their former partner or child support or property entitlements.

24. The emphasis should be on the quality of the time each parent spends with the child and using that time, whatever it may be, to establish and maintain a meaningful relationship between parent and child. So the next time a client drops that famous "shared time" catchphrase in an interview, whip out our checklist, ask the hard questions and draw some conclusions. As many Judges will tell you: sometimes 'shared time' just isn't the answer.

Endnotes

1. See McIntosh, J & Chisholm, R, Shared care and children's best interests in conflicted separation: A cautionary tale from current research. (2008). *Australian Family Lawyer*, *20*(1), 3–16 for a social science perspective on the issue.
2. The Age, 27 June 2003.
3. Ibid n 1.
4. Or in the best interests of the parents? See http://catholicsocialservices.org.au/node/14319.
5. Simon: *If I had a dollar for every time I have heard a client say "I want 50/50 care of my child", I really would be able to afford the entire Alf Barbagello collection of cars*. Nat & Owen: *Please buy us one each too.*
6. (2003) FLC 93-168
7. In brief. I don't want to bore you.
8. Brasch, J (November 2008) 'How Caring is Sharing?- The Family Law Amendment (Shared Parental Responsibility Act) Act 2006', Hearsay.
9. s65DAA of the Act.
10. Ibid n 8.
11. Horin, A (2008), Shared Care: Quality Matters Most. Available: www.essentialbaby. com.au.
12. *Matthews & Kennedy* [2007] FMCAfam 26 at paragraph 40-48
13. http://www.fahcsia.gov.au.
14. Presumably, FTB is not an acronym for *Fat Tax Break*.
15. Mother-residence households were the most common and were also the arrangement that shared care arrangements tended to gravitate towards. See n 8 and n11.
16. It is interesting, if not a little disturbing, that shared care arrangements fail at almost exactly the same rate as the marriages and relationships that produced the child.
17. Ibid n 1.
18. Ibid n 1.
19. The analysis was based on 1448 finalised litigated cases and 2719 early agreement cases finalised between the period of 2007 and 2008 and only collected in Family Court matters. Available: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Business/Statistics/FCOA_stats_SPR
20. The checklist may also be of use for clients who want substantial time with the children.