

Shared Care and Children's Best Interests In Conflicted Separation

A Cautionary Tale from Current Research

by Jennifer McIntosh¹ and Richard Chisholm²

Introduction

The shared physical care of children following separation has long been a complex issue, and is again in the spotlight following the Family Law Amendment (Shared Parental Responsibility) Act 2006. In this article we introduce new Australian data on the emotional well-being of children which, we suggest, provide food for thought about the pluses and minuses of substantially shared care arrangements³ where separated parents are in continuing conflict.⁴ In the context of the current legal and perhaps social support in Australia for greater shared care, these findings provide a cautionary note. While these new findings relate to children over 4 years of age, we also present a brief overview of psychological aspects of shared care for young children and infants.

In discussing implications for family law practice and legislation, we suggest that it will be important for lawyers and dispute resolution practitioners to give careful attention to the likely consequences for children, good or ill, of shared care arrangements. Predicting such consequences will

never be an easy task, but may be assisted by attending to the relevant factors outlined here. Professionals in family law, we suggest, need to have regard both to the relevant social science findings and to the legislative guidelines as they try to assist conflicted parents towards developmentally sound post-separation care arrangements, whether agreed or adjudicated.⁵

We fully accept that in general children benefit greatly if they maintain good quality relationships with both parents. Our focus here, though, is not primarily on the children of the many separating parents who can focus on the children's interests and manage to sort out parenting arrangements amicably (with or without assistance from the legal system). It is rather on the interests of children in families characterised by persisting inter-parental conflict: many of these parents ultimately have their parenting arrangements adjudicated by a court, or reach agreed arrangements, but in circumstances of continuing conflict.

In a review of care and contact patterns across a representative cross-section of the Australian population, Smyth (2004) found that, at that time, shared care was 'relatively rare'. It proved to be a viable arrangement for a small and distinct group of families, who self-selected into shared care arrangements and who had the following relational and structural profile:

- Geographical proximity;
- The ability of parents to get along sufficiently well to develop a business-like working relationship;
- Child-focused arrangements (with children kept 'out of the middle', and with children's activities forming an integral part of the way in which the parenting schedule is developed);
- A commitment by everyone to make shared care work;
- Family-friendly work practices for both mothers and fathers;
- Financial comfort (particularly for women); and
- Shared confidence that the father is a competent parent.

Many separating parents who require Court or formal dispute resolution involvement to determine their contact and care arrangements unfortunately do not share these characteristics. As a result of the introduction of the Family Law Amendment (Shared Parental Responsibility Act) 2006, it has arguably become more important for professionals to identify

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family contexts that do not have the basic structural or relational requirements to make substantially shared care a viable developmental option for their children.

Studies that have specifically addressed the dynamics of uncooperative post separation family care, involving protracted and/or serious levels of parental conflict,⁶ support the need for careful consideration of the impact upon children of acrimonious co-parenting arrangements. These studies have shown that shared parental care is unlikely to be appropriate in high conflict situations where parental attunement is compromised, and where the child, in order to maintain a relationship with both parents, develops conditional, high maintenance loyalties to each parent. This literature points to the complex dynamics involved for children in continued exposure not only to actual manifestations of conflict between their parents on change-overs between the two houses, but also to the less tangible tensions of poorly concealed acrimony, ongoing denigration of one parent by another, and insidious embroilment of children in supporting the separate views of each parent (upon whom they continue to depend).

This article explores connections between children's well-being and living arrangements through data available from two Australian studies involving conflicted parents in dispute over care and contact. We outline some of the specific areas of caution suggested by the data, and identify some factors that legal and family dispute resolution practitioners may consider as they advise about shared care arrangements. We also review the amendments of 2006, and suggest that, while the present legal framework certainly emphasises the importance of parental involvement, and requires decision-makers to give careful consideration to the benefits that children may have from cooperative parenting, it should not be understood as a strait-jacket that requires equal or near-equal shared parenting in all cases except those characterised by violence and similar problems.

First, we outline relevant findings from recent research by the first author.

Findings from two Australian studies

Two recent studies have explored the impacts of Family Court and community based dispute resolution interventions for parents experiencing significant conflict over the nature of their post separation parenting agreements. The interventions

were specifically designed to assist the management of parental conflict and to support higher levels of cooperation. Each study tracked family functioning prior to intervention and after settlement of the dispute, and considered associations between children's well-being and parental acrimony, alliance, and living arrangements.

Study 1: Disputing parents and their children: a mediation sample

The 'Children Beyond Dispute' research program is a longitudinal study, funded by the Australian Government Attorney-General's Department, and directed by McIntosh. The study is now in its fourth year. The findings reported here are from the first three phases of this project, where outcomes were compared for two groups of separated parents, selected on identical criteria and recruited voluntarily during two six month periods. Each group of parents were allocated to one of two different forms of brief therapeutic mediation for entrenched parenting disputes. The study and its background are described in detail elsewhere,⁷ and the interventions themselves are less central to this article, so are not elaborated.⁸

Among other things, the study explored impacts of the interventions on parental acrimony (psychologically held hostility), and parental alliance (parental cooperation and regard), and the emotional well-being of children. Data were collected from parents and children prior to their mediation, three months after, and again one year after. One hundred and eighty-three families were involved in this phase of the study, with parent report data collected on over 300 children. In this article we focus on data relating to school-age children's mental health, one year after the dispute was resolved.

Mental health was measured with the 'Strengths and Difficulties' Questionnaire (SDQ), parent report.⁹ This 20-item scale distinguishes children with normal, commonly occurring levels of anxiety from those who are in what is called the 'clinical range'. The clinical range can be thought of as a concerning level of emotional distress, shown in anxiety, sadness, clinginess, psychosomatic and anti-social symptoms, at a level that warrants professional intervention, ie counselling or specialist child psychiatry services.

In this study, complete data were available for 181 school-aged children. Levels of conflict and acrimony in this sample were significant, and similar to levels reported in other key studies in this

area.¹⁰ In keeping with other large scale studies,¹¹ twenty-one percent of children in this sample of conflicted families had a higher than average rate of clinical anxiety compared to 14% of 'non-divorced' children in the Australian population. Twenty-seven percent of families left mediation with an agreement for substantially shared care of their children, of at least five nights per fortnight with each parent on average.

McIntosh and her colleagues identified all children across the two intervention groups who remained in the high-risk mental health bracket one year after mediation. They examined multiple variables to see what core factors or combination of factors were most highly associated with their poor outcomes.¹² Findings of regression modelling indicated that six variables were associated with children's high emotional distress scores:

- 1 Fathers had low levels of formal education;
- 2 There was high, ongoing inter-parental conflict;
- 3 Children's overnight care was substantially shared;
- 4 Mother-child relationship was poor, as reported by mother and child;
- 5 There was high acrimony (psychological hostility) between parents; and
- 6 The child in question was under 10 years old.

The first two variables independently predicted poor outcomes. Variables 3-6 added to the likelihood of poor outcomes when they co-occurred with any of the other variables.

Analyses also indicated that fathers and children benefited from a shared residence arrangement most when this occurred in an environment of low acrimony and cooperation with the child's other parent. Older children (over 10 years) in shared care who were not caught in high conflict dynamics did not show evidence of poor mental health outcomes, and generally showed a greater capacity to cope with existing parental tensions.¹³

Study 2: High conflict parents and their children: a Family Court sample

A separate study examined outcomes for 77 parents and 111 children who had attended the Child Responsive Program Pilot in the Family Court of Australia.¹⁴ This study involved comprehensive interviews with parents, prior to and four months after litigated settlement of their dispute over the care of their children. The interviews explored conflict, cooperation, relationships and child well-

being, again using the Strengths and Difficulties Questionnaire.¹⁵ Data for all children aged four years and over were obtained on domains of anxiety, tearfulness, fearfulness, psychosomatic symptoms, and separation anxiety.

Four months after settlement, 28% of these 111 children had emotional well-being scores in the clinical range, indicating a high degree of emotional distress. Multiple regression modelling was again used,¹⁶ exploring all variables to see which combination of factors best accounted for children's poor emotional outcomes. The following five variables were most highly associated with children's poor mental health outcomes in this Family Court sample:

- 1 The child was unhappy with their living and care arrangements;
- 2 The parent's relationship with the child had deteriorated post Court;
- 3 The child lived in substantially shared care;
- 4 One parent held concerns about the child's safety with the other parent;
- 5 The parents remained in high conflict.

The first three variables independently predicted poor outcomes. Variables four and five added to the likelihood of poor outcomes when they co-occurred with any of the other factors. The emotional climate in which these Family Court children shared their lives between their parents was further illustrated by the following findings:

- Importantly – and in contrast to the relatively low rates of shared time identified in non-litigating samples (eg see Smyth, *op cit*) – 28% percent of the children studied here entered Court, and 46% left Court, in a substantially shared care arrangement (five nights per fortnight or more in the care of each parent).¹⁷
- Seventy-three percent of the parents involved in shared care arrangements post Court reported 'almost never' co-operating with each other.
- Thirty-nine percent of shared care parents reported 'never' being able to protect their children from their conflict.
- In four of the shared care cases in this study, parents reported 'never' having contact of any kind with each other. The children in each of these families were responsible for conveying day-to-day messages between their parents, involving them directly in potentially unpleasant communications about them.
- Seventy percent of these orders were made by

consent, either in the CRP or out of Court settlement. Thirty percent were judicially determined.

The data from this second study are concerning because they suggest that a significant proportion of these children emerged from Family Court proceedings with substantially shared care arrangements that imposed a psychological strain for the child.

The two studies have limitations, notably the relatively small samples and the associated possibilities of sampling error. On the other hand, they have strengths, including their 'repeated measures' designs (comparing each parent and each child's outcomes against their own baseline) which provide statistical power in smaller sample sizes, and obtaining data from multiple members of the same family. Substantial qualitative interview information also verified the core quantitative findings. We also note that strong correlations were found between mothers' and fathers' mental health ratings of their children, and between parents' ratings and children's own subjective well-being scores. All of these factors contribute to the confidence we place in these findings. Further, as Smyth (p 118, 2004) has identified:

"... there is so little empirical data on shared parenting that to disregard small pockets of data runs the risk of leaving our knowledge of joint parenting poorly informed."

These two studies support the need for larger scale enquiry into the potential links between living arrangements, parenting maturity and availability, conflict and children's psychological health.

The psychology of shared care for young children

The above findings relate to children aged over four years. In relation to young children, it is important for practitioners to have regard to what we know about their developmental needs. The nature of the strain imposed for very young children and infants by developmentally inappropriate living arrangements is considered in this section, taking us to the territory of attachment development. The vast literature that underpins attachment theory cannot be summarised here, but we offer some of the core findings as context for understanding the outcomes of the above studies, and for informing deliberations about shared care for young children and infants.

The psychological issues involved in the

division of children's care between two parents, two homes and two families are complex. Meta reviews of the related literature are available,¹⁸ but the field awaits definitive longitudinal research in this critical area. Specifically in the area of pre-school and infant overnight care, research is sparse, and that which exists¹⁹ is often held at arm's length when it fails to support conflicting ideologies.

It can, however, safely be said that the healthy emotional development of children depends upon their early experience of a continuous, emotionally available care-giving relationship, through which they are able to form an organised attachment, and to develop their human capacities for thought and relationships.²⁰ This core finding from attachment research can easily be misunderstood when legal decisions are made. For example, the infant's need for a primary attachment figure can be overlooked because of oversimplified understandings of the research evidence (for example, when findings are taken to mean that the infant can only have one care-giving relationship with one adult), or where research findings are misapplied to support the legal preference of one parent over another. Clearly a young child can form more than one attachment relationship. Further, a child in any family situation will develop a qualitatively different attachment to each parent: for example, a secure attachment to the father and an insecure attachment to the mother, by virtue of the essential differences in care-giving styles of each parent (reflecting the parent's own attachment history).²¹ The important point here is that attachment security is not transferred by the child from one parent to another when moving between their care.

Part of the developmental conundrum posed for young children of divorce is this: their attachment formation is likely to be poorly affected (or to become 'disorganised' in theoretical terms) when that infant does not have a continuous experience of reliable care with *either* parent. Shared care arrangements that involve frequent moves from one parent to another can, inadvertently, bring about this experience. Frequent transitions of care and absences from each parent necessarily interrupt the infant's experience of care with each parent, especially their relationship with a primary carer when there has been one. This brings about potential developmental difficulties for infants, particularly those with parents who remain acrimonious and struggle to facilitate a smooth transition for the infant.²² It is well documented that conflict between parents has an adverse impact on their ability to

parent sensitively,²³ and inter-parental conflict brings a higher likelihood of harsh styles of discipline and diminished emotional responses,²⁴ which are parenting behaviours associated ultimately with the child's emotional insecurity and social withdrawal.^{25 26}

For older children, and particularly adolescents, the primacy of attachment diminishes with advancing years, enabling the older child to tolerate longer periods of time away from a caregiver, and to consolidate and make good use of bonds of dependence with others. Yet when children of any age make frequent transitions between warring parents who are unable to conceal their feelings in the presence of the child, children then begin to use considerable energy to ensure their own comfort and emotional safety in each environment, actively and constantly monitoring the 'emotional weather' they encounter in each parent's home.

Through this developmental lens, it is relatively easy to see how, in the two studies presented here, the risks added up for these children of high conflict-ridden families who lived in shared care arrangements. Further, although the new data described above relate to outcomes for children over four years of age, there are important developmental reasons, sketched above, to be cautious about the recommendation of substantially shared care for children under four. Indeed we hope we have shown in this section why caution becomes more urgent in the case of the infant and the young child of high conflict divorce.

Against this background, we now review the application of the new legislation on shared parenting to conflicted families, particularly the more extreme cases often presenting to the Family Court or the Federal Magistrates Court.

The legislative context

This section considers the legislative context surrounding these findings, now that the amendments of 2006 are in place. We argue that there is nothing in those amendments or their background to prevent practitioners from taking the new data into account in applying the law. Indeed, there is a good deal to support practitioners in so doing. We first consider the paramount consideration principle, then the amendments relating to parental decision-making ('parental responsibility'), then those relating to parenting arrangements, particularly the time children are to spend with parents. We also consider briefly the new provisions relating to process.

The 'paramount consideration' principle

What we now call parenting law²⁷ has long been governed by the principle that the child's best interests must be treated as the paramount consideration. This principle was originally developed by court decisions in the nineteenth and early 20th century, and then incorporated into legislation. Not only has it been retained in the Act, but its importance was repeatedly emphasised in the background papers to the amending Act of 2006.²⁸ Section 60CA now provides:

"In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

Parental responsibility severed from residence since 1996

The amendments of 1995 and 2006 resulted in the replacement of the term 'guardianship' with 'parental responsibility', and a number of provisions designed to emphasise the importance of both parents being involved in cooperative parenting after separation. There are a number of components to this.

The first component was the severance of the link between residence and decision-making. Before 1996, a 'custody' order did two things: it meant that the child was to live with the custodial parent, and also that the custodial parent alone had certain decision-making powers. The 1995 amendments changed this. The new 'residence' orders were different from the 'custody' orders they replaced, in that when they provided only that the child should live with one parent (the 'residence parent'), they gave that parent no particular advantage in decision-making. Unless the court deliberately ordered otherwise, both parents retained the equal decision-making power they had by virtue of having 'parental responsibility'.²⁹ This feature was retained in the 2006 amendments. They got rid of the legal labels 'residence' and 'contact', and revised the list of things that could be covered by parenting orders,³⁰ but it remains the case that an order for a child to live with a person gives that person no additional decision-making power. The obvious intention is to encourage continued involvement by both parents in decision-making, even though the child might be living mainly with one parent, and even though one or both partners might have re-married.³¹

Shared parental responsibility and the amendments of 2006

The 2006 amendments also introduced some new measures designed to reinforce cooperative parenting. The first was a presumption of equal shared parental responsibility. By s61DA(1), with certain qualifications, when making a parenting order, the court 'must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child'. There is an exception, namely cases where there are reasonable grounds to believe that a parent has engaged in child abuse or family violence.³² And in interim proceedings (where the evidence is often incomplete) the presumption applies 'unless the court considers that it would not be appropriate in the circumstances'.³³ The presumption may be rebutted 'by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child'.³⁴

The second new measure is an explicit statement that an order for shared parental responsibility creates obligations to share decision-making: s65DAC. The obligation is imposed on persons who, under a parenting order, are to share parental responsibility for a child, and relates only to decisions 'about a major long-term issue in relation to the child'. The section says that the order 'is taken to require the decision to be made jointly' by the persons who have such parental responsibility³⁵ – something that makes little sense when there is a difference of opinion between the parents. More sensibly, the section goes on to say that the order is taken to require them to consult with each other and make 'a genuine effort to come to a joint decision' about the issue.³⁶ Failure to do this would be a breach of the order, potentially attracting penalties.³⁷

Strangely, perhaps, the legislation does not explicitly say that there is such an obligation to consult where there has been no such order. Although one might think from the emphasis the background papers gave to cooperative parenting, and perhaps from some of the language of s60B,³⁸ that there would be such an obligation, careful attention to the words of the Act seems to indicate that there is no such obligation. The provision that 'each parent has' parental responsibility³⁹ remains unamended, and the express creation of the obligation in cases of court orders might be taken to imply that there is no such obligation where there is no court order.⁴⁰ While it is clear that parental cooperation is *encouraged* by the Act, and that

failure to cooperate might be taken into account against a parent in relation to parenting orders,⁴¹ it seems that there may be no enforceable legal obligation to consult except where there is an order for shared parental responsibility.

Court's obligations to consider the child spending equal time, or substantial and significant time, with each parent

Parliament's answer to the question whether there should be a legal presumption in favour of children spending equal time with each parent was 'No, but ...'. The relevant provision is lengthy, but can be easily summarised.⁴² It applies in cases covered by the presumption in favour of equal shared parental responsibility: that is, roughly, in all cases except those involving such things as violence and abuse. It says, essentially, that in making a parenting order the court 'must consider' making orders that the child spend equal time, or if not equal then substantial and significant time, with each parent. 'Substantial and significant time' is defined to mean, essentially, weekdays and weekends and holidays, times that allow the parent to be involved in the child's daily routine as well as occasions and events that are of particular significance to the child or the parent.⁴³ This is an important provision, but falls short of establishing a presumption that it is better for children to spend equal time, or substantial and significant time, with each parent. One obvious intention was to challenge any assumption that it is normally satisfactory for children to see one parent only for limited purposes, such as being entertained at weekends, which would make it difficult for that parent to be fully involved as a parent, and difficult for the child to maintain or consolidate a secure attachment with a parent whose behaviour is oriented only to 'visiting' rather than 'care-giving'.

The Full Court has neatly summarised the gist of the provisions in the following carefully-worded sentence:⁴⁴

"In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable."

Obligations on advisers

Another measure that needs consideration is the detailed prescription about the obligations of

advisers (legal practitioners, family counsellors, and family dispute resolution practitioners).⁴⁵ Section 63DA first requires advisers to inform the clients that they could consider a parenting plan, and where they could get further assistance in doing so. It then says that if the adviser gives them advice in connection with making a parenting plan,⁴⁶ the adviser must give them specified information and advice.⁴⁷ The content of this generally follows the new guidelines relating to determining the child's best interests. Thus, in summary, the advisers must inform their clients:

- that they 'could consider' equal time, or substantial and significant time, if either is reasonably practicable and in the child's best interests;
- that the decisions should be made in the child's best interests;
- about the matters that can be covered by a parenting plan;⁴⁸
- that the parenting plan may override any prior parenting order;⁴⁹
- the desirability of including in the plan provisions about methods of resolving future problems;⁵⁰
- the availability of programs that help people who have difficulties in complying with parenting plans; and
- that s65DAB requires the court to consider any existing parenting plan when making parenting orders.

The new guidelines for determining the child's best interests: s60B and s60CC

The amendments of 2006 continued the pattern of increasingly elaborate legislative guidelines and exhortations, particularly in relation to the critical task of determining the best interests of the child. The most significant sections are ss60B and 60CC. Section 60B sets out the 'objects' of Part VII, and the 'principles underlying it':⁵¹

60B Objects of Part and principles underlying it

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) ensuring 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; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children 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 (such as grandparents and other relatives); and
 - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Section 60CC(1) says that the court 'must consider the matters' in subsections (2) and (3). Subsection (2) says that 'the primary considerations are':

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Sub-section (3) says that 'additional considerations are ...' and then sets out a long list of matters, the last being the catch-all, 'any other fact or circumstance that the court thinks is relevant'. Apart from a few modifications, they are the same considerations that were previously in the Act, and which, in turn, largely reflected the matters that courts had long taken into account. They include, for example:

- (a) any views expressed by the child ...
- (b) the nature of the relationship of the child with ... each of the child's parents; and ... other persons ...

- (c) 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;
- (d) the likely effect of any changes in the child's circumstances ...
- (f) the capacity of [parents and others] to provide for the needs of the child ...

The overall direction of these provisions is clear enough. The legislature has retained the principle that the child's best interests must be regarded as the paramount consideration, but in providing guidance to the courts on how to determine those best interests, it has strongly emphasised two aspects: the benefit to the child of a meaningful relationship with both parents, and protection from violence and abuse. These are the two 'primary' considerations in s60CC, and the first two of the objects of Part VII. The court also has to consider all the other matters relating to the best interests of the child – the 'additional considerations' in subsection (3).

Although that much is evident, at the time of writing it is not entirely clear how these provisions will be interpreted. We don't quite know how the courts will determine whether a particular parent-child relationship is 'meaningful'. Nor do we know the significance of the word 'benefit' in paragraph (a). Does the provision mean that any 'meaningful' relationship with a parent is presumed to be of benefit to the child? Or is the word an invitation to the court to assess in each case whether there is in fact a benefit to the child, having regard to the 'additional considerations'? Most obviously, we don't yet know how much weight they will give to the idea, introduced for the first time by the 2006 Act, that some considerations are 'primary' and others 'additional'.⁵² These uncertainties, however, relate mainly to the relative weight the courts should give to various factors. They do not in any way limit the categories of matters that need to be considered in determining the child's best interests.

Changes relating to process

For the purpose of this article it is not necessary to deal in detail with the amendments of 2006 relating to the processes of family law. There are two main aspects of these provisions. The first is a provision making it mandatory, in most cases, for parties to attempt to resolve their differences before commencing proceedings⁵³ – the latest development in the long-standing policy of encouraging parties to settle parenting disputes.⁵⁴

The second aspect was genuinely new: a set of principles and powers for the courts so that they can conduct children's proceedings in a 'less adversarial' way.⁵⁵

Two features of these provisions are relevant here. The first is the new provision that for the purpose of the proceedings the court may designate a family consultant, whose task includes 'helping people to better understand the effect of things on the child concerned'.⁵⁶ The second is the legislative principle that 'the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings'.⁵⁷

These provisions show that Parliament was concerned about impacts on children, and that it attached important to expert advice about children and their needs. They reinforce our view that it is entirely consistent with the legislation to learn from and apply research findings about the developmental needs of children.

Summary and implications

By way of brief summary, the provisions considered above:

- Continue the principle that the child's best interests must be regarded as the paramount consideration;
- Require the courts, in determining the child's best interests, to consider as 'primary considerations' the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from abuse, neglect or family violence; and also to consider a long list of 'additional considerations';
- Emphasise that both parents should normally share decision-making following separation, even where one or both re-partner or remarry, and regardless of whether the children live mainly with one parent;
- Strongly encourage parents to cooperate in decision-making relating to the children, and create legal obligations to do so where the court has made an order for shared parental responsibility;
- Where there is an order for equal shared parental responsibility, require the court to consider whether the child should spend equal time, or substantial and significant time, with each parent, except in cases of violence, or child abuse or neglect;

- Require advisers to have regard to these things.

For advisers and legal practitioners, as well as for decision-makers, it is important to take into account what social science can tell us about what will benefit children, particularly what constitutes a developmentally meaningful relationship with their parents: s60CC. The enhanced role of the family consultant in the new 'less adversarial' process⁵⁸ is a strong indicator that social science is seen as important. The new guidelines, although more prescriptive than the old, still focus on the child's best interests, and the new concepts are consistent with the use of social science.

Neither the general conditions for children's healthy emotional development nor the specific new findings described above contradict the core principle underpinning the new legislation, namely that most children will benefit from having both parents actively and cooperatively involved in their lives after separation. The data reported here suggest, however, that a group of children are liable to slip through the safety net of considerations designed to ensure that children do in fact benefit from shared parenting. The findings sound a strong cautionary note about applying the new presumptions to cases characterised by ongoing high conflict between parents. We have shown how, in living between and within climates of ongoing dispute and emotional pre-occupation, the mental health 'benefits' of substantially shared care accrued by children are questionable.

By implication, then, the 'safety net' of considerations through which we filter the 'best interests' questions attached to shared physical care needs to be more tightly woven. The task is to sensibly guide ourselves through the socio-legal and often highly emotive contexts that surround the issue, in that developmentally appropriate decisions can be made in each case.

The research outlined here suggests that substantially shared care arrangements may entail risks for children's healthy emotional development in families that have the following specific factors, especially in combination:⁵⁹

Parent factors:

- Low levels of maturity and insight;
- A parent's poor capacity for emotional availability to the child;
- Ongoing, high level conflict;
- Ongoing significant psychological acrimony between parents;
- Child is seen to be at risk in the care of one parent.

Child factors:

- Under 10 years of age;
- The child is not happy with a shared arrangement;
- The child experiences a parent to be poorly available to them.

In keeping with the findings of Johnston et al (1989), the new Australian data suggest that shared physical care is an arrangement best determined by the capacity of parents to exercise maturity, to manage their conflict and to move beyond egocentric decision-making in order to adequately embrace the changing developmental needs of their children. When considering 'the benefit to the child of a meaningful relationship with both parents', considerable weight should be given to the need of the child for care and contact arrangements that protect them from parental dynamics otherwise likely to erode their developmental security. Here, the capacity of parents for 'passive cooperation'⁶⁰ and the containment of acrimony may prove to be central benchmarks.

We trust that this article will contribute to lawyers' and dispute resolution professionals' awareness of conditions under which substantially shared care is likely to strain rather than support a child, and assist settlement processes that enable the appropriate sharing of a child's care and development, rather than the division of a child's life between two hostile, pre-occupied, 'parent rights focused' camps. Ultimately, we are asking professionals to ask themselves: Will a shared living arrangement in this parental context lead to an experience for the child of being richly shared, or deeply divided?

NOTES

- 1 BA(Hons) MCLinChild Psych. PhD., Adj Associate Professor, La Trobe University, Child Clinical Psychologist, Clinical Director, Family Transitions. We are grateful to Dr Bruce Smyth and Professor Patrick Parkinson for very helpful comments on a draft of this article.
- 2 BA, LLB, BCL; Honorary Professor, University of Sydney; Visiting Fellow, College of Law, ANU; formerly a Judge of the Family Court of Australia.
- 3 Substantially shared care throughout this paper is defined as a minimum of a 5:9 ratio (on average, a minimum of five nights with each parent, spread over an average fortnight).
- 4 We are not able to explore in this article the type of parenting that Smyth (2004) calls 'passive cooperation'.
- 5 It is of course impossible here to deal with the extensive literature on shared care. Sound Australian overviews include Smyth, B (Ed) (2004). *Parent child contact and post-separation parenting arrangements*. Research report no 9 Australian Institute of Family Studies, and Altobelli, T

- (2005). Rethinking contact arrangements involving young children. *Australian Journal of Family Law*, 19.
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 - 9 Goodman, R (1997) "The strength and difficulties questionnaire: A research note", *Journal of Child Psychology and Psychiatry*, 38 (5), 581-586.
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 - 11 Sawyer, MG, Arney, FM, Baghurst, PS, Clark, JJ, Graetz, BW, Kosky, RJ, Nurcombe, B, Patton, G, Prior, MR, Raphael, B, Rey, J, Whaites, LC, & Zubrick, SR (2000). *The Mental Health of Young People in Australia. The Child and Adolescent Component of the National Survey of Mental Health and Well-Being*. Canberra: Australian Government Printing Service.
 - 12 Details of these analyses are forthcoming in McIntosh, Wells, Smyth and Long, *Family Court Review*, January, 2008. General technical information is also in McIntosh and Long, 2006, *op cit*.
 - 13 These data will be elaborated in a forthcoming follow up study of this sample, as we follow families' progress four years post dispute resolution.
 - 14« McIntosh, J and Long, C (2007) "The Child Responsive program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes". Report to the Family Court of Australia.
 - 15 Goodman, 1997, cited above.
 - 16 Analyses controlled for whether the parent was the applicant or respondent. Technical information is available in McIntosh and Long (*op cit*).
 - 17 From parent report, almost half of were Interim Orders, and one third overall had been judicially determined.
 - 18 See for example the review by Altobelli, T, cited above.
 - 19 Eg Solomon, J, & George, C (1999) "The Development of attachment in separated and divorced families: Effects of overnight visitation, parent and couple variables", *Attachment & Human Development*, 1 (1), 2-33.
 - 20 McIntosh, JE (2006) "Assessing attachment needs and potential in high risk infants", *Journal of Family Studies*, Vol 12, No 1, pp. 57-71.
 - 21 Fonagy, P & Target, M (2005) "Bridging the transmission gap: An end to an important mystery of attachment research?" *Attachment and Human Development*, 7 (3), 333-343.
 - 22 Solomon and George, cited above.
 - 23 Harrist, A, & Ainslie, R (1998) "Parental discord and child behaviour problems", *Journal of Family Issues*, 19:140-163.
 - 24 Fincham, FD, Grych, JH, & Osborne, LN (1994) "Does marital conflict cause child maladjustment?: directions and challenges for longitudinal research", *Journal of Family Psychology*, 8: 128-140. Krishnakumar, A, & Buehler, C (2000) "Inter-parental conflict and parenting behaviours: a meta-analytic review", *Family Relations*, 49, 25-44.
 - 25 McIntosh, JE (2003) "Enduring conflict in parental separation: Pathways of impact on child development", *Journal of Family Studies*, 9(1), 63-80.
 - 26 Kerig, P (2001) "Children's coping with inter-parental conflict". In Grych, J & Fincham, F (eds). *Inter-parental conflict and child development*, (pp. 213-248). New York: Cambridge University Press.
 - 27 Before 1995, it was generally called 'custody law', and the usual orders were known as 'custody', 'access', and 'guardianship' orders. The language was changed by the 1995 amending Act: the court could make various 'parenting orders', namely residence orders, contact orders, and specific issues orders; and guardianship was replaced by 'parental responsibility'. The 2006 amendments changed the language again, dropping the names of the parenting orders, and just saying that the court could make parenting orders dealing with various topics, notably with whom the child should live, and with whom the child should spend time or communicate. 'Parental responsibility' was retained.
 - 28 Chisholm, R "Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006 (2007)", 21 (2) *Aust J Fam Law*, 143-172.
 - 29 'Parental responsibility' means 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': s61B. In the absence of a court order to the contrary, each parent 'has parental responsibility': s61C.
 - 30 Section 64B(2).
 - 31 See s61C(2), providing that the parents' parental responsibility 'is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying'.
 - 32 More precisely, 'if there are reasonable ground to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in: (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or (b) family violence': s61D(2).
 - 33 Section 61D(3). For an authoritative and detailed explanation of the legislation, see *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286.
 - 34 Section 61D(4).
 - 35 Section 65DAC(2).
 - 36 Section 65DAC(3).
 - 37 See generally Division 13A of Part VII.
 - 38 Section 60B(1)(a) ('ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives'); (2)(c) ('parents jointly share duties and responsibilities concerning the care, welfare and development of their children'); and (2)(d) ('parents should agree about the future parenting of their children').
 - 39 Section 61D.

- 40 This is partly because expressly including something at one place and not at another may suggest that it was deliberately excluded at the second place: see the discussion in DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, (6th ed 2006), at paragraph [4.28].
- 41 See s60CC(4) (court to consider the extent to which each parent has taken the opportunity to participate in making decisions about major long-term issues in relation to the child, and has facilitated the other parent in doing so).
- 42 Section 65DAA.
- 43 It is a little more elaborate than this. The court must consider whether equal time would be in the child's best interests; and whether it would be practicable; and, if it is, consider making an order for equal time: s65DAA(1). If not, then the court must consider the same issues in relation to 'substantial and significant' time: s65DAA(2).
- 44 *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286, paragraph 72.
- 45 Section 63DA(5).
- 46 Strangely, the requirements are not expressed to apply when the advice relates to consent orders as distinct from parenting plans.
- 47 See s63DA(2).
- 48 See s63C(2).
- 49 See s64D.
- 50 See 63C(2)(d)(g) and (h).
- 51 We have omitted sub-section (3), which further elaborates sub-section (2)(e) in relation to indigenous children.
- 52 For a discussion, see P Parkinson, "Decision-Making About The Best Interests of The Child: The Impact of The Two Tiers" 20 *AJFL* 179; Chisholm, "Making it work", cited above; and a forthcoming response by Parkinson, and a reply by Chisholm (also in *AJFL*).
- 53 Section 60I.
- 54 From the beginning it was accepted that judges had a responsibility for 'co-ordinating the work of ancillary specialists attached to the court, encouraging conciliation and applying, only as a last resort, the judicial powers of the court': *The Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill*: Report from the Senate Standing Committee, Parl Paper 133 (final report) 1974, p 3; quoted in Leonie Star, *Counsel of Perfection: the Family Court of Australia* (OUP, Melbourne, 1996), p 86. See also at p 111.
- 55 Part VII, Div 12A. For a detailed treatment, see Margaret Harrison, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (Family Court of Australia, April 2007). Those in a hurry might make do with R Chisholm, 'Less Adversarial Proceedings in Children's Cases' (AIFS, *Journal of Family Matters*, forthcoming).
- 56 Note to s69ZS. See also s11A.
- 57 Section 69ZN (it is the first of the five legislative principles).
- 58 Division 12A of Part VII.
- 59 Whether a factor should be treated as a contra-indication or a caution will be determined by severity, chronicity, and the capacity for change.
- 60 Personal communication, Bruce Smyth, October 2007.