LEGISLATING FOR SHARED-TIME PARENTING AFTER PARENTAL SEPARATION: INSIGHTS FROM AUSTRALIA?

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I
INTRODUCTION

Over the past four decades, the changing nature of work and family has meant that parenting roles, expectations, and responsibilities are in transition. These changes have led to a softening of the boundaries around the care of children after parental separation,[1] with the previous model of "sole custody"

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1. *See* Andrea Doucet, *Gender Roles and Fathering*, *in* HANDBOOK OF FATHER INVOLVEMENT 297 (Natasha J. Cabrera & Catherine S. Tamis-LeMonda eds., 2013); *see also* Allison Sigle Fuligni & Jeanne Brooks-Gunn, *Measuring Mother and Father Shared Care-Giving: An Analysis Using the Panel Study of Income*, *in* CONCEPTUALIZING AND MEASURING FATHER INVOLVEMENT 299 (Randall D. Day & Michael E. Lamb eds., 2004).

(usually to the mother) giving way to shared parenting. In many countries, shared-time parenting—where children spend equal or near-equal amounts of time with each parent[2]—is emerging as a new family type following divorce or separation.[3] In the United States, around 20% of postdivorce parenting arrangements involve shared-time parenting, although this estimate is as high as 32% in some states, such as Wisconsin.[4] Estimates range between 11% and 22% in Australia,[5] Canada,[6] the United Kingdom,[7] Denmark,[8] Norway,[9] and the Netherlands,[10] compared with 33% in Sweden[11] and Belgium.[12] Although fathers in intact families are spending only slightly more time with their children than in the past,[13] there is increasing support for the substantial involvement of both

2. This arrangement is also known as "joint physical custody" or "dual residence."

3. *See* Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form – The Shared Time Family*, 22 INT'L J.L. POL'Y & FAM. 231, 232 (2008); *see also* Kyrre Breivik & Dan Olweus, *Adolescent's Adjustment in Four Post-Divorce Family Structures*, 44 J. DIVORCE & REMARRIAGE 99, 100 (2006).

4. Melli & Brown, *supra* note 3, at 259; *see also* CONSTANCE AHRONS, WE'RE STILL FAMILY: WHAT GROWN UP CHILDREN HAVE TO SAY ABOUT THEIR PARENTS' DIVORCE 74 (2004); THOMAS GEORGE, WASH. STATE CTR. FOR COURT RESEARCH, RESIDENTIAL TIME SUMMARY REPORTS FILED IN WASHINGTON FROM JULY 2009 TO JUNE 2010, at 1 (2010); JANE VENOHR & RASA KAUNELIS, CTR. FOR POLICY RESEARCH, ARIZONA CHILD SUPPORT GUIDELINES REVIEW: ANALYSIS OF CASE FILE DATA 12 (2008), *available at* http://www.azcourts.gov/Portals/74/CSGRC/repository/2009-CaseFileRev.pdf.

5. RAE KASPIEW ET AL., AUSTRALIAN INST. OF FAMILY STUDIES, EVALUATION OF THE 2006 FAMILY LAW REFORMS 119 (2009), *available at* http://www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf; *see also* Bruce M. Smyth, *A Five Year Retrospective of Post-Separation Shared Care Research in Australia*, 15 J. FAM. STUD. 36 (2009) [hereinafter Smyth, *A Five Year Retrospective*].

6. Heather Juby, Céline Le Bourdais & Nicole Marcil-Gratton, *Sharing Roles, Sharing Custody? Couples' Characteristics and Children's Living Arrangements at Separation*, 67 J. MARRIAGE & FAM. 157, 162 (2005).

7. VICTORIA PEACEY & JOAN HUNT, NUFFIELD FOUND., PROBLEMATIC CONTACT AFTER SEPARATION AND DIVORCE? A NATIONAL SURVEY OF PARENTS 19 (2008), *available at* http://www.nuffieldfoundation.org/sites/default/files/Problematic%20contact%20after%20separation%20and%20divorce.pdf.

8. Ed Spruijt & Vincent Duindam, *Joint Physical Custody in the Netherlands and the Well-Being of Children*, 51 J. DIVORCE & REMARRIAGE 65, 66 (2009).

9. Ragni Hege Kitterød & Jan Lyngstad, *Untraditional Caring Arrangements Among Parents Living Apart: The Case of Norway*, 27 DEMOGRAPHIC RES. 121, 133 (2012).

10. WILMA BAKKER & CLARA H. MULDER, EXPLORING LIVING ARRANGEMENTS OF DIVORCED FAMILIES IN THE NETHERLANDS 2 (2009), *available at* http://webh01.ua.ac.be/cello/congres/docs/2009_ENSD_Paper_Bakker_Wilma.pdf; *accord* Spruijt & Duindam, *supra* note 8, at 72.

11. Åsa Carlsund, Ulrika Eriksson, Petra Löfstedt & Eva Sellström, *Risk Behaviour in Swedish Adolescents: Is Shared Physical Custody After Divorce a Risk or a Protective Factor?*, 23 EUR. J. PUB. HEALTH 3 (2012); *accord* Mia Hakovirta & Minna Rantalaiho, *Family Policy and Shared Parenting in Nordic Countries*, 13 EUR. J. SOC. SECURITY 247, 248 (2011); Anna Singer, *Active Parenting or Solomon's Justice?*, UTRECHT L. REV., June 2008, at 35.

12. An Katrien Sodermans, Sofie Vanassche & Koen Matthijs, *Post-Divorce Custody Arrangements and Bi-Nuclear Family Structures of Flemish Adolescents*, 28 DEMOGRAPHIC RES. 421, 426 (2013).

13. *See* Doucet, *supra* note 1, at 302; *see also* Karen E. McFadden & Catherine S. Tamis-LeMonda, *Fathers in the U.S.*, *in* FATHERS IN CULTURAL CONTEXT 250, 259 (David W. Shwalb, Barbara J. Shwalb & Michael E. Lamb eds., 2013); Lori A. Roggman, Robert H. Bradley & Helen H. Raikes, *Fathers in Family Contexts*, *in* HANDBOOK OF FATHER INVOLVEMENT, *supra* note 1, at 186, 193.

parents in their children's lives should parents separate.[14]

The growing popularity of shared-time parenting[15] seems to reflect the convergence of several mutually reinforcing social trends,[16] including a marked increase in women's participation in the labor force,[17] with "tag-team parenting" being a practical response to this;[18] greater acceptance of the importance of the role of fatherhood;[19] a growing appreciation that children generally benefit from an ongoing meaningful relationship with both parents after separation;[20] and divorce laws that increasingly "lean . . . in the direction of joint custody."[21] The recent development—and greater enforcement—of child-support laws might also have contributed to the new paradigm of involved fathers.

Shared-time families are not typical of the broader separated-parent population.[22] They tend to be dual-income, higher-educated parents with elementary school–aged children.[23] They have higher incomes than other separated families.[24] They are likely to have some flexibility in their hours of

14. *See* William V. Fabricius, Sanford L. Braver, Priscila Diaz & Clorinda E. Velez, *Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 201, 207 (Michael E. Lamb ed., 5th ed. 2010); *see also* KASPIEW ET AL., *supra* note 5, at 113.

15. Robert Bauserman, *A Meta-Analysis of Parental Satisfaction, Adjustment, and Conflict in Joint Custody and Sole Custody Following Divorce*, 53 J. DIVORCE & REMARRIAGE 464 (2012); *see also* Breivik & Olweus, *supra* note 3; Melli & Brown, *supra* note 3.

16. *See* Brandeanna D. Allen, John M. Nunley & Alan Seals, *The Effects of Joint-Child-Custody Legislation on the Child-Support Receipt of Single Mothers*, 32 J. FAM. ECON. ISSUES 124, 126 (2011); *see also* PATRICIA BROWN, EUN HEE JOUNG & LAWRENCE M. BERGER, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.–MADISON, DIVORCED WISCONSIN FAMILIES WITH SHARED CARE PLACEMENTS 50 (2006), *available at* http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/ps5report.pdf; Juby et al., *supra* note 6, at 170; Lawrie Moloney, Ruth Weston & Alan Hayes, *Key Social Issues in the Development of Australian Family Law: Research and Its Impact on Policy and Practice*, 19 J. FAM. STUD. 110 (2013).

17. Allen et al., *supra* note 16, at 126.

18. Kadri Täht & Melinda Mills, *Nonstandard Work Schedules, Couple Desynchronization, and Parent–Child Interaction: A Mixed-Methods Analysis*, 33 J. FAM. ISSUES 1054 (2012).

19. *See* David W. Shwalb, Barbara J. Shwalb & Michael E. Lamb, *Final Thoughts, Comparisons, and Conclusions*, *in* FATHERS IN CULTURAL CONTEXT, *supra* note 13, at 385, 386.

20. *See* Fabricius et al., *supra* note 14, at 217; *see also* JAN PRYOR & BRYAN RODGERS, CHILDREN IN CHANGING FAMILIES: LIFE AFTER PARENTAL SEPARATION 272 (2001); Paul R. Amato & Joan G. Gilbreth, *Non-Resident Fathers and Children's Wellbeing: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 569 (1999).

21. Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI* Principles of the Law of Family Dissolution, 10 VA. J. SOC. POL'Y & L. 5, 23 (2002).

22. *See* Marsha Kline Pruett & Carrie Barker, *Joint Custody: A Judicious Choice for Families – But How, When, and Why?*, *in* THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 417, 424 (Robert M. Galatzer-Levy, Louis Kraus & Jeanne Glatzer-Levy eds., 2nd ed. 2009). *But see* Melli & Brown, *supra* note 3.

23. KASPIEW ET AL., *supra* note 5, at 168; *accord* Bruce Smyth, Lixia Qu & Ruth Weston, *The Demography of Parent–Child Contact*, *in* PARENT–CHILD CONTACT AND POST-SEPARATION PARENTING ARRANGEMENTS 111, 118 (Bruce Smyth ed., 2004) [hereinafter Smyth et al., *The Demography of Parent–Child Contact*].

24. *See* BAKKER & MULDER, *supra* note 10, at 1; Maria Cancian & Daniel Meyer, *Who Gets Custody?*, 35 DEMOGRAPHY 147, 150 (1998); Denise Donnelly & David Finklehor, *Who Has Joint Custody? Class Differences in the Determination of Custody Arrangements*, 42 FAM. REL. 57, 59 (1993);

employment, and live near each other.[25] Moreover, fathers in shared-time families have often been involved in caring for their children prior to separation.[26] By contrast, the circumstances of many separated families—for example, where the parents live hundreds of miles from each other—make shared-time parenting difficult or impossible to achieve.[27] Thus, although parents with shared-time arrangements tend to report that their children are doing well,[28] and that they and their children like the arrangements,[29] the characteristics of shared-time families make positive outcomes for children in these families more likely than in other separated families.[30] This point is often missed when groups advocating a presumption of equal time assume or assert that these good outcomes are the *consequence* of the shared-time arrangements.

Most shared-time arrangements tend to be made by separated parents who respect each other as parents, who cooperate, who can avoid or contain conflict when they communicate,[31] who can compromise,[32] and who have arrangements that are child-focused and flexible.[33] Often the arrangements result from private agreements, without the involvement of lawyers or courts.[34]

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see also Kitterød & Lyngstad, *supra* note 9, at 140 (finding the education pattern for mothers but not fathers, and the income pattern for fathers but not mothers).

25. HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES 281 (1995); *see also* KASPIEW ET AL., *supra* note 5, at 142; Smyth et al., *The Demography of Parent–Child Contact*, *supra* note 23, at 118.

26. IRVING & BENJAMIN, *supra* note 25, at 250; *accord* KASPIEW ET AL., *supra* note 5, at 168.

27. JUDY CASHMORE ET AL., SHARED CARE PARENTING ARRANGEMENTS SINCE THE 2006 FAMILY LAW REFORMS: REPORT TO THE AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT 66 (2010), *available at* http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/SharedCareParentingArrangementssincethe2006FamilyLawreformsreport.PDF.

28. Bauserman, *supra* note 15, at 91; *accord* CASHMORE ET AL., *supra* note 27; KASPIEW ET AL., *supra* note 5, at 169; *see also* Carlsund et al., *supra* note 11, at 1; Beata Jablonska & Lene Lindberg, *Risk Behaviours, Victimisation and Mental Distress Among Adolescents in Different Family Structures*, 42 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 656, 660 (2007).

29. *See, e.g.*, CASHMORE ET AL., *supra* note 27, at xii; KASPIEW ET AL., *supra* note 5, at 169; Thoroddur Bjarnason, Pernille Bendtsen, Arsaell M. Arnarsson, Ina Borup, Ronald J. Iannotti, Petra Löfstedt, Ilona Haapasalo & Birgit Niclasen, *Life Satisfaction Among Children in Different Family Structures: A Comparative Study of 36 Western Societies*, 26 CHILD SOC. 51 (2012); Pruett & Barker, *supra* note 22, at 446.

30. Bauserman, *supra* note 15, at 98; *see also* Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1, 16 (2005); Jennifer E. Lansford, *Parental Divorce and Children's Adjustment*, 4 PERSP. PSYCHOL. SCI. 140, 148 (2009).

31. *See* Pruett & Barker, *supra* note 22, at 435–36; *see also* IRVING & BENJAMIN, *supra* note 25, at 249; Frédérique Granet, *Alternating Residence and Relocation*, UTRECHT L. REV., June 2008, at 48, 51; Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 506 (1988); Smyth et al., *The Demography of Parent–Child Contact*, *supra* note 23.

32. Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223, 240 (2011).

33. *See* Bruce Smyth, Catherine Caruana & Anna Ferro, *Fifty/Fifty Care*, *in* PARENT–CHILD CONTACT AND POST-SEPARATION PARENTING ARRANGEMENTS, *supra* note 23, at 18, 29 [hereinafter Smyth et al., *Fifty/Fifty Care*]; *see also* CASHMORE ET AL., *supra* note 27, at xi; KASPIEW ET AL., *supra* note 5, at 168–69 (articulating from fathers' perspectives).

34. *See* IRVING & BENJAMIN, *supra* note 25, at 286 (noting that shared parents who had not

In some families, however, shared-time parenting occurs in the context of—or indeed might be the product of—entrenched high parental conflict.[35] While the cooperative-parenting group tends to choose shared-time and flexible parenting,[36] the highly conflicted group tends to have more rigid arrangements,[37] often imposed by a court. In these families, the shared-time regimes might reflect a need to resolve a dispute, or views about equal parental entitlement, more than a focus on the children's needs.[38] There is a strong consensus among most parenting-time scholars that shared-time arrangements can work well for children in the first group but badly for children in the high-conflict group, where children can be "caught and used"[39] in their parents' conflict.[40]

Between these extremes there are parents who manage shared-time parenting despite some conflict and mixed feelings about its workability.[41] Little is known about children's outcomes in this intermediate (ambivalent) group,[42] or indeed about the extent to which agreements for this group in particular are shaped or "reached in the shadow of a coercive law."[43] This group might be a potentially high-conflict group not yet stuck in acrimony and hostility[44] or a group that moves from ambivalence to more positive feelings once a shared-

involved a lawyer were more likely to be satisfied with the arrangement than those who had involved a lawyer); *see also* HELEN RHOADES, REG GRAYCAR & MARGARET HARRISON, FAM. CT. AUSTL., THE FAMILY REFORM ACT 1995: THE FIRST THREE YEARS, at vii (2000), *available at* http://www.familycourt.gov.au/wps/wcm/resources/file/ebab0a49e079ac3/famlaw.pdf; Smyth et al., *Fifty/Fifty Care*, *supra* note 33, at 29.

35. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILLEMAS OF CUSTODY 159, 277–78 (1992); *accord* KASPIEW ET AL., *supra* note 5, at 169.

36. CASHMORE ET AL., *supra* note 27, at xi.

37. *See* JENNIFER MCINTOSH ET AL., AUSTRALIAN GOV'T ATTORNEY GENERAL'S DEP'T, POST-SEPARATION PARENTING ARRANGEMENTS AND DEVELOPMENTAL OUTCOMES FOR INFANTS AND CHILDREN 51 (2010) [hereinafter MCINTOSH ET AL., POST-SEPARATION PARENTING ARRANGEMENTS], *available at* http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Post%20separation%20parenting%20arrangements%20and%20developmental%20outcomes%20for%20infants%20and%20children.pdf.

38. Carol Smart, *Equal Shares: Rights for Fathers or Recognition for Children?*, 24 CRIT. SOC. POL. 484, 490 (2004).

39. Janet R. Johnston, Marsha Kline & Jeanne M. Tschann, *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576, 579 (1989).

40. *See* CHRISTY BUCHANAN, ELEANOR E. MACCOBY & SANFORD DORNBUSCH, ADOLESCENTS AFTER DIVORCE 258 (1996); *see also* ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE 163–64 (2006); Paul R. Amato, *Life Span Adjustment of Children to Their Parents' Divorce*, 4 FUTURE CHILD 143, 150 (1994); Christy M. Buchanan, Eleanor E. Maccoby & Sanford M. Dornbusch, *Caught Between Parents: Adolescents' Experience in Divorced Homes*, 62 CHILD DEV. 1008 (1991); Pruett & Barker, *supra* note 22, at 445.

41. Pruett & Barker, *supra* note 22, at 445; *see also* DIANNE LYE, REPORT TO THE WASHINGTON STATE GENDER AND JUSTICE COMMISSION AND DOMESTIC RELATIONS COMMISSION 3–20 (1999); Gry Mette D. Haugen, *Children's Perspectives of Everyday Experiences of Shared Residence: Time, Emotions and Agency Dilemmas*, 24 CHILD & SOC.112 (2010); Smyth, *A Five Year Retrospective*, *supra* note 5, at 52.

42. Pruett & Barker, *supra* note 22, at 445.

43. Elizabeth Scott & Andre Derdyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 485 (1984).

44. Pruett & Barker, *supra* note 22, at 445.

time arrangement is bedded down.[45]

The amount of conflict and the way it is handled appear to be very significant for the well-being of children. For Robert Emery, shared-time parenting is the "best *and* worst" possible parenting arrangement for children after separation, depending on logistics, parental harmony, and responsiveness of the parenting arrangements to children's wishes, developmental needs, and temperament.[46] Children generally benefit from flexible and responsive arrangements. In high-conflict situations, their needs can be compromised by the use of detailed timeshare schedules intended to minimize the frequency of children's transitions between households, even though such "parallel parenting" strategies are sometimes seen as a workable solution for high parental conflict.[47] Such strategies can indeed be useful as interim measures,[48] but the current weight of social-science evidence does not provide strong support for good outcomes for children when parents are unable to communicate effectively (or cooperate).[49]

There is evidence suggesting that legislative and other changes encouraging shared-time parenting do have an impact.[50] But the research mentioned in the previous paragraphs underlies continuing concerns that shared-time arrangements might be increasing in families that will find it difficult to manage the arrangements in a way that benefits children. The Australian changes of 2006, which we will discuss below, seem to have contributed to an increasing proportion of shared-time orders in fully adjudicated proceedings.[51] A similar trend has recently been reported in Belgium where, following legislative change in 2006 favoring joint physical custody, an increase in joint custody among high-conflict families occurred.[52] But parents who are unable to agree and communicate, and thus need a court to determine their parenting arrangements, typically have the highest levels of conflict and are most at risk of not being able to cope with the logistical and emotional demands of shared-time parenting. Consequently, for some decades, scholars have expressed concern about whether such developments benefit children.

In their ground-breaking study of custody arrangements in California, Eleanor Maccoby and Robert Mnookin examined 166 cases in which joint custody had been ordered, mostly to implement negotiated or mediated

45. *See* Melinda Stafford Markham & Marilyn Coleman, *The Good, the Bad, and the Ugly: Divorced Mothers' Experiences with Coparenting*, 61 FAM. RELAT. 586 (2012).

46. *See* EMERY, *supra* note 40, at 163.

47. Philip Epstein & Lene Madden, *Joint Custody with a Vengeance: The Emergence of Parallel Parenting Orders*, 22 CAN. J. FAM. L. 1 (2004); *see also* Fabricius et al., *supra* note 14, at 211.

48. MACCOBY & MNOOKIN, *supra* note 35, at 292.

49. *See, e.g.*, LYE, *supra* note 41, at 4–18.

50. *See* KASPIEW ET AL., *supra* note 5, at 133 (noting that judicially determined cases involving shared-time arrangements increased from four percent prereform to thirty-four percent postreform, where parenting time was specified in court orders).

51. *Id.*

52. An Katrien Sodermans, Koen Matthjis & Gray Swicegood, *Characteristics of Joint Physical Custody Families in Flanders*, 28 DEMOGRAPHIC RES. 821, 840 (2013).

agreements. They found that over a third (36%) "involved substantial or intense legal conflict."[53] They considered the frequency with which high-conflict families used joint physical–custody decrees to resolve their disputes to be their "most disturbing" finding.[54] In the U.K. context, John Eekelaar and his colleagues had found a greater readiness to make joint-custody orders in contested cases than in uncontested ones, which suggested that such orders might be used "more as a compromise solution to a difficult problem than as a creative attempt to involve the absent parent with the child's future."[55] Similarly, Carol Smart and Bren Neale concluded that shared parenting "may represent an uneasy compromise or deadlock in a context where neither parent has managed to assert authority over the other."[56] And not surprisingly, an initial marked increase in judicially imposed shared-time arrangements after the reform in Australia has also attracted concern.[57]

Legislative encouragement of shared-time parenting arrangements was only one component of the Australian changes of 2006: As we shall see, the legislation was accompanied by much public discussion and consultation, new and expanded community-based support and mediation services, new legal processes, and child-support reform. Assessing the impacts of these changes and of their several components is therefore a complex task. A major evaluation of the changes was conducted,[58] and although this has contributed greatly to an informed assessment, debate continues, for example, about whether simpler and more child-focused legislation might have led to better outcomes.[59]

Australia is thus an interesting exemplar for exploring the behavioral effects of family-law reform because, as noted recently by researchers in the United States,[60] "a rare new opportunity" has arisen in Australia in the form a "natural

53. MACCOBY & MNOOKIN, *supra* note 35, at 159. *But see* Juby et al., *supra* note 6 (finding that shared-living arrangements were more frequent when parents reached agreement without legal intervention).

54. MACCOBY & MNOOKIN, *supra* note 35.

55. JOHN EEKELAAR, ERIC CLIVE, KAREN CLARKE & SUSAN RAIKES, CUSTODY AFTER DIVORCE: THE DISPOSITION OF CUSTODY IN DIVORCE CASES IN GREAT BRITAIN 68 (1977). More recently, also see Jennifer McIntosh & Richard Chisholm, *Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation*, 14 J. FAM. STUD. 37, 39 (2008); Suzanne Reynolds, Catherine T. Harris & Ralph A. Peeples, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1675–76 (2006).

56. CAROL SMART & BREN NEALE, FAMILY FRAGMENTS? 60 (1999).

57. *See* Michael Lamb, *Critical Analysis of Research on Parenting Plans and Children's Wellbeing*, *in* PARENTING PLAN EVALUATIONS 214, 229 (Kathryn Kuehnle & Leslie Drozd eds., 2012); *see also* FAMILY JUSTICE REVIEW, FINAL REPORT 140 (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162302/family-justice-review-final-report.pdf; Belinda Fehlberg, Bruce Smyth, Mavis Maclean & Ceridwen Roberts, *Legislating For Shared-Time Parenting After Separation: A Research Review*, 25 INT'L J.L. POL'Y & FAM. 318 (2011) [hereinafter Fehlberg et al., *Legislating For Shared-Time Parenting*].

58. *See* KASPIEW ET AL., *supra* note 5.

59. *See* Tim Carmody, *The 2006 Part VII Reforms: A Judicial Perspective*, 19 AUSTL. FAM. LAW. 22 (2006).

60. Fabricius et al., *supra* note 14, at 217; *see also* Janet R. Jeske, *Issues in Joint Custody & Shared Parenting: Lessons From Australia*, 68 BENCH & B. MINN. 20, 21 (2011).

experiment."[61] Given (1) the breadth and depth of the Australian reform package, (2) the fact that the Australian legislation has gone further than that of many other countries to encourage shared-time arrangements, and (3) the fact that a wealth of research evidence has begun to emerge in relation to shared-time parenting and children's outcomes,[62] the Australian experience of legislating to encourage shared-time parenting offers potential insights for other countries considering similar initiatives.

In the following discussion, we examine the Australian legislative and systemic changes and attempt to discover what impact they have had, and whether they might benefit children. We present evidence about Australia's postreform trends in parenting time in the hope—to adopt a rare Mnookin metaphor—of returning from the safari with game worth keeping.[63] We find that since the family-law changes in 2006, the prevalence of shared-time parenting in Australia has plateaued at fifteen percent of children of recently separated parents in the general population, and that separated parents in more recent groups—including shared-time families—appear to be less conflicted than earlier groups. We argue that a general reduction in conflict is most likely linked not to legislative changes encouraging shared parenting but to the introduction of mandatory mediation (when appropriate) supported by an integrated and nationally based network of child-focused dispute-resolution and family-relationship services.

II
THE NEW FAMILY-LAW SYSTEM IN AUSTRALIA

In Australia the care of children following family breakdown is mainly governed by federal laws, notably the Family Law Act 1975.[64] Jurisdiction under the Family Law Act 1975 is mainly exercised by the "family courts," namely the

61. Natural experiments are serendipitous real-world situations in which a significant policy shift affecting a distinct subpopulation occurs, and any changes that follow can be plausibly attributed to this shift on the basis of (1) longitudinal– or sequential–time series data collected prior to and following it, or (2) comparative work that makes use of variation in the timing of different reforms. *See, e.g.*, STEPHEN T. COOK & PATRICIA BROWN, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.–MADISON, RECENT TRENDS IN CHILDREN'S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN (2006), *available at* http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/Cook-Brown-Task3-2006.pdf; Allen et al., *supra* note 16; Emily M. Douglas, *The Impact of a Presumption For Joint Legal Custody on Father Involvement*, 39 J. DIVORCE & REMARRIAGE 1 (2003); Anna Lubrano Lavadera, Liliana Caravelli & Marisa Malagoli Togliatti, *Child Custody in Italian Management of Divorce*, 34 J. FAM. ISSUES 1536 (2012).

62. *See, e.g.*, Belinda Fehlberg, Christine Millward & Monica Campo, *Post-Separation Parenting in 2009: An Empirical Snapshot*, 23 AUSTL. J. FAM. L. 247 (2009) [hereinafter Fehlberg et al., *Post-Separation Parenting in 2009*]; CASHMORE ET AL., *supra* note 27; KASPIEW ET AL., *supra* note 5; MCINTOSH ET AL., POST-SEPARATION PARENTING ARRANGEMENTS, *supra* note 37.

63. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 282 (Summer 1975).

64. *See generally* BELINDA FEHLBERG & JULIET BEHRENS, AUSTRALIAN FAMILY LAW: THE CONTEMPORARY CONTEXT (2009). Child support is governed by separate federal legislation. *Child Support (Assessment) Act 1989* (Cth); *Child Support (Registration and Collection) Act 1988* (Cth).

specialist Family Court of Australia (and the Family Court of Western Australia in that state) and the Federal Circuit Court of Australia,[65] which now deals with around eighty percent of children's cases.

Initially, the Family Law Act 1975 had used the traditional language in providing for "custody," "access," and "guardianship" orders after family breakdown, and applied the familiar principle that the court must make the child's welfare (now "best interests") the "paramount consideration" when making such orders.[66] Apart from a reference to children's wishes,[67] it left the courts to determine the child's best interests according to the facts of each case. In 1983 a simple list of relevant considerations (which largely reflected the existing case law) was inserted.[68] That list was to be modified and lengthened by later amendments.[69] In particular, amendments in 1995 elaborated the list of relevant considerations, and added a new set of "principles" and "objects," which drew selectively on certain provisions in the United Nations Convention on the Rights of the Child.[70] The 1995 amendments, especially in the new principles and objects, gave special prominence to the value of children's relationships with both parents and to their need for protection against violence and abuse.

Following the U.K. lead, the amendments of 1995 also changed the traditional language: "Guardianship" was replaced by "parental responsibility," and the court could now make various parenting orders, namely, "residence" orders, "contact" orders, and "specific issues" orders.[71] In one respect this involved more than a change of language: The new residence orders, unlike the "custody" orders they replaced, dealt *only* with residence, and did not give the resident parent any greater powers than the other parent.[72] The intention was to ensure that the nonresident parent (typically the father) would continue to play a real parenting role, unless the court specifically made an order about parental responsibility that altered the otherwise-equal position between the parents.[73]

The 1995 amendments, although certainly worrying feminist scholars,[74] were by no means welcomed by the fathers' rights groups who had been active in the

65. Formerly the Federal Magistrates Court. *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth).

66. *Family Law Act 1975* (Cth) ss 61, 64.

67. *Id.* at s 64(1)(b).

68. *Family Law Amendment Act 1983* (Cth) (amending *Family Law Act 1975* (Cth) s 64).

69. *Family Law Amendment (Shared Parental Responsibility) Act 2006* sch 1 (enacting *Family Law Act 1975* (Cth) s 60CC); *Family Law Reform Act 1995* (Cth) s 31 (enacting *Family Law Act 1975* (Cth) s 68F).

70. *Family Law Reform Act 1995* (Cth) s 31 (enacting *Family Law Act 1975* (Cth) s 60B).

71. John Dewar, *The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared – Twins or Distant Cousins?*, 10 AUSTL. J. FAM. L. 18 (1996).

72. *Family Law Reform Act 1995* (Cth) s 31 (enacting *Family Law Act 1975* (Cth) s 64B(2)(a)).

73. Peter Nygh, *The New Part VII — An Overview*, 10 AUSTL. J. FAM. L. 4 (1996).

74. *See generally* Juliet Behrens, *Ending the Silence, But . . . Family Violence Under the Family Law Reform Act 1995*, 10 AUSTL. J. FAM. L. 35 (1996).

lead-up to those amendments,[75] and continued vigorous lobbying after the amendments passed.[76] These critics argued that despite the 1995 amendments, one parent, mainly the mother, still tended to receive primary care for the children and in practice carried out most of the parenting, while the other parent, usually the father, was little more than a visitor.[77] They argued that the problem could be cured only by legislating for a rebuttable presumption that children should spend equal time with each parent after family separation.[78] This led the government to establish a parliamentary committee to consider "whether there should be a presumption that children will spend equal time with each parent, and, if so, in what circumstances such a presumption could be rebutted."[79] After much public debate, the committee rejected that proposal but recommended a variety of measures to help parents resolve disputes out of court, and to encourage the involvement of both parents.[80] After public discussion and further reports, amending legislation was passed, and other measures were implemented in 2006.[81] The amendments in 2006[82] set a new high-water mark for encouraging parents to be fully involved in their children's lives after separation and were described as the "most radical reform of [Australian] family law" since 1975, when no-fault divorce was introduced.[83] The key elements were (1) shared-parenting amendments, (2) changes to legal processes, (3) changes to services, and (4) changes to child support.[84]

A. Shared-Parenting Amendments

The 2006 amending Act, introduced on July 1, created for the first time a presumption of "equal shared parental responsibility" (rebuttable when not in the best interests of the child, and not applicable in such circumstances as child abuse or family violence).[85] Although this presumption refers to parental

75. *See, e.g.*, Margaret Harrison & Regina Graycar, *The Family Law Reform Act: Metamorphosis or More of the Same?*, 11 AUSTL. J. FAM. L. 327 (1997).

76. Miranda Kaye & Julia Tolmie, *Fathers' Rights Groups in Australia and Their Engagement with Issues in Family Law*, 12 AUSTL. J. FAM. L. 19 (1998); *accord* Helen Rhoades, *Children's Needs and "Gender Wars": The Paradox of Parenting Law Reform*, 24 AUSTL. J. FAM. L. 160 (2010).

77. STANDING COMM. ON FAMILY & CMTY. AFFAIRS, HOUSE OF REPRESENTATIVES, EVERY PICTURE TELLS A STORY: REPORT ON THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION 19 (2003), *available at* http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=fca/childcustody/report/fullreport.pdf.

78. *Id.*

79. *Id.* at xvii.

80. *Id.*

81. On the background to the legislation generally, see Richard Chisholm, *Making it Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006*, 21 AUSTL. J. FAM. L. 143 (2007) [hereinafter Chisholm, *Making it Work*].

82. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

83. Patrick Parkinson, *Keeping in Contact: The Role of Family Relationship Centres in Australia*, 18 CHILD FAM. L.Q. 158 (2006) [hereinafter Parkinson, *Keeping in Contact*]; *see also* Patrick Parkinson, *The Idea of Family Relationship Centres in Australia*, 51 FAM. CT. REV. 195 (2013).

84. Smyth, *A Five Year Retrospective*, *supra* note 5.

85. *Family Law Act 1975* (Cth) s 61DA; *see also* FEHLBERG & BEHRENS, *supra* note 64, at 266–67.

decisionmaking, there is a connection with the time the children should spend with each parent. If an order is made for equal-shared parental responsibility, then the court is required to "consider" making orders for the children to spend "equal" or else "substantial and significant" *time* with each parent where such arrangements are in children's "best interests" and are "reasonably practicable."[86] The guidelines specifically refer to the benefit to children of having a "meaningful relationship" with both their parents, provided that the children are protected from harm.[87] Mediators, lawyers, family counselors, family consultants, and other advisers are required to take these principles into account.[88] These provisions require the court to consider equal or shared time as a possible outcome, and emphasize the benefits of parental involvement.[89] The provisions seek to mark a clear departure from any legal expectation that the normal or usual outcome will be "one home, one authority" in which one parent (almost invariably the mother) has primary responsibility for children.[90]

The resulting legislation did not actually create a presumption of equal time, but it came close, because equal time (or "substantial and significant time") was the *only* outcome that the court was specifically required to consider when ordering equal-shared parental responsibility.[91] The link between this requirement and the presumption of equal-shared parental *responsibility*, combined with other complexities, created confusion and gave many people the impression that equal or shared care was the default presumption.[92] The focus on equal time exemplifies an increasing trend toward the mathematization of parenting time in children's law and in practice. Equal time in particular has taken on the status of a "legal number."[93] It has acted as a cognitive and emotional anchor when people try to apply the porous "best interests of the child" rule, and has given parents something concrete to fight about.[94] The words "equal time" send a "radiating message" about what parenting arrangements separated parents ought to be making, or what would be the "starting position" or best outcome if things went to court.[95] This was illustrated

86. *Family Law Act 1975* (Cth) ss 61DA, 65DAA; *see also* FEHLBERG & BEHRENS, *supra* note 64; McIntosh & Chisholm, *supra* note 55.

87. *Family Law Act 1975* (Cth) s 60CC.

88. *See Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 62DA(2).

89. *Family Law Act 1975* (Cth) s 65DAA.

90. FEHLBERG & BEHRENS, *supra* note 64, at 267; ISOLINA RICCI, MOM'S HOUSE, DAD'S HOUSE: MAKING TWO HOMES FOR YOUR CHILD 166 (1997) (using the phrase "one home, one authority").

91. *See Family Law Act 1975* (Cth) s 60DAA.

92. KASPIEW ET AL., *supra* note 5, at 207-08; Rick O'Brien, *Simplifying the System: Family Law Challenges – Can the System Ever be Simple?*, 16 J. FAM. STUD. 264, 266 (2010).

93. Bruce Smyth, *Time to Rethink Time? The Experience of Time with Children After Divorce*, 71 FAM. MATTERS 4, 8 (2005) [hereinafter Smyth, *Time to Rethink Time?*]; *see also Editors' Introduction to Judgment by the Numbers: Converting Qualitative to Quantitative Judgments in Law*, 8 J. EMPIR. LEGAL STUD. (SPECIAL ISSUE) 1, 2 (2011).

94. *See* KASPIEW ET AL., *supra* note 5; O'Brien, *supra* note 92.

95. *See* Sonia Harris-Short, *Resisting the March Towards 50/50 Shared Residence: Rights, Welfare and Equality in Post-Separation Families*, 32 J. SOC. WELFARE & FAM. L. 257, 258 (2010); *see also*

by reports of many fathers walking into mediators' and lawyers' offices around Australia with the opening statement, "I'm here for my 50/50."[96] Mistaking the presumption of equal-shared parental *responsibility* for a presumption of equal *time*[97] is understandable. Reflecting on the ambiguity of the legislation, a senior legal practitioner in Australia wrote, "A law that cannot be understood by the people affected by it – or worse still lends itself to being actively misunderstood – is a bad law. That is particularly so when we are talking about a law that affects families and children."[98]

By 2009 there was evidence of such confusion and increasing concern that the emphatic endorsement of parental involvement might have exposed some children to violence or abuse.[99] Influenced by published reports,[100] the government took the view that the emphasis on parental involvement should be balanced by greater protection against such abuse. This view was implemented by a number of amendments to the Family Law Act 1975 in 2011,[101] notably an expanded definition of "family violence,"[102] provisions to increase the chances that violence concerns would come to courts' attention,[103] and a provision mandating that courts attach "greater weight" to child protection when determining what is in a child's best interests.[104]

Australia has not been alone in making such a readjustment. In the U.S. context, Katharine Bartlett has observed,

> A few states do lean further in the direction of joint custody, but the more they lean, the more other rules seem to counteract their effects . . . . The most significant development in custody law in the past five to ten years is an increasing legal protection for parents and their children from domestic violence.[105]

B. Changes to Legal Processes

The changes of 2006 included, first, as the government put it, "a major change to the family-law system focusing on resolving disputes outside the

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ANDRINA HAYDEN, SHARED CUSTODY: A COMPARATIVE STUDY OF THE POSITION IN SPAIN AND ENGLAND 24 (2011), *available at* http://www.indret.com/pdf/795_en.pdf.

96. See O'Brien, *supra* note 92; *see also* KASPIEW ET AL., *supra* note 5.

97. KASPIEW ET AL., *supra* note 5, at 408; Fehlberg et al., *Post-Separation Parenting in 2009*, *supra* note 62, at 271; *see also* O'Brien, *supra* note 92, at 265.

98. O'Brien, *supra* note 92, at 265; s*ee also* RENATE KRÄNZL-NAGL, EUROPEAN CTR. FOR SOC. WELFARE POLICY & RESEARCH, JOINT CUSTODY AFTER DIVORCE: AUSTRIAN EXPERIENCES 3 (2006), *available at* http://www.euro.centre.org/data/1164623691_43750.pdf.

99. *See generally* CASHMORE ET AL., *supra* note 27; RICHARD CHISHOLM, FAMILY COURTS VIOLENCE REVIEW (2009); FAMILY LAW COUNCIL, IMPROVING RESPONSES TO FAMILY VIOLENCE: AN ADVICE ON THE INTERSECTION OF FAMILY VIOLENCE AND FAMILY LAW ISSUES 2009; KASPIEW ET AL., *supra* note 5; MCINTOSH ET AL., POST-SEPARATION PARENTING ARRANGEMENTS, *supra* note 37.

100. *See generally* sources cited *supra* note 99.

101. *See* Richard Chisholm, *The Family Law Violence Amendment of 2011*, 25 AUSTL. J. FAM. L. 79 (2011).

102. *Family Law Act 1975* (Cth) s 4AB.

103. *Id.* at ss 60CC(3)(k), 60CH, 60CI.

104. *Id.* at s 60CC(2A).

105. Bartlett, *supra* note 21; *see generally* COOK & BROWN, *supra* note 61.

courts" and, second, legislative changes to make family-law children's cases "less adversarial and less likely to escalate conflict."[106] In each aspect the changes were indeed significant, but they were developments of themes established earlier, particularly in the original 1975 Act.[107] The intention had always been to assist people in resolving their disputes rather than having them adjudicated; to that end the Family Court of Australia was equipped with "family court counsellors" and registrars who used mediation and counseling techniques to help litigants resolve issues relating to their children and money.[108] These dispute-resolution processes by court staff appear to have worked well,[109] but over the years there was a move away from the court-centric model of conferences conducted on court premises towards community-based family-relationship support and dispute-resolution services.[110] The term "mediation" and the more generic term "alternative dispute resolution" began to be used increasingly by services both outside and inside the court.[111]

In 2006 the government invested substantial additional funds in further expanding community-based counseling and support services rather than court-based services.[112] It also inserted new legislative provisions to the effect that, in general,[113] parties could not bring court proceedings unless they could certify that they had attempted to resolve their disputes with the help of a registered "family dispute resolution practitioner."[114]

In addition, a "less adversarial" approach in court, comprising legislative support for judges to play a more interventionist role in court proceedings, was also introduced. This approach essentially amounted to a statement of principles and a set of new powers, including the power to dispense with many of the more restrictive rules of evidence.[115] This was a departure from the

106. John Winston Howard, Prime Minister, Austl., Framework Statement on Reforms to the Family Law System (July 29, 2004).

107. Parkinson, *Keeping in Contact*, *supra* note 83, at 159.

108. Lawrie Moloney, Bruce Smyth & Kim Fraser, *Beyond the Formula: Where Can Parents Go to Discuss Child Support Together?*, 16 J. FAM. STUD. 33 (2010) [hereinafter Moloney et al., *Beyond the Formula*].

109. *See* Lawrie Moloney, *From Helping Court to Community-Based Services: The 30-Year Evolution of Australia's Family Relationship Centres*, 51 FAM. CT. REV. 214 (2013). Although there appears to have been no documented review of the Australian court-based service, it attracted only favorable comments from lawyers—many of whom had previously been skeptical—in a survey conducted shortly before the 2006 changes were coming into effect. *See* KASPIEW ET AL., *supra* note 5.

110. Moloney et al., *Beyond the Formula*, *supra* note 108, at 36

111. *Id*.

112. Parkinson, *Keeping in Contact*, *supra* note 83, at 158. Interestingly, there was little acknowledgment of the fact that the court-based services were essentially being replaced by those in the community, and no reference to the literature on the relative merits of court-based and community-based services.

113. *See Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 60I. There were, of course, exceptions, such as cases of violence or urgency. *See id.* at s 60I(9)

114. *See id.* at s 60I. Previously the Family Law Rules had imposed a similar requirement, but it was enforceable only by the threat of an adverse costs order (which, however, was at the court's discretion).

115. MARGARET HARRISON, FAMILY COURT OF AUSTL., FINDING A BETTER WAY: A BOLD DEPARTURE FROM THE TRADITIONAL COMMON LAW APPROACH TO THE CONDUCT OF LEGAL

traditionally passive role of the judge in "adversarial" proceedings, although there had been earlier judicial suggestion—not much of which translated into practice—that children's cases should be less adversarial.[116] An important part of the change was the new role of the court-based "family consultant" (the former "court counselor" in a new guise).[117] While retaining the role of child-focused facilitator, the family consultant provides advice when appropriate and is able to report and make recommendations to the court.[118] The confidentiality provisions of the previous court-counselor role no longer exist.[119]

The introduction of "less adversarial" processes took the Australian family courts a little away from the traditional approach and toward the more interventionist role that is found, for example, in European systems.[120] And the introduction of mandatory mediation is consistent with the emerging trend in American family law "away from an adversarial approach toward a more consensual, therapeutic approach,"[121] in which parenting disputes are redirected away from family-law courts and toward more child-focused family dispute–resolution services.[122] These services, addressed in the next subpart, thus play a critical role in the new Australian family-law system.

C. Creation and Expansion of Services

One of the central planks of the Australian reforms was the introduction of new and expanded community-based programs to help families strengthen relationships or deal constructively with separation-related disputes.[123] The centerpiece of these changes was the funding of a network of sixty-five Family Relationship Centres (FRCs) around Australia.[124] These centers are run by nongovernment organizations, are staffed mostly by professional counselors and mediators, and act as an early-intervention strategy to help separating

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PROCEEDINGS (2007), *available at* http://www.familycourt.gov.au/wps/wcm/resources/file/ebc70645b58cf92/Finding_Better_Way_April2007.pdf. The legislation drew on the experimental "children's cases program" that had been conducted by the Family Court of Australia (and independently reviewed) shortly before the 2006 reforms. *Id.*

116. *See, e.g.*, *Separate Representative v J H E and G A W* (1993) 16 Fam LR 485, 498–500.

117. HARRISON, *supra* note 115, at 51.

118. *Id*.

119. *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 11C(1) (permitting communications with family consultants to be admitted as evidence).

120. HARRISON, *supra* note 115.

121. Gwyneth I. Williams, *Looking at Joint Custody Through the Language and Attitudes of Attorneys*, 26 JUST. SYS. J. 1, 4 (2005).

122. Parkinson, *Keeping in Contact*, *supra* note 83, at 174.

123. *See* KASPIEW ET AL., *supra* note 5 (summarizing new and expanded services associated with the 2006 reforms).

124. AUSTRALIAN GOV'T, A NEW FAMILY LAW SYSTEM: GOVERNMENT RESPONSE TO *EVERY PICTURE TELLS A STORY* (2005), *available at* http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/Archived%20family%20law%20publications/A%20new%20family%20law%20system%20-%20Government%20response%20to%20Every%20picture%20tells%20a%20story%20June%202005.pdf; Parkinson, *Keeping in Contact*, *supra* note 83, at 157.

parents work out their parenting arrangements.[125] The centers provide information, referrals, and individual intake sessions plus one joint-mediation session free of charge.[126] Two additional joint sessions are free to low-income families.[127]

FRCs provide a nonadversarial and inexpensive gateway into the family-law system and act as a referral hub for access to other parts of the system.[128] An important role of FRC staff is to make facilitated ("warm") referrals to other sources of assistance for their clients. That assistance might, for example, be therapeutic, legal, court based, or educational. It might also include information on where a safe refuge might be found, or how child support can be applied for or modified. Thus in addition to providing direct (mainly information and mediation) services, the centers provide high-quality triage processes at points of intake for families in need of assistance.

To support the work of FRCs, a new national telephone service, the Family Relationship Advice Line, was set up.[129] This service provides information on family-relationship issues and advice on parenting arrangements after separation.[130] The advice line can also refer callers to local services that are able to provide more specialized assistance.[131] Thus, the advice line not only augments the information and services offered by FRCs but also ensures that people who are unable to attend a center can be helped.

The government also funded two innovative divorce-mediation programs pioneered by Jennifer McIntosh and her colleagues: "child-focused" mediation and "child-inclusive" mediation.[132] In child-focused mediation, the mediator actively seeks to educate parents on the needs of their children—especially the importance of containing conflict—and prioritizes the crafting of

125. Parkinson, *Keeping in Contact*, *supra* note 83, at 159.

126. *Id.*

127. *See* FAMILY RELATIONSHIPS ONLINE, FAMILY RELATIONSHIPS CENTRES - HELPING FAMILIES BUILD BETTER RELATIONSHIPS 2 (2014), *available at* http://www.familyrelationships.gov.au/BrochuresandPublications/Documents/frc_brochure.pdf.

128. Moloney et al., *Beyond the Formula*, *supra* note 108; Parkinson, *Keeping in Contact*, *supra* note 83, at 159.

129. *See The Family Relationship Advice Line*, FAM. RELATIONSHIPS ONLINE, http://www.familyrelationships.gov.au/services/fral/pages/default.aspx (last modified Apr. 22, 2014).

130. *Id.*

131. Sue Pidgeon, *From Policy to Implementation—How Family Relationship Centres Became a Reality*, 51 FAM. CT. REV. 105, 228 (2013).

132. *See* Jennifer McIntosh, Caroline Long & Lawrie Moloney, *Child-Focused and Child-Inclusive Mediation: A Comparative Study of Outcomes*, 10 J. FAM. STUD. 87 (2004) [hereinafter McIntosh et al., *Child-Focused and Child-Inclusive Mediation*]; *see also* JENNIFER MCINTOSH, AUSTL. INST. OF FAM. STUDS., CHILD INCLUSION AS A PRINCIPLE AND AS EVIDENCE-BASED PRACTICE: APPLICATIONS TO FAMILY LAW SERVICES AND RELATED SECTORS 1 (2007) [hereinafter MCINTOSH, CHILD INCLUSION AS A PRINCIPLE], *available at* http://www.aifs.gov.au/afrc/pubs/issues/issues1/issues1.pdf; Jennifer McIntosh, Yvonne Wells, Bruce Smyth & Caroline Long, *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes From a Prospective Study of Post-Separation Adjustment*, 46 FAM. CT. REV. 105 (2008) [hereinafter McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation*]; Lawrie Moloney & Jennifer McIntosh, *Child Responsive Practices in Australian Family Law: Past Problems and Future Directions*, 10 J. FAM. STUD. 71 (2004).

developmentally sensitive parenting plans.[133] Child-inclusive mediation does this too except that, in addition, a trained child specialist works with the children in a "supportive, developmentally appropriate" manner to build up a picture of their world, especially "their experience of their parents' separation and dispute," and then sensitively conveys this back to parents and the mediator(s) as part of the dispute-resolution process.[134] Although both approaches have been shown to reduce parental conflict, child-inclusive practice is particularly effective in acting as a "wake-up call" to disputing parents who might have lost sight of key needs of their children.[135] Interestingly, in research exploring the relative efficacy of the two forms of mediation, fathers assigned to the child-inclusive practice group were less likely to pursue shared-time arrangements than fathers in the child-focused mediation group and were more content with the parenting arrangements.[136] Child-inclusive practice is now offered by many family dispute–resolution services in the family-law system, while child-focused mediation is the mainstay of divorce mediation practice in Australia.[137]

Family Law Pathways Networks around Australia were also set up to bring together a wide range of family-law professionals from local regions—including judicial officers, lawyers, mediators, counselors, and financial planners—to exchange information and ideas, discuss the latest research findings and "best practice" initiatives, build stronger working relationships, and engage in cross-sector training and professional development.[138] In the United States, William Fabricius and his colleagues have suggested that the informal culture of professionals can indeed be a powerful instrument of change.[139] The Family Law Pathways Networks strengthen the collaborative referral capacity of group members, help break down barriers between and within professions, and improve understanding of the different roles and strengths within the network.[140] Each network operates in its own way so that it can tailor its approach to the unique geography and demography of its region.[141]

To sum up, the government's commitment to fund and strongly encourage the use of a significantly increased range of family dispute–resolution and supportive and protective services represents the backbone of the new

133. MCINTOSH, CHILD INCLUSION AS A PRINCIPLE, *supra* note 132; McIntosh et al., *Child-Focused and Child-Inclusive Mediation*, *supra* note 132.

134. MCINTOSH, CHILD INCLUSION AS A PRINCIPLE, *supra* note 132, at 5.

135. *Id.* at 12.

136. McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation*, *supra* note 132, at 118.

137. MCINTOSH, CHILD INCLUSION AS A PRINCIPLE, *supra* note 132, at 21.

138. ENCOMPASS FAMILY & COMMUNITY, MAPPING THE PATHWAYS: FAMILY LAW PATHWAYS NETWORKS IN QUEENSLAND 2010–11, at 3 (2011).

139. Fabricius et al., *supra* note 14.

140. *See generally* ENCOMPASS FAMILY & CMTY., INDEPENDENT REVIEW OF THE FAMILY LAW PATHWAYS NETWORKS (2012), *available at* http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/IndependentReviewoftheFamilyLawPathwaysNetworks.PDF.

141. *See Family Law Pathways Network*, FAM. RELATIONSHIPS ONLINE, http://www.familyrelationships.gov.au/ProfessionalResources/FPN/Pages/default.aspx (last modified Sept. 9, 2010).

Australian family-law system. These initiatives are important context for understanding any behavioral effects of legislating to encourage shared-time parenting after separation.

D. Changes to the Australian Child Support Scheme

The Australian Child Support Scheme was introduced in the late 1980s to tackle child poverty and minimize public expenditure.[142] The existing court-based discretionary system of assessment was producing typically low and varied child maintenance amounts. Adjusting or enforcing maintenance through this system was expensive and time-consuming, and thus off-putting to those eligible for support (mostly mothers). There was also substantial economic pressure to reduce government expenditure on social security amid rapidly increasing rates of sole parenthood.[143] The Child Support Agency was established to assess (via an administrative formula), collect (via auto-withholding or private arrangements), and transfer child-support payments.[144] Although the scheme has reinforced broad acceptance of the need for children to receive financial support from both parents, it, like most other child-support systems, has struggled to keep pace with social change.[145]

Between 2006 and 2008, sweeping changes were implemented featuring a dramatically different system for the calculation of child support.[146] Specifically, on July 1, 2008, Australia moved from a percent-of-obligor-income model—whereby child support is based on a flat percentage of the nonresident parent's income—to an income-shares approach—which accounts for the relative incomes of each parent.[147] The new formula also sought more equal treatment of both parents (for example, by allowing them the same self-support amount within the formula), encouragement of shared parenting (by lowering the level at which a reduction in payments first occurs from 30% to 14% of nights and changing the level at which larger *shared* time–parenting adjustments occur from 30% to 35% of nights), and improvement to the way that the costs of caring for children in second families are taken into account.[148] A strengthened enforcement regime was also introduced,[149] along with an intensive community-

142. MINISTERIAL TASKFORCE ON CHILD SUPPORT, IN THE BEST INTERESTS OF CHILDREN—REFORMING THE CHILD SUPPORT SCHEME 2 (2005), *available at* http://www.dss.gov.au/sites/default/files/documents/best_interests_children_full_report.pdf.

143. *Id*.

144. *Id.*

145. *Id.*

146. Bruce Smyth & Paul Henman, *The Distributional and Financial Impacts of the New Australian Child Support Scheme: A 'Before and Day-After Reform' Comparison of Assesses Liability*, 16 J. FAM. STUD. 5, 7 (2008).

147. *Id.* at 9.

148. *Id*. at 9–11.

149. *See* AUSTRALIAN NAT'L AUDIT OFFICE, DEP'T OF HUMAN SERVS., ANAO AUDIT REPORT NO. 46 2009–10, CHILD SUPPORT REFORMS: STAGE ONE OF THE CHILD SUPPORT SCHEME AND IMPROVING COMPLIANCE 53–74, *available at* http://www.anao.gov.au/uploads/documents/2009-10_audit_report_19.pdf.

education program, and a shift to a customer-focused organizational culture, including improved communication with parents.[150]

Although all of these changes are important, lowering the parenting-time threshold at which child support is reduced has meant that a greater number of separated parents than before are potentially affected by parenting-time adjustments—creating greater potential for strategic bargaining over child support and parenting time at lower levels of care.[151]

III
RECENT TRENDS IN SHARED-TIME PARENTING IN AUSTRALIA

In this part we explore the impact of the recent changes in shared parenting, drawing on three new sources of data. There is a surprising lack of reliable international data on the prevalence of shared-parenting time given the widespread interest in it. Obtaining reliable estimates is difficult: Court data are often lacking,[152] and it is hard to obtain large representative samples of shared-time families because shared-time parenting, although on the rise, is still relatively uncommon and more fluid than more traditional arrangements.[153] Where data do exist, comparative work is bedeviled by different studies' varying definitions, units of analyses, and sampling strategies.[154]

In this part, three new sources of Australian data on pre- and postreform trends in parenting time are presented: (1) administrative data from the Australian Child Support Agency, (2) survey data from three cohorts of recently separated parents registered with the Child Support Agency, and (3) administrative data from the Family Court of Australia. These three sources currently comprise the most recent nationally representative time-series data on shared-time parenting in Australia.

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150. AUSTRALIAN NAT'L AUDIT OFFICE, DEP'T OF HUMAN SERVS., ANAO AUDIT REPORT NO. 46 2009–10, CHILD SUPPORT REFORMS: BUILDING A BETTER CHILD SUPPORT AGENCY 14–15 (2010), *available at* http://www.anao.gov.au/~/media/Uploads/Documents/2009%202010_audit_report_46.pdf.

151. Bruce Smyth, Bryan Rodgers, Vu Son, Liz Allen & Maria Vnuk, *Separated Parents' Knowledge of How Changes in Parenting-Time Can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre-/Post-Reform Comparison*, 26 AUSTL. J. FAM. L. 181 (2012) [hereinafter Smyth et al., *Separated Parents' Knowledge of How Changes in Parenting-Time Can Affect Child Support Payments*].

152. Douglas W. Allen & Margaret Brinig, *Do Joint Parenting Laws Make Any Difference?*, 8 J. EMPIR. LEGAL STUD. 304, 305 (2011).

153. Richard Cloutier & Christian Jacques, *Evolution of Residential Custody Arrangements in Separated Families: A Longitudinal Study*, 28 J. DIVORCE & REMARRIAGE 17, 27 (1998); *see also* Bruce Smyth, Ruth Weston, Lawrie Moloney, Nick Richardson & Jeromey Temple, *Changes in Patterns of Post-Separation Parenting Over Time: Recent Australian Data*, 14 J. FAM. STUD. 23, 34 (2008) [hereinafter Smyth et al., *Changes in Patterns of Post-Separation Parenting*]. *But see* LAWRENCE M. BERGER, PATRICIA R. BROWN, EUNHEE JOUNG, MARYGOLD S. MELLI & LYNN WIMER, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.–MADISON, THE STABILITY OF SHARED CHILD PHYSICAL PLACEMENTS IN RECENT COHORTS OF DIVORCED WISCONSIN FAMILIES at 29 (2007), *available at* http://www.irp.wisc.edu/publications/dps/pdfs/dp132907.pdf.

154. Thoroddur Bjarnason & Arsaell M. Arnarsson, *Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries*, 42 J. COMP. FAM. STUD. 871, 873 (2011); Irving & Benjamin, *supra* note 25, at 237.

Consistent with prior studies in the U.S. and Australian contexts,[155] "shared-time parenting" is defined here as arrangements that involve children spending at least thirty percent of their time with each parent. This threshold also has a practical edge: In Australia and several U.S. states,[156] a formulaic adjustment to child support is applied at the thirty-percent parenting-time threshold thereby reducing a nonresident parent's child-support liability to help with the infrastructure costs of regular overnight stays.[157]

Shared-time parenting, according to Marygold Melli and her colleagues, actually encompasses two parenting arrangements: *equal*-time parenting, involving a roughly 50–50 division of parenting time, and substantial *unequal* shared–time parenting, involving timeshares of over 30% (for example, a 30%–70%, 35%–65% or 40%–60% time split).[158] Important differences have been found between equal and unequal shared–time arrangements: unequal time is typically more prevalent and less stable than equal (or near-equal) time, and possibly involves more parental discord.[159] Although some studies have started to disaggregate each care type,[160] the results presented below do not do so because the administrative data are not amenable to the analysis of more complex disaggregation.

A. Administrative Data from the Australian Child Support Agency

The Child Support Agency caseload currently represents the most recent and comprehensive sampling frame of separated parents in Australia with at least one dependent child. Around eighty-five to ninety percent of all separated parents in Australia are registered with the agency.[161] This is in large part because resident parents must register with the agency to receive government income support and family benefits (with some exemptions, such as for family

155. Melli & Brown, *supra* note 3; *accord* MCINTOSH ET AL., POST-SEPARATION PARENTING ARRANGEMENTS, *supra* note 37; Smyth et al., *Changes in Patterns of Post-Separation Parenting*, *supra* note 153; *see also* Arthur Baker & Peter Townsend, *Post-Divorce Parenting – Rethinking Shared Residence*, 8 CHILD FAM. L.Q. 217 (1996).

156. In the U.S. context, the modal threshold for applying a formulaic adjustment for shared-parenting time is thirty percent. *See* Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415, 423 (2005). In 2008, Australia changed the threshold for applying a formulaic adjustment for *shared*-time parenting from thirty percent to thirty-five percent of time. We refer to the thirty-percent threshold here because this threshold is used for the bulk of the time-series analyses.

157. MINISTERIAL TASKFORCE ON CHILD SUPPORT, *supra* note 142; Smyth & Henman, *supra* note 146.

158. Dorothy R. Fait, Vincent M. Wills & Sylvia F. Borenstein, *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. B.J. 12 (2012).

159. *See, e.g.*, MARGARET L. KRECKER, PATRICIA BROWN, MARYGOLD S. MELLI & LYNN WIMER, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.–MADISON, CHILDREN'S LIVING ARRANGEMENTS IN DIVORCED WISCONSIN FAMILIES WITH SHARED PLACEMENT 2 (2003), *available at* http://www.irp.wisc.edu/publications/sr/pdfs/sr83.pdf.

160. KASPIEW ET AL., *supra* note 5; KRECKER ET AL., *supra* note 159.

161. STANDING COMM. ON FAMILY & CMTY. AFFAIRS, *supra* note 77, at 127.

violence).[162] The agency is in a unique position in that it collects longitudinal unit-record data about children and their parents from the date of registration for child support (typically shortly after separation) until the relevant children turn eighteen years old.[163] It receives updated information (including changes in income and parenting time) from several sources: annual tax returns, government income-support or family-benefit reporting requirements by clients, and updated information from clients themselves, often in response to the agency's periodic assessment notices that are sent to each parent.[164]

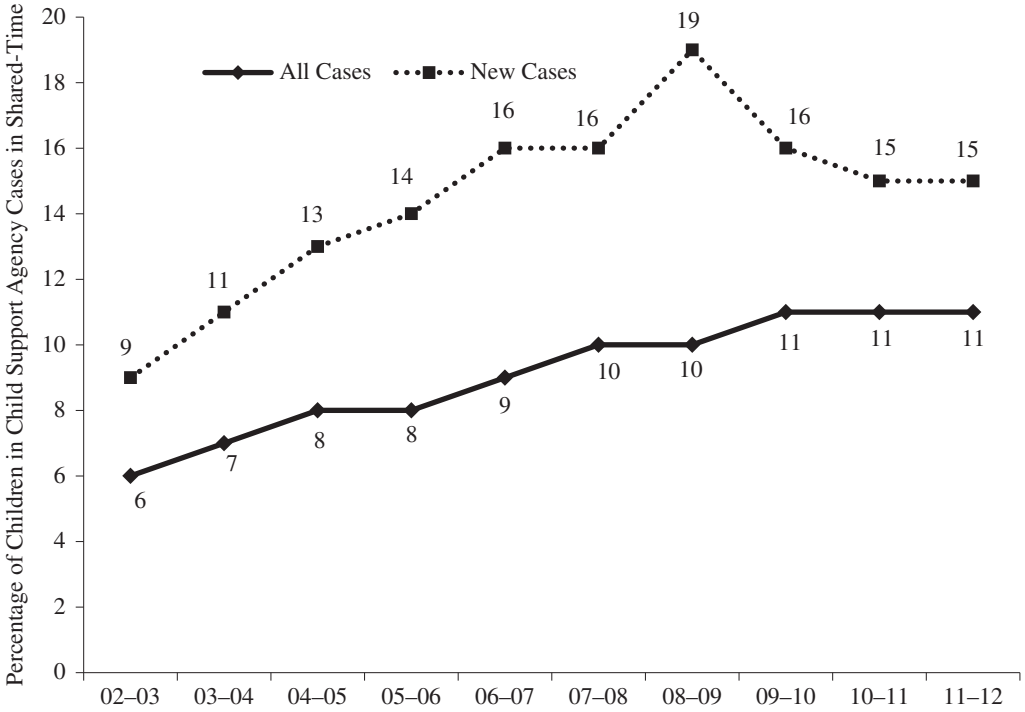
Figure 1 shows the percentage of children in shared-time arrangements registered with the Child Support Agency for the fiscal years 2002 through 2012 (as of June 30 of each year). New cases (that is, recent separations at the time) are shown separately from the cumulative active caseload to illuminate possible cohort differences. For consistency, the same shared-time parenting threshold (at least thirty percent of nights with each parent) is used for all time periods, even though different parenting time–adjustment thresholds were introduced after July 1, 2008.

162. Not much is known about the small group of those who do not register. There is some evidence that parents who stay outside of the Australian Child Support Scheme tend to be more affluent and have more cooperative coparental relationships than those in the scheme. There are obviously many reasons that separated parents might prefer to administer their own child-support arrangements than involve a government agency.

163. AUSTRALIAN NAT'L AUDIT OFFICE, DEP'T OF HUMAN SERVS., ANAO AUDIT REPORT NO. 16 2007–08, DATA INTEGRITY IN THE CHILD SUPPORT AGENCY 29 (2007), *available at* http://www.anao.gov.au/~/media/Uploads/Documents/2007%2008_audit_report_16.pdf

164. MINISTERIAL TASKFORCE ON CHILD SUPPORT, *supra* note 142, at 66.

Figure 1: Percentage of Children in Shared-Time Arrangements, 2002–2012



Notes: "shared-time" denotes parenting arrangements where children are with each parent for at least thirty percent of the time.

Source: Customized tables supplied by the Australian Child Support Agency.

Figure 1 has three standout features. First, the proportion of children in shared-time arrangements has increased steadily over the past decade—almost doubling from a low base of 6% in 2002–2003 to 11% in 2011–2012 (bottom line). There is no dramatic increase in shared-time parenting following the amendments of 2006, either among new cases or in the cumulative caseload (both lines). The lack of fit between the strongly worded legislation of 2006 and the prevalence of shared-time parenting over the period suggests that other factors must have played a major part. We return to this point in the concluding discussion.

Second, in the new cases (top, dotted line) the proportion of children in shared-time arrangements started at a higher level than the mostly older cases in the cumulative caseload (9% of children compared with 6% of children) and increased at a more rapid rate up until 2008–2009 than cases in the total caseload.

Third, the proportion of children in shared-time arrangements in new cases peaked at 19% in 2008–2009 (top line). This spike occurred just after the new child-support formula came into effect. It is unclear to what extent this spike among children in new cases might reflect (1) an increase in strategic bargaining

over child support and parenting time because of the lower parenting time–adjustment threshold, (2) a greater awareness of shared-time parenting because of the Child Support Agency's intensive community education program about the reforms (thereby creating opportunities for families to reconsider their arrangements or to try a shared-time arrangement), (3) administrative changes in the lead-up to the introduction of the new formula (such as the intensive effort by the agency to obtain updated parenting-time information for the introduction of the new formula), or (4) other policy changes occurring around that time (such as changes to income support and family-benefit requirements to register for child support).

The proportion of children in shared-time arrangements among recent separations appears to have plateaued at 15% in recent years (2010–2011 and 2011–2012). In fact, notwithstanding the statistical blip in 2008–2009, this plateau effect actually began after the family-law changes in 2006. This plateau effect is also evident for the entire caseload from 2009–2010 onwards (11% of cases).

To sum up, figure 1 shows shared-time arrangements increasing steadily from 2002–2003 to 2006–2007, but plateauing after the introduction of the shared-parenting amendments on July 1, 2006. The statistical blip among new cases just after the introduction of the new child-support formula in 2008 might well reflect a disappearing "nudge"[165] effect experienced in many areas of policy reform, in which a policy change produces a brief behavioral effect but then things return to the status quo.[166]

B. Survey Data from the Child Support Reform Study

It is important to look at separated parents' actual arrangements and not just the parenting-time information on the Child Support Agency's database. Administrative data might not reflect the reality of parents' arrangements for various reasons, such as reporting lags, private deals between parents "off the books," and care provided by grandparents and others.[167] Survey research can provide an independent, direct source of information from representative samples of separated parents in the general population.

As part of a large cross-sequential study designed to evaluate the impacts of the Australian child-support reforms, random samples were drawn from the Child Support Agency administrative caseload.[168] Three sequential cohorts, each comprising 1000 recently separated parents, were interviewed around two years

165. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS (2008).

166. *See, e.g.*, Kate Cahill & Rafael Perera, *Competitions and Incentives for Smoking Cessation*, COCHRANE LIBR., Apr. 2011, *reprinted in* KATE CAHILL & RAFAEL PERERA, COMPETITIONS AND INCENTIVES FOR SMOKING CESSATION 13 (2011), *available at* http://www.thecochranelibrary.com/userfiles/ccoch/file/World%20No%20Tobacco%20Day/CD004307.pdf.

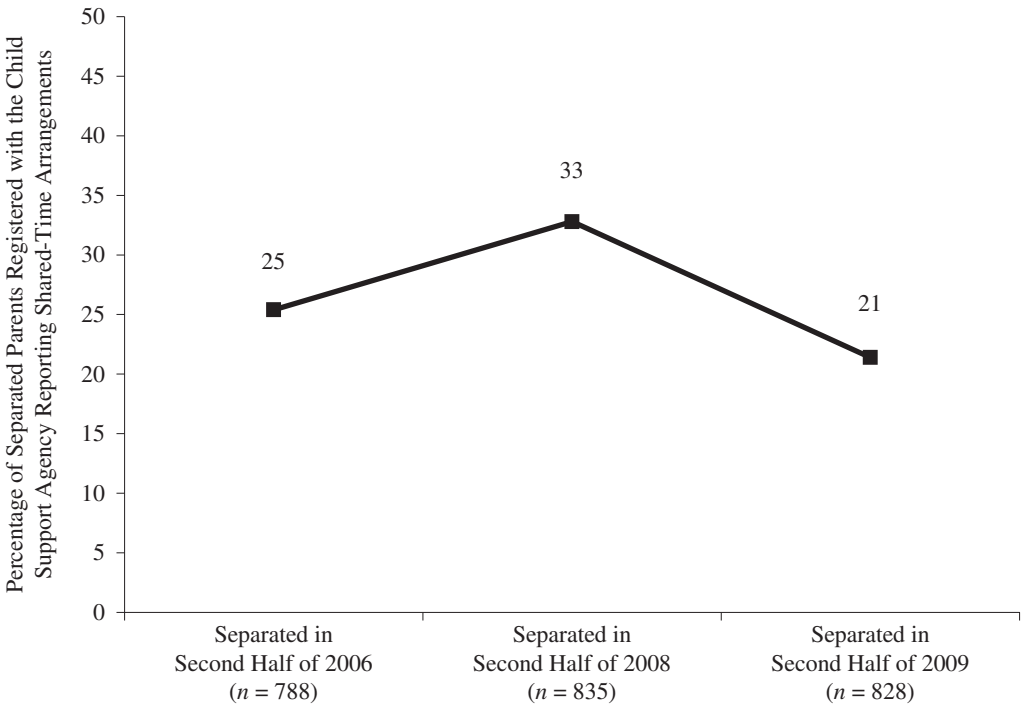
167. Smyth & Henman, *supra* note 146, at 13.

168. For detail on the research design, see Smyth et al., *Separated Parents' Knowledge of How Changes in Parenting-Time Can Affect Child Support Payments*, *supra* note 151.

after separation. Specifically, in the first cohort, parents separated in the second half of 2006 were interviewed in March 2008, in the second cohort, parents separated in the second half of 2008 were interviewed in March 2010, and in the third cohort, parents separated in the second half of 2009 were interviewed in March 2011. Computer-assisted telephone interviews about twenty-five minutes in duration were conducted with respondents in each separation cohort.

Figure 2 shows the percentage of separated parents with shared-time arrangements—defined once again as arrangements that involve children spending at least thirty percent of their time with each parent—for each of the three recently separated parent cohorts.

Figure 2: Percentage of Separated Parents in Shared-Time Arrangements, by Separation Cohort



Notes: "shared-time" denotes parenting arrangements where children are with each parent for at least thirty percent of the time; percentages weighted to administrative caseload.

Source: Child Support Reform Study survey data, Australian National University.

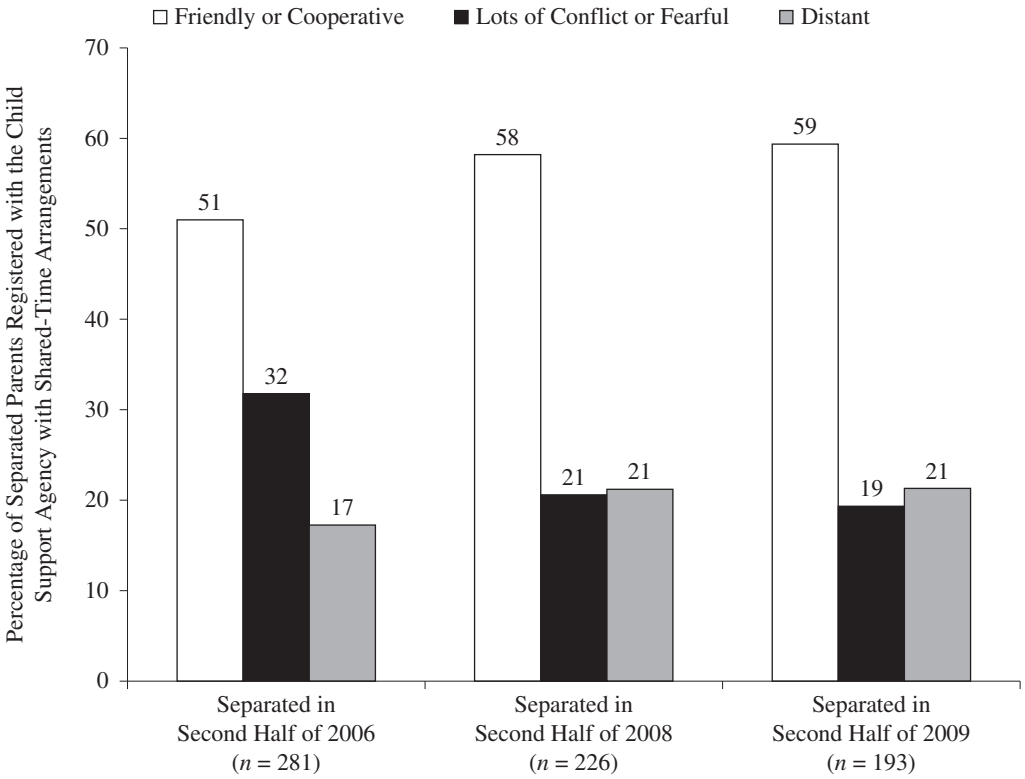
One-quarter of parents who separated in the second half of 2006 (immediately after the family-law changes but before the introduction of the new child-support formula) reported shared-time arrangements at interviews in March 2008, compared with one-third of separated parents who separated in the second half of 2008 (after the child-support reforms) interviewed in March

2010. By contrast, around one-fifth (twenty-one percent) of parents who separated in the second half of 2009 reported having shared-time arrangements at interviews in March 2011. Thus a similar pattern emerged to that shown in figure 1: an increase in shared-time parenting just after the introduction of the new child-support formula mid-2008 ($p < .001$), followed by a much larger decline in shared-time parenting ($p < .001$).

Given the Australian Institute of Family Studies' data showing a dramatic increase in shared-time among litigating parents immediately after the family-law changes of 2006—pointing to a potential shift in the demography of shared-time families towards more conflicted arrangements—the family dynamics surrounding shared-time parenting warrant investigation using the survey data. Figure 3 shows the percentage of separated parents with shared-time arrangements who reported "friendly" or "cooperative" relationships, "distant" relationships (including no contact), or "lots of conflict" or "fearful" relationships with their former partner for the three recently separated parent cohorts.[169]

169. Respondents were asked, "Which of the words I'm about to read out, best describe your relationship with [first name of target partner] over the past twelve months: friendly, co-operative, distant, lots of conflict, or fearful?" Responses such as "No contact in the last twelve months," or "No contact ever" were valid response options but were not read out. Multiple response options were allowed for respondents in the latter two cohorts: Ten percent of respondents who separated in the second half of 2008 (that is, the second group) used multiple descriptors, as did eighteen percent of respondents who separated in the second half of 2009 (that is, the third group). These more complex responses were excluded, and the analysis weighted to adjust for this. Several alternative approaches were used in an attempt to include multiple-descriptor responses. Some analyses pointed to a significant decrease in conflict or fear, other analyses produced only a slight decrease, and other analyses showed little change in the level of conflict or fear. But none of the analyses showed a significant increase in conflict or fear over time.

Figure 3: Percentage of Separated Parents with Shared-Time Arrangements, by Parental-Relationship Quality, by Separation Cohort



Notes: "shared-time" denotes parenting arrangements where children are with each parent for at least thirty percent of the time; percentages weighted to administrative caseload.

Source: Child Support Reform Study survey data, Australian National University.

Consistent with the research literature and prior Australian work,[170] the majority of separated parents with shared-time arrangements in each cohort described their relationship with their former partner as "friendly" or "cooperative" (51%–59%) ($p > .05$), while another 17%–21% of separated parents reported a "distant" relationship ($p > .05$). But the most striking feature of figure 3 is the decline in the proportion of separated parents with shared-time arrangements in the more recent cohorts who reported "lots of conflict" or a "fearful" relationship (32% of those who separated in 2006 compared with 19% of those who separated in 2009) ($p = .01$). This improving pattern of family dynamics among shared-time families appears to reflect a decline in the level of overall parental conflict or fearful relationships among separated parents registered with the Child Support Agency (from 31% of parents who separated

170. *See* KASPIEW ET AL., *supra* note 5, at 163.

in 2006 to 21% of parents who separated in 2009) ($p < .01$) (data not shown).[171] This trend is in sharp contrast to the marked increase in postreform, judicially determined shared-time cases evident in the early postreform family-law evaluation data published by others.[172] Of course, high-conflict, litigating excouples represent only a small slice of the general population of separated parents and are likely to differ from other families in important ways.

C. Administrative Data from the Family Court of Australia

In the United States, most studies tend to use court records or mediation agreements to estimate the prevalence of shared-time arrangements. But parents' actual arrangements might not reflect formal custody orders or agreements, especially in relation to shared-time parenting.[173]

In Australia, although much is now known about high-functioning, well-resourced, cooperative shared-time families given that these families have been the most likely to opt for shared-time and are best placed to make it "work," far less is known about the high-conflict shared-time family. An obvious source of data on such families is data about litigating separated parents seeking parenting orders from the Family Court of Australia.

To help monitor and report on the impact of the family-law amendments of 2006, between April 2007 and September 2012 the Family Court of Australia collected information about orders specifying the time children were to spend with their parents.[174] Such orders can be made in two circumstances. First, orders can be made by a registrar, without any litigation or court hearing, when parents file an application for consent orders.[175] Second, orders can be made by a judge determining litigated proceedings between the parties—either after a judgment or by consent when the litigants have reached agreement.[176] The court instructed its personnel to enter the statistical data for all such cases over the period.[177] Cases involving "approximately equal amounts of time" (defined as between 45% and 55% by the court for data-collection purposes) were flagged.[178] The information was provided by the registrars in the case of applications for consent orders, and by the judges' associates in the case of

171. There were no other significant associations between the cohorts on key variables (such as education, employment status, main source of income or repartnering) that might point to temporal changes in the composition of those opting for shared-time arrangements (that is, selection effects).

172. *See* KASPIEW ET AL., *supra* note 5, at 133.

173. *See* MACCOBY & MNOOKIN, *supra* note 35; *see also* Juby et al., *supra* note 6, at 159; Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibilities at Divorce – Social Science Research and the American Law Institute's Approximation Rule*, 40 FAM. CT. REV. 350, 361 (2002).

174. Orders did not necessarily spell out the times involved: An order provided for a child to live with one parent and spend "such additional time as the parties might agree" with the other.

175. *Family Law Rules 2004* (Cth) r 10.15.

176. Interview with Dennis Beissner, Manager, Statistical Servs. Unit, Family Court of Austl., in Canberra, Austl. (Dec. 13, 2012).

177. *Id.*

178. *Id.*

orders made in parenting proceedings.[179] It is important to note that these data only cover orders by the Family Court of Australia,[180] unlike the data reported by the Australian Institute of Family Studies that were based on a *pooled* sample of orders taken from an earlier postreform period from the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia.[181]

Over the past five years, there has been a marked decrease in the number of Family Court of Australia parenting cases (the most complex and difficult cases),[182] and an increase in the number of circuit-court applications for final orders in family-law matters.[183] It is possible, therefore, that the prevalence of shared-time arrangements in the two courts might reflect, to some extent, differences in the nature of the cases coming before each court. The data might also significantly understate the actual numbers of cases. Cases might well have been excluded when the orders did not specify time (for example, "such time as the parties may agree"), and when the associate or registrar found it difficult or impossible to categorize the orders (for example, when they were complex, or involved other parties, or when the time the child was to spend with a person was subject to some qualification, such a parent's unavailability because of work or travel commitments).

In the following analysis, data are presented separately for three types of cases: (1) those requiring a judicial determination, (2) consent orders reached *after* proceedings had been initiated ("settled cases"), and (3) consent orders made on request. Moreover, because the focus of the court's data collection was on identifying cases with near-equal time, the following figures are not directly comparable with figures 1, 2, or 3, and represent lower-bound estimates of shared-time arrangements more broadly. Figure 4 shows, for each cohort, the percentage of finalized–judicial determination cases where one parent was granted the majority of time with the children or where parents were granted a near-equal shared–time arrangement.

179. It is unclear whether there were errors or omissions in the coding of the data.

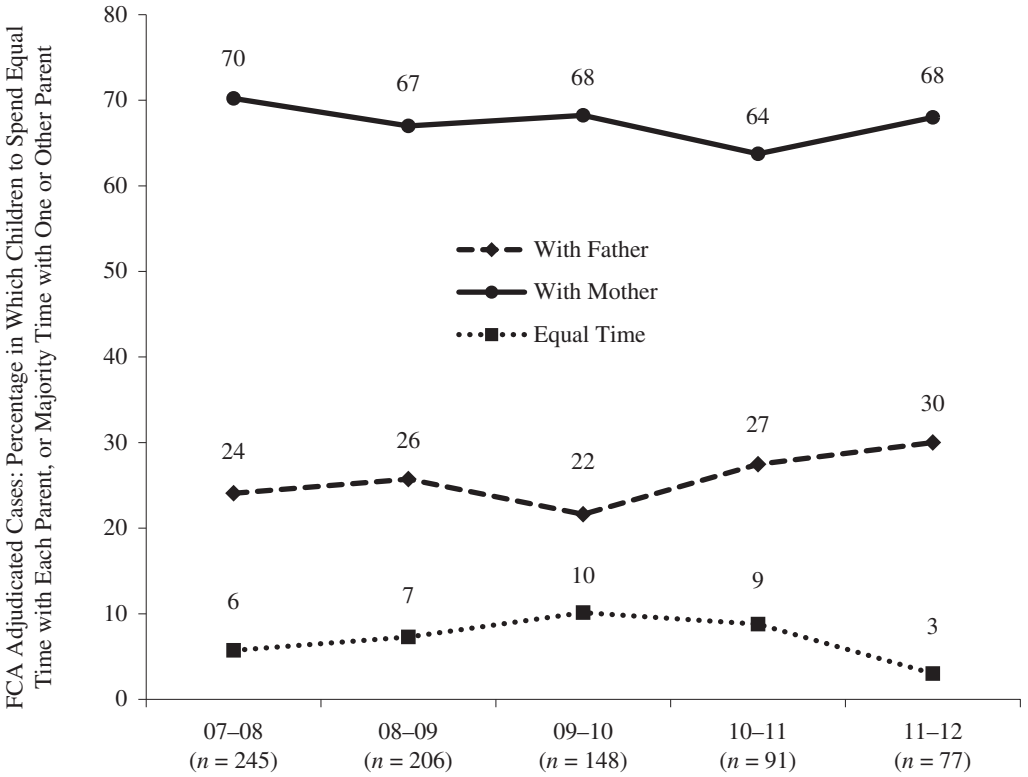
180. The Federal Circuit Court of Australia did not collect such statistics.

181. *See* KASPIEW ET AL., *supra* note 5, at 133.

182. *See* FAMILY COURT OF AUSTL., ANNUAL REPORT 2007–2008, at 42, 48 (2008), *available at* http://www.familycourt.gov.au/wps/wcm/resources/file/ebe3e941c46b4ee/Family_Court_AR08_Final_interactive.pdf (showing a twenty seven–percent drop in total applications for final orders, and a thirty-percent decline in total applications for final orders for children between 2011 and 2012). This decline in part reflects resource constraints, most notably a decrease in the number of family-court judges for the period under examination.

183. *Compare* FEDERAL MAGISTRATES COURT OF AUSTL., 2008–09 CHIEF EXECUTIVE OFFICER'S REPORT 1 (2009), *available at* http://www.federalcircuitcourt.gov.au/pubs/docs/CEO_Report_2009.pdf, *with* FAMILY COURT OF AUSTL. & FEDERAL MAGISTRATES COURT OF AUSTL., 2012 – THE YEAR IN REVIEW: CHIEF EXECUTIVE OFFICER'S REPORT 29 (2012), *available at* http://www.familycourt.gov.au/wps/wcm/resources/file/ebcc2f0624e798a/CEO_Report_2012.pdf. The comparison reveals a fourteen-percent increase in the total number of applications for final orders for family-law matters filed in the Federal Magistrates Court between 2007–2008 and 2011–2012.

Figure 4: Percentage of Family Court of Australia Finalized–Judicial Determination Cases Where Children Were to Spend the Majority of Time With One Parent or Were to Be in an Equal Shared–Time Arrangement, by Court-Application Cohort



Notes: Based on arrangements stipulated in the last order or judgment on file; "equal time" denotes parenting arrangements involving 45% to 55% of time; data from a small number of cases were excluded for (1) children for whom information on whom they were living with was missing, or who lived with someone other than their mother or father, and (2) children who were living with either parent but with parenting-time hours with a person other than a parent.

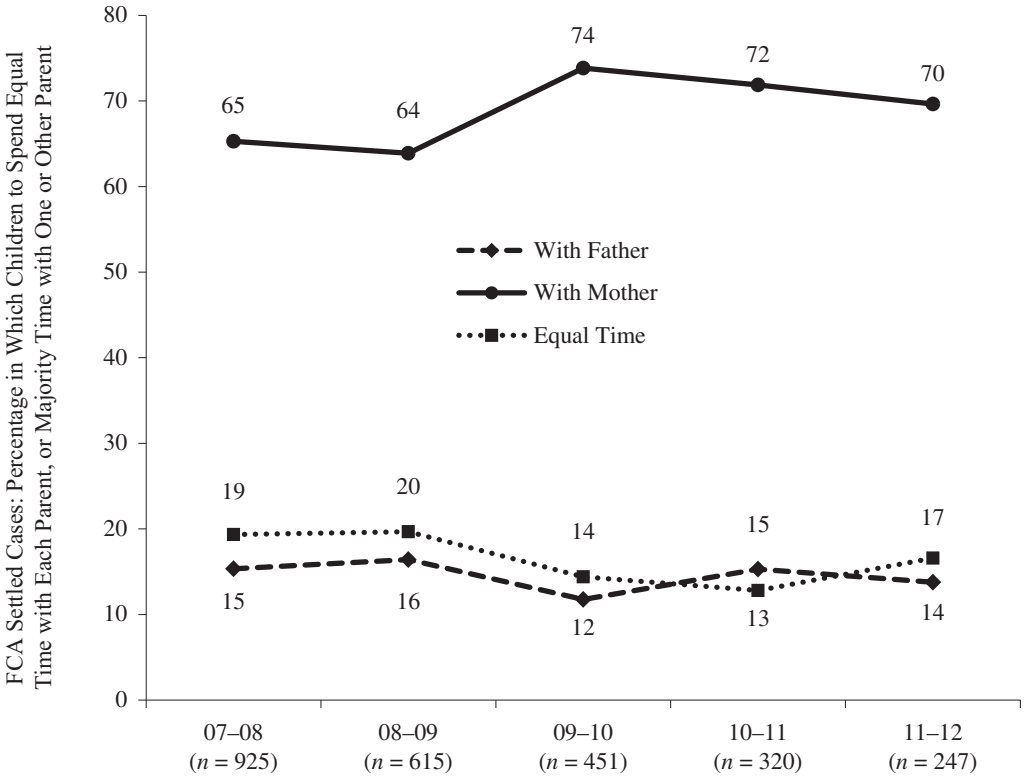
Source: Customized tables supplied by the Family Court of Australia.

The most common outcome of cases decided by judicial determination was that the children would spend the majority of time with their mother (64%–70% of cases) (figure 4). In 22%–30% of cases, children would spend the majority time with their father. Near-equal shared–time arrangements were ordered in 10% or less of cases in the five years after the legislative changes—increasing from 6% of cases in 2007–2008 to 10% in 2009–2010, but then declining sharply to just 3% of cases in 2011–2012. The decline in near-equal shared–time parenting parallels a gradual increase in majority time with the father: from 22% of cases in 2009 to 30% of cases in 2011-2012. One interpretation of this pattern is that from 2009 to 2010, court judgments started

moving away from shared-time parenting as a "compromise solution"[184] in high-conflict cases towards sole (maternal or paternal) custody.

Figure 5 shows, for each cohort, the percentage of finalized consent orders reached *after* proceedings had been initiated where children were to spend the majority of their time with one parent or were to be in a near-equal shared–time arrangement.

Figure 5: Percentage of Family Court of Australia Cases Involving Finalized Consent Orders *After Proceedings Had Been Initiated* Where Children Were to Spend the Majority of Time With One Parent or Were to Be in an Equal Shared–Time Arrangement, by Court-Application Cohort.



Notes: Based on arrangements stipulated in the last order or judgment on file; "equal time" denotes parenting arrangements involving 45% to 55% of time; data from a small number of cases were excluded for (1) children for whom information on whom they were living with was missing, or who lived with someone other than their mother or father, and (2) children who were living with either parent but with parenting-time hours with a person other than a parent.

Source: Customized tables supplied by the Family Court of Australia.

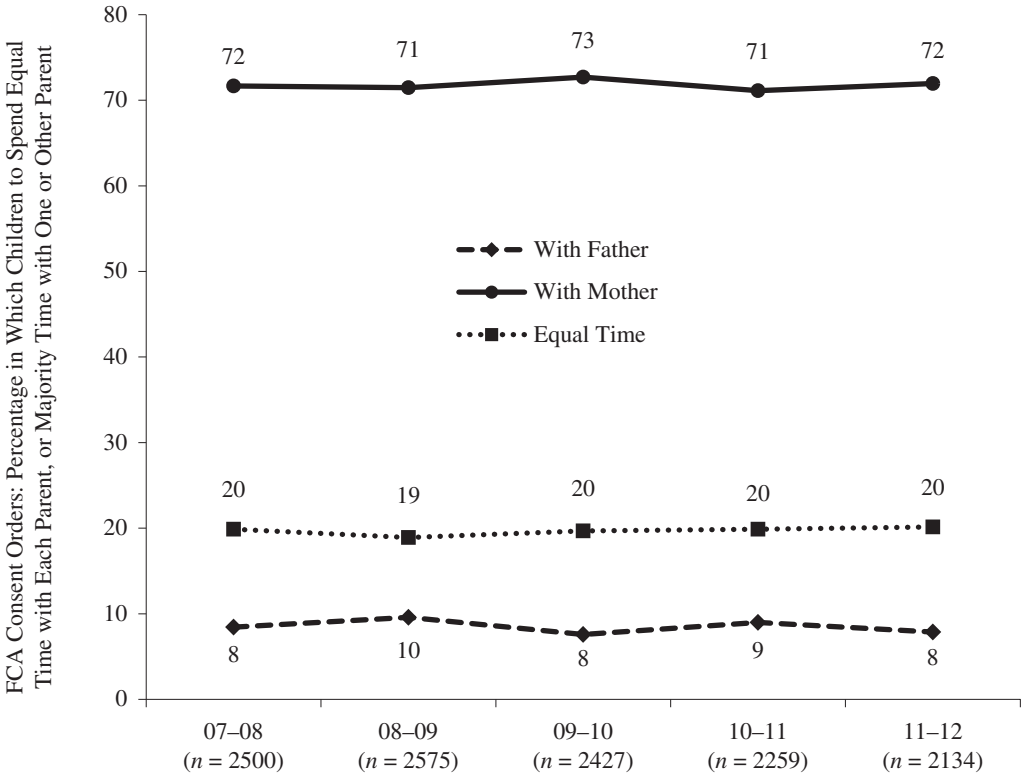
184. This phrase belongs to EEKELAAR ET AL., *supra* note 55, at 68.

Once again, the most common outcome was that children would spend the majority time with their mother (64%–74% of finalized cases involving consent orders after proceedings had been initiated). Interestingly, consent orders—arrived at after proceedings had been initiated—for fathers to have majority time remained relatively steady across the five-year period postreform (from 15% in 2007–2008 to 14% of cases in 2011–2012, dipping slightly in 2009–2010 to 12% of cases). A similar pattern emerged for near-equal shared–time parenting outcomes except that these outcomes were slightly more prevalent than those where children spend majority time with their mother (aside for the period 2010–2011, 13% versus 15%, respectively).

When judicial-determination cases are compared with cases resulting in consent orders after proceedings had been initiated (that is, when figure 4 is compared with figure 5), it can be seen that near-equal shared–time arrangements were more likely to occur by consent after proceedings had been initiated than in judicial-determination cases (for example, 19% versus 6% in 2007–2008, and 17% versus 3% in 2011–2012).

The general tendency for (1) mother residence to be the most common outcome, followed by near-equal shared–time parenting, and father residence, and (2) the pattern of outcomes to remain relatively similar across all years postreform is clear in cases reached purely by consent at the outset (as shown in figure 6 below). Figure 6 is almost identical (± 2% on average) to the pattern that emerges when all three figures are combined (data not shown) because parenting arrangements made purely by consent constitute the vast majority of family-court parenting orders.

Figure 6: Percentage of Family Court of Australia Cases Involving Finalized Consent Orders Where Children Were to Spend the Majority of Time With One Parent or Were to Be in an Equal Shared–Time Arrangement, by Court-Application Cohort.



Notes: Based on arrangements stipulated in the last order or judgment on file; "equal time" denotes parenting arrangements involving 45% to 55% of time; data from a small number of cases were excluded for (1) children for whom information on whom they were living with was missing, or who lived with someone other than their mother or father, and (2) children who were living with either parent but with parenting-time hours with a person other than a parent.

Source: Customized tables supplied by the Family Court of Australia.

Figure 6 shows that virtually no change has occurred over the past five years in the prevalence of near equal–time arrangements formalized by consent orders registered with the family court. That one in five consent orders involved near-equal shared–time arrangements suggests that although shared-time arrangements tend to be exercised in a climate of parental cooperation, a substantial number of families still make use of the legal system to give force and clarity to their arrangements—perhaps in the hope of providing stability for children (and themselves).

D. Summary

There are many complex moving parts in the preceding results, some of which interlock. Several key findings nonetheless stand out. First, the proportion of children in shared-time arrangements in Australia has increased steadily over the past decade—almost doubling from a low base of six percent. Second, changing the law to encourage shared-time arrangements did not lead to more families entering shared-time arrangements. Rather, such arrangements appear to have plateaued since the introduction of the shared-time amendments. Nor did changing the law lead to a shift in the demography of shared-time families towards high-conflict situations or to an increase in judges ordering equal (or near-equal) time. Such arrangements were ordered by judges in ten percent or less of fully adjudicated cases in the five years after the legislative changes. In recent years, a tendency for judges to order majority time to one parent (including fathers) rather than a shared-time arrangement is apparent. Finally, virtually no change has occurred in the past five years in the prevalence of near equal–time arrangements registered as consent orders with the family court: One in five consent orders are for near-equal time.

IV
SOME POSSIBLE EXPLANATIONS

What might explain the patterns apparent in the previous data? Why didn't shared-time parenting sharply increase after the 2006 legislation? Why are shared-time outcomes less common in fully adjudicated cases than in settled cases? Why do separated parents in shared-time arrangements seem to have a slightly better relationship these days? Do child-support laws influence shared-time arrangements? Although we have no data that directly links pre- and postreform shifts in the prevalence of shared-time to changes in services, legal processes, legal education, and so forth, we suggest several possibilities.

First, the pattern of shared-time parenting does not correspond closely with Australia's reform efforts. Legislation encouraging shared-time parenting was introduced in 1995, and again, in a much stronger form and combined with other changes, in 2006.[185] Yet we do not find corresponding rises in the prevalence of shared-time arrangements. Instead, the data (figure 1) indicate shared-time arrangements increasing steadily from 2002, but then plateauing after 2006. The pattern suggests an incremental effect of various factors. What those factors were, and how each might have contributed, is a matter of speculation. However, for each family, there will be a range of possible outcomes for the children, and it seems likely that the data reflect a climate of growing support for fathers to share in the care of children. Legislative change and the associated public debates no doubt played a part, although the legislative change might reflect public opinion as well as contribute to it. The gradual nature of the change suggests that the impact of legal change is not

185. McIntosh & Chisholm, *supra* note 55, at 44–45.

immediate or direct, but is partly mediated through progressively changing attitudes and practices of professionals, such as counselors, mediators, and lawyers.

The leveling out of shared-time arrangements since the family-law changes came into effect mid-2006, and the fact that these arrangements are consistently made only by a minority of families, might indicate that demographic and economic factors limit the number of families able to manage these arrangements. As noted earlier, shared-time parenting tends to be adopted by mainly well-educated, dual-income, cooperative parents with elementary school–aged children. These parents typically live near each other, have flexible parenting and work arrangements, and have good economic resources on which to draw. In the context of the recent global financial crisis, the tight job market in Australia, and the tendency for poorer families to be disproportionately represented among the separated-parent population in Australia,[186] the extent to which families are now better placed to take on the many logistical and relationship challenges of shared-time parenting is unclear. Even when legislation encourages shared-time parenting, there will always be limits as to the capacity of separated families to exercise such arrangements.

It seems appropriate that the numbers of shared-time cases are lower among fully adjudicated cases than among agreed cases, because fully adjudicated cases tend to exhibit entrenched, high levels of parental conflict, and this often makes shared-time parenting an unlikely outcome. The family courts are familiar with expert evidence, and this evidence would have given the courts insights from the rapidly emerging evidence base on shared-time parenting in Australia. This evidence indicates children in shared-time arrangements tend to not fare well when mothers have safety concerns,[187] when children are stuck in the middle of high ongoing parental conflict,[188] when arrangements are rigidly maintained,[189] and when children are under four years of age.[190] These findings have also become known to specialist family lawyers and other advisers to litigants, and this might have reduced the number of cases in which litigants *unrealistically* seek shared-time orders.

It would be risky to draw strong inferences from the data showing a modest recent decline in near equal–time outcomes in judicially determined cases (figure 4). Only a small minority of cases are judicially determined, with the vast majority ending in agreement (or abandonment of a case). The declining numbers of judicially determined cases in the Family Court of Australia (from

186. *See* Bruce Bradbury & Kate Norris, *Income and Separation*, 41 J. SOC. 425 (2005).

187. CASHMORE ET AL., *supra* note 27; *accord* KASPIEW ET AL., *supra* note 5.

188. MCINTOSH ET AL., POST-SEPARATION PARENTING ARRANGEMENTS, *supra* note 37.

189. *Id*.

190. *Id.* In the U.S. context, see Judith Solomon & Carol George, *The Development of Attachment in Separated and Divorced Families: Effects of Overnight Visitation, Parent and Couple Variables*, 1 ATTACHMENT & HUM. DEV. 2 (1999); Samantha L. Tournello, Robert Emery, Jenna Rowen, Daniel Potter, Bailey Ocker & Yishan Xu, *Overnight Custody Arrangements, Attachment, and Adjustment Among Very Young Children*, 75 J. MARRIAGE & FAM. 871 (2013).

245 in 2008 to 77 in 2011) probably reflects another complicating factor, namely that over this period the Federal Magistrates Court (as it was then called) dealt with an ever-increasing majority of cases,[191] and unfortunately we do not have data from that court.

The diminishing proportion of high-conflict families with a shared-time arrangement (figure 3) is a welcome and interesting finding. We have previously referred to commentators' fears that legislative support for shared-time arrangements might be embraced by or imposed on highly conflicted families to the disadvantage of the children. In the U.S. context, Beverely Ferreiro wisely argued that if a state adopts such legislation, it should accept responsibility for facilitating the development of services that divorcing families need in order to work out cooperative arrangements.[192]

The Australian experience appears to support this approach. Although the complex legislative provisions about shared time have been much criticized,[193] the accompanying changes introduced in 2006 offered new opportunities for courts and community-based services to work constructively together for the good of the children of separation and divorce. The legislative provisions, to the effect that parties cannot bring court proceedings unless they have attempted to resolve their dispute with the help of community-based dispute-resolution services, might well be where some of the movement in the prevalence and demography of shared-time parenting has occurred.

The new system, comprising a greater range of early-intervention pathways, might have helped some families reduce conflict and focus on the children and might have steered some high-conflict families away from shared-time arrangements. A recent evaluation of the Australian family-law reforms found that, postreform, (1) most parents had sorted out their parenting arrangements within a year or so of separating,[194] (2) most parents had used "informal ways" of negotiating their parenting arrangements and were "generally satisfied" with this approach,[195] (3) nearly two-thirds of separated parents reported "friendly" or "cooperative" relationships with each other a year or so after separation,[196] (4) a "modest culture shift" had occurred whereby parents were more likely to make use of family-relationship services than legal services to resolve

191. *See* FAMILY COURT OF AUSTL. & FEDERAL MAGISTRATES COURT OF AUSTL., *supra* note 183.

192. Beverly Webster Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 424 (1990); *see also* Christy M. Buchannan & Parissa L. Jahromi, *Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 439 (2008) (discussing the need for interventions to have multiple components).

193. Senior judges, for example, have described the pathway for legislative decisions as "convoluted," and as creating "a dilemma of labyrinthine complexity." *Marvel v Marvel* (2010) 43 Fam LR 348, 367; *see also* Carmody, *supra* note 59; Chisholm, *Making it Work*, *supra* note 81; Lucy Daniel, *Australia's Family Law Amendment (Shared Responsibility) Act 2006: A Policy Critique*, 31 J. SOC. WELFARE & FAM. L. 147 (2009).

194. *See* KASPIEW ET AL., *supra* note 5, at 90.

195. *Id.*

196. *Id.* at 34.

disputes,[197] and (5) that "[t]hose most likely to say that they had mainly used family law–system processes (i.e., counsellors, mediators or dispute-resolution services, lawyers, or the courts) were mothers" with a shared-time arrangement.[198] The same evaluation also found that, on parents' reports, children in shared-time arrangements "fared marginally better" than children in maternal residence—except where mothers reported "safety concerns."[199] The latter finding is consistent with studies of shared-time parenting and children's outcomes in the United States.[200]

It is also possible that changes in child support have played a part, but this is difficult to determine. The higher profile of child-support obligations might have generated a sense that fathers, now paying for their children, have some entitlement to spend time with them and even some moral obligation to do so.[201] More concretely, child-support guidelines that take into account shared-time arrangements encourage the payers (mostly fathers) to spend more time with their children.[202] Many child-support systems provide for reduced payments when parents have a shared-time arrangement ("shared-parenting time adjustments"),[203] although the amount of time needed to reduce payments varies considerably.[204] Shared parenting–time adjustments might encourage some payers (mostly fathers) to try to reduce the amount they pay by pushing for more overnight stays with children (colloquially referred to as "trading dollars for days").[205] Equally, however, these adjustments might encourage some payees (mostly mothers) to resist additional overnight parent–child contact to maximize the amount of child support and government family benefits they receive.

In Australia there is much anecdotal evidence that separated parents frequently structure their parenting arrangements for financial gain from the child-support and family-benefits systems. Similar concerns have been raised in the United States,[206] Canada,[207] the United Kingdom,[208] and Sweden.[209] However,

197. *Id.* at E2, 62.

198. *Id.* at 151. This was also the case for fathers whose children had only daytime contact with the mother; it is unclear in either case whether the tendency to make use of services was to negotiate, to obtain more information or advice about a less common arrangement, or to make a particular arrangement "work."

199. *Id.* at 273.

200. *See, e.g.*, Pruett & Barker, *supra* note 22, at 424.

201. Judith A. Seltzer, *Child Support and Child Access: Experiences of Divorced and Non-Marital Families*, *in* CHILD SUPPORT: THE NEXT FRONTIER 69, 83 (J. Thomas Oldham & Marygold Melli eds., 2000); *accord* Chien-Chung Huang, Wen-Jui Han & Irwin Garfinkel, *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, 77 SOC. SERVICE REV. 255, 275 (2003).

202. *See* Venohr & Griffith, *supra* note 156, at 423.

203. *Id*.

204. *Id*. at 424.

205. Stephen K. Erickson, *If They Can Do Parenting Plans, They Can Do Child Support Plans*, 33 WM. MITCHELL L. REV. 837 (2006); *see also* Carol Rogerson, *Child Support Under the Guidelines in Cases of Split and Shared Custody*, 15 CAN. J. FAM. L. 11, 30 (1998).

206. *See* Eleanor E. Maccoby, *The Custody of Children of Divorcing Families: Weighing Alternatives*, *in* THE POSTDIVORCE FAMILY: CHILDREN, PARENTING AND SOCIETY 51, 62–63 (Ross A.

even though many disputing parents will feel that the *other* parent is motivated by financial considerations rather than the children's interests, the evidence for widespread strategic bargaining over child support and parenting time is not strong.[210] Recent work in the United States and Australia indicates that separated parents generally have poor knowledge of the rules governing child support,[211] and that any strategic bargaining over child support and shared-time parenting is likely to be occurring in the context of a knowledge vacuum or misinformation.[212]

V
CONCLUSION

In 2006 Australia introduced significant legislative and systemic reforms encouraging shared-time parenting, provided new community-based services, and mandated prelitigation mediation for most cases. What then happened, and what can we learn from it?

Although early-evaluation data by others pointed to a sharp rise in the prevalence of shared-time arrangements among *fully adjudicated* cases immediately after the Australian family-law changes,[213] the new data presented in this article include the much larger number of separated parents who managed to reach agreement about arrangements for children. They show that shared-time parenting did not suddenly increase following the 2006 changes, but had already been increasing, continued to do so, and has plateaued in recent years.

Thompson & Paul R. Amato eds., 1999); *see also* PATRICIA R. BROWN & MARIA CANCIAN, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.–MADISON, WISCONSIN'S 2004 SHARED-PLACEMENT GUIDELINES: THEIR USE AND IMPLICATIONS IN DIVORCE CASES 1 (2007), *available at* http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/Brown_Cancian_Task8.pdf.

207. *See* Rogerson, *supra* note 205, at 30; *see also* Denise L. Whitehead, *Divorcing Parenting From Child Support: Justice and Care in the Discourse of the Rights and Responsibilities of Shared Custody*, 8 FATHERING 147, 150 (2010).

208. *See* ADELE ATKINSON, STEPHEN MCKAY & NICOLA DOMINY, UNIV. OF BRISTOL, FUTURE POLICY OPTIONS FOR CHILD SUPPORT: THE VIEWS OF PARENTS 26 (2006), *available at* http://www.ggy.bris.ac.uk/pfrc/Reports/Future_policy_options_full.pdf.

209. *See* Anna Singer, *Time is Money? Child Support for Children with Alternating Residence in Sweden*, *in* FAMILY FINANCES 591, 598 (Bea Verschraegen ed., 2009).

210. Fabricius et al., *supra* note 14, at 211; *accord* Bruce Smyth & Bryan Rodgers, *Strategic Bargaining Over Child Support and Parenting Time: A Critical Review of the Literature*, 25 AUSTL. J. FAM. L. 210, 234 (2011).

211. *See, e.g.*, MARIA CANCIAN, DANIEL R. MEYER & KISUN NAM, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS., KNOWLEDGE OF CHILD SUPPORT POLICY RULES: HOW LITTLE WE KNOW, (2005), *available at* http://www.irp.wisc.edu/publications/dps/pdfs/dp129705.pdf; NICK WIKELEY, SARAH BARNETT, JAMES BROWN, GWYNN DAVIS, IAN DIAMOND, TERESA DRAPER & PATTEN SMITH, NATIONAL SURVEY OF CHILD SUPPORT AGENCY CLIENTS (2001); Daniel R. Meyer, Maria Cancian & Kisun Nam, *Welfare and Child Support Program Knowledge Gaps Reduce Program Effectiveness*, 26 J. POL. ANALYSIS & MGMT. 575 (2007).

212. *See* Smyth et al., *Separated Parents' Knowledge of How Changes in Parenting-Time Can Affect Child Support Payments*, *supra* note 151.

213. *See* KASPIEW ET AL., *supra* note 5, at 133.

Although much work on joint legal and physical custody has been conducted in the United States,[214] whether legislating to encourage shared-time arrangements benefits children remains controversial.[215] In our view, a preoccupation with time as such might reflect parental feelings of entitlement rather than benefits for children. As previously indicated, children might well benefit when separated parents voluntarily choose shared-time arrangements that they can manage cooperatively and tailor to the children's changing needs, whereas rigid arrangements between warring parents are likely to have a negative impact on children.

The Australian data show a modest but encouraging trend in this regard: a general decline in parental conflict among separated families in more recent cohorts, including shared-time families. This seems more likely to have been brought about more by the provision of child-sensitive dispute-resolution processes, supported when appropriate by legal and relationship services, than by changes in the legislation itself.

The Australian legislation encourages shared-time parenting except when there is family violence or child abuse.[216] Although this might have been an understandable accommodation to competing political pressures,[217] it largely fails to send a clear message about children's needs, especially their need to be protected from continuing significant conflict. Indeed, the overly complex provisions have been shown to confuse some parents and their advisers.[218] It is likely they have also reinforced notions of parental entitlement (to equal time with the children). Especially when it was new, the legislation might have nudged parents, their advisers, and even the courts, towards shared-time arrangements in families unable to tailor those arrangements to the children's needs.

Over time, however, it might have become clearer that despite the confusing guidelines the legislation continued to treat the children's best interests as paramount, and lawyers and advisers, and perhaps judges, might have become more comfortable with the need to assess the extent to which shared-time arrangements represent the best outcome for each particular child. It also seems likely that the emerging research and emphasis by judges and mediators on the dangers to children of exposure to ongoing high levels of parental conflict might have reduced the number of shared-time arrangements in which children were subjected to continuing conflict.[219]

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214. *See generally* Bauserman, *supra* note 15; Pruett & Barker, *supra* note 22.

215. Fehlberg et al., *Legislating For Shared-Time Parenting*, *supra* note 57.

216. *See Family Law Act 1975* (Cth) ss 60B, 60CC, 65DAA; *see also Goode v Goode* (2006) 36 Fam LR 422.

217. *See generally* Chisholm, *Making it Work*, *supra* note 81; John Dewar, *Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia*, 24 AUSTL. J. FAM. L. 139 (2010); Helen Rhoades, *Children's Needs and "Gender Wars": The Paradox of Parenting Law Reform*, 24 AUSTL. J. FAM. L. 160 (2010).

218. KASPIEW ET AL., *supra* note 5, at 207–08; O'Brien, *supra* note 92, at 266.

219. *See, e.g.*, *Allen v Green* (2010) 42 Fam LR 538.

The availability of an increasingly diverse range of dispute-resolution pathways and services, the much-improved integration of these services through initiatives such as locally based Family Law Pathways Network groups, and the emphasis on early intervention rather than adversarial processes are key features of the new Australian family-law system. Over time, many of the new and expanded services have become more responsive to the interventions made by lawyers—and vice versa. This means not only that parents are less likely to be in conflict with each other, but also that they are less likely to see themselves as recipients of conflicting information and advice from the professionals with whom they are engaged.

Another factor might have been the concern that too enthusiastic an emphasis on involvement by both parents could expose some children to violence or abuse. Such concerns led to a number of reports and to legislation in 2011 that sought to enhance protections for children against violence and abuse.[220] At that time Australia was presented with a choice. On one hand, it could leave the 2006 provisions mainly in place but strengthen the legislative protections against violence so they could match the legislative enthusiasm for parental involvement. On the other hand, the government could simplify and clarify the legislation so that it reduced the emphasis on any particular aspects as "primary" considerations and substituted a simpler formulation that focused on the children's needs.[221] It opted for the former and so, although there are indeed new protections against abuse and violence, the legislation has become even more complicated, requiring decisionmakers to conduct an intricate analysis of multiple legal categories and to try to work out what weight the legislature requires to be attached to each.[222] The risk remains that the very complexity of the legislation might distract decisionmakers from taking adequate account of those factors that place a child or a parent at risk.

Although the details of the Australian legislation have been much criticized, it is the scale of the reforms across the entire family-law system that appears to set those reforms from legislative changes (enacted or being considered) in other countries. Our data confirm that the legislation is not the whole story, and may not even be the main story. For Lenard Marlow, "divorce is first and foremost an important personal event . . . and only secondarily a legal event."[223] Inevitably, law provides imperfect responses to personal questions.[224] Helping

220. *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

221. *See* Chisholm, *Making it Work*, *supra* note 81.

222. For example, in determining what is in a child's best interests the court is to attach "greater weight" to "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence" than to the other "primary consideration" ("the benefit to the child of having a meaningful relationship with both of the child's parents"), and the definition of child "abuse" now includes exposure to "family violence"—itself the subject of a lengthy definition—that causes a child "serious psychological harm." *See Family Law Act 1975* (Cth) ss 4, 4B (definitions); *id.* at s 60CC(2)–(2A).

223. Lenard Marlow, *Divorce Mediation: Therapists in Their Own World*, 13 AM. J. FAM. THERAPY 3, 5 (1985).

224. *Id.*

disputing parents to reach agreement involves more than dealing with their "conflicting interests." Many legal problems are essentially relationship problems. As part of the dispute-resolution process, it is often necessary to acknowledge and deal with feelings of hurt, fear, anger, and disappointment.[225] And obviously some relationship problems require legal intervention. Frequently, the role of lawyers in family-law cases is more likely to involve responsible advocacy than the provision of legal advice. This perhaps explains why much of the focus of the Australian reforms has been on the expansion of relationship-support services for families in transition and not on legislative change in isolation from other policies and services that support cooperative child-responsive parenting arrangements. As John Dunne and his colleagues point out:

> Although . . . it may not be possible to significantly alter children's emotional adjustment . . . through modifications in divorce law, reducing inter-parental conflict may be an attainable goal. This might be achieved by decreasing the amount of litigation involved in obtaining a divorce and by bolstering the social services, including mediation and divorce counseling.[226]

The point so stressed by Robert Mnookin,[227] that the best arrangements are generally those that parents negotiate for themselves, is now well established.[228] Over the past several decades, Australia has increasingly promoted legal processes and supporting services that provide incentives and supports for parents to consider which arrangements will work best for each of their children and themselves. Working within these systems, mediators, lawyers, and counselors have known for some time that there is much power in asking questions to entice the parties away from a focus on their own entitlements and such simplistic notions as equal time towards a more creative focus on what would work best for the children.[229] Such questions to parents might include, What kind of parent do you want to be? How do you want to be remembered by your children? and What could you and your former partner do differently that might help your children?[230] Child-*inclusive* divorce-mediation practice brings other questions and therapeutic conversations to the table: Have you thought about how your separation or parenting dispute might be affecting your children? The voice of children is likely to remain a grounding force in the pursuit of child-responsive parenting arrangements.

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225. *Id.* at 6.

226. John E. Dunne, E. Wren Hudgins & Julia Babcock, *Can Changing the Divorce Law Affect Post-Divorce Adjustment?*, 33 J. DIVORCE & REMARRIAGE 35, 52–53 (2000).

227. *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 957–58 (1979).

228. *See* Robert E. Emery, *Rule or Rorschach: Approximating Children's Best Interests*, 1 CHILD DEV. PERSP. 132 (2007); *see also* Williams, *supra* note 121.

229. Erickson, *supra* note 205.

230. These questions are borrowed from the clinical work of Lawrie Moloney and Jennifer McIntosh in Australia. LAWRIE MOLONEY & JENNIFER MCINTOSH, CREATING CHILD FOCUSED DIALOGUES WITH SEPARATED PARENTS: THEORETICAL AND CLINICAL UNDERPINNINGS OF CHILD FOCUSED DISPUTE RESOLUTION (2006).

Information and education are obviously also important. Separating parents often have a poor understanding of the parenting-time options available to them, and the likely benefits and pitfalls of these for their children and themselves.[231] In the past there might have been a tendency to promote what has been called formulaic 80%–20% arrangements in Australia, namely, every-other-weekend-and-half-of-school-holidays residential schedules.[232] Fortunately, in recent years, drawing on the latest divorce research and a rapidly growing evidence base on children's needs at different ages, several prominent American clinicians have proposed a range of developmentally appropriate scheduling options.[233] These options seek to take account of a number of critical factors, most notably the type and level of parental conflict, parenting capacity, children's ages and individual needs and temperament (particularly the child's ability to handle change), distance between households, and parents' employment patterns. Working with these options and with details of parents' *actual* schedules[234] has more than one benefit. Besides suggesting a wide range of possibilities, it can help focus the families on the implications for the children of each option, and help them craft child-sensitive parenting-time schedules, balancing children's needs and wishes against the practicalities of modern postseparation family life. This clearly child-focused approach is one reason we are cautious about legislation that places special emphasis on equal time, shared time, or indeed any specified amount of time. Most arrangements—be they simple, complex, predictable, or variable—can work well or badly, depending on the circumstances and the way in which they are handled.[235] A preoccupation with parenting time as a number (the "legality" of equal time) rather than as an experience can encourage separated parents to lose sight of what matters to their children: the building and sustaining of close emotional bonds, and being open to enjoying each moment together.[236]

231. *See* Ferreiro, *supra* note 192, at 424; *see also* JOAN B. KELLY, DIVORCE RESOLUTIONS, SOME OPTIONS FOR CHILD CUSTODY PARENTING PLANS (FOR CHILDREN OF SCHOOL AGE) (2003), *available at* http://www.coloradodivorcemediation.com/family/Child-Custody-Parenting-Plans-Options.pdf; Melli & Brown, *supra* note 3.

232. *See* STANDING COMM. ON FAMILY & CMTY. AFFAIRS, *supra* note 77, at 21. In the U.S. context, see LYE, *supra* note 41.

233. *See generally* ARIZ. SUP. CT., PLANNING FOR PARENTING TIME: ARIZONA'S GUIDE FOR PARENTS LIVING APART (2009), *available at* http://www.azcourts.gov/Portals/31/ParentingTime/PPWguidelines.pdf; EMERY, *supra* note 40; KELLY, *supra* note 231; PHILIP M. STAHL, PARENTING AFTER DIVORCE: A GUIDE TO RESOLVING CONFLICTS AND MEETING YOUR CHILDREN'S NEEDS (2009); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, WHAT ABOUT THE KIDS? RAISING YOUR CHILDREN BEFORE, DURING, AND AFTER DIVORCE (2003).

234. *See generally* Bruce Smyth, Bryan Rodgers, Liz Allen & Vu Son, *Post-Separation Patterns of Children's Overnight Stays with Each Parent: A Detailed Snapshot*, 18 J. FAM. STUD. 202 (2012); Sodermans, Vanassche & Matthijs, *supra* note 12.

235. *See* Harris-Short, *supra* note 95; *see also* Haugen, *supra* note 41, at 119; Singer, *supra* note 11, at 41.

236. *See* Smyth, *Time to Rethink Time?*, *supra* note 93, at 8.

Like others,[237] we recognize the limited power of law, especially law in isolation from other supports and services, to positively influence intimate relationships. Law itself cannot engender cooperation between disputing parents who are hostile, lack mutual respect, or want nothing to do with each other. Law might offer some relief to parents facing challenges related to resources or concerns about safety or the parenting capacity of the other. Even here, however, the law is inclined to be a blunt instrument.

On the other hand, family-relationship and family dispute–resolution services that resonate with and support a robust legal framework have the potential to cooperate to produce a qualitative shift in the contours of postseparation family relationships. Although the Australian story of postseparation–parenting law reform necessarily remains a work in progress, the latest chapter contains some promising twists and developments.

237. *See generally* MACCOBY & MNOOKIN, *supra* note 35; Williams, *supra* note 121.