

SHARED PARENTING: THE LAW AND THE EVIDENCE (PART 2)

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In Part 1 of this article I attempted an account of the statutory and case law principles by which shared residence order applications are decided (*Seen and Heard* 19(4) pp 19–30). In this second part, I offer an update to earlier work (see Gilmore, 2006a and 2006b), summarising the main research findings on shared residence arrangements and the well-being of children in such arrangements. The aim is to relate the discussion, where possible, to the legal principles already mentioned, thus highlighting features of the research which may particularly have implications for those advising the courts in individual cases.

The role, and limitations, of the research evidence in this context

It is important at the outset to call attention to some of the limitations of the research evidence and the use to which it can be put. The courts have rightly emphasised that each case is fact-sensitive. Even if it were capable of doing so (which it is not) the research evidence cannot be used to identify some blanket approach to the making of orders. The important role which research plays and the value of knowledge of the research evidence is in securing *awareness* of those factors which may particularly impact upon the child's welfare in this context. Those factors can then be given careful consideration in the circumstances of the individual case.

The difficulties of navigating the heterogeneity of research methods in studies of child well-being are well known (see Gilmore, 2006a for a summary). Here I wish to highlight two features which particularly afflict studies on shared residence. First, the samples of children in shared residence arrangements examined by researchers have often tended to be quite small, no doubt reflecting the fact that in the past shared residence arrangements were not common. As Smyth (2009) notes in a recent retrospective of research on shared residence in Australia, the evidence from several studies there is based on only 250 families and 85 children, although several large-scale studies are under way in Australia and evidence from larger samples is beginning to emerge (Kaspiew et al., 2009). Secondly, the types of samples vary greatly. Most studies rely on samples of dual residence children whose post-separation parenting arrangement was agreed rather than adjudicated, or mixtures of these categories. Therefore, when considering any findings that the arrangements proved positive for the children concerned, it is vital to bear in mind that many arrangements are likely to have been mutually agreed. Findings based on such self-selected groups cannot simply be applied to the parents who bring their disputes to court and arrangements which are imposed by a court or 'agreed' in the course of court proceedings.

Before proceeding to examine the research on children's well-being, it is convenient first to set the discussion in the context of data about the incidence of shared residence arrangements.

The incidence of shared residence arrangements

There is evidence from several jurisdictions that not insignificant numbers of separating parents are choosing shared residence arrangements and that the use of such arrangements appears to be increasing, possibly in response to a rise in shared parenting laws (Rhoades, 2002). In what is probably the first estimate of shared care in the UK, a recent national survey of 559 separated or divorced parents with a child under the age of 16 found that 12% of respondents reported a shared care arrangement in which the child concerned was spending the equivalent of at least three days and nights per week with each parent (Peacey and Hunt, 2009, p 17). The researchers comment that, even if allowance were made for the disproportionately low numbers of non-resident parents taking part in the survey, this would still translate to 9% of all separated families (p 17 and 25). A recent Australian survey (Kaspiew et al., 2009) of 10,000 parents who separated in 2006 (after implementation of legislation which has given increased emphasis to shared parenting) found shared care arrangements (each parent having between 35% and 65% of time with the child) in 16% of cases (Chapter 6), consistent with earlier findings of increasing shared care arrangements (see Smyth, 2009, p 40). In the United States, Melli and Brown (2008) report that in Wisconsin the use of shared residence increased from 2% to 32% of parental separations in the 20-year period to 2001. Skørten and Barlindhaug (2007, p 376), writing of the position in Norway, note an increase in use of shared residence from 4% of cases in 1996 to 10% in 2004.

Messages from child development research

Child development research, which in this context has examined the formation of attachment relationships and the effects of disrupted parent–child relationships, has found ‘substantial evidence that children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both their parents, whether the two parents live together or not.’ (Kelly and Lamb, 2000, p 303, summarising the evidence). As Lamb (2007, p 17) puts it, ‘the better (richer, deeper, and more secure) the parent–child relationships, the better the children’s adjustment, whether or not the parents live together’, explaining that the quality of parental behaviour is reliably associated with the security of infant–parent attachment and:

‘active paternal involvement, not simply the number or length of meetings between fathers and children, predicts child adjustment. This suggests that

post-divorce arrangements should specifically seek to maximise positive and meaningful paternal involvement rather than simply allow minimal levels of visitation.' (Lamb, 2007, p 16)

It is a view supported by Amato and Gilbreth's (1999) meta-analysis of 63 studies on child–parent contact, which found that the parenting style most consistently associated with children's positive development combined 'a high level of support (responsiveness, encouragement, instruction, and everyday assistance)' with a 'moderately high level of non-coercive control (rule formulation, monitoring and discipline)' (p 559). These findings, and the views expressed above, provide an argument for shared residence as the arrangement most likely to facilitate such a parental role (Hunt, 2003, p 11; Hunt with Roberts, 2004).

Kelly and Lamb (2000) make clear, however, that issues such as child abuse or inter-parental violence which require assessments of parental adequacy to avoid compromising child safety/development are not considered in their paper. The authors are writing about parent/child relationships that are capable of contributing to the child's attainment of psychological potential and the conditions under which that is most likely to be achieved by those interactions. Bearing in mind this very important qualification, Kelly and Lamb argue that research suggests that:

'The goal of any access schedule should be to avoid long separation from both parents to minimize separation anxiety and to have sufficiently frequent and broad contact with each parent to keep the infant secure, trusting, and comfortable in each relationship' (Kelly and Lamb, 2000, p 308).

This highlights another feature of child development knowledge which is relevant to decisions about shared residence: separation tolerance is age-related and the child's age is therefore relevant to identifying the appropriateness of particular shared residence arrangements. Most toddlers can manage two consecutive nights away from their primary carer but longer periods should be avoided. Most pre-school children might be stressed by separation of more than three or four days (except for a one-week vacation). At age eight, a child might be expected to tolerate five to seven days' separation and a two-week holiday period (Kelly and Lamb, 2000, pp 308–9).

Kelly and Lamb suggest that children under three years old may require regular transitions to ensure continuity of attachments. Overnight stays may maintain and deepen attachments, and provide opportunities for stimulating experiences and promotion of adaptability and healthy development (p 306). In other words, the potential parental contributions to the child's social, emotional and cognitive development must be considered, as well as the child's stability in terms of environment, which may be less important than consistent routines.

Other researchers, however, have disputed the benefits of frequent transitions in the case of young children (Solomon and Biringen, 2001), drawing attention to research which suggests that any link between father–child time and the child–father attachment is mediated by the quality of interactions. A study by Solomon and George (1999) of 145 infants aged 12 to 20 months who had regular overnight visits with their father found disorganised attachment to mothers associated with low parent communication and high conflict. As Gould and Stahl (2001) observe, the evidence as a whole suggests careful evaluation of parenting history, parent–child attachment history, parents’ communication and their strengths/weaknesses, and the child’s temperament. As Lamb acknowledges, ‘individual circumstances should be examined to ensure that the arrangements made are sensitive to the parents’ and children’s strengths, schedules and needs’ (Lamb, 2007, pp 21–2). It is important to hold in mind throughout the discussion which follows that one of the most robust findings from research is that children’s well-being is associated with the quality, not quantity, of child–parent contact (Amato and Gilbreth, 1999; Whiteside and Becker, 2000; see Trinder et al., 2008).

Research on the well-being of children in shared residence arrangements

Several studies of children in shared residence arrangements have reported positive outcomes for the majority of children studied (Abarbanel, 1979; Steinman, 1981; Luepnitz, 1986, 1991; Brotsky, Steinman, and Zimmelman, 1991). Furthermore, some studies comparing shared residence with other arrangements have found modest benefits of shared residence in some areas of children’s adjustment. For example, Buchanan, Maccoby and Dornbusch (1991; 1996) interviewed 522 adolescents four and a half years after parental separation, comparing adjustment for type of residential arrangement. The findings must be viewed cautiously because the sample of children in dual residence was small, and many of them had self-selected that arrangement. However, the authors concluded that dual residence ‘can indeed be supportive to adolescent children of divorced parents: these children do stay emotionally close to both parents, and in terms of adjustment we certainly have not found dual residence to be harmful, in comparison with alternatives’ (Buchanan, Maccoby and Dornbusch, 1996 p 79). Examining adjustment across problem behaviours, school adjustment, worst problem (that is, the worst score on depression/anxiety, deviance or school effort) and personal resources (such as relationships), the study found there was ‘a tendency for dual-resident adolescents to have the best scores on some adjustment measures (depression, grades, worst problem), even if the differences were not statistically significant’ (p 103). When adolescents’ most severe problems were considered, those in dual residence were functioning best (p 56).

Bauserman's meta-analytic review of 33 studies from 1982 to 1999 comparing the adjustment of sole custody and joint physical/legal custody groups (in total 1,846 sole custody children and 814 joint custody children) found that for all categories of adjustment examined, except academic adjustment (general, emotional and behavioural adjustment, self-esteem, family relations, academic performance and divorce-specific adjustment such as attitude to parents' separation), children in joint custody were better adjusted than sole custody children (Bauserman, 2002, at p 97). Bauserman acknowledges, however, that these findings neither demonstrate a causal connection between joint custody and child well-being, nor 'support joint custody as preferable to, or even equal to, sole custody in all situations' (p 92). The findings must be viewed cautiously, since the analysis conflated joint physical and joint legal custody, and some studies examined were not peer reviewed. Bauserman concluded, however, that joint-custody arrangements (whether legal or physical) do not appear, on average, to be harmful to any aspect of children's well-being, and may in fact be beneficial (p 99). Kaspiew et al. (2009), surveying both parents of 1,800 children in Australia found that children in shared care were doing as well as or better than those in sole mother residence (p 267).

However, several studies comparing shared residence arrangements with sole residence arrangements have been unable to discern more favourable adjustment patterns in any of the arrangements (for example, Luepnitz 1986; Kline et al., 1989, especially at pp 435–6; Pearson and Thoennes, 1990, p 245; Johnston et al., 1991; McKinnon and Wallerstein, 1991). Recent research by Melli and Brown (2008) comparing random samples of 590 divorced parents in shared care and 590 in traditional sole mother custody found that the outcomes and characteristics of families in those respective groups did not differ greatly. In studies which find comparative benefits of dual residence, the benefits tend to be modest. Buchanan et al. (1991; 1996) found that variation within each of the residential groups was large and not a great deal of the variation was associated with residential arrangement. Subject to what is said below about high conflict cases, these findings suggest that the post-separation parenting arrangement of itself generally plays a secondary and minimal role in explaining variations in child adjustment (for recent confirmation, see Kaspiew et al., 2009, p 259).

It will be recalled that the courts have moved away from their initially negative view of shared residence, which characterised shared residence orders (SROs) as only to be made in unusual circumstances. SROs are no longer regarded as unusual, although there is recognition that often such orders may not be practicable. The research evidence discussed above would appear to support this more flexible approach in the sense that it does not indicate that shared residence is necessarily detrimental to children's welfare. Indeed, it can be of benefit to some children. Research, however, also indicates that successful

shared residence families tend to share certain characteristics, which are not those typically exemplified by litigating parents.

Conditions conducive to making shared care a viable option

Research in Australia (Smyth et al., 2004) has highlighted a number of conditions – relational and structural – which appear conducive to making shared care a viable option for separated parents. They include:

- *‘geographical proximity;*
- *the ability of parents to get along and, at minimum, to maintain a “business-like” working relationship as parents with children being kept “out of the middle”;*
- *child-focused arrangements, with children’s activities forming an integral part of the way in which the parenting schedule is developed;*
- *a commitment by everyone to make shared care work; family-friendly work practices; a degree of financial independence, especially for mothers;*
- *and a degree of paternal competence’* (Smyth et al., 2004, p 29).

In contrast to this profile, several studies have shown high levels of conflict and violence in disputed cases which come before the courts (see, for example, Buchanan, Hunt, Bretherton and Bream, 2001; Trinder et al., 2005; Perry and Rainey, 2007).

In the next section I look at the factors which research has identified as important in making shared residence work.

Determining the appropriateness of shared residence in individual cases: relevant factors highlighted by research

Children’s wishes and feelings and their involvement in decisions

While the research does not suggest a generally negative stance to shared residence, the evidence of variation in children’s functioning in shared residence arrangements also shows that it cannot be assumed that shared residence will be beneficial in all cases. For example, interviews with 21 children who had been in shared residence for three to four years highlighted their wide range of experiences (Neale et al, 2003). Some children found the arrangement burdensome, yet found it hard to change for fear of re-igniting parental conflict, or because they ‘could feel too guilty or too responsible for their parents’ feelings to broach the subject’ (p 908). Positive views about shared residence were associated with arrangements that were flexible, prioritised the child’s needs, and where the child felt settled and truly at home in both households. Negative views reflected inflexibility, prioritisation of parents’ needs, and children feeling unsettled and like visitors (p 906). The children in Buchanan et al.’s study also

reported problems, such as coping with different household rules and feeling torn between parents (Buchanan et al. 1996, p 157) and practical difficulties, for example associated with moving, schedules, and having belongings in dual residence (p 156).

These findings suggest that there has to be careful examination of the appropriateness of the arrangements for the child concerned in each particular case, taking into account the child's views about the existing or proposed arrangements. This of course reflects the courts' approach. It will be recalled that the House of Lords has made clear that the court is seeking the outcome that will be best for the child concerned, not that which is best for the parents. It has also recognised that a SRO impacts heavily on the child's lifestyle, and children's wishes and feelings are of particular importance, since they can all too easily be subordinated to the rights claims of parents.

Carol Smart (2002), drawing on interview studies of children in shared residence arrangements (Smart et al., 2001), including Neale et al. (2003) discussed above, highlights children's perspectives on their space and time in such arrangements, which are likely to be helpful to those assessing children's views and the possible impact of the arrangements on the children's welfare. The concerns raised by children included:

1. Practical issues of moving between homes and ensuring belongings were in the right place at the right time.
2. Different emotional landscapes in each household, to which children needed to adapt.
3. Different routines/rules in each household. (Although this was not always viewed negatively, and could be encountered positively as experiencing a different style of parenting).
4. Inflexibility of arrangements (arranged to suit parents not children).
5. Time apart could be beneficial in providing emotional space for parent and child. However, it could be too long for some children (who could experience boredom, separation from friends, and worry about the other parent), which could depend on the quality of time.
6. Child's difficulty finding time for himself/herself (giving time to mum and dad in their respective households).

Overall, the researchers concluded, the way in which relationships were sustained and managed appeared to be more significant than the formal structure of the child's living arrangements (that is, contact or residence).

The danger that children's views can easily be subordinated to the claims of parents is illustrated by a recent study by Skørten and Barlindhaug (2007), which draws attention to a possible link between the characteristics of some parents and their children's involvement in decisions concerning shared residence. The

study surveyed a random sample of 527 parents in Norway whose children were in shared residence arrangements, examining the parent's youngest child's involvement in decisions concerning the residence arrangement. The study found that 25% of children participated to a significant degree, 21% had some influence, and 55% of children had no influence on the decision. Children's influence was strongly linked to age: 45% of children aged five to nine had no influence, 25% of children aged ten to 14 had no influence, and all children aged 15 or over had some influence. Interestingly, in the ten to 14 group twice as many parents with the highest educational attainment did not permit the child to participate. Analysis showed that a combination of gender and education, that is, whether the child had a highly educated father, was connected to children not being consulted. Very plausibly, Skørten and Barlindhaug argue that such well-educated fathers, who may be engaged in child care as well as being breadwinners, may see their shared physical care of the child in terms of their right, which can undermine the child's say (p 382). They highlight a possible tension between a policy of seeking to achieve more equal child care and hearing children's voices.

This may be of some significance if it is recalled that the courts have moved towards the view that existing shared care arrangements should be reflected in court orders unless there are good reasons to the contrary. The research highlights the risk that in some cases the existing arrangements may have come into being without consulting a child. In such cases, exploration of the child's wishes and feelings (for example, the child's preference for other arrangements, or possible dissatisfaction with the current arrangement) may be particularly important, without knowledge of which the court might simply reflect the current arrangements in a court order.

It is possible that children's involvement may be beneficial in some cases. McIntosh et al. (2009) in a comparative study of 111 families in child-focused mediation and 70 in child-inclusive mediation found unique outcomes for those in the latter (in which children's views were fed back to parents by professionals) in terms of assisting resolution of the dispute, and improved quality and stability of the resulting post-separation parenting arrangements (including shared care).

The importance of examining the impact of parental conflict

The courts have indicated that parental conflict is not necessarily a reason for not making a shared residence order, but nor is the fact that parents are warring a reason for making an order. Research evidence suggests, however, that parental conflict is a factor which the courts need to examine very carefully in cases where shared residence is an issue. There is a substantial body of evidence which correlates negative outcomes for children with high parental conflict (Hetherington et al. 1982; Healy et al. 1990; Amato and Rezac, 1994; Whiteside and Becker, 2000; for reviews, see Emery, 1999 p 61–65; Buchanan and Heiges,

2001; Grych and Fincham, 2001; Harold and Murch, 2005). The nature and impact of the parental conflict should be assessed. Parental disagreement as to the proposed arrangements or litigation conflict might be distinguished from intense ongoing conflict that is impacting negatively on the child's welfare. The 'most damaging interparental conflict is frequent, intense, angry, physically aggressive, occurs in the child's presence, focuses on the child or issues related to child rearing, involves the child in the dispute and remains unresolved.' (Emery, 1999 p 63).

There is some evidence that in cases of high parental conflict shared residence may compound risks for children. Buchanan et al. (1996) found that although dual-resident adolescents were not especially prone to adjustment difficulties in situations of high conflict (p 258), 'when parents were in high conflict (or low cooperation), dual-resident adolescents were more likely than sole-resident adolescents to report feeling caught between their parents' (p 223) and such feelings were related to higher levels of child depression/anxiety and deviant behaviour (p 226). Johnston et al. (1989, 1991), examining cases where parents were disputing custody in the family courts and had failed to settle, found evidence that children who had more frequent contacts were more emotionally troubled and behaviourally disturbed (p 182).

More recent research from Australia also suggests the need for caution (for a very useful summary of Australian studies, see Smyth, 2009). McIntosh (2009) reports findings from a longitudinal study of high conflict families who were involved in mediation with respect to post-separation parenting arrangements (McIntosh et al. 2008). A sub-sample of 141 families was studied pre-mediation and at one and four years post-mediation. The mean conflict within the sample was moderately high and there were high percentages of parents (59% of mothers and 42% of fathers) with very high to extreme levels of acrimony. Of the 141 cases, 69 (48%) resulted in a mediated shared care arrangement (at least a 35%/65% share). Shared care proved the least stable arrangement, however, with only one third maintaining the arrangement at one year; and only 17% of 123 families studied at four years after mediation doing so. Although fathers in continuously shared arrangements expressed greater satisfaction with the arrangements than those who had never shared care or whose arrangements had changed, they also reported consistently higher frequencies of conflict with former spouses. Of the children remaining in shared care, 45% wished to change the arrangement. They too reported sustained conflict and were significantly more likely to feel caught in the middle of their parents' conflict. The children's contentment correlated highly and negatively with these feelings and distress at their parents' conflict (McIntosh, 2009, p 395).

In light of these findings concerning sustained conflict, McIntosh and Chisholm (2008a and b) examined data relating to the mental health of 181 school-aged children for whom data was available at one year post-mediation,

identifying all children whose mental health remained in the ‘clinical range’, warranting professional intervention. They found two factors which independently predicted such poor outcomes: fathers’ low levels of formal education; and high, ongoing inter-parental conflict. Four other variables added to poor outcomes when co-occurring with other variables, namely: substantially shared overnight care; poor mother/child relationship; high acrimony (psychological hostility) between parents; and child being under ten years old (McIntosh and Chisholm, 2008a, p 41; McIntosh and Chisholm, 2008b, p 3). Thus in this study shared care is an added risk factor for children who are caught in parental conflict. Children fared better in shared care where there was cooperation between parents and conflict was low. Children over ten were better able to deal with parental conflict. Emotional well-being was the poorest for those under ten where overnight care was shared between highly conflicted parents and where there was poor maternal availability (McIntosh et al., 2008).

Another study (McIntosh and Long, 2007; see for a summary, McIntosh and Chisholm, 2008b, pp3–4) examined outcomes for 77 parents and 111 children four months after involvement in the Australian Family Court’s Child Responsive Program (‘a supportive court process for separating parents, aiming to maximise early and effective dispute resolution’ (McIntosh and Long, 2007, p 4). Four months after settlement, 28% of the children had emotional well-being scores in the clinical range. Three variables independently predicted poor outcomes:

1. The child was unhappy with their living and care arrangements.
2. The parent’s relationship with the child had not improved post Court.
3. The child lived in substantially shared care (35% or greater).

Two others were similarly associated in combination with the other factors:

4. The parent had concerns about the child’s safety when in the care of the other parent.
5. The parents remained in high conflict (p 17).

The research also found that:

‘Seventy-three percent of parents involved in shared care arrangements post Court (41 of 56 parents) reported “almost never” co-operating with each other. Thirty-nine percent of shared care parents reported “never” being able to protect their children from their conflict’ (McIntosh and Long, 2007, p 18).

McIntosh and Long comment:

‘The issue is not that shared care is harmful per se, but that the regular movement of children through a cross-fire of acrimony between parents who do not cooperate, brings accumulating and damaging levels of stress to children who are imperfectly, if at all, shielded from that discord’ (p 19).

Other studies also highlight the relevance of the parents’ ability to minimise their conflict (for example, Brotsky et al., 1991; Luepnitz, 1991; Kline et al., 1989). The findings raise questions about the sustainability and suitability of shared residence arrangements in high conflict cases.

Recent survey evidence of the views of both parents of 1,800 children in Australia (Kaspiew et al., 2009) one to two years into residence arrangements found a link between the children’s low well-being, and family violence and safety concerns about children respectively. The study found that children fared worse in shared care arrangements when mothers reported safety concerns, although the same pattern was not found in relation to conflict and violence.

When read together with knowledge of high levels of conflict in litigated cases, these findings clearly provide an important indicator of the likely appropriateness of ordering shared residence in such cases, and suggest that the courts should proceed cautiously.

Summary

Research suggests that shared residence is not necessarily detrimental to children’s welfare and can be of benefit to some children. However, there is also evidence that some children do not fare well in such arrangements. The benefits cannot be assumed in all cases, and each case therefore requires a careful assessment of whether the existing or proposed arrangement is in the child’s interests.

It must be emphasised that most of the research on shared residence arrangements is based on non-litigating families and those findings are not necessarily applicable to those who bring disputes to court. Of particular note is the fact that high conflict (one of the key contra-indicators of positive outcomes for children in shared residence), is much more likely to be found in litigated disputes. The research suggests that courts will need to consider carefully:

1. The nature and impact of any parental conflict. In cases of high conflict, or where parents have safety concerns, shared residence may compound risks for children.
2. Children’s wishes and feelings regarding the arrangements and their impact, physically, emotionally and psychologically in terms of the child’s perception of movement, space and time. Flexible, child-

focused arrangements are important to children and associated with good outcomes and durability. There is also some evidence that shared residence arrangements exist in cases of high conflict and come about without children's influence. It is particularly important, therefore, that these features of cases are explored when the court is considering whether to endorse an existing arrangement.

3. The practicability of the arrangements and their suitability in the light of the child's age and separation tolerance.

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