NOTES FOR PARLIAMENTARY INQUIRY INTO JOINT CUSTODY

By Justice Richard Chisholm

1. INTRODUCTION

These notes are prepared in response to some of the questions raised by the Committee on 10 October 2003. I hope they are helpful. I would be happy to provide any further ideas or clarification if requested. I have tried to avoid legal technicalities – the Committee will have received a great deal of information about the technical law.

I will start with some relatively simple technical matters and then discuss some wider issues.

2. TWO ISSUES: DECISION-MAKING AND ALLOCATION OF TIME WITH EACH PARENT

In getting through the technical language of custody, residence, guardianship and so on, I think it is helpful to say that there are essentially two issues. The first is the allocation of decision-making powers between parents. The second is the allocation of the child's time with each parent.

Decision-making

In relation to *decision-making powers*, the present law gives parents equal powers ("parental responsibilities") regardless of how much time the child spends with either parent. The Court can of course change that after hearing a case. In practice, it is rare that the Court will change the position that each parent has responsibility for the child's long term care, welfare and responsibility. (In that sense, "shared parenting" is the norm). It is common to find orders to the effect that each parent has responsibility for the child's day to day care welfare and responsibility during times that the child is with that parent. Of course, such orders may be made either by agreement or when the Court determines a contested matter. These issues are governed by the principle that the child's best interests are the paramount consideration.

So far as I know, this part of the law is not controversial and seems to work satisfactorily. There are some technical issues that I could if necessary discuss, but essentially I cannot see that in the area of decision-making there is any legal inequality between parents and I doubt that any presumption of the kind that has been discussed would be relevant.

Time allocation

It is a completely different question how much time the children should spend with each parent. In relation to the child spending time with each parent, there is presently no legal presumption. Parents can agree on it, and the Court will normally make consent orders in terms of what they agree. If there is a dispute, the Court will determine the question on the evidence in the particular case.

Orders about children spending time with parents can be expressed either in terms of the child "living with" a parent or "having contact" with that parent. There is no real difference in substance. Orders of this kind are quite irrelevant to decision making powers. There is no different in substance between an order that the child "live with" Parent A on alternate weekends and an order that the child "have contact with" Parent A on alternate weekends.

3. HOW WOULD A PRESUMPTION OF EQUAL TIME OPERATE?

One of the questions that arose was what difference a legislative presumption that children should spend equal time with each parent would make in practice. This is of course a vital question.

I only want to deal with two aspects, the importance of identifying precisely what the presumption would be, and the impact of a presumption in interim proceedings. But first I will comment briefly on the existing legislation and how a presumption might fit into it.

The existing legislation

Broadly speaking, the present legislation does not contain *any* presumptions about what is likely to be in the interests of children. It says that their best interests are to be paramount (s 65E) and that the court should take into account a range of matters (s 68F).

The matters in s 68F are carefully phrased to avoid creating presumptions. For example, the section does not specify what sort of relationships children should have with parents, but it says that the court should take into account the nature of the relationship of the children with parents (and others).[1] It does not create a presumption that the outcome should ordinarily conform with children's wishes, but instead says that the Court must consider any wishes expressed by the child.[2] Again, it does not create a presumption that there should be no contact between an abusive parent and a child. Instead it tells the Court to have regard to the need to protect the child from harm,[3] and to take into account the capacity of each parent to provide for the child's needs.[4]

There is perhaps a qualification to this, in that some provisions of s 60B may be seen as coming close to creating one or two presumptions ("children have a right to be cared for by both their parents..."; and have "a right of contact, on a regular basis, with both their parents and with other people significant to their care..."). However the interpretation of s 60B is a matter of some complexity, dealt with in *B and B*, and I will not digress to deal with this.

It follows that a specific presumption that it is likely to be in children's interests to have equal time with their parents would be a very different kind of provision from any that are now in the Act, certainly in s 68F.[5]

For that reason, the introduction of such a presumption would be likely to lead to litigation to work out what it meant and how it related to other provisions of the Act. For example, it might be unclear whether evidence about the wishes of a child, or risk to a child, would rebut the presumption.

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1 S 68F(2)(b).

2 S 68F(2)(a).

3 S 68F(2)(g).

4 S 68F(2)(e).

5 So far as I know, there is no such legislative presumption in the law of any comparable country – the UK, Canada, New Zealand. There are some provisions in one or two States of the USA that look a bit like such a presumption, and it would be worth examining these carefully and considering how effective they have been. (I believe the Committee will have other material on this).

Drafting: what would the proposed law *say*, exactly?

It seems risky to debate the merits of a presumption unless one has a clear idea of what it is. The impact of an equal time presumption would depend on the way it was formulated.

The formulation would deal with at least two questions.

The first question is, what is the preferred time allocation? Does it mean that the child should spend exactly equal time with each parent? If so, does it specify how this should happen? For example, does it mean:

- The child should spend alternate weeks with each parent? Or alternate days? Or months, or years?
- The child should remain in the home, and each parent should live in the home for alternate periods with the child?
- The child should spend approximately equal time with each parent?
- The more the allocation of time approaches equality the more it is likely to benefit the child?
- The child should spend more than a certain minimum time with each parent?

We are obviously talking about a rebuttable presumption. The second question relates to the *force* of the presumption, or what it would take to rebut it.

Everyone agrees that there are *some* situations in which it is not in the child's interests to spend equal or near-equal time with each parent, for example where a parent has abused the child, or is disabled from proper parenting by drug abuse or illness. A presumption can be expressed in various ways, and, depending on the formulation, can be of varying strength.

Here are some possible formulations, ranging from weaker to stronger (for the purpose of this it will be assumed for the moment that the formula will be in terms of the child spending equal time with each parent):

1. The court should consider in each case whether it would be in the child's interests to spend equal time with each parent.[6]

2. The court should order that the child spend equal time with each parent unless to do so would be contrary to the child's best interests.[7]

3. The court should order that the child spend equal time with each parent unless due to exceptional circumstances it is satisfied that to do so would be contrary to the child's best interests.

4. The court should order that the child spend equal time with each parent unless doing so would be likely to harm the child.

Presumptions and interim proceedings

It could perhaps be said that a presumption would have limited effect because in the end the Court would hear all the evidence and decide whether on the facts the presumption has been rebutted.

This may be true to a considerable extent in relation to final hearings. However I think a presumption might have a large impact in interim hearings. In interim hearings, there is normally no opportunity for cross-examination, and the cases is determined "on the papers", that is, on the basis of the affidavits by each party, sometimes with other material such as medical or other reports, and submissions. In those circumstances, it is difficult to make findings about contested matters, for example allegations that a parent has been violent to the other parent or to the child, or has denigrated the other parent to the child. In the absence of findings, the Court needs to rely on presumptions.

It would be useful for the Committee to consider how a presumption might work in particular cases. Here are three cases. The first is based on a case I heard very recently and involved what we call relocation issues. The second reflects a type of situation that frequently occurs in cases that come for adjudication. The third may not

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6 cf s 68F(2)(k) (re avoiding litigation) which is in these terms: "whether it would be preferable to make the order that would be lease likely to lead to the institution of further proceedings..."

7 This is the language used in s 60B(2).

be a common situation, but of course any presumption will have potential application in all cases, so it might be useful to consider how it would apply in this one.

Case 1

Fred and Margaret have two girls, aged 7 and 9. They have lived in the eastern suburbs of Sydney since they married in 1990. They separated in 2001. Fred moved into rented premises nearby with his new partner, Jennifer. By agreement, the children spent about two out of three weekends with him, and often stayed overnight on one or two nights during the week.

In early 2002, Margaret formed a new relationship with Mark, who had family in Bowral. In late 2002 Margaret told Fred that she and Mark had bought a property in Bowral (about 2 hours drive from Sydney). They had visited it with the children, and also visited the school where they proposed the children would live. She proposes that the children come to live with her in Bowral, and spend two out of three weekends, from Friday afternoon to Sunday evening, with Fred.

Fred opposes the move. He says the children would be better living with him and Jennifer in their familiar environment than in Bowral. He asks the court for orders restraining Margaret from relocating with the children to Bowral. His position is that if Margaret remains in the Eastern suburbs with the children the present arrangements should remain, but if she goes to live in Bowral the children should live with him and have contact with Margaret two weekends in three and for half the school holidays.

The case comes on for interim orders. The limited evidence is to the effect that the children are doing well and have good relationship with all relevant adults, and have many friends at school. They have declined to express a view about whether they want to go to Bowral.

Case 2

The child, John, now aged 4, has lived with his maternal grandmother, Emily, since age 2, because Cheryl, his mother (28), has been in drug rehabilitation programs in relation to speed and alcohol abuse. Cheryl now claims to be cured, and wants John returned to her care. The grandmother, Emily, fears that John would be unsafe with the mother, and seeks interim residence, with Cheryl to have only daytime contact until she proves that she is off drugs.

John's father, Cameron, who has seen John only intermittently, wants the child to live with him and with the mother on alternate weeks. He blames the mother for having prevented him from seeing more of the child. He works shift work, but proposes that during "his" week the child will be cared for partly by him, partly by his mother, and partly through child care.

At the interim hearing, there is very little evidence that would enable the court to determine the contested allegations.

Case 3

Since they separated in 2001, Mark and Judith had an agreed arrangement for their three children, aged 13, 10 and 3. They rented a unit near the former home. Each parent would live at the home, and then at the unit, on alternate weeks, the children remaining in the home. Each parent had a part-time or job share arrangement that meant they could give full time care to the children in "their" week.

In early 2003, however, Mark formed a new relationship, with Annabel. Annabel is now pregnant with their first child. Mark is about to move into a new home with Annabel, about an hour's drive away. He proposes that the children live with him in alternate weeks. He will be returning to full time work, but says that Annabel, who is not working, is well able to care for the children, especially the three year old.

Judith proposes that the children live mainly with her, and with Mark from Friday afternoons to Mondays mornings on two out of three weekends. She says that the older children have told her that they want to stay in the home where they have the clothes, toys, pets and homework things, and that it would be too disruptive for them to go to a different home each week. She says the children complain about Annable being "mean" to them. Mark says that the older children have told him they would be happy to live with him each alternate week, and says that they get on excellently with Annabel.

In the interim hearing, the Court is unable to determine these contested issues.

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Innumerable other cases could be sketched out. I suggest that the Committee could usefully consider how the presumption – formulated in one way or another – might operate in such cases.

4. IDENTIFYING THE PURPOSE OF ANY LEGISLATIVE PRESUMPTION OR OTHER AMENDMENT

Is may be useful to identify clearly the purpose of any amendment. Broadly speaking, I think there are three types of purposes that might be considered:

1. To change the outcomes of cases decided by the Court.
2. To change the outcomes of cases agreed by the parties "in the shadow of the law".
3. To change the attitudes of people in the community.

Changing outcomes of decided cases

If the Committee has in mind the first purpose, I suppose the obvious task would be to examine decided cases and identify whether some different outcome would be desired. There are of course many decisions reported and they are easily accessible.

I understand that the Committee has heard criticism of the Court. I do not wish to be defensive: in particular cases we may well have made decisions that the Committee might disagree with, and, probably like most judges, I am sure there are cases that I might have handled better. However in considering criticisms of particular decisions, or suggestions that there is some pattern in the outcomes, it seems essential to read the judgments in each case. The view of the facts that might be given by one party in a submission might be different from the conclusions the Court reached on the evidence before it, having heard both sides.

If, having studied the judgments of the Court, the Committee reached the conclusion that there should be some change of direction in the outcomes of decided cases, then it would be appropriate for it to consider whether there should be some legislative amendment that would lead to the desired outcomes.

Influencing outcomes of "settled" cases

It seems true to say that when parties try to reach agreed outcomes – to "settle" their cases – they will be influenced by what they believe the court would decide if the case were to be adjudicated.

I do not say this will be the *only* thing they have in mind, of course. But normally, I assume that if one party seeks a particular result, and the other party thinks it likely that if the case were fought in court the court would be likely to make an order in those terms, then the first party would feel under pressure to agree to that outcome rather than waste a lot of money in litigation and have that outcome ordered by the Court. This is often referred to as bargaining "in the shadow of the law", a phrase used in a famous article written many years ago.

What influences the parties, of course, is what they *believe* the Court would do. I understand from the Committee's comments that there has been some evidence to the effect that some people believe that the Court approaches cases with some particular outcome in mind, for example that the time the children should spend with the mother is 80% and with the father 20%. As it happens, this is not true. However if the litigants *believe* it is true, they might agree to that outcome.

So, in thinking about the formulation of any amendment, it is important to think not only about what effect it would actually have on the Court's decisions, but how the amendment might be perceived.

Overall, it seems desirable that the law should be as clear as possible, so that a reader of the legislation will gain a clear idea of what principles the Court will apply.

Influencing attitudes

One possible purpose of legislation may be to influence attitudes of people to their responsibilities as parents. For example, the Committee might feel that legislation could help to encourage fathers to be more involved in their children's lives, before and/or after separation.

It seems that at least to some extent, the 1995 amendments had such a purpose.[8]

If the Committee is interested in this purpose, I suppose it would need to identify what sort of change it had in mind, and what sort of amendment would achieve it. In that connection, it would be important to examine the existing provisions of the Act, especially s 60B, and then consider whether some modification or addition would be desirable.

The Committee might also consider whether some other approach might be appropriate. For example, a public education campaign might be more effective than amendments to the Family Law Act 1975, since – I assume – most parents do not spend their time studying the Act when considering how to deal with their children. It might be useful for the Committee to consider what evidence there is about the impact of the 1995 provisions, that do seem to have been intended to have an educational effect. And if legislation is to be used to send some message to parents, the Committee might consider whether that message should be a suggestion that in all or most cases parents should spend equal time with their children, or perhaps something else.

5. THE SIGNIFICANCE OF PEOPLE'S PERCEPTIONS OF THE LAW AND OF THE COURT'S APPROACH

I understand from some of the Committee's comments and questions that it has heard evidence to the effect that some people have a perception that the Court approaches cases with some particular outcome in mind. There was some reference to "80:20". I take this to mean that people perceive that the Court approaches cases with the view that the correct outcome is for the children to be with the mother 80% and the father 20%, or something along those lines.

Perceptions, true or false, can have consequences, so it is appropriate for the Committee to give this matter careful consideration.

If such a perception is indeed widely held (I do not know), I would agree that it indicates a problem, and that something should be done about it. However I would

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8 "Assessing the Impact of the Family Law Reform Act 1995" (1996) 10 (3) *Aust J Family Law* 77-197.

argue that it is critical, in working out how to deal with it, *to determine whether such a perception is true or false.*

Let me say at once that I do not believe it is true: it does not accord with my own views, or with what I know of my colleagues' work. My view is that the judges decide the cases as best they can on the evidence. Their own values must inevitably play a part, but to a large extent the Court will adopt and apply values that are based on the way the parents in the particular case have approached their task of parenting.[9] No doubt in particular cases, people would have different views about what outcome would be best for the children.

The Committee showed some interest in statistics in this connection. The Court's written response contains a lot of this material and I don't want to comment on it. However I think we need to be cautious in drawing inferences too readily from statistics about outcomes.

Suppose you find, when you look at the figures, that in the majority of settled cases, the mother has residence and the father contact. That statistic is consistent with very different theoretical possibilities. I will mention two – I have taken the extremes to illustrate my argument.

Possibility (a): Both parents thought this was the best arrangement for the children in their particular circumstances.

Possibility (b): The father wanted the children to live with him, or with each parent equally, and believed that this would be in their interests, but grudgingly went along with the mother's wishes because he believed that the Court would inevitably order that the children live with her, whatever the circumstances.

Possibility (a) would be satisfactory, in that the outcomes would be what the parents considered best for the children; because, for example (i) the mother was the one who mostly cared for them during the relationship, and the parties both think it is best for this to continue, (ii) the father's work commitments make it difficult for him to have

the care of the children much during the week, and the family still depend to a large extent on his income, and (iii) the children wish to stay with the mother.

Now it is possible, of course, that someone might take the view that those parents were *wrong* about their children's interests, and that the parents should have realised that it would have been better for the children to spend equal time with each parent. However, the law does not generally seek to impose other people's views on parents about what is best for their children. The law gets involved, mainly, in one of two circumstances. The first is when a state or territory child welfare agency believes the child is at risk and take the case to the children's court so that the children can be removed from danger and eg removed into foster care for their own safety. This is not part of the Family Court's jurisdiction. The second is when the parents can't agree and come to the Family Court to resolve the dispute. The law does impose some other requirements; for example parents must send their children to school. But broadly speaking, apart from these situations the law leaves it to parents to decide what is best for their children.

So I would argue that possibility (a) is indeed satisfactory; and that it would be an unusual use of the law in our society to try to impose any particular regime on parents, whether they were together or had separated. The Family Court only gets involved because parents cannot agree, and a decision has to be made.

Possibility (b) would be unsatisfactory, indeed alarming, because the outcomes for those children would be based not on the parents' views about what was best for them, but on a view about how the law operates. In other words, if a lot of litigating parents agree that the children should live mainly with the mother not because they think this is best for the children but because they think that this is the inevitable outcome of court proceedings, there would be a serious problem that would need to be addressed.

Thus, on its own, the statistic that the majority of parents reach agreement that the children should live mainly with the mother does not tell us whether there is a

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9 I have discussed this in some detail in "Perceptions and values: their role in family law decisions" (paper given to the College of Law in August 2002; published in *Australian Family Lawyer*, Autumn 2003).

problem. There would only be a problem *if that outcome was a result of the parties' perception that if they went to Court that would be the inevitable result.*

It follows that there is an important factual question to be resolved, namely whether the outcome that most children live with the mother by agreement is the result of the parties' perceptions about the inevitable outcome of going to court. To the extent that it is, there is a problem.

I don't know whether that problem exists or not, and I will not attempt to comment on that. I will assume for the purpose of the discussion that the evidence leads the Committee to think that it does.

If so, there is a problem. But the nature of the problem, and its solution, would depend on *whether the perception is correct or incorrect.*

If the perception were *correct*, then clearly something would need to be done about how the Court deals with cases, with a view to removing the bias.

If the perception were *incorrect*, something would need to be done to correct it, so people had a true understanding of how the law operates. In this case, the problem to be addressed is the mis-perception, and the answer would seem to lie in education programs, aimed at the public, the legal profession, and perhaps at other groups.

I think it is important, therefore, for the Committee to consider whether as a matter of fact the Court does have a bias in favour of 80:20, as it has been put, or in other words a bias in favour of mothers having residence and fathers having only weekend contact.

As I have said, my own view is that the Court does not have such a bias. I may be wrong. It is up to the Committee to form its own view on the evidence it receives.

What would be relevant evidence? As indicated above, I do not think statistics on outcomes are very illuminating, since they could be due to various factors other than such a bias.

The best evidence, I think would be an examination of the results in actual cases, having regard to the evidence and the reasons for judgment. Such an examination would be difficult and a lot of work, because the facts of each case are different.

There might be other types of evidence that would be useful, for example surveys of attitudes of judges and other participants in the system. I assume that given the limits of time, the Committee may not be able to conduct such research itself. I am not sure that there is much in the way of existing research or evidence that would be helpful, but I have not researched this myself, and there may be some that I don't know about.

I hope this does not sound defensive, but if there is no satisfactory evidence that such a bias exists, I do not think the Committee should assume that it does. I think that the Committee could reasonably assume that judges and others in the Court do their best to apply the law to the cases that come to them. The idea that we would set out to impose an artificial outcome regardless of the evidence of each case seems inherently unlikely. It would seem more sensible for the Committee to assume, unless there was good evidence to the contrary, that the judges and other Court personnel do their work in a conscientious manner, determining cases as best they can on the evidence that is available.

6. GENERAL

Finally I would like to express some very general personal views.

Parenting cases that come to Court are extremely stressful for the parties and the children, and often involve expense that causes financial hardship. I have no doubt that many cases "settle" because one or both parties feel that they cannot afford to litigate, or that the process of litigation would be so damaging that it would outweigh any benefits to the children that might come from a favourable decision. I suspect that the most fruitful area for improvement lies in the processes by which we deal with the problem, rather than the legal principles that apply. Improving the process is something many people have been working on, but we have by no means solved it. I suspect that the solution will require much hard work and some experimentation, and might well require changing some legislation relating to evidence and procedure. It might also involve more resources, or different resources.

In a perfect world, one might well say that it is desirable for children to spend equal time with each parent when parents have separated. And there are certainly cases in which some form of shared arrangement works well both for the parents and the children. There is no obstacle to those parents obtaining consent orders to that effect.

But it is my impression that for all sorts of practical reasons, unrelated to the law, this is the case for a minority of separated parents. These reasons include job commitments, difficulties in finding accommodations near each other, the wishes of older children, and many others. I doubt if it is the law that prevents most separated parents from having equal sharing arrangements.

I would suggest that in considering whether any presumption would be desirable, the Committee might ask itself the following questions:

1. What problem is it intended to solve? What evidence is there about the extent and nature of the problem?

2. What would be the intended outcome of the presumption. Is it intended to affect decided cases; to influence agreed cases; or to influence parents in the community, or some combination of these?

3. Would the presumption be likely to achieve that intended outcome?

4. If it did, would the presumption have other consequences? Would any of them be undesirable? If so, would the advantages be likely to outweigh the disadvantages?

I hope these comments are helpful (and I am sorry they are so long!).

Richard Chisholm
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