Courier Mail, 10 Nov 2008

50-50 IS NOT FAIR

When an ill-thought-out law forces divorced couples to split parenting equally, children can suffer, writes Matthew Fynes-Clinton

KATE can vividly recall the instant she learned of a Family Court judgment forcing her six-year-old daughter, Mia, to spend equal time with each of her estranged parents.

"My initial thought was, 'They'll realise (50-50 parenting orders) are a mistake in about 10 years time — and that they've screwed up a generation," says Kate, whose real name and that of her daughter have been changed to protect their identity.

"There are cases where Mia has said to me, 'I live with you or I live with Dad, but I don't have a home'. That's really saddening.

"I've seen her compartmentalising her life. And I worry about that. Will these kids have romantic relationships where they can settle down in one life?

"I wonder how they will ever go about making relationships for themselves that are permanent."

After spending a week with one parent, Mia, now 8, will be dropped at school on Friday morning. When she emerges from the grounds in the afternoon, the opposing parent will be there to pick her up. And so the weekly cycle turns; holidays also are split in half.

"Opposing" is an apt characterisation. Mia's mother and father — who live within 30 minutes' drive of each other in southeast Queensland — do not speak to each other, says Kate.

Against such a backdrop, she is confounded by how a court, with their child's "best interests" supposedly paramount, could impose a co-operative parenting arrangement.

"It's impossible (for the order to work)," says Kate, "because we don't have communication between the two parents. There is no co-operation."

The Family Law Amendment (Shared Parental Responsibility) Act of 2006 ushered the most sweeping innovation to family law since the passage of no-fault divorce in 1975. In child custody battles, a Family Court judge or federal magistrate must now "presume" that it is in the best interests of the child for the child's parents to have "equal shared parental responsibility."

The primary exception to the rule is where there are reasonable grounds to indicate a history of family violence or child abuse.

Shared responsibility creates obligations towards joint decision-making.

For major long-term issues, such as education and health, parents are legally bound to consult in a genuine effort to reach agreement. Financial and other penalties for non-compliance may arise.

While equal parental time is not automatic, an equal shared responsibility order requires the court to also "consider" instituting 50-50 time, or, where that would not be "reasonably practicable", consider an order of "substantial and significant time" for each parent.

However, Queensland Law Society family law chairman Julie Harrington says that even in a typical substantial time order — where children may spend five nights every fortnight with their father — serious tensions may emerge.

"I have (such a) client and the picture he draws of how that family functions is really quite sad because he takes the child to gym, mum won't.

"He takes the child to piano, mum won't.

"He says, '(My ex-wife) keeps saying to me our daughter can have one life in your household and another life in my household'. The child's got this sort of split personality thing happening."

Harrington says that, by and large, it is not the judicial officers making the orders who are at fault — but the mandated "presumption" of shared responsibility from which they must take their cue.

Legal Aid Queensland's Bris-

What the changes mean

THE OLD LAWS

- Pre-1996, children were ordered to live with a "custodial parent" who alone had certain decision-making powers.
- 1995 Family Law Act amendments replaced custody orders with "residence orders". Scope to give resident parent and non-resident parent equal decision-making powers, but court decisions did not often reflect this in practice.
- 80-20 orders were common, usually granting the mother sole residence and the father alternate weekend and half school holidays contact.

THE NEW LAWS

Family Law Amendment (Shared Parental Responsibility) Act 2006:

- Introduces a presumption of equal parental responsibility. This means both parents have an equal role in decisions such as where a child attends school or serious health issues.
- Cancels the equal responsibility presumption where there are reasonable grounds to believe a parent has been violent.
- Courts must consider if spending time with both parents is reasonably practical and in the child's best interests.

"50-50 is not fair" (cont.)

"They'll realise 50-50 parenting orders are a mistake in about 10 years and that they've screwed up a generation"

bane family law head Jennifer McArdle notes the imperative of that presumption is even leading to some 50-50 residential orders being imposed, despite the risk of harm.

These are usually cases where litigants or their lawyers do not supply adequate information to support allegations of domestic violence or child abuse and the court has no choice but to "apply the law."

For Kate, the gulf between deeply-divided former spouses and pragmatic co-parenting is immeasurable.

When little Mia falls ill while in the care of her dad, her mother is not informed.

Recently, Kate missed attending a parent-teacher meeting for Mia that occurred in the week she was with her father.

"(My ex-husband) and his girlfriend went," she says. "I didn't find out about it until after it happened."

And when Mia wished to start weekly tennis lessons, her dad said no — "because it didn't fit with his schedule", says Kate.

She thinks the real reason is more insidious.

"It's about him and me. And it's about control," she says, concerned about the potential of such power plays to turn their daughter into a pawn.

"Because her dad doesn't want to take her, I have actually arranged for her to do tennis every second week. But she loses the ability to get really into it as she's not going often enough."

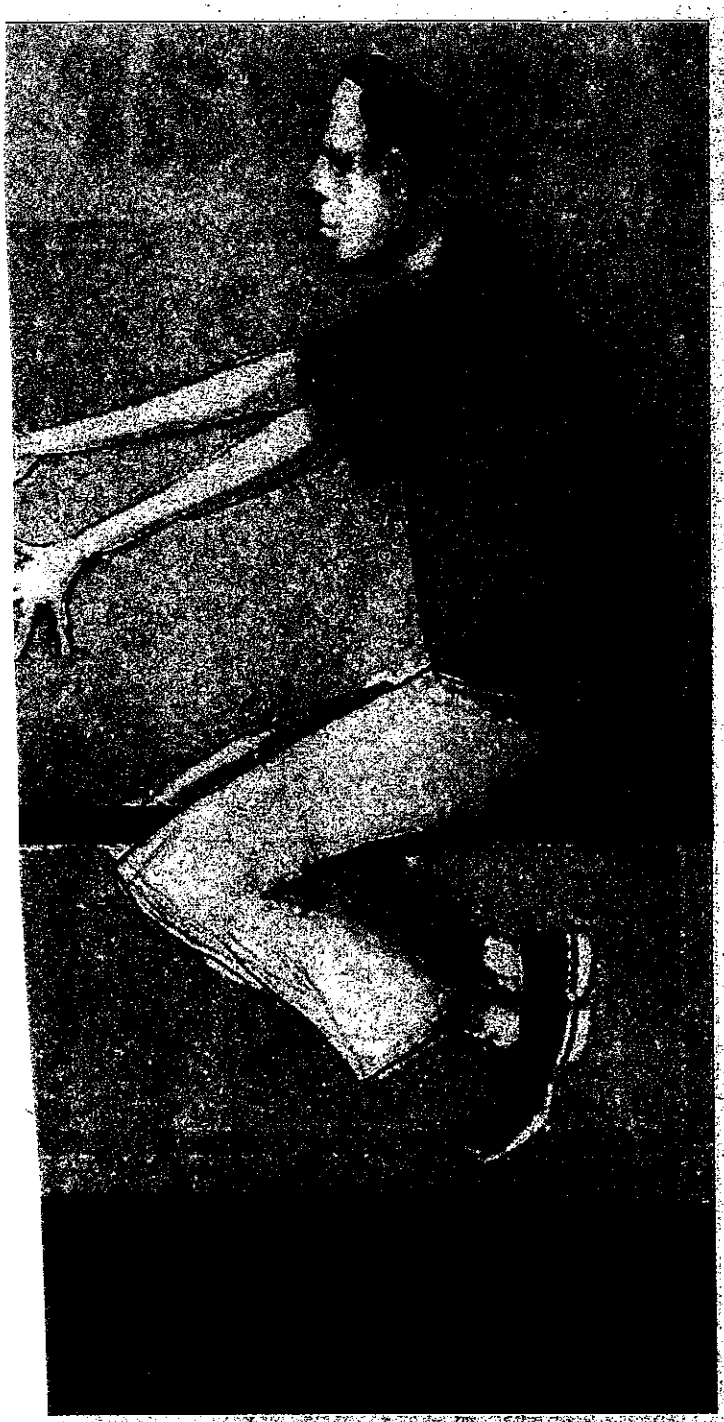
She says that so far, she and her ex have not had to face together any comprehensive decisions as stipulated by the law. However, she dreads the day, especially when their only contact is by sporadic email.

"What happens, if, God forbid, Mia gets into drugs or alcohol and she needs help and extra parenting?" Kate asks. "What happens then?"

She says the most persistent sore for Mia is the short-circuiting of friendship ties.

"When she comes home on a Friday, she's out in the street re-

"50-50 is not fair" (cont.)



establishing her connections with the kids in the neighbourhood every single week.

"Quite often, she's overbossy, just trying to get herself back in with the group. She knows she's only got a limited amount of time.

"Occasionally, you'll get one kid who doesn't talk to her because he hasn't seen her for a week. So she comes back crying."

Recent research by Melbourne child psychologist Jennifer McIntosh, funded by the federal Attorney General's Department and the Family Court, offers a rare snapshot into post-2006 shared parenting.

The landscape is grim. "In unresolved high levels of conflict," she says, "where children are toing and froing between houses and there is no emotional bridge between the houses, this seems to be taking quite a toll. It's created an enormous conundrum for children."

She says the fundamental paradox with laws encouraging mutual-parenting responsibility is the contrariness of the couples who seek judicial determination of their child-custody wrestle.

"The legislation is written about parents who can do (equal-time parenting)," she says, "and it's applied to parents who can't."

"Some couples dislike each other more than they love their kids"

In one of her studies, a Family Court sample involving 77 parents and 111 children, almost half the children left court in a substantially shared-care arrangement (five nights or more a fortnight with each parent).

Four months later, 73 per cent of shared-care parents reported "almost never" co-operating with each other.

Yet even when the law operates only in spirit, as in cases mediated out of court, equal-time care may be no more successful for strained former couples.

In a second investigation by Dr McIntosh, of 119 high-conflict families whose parenting disputes were mediated, 28 per cent went into substantial shared care.

A year later, three-quarters of those arrangements had collapsed.

McIntosh says substantial or equal-shared care can succeed where "self-selected" by mature, child-focused couples.

"But you need two sets of everything, co-operation, geographic proximity, family-friendly work practices and people to be financially comfortable. On top of that, you need the emotional equipment for it.

"When you actually look at what it takes to make it work, it's phenomenal."

She reserves her greatest concern for children under three.

"We're seeing increasing numbers of developmentally inappropriate arrangements going ahead on the strength of the legislation," she says.

"Two-year-olds (should not be having) shared overnight care at more than, say, one night a week.

"At that age, relationship-dependent growth is going on. Children can end up without the capacity to be securely attached to either parent."

McIntosh believes some fathers are undoubtedly pursuing their "right" to parity of time under the new laws, ahead of their children's best interests.

She says her data indicates children from broken families are happiest where parenting time is not substantially shared.

"(Such children) are in less than 35-65 arrangements," she says. "They have a principal place of residence, predictability, stability, routine and have the active support of a parent who they're not living with."

But McIntosh says the primary carer could just as effectively be a father.

"Often it is the mother — that is the reality," she says. "It's not a gendered issue. There's nothing to rule out that person being the father."

Former Queensland Family Court judge Tim Carmody, SC, says the obligation to jointly and co-operatively parent is "pre-ordained" under the equal shared responsibility laws.

"But stop signs don't actually stop cars — people do," he says. "Likewise, family laws with good sentiments don't make people do the right thing.

"The 5 per cent of (litigating) couples who end up in a family-court trial have got personality problems or they're into war. Some dislike each other more than they love their kids.

"Fifty-fifty should be where you arrive at, not where you start. It doesn't make any sense to me."

Carmody says even the healthiest of marriages are rarely underscored by truly equitable parenting.

"One of the partners is generally always doing more," he says.

Kate wholeheartedly agrees.

While her ex-husband successfully fought for 50-50 time, she had argued to be Mia's primary carer on nine-nights-a-fortnight basis.

"In every single family I know, there's usually a captain at the wheel," she says.

"One parent or the other does more than 50 per cent of the parenting and, in most cases, it's the female. That's just the way it is.

"So in 50-50, they're not allowing that natural system to work. What they're actually creating is an unreal world."

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Sharing the care

Equally shared care of children post-divorce is increasingly common but is it working out for the children? **Kathleen Noonan** reports

WEDNESDAY afternoon at schools throughout Queensland you can see it. The child changeover. Children dropped at school by mum in the morning are picked up by dad in the afternoon as increasing numbers of separated parents attempt to share care more equally.

These are Australia's growing number of "children with two homes". A decade ago it was 3 per cent of children. Today it's about 9 per cent and rising.

They are part of a national social experiment bought about by Family Law amendments in 2006, perhaps the biggest revolution in Australian Family Law since the Act was drafted. Court orders of significant and equal time share are on the increase, says Queensland Family Law specialist Geoffrey Sinclair. "There's no doubt the Family Court has latched on to what the Federal Government wanted and is ensuring it happens," says Sinclair.

Yet, according to highly respected child psychologist and researcher Dr Jennifer McIntosh, no one really knows the long-term impact on the shared children. "The legislation came before the research."

This adjunct associate professor at La Trobe University was studying children affected by separation when she found something disturbing. "I was looking at two groups of pretty high-conflict families. In both, there was a distinct group of children struggling. They were more nervous, fearful, anxious, worried and depressed."

What the children had in common was substantially shared parenting. Their parents were in high conflict. "It was proving disastrous. They were being torn apart."

McIntosh found that children aged under 10 were the most vulnerable.

Since publishing her findings, McIntosh has found herself under attack from men's rights groups. "I would rush to say my findings are not about gender or anti-father," she said. "In the Family Court study there was a number of resident fathers and non-resident mothers.

"But the facts are the parents in 50-50 shared care tended to have higher rates of conflict, and this was damaging."

So how many Australian families are grappling with custody issues? The Australian Bureau of Statistics reveals that half of Australia's 51,375 divorces each year involve children — some 48,400 of them. In Queensland, more than 12,000 couples divorce each year.

One Queensland parent who has tried the 50-50 split is Sharon (not her real name), a mother of three children aged five to 12, who lives on the Gold Coast. "It's so hard," she said. "You both need jobs that are flexible, a good memory, patience and the ability to hold your tongue."

She and her ex-husband split three years ago with Sharon as custodial parent. "Last year we tried to increase it to week-about. But it all fell apart. It just was an organisational nightmare. We couldn't afford to have two of everything at both houses: two sets of uniforms, sports gear, bags, homework books, laptops. So when packing, something would always be left behind. And there'd be tears and then blaming each other. So we went back to the way it was — weekends and half the holidays — with an extra day a week. Maybe when they are older we'll try again."

Sharon's experience is not uncommon, according to research by Dr Bruce Smyth, an associate professor at the Australian National University and an Australian Institute of Family Studies research fellow.

It was a nightmare. We couldn't afford to have two of everything at both houses: so when packing, something would always be left behind. And there'd be tears

He compared 50-50 shared care and other arrangements, finding that shared care was the least stable. "After three years, only half of the families with equal shared care were still doing it," he said.

This may not be a bad thing. "It may mean people tried equal share; it didn't work, so they try something else. That shows flexibility and communication."

Smyth says separated Australian families fall into three groups: highly co-operative couples, highly conflicted couples and those in between.

The common factors of success are parents living near each other, both with jobs, financial independence, a low rate of re-partnering, and with a philosophical view of that's how it should be.

"These people never go near a lawyer," Smyth said. "In the high-conflict cases, kids get caught in the middle, are exposed to conflict and poverty, and are stuck in the middle as mum and dad use them as spies and messengers.

"As shared care increases, the real question for me as a researcher is: Is the composition of people trying it becoming a more conflicted group? Because that is worrying."

Smyth urges people to step back from the debate. "For me it's not about how many hours but the quality of relationships. When surveyed, kids say what is important is mum and dad not fighting and they get to see both. They don't give a stuff about details."

Equal time share works well in some cases, says Geoffrey Sinclair, who represents the state's solicitors on the Law Council of Australia Family Law section executive. "But in a lot of cases when it's forced upon people, I think it causes more harm than good."

Just less than 50-50 care works well for some Queensland families, he says. "Let's say the mother is the primary care-giver and dad has the children Wednesday to Monday (once a fortnight) which is pretty common. That means he can be involved in school, meeting teachers and do the day-to-day grind and not just the fun weekends."

A new child support scheme starts on July 1, taking account of each parent's level of care.

The more nights the non-resident parent has the children, the less they pay.

But Sinclair strongly rejects the notion that non-resident parents are increasing time to reduce their child support payment.

"Very rarely do you see such a thing happening," he said.

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Custody laws hit children – judge

In the first of our special series on the legal issues affecting Australian families, **Matthew Fynes-Clinton** reports on 50-50 custody orders

LANDMARK laws that promote equal parenting time for separated couples are damaging children, lawyers and psychologists claim.

Brisbane-based former Family Court judge Tim Carmody has branded the push towards shared parental responsibility and 50-50 parenting time "a failure".

He said the onus to apply equal shared parenting orders was part of the reason he resigned from the bench in July.

"It created a real crisis for me," Mr Carmody said. "I just couldn't keep doing it."

The orders appear to fly in the face of exceptions to the legislation, such as family violence or when equal time with parents is not "reasonably practicable".

Melbourne child psychologist Jennifer McIntosh said children in 50-50 care risked developing higher than average levels of sadness, anxiety, clinginess and other mental health problems.

She said equal-time parenting could be especially damaging for children under three.

"I recently had a case of a two-year-old in week-about care, whose parents couldn't even agree what day care centre the child went to," Dr McIntosh said.

"They both work full-time. So the child goes not only between the two houses but two day care centres.

"The fragmentation of this little boy was significant," she said.

Mr Carmody, SC, who has returned to the private bar after serving the Family Court for five years, said only 5 per cent of couples continued to trial after filing to the courts over child custody.

They amounted to the most hostile

Yet, under the Family Law Amendment (Shared Parental Responsibility) Act, judicial orders for these couples must apply a presumption that "equal shared parental responsibility" is in the best interests of a child.

The changes — introduced by the Howard government in 2006 to assuage concerns about absent fathers — mean both parents are legally bound to jointly attempt to make "major long-term decisions" about their children's care, welfare and development.

Fifty-fifty parenting time is not automatic. But when equal shared parental responsibility is imposed, Mr Carmody says the court is required to "favourably" consider a further order that a child spend equal time with each of the parents.

The amendments were flawed because highly conflicted former partners never co-operated on decisions, Mr Carmody said.

He called for a "non-presumptive best interest-based solution".

"In most cases, (that) would be in a single principal place of residence (with children) spending more time with mothers than fathers," Mr Carmody said.

"For most people (in the past), that worked. Even though dads didn't like it and grumbled about it, it worked, even for them."

Family litigation is mostly a Commonwealth matter, determined in either the Federal Magistrate's Court or the Family Court of Australia.

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Blind eye to abuse

Burden of proof makes lawyers tread carefully

SERIOUS concerns . . . socio-legal researcher Cate Banks.

Matthew Fynes-Clinton

SOME Queensland family lawyers are silencing clients' allegations of violence and abuse against their ex-partners to satisfy controversial co-operative parenting laws.

"One (solicitor) said to me, 'Unless I have absolute proof, like bruises or photos or police reports, I just won't raise it'," Brisbane socio-legal researcher Cate Banks said.

Under the Howard government's Family Law Act changes of 2006, family courts must presume it is in the best interests of a child for its separating parents to have "equal shared parental responsibility". A history of a parent committing child abuse or family violence is meant to cancel the presumption.

However, in the new era of co-operative parenting, the court also looks unfavourably on a parent not willing "to facilitate a close and continuing relationship between the child and the other parent".

Lawyers fear that if they present unproved allegations of violence or abuse, clients will be viewed as resisting the system.

"The concern is that if a mother raises unsubstantiated allegations of violence and is seen as obstructive, the father's (parenting time) order may be increased, and the mother's reduced," Dr Banks said.

In an unpublished study released to *The Courier-Mail*, lawyers interviewed by Dr Banks say Family Court judges and federal magistrates have set the evidence threshold for violence and abuse too high.

Dr Banks says that as a result, the overarching presumption of shared parenting is swamping decisions, leading some judges and magistrates to order children to spend up to 50 per cent of their time with an allegedly violent parent.

"There's a lot of concern (from lawyers) about how the federal magistrates are just pushing allegations of violence aside," she said. Dr Banks is a former research fellow from the Griffith University Law School.

FAMILY JUSTICE

For her findings, part of a wider ranging study into the post-2006 reforms, she interviewed 115 Queensland-based family law workers including lawyers, federal magistrates, mediators and counsellors from November 2006 to March 2007.

Her study quotes one lawyer saying: "To change a share care arrangement, you virtually have to show child molestation to a criminal level, or drug abuse by a parent to a point where they are incapable of caring."

Another admitted: "Some (lawyers) tend to ignore the allegation of violence and abuse . . . and say, 'Well, we've got to focus on the child's right to spend time with Dad'."

One solicitor was concerned "we might be just sending kids . . . into situations that aren't really safe." A fourth pointed to the potential costs orders involved with false allegations saying, "There are some provisions preventing women from raising concerns about children, or concerns about violence, for fear of the ramifications."

Dr Banks said allegations of violence in the family courts were often poorly supported by evidence due to their being aired for the first time.

"Violence can permeate a family in a way even the victim may not understand," she said.

"They may have never raised it before because they may not understand the gravity of it. Or they may be scared."

The equal shared parental responsibility rule forces parents to consult on major long-term decisions affecting their children. A shared responsibility order also requires the court to consider placing children in a 50-50 time arrangement with both parents.

Where that is not "reasonably practicable," an order of "substantial and significant time" for each parent must be considered.

Queensland Law Society family law chairman Julie Harrington said ongoing judicial education had led to fewer "extreme" orders of equal time.

"(But) you might still get cases where very serious allegations (of violence) are made and there is substantial time ordered," she said.

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Some troubling outcomes

QUEENSLAND Law Society family law chairman Julie Harrington said that in one interim hearing last year, a federal magistrate ordered the custody of a nine-month-old baby to be split week about.

"It was a high-conflict family, with allegations (on both sides) of significant domestic violence, drug abuse and alcoholism," Ms Harrington said the (magistrate) couldn't decide "who was telling the truth".

Ms Harrington said the Department of Child Safety was eventually forced to remove the child.

In another case, a mother ordered into week-about care was still breastfeeding and the father (in his week) refused to take the child back to mum for breastfeeding, she said.

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