

Contact Arrangements for Young Children

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Abstract

Courts are required on a daily basis to make decisions in disputes about residence and contact arrangements for young children when the parents live apart. This article considers the social science evidence both on what parenting arrangements are likely to be optimal for young children at different developmental stages, and on risk factors to be avoided. In particular, it considers the evidence about when an overnight stay with the non-resident parent may be beneficial to a very young child and when it is contraindicated. While appropriate arrangements need to be guided by what is optimal (absent risk factors), this will often have to be limited by what is practicable in the parents' circumstances, and by the need to avoid harm.

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A substantial proportion of parents separate before their children have started school. In some cases, the parents have never lived together at all. The Australian Institute of Family Studies, in a 2008 survey of 10,000 parents who separated after July 1 2006, found that 47% of fathers and 50% of mothers had an only child or youngest child (with the other parent) aged two years or younger. A further 19% of fathers and 17% of mothers had an only or youngest child aged 3-4 years.¹ 12% of men and 15% of women reported that they had neither been married to, nor cohabited with, the other parent.²

It is not surprising therefore that the family courts are required on a daily basis to make decisions in disputes about parenting arrangements for young children following the separation of their parents. Many more arrangements for such young children are made with the assistance of lawyers, mediators and family consultants.³

The aim of this article is to outline the research findings that need to be taken into account when the courts, professionals and parents are faced with making decisions about the appropriate arrangements for young children after their parents separate. This article explores the issues that need to be considered both when the parents live within a reasonable proximity of one another and when they live a long distance apart.

¹ R Kaspiew, M Gray, R Weston, L Moloney, K Hand and L Qu, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2000, pp 24-25. On average, these interviews occurred 15 months after separation. *Ibid*, p. 21, fn 37.

² *Ibid*, p 25.

³ Family consultants are social scientists employed in the family courts who engage in non-confidential dispute resolution, and may be required to make a report to the court concerning the issues in a parenting dispute.

Guidelines

When parents separate, the overwhelming majority of infants and young children in Australia, as in most Western countries, live with their mother,⁴ reflecting the typically greater caring roles of mothers for young children in most intact families.⁵ This means that separated fathers of infants and young children are generally non-resident parents who need to set up or maintain a pattern of contact with their young children that allows them to sustain a meaningful relationship with them.⁶

In the abstract, guidance might be given about parenting arrangements which would 'work' for such young children taking account of their developmental needs. Indeed, there is no shortage of such guidance available, at least in the US. For example, the Superior Court of Orange County, California has issued Parenting Plan Guidelines that would be suitable for children 0-3, 3-5 and for older children.⁷ The guidelines in relation to children 0-3 offer a range of suitable options where the child is securely attached with both parents. One plan is for the child to spend time with the non-resident parent for three hours on Tuesdays

⁴ J Pryor and B Rodgers, *Children in Changing Families: Life after Parental Separation*, Blackwell, Melbourne, 2001.

⁵ J Baxter and D Smart, *Fathering in Australia among Couple Families with Young Children*, 2010, at <<http://www.fahcsia.gov.au/about/publicationsarticles/research/occasional/Documents/op37/OP37.pdf>> (accessed 14 April 2011).

⁶ For ease of reference, and given the typically gendered patterns of care with young children, the primary caregiver is assumed to be the mother in this article, and the non-resident parent is assumed to be the father.

⁷ These guidelines, published in 2005, are available at <<http://www.occourts.org/media/pdf/parenting-plan-guidelines.pdf>> (accessed 14 April 2011). Alaska, Arizona and Oregon courts have likewise offered a range of parenting plans that are age-specific, and which may be suitable for a variety of different circumstances.

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and Thursdays and for a 24 hour period involving an overnight stay, every weekend. There are other options for more frequent or extended overnight visits. Typically, such sample parenting plans aim to promote relatively brief but frequent contact between the child and the father, avoiding long separations from the mother.

Helpful as such guidelines might be, what is desirable in the abstract may be at odds with what is practicable given the specific circumstances of each parent.

Practicalities

Issues concerning travel can be problematic both in Australia's highly urbanised environment and in rural areas. For example, contact from 4-7pm on Tuesdays and Thursdays may be practicable if the father has a flexible work schedule and can travel without difficulty to visit or collect his child. However, many full-time employees do not have such flexible schedules, and may commute long distances to and from work.

There are also practical issues that arise about what to do in those three hours. Options may be limited in the vicinity where the mother lives, especially if it is raining or cold. If the father wants to take his child back to his house to provide a home-cooked meal and a relaxed play environment, then he must deal with the issue of car travel. That may not be a problem if the parents live one or two kilometres apart, but in a large and congested city such as Sydney or Melbourne, even a 15 kilometre journey may be a time-consuming ordeal with young children.

It is not at all uncommon for separated parents to live some distance apart. Separation typically has centrifugal effects on parents.⁸ One reason is the difficult

⁸ J Cashmore, P Parkinson, R Weston, R Patulny, G Redmond, L Qu, J Baxter, M Rajkovic, T Sitek and I Katz, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government, Attorney-General's Department*, 2010, p 140.

financial circumstances after separation. Going from the costs of one joint household to separate households is not easy for either parent. For mothers of young children, it may mean either surviving on welfare benefits or returning to work and having to manage the costs of child care. For fathers, it may mean rehousing themselves while paying child support. As a consequence of financial pressures, one or both parents may have to move to an area where housing is cheaper, and that often means increased travel burdens. Financial difficulties are particularly common for parents of young children, who are likely to be quite young themselves, and to have had fewer years to accumulate property than parents who are older.⁹ While it may be ideal for the other parent to relocate to the same area, the practicalities of cost and commuting may mean this is not feasible. Re-partnering is another reason why one parent may move some distance from the other parent.

If fathers have infrequent contact with young children after the separation, with substantial periods apart from them, it is difficult for them to develop or maintain a meaningful relationship and to feel engaged in their children's lives. Yet the difficulties in travel may make frequent contact very difficult.

Impaired parenting capacity

Mediators, lawyers and judges may also be faced with difficult decisions about what arrangement is best for a child given impaired parenting capacity. The research by the Australian Institute of Family Studies on parenting after separation found that about half of the mothers and around one-third of the fathers indicated that mental health problems, use of alcohol or drugs, gambling or other addictions were apparent prior to separation.¹⁰ Parents who contacted

⁹ M Whiteside, 'Custody for children age 5 and younger' (1998) 36 *Family and Conciliation Courts Review* 479.

¹⁰ Kaspiew et al, above n 1, p 29: parents were "not asked which family member exhibited such problems" given the likely reluctance of parents to acknowledge their own problems.

professional services were much more likely than those who did not, to report some form of family violence, mental health problems, alcohol and drug issues or other addictions before the separation. They were also more likely to have distant, highly conflicted and even fearful relationships.¹¹

In many cases where one or both parents has an impaired parenting capacity, the kinds of parenting plans that may be desirable where parents are able to provide 'good enough' parenting may not be appropriate, and a court must evaluate a range of alternatives to find the best possible arrangement given the strengths, difficulties, and limitations of each of the parents, and with a particular focus on the child's safety and well-being.

Conflict

A further issue that may make it difficult to formulate an appropriate parenting plan for a young child in the context of a family law dispute is the level of acrimony between the parents. Where the parents are highly conflicted, and the mother is resistant to or anxious about the father spending time with the child, those emotions may well be conveyed to young children. This makes it hard for children to cope with separation from their mother, or to experience security in the care of their father.¹²

Confounding factors

There are also other factors that may make it more difficult for mediators and lawyers to get agreement to plans that are appropriate for young children. One issue concerns the views that parents may have about the appropriateness of shared care arrangements for young children. Where a father considers that an

¹¹ Ibid, p 48.

¹² J Kelly and R Emery, 'Children's adjustment following divorce: Risk and resilience perspectives' (2003) *52 Family Relations*, 352–362.

equal time arrangement will be appropriate for a child under 3, it may be very difficult for him to accept a parenting plan that does not offer him anything like that amount of time.

Child support is another confounding factor. If the father has the child overnight for at least one night per week, then he will pay a lower level of child support than if the child does not stay overnight.¹³ This can create an incentive for a father to seek overnight stays when this may not be in the best interests of an infant child.

Controversies

A significant issue with sample parenting plans is that the social science knowledge on which they are based is contested, as outlined later. For example, all of Orange County's sample arrangements for children aged 0-3 years involve at least one overnight stay per week with the non-resident parent, as long as the child is deemed to be attached to both parents (defined as being comfortable and secure with both). Where a child is significantly less comfortable and secure with one parent than the other, the guidelines suggest gradually increasing levels of contact over a short period of time - 7 weeks - at which time overnight stays are seen to become appropriate.

It is at least questionable whether a single parenting plan is appropriate to cover the entire first three years of life. Where parents have never lived together or separated very soon after the child's birth, such plans may need to be negotiated very early in the child's life. Furthermore, and for children under two especially, there are significant differences of opinion between experts about whether there should be overnight stays with the non-resident parent.¹⁴ While children can

¹³ See generally, P Parkinson, 'The future of child support' (2007) 33 *University of Western Australia Law Review* 179.

¹⁴ See special issue of *Family Court Review* in 2001 (vol 39).

tolerate longer separations from a primary caregiver as they get older, some experts have expressed concern about the risks for the social and emotional development of infants and toddlers who are separated for too long from parents and other caregivers to whom they are attached. These concerns have to be addressed in the context that the child's attachments to both parents are important. There are also practical issues like breastfeeding that need to be taken into account.¹⁵

One of the parenting plans that is deemed suitable under the Orange County guidelines involves one parent having the care of the child from Tuesday noon to Wednesday noon, from Thursday noon to Friday noon and from Saturday noon to Sunday noon, with the other parent having care the remainder of the time. This is essentially a 4-3 arrangement in terms of overnights each week, and involves the child alternating homes almost every day. It is an arrangement which is unlikely to be practicable unless both parents are not employed outside the home. Even if it is practicable, however, the question remains whether such an arrangement is desirable from the point of view of the child's emotional development. Such an arrangement raises issues about young children's tolerance for such alternating overnight stays in each household, given their need for some predictable routine.

The importance of understanding the research

Given all these issues, there is a great need not only to understand what the research says and does not say, but also how principles that may be derived from the social science evidence can be applied in circumstances that are not optimal. This includes cases where there are significant logistical challenges to frequent

¹⁵ L Sweet and C Power, 'Family law as a determinant of child health and welfare: Shared parenting, breastfeeding and the best interests of the child' (2009) 18 *Health Sociology Review* 108.

contact, where one parent's capacity to parent is impaired, or where there is high conflict.

In particular, these practical issues and dilemmas require consideration of three issues. First, at what age and in what circumstances, is it appropriate for infants and very young children to stay overnight with the non-resident parent? Second, to what extent is it appropriate to make arrangements for substantially shared care between parents of young children? Third, what orders should be made if the parents of a young child live a long distance apart or the child's primary carer wants to move a long way from the other parent?

The research base and the debate about overnight stays

While there is a very substantial body of research over the last four to five decades concerned with the effects of parental separation and post-separation arrangements on children, adolescents, and young adults, there is very little empirical research that is specifically concerned with infants and young children. A meta-analysis by Whiteside and Becker, published in 2000, was based on only 12 articles that met their criteria for inclusion.¹⁶ That study and an earlier review by Whiteside¹⁷ found that, as with older age-groups of children, the quality of the father-child relationship was associated with the level of cooperation between the parents, the frequency of the father's contact with the children, and the level of the father's involvement with them before the separation. In turn, children who had frequent contact and positive relationships with their father had fewer

¹⁶ Whiteside and Becker located 131 English-language articles published between 1970 and 1994 that included information on children who had experienced parental separation by age 5; only 12 of these, however, met their criteria of containing measures relating to either fathers' contact with children under six or the quality of the interaction between parents, and zero order correlations for this age group: M Whiteside and B Becker, 'Parental factors and the younger child's post divorce adjustment: A meta-analysis with implications for parenting arrangements' (2000) 14 *Journal of Family Psychology* 5.

¹⁷ Whiteside, above n 9.

internalising symptoms and behaviours (withdrawn, anxious, or depressed). Whiteside and Becker concluded that:

simply having possession of the child during part of the month is neither positive nor negative in its own right. Rather, what transpires between the father and the child during that time can influence the child's adjustment".¹⁸

These conclusions concerning young children are very similar to those emerging from a growing body of literature about the association between the quality and authoritative nature of the father-child relationship, the level of conflict and cooperation between the parents, and the psychosocial adjustment of children of various ages.¹⁹ While the frequency of contact per se²⁰ may not be the operative factor, it appears that the frequency and type of contact provide an opportunity for fathers to contribute to and engage with their children, but that this, and

¹⁸ Whiteside and Becker, above n 16, p 20.

¹⁹ B Barber, 'Support and advice from married and divorced fathers: linkages to adolescent adjustment' (1994) 43 *Family Relations* 433; P Amato and J Gilbreth, 'Nonresident Fathers and Children's Well-being: A meta-analysis' (1999) 61 *Journal of Marriage and the Family* 557; J Dunn, 'Annotation: Children's relationships with their nonresident fathers' (2004) 45 *Journal of Child Psychology and Psychiatry* 659; S Stewart, 'Nonresident parenting and adolescent adjustment: The quality of nonresident father-child interaction' (2003) 24 *Journal of Family Issues* 217; J Sobolewski and V King, 'The importance of the coparental relationship for non-resident fathers' ties to children' (2005) 67 *Journal of Marriage and Family* 1196.

²⁰ Amato and Gilbreth's meta-analysis showed that the frequency of contact was only weakly associated with better outcomes for children, but the association was stronger in the more recent studies (conducted between 1989 and 1998, compared with those conducted between 1970-1988) reflecting the greater involvement of fathers in parenting and greater contact post-separation in more recent cohorts: *Ibid*, pp 567, 569.

particularly the likelihood of overnight stays, depends on the level of trust and cooperation between the parents, and the age of the child.²¹

The debate about overnight stays for infants and young children

Although there has been relatively little empirical research directly focusing on young children,²² that has not stood in the way of a very vigorous debate about the issue of overnight stays between respected researchers and clinicians.²³

The debate was very much focused on children's attachment relationships, the means by which infants develop primary relationships with their parents and with other important caregivers as a means of ensuring their survival and

²¹ C Caruana and B Smyth, 'Daytime-only contact' in B Smyth (Ed), *Parent-child Contact and Post-separation and Parenting Arrangements*, Australian Institute of Family Studies, Melbourne, 2004, p 69; J Cashmore, P Parkinson and A Taylor, 'Overnight stays and children's relationship with resident and nonresident parents after divorce' (2008) 29 *Journal of Family Issues* 707; E Maccoby, C Buchanan, R Mnookin and S Dornbusch, 'Postdivorce roles of mothers and fathers in the lives of their children' (1993) 7 *Journal of Family Psychology* 33.

²² Only 5% of the effect sizes derived from the 63 studies included in Amato and Gilbreth's meta-analysis, for example, involved children under 5 (see above n 19). Moyer commented that "Little data are available on the effects of custody arrangements on children of different ages": S Moyer, *Background Paper Child Custody Arrangements: their characteristics and outcomes*, Department of Justice, Canada, 2004.

Nord and Zill comment that the following questions are almost never researched: • Do optimal custody arrangements vary by the age of the children? • Does the influence of any given factor change with the developmental stage of the children? For example, is parental conflict more or less damaging when children are toddlers, when they are in grade school or when they are adolescents?" C Nord and N Zill, *Non-custodial Parents Participation in their Children's Lives: Evidence from the survey of income and program participation*, Vol. 2, Synthesis of Literature (DHHS-100-93-0012), U.S. Department of Health and Human Services, Washington, DC, 1996, p 7.

²³ The articles in this debate were all published in the *Family and Conciliation Courts Review* (or the *Family Court Review*, as it was renamed) between 2000 and 2002. See further below.

development. While attachment theory is commonly used to underpin policy and practice in this area, its use and interpretation are contentious. The contentious aspects include the singular focus on maternal attachment by some of the earlier psychoanalytic theorists, the reliance on the 'strange situation' as a means of assessing attachment, and the difficulties of making longer term predictions about children's adjustment on the basis of these assessments.²⁴

Kelly and Lamb²⁵ initiated the debate by being critical of the "unnecessarily restrictive" 'traditional' guidelines favouring mother-child attachment at the expense of father-child attachment and relationships, based on the views of early and contemporary psychoanalytic theorists.²⁶ They argued that these views are out of step with the research that highlights the importance of fathers in children's healthy development and wellbeing.²⁷ Their view is that infants develop multiple, hierarchical attachments and that those attachments, crucial to children's social and emotional development, are based on regular and frequent

²⁴ L Sroufe, E Carlson, A Levy and B Egeland, 'Implications of attachment theory for developmental psychopathology' (1999) 11 *Development and Psychopathology* 1; P Ludolph, 'Answered and unanswered questions in Attachment Theory with implications for children of divorce' (2009) 6 *Journal of Child Custody* 8.

²⁵ J Kelly and M Lamb, 'Using child development research to make appropriate custody and access decisions' (2000) 38 *Family and Conciliation Courts Review* 297.

²⁶ J Bowlby, *Maternal Care and Mental Health*, World Health Organization, Geneva, Switzerland, 1951; Goldstein, Solnit and Freud proposed that children involved in contested divorces should remain in the care of one primary caretaker, their psychological parent, without overnight stays with their non-resident parent until later toddlerhood, about the age of three: J Goldstein, A Solnit and A Freud, *The Best Interests of the Child: The Least Detrimental Alternative*, Free Press, New York, 1996; W Hodges, *Interventions for Children of Divorce: Custody, Access, and Psychotherapy*, John Wiley, New York, 1991.

²⁷ See eg M Lamb, K Sternberg and R Thompson, 'The effects of divorce and custody arrangements on children's behavior, development, and adjustment' (1997) 35 *Family and Conciliation Courts Review* 393, and see now, M Lamb (Ed), *The Role of the Father in Child Development* (5th ed), Wiley, New York, 2010.

interactions with their parents in a variety of contexts.²⁸ They argued that this should include overnight stays with routine care-giving and bedtime rituals, but, because young children's sense of time and capacity to tolerate long separations are limited, there should be more transitions between the parents to ensure the continuity of both relationships.

While agreeing with Lamb and Kelly about the importance of children's attachments and relationships, and the 'misuse' and misunderstanding of the attachment literature encouraging a "rigid and often wholly unnecessary exclusion of fathers from the lives of their young children", Solomon and Biringen were "circumspect with respect to repeated overnight separations from the primary caregiver".²⁹ Citing research by Solomon and George,³⁰ they were concerned about the risk of disorganised attachments as a result of overnight separations from the 'primary caregiver', especially where there are frequent transitions and conflictual contact between the parents. They based their concern about frequent transitions on research that suggests that frequent transitions involving contact between the parents can exacerbate conflict between the parents but acknowledged that fathers' frequent interactions with their children "may be fundamental to fathers' view of themselves as good parents".³¹

²⁸ See also R Warshak, 'Blanket restrictions: Overnight contact between parents and young children' (2000) 38 *Family and Conciliation Courts Review* 422. As Dolby points out, "attachments grow in the ordinary moments when children and their caregivers have time to concentrate on each other": R Dolby, 'Children's attachments: The importance of relationship repair', paper presented at Australian Family Court Judges' Conference, Sydney, 11-12th November, 2005.

²⁹ J Solomon and Z Biringen, 'The continuing debate about overnight visitation: Another look at the developmental research: Commentary on Kelly and Lamb's "Using child development research to make appropriate custody and access decisions for young children"' (2001) 39 *Family and Conciliation Courts Review* 355 at 361.

³⁰ See further below.

³¹ Solomon and Biringen, above n 29, p 360.

The level of disagreement between these clinicians and researchers may leave judges and lawyers somewhat confused about the application of the available research evidence to decisions concerning young children.³² The research by Solomon and George, and the subsequent work by other research teams, therefore reward close analysis.

Solomon and George

The baseline³³ and follow-up³⁴ study (in California) by Solomon and George assessed the attachment of 145 infants, aged 12-20 months, to their mother and father. There were three groups of families: intact two-parent families (group 1), and two groups of separated families where the father had contact with the child on a regular basis either with overnight stays (group 2: 'overnight' group) or without staying overnight (group 3: 'no overnight' group). The follow-up study was conducted 12 months later.

In the first study, more infants in the intact families were found to have organised attachments than in either of the two groups of separated families. This is consistent with the findings of other research indicating that disruptive events such as parental separation have a negative impact on infants' attachments with their parents. The results of the baseline study indicated that overnight contact was "not inevitably associated" with disruptions in the mother-infant attachment (disorganised attachment) but occurred when there

³² For discussion of this evidence, see T Altobelli, 'Rethinking contact arrangements involving young children' (2005) 19 *Australian Journal of Family Law* 29.

³³ J Solomon and C George, 'The development of attachment in separated and divorced families. Effects of overnight visitation, parent and couple variables' (1999) 1 *Attachment and Human Development* 2.

³⁴ J Solomon and C George, 'The effects on attachment of overnight visitation in divorced and separated families: A longitudinal follow-up' in J Solomon and C George (Eds), *Attachment Disorganization*, Guildford Press, New York, 1999, pp 243-264.

was conflict between the parents, poor communication, and the mother was not sensitive to the child's distress on separation and reunion.³⁵ Mothers who reported that they adapted the arrangements to the child's needs and were responsive to their distress on separation and reunion were more likely to have children with secure attachments in both the overnight and no overnight groups. Higher levels of conflict and low levels of communication in the overnight group were, however, associated with more disorganised attachments. The extent to which mothers communicated with the father about the child was strongly associated with the security of the child's attachment to the father in all three groups of families, indicating that fathers may be "dependent on approval from and communication with the mother to establish a relationship with the child in the early years".³⁶

In the follow-up study conducted 12 months later, Solomon and George compared families who had had overnight stays at the time of the earlier study with a combined comparison group that included those who had had no overnight stays (group 2) and those who were married and living together (group 1). The earlier attachment classification was used to predict mothers' and children's behaviour in several problem-solving and cleanup tasks.³⁷ Solomon and George were again cautious in their interpretation of children's attachment behaviours in the context of separation and divorce, and interpreted their results in terms of the conditions surrounding the overnight arrangements – the level of conflict, the mother's communication with the father about the child, and the mother's sensitivity to the child's needs at separation and at their reunion and in adapting the schedule. They tentatively concluded that "overnight visitation schedules can disorganize the child's attachment strategies but that such disorganization does not necessarily pervade or reflect the overall quality of the

³⁵ Solomon and George, above n 33, p 25.

³⁶ Ibid, p 26.

³⁷ Solomon and George, above n 34.

mother-child relationship".³⁸ Solomon later concluded that "the prevalence of disorganized attachment relationships in the overnight group is a reaction to" mothers feeling helpless, either because of the realities of her circumstances or because of her perceptions of the father's behaviour; this results in mothers being unresponsive to the child's needs.³⁹

Different interpretations. Lamb and Kelly,⁴⁰ and Solomon and Biringen⁴¹ interpreted Solomon and George's findings somewhat differently. While Solomon and George were tentative in their conclusions, and highlighted the context surrounding children's overnight stays with their fathers, Solomon and Biringen⁴² focused on the higher than expected proportion of children involved in overnight stays who had disorganized attachments (66%), compared with those in separated families without overnight stays (43%) and those in intact families (35%).⁴³ Lamb and Kelly discounted the differences on the basis of the contextual and other differences between the three groups.⁴⁴ They were also

³⁸ Ibid, pp 260-261.

³⁹ J Solomon, 'An attachment theory framework for planning infant and toddler visitation arrangements in never-married, separated, and divorced families' in L Gunsberg and P Hymowitz (Eds), *A Handbook of Divorce and Custody: Forensic, Developmental and Clinical Perspectives*, Analytic Press, Hillsdale, New Jersey, 2005.

⁴⁰ M Lamb and J Kelly, 'The continuing debate about overnight visitation: Using the empirical literature to guide the development of parenting plans for young children: A rejoinder to Solomon & Biringen' (2001) 39 *Family and Conciliation Courts Review* 365.

⁴¹ Solomon & Biringen, above n 29.

⁴² Ibid, p 359.

⁴³ See Solomon and George, above n 33, p 14.

⁴⁴ Lamb and Kelly commented that "Solomon and George observed no difference between the proportions of secure infant-mother attachments in the groups of infants who did and did not have overnight visits with their fathers": above n 40, p 368. They were correct in relation to the overall loglinear paired comparison analyses reported on page 14 ($p = .10$) but Solomon and George did comment further that (above n 34, p 15):

critical of basing any recommendations to the courts or to mediators on the Solomon and George study, pointing to the fact:⁴⁵

that many of the infants in the divorce/separated group had never lived with their two parents, there was no evidence that they had formed attachments to their fathers before overnight visits commenced, and an unusually high number of infants had disorganized attachments to their mothers. ... Furthermore, even when there were overnight visits, some of the infants “experienced repeated and sometimes prolonged separations from their fathers”.

Solomon and Biringen, conversely, urged caution, concluding that:⁴⁶

the available evidence, albeit scarce, indicates that separations from the mother should still be viewed with caution, particularly where nighttime separations are concerned and until more empirical evidence is gathered. This is not to say that frequent nighttime separations from the mother are necessarily ill fated but that we should tread lightly on territory that has not been explored through rigorous research in the field.

Other limitations of the study. There were several other sample-related or methodological issues in addition to those that Lamb and Kelly highlight. These issues limit or qualify the conclusions that can be drawn from this study and the

‘Looking at the adjusted standardized residuals (shown in Table 3) it is clear that the Overnight group was distinguished from the Married and No overnight groups by lower than expected numbers of secure classifications and higher than expected numbers of disorganized classifications.’

The proportion of secure attachments among intact families was also lower than expected at only 37% in this sample compared with about 2 out of 3 in middle class American families generally: see Kelly and Lamb, above n 25, p 302.

⁴⁵ Solomon and George, above n 34, p 368.

⁴⁶ Solomon and Biringen, above n 29, p 359.

follow-up. First, all the measures in relation to visitation or contact, conflict, communication between the parents, and the mother's psychological protection of the child were based on the mother's report only, and there is good reason for concern about the validity of measures and accounts of family life that are based on only one 'informant'.⁴⁷

Second, there were significant differences between the two groups of separated/divorced families that need to be taken into account in interpreting the findings.⁴⁸ Infants in the 'no overnight' group, for example, were more likely to have weekly access to their fathers than those in the 'overnight' group, although the total time was less. Some children had repeated and prolonged separations from their fathers so it is possible that the regularity and frequency of the schedule may be as important, or even more important, than the total time together.⁴⁹ There were also significant differences between the 'overnight' and 'no overnight' groups in relation to conflict and hostility, with more restraining orders against mothers and more formal mediation or intervention in the families where children stayed overnight with their fathers compared with those who did not.

⁴⁷ W Cook and M Goldstein, 'Multiple perspectives on family relationships: A latent variables model' (1993) 64 *Child Development* 1377; M Hetherington, 'Social support and the adjustment of children in divorced and remarried families' (2003) 10 *Childhood* 217; J Warin, Y Solomon and C Lewis, 'Swapping stories: Comparing plots: Triangulating individual narratives within families' (2007) 10 *International Journal of Social Research Methodology* 121.

⁴⁸ It should also be noted that since the parents in these groups self-selected into these groups, one of the conditions for causality – initial equivalence, often based on random allocation – was not met.

⁴⁹ While Solomon and George indicated that there were no differences in attachment with either parent associated with any "particular characteristic of the visitation arrangements themselves, including their number, duration, patterning" or the age at which they began, they did acknowledge that this may have been a result of the "limited variability" in their sample and the restriction on more complex analyses because of the sample size: see above n 33, p 25.

Since disorganised attachment was associated with poor cooperation and communication, and with conflict between the parents, the higher levels of conflict and hostility between the parents in the overnight stays group is clearly a confounding factor. Further, those in the 'overnight' group were more likely to have joint physical and legal custody than those in the 'no overnight' group, despite the higher levels of conflict and hostility. This is significant in the light of other research which has shown that children's attachments become less secure in high conflict divorces, and that higher levels of contact where there is serious and persistent conflict between parents have a negative effect on children's adjustment and attachment to both their mother and father.⁵⁰

Third, the analyses do not indicate how many children had disorganised attachments with both their mother and father, and how this related to the relationship between the parents and overnight stays. Nor do the analyses in the follow-up study differentiate between families in which children were having overnight stays with their fathers both at baseline and in the follow-up study.

These aspects clearly limit the interpretation of the findings. Solomon and George acknowledged that "the interpretation of our findings is obviously problematic",⁵¹ and their conclusions were tentative. Younger (2002) concludes:⁵²

⁵⁰ J McIntosh and R Chisholm, 'Cautionary notes on the shared care of children in conflicted parental separation' (2008) 14 *Journal of Family Studies* 37; P Amato and S Rezac, 'Contact with nonresident parents, interparental conflict, and children's behaviour' (1994) 15 *Journal of Family Issues* 191; M Cox, M Owen, V Henderson and N Margarid, 'Prediction of infant-father and infant-mother attachment' (1992) 28 *Developmental Psychology* 474; M Hetherington and J Kelly, *For Better or for Worse: Divorce reconsidered*, Norton, New York, 2002; J Johnston, M Kline and J Tschann, 'Ongoing Post Divorce Conflict: Effects on children of joint custody and frequent access' (1989) 59 *American Journal of Orthopsychiatry* 576.

⁵¹ Solomon and George above n 34, p 260.

⁵² J Younger, 'Post-divorce visitation for infants and young children – The myths and the psychological unknowns' (2002) 36 *Family Law Quarterly* 195 at 203-4.

Three things seem important in the development of a child's secure attachment in the context of visitation after divorce: a mother's ability to protect the child from the stresses of separation, parents' ability to communicate and cooperate with each other about the child, and the absence of conflict between parents. Scheduling – that is the presence or absence of overnights – is not the definitive factor. ... if parents can focus on the child's reactions and console and support the child adequately, there appears to be no interference with the child's basic security.

Kline Pruett, Ebling and Insabella

The study by Kline Pruett, Ebling and Insabella⁵³ and the follow-up by Kline Pruett,⁵⁴ published after the earlier debate in the *Family and Conciliation Courts Review/Family Court Review* during 2000 to 2002, are important for several reasons. Kline et al examined several aspects of the parenting plan (overnight stays, when they occurred, the consistency of the schedule, and the number of caregivers for the child, including grandparents and child care). The study involved 161 families with children under six, filing for divorce in Connecticut; 132 families were involved in the follow-up study 15-18 months later. They used various measures of children's behaviour and adjustment, based on both mothers' and fathers' reports,⁵⁵ rather than relying on mothers' reports and on

⁵³ M K Pruett, R Ebling and G Insabella, 'Parenting plans and visitation: Critical aspects of parenting plans for young children interjecting data into the debate about overnights' (2004) 42 *Family Court Review* 39.

⁵⁴ M K Pruett 'The Collaborative Divorce Project: Helping parents co-parent when young children are involved', Paper presented at International Conference on Children and Divorce, Norwich, England, July 2006.

⁵⁵ Parents completed the Child Behavior Checklist (CBCL): T Achenbach and C Edelbrock *Manual for the Child Behavior Checklist and Revised Child Behavioral Profile*, University Associates in Psychiatry, Burlington, Vermont, 1983. "Two versions were used according to the age of the child (2 to 3 years or 4 years and older); both forms have demonstrated very

measures of attachment alone. Attachment is an important aspect of parent-child relationships, but as Kline Pruett and her colleagues argue:

Attachment tells only a small frame of the entire story of a young child's life; attachment categorizations may change over time. ... Behavior and psychological symptoms represent other important indices in child adaptation that have not yet been empirically examined in relation to overnights.⁵⁶

Consistent with other research, Kline Pruett and her colleagues found that the quality of the parent-child relationship reported by both mothers and fathers⁵⁷ was the best predictor of children's adjustment. Conflict between the parents was also important, but the consistency of the schedule and the number of other caregivers were still significant after taking account of inter-parental conflict and the quality of the parent-child relationship. According to both mothers and fathers, children aged three and older who had a consistent schedule and overnight stays with their fathers had fewer behavioural and social problems than children who did not.⁵⁸ There were no significant differences for children

good reliability and validity": T Achenbach, *Manual for the Child Behavior Checklist /4-18 and 1991 Profile*, University of Vermont, Department of Psychiatry, Burlington, Vermont, 1991.

⁵⁶ Kline Pruett et al above n 53, p 41.

⁵⁷ This was measured by "Maccoby, Mnookin, and Depner's (1993) 10-item, 5-point Likert measure of the parent-child relationship. Parents reported on changes in the emotional distance in their relationship with their child, as well as changes in expectations for the child, play time, patience, consistency, and the child's compliance since parental separation": Kline Pruett et al, above n 53, p 42.

⁵⁸ Age was found to have a moderating effect: there were fewer problems for older children if they had overnight stays but there was little difference for younger children (aged 2-3 years). Older children (4-6 year-olds) with overnight stays had more problems (anxious/depressed, withdrawn, somatic, aggressive/destructive, and problems with attention, thought according to their mothers) than others their age who did not have overnight stays: Kline Pruett, above n 53.

under three except that fathers reported children as more anxious and depressed when they had mid-week overnight stays. Kline Pruett and her colleagues observed that:

...overnights play an important role in child adjustment in some limited respects and by illuminating a larger picture that indicates it is not overnights in and of themselves that are most important. Our findings underscore the importance of taking into account the circumstances that surround the arrangements and basic characteristics of the individual child. As other researchers have concurred... the context surrounding the parenting plan is critical to the way in which it is experienced by the child.⁵⁹

Overnights do matter but what matters more to these children is whether they occur on a regular, unchanging schedule.⁶⁰

Kline Pruett and her colleagues concluded:

Parents and judges also will want to consider whether the schedule can remain consistent across weeks and months, and not be subject to change in accord with parental work schedules or other adult needs. Both parents reported identical links between inconsistent schedules and internalizing problems and social problems, suggesting that such inconsistencies took their toll socially and emotionally on children. Alternatively, parents who cannot or choose not to maintain consistent schedules may have a more difficult time supporting their children's social and emotional development in other ways as well. These findings underscore the importance of parenting plan schedules for young children, but also turn us away from the overnights debate toward a fuller evaluation of the broader context of the plan.⁶¹

⁵⁹ Pruett et al above n 53, p 53.

⁶⁰ Ibid, p 56.

⁶¹ Ibid, p 55.

McIntosh, Smyth and Kelaher

In a recent Australian study, McIntosh, Smyth and Kelaher examined data from the Longitudinal Study of Australian Children (LSAC) to explore the relationship between frequent overnight stays with the non-resident parent, and the psycho-emotional development of young children.⁶² Three age groups were analysed: a cohort of infants under 2, the same children as 2-3 year olds, and a group of 4-5 year olds that included this same cohort several years later.

LSAC does not have data on attachment, but other measures of emotional and behavioural regulation, including irritability and visual monitoring⁶³ of a parent were examined, as well as several measures of children's health, including illness with wheezing. All the data were obtained from the parent with whom the child was living most of the time – mostly mothers.

In the under 2 age group, the researchers compared the outcomes under four conditions: first, intact families; secondly, where the child rarely if ever, stayed overnight with the other parent (the 'rare overnights group') but had daytime contact; thirdly, where the child stayed overnight with the other parent 1-3 nights per month, but less than once per week (the primary care group); and finally, a group which they classified as 'shared care' involving one or more overnights with the other parent per week. Eleven of the 55 infants⁶⁴ in the

⁶² J McIntosh, B Smyth and M Kelaher, *Parenting Arrangements Post-separation: Relationships between Overnight Care Patterns and Psycho-emotional Development in Infants and Young Children*, Report to the Australian Government Attorney-General's Department, Attorney-General's Department, Canberra, 2010, available at <<http://www.ag.gov.au/>> (Research on Shared Care Parenting and Family Violence) (accessed 14 April 2011).

⁶³ Visual monitoring is a measure of "infants' efforts through gaze and gesture to monitor" and maintain contact with the attachment figure and an indicator of their anxiety about "their caregiver's emotional or physical availability". Ibid, p 115 (citing Bowlby and Ainsworth).

⁶⁴ Ibid, pp 112, 120.

'shared care' group were with each parent for five or more nights per fortnight. By far the largest group ($n = 396$) was the rare overnights group, comprising nearly two-thirds (66%) of cases where the parents were living apart.⁶⁵

Infants staying with the other parent (mostly fathers) one or more nights per week were judged by their parent (mother) to be more irritable than those in the primary care group, but rather less so than infants in the rare overnights group, and about the same as those in intact families.⁶⁶ The children with more overnight stays also showed higher levels of visual monitoring than the primary care group, but the levels for intact families and rare overnight stays were also higher than for the primary care group, indicating that this small primary care group (of only 17 cases) was atypical in comparison with infants in intact (and separated) families. Further, visual monitoring is a proxy for attachment and its strength as a measure is unknown.

While parenting style, the quality of the co-parental relationship and measures of the respondent parent's socio-economic status were included in the regression analyses, whether or not the parents had ever lived together was not taken into account. Those who had never lived together comprised 58% of the rare overnights group, 28% of the primary care group and 27% of the group of infants who stayed overnight with the other parent one night per week or more.⁶⁷ Analysis of this variable is important for the debate about overnight stays, since, as Kline Pruett et al found, there is a considerable difference of context between overnight stays which maintain some degree of continuity for the infant following parental separation, and commencing overnight stays with a parent where there has been no prior history of that parent living with the child. Given the variability of outcomes between the four groups on the various measures, the

⁶⁵ Ibid, p 120.

⁶⁶ See graph, *ibid*, p 133. The children in intact families were, however, not included in the analyses.

⁶⁷ Ibid, p 121.

small sample size in the primary care group, and the fact that the previous cohabiting status of the parents and the consistency and schedule of contact were not factored into the modelling, the findings of McIntosh et al in relation to overnight stays for children under 2 are equivocal. Infants in the primary care group, in any event, stayed overnight 1-3 times per month with the non-resident parent. It is therefore not clear that overnight stays with the non-resident parent for children under 2 are contra-indicated.⁶⁸

The findings in relation to the 2-3 year olds were somewhat clearer. For the 2-3 year-olds, shared care was defined as at least five nights per fortnight with each parent. The 23 children in this group showed lower levels of persistence than the 179 children in the primary care or the 284 children in the rare overnight groups.⁶⁹ They also showed more problematic behaviours than those in the primary care group.⁷⁰ On the other hand, there were no significant differences between the groups in parents' concerns about their infant's learning, development and behaviour or their global health. While these findings are clearer than for the infants, the small number of children in the 'shared care' group and the markedly higher level of disagreement between the parents in this

⁶⁸ Lamb also concluded that the findings from this study were 'ambiguous' for the infants but indicated some possible behavioural problems for 2-3 year olds: M Lamb, 'Critical analysis of research on parenting plans and children's well-being' in L Drodz and K Kuehnle (Eds), *Parenting Plan Evaluations: Applied Research for the Family Court*, (Oxford University Press, New York, forthcoming).

⁶⁹ The researchers reported that this effect was also significant when 2-3 year olds were in the care of the non-resident parent for one night per week or more (above n 62, p 136), but no data on this was given. Such a group would comprise a broad range from one night per week to seven nights per fortnight with the father, so caution is needed in relation to any conclusions about the suitability of overnight stays for one night per week.

⁷⁰ While, again, the prior cohabiting status of the parents was not factored into the modelling, 87% of the shared care parents and 85% of the primary care group had previously cohabited.

group are problematic; 95% of the 23 parents in this small 'shared care' group indicated disagreement between themselves and the other parent.⁷¹

The same 'care arrangement' categories were used for the 4-5 year olds as for the 2-3 year olds. For the older age group, there were no independent effects of any particular care arrangement on the outcomes measures for health, emotional regulation or behaviour. Differences between the groups were explained by other factors, and in particular, lack of parental warmth and parental disagreement.

Significantly, these analyses do not examine the continuity of the care arrangements for the infant cohort whose subsequent data, as 2-3 year olds and 4-5 year olds, were used in the analyses for these two older age-groups. It is possible, for example, that the higher level of disagreement between parents of 2-3 year olds may be a result of shared care beginning or increasing at this age. It is also likely that the high level of disagreement between parents in this group in turn affects the behaviour of the children. Clearly, longitudinal analyses are needed to help interpret these interactions.

Summary of research findings

In summary, the main finding of the research on young children is that what is crucial is the overall context. This includes parents' capacity to set aside or control their own differences, especially those that the children are exposed to, their willingness to communicate and cooperate in managing the transitions, and the warmth and responsiveness of their relationship with their children. It also includes the continuity and consistency of the care arrangements and the number

⁷¹ The disagreement figures for the other 'shared care' groups in older and younger children were 56% for the infants under 2, and 61% for 4-5 year-olds. None of the parents in the other care arrangements across the three cohorts reported such high frequencies of disagreement with the other parent. Since the cohort of 2-3 year-olds is the infant cohort, two years on, this raises questions about the reasons for the marked increase in parental disagreement and the likely impact on the children.

of other caregivers children have. The empirical studies by Solomon and George and Kline Pruett et al highlight these factors; but in contrast to Solomon and George, Kline Pruett's study provides evidence (from both mothers and fathers) about the benefits of overnight stays provided there is consistency and some pre-existing relationship between the father and the child. To some extent, Kline Pruett's results may reflect the overall involvement of fathers associated with overnight stays and the overall amount of time they had with their children although their analyses did not provide any direct evidence of this.⁷² As they acknowledge:

[T]he parenting plan variables under study may serve as proxies for greater nonresidential father involvement in the lives of their children. Such involvement is generally threatened during separation and divorce ... especially among families with young children, but these variables indicate the continued presence of fathers at this time.

McIntosh et al's study adds to the information available from the other studies, particularly as a recent Australian study. It indicates some risks associated with shared care arrangements involving five or more nights per fortnight with each parent, for 2-3 year old children whose parents nearly all indicated disagreement with the other parent. In comparison with those children who stayed overnight with the non-resident parent for between one night per month and four nights per fortnight (itself a broad range), this group of children had lower levels of

⁷² Kline Pruett et al used a dichotomous split on overnight stays: "Parenting plans specified the occurrence of overnights (0 = no, 1 = yes). More detailed variables about the frequency of overnights did not yield additional information in analyses and were excluded": above n 53, p 43.

Solomon and George (above n 33), however, found that the amount of time did make a difference, with fathers who had overnight contacts being more likely to have weekly access (p 16) and having more than twice the amount of time with their children compared with those who did not have overnights (p 20).

persistence and more behavioural problems. Their parents did not, however, have more concerns about their health and other aspects of their development than those in the other care arrangements. There were no discernible adverse effects for older 4-5 year olds in shared care.

The broader context of these findings lies in the assumptions or models that underpin these analyses and interpretations and which are reflected in the views of those deciding on the care arrangement. There appear to be three models. The first assumes that very young children need a secure and stable attachment to their primary caregiver, assumed to be their mother; in this model, any time away from the mother is seen as a deficit or a risk to this attachment. Much of this research is based on data from mothers only. The second focuses on the importance of the father, and the value-add of this relationship, challenging concerns about separations from the child's mother only, and not from the father. The third takes a family system approach and focuses on the child's behaviours and relationship with their mother, father and other caregivers, based on data from both mothers and fathers. Much research is based on the first or second competing models – Solomon and George, and McIntosh et al are good examples of the first model. Lamb's work might be seen as an example of the second, but Kelly and Lamb have focused on contexts involving "established attachments to two involved parents prior to separation/divorce".⁷³ Kline Pruett's work reflects an application of the third model, including responses from both mothers and fathers, as well as the consistency of the schedule, and the number of caregivers in the child's life. The findings need to be read in this light.

⁷³ M E Lamb and J B Kelly. 'Improving the quality of parent-child contact in separating families with infants and young children: Empirical research foundations' in R M Galatzer-Levy, L Kraus, & J Galatzer-Levy (Eds.), *The scientific basis of child custody decisions* (2nd ed), Hoboken, NJ: Wiley, 2009 (pp. 187-214).

Implications for parenting arrangements for young children

While the research findings may be interpreted in line with different models and assumptions, they are consistent in pointing to the critical importance of the contextual environment for any parenting plan. The security of children's attachments to their mother was associated with the level of conflict between the parents, especially that to which children are exposed, and the mother's responsiveness to the child's distress at separation and reunion, and her willingness and capacity to adapt the arrangements to meet the child's needs. As Solomon and George concluded, the quality of fathers' attachment with very young children may be 'dependent on approval from and communication with the mother'.⁷⁴ Lamb and Kelly point out, however, that some distress might be expected at separation from the primary caregiver, so this should not be interpreted as a licence to reduce contact.⁷⁵ It may mean that the parents need to adjust arrangements, taking account of how well the child is dealing with these transitions.

It is important also to put the issue of separations and transitions into perspective. Many mothers of very young children return to work after a period of maternity leave. When mothers work, infants and very young children are left for substantial periods during the day with grandparents, other family members or friends, or in child care centres. Young children seem to manage these quite lengthy daytime separations from the primary caregiver.⁷⁶

⁷⁴ Solomon and George above n 34, p 26.

⁷⁵ Lamb and Kelly above n 40.

⁷⁶ NICHD Early Child Care Research Network, 'The effects of infant child care on infant-mother attachment security: Results of the NICHD Study of Early Child Care' (1997) 68 *Child Development* 860; NICHD Early Child Care Research Network, 'Factors associated with fathers' caregiving activities and sensitivity with young children' (2000) 14 *Journal of Family Psychology* 200.

With infants and young children, the quality of the parents' relationship with one another, and the mother's attitude towards the child spending time with the father, are crucial to the success or otherwise of the parenting arrangements. As Dolby outlines:⁷⁷

If the parent is emotionally available to the child at separation and at reunion then this positive support can mitigate infant distress and protect attachment security; on the other hand, if the transitions are handled in a negative way, then this can cause more stress....

And further:

It is the ability to repair a disruption that is the essence of a secure attachment, not the lack of disruptions.⁷⁸ ...The experience of having a person who 'walks them through', who assists them back to a calm state when things go wrong, enables children to build up a sense of trust in their parent's availability and ability to help them. Over time they internalise the help they have received from their parents enough to be able to draw on it on their own. This is how children learn to manage their feelings: resolving distress in the context of a safe relationship enables them to learn to cope with strong feelings like fear for themselves.

How these findings are applied to the work of resolving parenting disputes concerning young children depends to some extent on the context for dispute resolution. Mediators in Family Relationship Centres or other mediation services who are seeing parents at a stage when no litigation has been initiated will usually deal with parents who have a greater capacity for co-operation and trust than the parents that judges see in the course of trials. The process of litigation

⁷⁷ Dolby, above n 28.

⁷⁸ Quoting R Marvin, G Cooper, K Hoffman and B Powell, 'The Circle of Security Project: Attachment-based intervention with caregiver-young child dyads' (2002) 4 *Attachment & Human Development* 107 at 109.

itself damages the parental alliance⁷⁹ and it is the most intractable cases that have to be resolved by a judge.

Charting the right course

What arrangements will be appropriate in each case will depend on charting an appropriate course, navigating by the star of what is optimal, taking account of what is practicable, and avoiding, as far as possible, the rocks that might lead to shipwreck.

What is optimal in circumstances of parental separation, at least when both parents have a secure and warm relationship with the child which was established before they separated, is:

- that the mother is supportive of the father-child relationship; for the mother, that means giving her emotional permission for the child to be with the father, and expressing positive feelings and reassurance on handover and reunion;⁸⁰
- that the father is able to be involved with all aspects of caregiving, with regular contact occurring several times per week and some overnight stays, if this would not interfere with breastfeeding;
- that the routine is consistent;

⁷⁹ J McIntosh, *The Children's Cases Pilot Project: An exploratory study on impacts on parenting capacity and child well-being, Final Report to the Family Court of Australia*, Family Transitions, March 2006.

⁸⁰ M K Pruett, L Arthur and R Ebling, 'The hand that rocks the cradle: Maternal gatekeeping after divorce' (2007) 27 *Pace University Law Review* 709; L Trinder, 'Maternal gate closing and gate opening in postdivorce families' (2008) 29 *Journal of Family Issues* 1298.

Contact Arrangements for Young Children

- that any conflict between the parents does not occur in front of the child and does not result in negative feelings about the other parent being conveyed to the child.

When the conditions are right, overnight stays even for children under 2 years old may prove beneficial. As Lamb observes:⁸¹

The evening and overnight periods (like extended days with naptimes) with nonresidential parents are especially important psychologically for infants, toddlers, and young children. They provide opportunities for crucial social interactions and nurturing activities, including bathing, soothing hurts and anxieties, bedtime rituals, comforting in the middle of the night, and the reassurance and security of snuggling in the morning that 1- to 3-hour-long visits cannot provide. According to attachment theory, as noted earlier, these everyday activities promote and maintain trust and confidence in the parents, while deepening and strengthening child-parent attachments, and thus need to be encouraged when decisions about access and contact are made.

When parents are in dispute about the arrangements for the father to be involved in the child's life, the conditions for optimal post-separation parenting arrangements may well not be present. For this reason, mediators, family consultants and other professionals involved with the parents have an important educative role, and therapeutic support may also assist in creating the conditions in which a very young child can move between the parents without undue distress or damage to his or her attachments.

Furthermore, what is practicable may well fall far short of what is optimal. Even if the relational conditions for successful co-parenting or parallel arrangements are there, the logistical issues may constrain what is practicable. Work schedules, commuting time, the distance between homes, or between home and the father's

⁸¹ Lamb, above n 68.

work, breastfeeding, and an infant's sleeping patterns may all constrain the options available.

The research literature also provides a map of the treacherous rocks that need to be avoided if at all possible. The child's capacity to develop and maintain a secure relationship with both parents is likely to be impaired if:

- the mother is fearful about, or resistant to, the infant child going to stay overnight with the father, and communicates that anxiety or hostility in the way she relates to the child during transitions;
- there is high level of conflict between the parents, and this takes place in the presence of, or hearing of, the child;
- there is poor communication between the parents;
- the mother is insensitive to the child's needs at separation and reunion.

There may also be numerous other issues that need to be considered in avoiding risks to the safety and emotional wellbeing of young children. Parents who have an impaired capacity to parent due to mental illness (including chronic depression), alcohol or drug addiction, or a chaotic and dysfunctional lifestyle, present different issues for the courts from those who are able to provide good enough parenting, or better. When the mother's parenting capacity is impaired, consideration may have to be given to whether the father is better able to provide a safe and nurturing environment as primary caregiver. If the mother remains the primary caregiver, a non-resident father may be able to provide a protective role by having a substantial role in caring for the child.

Fathers may also have an impaired parenting capacity or be insensitive to a young infant's needs. That raises other issues about the appropriateness of the parenting arrangements in these circumstances.

Being realistic about the destination

While mediators and lawyers negotiating suitable parenting arrangements between 'good enough' parents may have a range of available options that could assist the child in developing a meaningful relationship with both parents, courts do not often have the luxury of choosing what is optimal. More commonly, the focus is on what is practicable and what will minimise risk in the circumstances.

One of the difficult issues to confront, in this context, is whether it is realistic to think that the parents can form a co-parenting relationship for the long-term which will be of benefit to the child. Section 60CC of the Family Law Act 1975 requires courts to consider the benefit to the child of having a meaningful relationship with both of the child's parents. However, the law does not assume that benefit.⁸² As Bennett J observed in *G and C*,⁸³ "the court must evaluate the nature and quality of the relationship to establish whether there is any 'benefit to the child' in having or continuing a relationship and whether such relationship is or will be 'meaningful' in the relevant sense".

In addressing these questions, there is a difference between continuing a meaningful relationship and developing one which does not yet exist, in circumstances where there is likely to be significant ongoing conflict between the parents.⁸⁴ It is a principle of the Family Law Act, subject to a child's best interests, that "children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together".⁸⁵ However, when the parents have never lived together or separated before the child was born, the question that arises for

⁸² P Parkinson, 'Decision-making about the Best Interests of the Child: The impact of the two tiers' (2006) 20 *Australian Journal of Family Law* 179.

⁸³ [2006] FamCA 994, at [68].

⁸⁴ Lamb and Kelly, above n 73, p. 198.

⁸⁵ Family Law Act 1975 (Cth) s 60B(2).

the court is likely to be about the options available for the father to develop a relationship with the child, in circumstances where the parents have never shared the parental role, and are in conflict.

If the parents have never lived together and shared life as a family, it may be harder for the parents to co-operate in an aspect of family responsibilities than if they have at one stage made a commitment together to a shared life. The sociological evidence is that, in the long-term, the father-child relationship tends to be much more fragile and tenuous than if the parents had been married.⁸⁶

For these reasons, in situations where there are significant practical problems, or substantial risks to a young child's wellbeing given the circumstances of each parent, and the relationship between them, it is important to be realistic about the purposes for which parenting orders are to be made. It may be too much to expect that a successful co-parenting relationship can be established when the foundations for such co-operation have not previously existed, where the father does not take naturally and easily to the parenting role, and where the mother is anxious or resistant to the child's contact with the father. In particular, the foundations may be laid for long term conflict and difficulty if the mother is concerned about the child's safety with the other parent.⁸⁷ Where the children are very young, mothers' concerns about the child's safety and well-being and

⁸⁶ M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood across Households*, Hart, Oxford, 1997; M Carlson, S McLanahan and J Brooks-Gunn, 'Coparenting and nonresident fathers' involvement with young children after a nonmarital birth' (2008) 45 *Demography* 461; P Amato, C Meyers and R Emery, 'Changes in nonresident father-child contact from 1976 to 2002' (2009) 58 *Family Relations* 41; L Tach, R Mincy and K Edin, 'Parenting as a "package deal": Relationships, fertility, and nonresident father involvement among unmarried parents' (2010) 47 *Demography* 181; J Cheadle, P Amato and V King, 'patterns of nonresident father contact' (2010) 47 *Demography* 205.

⁸⁷ J Cashmore and P Parkinson, *Understanding Contact Disputes. Report to Federal Attorney-General's Department, Australian Government*, 2010, at <<http://ssrn.com/abstract=1721927>> (accessed 14 April 2011).

the level of disagreement about child-rearing practices are likely to be exacerbated.⁸⁸

Relocation cases

The need to be realistic about the destination is particularly important when there is a relocation dispute involving a young child.⁸⁹ Given the young child's sense of time, and the limitations of even telephone and webcam communication with very small children, relocation of a young child to a distant location is likely to make it very difficult indeed for the child to maintain a meaningful relationship with the non-resident parent. If the non-resident parent can move as well, that difficulty can be resolved.⁹⁰ In other cases, the question has to be asked whether the benefit to the child of having a meaningful relationship with both parents, given the parenting capacity of the father and the level of acrimony between the parents, is such as to outweigh the mother's case for relocation.⁹¹ It is unrealistic and unfair on the child to think that a meaningful relationship with

⁸⁸ Further analysis of the data in the Cashmore et al study (see n 8) indicates that mothers of children under five were significantly more likely than mothers of older children to have concerns about the children's safety ($p = .005$), to say that they disagreed with the child's father about child-rearing matters ($p = .032$), that the arrangements were working less well for the children ($p = .005$), and that the children were not happy with the arrangements ($p = .014$).

⁸⁹ See generally, J Kelly and M Lamb, 'Developmental issues in relocation cases involving young children: When, whether and how?' (2003) 17 *Journal of Family Psychology* 193. Lamb and Kelly note that a range of factors need to be evaluated in determining a relocation case. However, they consider that if a relocation is necessary, it should ideally be postponed until children are two or three years old in order to allow the relationship with the non-resident parent to be developed to the point that a long-distance relationship can be sustained.

⁹⁰ *U v U* (2002) 211 CLR 238; M Weiner, 'Inertia and inequality: Reconceptualizing disputes over parental relocation' (2007) 40 *UC Davis Law Review* 1747.

⁹¹ See generally, P Parkinson, *Family Law and the Indissolubility of Parenthood*, Cambridge University Press, New York, 2011, Ch 7.

a young child can be maintained by making orders for extensive contact that involves frequent travel across long distances. The costs of travel, and the burden of travel for young children, must be realistically assessed.⁹²

Shared care and young children

In the absence of risk factors, young children are likely to benefit very much from the meaningful involvement of both parents in their lives. Is shared care – defined as five nights per fortnight or more with each parent – ever appropriate for young children?

Apparently, many in the population think so. The Australian Institute of Family Studies' research indicated that 32% of fathers and 23% of mothers in the general population thought an equal time arrangement for a child under three was 'totally appropriate', while only 6.5% of fathers and 11% of mothers thought it was totally inappropriate.⁹³ Two per cent of children under 3, whose parents were living apart, were in equal time arrangements in 2008. The corresponding figure for 3-4 year olds was 9%, which was higher than the average for children overall.⁹⁴ There may of course be a variety of different equal time arrangements, alternating days, four-three divisions of the week, or week-about arrangements. It is possible that some people may think of an arrangement for frequent day-time contact by a father as being an equal time arrangement.

While it may assist a young child to maintain attachments with both parents by seeing the non-resident parent frequently, young children also need stability, continuity and security with a primary attachment figure. There is no support in

⁹² P Parkinson, J Cashmore and J Single, 'The need for reality testing in relocation cases' (2010) 44 *Family Law Quarterly* 1; P Parkinson, 'The realities of relocation: Messages from judicial decisions' (2008) 22 *Australian Journal of Family Law* 35.

⁹³ Kaspiew et al, above n 1, p 116. See also B Smyth and R Weston, 'The attitudes of separated mothers and fathers to 50/50 shared care' (2004) *Family Matters*, no 67, 8.

⁹⁴ Kaspiew et al, above n 1, p 119.

the social science literature for parenting arrangements for children under four that involve alternating substantial blocks of time.⁹⁵ –The McIntosh et al findings suggest that 2-3 year old children with conflicted parents fare less well when each parent has the care of the child overnight for at least five nights per fortnight. While otherwise there is no direct evidence that alternating substantial blocks of time is harmful, the preponderance of expert opinion, based upon what is known about young children’s attachments and sense of time, is that a primary residence with one parent, regular contact with the other parent, and limited periods of separation from both parents are best for young children, and especially those under four.

McIntosh et al also note the additional risks associated with high conflict families involved in litigation. They observe:⁹⁶

In court samples, parents frequently lack the equipment needed for an effective shared care arrangement, for example, adequate co-parenting communication, conflict management skills, and pragmatic infra-structure... ‘shared care’ infants in higher risk divorce populations thus may accrue both normative risk through their sheer developmental vulnerability, and additional risk through the domino impacts of parental conflict, and pre-occupied or otherwise compromised parenting.

There is nothing within the Family Law Act 1975 (Cth) to suggest that a week-about arrangement ought to be seriously contemplated with a young child. When there is, or will be, an order for equal shared parental responsibility, courts must consider the options of an equal time arrangement or an arrangement for ‘substantial and significant’ time.⁹⁷ These requirements are not limited to

⁹⁵ Kelly and Lamb, above n 25, p 304.

⁹⁶ McIntosh et al, above n 62, p 156.

⁹⁷ FLA s 65DAA.

children of school age and above. However, in determining what is reasonably practicable, the court should consider, *inter alia*, the impact that an arrangement of that kind would have on the child.⁹⁸ Section 60CC(3)(d) refers to the likely effect on the child of any separation from either of his or her parents'. These considerations ought to lead a court to reject proposals for week-about arrangements involving children who are not yet in school, and to be very cautious about any other arrangements that appear to be driven by an aim to split time approximately equally rather than to meet the child's developmental need for secure attachments, a stable environment, and a consistent schedule.

Conclusion

Post-separation parenting arrangements for infants and young children are negotiated in a variety of contexts. In many cases, parents have previously lived together and shared the care of the child while their relationship was intact; the child has formed a relationship with both parents in the first months of life or longer, and the challenge is how to maintain and develop that relationship in the often difficult circumstances that exist after separation. In other cases, the parents have broken up during the child's pregnancy, or never lived together at all. Some children are born to parents who have at one stage made a commitment of marriage, while other children are born to parents who have only had a relatively casual and transient, non-cohabiting relationship. These different contexts cannot be ignored in working out what is in the best interests of children when parents live apart.

In considering what care arrangements are in the best interests of the child, there are also various risk factors to consider. The level of conflict between the parents, and the extent to which both the mother and father are able to be sensitive to the child's needs on separation and reunion are both important factors. There may be other risks to the young child's physical safety or emotional needs arising from

⁹⁸ FLA s 65DAA(5)(d).

impaired parenting capacity, particularly in circumstances where a parent abuses alcohol or drugs, or suffers from mental illness. The cases that judges typically hear - that is, the cases that cannot be settled - will very often be cases where significant risk factors are present, and where one or both parents has difficulty in understanding and meeting the emotional needs of the very young child.

Furthermore, there are often logistical challenges in working out suitable parenting arrangements. Even when there are no risk factors, the work schedule of the father and the time it takes for him to commute to and from work may make it difficult for him to spend the time with an infant or toddler that would ordinarily be desirable; the time taken to travel between the parents' homes may present further challenges, particularly in Australia's largest cities. The straitened financial circumstances of the parents after separation may mean that one or both parents has to move to a lower cost housing area, and this is a major reason why such travel issues arise.

Parents, with the assistance of mediators, family consultants and lawyers, or courts in adjudicated cases, must try to work out what is best for children taking all of these circumstances and issues into account. The social science literature is helpful both in identifying what is likely to be optimal in the circumstances, and in pointing to risk factors. That literature does not support a prohibition on overnight stays for infants and toddlers, but suggests the need for both discernment and caution, particularly in relation to overnight stays of more than one night per week for children under 3. There is a major difference between an overnight stay that represents a continuation of pre-separation caring responsibilities, and staying overnight with a biological parent who is, to that child, something of a stranger.

Above all, in this difficult area, there is no room for decision-making that is driven by a concern for parental rights or fairness between the parents. The first three years of life are vital to the young child's cognitive and emotional development. It may often not be possible to devise post-separation parenting

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arrangements that are optimal for young children, but at least, we should aim as far as possible, to protect vulnerable young children from paying the price for adult notions of justice.