THE PAST CARETAKING STANDARD IN COMPARATIVE PERSPECTIVE

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I THE PAST CARETAKING STANDARD

A A new approach to resolving post-separation parenting disputes

The Principles advocate a radical new approach to the issue of determining parenting arrangements after separation. The central operating idea is found in §2.08. It is that the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation. This is the past caretaking standard. It is based on the concept of continuity between the intact and separated family.

The presumptive allocation of custodial responsibility that results from this assessment can be modified, but only to the extent necessary to achieve a list of other objectives contained in §2.08(1).


2 Principles §2.08(1). The objectives are as follows:

(a) to permit the child to have a relationship with each parent which, in the case of a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions, should be not less than a presumptive amount of custodial time set by a uniform rule of statewide application;

(b) to accommodate the firm and reasonable preferences of a child who has reached a specific age, set by uniform rule of statewide application;
to be made to the exceptions provided by §2.11. This section sets out a number of justifications for limiting the parental responsibility of a parent in order to protect the child, the child’s parent, or other member of the child’s household from harm. This includes abuse, neglect or abandonment of a child, domestic violence, abuse of drugs, alcohol or another substance in a way that interferes with the parent’s ability to perform caretaking functions, and interfering persistently with the other parent’s access to the child. There is some overlap between §2.08 and §2.11. Some factual circumstances could be argued on more than one ground.

The past caretaking approach is also relevant to the allocation of responsibility for making significant parental decisions. The PRINCIPLES §2.09 provides that in the absence of parental agreement, the court should allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child's education and health care, to one parent or to two parents jointly, in accordance with the child's best interests. Factors to consider in making this

(c) to keep siblings together when the court finds doing so is necessary to their welfare;
(d) to protect the child's welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs;
(e) to take into account any prior agreement, other than under §2.06, that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;
(f) to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child’s daily schedules, and the ability of the parents to co-operate in the arrangement;
(g) to apply the Principles set forth in §2.17(4) if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the presumptive amount of custodial responsibility under this section;
(h) to avoid substantial and almost certain harm to the child.
allocation include the allocation of custodial responsibility under §2.08 and the level of each parent's participation in past decision making on behalf of the child.

The past caretaking standard clearly represents a bold new direction in the law of parenting after separation. Of course, Chapter 2 as a whole reflects many themes and ideas that are expressed in post-separation parenting laws across America and beyond. Much is familiar to an overseas’ reader in Chapter 2. The idea of parenting plans, the grounds for restricting parental involvement as a consequence of domestic violence or child abuse, and the proposals for dealing with the vexed issue of relocation, all reflect ideas that are to be found in the laws of many US jurisdictions and of other countries.

Like many jurisdictions in which major family law reform has occurred in recent years, the PRINCIPLES avoid the now outdated language of custody and visitation. The

3 PRINCIPLES §2.05ff. The idea of encouraging parents to draw up parenting plans in sorting out arrangements after separation has now become a widespread practice used by mediators. In some US jurisdictions, a parenting plan is mandated by legislation. Washington State was in the vanguard. In that State, the parenting plan replaces the concepts of custody and visitation. WASH. REV. CODE § 26.09.184 (West, 2004). For commentary on these reforms, see Jane W. Ellis, Plans, Protection and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals, 24 U. MICH. J. L. REFORM 1-188 (1990). In other jurisdictions, the idea of having a parenting plan is grafted onto the traditional concept of custody e.g. Illinois, 750 ILL. COMP. STAT. 5/602.1(b) (2004); Missouri, MO. ANN. STAT. § 452.375(2)(1),(9) (West 2004); Utah, UTAH CODE ANN. § 30-3-10.8 (Matthew Bender 2003); Wisconsin, WIS. STAT. ANN. 767.24(2) (West 2004).

4 PRINCIPLES §2.11. A presumption against joint custody or generous visitation where there is proven domestic violence is a common feature of American statutes. See, e.g., IOWA CODE ANN. § 598.41(1)(b) (West 2004) (“if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists”); Illinois, “Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child.” 750 ILL. COMP. STAT. 5/602(c) (West 2004).

5 PRINCIPLES §2.17.
term ‘custodial responsibility’, used in Chapter 2 is something different from the traditional notion of custody, for it does not imply the necessity for a binary choice between the mother and the father as caregiver. The parenting plan that is the subject of court orders does not specify which parent is to have physical custody. Rather, both parents are likely to have “custodial responsibility” and the parenting plan should include a “custodial schedule that designates in which parent’s home each minor child will reside on given days of the year” or a formula or method for determining such a schedule. In this way, the either/or choice between the parents of traditional custody adjudication is abandoned in favour of an approach which recognises that in the absence of reasons to restrict or prohibit one parent’s contact with the child, both will have caring responsibility for the child, and the parent who is not in a primary caregiving role is nonetheless something more than a visitor in the children’s lives.

B Origins: The Primary Caretaker Presumption and the Approximation Standard

The notion that past caretaking ought to be relevant to custody decision-making when choosing between parents in terms of who should have physical custody of a child is not at all new. Whether articulated expressly in legislation or not, courts have always given great weight to the claims of the primary caretaker.

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6 PRINCIPLES §2.05(5)(a). This is similar to the approach adopted in Washington’s Code. It provides that the “plan shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions”. WASH. REV. CODE § 26.09.184(5) (West, 2004).
Indeed, for those who are familiar with the history of American child custody law, the past caretaking standard has a familiar ring. In particular, it is a variant on the approach adopted first by the West Virginia Supreme Court, in Garska v McCoy. In that case, the Court held that there should be a presumption in favor of the primary caretaker parent, if he or she meets the minimum, objective standard for being a fit parent. Neely CJ enumerated a list of practical tasks that could be examined in determining who was the primary caretaker. The presumption was an absolute one for children of tender years. The trial judge was required to give such weight to the opinions of older children as he or she considered justified. The primary caretaker standard in West Virginia replaced the maternal preference rule. It is an approach that has been strongly advocated by some feminist scholars.


8 One source of difficulties with the primary caretaker presumption, both in Minnesota and West Virginia, is identified by Laura Sack who in a study of the reported decisions in West Virginia and Minnesota (Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases (1992) 4 YALE J. L. & FEM 292) found numerous examples of trial judges using the unfit parent exception to disqualify women from custody on the basis of their sexual conduct. While generally these decisions were overturned on appeal, Sack noted that the need for appellate intervention undermines one of the proposed benefits of the presumption, and the cost of an appeal might well deter many women from seeking to do so.

9 “In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.” Garska at 363.


Garska v McCoy was adopted by the Minnesota Supreme Court in Pikula v Pikula in 1985. However, it only survived there for four years before it was overturned by legislation. Further amendment to the legislation in 1990, designed to overcome continuing judicial support for the presumption, was emphatic in abolishing it. It stated that: "The primary caretaker factor may not be used as a presumption in determining the best interests of the child."

The past caretaking standard itself has its origins in a seminal article by Professor Elizabeth Scott published in 1992. Professor Scott examined the primary caretaker preference, and also the joint custody approach which achieved a great deal of popularity in the late 1970s and the 1980s. She found both to be lacking in certain ways. She proposed instead an approximation standard that is very similar to the approach adopted in the PRINCIPLES.


The primary caretaker presumption has not gained universal approval from feminist writers. The debates among feminists are reviewed in Susan Boyd, Potentialities and Perils of The Primary Caregiver Presumption 7 Canadian Family Law Quarterly 1 at pp 24-28 (1990). See also Susan Boyd, Helen Rhoades and Kate Burns, The Politics of the Primary Caregiver Presumption 13 AUSTRAL. J. FAM. L. 233 (1999).

12 (1985) 374 N.W. 2d 705.
The difference between the approximation standard and the primary caretaker presumption is that in the former, the history of past caretaking is not only relevant to the decision about who should have primary caregiving responsibility, but also to the amount of time that the other parent will spend with the child. To the extent that it is used to select who should be the primary caregiver, the past caretaker standard is indistinguishable from the primary caretaker principle. Prof. Scott acknowledged the relevance of the Garska v McCoy factors in determining who has been the primary caregiver.  

In preparing the successive drafts of the PRINCIPLES during the 1990s, the drafters preferred Prof. Scott’s approach to all the existing approaches that were available to them in American jurisdictions or elsewhere. Since that time, West Virginia has replaced the primary caretaker presumption with a version of the past caretaking standard.

## II THE PAST CARETAKER STANDARD AND THE CLAIM TO PREDICTABILITY

One of the major claims made for the past caretaking standard in the PRINCIPLES is that it will promote more predictable and easily adjudicated results, thereby advancing the best interests of children.  

The commentary to §2.08 notes:

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15 Scott, above n.13 at 638, fn 71.  
17 PRINCIPLES §208, comment b.
“While each parent’s share of past caretaking will in some cases be disputed, these functions encompass specific tasks and responsibilities about which concrete evidence is available and thus offer greater determinacy than more qualitative standards, such as parental competence, the strength of the parent-child emotional bond or – as the general standard simply puts it – the child’s best interests.”

Unless one of the exceptions applies, then the patterns of past caretaking will be determinative of the issue of custodial responsibility. The PRINCIPLES seek to limit the discretion of judges to that of determining a series of relatively closed questions.

What was the proportion of time that each parent spent performing caretaking functions while they were together? Do any of the exceptions listed in §2.08(1) apply, and if so, to what extent should the presumptive allocation be modified? How should the custodial schedule best be organised to reflect the amount of custodial time allocated to each parent, given their post-separation circumstances?

Whether the past caretaking standard is likely to reduce litigation depends on the circumstances of the case, and the issues that are before the Court.

A The past caretaking standard and the choice of primary caregiver

The past caretaker standard ought to be a reasonably straightforward principle to apply in cases in which both parents are seeking an order for what has traditionally been called sole physical custody. If the issue is which parent will be the primary caregiver following separation, then the answer provided by this standard is that it should be the parent who was the primary caregiver during the course of the marriage or cohabiting relationship.
Application of the test to custody disputes is of course, not entirely free from difficulty. The commentary on §2.08 addresses a number of issues that could arise, including the problem of how the test should be applied when the division of caretaking functions has changed over time. Arguments may arise concerning who was the primary caretaker. However, other tests for determining custodial responsibility are also fraught with difficulty, not least the best interests standard. It is not a convincing argument against the past caretaking standard that it may at times be difficult to apply.

Nonetheless, the history of application of the primary caretaker presumption in Minnesota indicates that the test may not have the effect of creating certainty that proponents suggest. Minnesota's experience with the presumption was analysed by Gary Crippen, a judge of the Minnesota Court of Appeals. Crippen found that there was a dramatic increase in the numbers of appeals on custody to the intermediate appellate court from nine in the year before Pikula to an average of 30 per year in 1986-88. His survey of practitioners and judges who had extensive experience of family law also demonstrated their perception that while the preference was effective in some cases in discouraging litigation, in other cases it had the effect of inducing litigation. Trial judges sought to get around the implications of the test in favour of outcomes that they considered more justifiable. One of the lessons from Minnesota,

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18 See §208 comment c.
perhaps is that a custody rule that does not have general acceptance among those entrusted with its application, is unlikely to succeed as intended.

B Are the exceptions actually the rule in cases that go to trial?

Even if the past caretaking standard does promote greater predictability, this is only likely to be the case when it is the rule itself, rather than one of the exceptions, that is the major issue in a trial. Arguably, the exceptions to the standard are so many that they threaten to swallow up the rule.

There are many common situations where the exception, rather than the rule, is likely to be the focus of litigation. For example, the father may concede that the mother was the primary caregiver during the marriage, but argue that the determining factor ought to be the child's wishes. The mother’s argument is that those wishes are the consequence of manipulation by the father and should not be given sufficient weight to displace the past caretaking standard. Alternatively, the father may argue that while the mother has been the primary caretaker, she is not able to fulfil this role adequately because she is incapacitated by drug and alcohol abuse or mental illness.

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20 The drafters indicate that the rule-maker could reasonably choose the age of 11,12,13 or even 14 as the appropriate age. PRINCIPLES §2.08, comment f.

He may therefore argue for the exception that there is a gross disparity in “each parent's demonstrated ability or availability to meet the child's needs.”

Another dispute may turn on the quality of the relationship between the child and each parent. Although one has been the primary caregiver, the other argues that there is a gross disparity in the “quality of the emotional attachment between each parent and the child”. Another dispute may be about whether one parent should have contact with the child at all, or should only have supervised contact. The issue here is not the relative involvement of the parents in past caretaking but the risk of harm to the child if unrestricted contact takes place. This falls within exception (h) – the need to avoid substantial and almost certain harm to the child, and §2.11.

The §2.08 exceptions and the §2.11 list between them account for the issues that are central to a very substantial proportion of all cases that go to trial in Australia. Because the primary caretaker is usually the obvious parent to continue in that role after separation, it takes some other significant factor such as is set out in the list of objectives that constitute exceptions to the past caretaking standard, to displace the natural tendency of courts to preserve the status quo. Consequently, if the

22 The drafters indicate that this exception is only intended to cover “exceptional cases”. PRINCIPLES §2.08, comment h.


24 An empirical study of closely contested custody disputes in Australia has found that such claims of the unfitness of the child’s primary caregiver are a major reason why fathers win custody disputes.
PRINCIPLES were to be introduced into Australia, it would probably make very little difference at all to the kinds of disputes that trial courts hear day in and day out. The exceptions given in the PRINCIPLES are the rule when it comes to litigated cases. Perhaps the position is different to the United States.

C. When the past caretaking has been shared equally

This issue clearly caused the drafters of the PRINCIPLES a great deal of difficulty. The logic of the ALI approach is that if the parents have shared in the care of the child more or less equally, then the presumptive allocation of custodial responsibility between them should also be more or less equal, at least if the parents circumstances permit.25 Surprisingly, however, the commentary and illustrations that accompany §2.08 indicate a great deal of confusion about what the outcome should be in this situation. There are three different views to be found in the commentary.

The first view is that in this situation the past caretaking standard is not applicable at all. Illustrations 13 and 20 both involve a situation where the two parents shared approximately equally in the caretaking responsibilities while they were living together. The commentary indicates that because the parents shared caretaking equally in the past, the allocation of primary caretaking responsibility cannot be resolved by means of the presumptive standard and the court must apply the best


25 PRINCIPLES §208(1)(f) indicates that the presumptive allocation may have to be modified in the light of the economic, physical or other circumstances of the parents, including the distance between the parents’ residences and each parent’s schedule.
interests of the child test.\textsuperscript{26} This, the drafters say, is an application of the principle contained in paragraph (3) of §208, that the best interests test should apply because the history does not establish a sufficiently clear pattern of caretaking.

The second view is that the outcome depends on whether there was a prior agreement between the parents. It appears from illustration \textsuperscript{27}\textsuperscript{27} that if the parents had an agreement to share the care of the child on an equal basis during the marriage, and carried this into effect, then this would support an equal division of custodial responsibility between the parents.

The third view is that the past caretaking standard ought to dictate an allocation of equal custodial time unless one of the exceptions applies. In Illustrations 34 and 35, it is accepted that if the parents have shared equally in the caretaking of the children, then an allocation of equal custodial time would ordinarily be warranted.\textsuperscript{28} However, each of these illustrations demonstrates an exception that displaces the ordinary application of the principle.

These illustrations are followed almost immediately by illustrations 38 and 42, in which the drafters return to the interpretation given in illustrations 13 and 20, that if the parents have shared custodial responsibility equally, then the best interests test should apply.

\textsuperscript{26} PRINCIPLES §2.08, comment f and comment h.

\textsuperscript{27} PRINCIPLES §2.08, comment i.

\textsuperscript{28} This approach is supported by one of the drafters, Prof. Katherine Bartlett. She writes: “If parents shared caretaking responsibilities, that fact will be reflected in the custodial allocations.” Katherine T. Bartlett, \textit{US Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution}, 10 VA. J. SOC. POL’Y & L. 5, 18 (2002).
Any jurisdiction considering legislation along the lines of the PRINCIPLES would need to make a clear choice between these conflicting interpretations of the past caretaking standard. What ought to be beyond doubt is that where the parents have shared caretaking responsibilities more or less equally for years, there is an absolutely clear pattern of caretaking – one of equal caring. There may be other good reasons why an equal care arrangement following separation is not desirable, but to argue that no clear pattern has been established defies logic.

D. The past caretaking standard and contact arrangements

It is also less than clear from the illustrations in the commentary on §2.08 how exactly the custodial responsibility of the non-resident parent is to be allocated in accordance with the past caretaking standard. Mostly, the illustrations establish who should be the primary caretaker following separation, not how much time the other parent will get to spend with the children. In Illustrations 2 and 3, the drafters provide their only illustrations of how the primary caretaker standard might be applied to allocate the custodial responsibility of the non-resident parent. In the illustration, Shira was a stay-at-home parent, while Duncan worked ten-to-twelve hour days in full-time employment and three to four hours per week playing with his children while the parents were living together.

29 As the drafters note, (PRINCIPLES §2.08, comment j) “Custodial arrangements involving substantially equal amounts of custodial responsibility and no primary custodial home pose particular challenges.” For discussion of the issues in the Australian context see HOUSE OF REP. STANDING COMMITTEE ON FAMILY & COMMUNITY AFFAIRS, EVERY PICTURE TELLS A STORY: REPORT OF THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION (2003) Ch 2. See also Patrick Parkinson, Custody Battle, 18 ABOUT THE HOUSE 16 (2003).
The commentary in illustration 2 seems to suggest that if the non-resident parent only spent three to four hours per week playing with his children while the parents were living together, then that is all the time he is entitled to have with them after separation under the past caretaking standard. However, the drafters go on to say that the ordinary operation of the past caretaking standard is dispatched because this would be lower than the minimum time under the state rule which aims to ensure that the child is permitted to have a relationship with each parent.

In other parts of the commentary, however, it is clear that the issue is not how much time the parent spent in caretaking responsibilities, but the proportion this bears to the caretaking responsibilities of the other parent. The definition of caretaking responsibilities in the PRINCIPLES (§2.03(5)) is “tasks that involve interaction with the child or that direct, arrange and supervise the interaction and care provided by others”. Families engage in a lot of other activities that do not involve caretaking as so defined, except incidentally – going shopping, doing the washing and ironing, doing other chores around the house and garden, and engaging in recreational activities. One parent might have spent 4 hours per week in caregiving responsibilities, while his partner, who was the primary caregiver, spent say, 12 hours in caretaking responsibilities as defined in the PRINCIPLES. If the proportionality test is applied, then the first parent ought to have the children staying with him for approximately 25% of the time and the primary caregiver, for 75% of the time.

The other illustrations, to the extent that they address the issue at all, posit a situation where the parents have shared equally in the caretaking tasks. It is less than clear from the illustrations taken as a whole how precise the past caretaking standard is
meant to be in allocating parenting time between two involved parents where one does more of the caretaking than the other, but both are actively engaged in caretaking tasks in the course of the marriage.

This lack of clarity on the issue in the PRINCIPLES is unfortunate. The question of how to allocate parenting time was dealt with more fully by Prof. Scott in her explanation of the approximation standard in her 1992 article.\(^\text{30}\) She wrote that for the standard to have practical application, the courts would need to “characterize predivorce family arrangements by using simplifying categories or rules of thumb to ease the judicial task of applying the rule.” She thought that three categories could be constructed that would roughly reflect various patterns of parental involvement, spanning a continuum from a family in which both parents equally share caretaking responsibility to one in which one parent is uninvolved while the other shoulders most of the burden. In the first category, an arrangement for joint physical and legal custody would be appropriate. Where one parent is uninvolved in caretaking, the appropriate order would be for sole custody and visitation. Prof. Scott then described the third category as follows. It would

\(^{30}\) Above, note 13 at 640.
group might use a variety of formulas to allocate the child's time between households, designating time with each parent as a proportion of the month or week. For example, the order might direct that the child live with an actively participating secondary caretaker twelve days a month (or three days a week), while a less involved secondary parent might be awarded physical custody eight days a month (or two days a week).”

In Prof. Scott’s formulation, the approximation standard is very approximate indeed. Contact arrangements are only loosely based on an examination of the amounts of time each parent spent in caretaking functions. The main purpose of that analysis is to choose who should be the primary caregiver following separation. In relation to the amount of time the other parent should spend with the children, the approximation standard can be otherwise expressed by saying that the more involved the parent was in caregiving during the marriage, the more time he or she should be allocated after separation. If this is all the approximation standard means, then it is really little different from the primary caretaker standard with an additional principle to give guidance about contact arrangements. The claim to greater certainty and predictability than the best interests standard is difficult to validate.

III THE PAST CARETAKING STANDARD AND THE ROLE-DIVIDED MARRIAGE

Role-divided marriages remain a very common form of marital partnership. While fathers are playing a more active role in their children’s lives, mothers continue to carry most of the family’s domestic responsibilities. The common pattern remains for women and men as parents to make differential life-course investments, with fathers’ primary investment being in the market-place of career or self-employed business,
while women’s life investments are more diversified, and include a major orientation towards the care of children.\footnote{The difference in role does not necessarily indicate a difference in total hours spent in paid and unpaid work. For U.S. research see Beth Shelton, Men, Women, and Time: Gender Differences in Paid Work, Housework and Leisure Ch 5 (1992) (men and women have approximately the same amount of leisure time although patterns of availability and use are different). See also Herbert Smith, Constance Gager & Philip Morgan, Identifying Underlying Dimensions in Spouses’ Evaluations of Fairness in the Division of Household Labor, 27 Social Science Research 305 (1998); Nancy E. Dowd, Redefining Fatherhood (2000) 48-57. For Australian research, see Michael Bittman, Juggling Time: How Australian Families Use Their Time (1991); Australian Bureau of Statistics, No. 4150.0, Time Use Survey (1997); Ken Dempsey, Men and Women’s Power Relationships and the Persisting Inequitable Division of Housework, 6 J. Fam. Studies 7 (2000).}

Prof. Scott’s approach to the application of the approximation standard in her article, if adopted by courts applying the ALI approach, would at least ensure that those non-resident parents who were most active and committed to caretaking during the marriage should also have a significant level of care following separation.

However, what is so controversial about the PRINCIPLES is the way in which non-resident parents in role-divided relationships fare, at least according to the illustrations given in the commentary. Duncan, the father in illustration 2 who worked ten-to-twelve hour days in full-time employment, is given the minimum amount of time with his children after separation that the state rule deems appropriate. The same is true for Randy, a father of two children aged 2 and 4, introduced in illustration 10. Randy and Dawn had a role-divided marriage. Dawn was a stay-at-home parent while Randy worked outside the home, “interacting with the children in the evenings when he was at home and on weekends.” The description of Randy is of a loving and involved father who engages with the child-rearing as much as his full-time work routine allows. Randy, however, will only be awarded the minimum amount of time that the
statutory rule stipulates for those who have performed a reasonable share of parenting functions. His fathering role during the intact relationship is clearly attributed little value.

The commentary indicates that in the drafters’ opinion, a presumptive period of four to six hours per week for children under the age of 6 months is reasonable, while for a child over the age of six, six to eight days per month is a reasonable minimum.\(^{32}\) In comment e, the drafters acknowledge that while consistency and quality of contact is more important than the amount of contact, time that includes family routines and not merely recreational activity is likely to be beneficial. What is clear, however, is that the non-resident parent who has been in a role-divided marriage is only entitled to the minimum amount of time necessary to sustain a relationship with the children.

The past caretaking standard has had an enthusiastic reception from many academic writers in the United States. Prof. Herma Hill Kay, for example, welcomes it as offering “both mothers and fathers a way to retreat from this particular battlefield [of custody law] with their honor intact”.\(^{33}\) The standard has also been praised for being gender-neutral.\(^{34}\)

In this writer’s view, neither claim withstands careful scrutiny. As a principle for determining who should be the primary caregiver after separation, the past caretaking

\(^{32}\) PRINCIPLES §2.08, comment e.


\(^{34}\) Kathy T. Graham, How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations, 8 DUKE J. GENDER L. & POL’Y 301 (2001).
standard is not inappropriate. There can be no question that the division of roles in the intact marriage is, and ought to be, a very significant factor in deciding who should be the primary caregiver after separation. Children are likely to have developed a closer attachment to the parent who has in the past been their primary caregiver, and that parent is more likely to be attuned to the needs of the children. Primary caregivers also play an anchor role emotionally in the lives of children. The primary caregiver’s better qualifications to continue in that role justify the allocation of primary caring responsibility to them after separation in the majority of cases in Australia, as well as in other countries.

However, a fundamental issue about the past caretaking standard is whether past caretaking patterns should dictate the amount of contact that non-resident parents should have when they have been in a role-divided marriage. The evidence from the commentary to the PRINCIPLES is that the past caretaker standard is prejudicial to the primary earning parent in role-divided marriages. That prejudice can be alleviated to some extent if the rule of statewide application sets a generous amount of time for the non-resident parent to see the children.

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35 This can be seen in the aftermath of separation. The great majority of children and young people in families where the parents are not living together report that they feel close to their mothers: CHRISTY M. BUCHANAN ET AL., ADOLESCENTS AFTER DIVORCE 85 (1996), at Table 5.1, 188. The picture in relation to fathers is rather more mixed. For example, recent British research with children of divorce found that half of the children interviewed reported that their fathers knew nothing, or very little, of their feelings about the divorce, while this was true of only 20% of mothers: IAN BUTLER ET AL., DIVORCING CHILDREN: CHILDREN’S EXPERIENCE OF THEIR PARENTS’ DIVORCE 39 (2003).
A Should levels of contact follow pre-separation patterns

What then, are the arguments against the use of past caretaking patterns to determine the amount of contact that a non-resident parent will have?

The first argument against this strict continuity approach is that it equates practical caretaking with emotional closeness. A child may spend much more time with one caretaker than another and yet feel close to both and want to spend time with them both. This needs to be reflected in the contact arrangements.

Secondly, the argument that fathers should not have a greater role in parenting after separation than they had before separation ignores the significance of the change that separation can make to fathers’ attitudes to the parenting role. Smart and Neale found in their research in Britain, that some fathers adjust to divorce by making a new commitment to parenting.\(^{36}\) They leave the workforce or adjust the extent of their workforce participation in order to invest in a relationship which they feel could not be sustained without a substantial new investment of time and energy. The process of divorce then has an effect of causing them to reorder their priorities in a way that was not required before the separation.

This is far from a belated conversion on the road to Damascus. Role division within the marriage partnership makes sense for a great many couples as long as the relationship remains intact. Economists have sought to demonstrate how role

specialization maximizes benefit.\textsuperscript{37} A law which provides that post-separation parenting arrangements should be determined on the basis of the patterns of parenting before separation may be appropriate to the extent that the primary caregiver is better attuned to the needs of the children. However, it may act unfairly if the strength of a presumption in favor of the primary caregiver operates to the prejudice of men who fulfilled their role as primary breadwinners within a role-divided partnership, but who want to restructure their working arrangements significantly after separation to ensure that they can remain actively involved with their children’s lives.\textsuperscript{38}

Another flaw in the past caretaking standard is that it assumes that the co-parenting arrangement after separation can mirror the patterns of care-giving within an intact relationship. This takes too little account of the emotional, geographical and financial earthquake that separation can involve for parents. Co-parenting after divorce, whatever form it takes, requires new patterns of parenting to be developed in the very different circumstances that exist for the separated family.

\textsuperscript{37} GARY S. BECKER, A TREATISE ON THE FAMILY (1991).

\textsuperscript{38} The point is well made by Guidubaldi in his minority report for the the U.S. Commission on Child and Family Welfare: U.S. COMMISSION ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION, A REPORT TO THE PRESIDENT AND CONGRESS, 87 (1996):

“A frequently heard rationale for sole mother custody concerns the issue of pre-divorce parenting role performance serving as a precedent for post-divorce parenting roles. In response, it should be noted that during the marriage, traditional role complementarity provides for efficient childrearing, wherein one of the parents usually serves as the primary bread-winner, providing for the child's food shelter, clothing, etc. while the other parent's main focus is on utilizing these resources in providing direct services for the child. Neither contribution should be denigrated in determining post-divorce childrearing privileges or responsibilities. Since both roles were essential for child welfare, since both parties may be presumed to have had at least a tacit agreement to these role divisions, and since in many families the roles are not mutually exclusive and may involve a considerable amount of overlap, the pre-divorce parenting roles should not be the basis for post-divorce parenting time and should not place either parent at a disadvantage in custody conflicts.”
In particular when parents are living apart it may not be practicable to replicate the arrangements that were there when the marriage was intact. There is a big difference between parenting together when you are living together in the same household and parenting apart, where each parent must be the sole caregiver of the child during the times that the child is living with him or her. As Smart and Neale observe: “Pre-divorce parenting may be a poor preparation for post-divorce parenting, and the skills, qualities and infrastructural supports required for the former may be rather different to those required for the latter.”

When each parent is the primary caregiver of the child during the periods that a child lives in his or her care, it may be much more difficult to organise roles in the same way as during the intact relationship. For example taking children to school and picking them up, arranging meetings with friends and taking children to extracurricular activities may be much more difficult for the parent who is engaging full-time in the workforce than one who is working part-time. Post separation parenting means a reorganisation of parenting roles rather than a continuation of parenting roles.

B The past caretaking standard and the rise of shared parenting laws

In its application to parents who have had role-divided marriages, the direction of reform proposed by the PRINCIPLES goes in the opposite direction to the trend not only in the United States but all over the Western world. That trend is towards the encouragement of shared parenting after divorce.

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39 Smart & Neale, above n 36 at 46.
The approach of awarding the minimum amount of time to the non-resident parent that is sufficient for him or her to maintain a relationship with the child stands in marked contrast to the law in a number of US jurisdictions where the emphasis is on facilitating the non-resident parent’s role to the fullest extent that is consistent with the best interests of the child.

These provisions are self-consciously aspirational.\(^{41}\) In countries within the common law tradition, aspirational or normative statements are not an established part of the tradition of legislative drafting. However, laws concerning parenting after separation provide an exception. In the United States, it is common to have statements of legislative policy about the involvement of both parents.\(^{42}\) In Missouri, for example, it is the public policy of the state that there should be “frequent, continuing and meaningful contact with both parents” following separation, unless the best interests of the child dictate otherwise.\(^{43}\) In similar vein, the law in Florida provides: “It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys of

\(^{41}\) Aspirational statements promoting shared parenting take a number of different forms in jurisdictions around the world. In systems influenced by the civil law tradition, contact between the non-resident parent and the child may even be expressed in terms of a parental duty, in contrast to the common law focus upon rights. The Children Act 1995 in Scotland offers an example. Section 1 provides that where a child is not living with a parent, the parent has the responsibility “to maintain personal relations and direct contact with the child on a regular basis.”

\(^{42}\) FLA. STAT. ANN. § 61.13(2)(b)1 (2004).

\(^{43}\) MO. ANN. STAT. § 452.375 (West, 2004). The formulation of frequent and continuing contact is to be found in the laws of a number of other jurisdictions in the United States See e.g. CAL. FAM. CODE §3020 (West, 2004); FLA. STAT. ANN. §61.13(3)(a) (West 2004); ME. REV. STATE. ANN. §1653(1)(C) (West, 2004); OKLA. STAT. §43-110.1 (West, 2004).
childrearing.” In Iowa, the post-separation parenting arrangements should be such as to “assure the child the opportunity for the maximum continuing physical and emotional contact with both parents.”

This kind of positive language about the importance of the secondary parent’s role is not entirely absent from the PRINCIPLES. In §2.02, one of the objectives is stated to be that there should be ‘meaningful’ contact between the child and each parent. However, this is something less than the emphasis that has been there for years in many US jurisdictions on frequent and continuing contact. The significance of the secondary parent for the child’s wellbeing is, to say the least, understated in Chapter 2 of the PRINCIPLES.

C Alternating residence: the new frontier

Legislative encouragement in many jurisdictions to share the parenting after separation has been accompanied by a significant increase in the numbers of families in which care is substantially shared, with the children alternating between the parents’ homes. In rare cases, the parents alternate in living in the matrimonial home with the children - a practice known as “bird-nesting”.

Prof. Melli and her colleagues reported that in Wisconsin, the incidence of joint physical custody amongst divorced couples increased from 2.2% to 14.2% between 1980 and 1992. Their most recent research indicates that the proportion of shared

44 Iowa Code Ann. §598.41(1)(a) (West 2004).
parenting arrangements has now reached more than 20%. They define a shared parenting arrangement as involving at least 30% of the time with each parent. Equal time arrangements are not as common. Fabricius and Hall, in their retrospective study of the living arrangements of college students who had experienced parental divorce, found that 8% of respondents reported that they lived equal amounts of time with each parent.

At the political level, there has been pressure for change in a number of jurisdictions based upon the idea that for parents to be treated equally, there ought to be a presumption of joint physical custody, involving children having an equal amount of time with each parent after separation. This idea has even made it onto the statute book in Louisiana. In that jurisdiction, there is a presumption in favor of joint custody. In determining what the arrangements for joint parenting should be, the courts are instructed that “to the extent it is feasible and in the best interest of the


47 William Fabricius & Jeff Hall, Young adults’ perspectives on divorce: Living arrangements, 38 FAM. & CONCIL.CTS. REV. 446, 451 (2000). In contrast, a study in Oregon of 274 cases which were resolved by mediation in one county in 1995–96 found that only in 9 cases (3.3%), was the arrangement for joint physical and legal custody without allocating a primary caregiver: Kathy T. Graham, Child Custody in the New Millennium: The ALI’s Proposed Model Contrasted with Oregon’s Law, 35 WILLAMETTE L. REV. 523, 543 (1999). However, these figures exclude consensual equal time arrangements reached without the need for mediation.

48 The U.S. Commission on Child and Family Welfare, above n. 38, considered this option but did not adopt it, to the disappointment of the minority. See John Guidubaldi, minority report, 87, 93-97.

49 Art. 132 of the Civil Code provides: “If the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award.

In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.”
child, physical custody of the children should be shared equally." 50 This may be little more than a rhetorical flourish, however, as the Court is also required to identify a “domiciliary parent” who is the parent with whom the child “shall primarily reside”. 51 The domiciliary parent also has the authority to make all decisions affecting the child unless an implementation order provides otherwise, and there is a statutory presumption that all major decisions made by the domiciliary parent are in the best interest of the child. 52 Thus while including a presumption in favor of equal time arrangements on the one hand, Louisiana law also assumes that there will always be a primary caregiver with the major decision-making powers. Such legislative schizophrenia illustrates the tensions with which lawmakers must grapple in determining custody policy, and the impact of inconsistent amendments being made to the law at different time periods.

Other US jurisdictions also encourage consideration of equal custody. In Oklahoma, legislative policy is in favor of shared parenting, and the court is required to order “substantially equal access” at the time of making temporary orders, if requested by one parent to do so. In Iowa, an amendment made to the law in 2004 stipulates that if

50 CIVIL CODE ANCILLARIES 9-335 A(2). In Arizona and Georgia also, joint physical custody is defined as substantially equal time, but, unlike in Louisiana, there is no presumption in those states in favor of joint physical custody. See ARIZ. REV. STAT. § 25-402(3) (Matthew Bender 2004); GA. CODE ANN. § 19-9-6(3) (West, 2004).

51 CIVIL CODE ANCILLARIES 9-335 B. Prof. Katherine Spaht writes that “the principal provision is para. B which establishes the default ‘implementation plan’. That default plan designates a ‘domiciliary parent’, defined as the parent with whom the child primarily resides. That definition would make co-domiciliary parents and equal physical custody an oxymoron.” She explains further that the section about the physical custody of children being shared equally was inserted as an amendment. The “legislative history of the language suggests the language is purely hortatory.” Prof. Katherine Spaht, personal communication to author, (Jul. 7, 2003) (on file with author). Prof. Spaht is the Reporter, Persons Committee of the Louisiana State Law Institute. The custody provisions in the Civil Code are based upon recommendations made by this Committee.

52 CIVIL CODE ANCILLARIES 9-335 B.
joint legal custody is awarded to both parents, and one of them seeks an award of joint physical care, then there is an obligation on the court that declines to make such an award to give reasons why. It must make specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interests of the child. A similar provision, requiring reasons to be given for rejecting shared primary residential care, exists in Maine. These provisions however, fall short of a presumption in favor of joint physical custody. In Australia at least, it would be seen as fundamental to the judicial duty to give reasons for or against any proposal that was put forward by one of the parties. A failure to address that proposal in the reasons for judgment would constitute an appellable error.

Agitation for an equal time presumption is also occurring elsewhere. In Britain, pressure for such a change in the law has been given particular impetus by the advocacy of singer Sir Bob Geldof, whose personal struggles to gain custody of his two children attracted considerable media attention. In Australia, the issue was examined through a Parliamentary Inquiry. The terms of reference required the

53 Iowa Code Ann. §598.41 (West 2004).
56 Bob Geldof, The Real Love that Dare Not Speak its Name, in CHILDREN AND THEIR FAMILIES, above n. 53, 171.
57 The announcement of the inquiry followed an indication from the Prime Minister, The Hon. John Howard MP, in June 2003 that he wanted to explore the option of a rebuttable presumption of “joint custody”. He expressed concern that many boys growing up in single parent families lack male role models both at home and in school until their teenage years: The Australian, Jun. 18, 2003, at 3.
Family and Community Affairs Committee of the House of Representatives to examine whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted.\textsuperscript{58}

Although members of the Committee began the Inquiry with some sympathy for the idea of an equal time presumption, in the end they recommended against it, concluding instead that “the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time”.\textsuperscript{59}

Nonetheless they recommended that the legislation should require mediators, counselors, and legal advisers to assist parents who will share parental responsibility to first consider a starting point of equal time where practicable. Courts should also

\textsuperscript{58} The Committee was also asked to consider whether changes should be made to the formula for calculating child support liabilities and issues concerning grandparents’ rights to contact.

\textsuperscript{59} \textit{EVERY PICTURE TELLS A STORY}, above, note 29, at 30. The Committee gave a number of reasons for considering that there should not be a presumption in favor of equal time for each parent (at 31):

“Two aspects of an equal time template have been highlighted. First, there are dangers in a one size fits all approach to the diversity of family situations and the changing needs of children. Secondly, there are many practical hurdles for the majority of families to have to overcome if they are to equally share residence of children. Many have pointed to the increased risk of exposure of children to ongoing conflicted parental relationships and the instability that constant changing would create for children. Family friendly workplaces are rare, as are the financial resources necessary to support two comparable households. Some parents lack the necessary child caring capabilities. Distance between households creates problems for transport and for schooling. Second families can also bring complications. Indigenous families’ approach to parenting does not fit with the expectations of equal time.

Some have talked about the factors that support successful equal sharing, such as cooperative relationships, geographical proximity, prior sharing of parental care, good communication, agreement about matters relevant to the child’s day to day care, parental commitment to the arrangement and to a focus on the child’s interests. The more these characteristics exist, the more likely a shared arrangement will be workable and positive for the child.”
first consider substantially shared parenting time when making orders in cases where each parent wishes to be the primary carer.

In France, an intermediate position has been adopted as a result of reforms in 2002. While amendments made in 1993 established the principle of joint parental authority after separation, the legislature rejected the idea of alternated residence. However, some judges were persuaded to fix a primary residence, while allowing contact with the non-resident parent so extensive that the arrangements were equivalent, in practice, to an alternated residence system.

Two commissions were established to advise the Government concerning possible reforms to the law of parental authority in the 1990s. One took a sociological view, under the presidency of Irène Théry. The other focused more on legal issues under the presidency of Françoise Dekeuwer-Défossez. Dekeuwer-Défossez recommended that the notion of principal residence should be removed from the Code because it led

60 This was implicit in the text, since the principle of a primary or usual residence was maintained, but explicit in the legislative debates: Hugues Fulchiron in L’ autorité parentale renouée, RÉPERTOIRE DU NOTARIAT DEFRÉNOIS 959 (2002).

61 Hugues Fulchiron & Adeline Gouttenoire-Cornut, Réformes législatives et permanence des pratiques: à propos de la généralisation de l'exercice en commun de l'autorité parentale par la loi du 8 janvier 1993, 1997 RECUEIL DALLOZ CHRONIQUES 363 and the cases cited therein. See also Paris, 10 Fevrier 1999, J.C.P., 99, 2, 10170. Garé (appeal court affirmed trial judge’s decision in favor of alternating residence. The court commented that the traditional division into “usual” residence and visiting and housing rights for the other parent, contributed to a weakening of the bond between the child and the non-resident parent. Consequently, shared residence was to be encouraged. A decision of the Cour d’Appel de Toulouse on May 2, 2000 took a different view. It considered that the Civil Code did not allow for an order for alternating residence, as it required the child’s primary residence to be fixed, with the other parent having visiting and housing rights: see Agnès Bigot,Autorité Parentale: L’article 374 Alinea 3 du Code Civil Interdit de Fait la Résidence Alternée, 26 LES PETITES AFFICHES 131 (2001).


judges to refuse shared residence arrangements when such arrangements would not have been contrary to the child’s best interests.\(^\text{64}\)

The consequence of these proposals for reform, and subsequent governmental consideration, was legislation on parental authority passed in 2002. This legislation was intended to promote alternating residence arrangements. Mme Ségolène Royal, the Minister for Family Affairs, indicated in the legislative debates that the reform’s purpose was to encourage the parents to reach agreement on the principle of alternating residence, arguing that it had the advantage of maintaining parity between them.\(^\text{65}\) However, in the Senate, concerns were expressed about the imposition of an alternating residence arrangement on parents without their agreement.\(^\text{66}\)

In the result, a compromise position was adopted. Article 373-2-9 of the Civil Code now provides, as a result of the 2002 amendments, that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option. At the insistence of the Senate, the same

\(^{64}\) Id. at 82.

\(^{65}\) Assemblée Nationale, session of Jun. 14, 2001, J.O. 15 Juin 2001, Bebat Ass. Nat. at 4251. See also for an examination of the parental agreements since the March 4, 2002 reform, Olivier Laouenan, Les Conventions sur L’autorité Parentale Depuis la Loi du 4 Mars 2002, 28 J.C.P. (2003). See also Fulchiron, above, note 58. The possibility for the parents to reach agreements to organize the terms of exercise of parental authority after divorce or separation is provided in article 373-2-7 of the French Civil Code since the 2002 reform. See also DEKEUWER-DEFOSSEZ, above note 61, at 66-67: The author suggests that “…it seems that the parents are in the best position to organize their child’s life according to his or her needs and to devise solutions that take into account their particular situation, availability and professional constraints.”

\(^{66}\) This position was expressed particularly by the Senate’s reporter on the Bill, Mr Béteille. He emphasized in the debate that it was important to be careful about the adoption of an alternating residence schedule without the agreement of the parents because of the practical constraints in terms of housing, the constant collaboration needed, and the uncertainties of the experts about the consequences of alternating residence for the child’s development. Rapport Sénat, 71, Session Ordinaire 2001–2002, 18.
Article also provides that alternating residence should not be imposed on the parties without their joint agreement unless there has first been a temporary alternating residence arrangement to determine its workability.\textsuperscript{67}

The strong legislative encouragement towards shared parenting in many jurisdictions, and the increasing acceptance of the option of equal time provisions, stands in stark contrast to the approach adopted in the \textit{PRINCIPLES}. The past caretaking standard can yield a result similar to the shared parenting statutes of other jurisdictions, but not for parents in role-divided marriages. Jurisdictions around the world that have statutes encouraging shared parenting are moving away from traditional patterns of custody and visitation. By way of contrast, the provisions on custodial responsibility in the \textit{PRINCIPLES} reinforce those old patterns, giving many devoted fathers nothing more than a minimum level of contact set by the State legislature. The world is going one way. The ALI, it seems, is going another.

\section*{IV THE INEVITABILITY OF SHARED PARENTING}

How are we to understand this new legislative emphasis on shared parenting over the last few years, and the equally profound changes in patterns of parenting after separation? The legislative changes have been all the more remarkable because they

\textsuperscript{67} Despite the emphasis on alternating residence in the debates leading up to the 2002 legislation, such arrangements remain uncommon in France. Figures published by the French Department of Justice in 2003 indicated that this kind of arrangement was not commonly sought. Only 10\% of the cases involving minor children involved such a request, whether it originated from both parents or only one of them. In the context of consensual divorces, these requests were much more frequent (15.8\%) than in the contested divorces, where they represented only 6.1\% of the cases. In 80.7\% of the cases, the alternating residence requests were jointly made by the parents. Where the parents disagreed on the issue, alternating residence was only ordered in 25\% of the cases. \textit{DEPARTMENT OF JUSTICE, ETUDES ET STATISTIQUES JUSTICE, 23, LA RESIDENCE EN ALTERNANCE DES ENFANTS DE PARENTS SEPARÉS} (2003).
have not gone unchallenged. In some jurisdictions in particular, custody laws have been the subject of great public controversy. Politicians’ interest in custody law reform has been galvanized by the pressure of groups representing fathers, while women’s groups and feminist advocates have been prominent in opposing reforms such as presumptions in favor of joint custody and shared parenting laws.

While there can be little doubt that politicians’ interest in custody law reform has been influenced by pressure groups, especially those representing fathers’ interests, seeing issues of post-separation parenting primarily in terms of the politics of gender diverts attention from the cultural factors and attitudinal changes which have led to the pressure for shared parenting laws. Away from the dust of battle in legislatures and the rhetoric of law reviews and internet sites, it is evident that there has been a quiet sea-change occurring in the hearts and minds of the general population concerning parenting after separation, including those who are separated or divorced. This is being buttressed by the findings of research and evidence of what children and young

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people themselves say that they want. It is far from clear that the ALI has appreciated the magnitude of this change.

A Changes in community attitudes towards parental responsibility

The extent of change in community attitudes about parenting after separation can be illustrated by reference to studies in Australia which indicate that the concept of shared parenting has very widespread support in the Australian population, including in the divorced population. Significant legislative change occurred in Australia with the enactment of the Family Law Reform Act 1995 which was intended to bring about a much greater emphasis on shared parenting.70 The Reform Act, particularly in its statement of objects and principles, emphasized the equal responsibility of both parents after divorce, and the child’s right of contact with both parents unless it was contrary to the child’s best interests.71

Around the time that the legislation was being passed through Parliament, the Australian Institute of Family Studies was commissioned to conduct research on attitudes to parental responsibility in the Australian population.72 What it found was that the 1995 legislation, far from being just a response to pressure groups

70 See generally, PATRICK PARKINSON & JULIET BEHRENS, AUSTRALIAN FAMILY LAW IN CONTEXT (3d ed. 2004); TOM ALTOBELLI, FAMILY LAW IN AUSTRALIA—PRINCIPLES & PRACTICE (2003); ANTHONY DICKEY, FAMILY LAW (4th ed. 2002); HENRY FINLAY, REBECCA BAILEY-HARRIS & MARGARET OTLOWSKI, FAMILY LAW IN AUSTRALIA (5th ed. 1997).

71 Family Law Act, 1975 § 60B (Austl.).

representing a minority of divorced fathers, reflected views already held by the great majority of the population. Funder and Smyth, the researchers at the Institute, reported that when parents are married, 78 per cent of Australians think children should always be cared for by both parents, sharing the duties and responsibilities for their care, welfare and development and another 20 per cent think this should mostly be the case. When parents are separated or divorced, assent is still strong for this proposition, although somewhat more conditional; 50 per cent of Australians think this should always be the case and another 33 per cent think this should mostly be the way parents care for their children under these conditions. These were the views of respondents in the survey taken as a whole. But even among the subset of those who had experienced separation and divorce, the results were very similar.

B The benefits of closeness to non-resident parents

The desirability of shared parenting has also been supported by research which has been done on the outcomes for children of divorce. One of the arguments against laws which promote frequent and meaningful contact, or which start from an assumption that parental responsibility will be shared after divorce, is that such laws overstate the significance of frequent contact with the non-resident parent. Opponents of laws encouraging shared parenting have pointed to a large body of research on outcomes of divorce for children based on psychological testing which has failed to show that


74 FUNDER & SMYTH, above n. 72, at Table 3.1.7.

75 Id. at Table 3.1.10.

76 Id. at Tables 3.7.8 3.7.9 3.7.12 3.7.15 3.7.17 3.7.18.
more frequent contact with the non-resident parent leads to improved wellbeing for the children of divorce.\textsuperscript{77} By way of contrast, they have argued that the most important factor for the wellbeing of children after divorce is the wellbeing of the primary caregiver, and that it is this relationship that should be the focus of the court’s concern.

Whatever the strength of this view a few years ago, it must now be reassessed in the light of more recent research which gives a more nuanced picture. In a meta-analysis of 63 prior studies on parent-child visitation published in 1999, Amato and Gilbreth confirmed that frequency of contact in itself does not appear to be associated with better outcomes for children.\textsuperscript{78} However, emotional closeness, and in particular, authoritative parenting,\textsuperscript{79} is highly beneficial to children. Authoritative parenting included helping with homework, talking about problems, providing emotional support to children, praising children's accomplishments, and disciplining children for misbehavior. The researchers concluded that “how often fathers see children is less important than what fathers do when they are with their children.”\textsuperscript{80}

\textsuperscript{77} See, e.g., SUSAN B. BOYD, CHILD CUSTODY, LAW, AND WOMEN’S WORK (2003).


\textsuperscript{79} The term refers to a style of parenting which is neither authoritarian nor permissive. On authoritative parenting, see D. Baumrind, Authoritarian v Authoritative Control, 3 ADOLESCENCE 255 (1968). See also E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 127-130 (2002); ELIZABETH SEDDON, CREATIVE PARENTING AFTER SEPARATION 26-28 (2003). Further research is needed to determine what aspects of authoritative parenting by a non-resident parent after separation is particularly beneficial to children and young people. Susan Stewart, Nonresident Parenting and Adolescent Adjustment: The Quality of Nonresident Father-child Interaction, 24 J. FAM. ISSUES 217 (2003). See also Ronald L. Simons et al., The Impact of Mother’s Parenting, Involvement by Nonresidential Fathers, and Parental Conflict on the Adjustment of Adolescent Children, 56 J. MARRIAGE & FAM. 356 (1994).

\textsuperscript{80} Amato & Gilbreth, above n. 78, at 569.
Parental separation and divorce is a significant risk factor for children both in terms of long-term emotional wellbeing and educational performance. Greater involvement of fathers in post-separation parenting has at least the potential to ameliorate these risks, particularly the risk of depression and other indications of emotional distress. Adolescents who have no contact with their non-resident parent, and those who have infrequent contact, have been shown to be more depressed than those in frequent-visit and married families. Although the research evidence is not unequivocal, closeness to non-resident fathers has also been found to be related to less depression in adolescents, better school performance and a perception that their worst problem was less severe, independently of the effect of closeness to the mother.

Measures to encourage a continuing relationship between non-resident parents and their children should therefore be seen as highly desirable in the absence of high

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82 Bonnie L. Barber, Support and Advice from Married and Divorced Fathers: Linkages to Adolescent Adjustment, 43 Fam. Rel. 433 (1994).

83 Buchanan et al., above n. 35, 193, 204 (Fig.10.6) (1996). Buchanan et al could not say whether a better relationship with the non-residential parent leads to better adjustment in the adolescent, or whether adolescents who are better adjusted maintain better relationships with their non-resident parent. They considered that both processes are at work (Id. at 198). They also found that the better adjustment of adolescents in dual residence families compared to single residence families was a reflection of the level of closeness they felt to both parents (Id. at 204-5). See also Susan Stewart, Nonresident Parenting and Adolescent Adjustment: The Quality of Nonresident Father-child Interaction, 24 J. Fam. Issues 217-244 (2003) (closeness to non-resident fathers after separation associated with significantly less emotional distress in young people independently of the effect of closeness to the resident mother). But see Frank F. Furstenberg, S. Philip Morgan & Paul D. Allison, Paternal Participation and Children’s Well-being After Marital Dissolution, 52 Am. Soc. Rev. 695 (1987) (closeness to fathers was not associated with lower levels of delinquency or distress, although the association between emotional closeness and children’s reports of dissatisfaction approached significance); Elaine Welsh, Ann Buchanan, Eirini Flouri and Jane Lewis, 'Involved' Fathering and Child Well-being: Fathers' Involvement with Secondary School Age Children (2004) (no relationship found between non-resident parent involvement and young people’s well-being).
levels of ongoing conflict between the parents, irrespective of the division of roles between the parents when the marriage was intact.\textsuperscript{84}

New thinking is emerging about the value of overnight stays with the non-resident parent even for infants. It is argued that this will promote stronger attachments.\textsuperscript{85}

These generalizations about what is likely to benefit children and young people after parental separation and divorce must, however, be qualified by the extensive evidence that serious ongoing conflict between the parents after separation is likely to be harmful for children.\textsuperscript{86} There is evidence, for example, that contact with non-resident


\textsuperscript{86} Michael E. Lamb, Kathleen J. Stemberg & Ross A. Thompson, The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment, 35 FAM. & CONCIL.
fathers decreases boys’ behavior problems when parental conflict is low but increases their behavior problems when levels of conflict are high. In particular, when children are caught up as messengers or spies in these conflicts, then contact may impact negatively on children’s wellbeing. The risk of ongoing emotional harm to children is particularly great where the relationship between the parents after separation is characterized by ongoing violence. These research findings provide strong support for the provision in §2.11 of the PRINCIPLES that limits should be placed on the parental responsibility of a parent where there has been a history of violence or abuse.

While frequency of contact is not in itself beneficial to children, some degree of frequency of contact is a precondition for the kind of parenting that will be beneficial to children. There must be a minimum amount of time that is necessary to foster and maintain a “real parenting” relationship instead of merely a visiting relationship,

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87 Paul Amato & Sandra J. Rezac, Contact with Non-resident Parents, Interparental Conflict, and Children’s Behavior, 15 J. FAM. ISSUES 191 (1994). The findings in relation to girls were in the same direction, but did not reach significance (Id. at 200).


89 Catherine Ayoub, Robin Deutch & Andronicki Maraganore, Emotional Distress in Children of High-Conflict Divorce. The Impact of Marital Conflict and Violence, 37 FAM. & CONCIL. CTS. REV. 297 (1999); Claire Sturje & Danya Glasser, Contact and Domestic Violence — The Experts Court Report, 30 FAM. L. 615 (2000); Peter Jaffe, Nancy Lemon & Samantha Poisson, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2003). Recent research has however, demonstrated the importance of distinguishing between different types or contexts of violent behavior: Michael P. Johnson & Kathleen J. Ferraro, Research on Domestic Violence in the 1990s: Making Distinctions, 62 J. MARRIAGE & FAM. 948 (2000). There needs to be a proper assessment of the etiology and nature of the violence in order to determine the implications of this for post-separation parenting arrangements: Janet Johnston & Linda Campbell, Parent-Child Relationships in Domestic Violence Families Disputing Custody, 31 FAM. & CONCIL. CTS. REV. 3 (1993).

90 Judy Dunn, Contact and Children’s Perspectives on Parental Relationships, in CHILDREN AND THEIR FAMILIES, above n. 55, at 15 (more contact associated with closer relationships with non-resident fathers).
whether it is through frequent and regular contact arrangements\textsuperscript{91} or sustained periods of visiting during school holidays.\textsuperscript{92} Regular overnight stays play an important role in fostering emotional closeness between children and non-resident parents.\textsuperscript{93} When fathers have only brief or relatively infrequent contact with their children, they are less likely to feel comfortable about disciplining their children and engaging in other aspects of involved, authoritative parenting. Instead, they are likely to try to make the visits “fun” and entertaining so that the children want to continue the visits.\textsuperscript{94}

The PRINCIPLES might provide a basis on which parents who have been involved in their children’s lives prior to separation have enough time after separation to provide the conditions for authoritative parenting. However, this is in spite of, rather than because of, the past caretaking standard. It is only because a rule of statewide application is allowed to override this standard, that many non-resident parents would maintain a parental role in their children’s lives. The PRINCIPLES themselves, do not state what this statutory minimum should be.

\textsuperscript{91} William V. Fabricius, \textit{Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis and Blakeslee}, 52 FAM. REL. 385, 389 (Fig. 3) (2003).

\textsuperscript{92} Eleanor E. Maccoby et al., \textit{Postdivorce Roles of Mothers and Fathers in the Lives of Their Children}, 7 J. FAM. PSYCH. 33 (1993). \textit{See also} Buchanan et al., above n.35.

\textsuperscript{93} Bruce Smyth & Anna Ferro, \textit{When the Difference is Night and Day: Parent-child Contact After Separation}, 63 FAM. MATTERS 54 (2002).

\textsuperscript{94} As Thompson and Wyatt argue: “Divorced from the routines, settings and everyday activities of the child’s usual life, a visiting relationship with the nonresidential parent quickly becomes constrained and artificial, making it easier for fathers and their children to drift apart as their lives become increasingly independent.” Ross A. Thompson & J.M. Wyatt, \textit{Values, Policy, and Research on Divorce: Seeking Fairness for Children}, in \textit{The Post-Divorce Family}, above n.84, at 222. The artificiality of the contact relationship may help to explain why some fathers disengage from their children after separation and divorce: Bob Simpson, Julie Jessop & Peter McCarthy, \textit{Fathers After Divorce}, in \textit{Children and Their Families} above n. 55, at 201.
C   Children’s voices

Research on what children and young people say from their own experience has fortified the case for rethinking conventional notions of custody and visitation.\textsuperscript{95} Recent studies in Australia and New Zealand have shown that substantial numbers of children and young people would like to see their non-resident parents more than they do. In Australia, a study of the views of 60 young people aged 12-19 who had experienced their parents’ separation a few years earlier found that 50% said that they did not have enough time alone with the non-resident parent.\textsuperscript{96} In contrast, most young people (72%) said they had enough time alone with their resident parent.\textsuperscript{97} A New Zealand study which interviewed 107 children and young people from 73 families who had experienced divorce found that 52% of the children felt that the levels of contact were about right, 34.7% wanted to see the other parent more often, and 11% wanted to see the other parent much more often. Only 2% wanted less time on access.\textsuperscript{98}


\textsuperscript{97} Ibid. This did not differ according to whether they lived mostly with their mother or father, or by their age or gender.

\textsuperscript{98} Anne Smith & Megan Gollop, \textit{Children’s Perspectives on Access Visits}, 2001 BUTTERWORTHS FAM. L. J. 259; see also Gollop, Smith & Taylor, above n.95.
This is consistent with the findings of earlier research in Australia, Britain, Canada and the United States. It is also consistent with the available evidence of young adults’ views in the United States. Laumann-Billings and Emery found that young adults who lived in sole custody arrangements expressed more feelings of loss, and more often viewed their lives through the lens of divorce, compared to those young adults who grew up in more shared physical custody arrangements. In another study, Fabricius and Hall interviewed students in psychology classes at Arizona State University over a four year period about their experiences of parental divorce and their views on what would have been the best custody and visitation arrangements. 344 men and 485 women participated in the study. They found that both men and women wanted signficantly more time with their fathers than they actually had, although men reported wanting more time with their fathers than women. When asked what they thought would be the best living arrangement for children after divorce, 70% said an equal time arrangement was optimal. There were no significant differences between men and women in this response.

102 Judith S. Wallerstein & Joan B. Kelly, Surviving The Breakup (1980); Buchanan et al., above n.35.
103 Lisa Laumann-Billings & Robert Emery, Distress Among Young Adults From Divorced Families, 14 J. Fam. Psychol. 671 (2000).
104 Fabricius & Hall, above, n.47.
105 Id. at 451.
106 Id. at 453-4.
This is not to say that an equal time arrangement is the optimal arrangement for post-separation parenting. In Fabricius and Hall’s study, only just over 20% of the respondents wanted equal time given their particular family circumstances.  

While in that study, 93% of the 80 young adults who had actually lived in an equal time arrangement believed it was best, research in Britain has found that children in equal time parenting arrangements had a more diverse range of reactions to it, with some finding the arrangement oppressive and constricting, particularly if the parents were rigid in maintaining the schedule and not focused on the needs of the children. There is also the risk that children’s support for an equal time arrangement has more to do with their concern to be fair to each parent than to be fair to themselves.

As has been noted above, the PRINCIPLES are less than clear on what the operative rule should be when the past caretaking of the parents has been approximately equal. One view is that the parents should have equal custodial responsibility. That may be fair as between the parents, but what if it is not fair to the child? The PRINCIPLES so constrain judicial discretion that it may be difficult for a judge, applying the law faithfully, to avoid ordering equal custodial responsibility even in the face of evidence that it is not an optimal arrangement for the child.

107 Id. at 457. It was more common for respondents to indicate that they would have liked to have lived with their mother while seeing their father a lot of the time (Id. at 452).

108 Id. at 454. The number of students who had lived in equal time arrangements is reported in a later review of the research: William V. Fabricius, Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis and Blakeslee, 52 FAM. REL. 385, 387 (2003).


110 Parkinson, Cashmore & Single, above n.96.
Children’s voices may also speak against extensive contact in their situation. There are some children who do not want more time with their non-resident parent. Children may blame one parent for the marriage breakdown, or find that the non-resident parent does not do enough interesting things with them. Some fathers do not make enough time for their children because of the demands of work or new relationships. Others cannot be more involved with their children’s lives because of the tyranny of distance. Listening to children involves listening to their individual needs and views, without romanticizing the parent-child relationship in such a way that it is assumed that children want to have a close relationship with the non-resident parent. Listening to children also involves being sensitive to their needs as circumstances change. An alternating residence arrangement for example, may work well at a certain stage of a child’s life but not as he or she grows older.\footnote{Neale, Flowerdew & Smart, above n.109.} The past caretaking standard may be overridden to the extent necessary to accommodate the firm and reasonable preferences of a child who has reached a specific age, set by a uniform rule of statewide application. However, this exception to the rule may be insufficiently flexible to ensure that children’s voices influence the outcome of cases.

While children’s voices, from the available research, do not speak in favour of any one custody rule or standard, they do indicate that traditional patterns of visitation, as a general rule, are utterly inconsistent with the needs of most children. While usually, the most practical and sensible arrangement will be to have a primary caregiver with whom the children live the majority of the time, children’s interests are best served if we can find ways of encouraging active parenting by both parents following
DRAFT PAPER: The author retains full legal copyright and ownership of the intellectual property rights of this draft paper; this paper may not be used or copied without express permission of the author.

separation,\(^{112}\) at least where the non-resident parent wants this and there are no concerns about women’s or children’s safety arising from such involvement. The PRINCIPLES might allow for this through the statutory provision setting a minimum level of contact for an involved parent. They certainly do not encourage it.

D  \textbf{Changes in the attitudes of fathers}

It is clear that the major reason for the shift in favor of shared parenting arrangements, whatever that may mean in terms of time allocation, is pressure from fathers for more time with their children. Despite the rhetoric of equality, more fathers want to assist in the parenting role after separation than to take over as primary carer.\(^{113}\)

Over time, there have been significant changes in the ideal of fatherhood, with a greater emphasis on emotional closeness and active involvement with the children.\(^{114}\) This has led to greater involvement in parenting in intact relationships, with a consequential impact upon fathers’ attitudes towards post-separation parenting.\(^{115}\)

This can be seen in research in a number of countries. For example, Fabricius and Hall found in their interviews with college students who had experienced parental divorce that both men and women reported that their fathers had wanted more time


\(^{114}\) GRAHAM ALLAN & GRAHAM CROW, FAMILIES, HOUSEHOLDS AND SOCIETY (2001).

with them than they had or their mothers wanted them to have. 44% reported that their fathers had wanted them to spend equal time with them or more.\textsuperscript{116}

There is similar evidence from studies in Australia. In one study, 41% of fathers contacted in a random telephone survey of divorced parents in 1997 indicated that they were dissatisfied with the residence arrangements for the children. Two-thirds of this group said that they wanted to be the primary residence parent, the remaining third wanted to have equal time with their children. On average this was about five years after the divorce. The study also indicated a very high level of dissatisfaction with levels of contact.\textsuperscript{117}

In another study of a nationally representative sample of separated parents, interviewed in 2001, three-quarters of the non-resident fathers indicated dissatisfaction with the amount of contact they had. 57% of fathers indicated that they had nowhere near enough time with their children and a further 18% said they did not have quite enough time with their children.\textsuperscript{118}

\begin{footnotes}
\item[116] Fabricius & Hall, above n.47.
\item[118] Patrick Parkinson & Bruce Smyth, Satisfaction and Dissatisfaction with Father-Child Contact Arrangements in Australia, 16 CHILD & FAM. L. Q. 289 (2004). The greatest levels of satisfaction for both mothers and fathers were with shared parenting arrangements. The data came from the Household Income and Labour Dynamics in Australia survey (HILDA). Interviews were conducted with 13,969 members of 7,682 households. It is not only fathers who want more time with their children. Mothers also want to see more contact between the children and their fathers. In this study, although the majority of resident mothers expressed satisfaction with the contact arrangements, 25% reported that they thought there was nowhere near enough father-child contact taking place, and a further 15% said there was not quite enough contact. Only 5% thought that there was too much contact.
\end{footnotes}
This does not mean, of course, that there has been a complete change in fathers’ attitudes towards post-separation parenting. There remain a large number of fathers living apart from their children who, for one reason or another, do not see them often. In the United States, the picture is relatively consistent over time. For example, Judith Seltzer, reporting data from a national survey in the United States conducted in 1987-88, found that almost 60% of non-resident fathers saw their children less than once per month, according to mothers’ reports. Her findings were consistent with other general population studies in the United States conducted in the 1980s and early 1990s which revealed a pattern of disengagement by a majority of non-resident fathers over a period of years. Stewart, reporting on data collected from young people between 1994 and 1996 in the National Longitudinal Study of Adolescent Health, found a similar level of disengagement. 61% of these young people saw their fathers less than once a month.

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119 Judith A. Seltzer, Relationships between Fathers and Children Who Live Apart: The Father’s Role after Separation, 53 J. MARRIAGE & FAM. 79, (1991). She concluded that “for most children who are born outside of marriage or whose parents divorce, the father role is defined as much by omission as commission” (Id. at 97).

120 Frank Furstenberg et al., The Life Course of Children of Divorce: Marital Disruption and Parental Contact, 48 AM. SOC. REV. 656 (1983); Judith A. Seltzer & Suzanne M. Bianchi, Children’s Contact with Absent Parents, 50 J. MARRIAGE & FAM. 663 (1988); J. Munsch, J. Woodward & N. Darling, Children’s Perceptions of Their Relationships with Coresiding and Non-Coresiding Fathers, 23 J. DIV. & REMARRIAGE 39 (1995). Research with divorced parents, however, presented a different picture, with most fathers remaining involved in their children’s lives in the first few years after divorce: Maccoby et al., above n. 92. See also, in relation to young adults’ contact with divorced fathers, Teresa M. Cooney, Young Adults’ Relations With Parents: The Influence of Recent Parental Divorce, 56 J. MARRIAGE & FAM. 45 (1994).

However, as the Australian research shows, disengagement does not necessarily mean disinterest. There have been similar findings in Britain. In one study, 76% of fathers who never saw their children were dissatisfied with this.

One explanation for the growth in fathers’ desire to be actively involved in their children’s lives after separation is that it represents a reaction to the disappointment about failed adult relationships. German sociologists Beck and Beck-Gernsheim make the point that following marriage breakdown:

“The child becomes the last remaining, irrevocable, unique primary love object. Partners come and go, but the child stays. Everything one vainly hoped to find in the relationship with one's partner is sought in or directed at the child. If men and women have increasing difficulty in getting on with one another, the child acquires a monopoly on companionship, sharing feelings, enjoying spontaneous physical contact in a way which has otherwise become uncommon and seems risky. Here an atavistic social experience can be celebrated and cultivated which in a society of individuals is increasingly rare, although everyone craves it. Doting on children, pushing them on to the centre of the stage…and fighting for custody during and after divorce are all symptoms of this. The child becomes the final alternative to loneliness, a bastion against the vanishing chances of loving and being loved. It is a private way of ‘putting the magic back’ into life to make up for general disenchantment. The birth-rate may be declining but children have never been more important.”

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122 Parkinson & Smyth, above n.118. In this study, only 20% of those fathers with no contact, and only 8% of the group that saw the child for 1–17 nights or days per year considered that the level of contact was about right.


To some extent then, the new focus on parenting after separation reflects non-resident parents’ desire for meaning and connection. The cultural battle over post-separation parenting reflects deep-seated emotions and values.

Of course, as feminist scholars have pointed out, there is a difference between caring about and caring for, and the majority of the “caring for” in parenting after divorce remains a female responsibility. Yet “caring about” matters. It matters especially to children. On the whole, the greater willingness of non-resident fathers to be involved in their children’s lives is a very positive development in terms of children’s wellbeing.

E Governments and Shared Parenting

A final reason why shared parenting legislation seems inevitable is that governments have become persuaded of the need to keep families together after separation in much the same way as once they were persuaded, under the tutelage of the Church, to keep marriages together through laws prohibiting or restricting divorce.

Why is it that governments in many parts of the western world have, to such a significant extent, embraced the ideology of shared parenting? The influences on government are no doubt many and various. Pressure groups, mainly those of fathers,

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125 See, e.g., Carol Smart, Losing the Struggle for Another Voice: The Case of Family Law, 18 DALHOUSIE L.J. 173 (1995).

126 For a history, see MARY ANN GLENDON, STATE, LAW & FAMILY (1977).
have certainly played their role in making family law reform an issue.\textsuperscript{127} Shared parenting offers an answer to the difficult politics of divorce. It speaks in the language of compromise in contrast to the “winner takes all” concept of custody. It draws upon the cultural persuasiveness of the idea of equality between men and women. Shared parenting, if it can be made to work, also reflects widely held beliefs about what is desirable after separation.

While all these factors have no doubt assisted the passage of laws promoting shared parenting, one rationale has made shared parenting virtually inevitable. This is the financial desirability, from the taxpayers’ point of view, of privatizing maintenance obligations, especially the support of children, given the growth in the number of one-parent families.\textsuperscript{128} This has occurred not only as a consequence of the rise in divorce rates following the no-fault divorce revolution, but also because of the massive increase in the numbers of children born outside marriage in Western countries.\textsuperscript{129}


The term “father’s rights groups” is an externally imposed label. Such groups would not generally characterize themselves as being motivated by a concern for their own rights. They present their concerns as being about the best interests of children. The names of some of the groups also reflect a commitment to shared parenting.


\textsuperscript{129}In 1998, two-thirds of births in Iceland and half or more of births in Norway and Sweden were out of wedlock. In the United States, the proportion was one-third: Stephanie J. Ventura & Christine A. Bachrach, \textit{Nonmarital Childbearing in the United States, 1940–99}, 48 NAT. VITAL STATS. REP. 16 (2000), available at http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48_16.pdf. This is a relatively new phenomenon. There has been a dramatic rise, in many countries, in the numbers of children born ex-nuptially. In the United States, the percentage of births to unmarried women increased from 14.8 percent in 1976 to 33.0 percent in 1999 (\textit{Id.} at Table 1). In Britain, the rate of
Many of these children are born to cohabiting couples, but since the rate of breakdown of cohabitating relationships is so much greater than that for marriages, a substantial proportion of these children will experience parental separation.

Child support provides the only justification for ongoing income transfers between non-married couples following separation. As Prof. Dewar has written: “Parenthood is a way of tying men into the non-marital family”. Concern about the feminization of poverty has led to rigorous child support enforcement in particular. If non-resident parents are not contributing to their children’s support, the State is left as the default

increase has been much greater. The proportion of births outside of marriage rose from 9.2% in 1976 to 40.6 per cent in 2002: available at


130 Larry L. Bumpass & James A. Sweet, National Estimates of Cohabitation, 26 DEMOGRAPHY 615 (1989) (about 29% of cohabiting couples break up within the first two years compared with 9% of married couples); Kathleen Kiernan, Cohabitation in Western Europe, 96 POPULATION TRENDS 25 (1999). In a study of 11 European countries, Kiernan found that cohabiting relationships which did not result in marriage were much more fragile than marriages either preceded by a period of cohabitation or without a prior period of cohabitation. In Britain, only 18% of such relationships survived for ten years. The levels of stability of cohabitation were higher in other countries, but in no country other than East Germany did the majority of cohabiting partnerships survive for ten years. See also Steven L. Nock, A Comparison of Marriages and Cohabiting Relationships, 16 J. FAM. ISSUES 53 (1995); Helen Glezer, Cohabitation and Marriage Relationships in the 1990s, 47 FAM. MATTERS 5 (1997); Ann Berrington, Entry into Parenthood and the Outcome of Cohabiting Partnerships in Britain, 63 J. MARRIAGE & FAM. 80 (2001) (26% of all cohabiting partnerships dissolved within 5 years, 16% continued and 59% resulted in marriage. For women, the presence of children born within the partnership had no effect on either the probability that the couple marry or the rate of separation compared to women without children, although for men, the birth of a child had a stabilizing effect on the partnership). See also Kathleen Kiernan, Childbearing Outside Marriage in Western Europe, 98 POPULATION TRENDS 11, Table 11 (1999) (probability of relationship surviving 3 and 5 years after birth of first child among women aged 20–45 lower for cohabiting relationships than marriage in 9 countries studied); Renate Forste, Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S., 4 J. L. & FAM. STUD. 91 (2002).


provider for low-income female-headed households with children, placing a considerable strain on welfare budgets.\textsuperscript{133}

Whereas once, courts were willing enough to allow non-resident parents to prioritize the needs of second families over first families,\textsuperscript{134} the massive rise in the numbers of such families dependent on welfare benefits made it impossible to sustain a policy of allowing non-resident fathers to get a divorce from financial commitments to children of former relationships.

This need to ensure child support is paid does not have to be connected with shared parenting laws, but the evidence from many studies is that there is an association between regularity of contact and child support compliance, giving governments a motivation for encouraging continued father-child involvement.\textsuperscript{135} Furthermore, it is difficult for governments on the one hand to regularize the payment of child support while on the other hand turning a deaf ear to non-resident parents’ complaints about the little time they are able to spend with their children. This has become a driver for law reform.

\textsuperscript{133} In Australia, according to the 2001 census, 18\% of children under 15 years (over 660,000 children) lived in a household with no employed parent, with over half (61\%) of these living in one-parent families. Of 83.5\% of one-parent families where the parent was not in the workforce, that parent was not looking for work: Australian Bureau of Statistics, Families with no Employed Parent, \textit{in AUSTRALIAN SOCIAL TRENDS} (2004): available at http://www.abs.gov.au.


V CONCLUSION

One of the surprising elements of Chapter 2 of the PRINCIPLES is the lack of attention to the detail of applying the past caretaker standard in practice. The commentary and illustrations confuse more than they illuminate on certain points. Any criticisms of the past caretaker standard must be qualified therefore by the observation that the ALI have left much to the discretion of legislatures and trial judges about how the principles should be applied in practice.

What ought to be clear from the above analysis is that the past caretaker standard is a much better approach to determining who should be the primary caregiver, especially for young children, than it is as a means of determining how much contact the other parent should have. The past caretaker standard has an appearance of fairness as between the parents. However, in its application to role-divided marriages, the standard may be insensitive to the commitment that the primary earning parent has shown to the children, and the bond of love that is between them. Even if the rule were fair as between the parents, that would not be enough to commend it. What matters most is that the standard is fair to children and that the law is aligned with social science knowledge about what is likely to benefit children in the aftermath of separation. It is not obvious that the past caretaking standard is well-aligned with that knowledge base or that it is sufficiently sensitive to the needs of children following parental separation. As a general principle, the idea is sound that the more involved a parent has been with his or her children in the intact relationship, the more that parenting should be shared after separation to the extent that the circumstances of the
parents permit it. Whether or not the parenting should be substantially shared ought to depend on a range of factors beyond past caretaking, including the relationship between the parents and the perceived needs of the child. If the past caretaking standard is thus reduced to a general principle, to be weighed against countervailing factors, it is unobjectionable. However, the drafters claim very much more for it than this. On close analysis, it doesn’t deliver.