

Benefits of post-divorce shared parenting and the situation in the Netherlands, Belgium and Germany



Presentation by Peter Tromp MsC, child and educational psychologist¹, President of the Father Knowledge Centre Europe, and Chair of the Dutch Foundation for Children, Access and Equal Parenting at the International Conference on Family and Equality “Justice and Father’s & Men’s Dignity” on 2-4 January 2009 in Drama, Greece

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Abstract

All across Europe the child custody debate has moved to the top of the political agenda. The battle lines are essentially the stark choice between mother-only-custody of the child versus shared parenting where both parents are participants in child custody and care. Much is at stake - not just for feminists, who support the former, and fathers, who support the latter, but for children and whether the balanced, healthy society we all seek will become a reality. This is a clash that must be won. It cannot, as American author Warren Farrell famously said, be an undeclared war won at a battlefield where only one side turned up. The question today is whether children in the post divorce scenario grow up to be a liability and burden on the state, or a jewel in society's crown ? After 30 years of feigning deafness, politicians across Europe are acknowledging the contributions and efforts fathers should be allowed to make to young children if they are ever to be properly 'socialised'." This cannot be done under the present regime of mother-only-custody found in most European countries. This paper will address the psychological and emotional needs of children but it will also mention the concrete changes underway. Fathers for too long excluded from the social policy level and denied any input in shaping policy are today making small inroads. For instance, there are developments in shared parenting to be found in Holland, Belgian and to a degree in German family law which I will also cover in this paper. Slowly, 'outcomes' for so long championed by fathers' groups, are being adopted as the criterion rather than ideologically driven dogma. It was just 10 years ago that the consensus was that it was unnecessary for a father to have any role after birth and were increasingly seen as superfluous to children's needs. Slowly, as society has unravelled, it has been recognised that children in fatherless families run greater mortality and morbidity risks. That their 'quality of life' is poor, their 'live chances' negligible. Without fathers present they become victims of physical abuse, emotional and sexual abuse, have poor health, poor education, become drink and drug dependent, homeless and jailed.

1. Introduction

Good morning Mr. Chairman. First of all I would like to thank the Greek Men’s and Father’s Dignity Association SYGAPA, the Prefecture of Drama and the Technological Educational Institute of Kavala in Greece for taking the initiative for arranging for an international conference on the equality and dignity of men and fathers in the family and in family law and offering me the opportunity to make the opening presentation at the start of your conference.

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The excellent initiative of SYGAPA to organise this international conference in Drama, Greece in 2009 stands in a longer tradition that first started with a series of yearly European father summer conferences organised during the eighties and nineties of the last century by Professor Eduard Bakalar in Prague, Czechia. His initiative was followed by the International Father Conference in 1996 at Woudschoten and the International Father Conference “In the best interest of the child – reality or magic formula?” in 1999 at Breda. Both conferences were organised by myself in the Netherlands in cooperation with the Dutch ministry of Justice on behalf of the Dutch Association Parents for Children. Also in 1999 an international summer camp conference on equal parenting was held from 25-31 July at Langeac in France. In 2000 and 2001 this was followed by two International Father Conferences organised by Mankind in London on the issues of “The age of violent young males – causes and remedies” and “Censorship”. On 18/19 October 2002 the first international conference on the Parental Alienation Syndrome (PAS) was held in Frankfurt/Main in Germany under the chairmanship of the Wuerzburg psychiatrist Wilfrid von Boch-Galhau. In 2004 this was followed by the European Father Conference organised by the Austrian government during its EU-presidency term in Vienna. Finally in July 2007 this was followed by the International Conference “Boys and the boy crisis” in Washington DC. It is a tradition that certainly deserves further continuity into the near future.

But let me introduce myself. My name is Peter Tromp. I am a child- and educational psychologist from the Netherlands and - as its president and international coordinator - I represent the Father Knowledge Centre Europe.

The Father Knowledge Centre Europe (FKCE) was originally set up by Dutch voluntary-sector NGO the Foundation for Children, Access and Equal Parenting, which itself was founded in 1989. Father Knowledge Centre champions the cause of equal parenting and keeping both parents actively involved in children’s lives after divorce and separation.

It works with policy makers, scientists, campaign groups, lobbyists and reformers and aims to make knowledge and information available about the role, the contributions and the efforts men and fathers are making in children’s lives, particularly in raising and educating (their) children. Whether that is in the family - both before and after divorce - or in any of the other living environments where children grow up, like childcare and education.

The aim is to have these contributions and efforts of fathers and men in caring for and educating children better acknowledged and supported on the social policy level.

The mode of operation of the Father Knowledge Centre Europe to these effects is on both the Pan-European as well as on the national levels in Europe. To this

end a Pan-European communication forum between the countries that constitute the European Union (EU) - the Familyrights-4-Europe Forum - was established in January 2003, while at the same time the Father Knowledge Centre Europe established separate national branches in the Netherlands, the United Kingdom and Belgium, with a separate branch in Germany now being underway.

In my presentation of today I would like to speak to you about some of the benefits of post-divorce 'shared parenting' arrangements for children². And as a prelude to the programmed presentation at this conference on the history of shared parenting in the United Kingdom³ by my honourable friend Robert Whiston FRSA, the president of the Father Knowledge Centre United Kingdom, At the end of my presentation I would like to conclude with summary introductions to the situation of - and developments in – shared parenting in the European Union, with emphasis on recent developments in the Dutch, Belgian and German divorce and family law systems.

2. Some definition issues in post-divorce shared and equal parenting

Before elaborating on the benefits of post-divorce 'shared parenting' for children I would first have to spend some words on some of the different issues surrounding a definition of shared and equal parenting.

Joint legal custody, joint physical custody, shared parenting, equal parenting, shared residence, shared care, bi-location, co-parenting are all terms and concepts that are being used in the context of shared and equal parenting. They all have different meanings and different legal connotations.

When I am talking, however, of the benefits of shared and equal parenting I am referring to any post-divorce form of parenting in which both parents share in the day-to-day care and residence for the children in a mutually agreed post-divorce parenting plan or arrangement between the parents. This excludes forms of shared parenting that are only limited to joint legal custody without sharing in the day-to-day physical care for the children, as I consider these custody forms to be 'shared parenting' only in name and not in practice.

² Because children are the future of any society, I will take in my presentation the perspective of the children involved in divorce in documenting some of the effects of divorce. This does not mean however that divorces do not also have profound effects on the quality of life of the divorcing adults involved. They do. But - although in most of the psychological literature divorce is acknowledged as one of the main life course events and possible trauma's - not much research is readily available yet on the exact traumatising effects of parental alienation and exclusion resulting from the destructive sole care and residence practises of Western family law systems and family court practises on the divorcing adult parents. One recent Dutch study documented however that divorced parents count for 48% more of company's and society's sick leave costs in the workspace (Kunst a.o., 2007). Also a relationship between divorce and suicide has been documented. This indicates that the costs of divorce for society and companies are still far from being documented extensively and can be expected to be tremendous, both for children and the adults involved.

³ Simultaneous presentation held at the Drama conference by Robert Whiston FRSA, 2009, Children Act 1989: The elimination of shared parenting.

3. The benefits of post-divorce shared parenting

If we look at what available scientific research tells us what the best interests of children are with regard to parenting arrangements after divorce or separation, then the picture cannot be clearer. Comparing the outcomes for children growing up in shared parenting arrangements, having regular contact with and care from both parents after divorce or separation, with the outcomes for children growing up in single parent families in the sole care of only one of their parents, generally the mother, than children growing up in shared parenting do much better.

Better outcomes for children in shared parenting arrangements

From a meta-analysis on 33 underlying separation researches Robert Bauserman (American Psychological Association, 2002) concluded, that children growing up in a form of shared parenting with frequent contact with and care from both parents, had

- less behavioural - and emotional problems,
 - exhibited higher levels of self-worth and self-confidence,
 - were better capable of building and preserving social contacts and relations, both within and outside the family and
 - performed better at school,
- than children who had grown up in the sole care of only one of their parents.

Children growing up in shared parenting of both parents after divorce and separation did so much better than children growing up under sole care of only one of their parents, that shared parenting arrangements after separation by far proved to be the "second best" parenting arrangement for growing up children, providing them with a new post-divorce family situation that best approached the ideal situation of an intact family.

From a range of other researches it further became clear, that children growing up in shared parenting of both parents

- develop better,
- are more satisfied,
- prove to be better adapted and adjusted and
- have more self-confidence and self-worth

in comparison with children growing up in sole care of one of their parents (Nunan, 1980; Cowan, 1982; Pojman, 1982; Livingston, 1983; Noonan, 1984; Shiller, 1984, 1986; Handley, 1985; Wolchik, 1985; Bredefeld, 1985; Öberg & Öberg, 1987).

From a Harvard study on 517 separation families over a period of 4 years wide, children growing up under post-divorce shared parenting proved to be less

depressed, exhibited less unadjusted behaviours, and achieved better school results than children growing up in post-divorce sole care. (Buchanan, MacCoby, Dornbusch, 1996.)

Also, boys growing up in shared parenting are found to have less emotional problems than boys growing up in sole care (Pojman 1982; Shiller 1986).

Adverse effects on children's health and well-being of growing up fatherless in one-parent families

The available research clearly shows that children growing up in sole care - mainly fatherless and with their mothers in mother-headed families - do much worse than children growing up in shared parenting.

Children being raised by one parent are at a greater risk for many things as they grow up, including health risks such as poorly controlled diabetes and asthma. (Holmes, 2007)

A Swedish large scale population study on children's health found that children growing up fatherless in single-parent families also have more depression complaints, use more and earlier drugs and alcohol (binge-drinking), get more accidents and more often commit suicide, than children growing up in the care and with the involvement of both parents. (Swedish population study into the consequences of single-parent families on children, Ringbäck Weitoft, Hjern, Haglund, Rosén, 2003).

And a recent Dutch study on the importance of fathers for their children after parental separation and divorce (ENOVA, 2008) found that in the Dutch province of Drenthe 62% of all children in need of special youth care and youth welfare provided by the Dutch state originated from single parent families headed by mothers.

Also a consistency has now been determined between growing up in fatherless single-parent families and the prevalence of children being diagnosed with attention deficit and hyperactivity disorder ADHD/ADD. Children in single parent families are at twice the risk of being ADHD-diagnosed and prescribed with the drug Ritalin than children from intact two-parent families (Strohschein, 2007).

Child abuse risk and "new boyfriend-" or stepparent-risk

Child abuse can happen in all types of families, but it happens most in single parent mother-headed families and in new "patchwork-families" with stepchildren.

Children, especially boys, growing up in single parent mother-headed families are at twice to 2,5 times the risk of child sexual abuse, physical abuse, emotional and mental abuse and neglect by either the mother herself or her “new friend”, the so-called “stepparent”. (Holmes, 2007; AMK, 1999, 2000, 2001)

Brought into a situation of social exclusion from the paternal half of their families by the present mother-only custody and care practises in family law and family courts, and with their fathers and paternal grandparents no longer involved or present in their lives, isolated children more often become victims of emotional, physical and sexual abuse or neglect by the mother or her new boyfriend. The devastating results of social and family court policies giving prevalence to mother-only custody and care for the divorce children involved in terms of rising child abuse cases and occurring family-drama's are now reported on frequently in today's journals and newspapers of all of our societies.

Effects on children of growing up fatherless in single parent families in the different age groups (O'Neill, 2002)

Children (0-12)

If we take a closer look at the effects of growing up fatherless on the different age groups children (0-12) growing up in fatherless single-parent families have a greater risk of a life in poverty, run more risk on physical, emotional and sexual abuse, more often become runaways from home, have a greater risk of becoming homeless youths, have more risk of health complaints and have more problems at school and in their social contacts with others (O'Neill, 2002).

Teenagers (12-18)

Teenagers growing up in fatherless single-parent families have a greater risk of teenage-pregnancy, to end up in (youth) crime, to smoke, to use alcohol and drugs, of playing truant, to be suspended, of becoming drop-outs and ending their school careers at an early age school, and of getting adaptation problems (O'Neill, 2002).

Young adults (18 onwards)

And young adults, having grown up in fatherless single-parent families, stand a greater risk of not having finished a proper vocational education, earning lower incomes, becoming jobless and in need of benefits, at risk of becoming homeless, or of getting involved in crime, of developing chronic emotional and mental-health problems, of developing general physical health complaints, and sooner have cohabiting relations, more often have extramarital children, only to

end up in separation and divorce more often. (Meta-study “Experimenting in living, The fatherless family”, Civitas, O’Neill, 2002).

Parentification of children of divorce in single parent families

British teenage-girls who have grown up in sole care or single parent families reported that they get stressed out and overloaded by the separation problems of their parents, especially caused by the call on them by their caring parent, in 90% of the cases the mother, for support in the fight concerning the children, put up with the other parent after divorce and separation. (Bliss survey, 2005: Girls take strain or parents’ split)

In single parent families it is often not the child who is being taken care of by the parent, but - as “mother’s little helper” - the child becomes an instrumental friend and partner to the parent in distress taking care of the parent’s welfare instead, thus forcing children of divorce into early maturation and depriving them of their youth. This phenomenon is documented in the psychological literature as that of “parentification”.

Post-divorce father involvement in children’s lives makes all the difference

Another line of comparative research focuses on the different effects on children of growing up with either involved or not involved (i.e. excluded) non-residential fathers after parental separation and divorce.

Carlson (2006) found in her research “*Family structure, father involvement and behavioural effects on adolescents*” based on the 1996 and 2000 data cohorts of the USA National Longitudinal Youth Study on 2.733 10-14 year old adolescents living only with their mothers while their fathers were non-residential that the greater the involvement of fathers was in the lives of their adolescent children, the less behavioural problems the adolescents had in terms of aggression, antisocial behaviour, and negative feelings like anxiety, concern, depression and low self-esteem.

Shared parenting leads to fewer conflicts between the parents and between the child and its parents

It is frequently contested by antagonists to shared parenting that present shared or equal parenting arrangements are self-selective on the issue of pre-existing conflict levels between the separating parents as they are court-provided on a voluntary base of consensus and consent between the two divorcing parents involved.

It is therefore important to note in this context, that the better outcomes for children documented in the quoted research above have also been found in research that controlled for pre-existing levels of conflicts between the parents as a self-selecting factor for shared parenting.

Furthermore it is also frequently claimed and presumed by antagonists to post-divorce shared parenting arrangements that shared parenting is the cause of more post-divorce conflicts between the divorced parents as it raises the level of interactions and contacts between the two separated parents.

The meta-study conducted by Robert Bauserman (APA, 2002) however found that, in contrast with what is usually claimed, the number and levels of conflicts between the parents in shared parenting arrangements strongly diminished in comparison with the number of conflicts in situations of sole care with access arrangements. As a result these lower level of conflicts between the divorced parents in shared parenting arrangements contributes greatly to better child welfare and well being.

Moreover, not only do parents experience less mutual conflicts in shared parenting arrangements, but also children growing up in shared parenting appear to have fewer conflicts with their parents, than children growing up in sole care of one parent (Karp, 1982).

Less loyalty and allegiance conflicts

It is also frequently claimed by antagonists to shared parenting that children growing up in shared parenting arrangements with both parents do not have a place and home of their own (“Do not take away the children’s home”, it is claimed). Children in shared parenting arrangements are pictured as being constantly underway between houses and as being continuously exposed to conflicts of allegiance. Available research however confounds this picture. Children are more flexible - within reason of course - than we expect them to be. What is more important to them is keeping their relations with both their parents. (Steinman, 1981, Luepnitz, 1986, Shiller, 1986, Coller, 1988, Tornstam, 2000).

Children want it themselves

The last argument these antagonists make against shared parenting is that proponents of shared parenting only argue from the point of view of the parents and do not take the interests and wishes of children into consideration. From child-research in which children themselves are questioned on their preferences however, it becomes clear that children themselves also most prefer shared parenting and care from both their parents after separation (Fabricius, 2003).

Children themselves most want to preserve and maintain their relations with both parents after divorce and separation. They consider having narrow links and bonds with both their parents as being important to them, while growing up in shared parenting leaves them more satisfied than growing up in sole care. (Kelly, 1993).

Breaking the cycle of broken families: Less divorces and separations

Finally, children of divorce growing up in single parent mother-headed families themselves are at a 3,5 times greater risk of separation and divorce later on in their lives (Spruijt, 2007), thus contributing to a self perpetuating and accelerating cycle of new broken families into the future.

Post-divorce shared parenting arrangements on the other hand however – instead of accelerating the pace of separation and divorce resulting into broken families in the future - also prove to be a valuable incentive for keeping two-parent families together when possible. The more shared parenting arrangements are to be implemented instead of mother-only custody and care after separation, the fewer parents are inclined to go for a divorce. (Brinig & Allen, 2000) This contributes directly to the best interest of the children involved, as all of the research so far has indicated that intact two-parent families are still the best and most ideal setting for children to grow up in and flourish into the jewel in society's crown they deserve to be, instead of growing to be a liability and burden on the state.

To come to a first conclusion

Overseeing the presented and available social research objectively and rationally one is inclined to ask therefore why sole care and residency at present still is championed, and shared parenting still isn't, as the preferred default and dominant presumption for post-divorce parenting arrangements in Western family law systems and family court practises?⁴ In any other sphere of life such a degree of dysfunctionality would not be tolerated.

Seen from a point of view of the best interest of the child the current practice of sole care in family law should be considered as completely incomprehensible. If we really - and not in name only - give priority and weight to the best interests

⁴ It is not within the scope of this presentation to further elaborate on the parochial, subjective and irrational reasons why Western family law systems and family court practises instead still opt for single parent mother-only custody, care and residency as the preferred default and dominant presumption for post-divorce parenting arrangements. Instead I refer to the excellent presentations that were simultaneously held on this subject at the Drama conference by Robert Whiston FRSA (“Law is parochial”) and Peter D. Zohrab LLB, BA, BA(Hons), („The Move to Female Subjectivity as the Standard for Law and Policy“), to further elaborate on the critical issue of why subjective, irrational and parochial choices at present are leading in Western family law systems and family justice practises.

of children, then the available research provides us with a very clear message. This message is that:

- after intact two-parent families, the outcomes for children in post-divorce shared parenting arrangements prove to be the next best situation for children to grow up in
- post-divorce shared parenting arrangements are in the best interest of the child(ren), while sole care arrangements in single parent families are not
- shared parenting and keeping both parents involved in children's lives after parental separation and divorce seems to be the only way to go.

This very clear message does not only emerge from the available social research discussed. It is also communicated to us by the civil servants that are in charge of society's institutions that have to deal on a daily basis with the effects of mother-only custody, care and residency practises and fatherlessness of children.

In April 2008 the British senior judge Mr. Justice Coleridge, responsible for family courts across South-West England, shortly after having passed judgement in the divorce of Sir Paul McCartney from Heather Mills, in a speech to British family lawyers launched a devastating attack on the fractured and fragmentising British society caused by family breakdown and divorce. In his speech he warned British government that family life in the fractured British society was now not only in disarray but in complete meltdown. Quoting from the Daily Mail this is what the senior judge said:

“Family life is in 'meltdown'. Family breakdown is a "cancer" behind almost every evil affecting the country. Mr Justice Coleridge blames youth crime, child abuse, drug addiction and binge-drinking on the "meltdown" of relations between parents and children. He warns that the collapse of the family unit is a threat to the nation as bad as terrorism, crime, drugs or global warming.

The speech to family lawyers contains a fierce attack on the "neglect" of successive governments. The 58-year-old judge, who is married with three grown-up children, will say family breakdown is an epidemic affecting all levels of society from the Royal Family down. It is "on a scale, depth and breadth which few of us could have imagined even "a decade ago. It is a never-ending carnival of human misery. A ceaseless river of human distress. "I am not saying every broken family produces dysfunctional children but I am saying that almost every dysfunctional child is the product of a broken family."

The judge, who is in charge of family courts across South-West England, will say he has a duty to speak out. He will call on the Government to put

the family at the top of its agenda, alongside the economy and the war on terror - and make it "rather more important than taking oaths of allegiance". His speech will say: "Families are the cells which make up the body of society. If the cells are unhealthy and undernourished, or at worse cancerous and growing haphazard and out of control, in the end the body succumbs. "In some of the more heavily populated urban areas, family life is quite frankly in meltdown or completely unrecognisable . . . it is on an epidemic scale. In some areas of the country family life in the old sense no longer exists."

The judge condemns families with a mother and several absentee fathers. He says: "Single parents often do a fantastic job, but a great many, perhaps through no fault of their own, do not. "A large number of families now consist of children being brought up by mothers who have children by a number of different fathers, none of whom take any part in their lives or support or upbringing. "These are not isolated, oneoff cases. They are part of the stock-in-trade of the family courts."

Judge Coleridge has spent the past eight years presiding over cases of divorce, children in care and family break-up.”
(*Coleridge, Daily Mail, 4 April 2008*)

And speaking to *The Times* of 21 August 2006, Rod Morgan, the chairman of the UK Youth Justice Board, said:

““What many young children lack are any sorts of boundaries being set to their behaviour so that literally they don’t know how to behave properly. There has not been a role model to explain things and to set boundaries. Most children we know like a reasonably structured existence and many don’t have it,” he said. He said that, without change, increasing numbers of young people would be drawn into the formal criminal justice system, a trend that has accelerated since Labour came to power. Between 35,000 and 40,000 young people are today being prosecuted in front of magistrates. Ten years ago many would have been punished informally outside the courts. “What magistrates are telling us is that many young people are coming before the youth courts who, in their judgment, don’t need to be [there]. . . — the police are more and more being used as a disciplinary back-up force . . .

. . . Mr Morgan blames changes in demographics and the rise in the proportion of lone-parent families, particularly those headed by a woman, for the problems. “We know that the proportion of families where young parents — often mothers bringing up a child alone without the presence of a male role model and a father present on the scene, and without the

support of an extended family — are having to cope with more and more challenging child behaviour in fairly deprived areas.” He said that some children were being raised in homes without even the most basic discipline being imposed, such as instructions about what time they should be up or back indoors. That behaviour presented serious problems in schools, where teachers’ confidence was undermined by the threat of being taken to court or by parents who have no regard for authority.”
(*Morgan, The Times, 21 August 2006*)

4. Fracturing societies: the scope of the problem of broken families and fatherlessness

To give you a better idea of the scope and extent of the problem of broken families and fatherlessness in most countries of the European Union, allow me to first draw you a picture of the present situation of family breakdown in the Netherlands, as that is the country I come from and know the best.

An estimated total number of 60.000 new children – coming from both breaking marriages and breaking registered partnerships - are experiencing the divorce or separation of their parents in the Netherlands every year (every day 160 Dutch children are experiencing the divorce and separation of their parents). From a total of 3.2 million children in the Netherlands between the ages of 0 and 18 years old, an estimated 1 million children have already experienced the divorce or separation of their parents. This has resulted in a situation where it is now estimated that 1/3 of all Dutch children are from broken families.

Most of these Dutch children of divorce and separation (an estimated 85% to 90%, i.e. 850.000 to 900.000 children) grow up in mother-only care and residency in single-parent mother-headed families with their fathers being non-resident and living elsewhere.

Measured one year from the time of divorce or separation an estimated 45% of the Dutch children of divorce and separation have lost all further contact with their fathers and are growing up completely fatherless in mother-headed single-parent-families or patchwork stepfamilies. Another 45% of the Dutch children of divorce and separation are estimated to grow up with their mother while their fathers are being marginalised and the children have only minimal, reduced and restricted contact and access arrangements with their fathers of one weekend every two weeks and some extra time during school holidays. (Cresskill, Griffith & Hekman, 1986)

This results in a situation in the Netherlands where an estimated 500.000 Dutch children of divorce and separation grow up completely fatherless (15% of all

Dutch children), while another 500.000 Dutch children of divorce and separation grow up with marginalised fathers (another 15% of all Dutch children).

This situation of 30% of children left fatherless or with marginalized fathers after parental separation is prevalent in most European Union countries, including the new East European members. The incidence of fatherlessness tends to be still somewhat lower in Southern European countries and higher in Northern European countries.

For future trends we need to look at the USA, being at the forefront of the situation where Europe is also heading to. And in the USA now already 40% of all children are growing up completely fatherless (Source: Newsweek figures from January 2006).

A recent Dutch research study on the Parental Alienation Syndrome in the Netherlands (Kaplan, 2008) found PAS in the Netherlands to be a much bigger problem than was previously estimated. Some of the main conclusions of the Dutch study on Parental Alienation are:

- 72% of Dutch separated fathers believe PAS to be a problem.
- 64% of mothers believe PAS to be a problem
- According to father's PAS is a severe problem in 21% of cases
- But according to mothers PAS is only a severe problem in 10% of cases.
- Overall Dutch fathers consider serious PAS twice as big a problem as Dutch mothers

5. The present status of shared parenting legislation after parental separation in Europe

Current judicial practice of mother care and custody is heavily influenced by John Bowlby and Anna Freud. In the 1950's and 1960's this view of mother's role was revolutionary. The validity of this view has now been doubted and the judiciary has not kept pace with present day psychiatry.

The upshot of this is an over-reliance by judges on their own abilities to be able to award custody in terms of black and white (father versus mother) instead of shades of grey, i.e. shared parenting. The focus of the courts seem to be always in making the grandiose custody statement for children, instead of delivering care and residence arrangements in minute detail making shared parenting into a real possibility and delivering peace between the two adversarial parents by keeping both parents involved in children's lives.

The present dominant European family legislation and family court practice regarding court ordered parenting arrangements after parental separation, is still a combination of joint legal custody legislation combined with sole physical

custody. Courts are giving children to the sole care and residency of one parent, i.e. the custodial parent who is nearly always the mother, while the noncustodial parent is made nonresidential to the children and further put at a distance and excluded from his/her own children by:

- highly limited access or contact arrangements for noncustodial parents (normally limited to one weekend every two weeks, making serious parenting impossible)
- a deliberate policy of non-intervention by the courts when court-ordered access arrangements are broken by the custodial parent, usually the mother
- severely repressive legislation aimed at criminalizing noncustodial parents who do not accept being excluded from their children (stalking legislation, DV legislation, abduction legislation, restrictive injunction orders, etc.)
- fiscal and welfare policies and practices are geared to favor and support children, but only when living with one half of their separated families. This is often combined with extraction of money from the officially designated non-resident parent for support of the "family with children" which the state itself has imposed upon that family.

This choice of discriminative and repressive instruments implemented to achieve social policy goals seems to be common in all countries of the European Union.

More and more policy makers are seeing the writing on the wall. The ramifications include rising youth crime, an aging population and a lower birthrate. The well-documented disastrous effects that family law and family court policies have on children's lives are becoming obvious, with ever increasing demands for larger budgets so that social services can meet the demand of broken families. The consequences of children growing up excluded from half of their families cannot be ignored.

The reaction of policy makers so far - and this can be observed as a generalized reaction to many policy situations today - is to make largely cosmetic adjustments to the present defective system which will take an inordinate time to have any effect (if ever), These types of policy already have a proven track record of failure. To make a mark on the problem, it is not enough to copy failed solutions from other jurisdictions.

Looking at the present trend in family law reform in EU countries (Europe)

We are now witnessing a distinctive shift in the different national family law systems of the countries in the European Union. Following the strong previous family law tradition of single care, residency and custody orders and practices favouring mothers during the second half of the twentieth century (as the only meaningful parent after divorce), There is a distinctive shift towards more equal and shared parenting arrangements and keeping both parents involved in the post-divorce care and residency arrangements for their children.

The first mainly symbolic steps of acknowledging the importance of both parents in children's lives were based on Article 8 (Article on family life) of the European Convention of Human Rights (ECHR) (Council of Europe, 1950, 2003). As a result a post-divorce presumption of joint **legal** custody was put in effect in family law since the late nineties of last century (1996/1998) in several EU countries, including Germany, Belgium and the Netherlands.

The present general European trend within family law reform in European countries is, however, most definitely pointing strongly in the direction of moving away from sole physical custody and care legislation with court practices tending towards joint and equal physical custody and care legislation. Both trends recognize the importance of keeping both parents and extended families actively involved in children's lives after parental separation.

Let me give you some brief summaries by country on the present state of Shared Parenting Legislation in the countries of the European Union:

1. **Italy** now has a mix of joint legal custody and elements of joint physical custody since a law change that came into effect on 16th March 2006.
2. **France** has a mix of joint legal custody and elements of joint physical custody (Residence Alternee) that came into effect in 2002. An estimated 15% of French children of divorce are now growing up in shared parenting and alternating residence arrangements.
3. **Belgium** on the initiative of its Socialist Party now has implemented presumptive 50/50 joint physical custody legislation (effective bi-location of the children) after parental separation in both its House of Commons and Senate which came into effect when it was formally published by the Belgian Federal Government on the 4th of September 2006. The new Belgian federal law on bi-location will be discussed at more length in my presentation below.
4. In the **Netherlands** joint **legal** custody was implemented in family law by the Dutch Parliament in 1996 making joint **legal** custody the standard for post-divorce parental authority. And with the new Dutch Law on Continued

Parenting after Separation (no. 30145), that went into effect on 1 January 2009, this was followed by the introduction in Dutch family law of the basic principle of the equality of both parents and the presumption of equal parenting (both before and after divorce or separation, and regardless of whether the parents were previously married or not). The new Dutch family law also introduces a strong incentive for separating parents to come up with a mutually agreed parenting plan during the separation and divorce proceedings.

The new Dutch law reform will be discussed at more length in my presentation below. Considering however the poor Dutch tradition on effective family law reform, the mainly decorative value of Dutch family court orders for fathers and the Dutch family court's tradition of legislating from the bench, it still remains to be seen what this new Dutch law will bring in day-to-day family court practises for divorcing and separating parents and their children.

5. **Norway** still has sole physical custody but its Minister of Justice has already announced (in 2007) a complete family law review based on the principles of presumptive joint physical custody. Up until now, however, this has not yet materialized.

6. **Ireland** has, since the advent of Parental Equality (the Irish lobby group associated with Liam O'Gogain) circa. 1993, been considering the possibility of a change to laws of joint physical custody - which gives some gauge of the lack of seriousness with which such laws are being considered.

7. In **Germany**, a professional court intervention model called the Cochem model, based on principles of shared parenting, is gathering strength. This German Cochem court practice model will be discussed at more length in my presentation below. In this model parents are only allowed access to the family court for parental separation and divorce after they have themselves also filed a shared post-divorce parenting plan agreed by and between both of them. The German federal minister of Justice has previously (February 2006) announced future family law reform in which "elements of the Cochem model of multi-disciplinary court orchestrated intervention" are to be integrated into the German family law. Which elements, however, are as of yet unknown. This family law reform at the federal level has, therefore, not yet materialized.

8. **Malta** also has some form of shared parenting presumption according to Maltese family rights organizations. As of yet, however, it is unclear what is the exact nature of their shared parenting presumption.

9. **Spain** introduced a new shared parenting law in mid-2005 which is regarded as wholly inadequate by Spanish family rights lobbyists. Government officials

and professionals on their own initiative are attempting to introduce policies reintegrating alienated children with their alienated parents and there is a vigorous movement for change.

10. The **UK** under the present Labour government has, as of yet, no effective shared parenting laws in existence. In his simultaneous presentation at the Drama Conference based on a study of the British Law Commission's research papers Robert Whiston found that court-ordered shared parenting was commonly practiced in the south part of England in the second half of the last century until it was eliminated by the Children Act 1989 (Whiston, 2009a). At present, the oppositional **Conservative Party** – which is expected to win the next 2009 elections - has adopted Equal Parenting Family Law Reform as part of its election program. Also some judicially-motivated efforts to introduce norms of shared parenting do exist, in spite of the family-hostile parameters of the present law and fiscal framework.

11. **Luxembourg** is also said to have introduced post-divorce joint physical custody legislation.

Other jurisdictions

- **Australia** passed a Shared Parenting Bill in the Senate in 2006 of the window dressing sort. Australia in fact is a good example of the sort of jurisdiction that repeatedly passing pretend laws that are having no real effects on keeping both parents involved in children's lives after parental separation. And each time it is claimed that the present law proposal will be better than the last, while children of separation continue to grow up in a family-hostile environment. The same pattern can be observed in EU-countries like the UK, the Netherlands and Spain.

- In the **USA** several states have implemented shared parenting legislation.

6. Recent developments in family law and family courts in Belgium, the Netherlands and Germany

Family law reform in Belgium

Belgium already had a presumption of joint legal custody in its family law since the nineties of the last century.

Since September 2006 the Belgian federal law on "bi-location" or "alternating residence" also came into effect after having passed both houses in the Belgian federal parliament. This new law additionally introduced a presumption of joint physical custody, care and residency as the norm or preferred post-divorce parenting arrangement to be ordered by the Belgian family courts. Furthermore

immediate unilateral court-access for either of the divorced or separated parents in requesting for additional reinforcement orders if needed was introduced.

Contrary to common belief the Belgian family law reform of September 2006 however did not introduce a 50/50 joint physical care and residency arrangement as the fixed end-result for all divorcing or separating Belgian parents. Instead it introduced a presumption of dual location or shared residency which by law should be taken into serious consideration and thorough investigation with priority in each individual case by the Belgian family courts and judges on the request of either one of the divorcing parents separately.

In the situation where both separating parents consensually forward shared residency, care and access proposals between the two of them in the divorce and separation proceedings, the law puts the Belgian family courts and judges under the obligation to accept those mutually consented proposals as leading in the court-orders to be subsequently imposed in the divorce and separation proceedings.

In effect the wishes with regard to the post-divorce residency, care and access arrangements of either parent parties involved were thus again acknowledged and reinstated at the core of Belgian family law and family court proceedings regarding physical custody, residency and care. By law Belgian family court judges were endowed with the obligation to explicitly specify in their court-orders their decisions and provisions with regard to the imposed post-divorce residence and care arrangements in writing if they were to deviate from the presumptive and preferred bi-location or shared parenting arrangement in their court-orders.

These new Belgian law provisions have put shared parenting at the forefront of the family courts decision-making regarding the care, access and residency of the children involved, while the need and obligation imposed by law on the Belgian family courts and judges to extensively specify in writing in their imposed court-orders as to why a shared parenting or bi-location order was not imposed, opens the possibility for appeal of the courts decisions and motivations.

A further additional but underestimated new element of the Belgian family law reform is the introduction of immediate or priority access to the courts and judges on the request of either one of the parties one-sidedly. This can be activated unilaterally and individually - without the need of being represented by a lawyer at the court-session requested for - for additional reinforcement orders of the court when the court-ordered parenting arrangements were not sufficiently complied with by the other parent and when there were complaints about the

other parent with regard to abiding by the specific parenting arrangements laid down by the judge in the original case residency, care and access order(s) given.

Although the law, as a federal national framework, has been in effect for only 2,5 years - and so it is too early to evaluate its effects thoroughly - first impressions are that it has contributed strongly to the Kantian appeasement between divorcing and separating parents in Belgium. This contributes to both the leading civil and family law principle of appeasement between conflicting parties as well as to the best interest of the children involved who now flourish far better under the care of the appeased but separated parents.

Family law reform in the Netherlands

In 1996 joint legal custody (in Dutch: gezamenlijk gezag) was implemented by law by the Dutch Parliament making joint legal custody the standard for post-divorce parenting in the Netherlands to oblige with EVRM Article 8 on the Right to Family Life.

However, shortly after the introduction of the law, the family courts in conjunction with the Dutch High Court neutralised the Dutch Parliament's specific intent for a law by to keep both parents involved in children's lives.

Perversely, the judiciary undermined Parliament's sovereignty by stating that joint legal custody could be awarded but that it did not automatically entitle fathers to contact and access arrangements.

Over the past few years the Dutch Parliament has taken several new initiatives to introduce joint physical custody and equal parenting as the legal presumption for post-divorce parenting arrangements.

The first attempt was the legal initiative on administrative divorce (divorce without the use of a court and representing lawyers) and continued parenting, No. 29676 by parliament in 2004 (Luchtenveld, 2004), better known as the Luchtenveld-proposal⁵. It passed the Dutch House of Commons in the winter of 2005 only to be left stranded in the Dutch Senate in the summer of 2006. This however was mainly caused by the "Administrative Divorce" part of the law

⁵ The Luchtenveld law proposals embraced post-separation equal parenting on principle and were originally designed to support joint physical custody, residency and care, but in the end they did so only on the principle of it without also factually sufficiently implementing it in the practice of the law, i.e. they ended up being a watered down version of joint physical custody, leaving courts free to continue the practice of sole custody orders. The Luchtenveld proposals ended up as mere window-dressing which is a very usual practice within Dutch "Polderpolitics" (swamp-politics): that is Dutch politics often say to solve a matter by intend while in the fact and practice of the matter they then willingly do not by compromising the law proposals and making them inconsistent. As such the Luchtenveld proposals were no exception to that rule and were in their end-version – after being window-dressed in the Dutch House of Commons - considered insufficient and inadequate for implementing real shared parenting.

being contradictory to lawyers' interests, which hit on heavy resistance with the Dutch judiciary⁶.

Another new attempt for family law reform, better known as the "Donner-proposal", was then made on the initiative of the Ministry of Justice with the Law on Continued Parenting after Separation (No. 30145). This law while it passed in the Dutch House of Commons in June 2006, on the initiative of the Dutch Socialist Party was unexpectedly altered by a constitutional majority amendment introducing equal parenting as the presumption for post-divorce parenting. On November 25th 2008 this law passed the Dutch Senate. It went into effect two days ago on January 1st 2009.

This new law has the following main positive features with regard to shared parenting arrangements and the reinforcement of parenting orders by the Dutch family courts:

- It introduces and aims to guarantee in Dutch family law the basic principle of equality for both parents and the presumption of equal parenting both before and after divorce or separation, and regardless of whether the parents were previously married or not
- It introduces a strong incentive for parents to come up with a mutually agreed parenting plan during the separation and divorce proceedings.
- Adding new but complicated reinforcement possibilities to the toolbox of options available to judges to ensure compliance with court-ordered parenting arrangements

However, the law also has some distinctly negative features for shared parenting as it once again re-opens the possibilities for the family courts to deviate from the Parliamentary default presumption of joint legal custody. This could give rise to new ways and new reasons for a court to exclude a father from parenting his children. For a more detailed account of the features in the new Dutch family law on parenting after divorce however I further refer to the Appendix A with this presentation.

Tragic history of Dutch family courts and family justice

The tragedy of Dutch family law reforms over the last few decades is best exemplified in its complete and utter incompetence in all matters legislative. What new dawn this Dutch law will usher in for divorcing and separating parents and their children therefore remains hypothetical.

⁶ This offers a fine example of what is discussed by Robert Whiston FRSA in his simultaneous presentation at the Drama-conference that "Law is parochial". Dutch lawyers are over represented in the Dutch senate and voted this law proposal down because of its introduction of the possibility of an administrative divorce that contradicted their and their lawyer firms and institutions professional interests in obligatory lawyer representation in court-divorce proceedings.

Legislating from the bench

One of the main problems we face in the Netherlands is the persistent interference by the judiciary after Dutch legislative intentions have been democratically made clear.

There is a long history of Dutch family courts compromising parliamentary efforts to find a route towards post-divorce equal and shared parenting by continuing to give preference to sole care arrangements.

Instead of honouring the democratic principle of the Trias Politica in passing judgement based on parliament's legislation, Dutch judges and courts are instead occupied with taking the legislative chair themselves changing the law and its intent. *De facto* this places them above and beyond the law set by the highest court in the land, Parliament.

To date the Dutch parliament and politician have not proved to be strong enough to withstand this onslaught by the Dutch judiciary. As a result time and again Dutch politics and parliament in their legislative efforts do try to keep both parents involved in their children's lives after parental separation, BUT IN NAME AND INTENT ONLY, while in the facts of the matter and the laws being implemented time and again it is proved that the Dutch family courts and judges are turning over the children to only one of the parents to the exclusion of the other.

Dutch family court orders at best only have decorative value for fathers

Another problem is the long previous "laissez-faire" history of utterly poor Dutch family court and family justice performances when it comes to the issue of any reinforcement of the family court orders that have been given adding to a situation where Dutch family courts are among the very worst in the European Union in implementing any family law.

Till now Dutch family court orders have had no executional value or discretion whatsoever. As one of the Dutch family court judges previously admitted herself Dutch family court-orders usually aren't worth the paper they are written on and till now "at best have only decorative wallpaper-value for those concerned".

Reforms in Germany – The Cochem court-practice model

Several years ago a family court judge Jurgen Rudolph – based in the German regional family court of Cochem was confronted time and again with two equally capable parents. Both were forced to fight each other - almost to the

death - in adversarial court proceedings. His radical solution will be detailed later in this paper.

Also in Germany a post-divorce presumption of joint legal custody was already in effect in family law since 1998, when several years ago the family court judge Jurgen Rudolph (Rudolph, 2007) - residing at the German regional family court of the city and district of Cochem - in his courtroom bench was confronted with capable parents fighting each other with the help of their lawyers (and to the detriment of their children) over post-divorce arrangements concerning the residency, care and access over their children and demanding from him as the judge to decide in favour of either of them. Parents and lawyers from both sides seemed to be only involved in painting their adversarial 'opponents' as black and incapable as possible during the divorce proceedings in the family court.

The position family court Judge Jurgen Rudolph took in this was that he considered post-divorce physical custody arrangements between principally fit and capable parents not to be a standard-decision for the family court and himself as the family judge to make and decide on by default over the heads of either one of the parents. On the basis of the lawfully existing care-obligation in Germany for both parents to care for their children the making of physical custody arrangements over their children had by default to be considered primarily as a matter of responsibility for both the divorcing parents themselves to decide on in the first place.

Resulting from the in-fights between parents and their lawyers taking place in adversarial divorce proceedings, the regional family court of Cochem then experimented by changing its family court practises. In the new family court practice divorcing parents were strongly encouraged by the court to first come up themselves with a mutually and consensually agreed "parenting plan" for the residency, care and access to and over their children, as a mandatory precondition before being able to enter and finalise their divorce settlements in the Cochem family court.

As the parents now needed to come up with a mutually agreed parenting plan or parenting arrangement proposal, this mandatory demand of the court both not only resulted in a reinstatement of the equal level playing field and cooperation between the parents looking for divorce (instead of the previous court practises magnifying the differences and conflicts between the parents). But equally important, it also lead to a complete practise overhaul within the professions involved in the divorce proceedings in the family court.

Instead of aggravating the parents in their conflict, all professions, i.e. lawyers, social workers, youth welfare workers, etc., began cooperating with each other in order to offer mediatory and other support services and help to the divorcing

parents who were in demand of support in making the parenting plan needed in order to finalise their divorce proceedings. In time, the cooperation between professionals evolved from cooperation on the individual case levels to a more structured network cooperation of the involved professions around the Cochem family court.

These changes in Cochem court practises and the resulting changes in practises by the surrounding professionals in the meantime have earned wide recognition in Germany and are nationally referred to in Germany as the Cochem court practises (in German: Cochemer Praxis) or the Cochem model (in German: Cochemer Modell). They are now also taken into evaluation and consideration in a future planned reform of family law by the German federal ministry of justice in Berlin.

Comparing Belgium, the Netherlands and Germany

The separate developments in these three European countries are interesting because of their convergence. In Belgium and the Netherlands developments have started top-down so to speak from the national or federal political-legislational level with the introduction of a new family law creating a national framework and new guidelines for the functioning of the family courts. While in Germany these same developments started not top-down but bottom-up from the family courts themselves experimenting with less adversarial proceedings and court practises regarding post-divorce residency, care and access arrangements and orders.

Of the law reforms in these three European countries the Belgian law reform on bi-location is to be regarded as the most clear-cut in its choice for shared parenting. The family law developments in the three European countries discussed however all share in their emphasis a distinctive shift towards implementing the concept of shared parenting and restoring an equal level playing field between both divorcing parents in family law and/or family court practises as opposed to the previous mother-only single parenting presumption that has dominated family law and family court practises in the countries of the European Union for so long.

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Appendix A : More detailed summary of the family law reform by the new Dutch family law on continued parenting after separation (no. 30145)

This new Dutch family law was passed in the Dutch House of Commons in June 2006, while as recently as on 25 November 2008 the law was also passed by the Dutch Senate. It has gone into effect in the Dutch family courts on January 1, 2009. Two separate code books of the Dutch civil law are included in its law reform provisions:

- a. CC = Civil Code (In Dutch :: Burgerlijk Wetboek: BW in Dutch short)
- b. Jp = Statutes on Civil Justice Proceedings (In Dutch :: Wetboek van Burgerlijke Rechtsvordering: Rv in Dutch short)

1. Reforms on the issue of Parental Authority (*Title 14 CC*)

1.1 Parental authority in this new law now also comprises the duty to stimulate and promote the development of ties and attachments between the child(ren) with the other parent (*Art.247 Clause 3 CC*).

1.2 The child is entitled to equal care and education from both parents (*Art.247 Clause 4 and 5, CC*).

2. Reforms on the issue of taking away parental authority (*Art. 251a CC*).

The judge can however also take away parental authority of one of the parents if and when:

2.1 the child “feels trapped or is in possible danger of being trapped or lost between both parents” (*Clause 1 sub a*),

2.2 changing parental authority is considered necessary by the court in “the best interest of the child” (*Clause 1 sub b*),

2.3 the child wants that itself (also when the child is younger than 12 years)⁷(*Clause 4*).

⁷ ‘As to the recent developments in family law and family courts in Europe in which divorce children are now being forced to speak out on post-divorce parenting arrangements by the judges in the family courts (the child being ‘heard’ in the Family Courts)’ the Father Knowledge Centre Europe emphasizes the importance of honouring the explicitly formulated rights of children to have family life and parenting and care from both their parents as these are formulated in the UN children’s rights convention and in the European Convention for Human Rights (ECHR) and issues warning for the dangers of introducing and institutionalising systemic forms of child abuse when state agencies and family courts for their own legitimacy reasons further continue on the path of explicitly and deliberately bringing children into the conflict of continued adversarial divorce and separation proceedings and single parent custody and care practises and are thus bringing children into a position in which they are solicited into publicly speaking out against either one of their parents in favour of the other

3 Reforms on the issue of making up a parenting plan (Art. 815 Clause 2 and 3 Jp)

3.1 The parents have to make up a written parenting plan with agreements on:

- the division in the care- and parenting tasks,
- how to inform and consult each other on parenting the children,
- the costs of caring and parenting the children.

3.2 When the parents cannot agree on a parenting plan:

- the judge is at the discretion of sending them to a mediator (Art. 818 Clause 2 Jp),
- the parents can however also choose to continue (adversarial) proceedings on (co-)parenting, the division of parenting tasks and the costs of care and parenting (Art. 815 Clause 6 Jp).

4 Reforms on the issue of disagreement between the parents on issues of joint legal custody (Art. 253a CC) the court or judge can be requested to:

4.1 impose a taskdivision regarding care and parenting between the parents (Clause 2 sub a),

4.2 impose an information- and consultation arrangement (Clause 2 sub c),

4.3 impose a contact exclusion order to one of the parents (Clause 2 sub a),

4.4 impose a main residency order for the child (Clause 2 sub b),

4.5 authorise the police and justice authorities to reinforce the courts parenting arrangements by the strong arm of the law (Clause 5 en art.812 Clause 2 Jp).

parent.

Not only do such family law provisions and family court practices involve children directly in divorce and separation conflicts by forcing them to speak out against either one of their parents, but by doing so they are also exposing the children involved to the immediate risk of emotional and physical abuse by soliciting social, psychological and physical pressure from the side of the parent under whose care they are (temporarily) placed by the court, to choose for her or him and against the other parent.

What is demanded from children, when solicited by adversarial family court practises and family law provisions into publicly speaking out in favour or against one or the other of its parents for court and family law legitimacy reasons, is threatening the child's or children's longer term identity and depriving them of half of their identity by forcing children into expressing life-choices they are not naturally inclined to make and of which they cannot yet oversee the long lasting consequences when being made. Further forwarding this new course of action of directly involving children in the divorce and separation conflict by family law provisions and family court practises for solving their own legitimacy reasons, therefore creates severe risks for the identity and welfare of the children involved on the long run and well into their adult lives.

4.6 Differences between the parents on parenting issues can be brought to the court unilaterally by either of the parties representative lawyers only but have to be completed in the court within a strict timetable of 6 weeks (*Clause 6*).

5 Reform on the issue of denial of the right of care for the children (*art. 253a Clause 4 juncto art. 377a Clause 3 sub d CC*)

The court or judge can deny a parent the right to care for a child when the care provided by the parent is incompatible with crucial best interests of the child.