

House of Representatives Standing Committee
on Family and Community Affairs

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Legal Aid
NEW SOUTH WALES

**PARLIAMENTARY INQUIRY
INTO JOINT RESIDENCE ARRANGEMENTS
IN THE EVENT OF FAMILY SEPARATION**

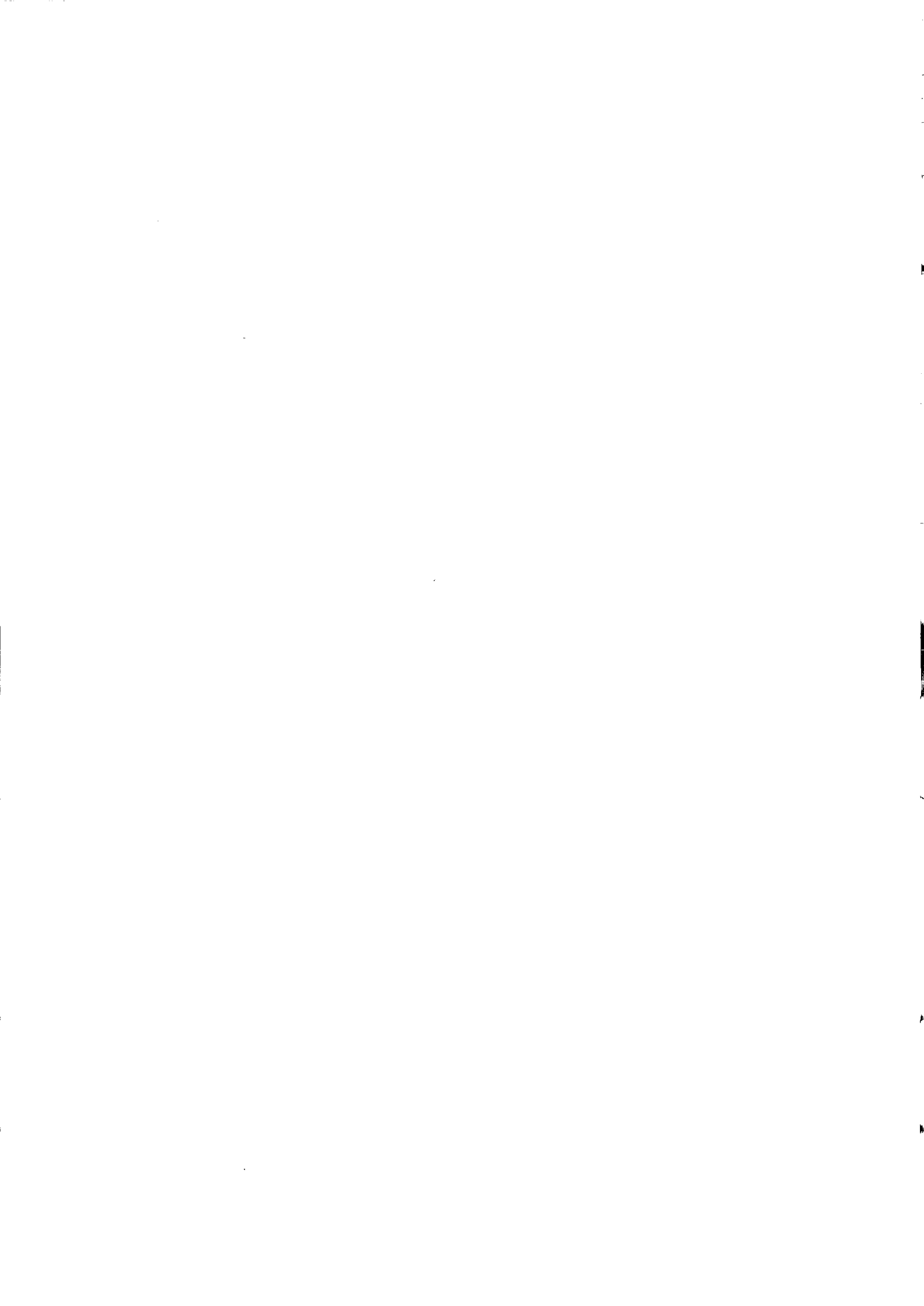
**Submission to the Standing Committee
on Family & Community Affairs**

by the

LEGAL AID COMMISSION OF NSW

August 2003

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TERMS OF REFERENCE

- (a) given that the best interests of children are the paramount consideration:
- (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular 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.
 - (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.
- (b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children
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Introduction

The Legal Aid Commission of New South Wales has a significant involvement in family law matters, facilitating legal representation in court in over 10,000 matters each year. Legal assistance is provided to parties to conduct family law matters in the Family Court, the Federal Magistrate's Service and Local Courts. Assistance is given through the Grants Division to private practitioners and through the in-house practice. The Commission also conducts a substantial alternative dispute resolution scheme where parties are referred to mediation conferences in an attempt to resolve matters without the need for recourse to litigation. Almost 1,500 grants of legal aid a year are made so that people can attend a legal aid conference. Further assistance is given by duty lawyer services, by community legal education including divorce classes and through advice services, including face to face advice which assists people on approximately 20,000 occasions each year. A particular focus of the in-house practice is work undertaken as children's representatives. Additionally, the Commission provides specialised legal advice and representation in Child Support matters. This service is available to both parents who are liable to pay child support and carer parents who receive child support payments.

The Commission then, is well placed to understand the context of family law disputes, particularly from the perspective of children involved in these matters.

THE EQUAL TIME PRESUMPTION

1. The Context

Many families can communicate and resolve differences upon separation. Many families work out co-operative arrangements without the need for any third party intervention. Others are assisted by counselling and mediation to resolve the problems that arise from family breakdown. Still others may institute proceedings in

court but with legal advice, negotiation and referral to mediation or counselling, resolve matters by consent early in the litigation.

The initial procedures of the Family Court focus on ways of exploring resolution except, of course, in those matters where there is a high degree of urgency, for example where there has been an abduction of a child or other apparent serious risk to a child. These procedures focus on attempts to narrow issues and explore settlement of matters. Parties are required to attend an information session where court procedures are explained as are alternatives to the litigation process and the costs likely to be incurred. Children's matters are referred to either a case assessment conference where resolution is explored by both a court registrar and counsellor, or to confidential counselling. Matters proceed to the next stage for determination if no settlement has been reached. Even at this point many matters settle as further evidence becomes available and issues narrow. A good opportunity for a later settlement is when the family report becomes available before hearing dates are given. The information about the needs of particular children and the recommendations contained in these reports can often be the basis of a settlement of matters.

In legally aided matters wherever appropriate an applicant would be given an initial grant of legal aid for alternative dispute resolution to avoid the litigation path. Even after proceedings have commenced legally aided parties may be required to attend later stage mediation if it appeared that this might resolve the matter.

A relatively small percent of separating families cannot resolve their disputes in these ways and persist in the litigation stream. This group is characterised by a breakdown in communication, hostility and high level conflict which can impact very negatively on children.

Matters litigated to this level often involve issues of parental capacity, for example, allegations of abuse of children, allegations of substance abuse affecting a parent, issues of domestic violence and issues of mental health. Often a parent's own traumatic childhood experiences impact on a relationship and add complexity to family breakdown. There may also be difficulties in the relationship between a child and a particular parent. These issues can be compounded by a new relationship which a parent had entered into and which cause problems for a child. Sometimes the beliefs of one child impact on the others. Sometimes out of loyalty or a sense of perceived injustice to a parent a child wants to protect that parent. Sometimes a child blames a parent for the breakdown and wants little to do with that parent. Children at certain developmental stages are more likely to blame themselves or become alienated from a parent (this is elaborated upon in the study of Dr Jennifer McIntosh referred to later). There can also be significant cultural issues which impact on the behaviour of children and their willingness to spend time with a particular parent.

Given the complex dynamic of matters which persist in the litigation stream, despite all the current alternatives and disincentives to continued litigation, any presumption as proposed would be liable to be rebutted in the vast majority of cases going to final hearing. From this practical view alone it would achieve little.

2. Recognition in the law of the importance of maintaining a relationship between children and each of their parents following separation

An important aim of social policy, and indeed the Family Law Act, is to maintain relationships between children and each of their parents in the event of family breakdown.

The objects of the Family Law Act are set out in Section 60B of Part V11 of the Act which deals with children.

S60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

60B (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never been married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.

The Family Law Act also provides that each of the parents of a child has parental responsibility for the child, subject to any order of a court.

The Family Law Act provides for flexibility in the type of parenting orders which can be made. Since the Family Law Reform Act 1995 there is no provision for a custody order which imports ideas of ownership of a child. Rather the law provides for residence orders, which are orders about where a child is to live, contact orders and specific issues orders. It is of course possible to have residence/residence orders which provide that a child lives for specified times with each parent, or residence/contact orders. Specific issues orders can provide for the long term and/or day to day responsibility for the day to day care, welfare and development of a child.

These amendments to the Act were intended to increase the focus on the wellbeing of children and the responsibilities which both parents had to their children. They also allowed considerable flexibility in the orders that could be made taking into account the best interests of children and the circumstances of particular families. The aim of the Family Law Act is to allow the court a discretion to take into account the needs of particular children and their individual circumstances.

People are aggrieved with their experience of litigation. In part this arises from the experience of court delays and the inevitable frustration of having an outside authority impose a solution on a family by way of a court order. It really cannot be a

win/win solution. It can be a lose/lose solution. Of its very nature it is a situation where all parties cannot realistically have their expectations met. In part though, the sense of grievance stems from the characteristics of those parents whose dispute persists despite all other options offered. Unfortunately often these parties cannot see how they themselves have contributed to a situation and as a result are, more than other people, like to find blame elsewhere. Unfortunately also many of these participants in the litigation process are unable to see their children's needs as distinct from their own.

The introduction of a presumption that children spend equal time with each parent is not a realistic way to address grievances some people have with the litigation process.

3. Determining the best interests of children

Section 65E provides that in deciding whether to make a particular parenting order in relation to a child the court must regard the best interests of a child as the paramount consideration.

Section 68F(2) sets out the following factors which the court must take into consideration in determining what is in a child's best interests:

- (a) *any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes.*
- (b) *the nature of the relationship of the child with each of the child's parents and with other persons*
- (c) *the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*
 - (i) *either of his or her parents; or*
 - (ii) *any other child, or other person, with whom he or she has been living;*
- (d) *the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relationships and direct contact with both parents on a regular basis;*
- (e) *the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;*
- (f) *the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait islanders) and any other characteristics of the child that the court thinks are relevant;*
- (g) *the need to protect the child from physical or psychological harm, caused, or that may be caused, by:*

- (i) being subjected to or exposed to abuse, ill-treatment, violence or other behaviour; or*
- (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;*
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
- (i) any family violence involving the child or a member of the child's family;*
- (j) any family violence order that applies to the child or a member of the child's family;*
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;*
- (l) any other factor or circumstance that the court thinks is relevant.*

To satisfy the requirements of this section, evidence is put before the court of many matters impacting on the welfare of children. Evidence may be obtained from a wide range of sources including the following:

- schools,
- community workers
- the Department of Community Services
- treating doctors including doctors providing specialized services relating to the behavioural problems of children
- the police
- counsellors and mental health workers
- drug and rehabilitation professionals

In children's matters family reports are usually prepared. The counsellors preparing these reports interview the parents and children. The reports address matters referred to in Section 68F (2) such as the wishes and maturity of children; the relationship, including the bonding and attachment between children, their parents and other important people; parenting capacity; effect on a child of separation from a parent or sibling and issues relating to the protection of children from physical or psychological harm

In more complex matters orders are often made for the appointment of a child and family psychiatrist to prepare a report as a court expert in the place of the more usual family report. These court experts usually have an opportunity to peruse documents produced by the various sources referred to above. Their high level of professional training and clinical expertise usually means that their reports are of considerable assistance to the court in its determination of matters related to the best interests of children.

A presumption of "shared custody" is inconsistent with the requirements for determining the best interests of a particular child.

4. The need to focus on children

In May 2000 the Government established the Family Law Pathways Advisory Group to advise it on how to achieve an integrated family law system that is flexible and builds individual and community capacity to achieve the best possible outcomes for families. The Advisory Group's Report, "*Out of the Maze – Pathways to the Future for Families Experiencing Separation (Pathways Report)*", was completed in July 2001. The thrust of the recommendations of the Pathways Report were strongly supported in the *Government Response to the Family Law Pathways Advisory Group Report*, dated May 2003.

The Pathways Report set out four fundamental principles that guided the thinking of the Advisory Group (p7)

- the first principle is the overriding importance given to the best interests of the child
- the second principle is priority for the use of non-judicial processes to resolve issues of family conflict and transition
- the third principle is the need to ensure safety from family violence
- the fourth principle is the responsibility of parents to provide financial support for their child

The Report outlines its understanding of problems and weaknesses of the family law system and sets out seven points which it recommends will help address identified problems. The first of these is to increase the focus on children. This is echoed in the Government Response which states that "for some time now the government has recognised and promoted the need for earlier conflict resolution and agreement in separating families and for a greater focus on the needs and interests of the children involved" (p5). The Government Response also identified that the Pathways Report had found that there was not enough focus on the best interests of the child or child inclusive practices in family law services (p11).

The proposed presumption that children spend equal time with each parent focuses on the rights of parents not the needs of children and is inconsistent with the current considered approach to reform in the family law area as reflected in reform to the Family Law Act and the recommendations of the Pathways Report.

5. Issues for children in shared parenting arrangements

Unfortunately after family breakdown there is inevitable change in roles and relationships compared to what had previously existed in an integrated family unit when family members were able to complement each other in what they did within the family. In the real world two separate households are not able to replicate what could previously be done for children in the former single household and there can be issues for children which are not immediately apparent if the care is shared between two households following separation.

Some issues which would need to be considered in the context of the present proposal are the following:

- The needs of babies and young children are different to those of older children. There are important child development issues relating to bonding and attachment and no studies to support a presumption of equal division of time for such young children. In a practical sense it is not stereotyping to state that the usual situation in the context of childbirth and breastfeeding of very young children is that mothers take maternity leave and as children get older re-enter the workforce initially on a part-time basis. They ordinarily take prime responsibility for organising their time to be available for the needs of young children.
- There are obvious problems in introducing a presumption which takes no account of children's wishes. The ratification of the United Nations Convention on the Rights of the Child reflects Australian and international recognition of the growing importance of the right of children to express their opinions and be heard.
- A possible consequence of the proposal is that it may, for example, be rebutted for one child in a family but not another. This could arise, for example because of the age of a child, strong wishes of a child or because of concerns about the mental state of a child. Could this mean splitting siblings more often than would be the case at present? What is the impact of this on the emotional welfare of children?
- What if the proposal was in direct opposition to the very strong wishes of an older child? How are the wishes of the child to be acknowledged? What are the ramifications for a child of being placed or one half of his/her time in a residential setting to which the child is strongly opposed? and if it means the child spends much of his/her time with a step parent with whom the child does not have a good relationship? How does the proposal take account of the changes in children's circumstances and wishes over time and the greater flexibility required for children entering adolescence?
- What would be the impact on children if the arrangement does not reflect the history of the relationship children have had with a parent?
- Does it mean more children will be sitting in after school care when they know they could be with the other parent? What would be the impact of this on a child?

Judith Wallerstein and Julia Lewis have conducted a 25 year longitudinal study in the United States of the responses of children to parental separation and divorce, "*The Long Term Impact of Divorce on Children*", Family and Conciliation Courts Review, vol.36, no 3, July 1998. Judith Wallerstein is a very highly regarded expert on issues relating to the impact of separation on children. Her work is of particular importance because children are directly involved in her research and consequently it has the value of being child focussed.

The study noted the responses of the children, now grown up, to court orders or a strictly enforced agreement to maintain a particular schedule of visits into which they had had no input :

No single child who saw his or her father under a rigidly enforced court order or unmodified parental agreement had a good relationship with him after reaching adulthood (pp376-377).

The problem here was the fact that children were not listened to and there was a lack of flexibility in taking into account the changed needs and circumstances of children as they moved from pre-schoolers to adolescents. Something that had worked well for them as preschoolers could be perceived as something that was very disruptive to their lives as young adolescents.

Negotiating the day to day issues

There would be difficulties for any families in negotiating all the issues which may arise after family breakdown to successfully achieve a form of shared parenting. For high conflict families there is little realistic chance of being able to negotiate all the extra child related issues that will arise. Further conflict will be generated and it will focus on matters to do with the children inevitably involving the children themselves in greater conflict about what would otherwise be relatively mundane parts of their lives.

Below are just a few of the difficult day to day issues which would need to be addressed.

- Arrangements for schooling - assuming as is frequently the case, because of repartnering and moving accommodation, that parents after separation are not residing within reasonable travelling distance of the one school.
- Continuity in the after school extra curricular activities which enrich childhood – mid week soccer training with friends from the local area – gym, music, scouts, athletics or dancing. Even when parents are able to negotiate a co-operative arrangement there are likely to be serious logistical difficulties in children's continuing involvement in such activities unless the parents' households are reasonably close to each other.
- What happens when notes are sent home from school in one parents time about an activity when the child will be with the other parent – and the parents are not co-operative? Who is blamed when the parent does not get the message? the child who forgets to pass on a note?
- Which GP is the child's doctor? Whose advice is followed and what treatment is agreed upon?
- Who gets the child's hair cut and in what style?
- Is the child allowed to have pierced ears and wear jewellery/nail polish/make up? or are some of these things allowed in one household and not the other?

- What about when the parents believe that the child should have different interests – ie different things are valued in the two households? – is soccer practice with the local team missed when the child is in the other household and substituted for music lessons? Or exam coaching?
- What if one parent registers a child for the maths competition in that parent's time and the other parent thinks this is pressuring a child who is not academically inclined?

6. The impact of entrenched family conflict on children

Solicitors acting as child's representatives see first hand the impact of conflict following family breakdown on children. They hear children tell them how they get a "pain in the tummy", and are sometimes physically sick when they move from one parent to the other. They hear children crying and saying they wish it would be all over, or blaming themselves for what is happening between their parents. Child representatives talk with counsellors and doctors about the anxiety, depression and behavioural disorders of children caught in entrenched family conflict.

Research on the impact of conflict on children

While the Pathways report acknowledges that there is a significant lack of Australian based research about issues relating to parenting and family breakdown, there is relevant research which refers to the detrimental impact of conflict on children. Dr Jennifer McIntosh of La Trobe University and the Children in Focus Program has undertaken a review of recent research titled "*Entrenched Conflict in Parental Separation: Pathways of Impact on Child Development. A synopsis of recent research*", La Trobe University. May 2002.

Dr. McIntosh notes in her study that "from every theoretical vantage point, research concludes that parental conflict can violate children's core developmental needs, posing a threat to their psychological growth" (p1). More specifically "enduring parental conflict interrupts vital attachment processes in infancy and toddlerhood, with high intensity conflict linked with the development of insecure and disorganised attachment styles...In turn this interrupts the development of emotional security, with children becoming more prone to negative emotional arousal and distress, less able to regulate their feelings, less optimistic about their ability to cope, and less able to cope" (p3). Dr McIntosh notes that research shows "that children of high conflict divorcing families are often preoccupied with surviving in the emotionally volatile climate of their divided family, and confused about their loyalties"(p3). She refers to a state of mind of children of high conflict divorcing families as "one of acute anxiety for the child, whose capacities for everyday learning, thinking, interacting and playing can be sorely diminished by their internal struggles" (p4).

The study also refers to research identifying higher levels of self blame and perceived threat (to children's needs for security and fear of abandonment) as clear vulnerability factors for children exposed to marital conflict and a finding that these factors were also associated with higher levels of internalising and externalising behaviours, health problems and cardio-vascular reactivity to arguments (p5).

There is a real issue as to when the effects of interparental conflict outweigh the benefits of maintaining an ongoing relationship with each parent

Any proposal which had the likely effect of exposing children to higher levels of family conflict, either because they would be exposed to situations of conflict more frequently or because more areas of conflict would be introduced into their lives, risks causing significant harm to children's wellbeing.

7. Need for child focussed research

The Pathways Report noted the "lack of Australian-based research on important family law and separation issues" and recommended that a comprehensive national research strategy be developed in family law and separation issues that recognises Australia's unique characteristics" (p 93-94). This was also a finding acknowledged in the Government Response.

A significant change to the law which will impact so much on children should not be considered without cogent national research in support of the proposition.

8. Optimum indicators for shared care

There is some relevant Australian research in particular the study by Bruce Smyth, Catherine Caruana and Anna Ferraro, "*Some whens, hows and whys of shared care*", a paper given at the Australian Social Policy Conference, 9 –11 July 2003 and published by the Australian Institute of Family Studies. The authors saw their work as only a preliminary study – a work in progress. They noted that a major shortcoming of their study was that data had been gained from the parents and that little was known about the children's views on shared parenting arrangements. They were able to draw some conclusions and reported that the data suggest that families' arrangements "are often logistically complex, and that those who opt for shared care appear to be a relatively distinct sub group of separated parents" p 21.

The study also referred to a number of conditions - relational and structural – that appeared necessary to make shared care a viable option and noted that they included the following:

- Geographic proximity
- The ability of parents to get along in terms of a business-like working relationship as parents
- Child-focused arrangements (with children kept "out in the middle", and with children's activities forming an integral part of the way in which the parenting schedule is developed);
- A commitment by everyone to make shared care work
- Family friendly work places – especially for fathers
- A degree of financial independence – especially for mothers; and a degree of paternal competence

These conclusions reflect what those practising in the area, particularly as child representatives, already understand from their own experience in children's matters.

The required capacity to be able to negotiate issues about day to day aspects of children's lives is one reason why historically the families who have managed shared residence arrangements successfully are those in low conflict who have the skills to communicate well and co-operate and who are child focussed.

9. Increased litigation

The proposal is likely to be an incentive to more litigious behaviour because settlement of matters may be more difficult to achieve if one party thinks that something more could be achieved by litigation because of a presumption that children will spend equal time with each parent.

It is likely also that parties to finalised litigation will seek ways to relitigate to vary orders in the hope of achieving a different result should such a presumption be introduced.

A legal presumption that post separation, children will spend equal time with each parent will encourage adversarial behaviour and increase conflict at a time when the aim of innovation in the family law system has been to reduce conflict, adversarial behaviour and, in the interests of children in particular, make the litigation path the path of last resort.

10. Cost impact

- increased costs in the litigation stream.
- increased resources needed for the court system because of further delays resulting from extra applications to court.
- impact on social security as income is reduced with less child support
- straining of resources of the counselling and parenting services in the community at a time when many family services are already seeking further and more secure funding to maintain and provide services in line with the recommendations of the Pathways Report.
- reduced likelihood for mother to retain the family home with rental assistance more likely to be required – and, associated with this, less stability in housing arrangements for children.
- need for more child care facilities as children are more likely to spend time in the care of a working parent.

The inevitable result of the introduction of the presumption is to increase costs in the litigation stream, including costs for Legal Aid Commissions, to increase demand and to strain the resources of the family service sector.

11. Alternatives to legislative prescription

The goal is to maintain relationships between children and both their parents following family breakdown where that does not pose a risk to children which of course will be the situation for the great majority of families.

The Wallerstein and Lewis longitudinal study referred to previously:

Parent child relationships that have been cut loose from their moorings to the marital bond within which they developed are inherently less stable than those in intact families. We observed in this study that a father's interest and availability to his children tended to fluctuate widely in accord with the father's sense of success or failure in other parts of his life. Men who were troubled or unhappy, physically unwell or economically failin, had difficulty maintaining regular contact with their children...The psychological status and dominant mood of the father, which varied a good deal during the years following the break-up, especially among younger men was, then, an important influence in the father's capacity to maintain his contact with his child...Contact with the child also varied with the father's remarriage, with the attitude of the new wife and the presence of children within the new family. Stepmothers, especially if they had children of their own, were often frank to say that they resented the children of the husband's first marriage and saw them as intruders...Men who had been good parents within the supportive structure of the marriage gradually stopped visiting as new jobs, new locales, or new relationships took hold of their main interests (pp374-375).

Dr McIntosh's study also commented on the father's role and noted that:

"the fathering role appears to be more consistently altered by marital conflict than the mothering role...Research suggests that the fathering role remains more tenuous and less well defined socially than the mothering role, and more subject to the disruption and disorganisation that marital conflict brings. Withdrawal of the mother from room facilitating situations that enhance the father-child relationship is a key variable here (p11).

To achieve better outcomes for children in terms of relationships with both their parents following family breakdown requires more than legislative prescription.

Significant are major social issues such as work/family balance and flexibility in the workplace. The economic pressures on families mean that in most families, at least one parent needs to be committed to full time work.

A change in behaviour following separation needs to be underpinned by changes in social attitudes, changes in attitudes towards the responsibilities of parents and a

more child focussed approach in dealing with the issues which stem from family breakdown.

The law has been changed both in its vocabulary, the flexibility of the parenting orders it can make, in its objects and principles and in the increased emphasis on mediation.

What is needed is to educate people about these changes and by an education program support the values of approaches which are child focussed.

This was something strongly recommended in the Pathways Report where recommendation 2 was:

That a long-term community education campaign, with clear core messages and promoting the principles that underpin the family law system, be developed. The campaign would:

- a. focus in the interests and needs of children;*
- b. reinforce post-separation parenting responsibilities (including flexible parenting models that work); and*
- c. provide information about where to get help*

That Report also strongly recommended support for a wide range of community based family services including counselling support, family relationship services, services specifically to support children in separating families, services to help men co-parent and contact services.

Contact services are a particular means of promoting parents' contact to children. While the Government has established 35 Children's Contact Services since 1996, they are thinly spread. Sydney, for example, with a population of over 4 million has two funded contact services. These centres play an important role in facilitating contact. They allow for the reintroduction into children's lives of fathers who have dropped out of their children's lives. They allow for children to move between hostile parents without being exposed to direct conflict between the parents. They also allow for contact to continue while allegations of violence and abuse are investigated. Potentially they can also be linked with other services which can enhance parenting capacity and foster relationships between parents and their children.

To increase the effectiveness of the community based family support services recommended by the Pathways Report there should be an ongoing evaluation of the quality, relevance and accessibility of the developing programs. Many of these services are handicapped by a lack of certainty about their longer term funding. Many client groups still have difficulties accessing family services.

Obtaining therapy for children affected by family breakdown remains difficult for parents who cannot afford the cost of private psychologists whose services are not covered under Medicare. Upon separation families inevitably experience increased cost pressures if for no other reason than that two households are more expensive

to run than one. The services of publicly funded services are effectively rationed with long waiting lists or restrictive entry guidelines.

In summary, there are many ways to facilitate both parents having a quality relationship with their children after separating. However the provision in legislation of a presumption that children spend equal time with each parent is likely to be counter productive, to place more stress on children, to encourage more litigation and have cost impacts on both families and service providers.

CONTACT WITH OTHER PERSONS INCLUDING GRANDPARENTS

The Family Law Act presently provides that "children have a right of contact on a regular basis, with both their parents and with other people significant to their care, welfare and development" (Section 60B(2)(b)). This, of course, includes grandparents.

Section 65C of the Family Law Act already specifically provides for applications by grandparents.

The Pathways Report at p19 notes that some grandparents may provide the only source of a stable relationship for children in the aftermath of separation. From the experience of practitioners in the Legal Aid Commission this can certainly be the case, especially when there is an issue of parenting capacity relating to one of the parents. This may involve allegations of substance abuse or possibly mental health issues. Children may reside for periods of time with grandparents or grandparents may play a role as supervisors of contact.

Unfortunately there are also matters where grandparents can enter into the adversarial situation by aligning with the position of their adult child who is a party to the litigation. In these cases the conflict is compounded as is the pressure on a child.

There may be other cases – fortunately not many - where grandparents have a position different to that of either of the parents and where the result of grandparent involvement would be to increase the area of conflict impinging on a child. However all of these matters can be addressed in the best interests of children in their particular circumstances in the law as it presently stands. There would be no purpose in any change to the law.

In the interests of children the approach to grandparent issues must be child focussed to avoid increasing family conflict for children and increasing the resort to litigation.

CHILD SUPPORT

The objects of the child support legislation (see section 4(2) of the *Child Support (Assessment) Act 1989*) as follows:

- (a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support; and
- (b) that the level of financial support to be provided by parents for their children should be determined in accordance with the legislatively fixed standards; and
- (c) that persons who provide ongoing daily care for children should be able to have the level of financial support to be provided for the children readily determined without the need to resort to court proceedings; and
- (d) that children share in changes in the standard of living of both their parents, whether or not they are living with both or either of them; and
- (e) that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, parentage or marriage.

We support the view that an administrative system of child support is a more appropriate method of determining child support obligations than a court-based system. A fundamental principle underlying the *Family Law Act 1975* and the child support legislation is that child support and contact/residence issues are dealt with separately. It is important that any proposed changes to the child support scheme seek to uphold this principle.

The existing child support formula was developed following extensive research into the costs of maintaining children carried out by the Australian Institute of Family Studies. It should be emphasised that shared care arrangements are *already* reflected in the child support formula as a result of this research, and later amendments to the formula.

We have seen examples of parents wishing to influence the amount of contact because of the implications for their child support payments, rather than what is in the best interests of the children. For this reason, we are concerned that any further alteration to the formula providing for a reduction of child support when contact increases will result in increased litigation between parents. A recent amendment to the *Child Support (Assessment) Act 1989* (see section 8A of the *Child Support (Assessment) Act 1989*) makes it possible for a non-resident parent to pay child support in accordance with the care of the children as outlined in a court order, rather than the current care arrangements for the children. In our experience we have regularly seen resident parents who have contact orders, which are not being complied with, by the non-resident parent. In these circumstances the level of child support would be based on the contact orders, although the non-resident parent is not exercising that level of contact. Resident parents are then faced with the need to apply to the court to vary their contact orders to ensure that the child support is based on the actual arrangements for the children. If the Committee is of the view that there should be a change to the child support formula such as reducing the percentage of nights required to reduce child support from 30% to 10% there should be an amendment to the *Family Law Act 1975* to allow resident parents to enforce contact orders.

We are concerned that further changes to the formula will result in increased litigation between parents.

It must be acknowledged that reducing the child support provided for children in low-income families on the basis that the non-resident parent is exercising a certain amount of contact will simply further disadvantage such children and place increased pressure on the social security system.

It follows that before the child support formula is departed from there is a need for in-depth research into:

- (a) *whether the current formula reflects the costs of care of and contact with children*
- (b) *the effect of contact arrangements on the costs of maintaining children*

The terms of reference in relation to child support asks "whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children". If amendments are being considered in relation to the child support scheme they should have a broad focus, taking into account other areas for attention and reform such as:

- the problem of parents entering into child support agreements without adequate understanding of the effect of such agreements – consideration should be given to a requirement for independent legal advice before agreements can be registered with the Child Support Agency
- widespread enforcement problems where the non-resident parent is self-employed – in our experience there are a vast number of resident parents who are not receiving any child support for this reason
- the capacity for the child support formula to recognise differentials in the cost of living across Australia.