1 INTRODUCTION

In the manner of the Family Court I will commence my submission with a case summary:

- There are two children of my marriage, my daughter, now 13 years old and my son, now 11 years old.
- I am 45 years old and was married for a little over 13 years.
- I have been separated for over 18 months

I believe that a presumption of shared parenting would have eliminated a large amount of the distress that my children have been through in the last year and half.

The current adversarial legal system encourages lawyers, acting for their adult clients, to manoeuvre for advantage with no apparent thought for the impact of their actions on the children involved.

The process has become so systematised that the legal and judicial participants no longer see the effect on the families and children. In some senses the Family Court is adopting a "head in the sand" attitude so that it can maintain the pretence that is has always acted in the best interests of the children. There are a large number of fictions maintained by both the solicitors and judges to ensure that they can legitimately claim to be unaware of some issues or actions.

Several provisions of family law and civil law are open to abuse and are currently misused by solicitors to gain advantage for their adult clients with no regard for the impact these actions have on the children.

Some special interest groups have waged a campaign against the proposal of rebuttable shared parenting using a variety of skewed statistics or claims that it will create more violence against mothers and children.

In addition to the inequities in the current approach to residency provisions for children the Child Support (Assessment) Act does not provide adequate recognition of the provision of residency on the part of parents not involved in shared care.

2 BEST INTERESTS OF THE CHILDREN

One of the most vexed questions that seems to be thrown around by opponents of the concept of shared parenting is that it is not in the best interests of the children. The Family Court seems to believe that it has a moratorium on the determination of what is in the best interests of the children.

Section 43 of the Family Law Act states:

> ***43 Principles to be applied by courts***
> *The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:*
> *(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;*
> *(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;*
> *(c) the need to protect the rights of children and to promote their welfare;*
> *(ca) the need to ensure safety from family violence; and*

> *(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children.*

I would like to contend that since we consider a family with two parents, actively involved in parenting, as the normal and optimum goal we should continue to pursue that goal in the event of separation. Anything else is not in the best interests of the children.

The current conduct of the Family Courts and a number of special interest groups is, I believe, focussed on disconnecting fathers from their role in parenting. For example groups such as the National Council for Single Mothers and their Children (NCSMC) state in their charter that they are a self help group to fight for the basic and essential rights of all sole parent families. Their motto is: "Single Mothers : Half the couple, twice the parent". It would seem that by their definition fathers are not parents. Why is a family post separation automatically considered to be a sole parent family? The NCSMC starts from a premise that post separation the father will be excluded from parenting. This is an extremely biased and discriminatory view which does not seem to have any basis other than pure self-interest.

The best interests of the children must involve ongoing contribution to their parenting from both parents post separation. Attempts to portray either parent, by gender or other characteristic, as of lesser importance is not in the best interests of the children. The argument for presumptive shared parenting is not a gender based issue where one parent is considered to be a better role model than the other, it is an argument which says that children are better prepared for life by being exposed to as great a range of role models as is possible within the limits of their family.

3 VIOLENCE

Dr Elspeth McInnes from the National Council for Single Mothers and their Children is fond of quoting statistics that variously claim that over 40% of mothers experience violence during separation. The figure notionally comes from the Australian Bureau of Statistics (ABS) 1996 publication "Women's Safety Australia" [1]. The ABS publication states in the pre-amble that only 6,300 women completed the survey used to develop the report yet the report quotes various numbers of respondents including, in the section below, figures of 1.1 million women:

> *"3.3% of women experienced violence from a previous partner during the previous 12 month period. Many of these will no longer be in contact with this partner. When violence over the whole relationship is considered, women were much more likely to have experienced violence from a partner they no longer live with than from a current partner. 42% of women (1.1 million) who had been in a previous relationship reported an incident of violence by a previous partner compared to 8.0% of women who reported violence from a current partner during the relationship. Women were more at risk of physical violence than sexual violence. 42% of women who had been in a previous relationship had experienced physical violence and 10% had experienced sexual violence."*

It would seem that there several inconsistencies in these figures as only 3.3% of women experienced violence in the past 12 months yet 42% of women had experienced violence. The report actually states that 42% of women who had been in a previous relationship had experienced violence in that previous relationship and had left that relationship but only 3.3% of women had experienced violence from a previous partner after they had left the

[1] Australian Bureau of Statistics publication 4128.0 Women's Safety Australia, 1996

relationship. This is a significantly different interpretation to that employed by Dr McInnes who is suggesting that the violence continues post separation to the tune of 42% not 3.3%.

Since there is a discrepancy between the figures of 6,300 survey respondents and 1.1 million I have assumed that the 1.1 million figure comes from court statistics but I have not been able to authenticate the origin of these figures. I would instead like to offer a description of my experience to demonstrate that the statistics quoted, even if based on court figures are heavily biased and unreliable.

My wife and I agreed to separate in December 2001. At the time my wife advised me that she did not want to tell the children until we had sorted out what we were going to do. We continued to live in the same house and even took the children to Coffs Harbour for a weeks holiday that had been planned for some months. We talked about shared residency and property settlements. My wife advised me that she wished to talk to a lawyer about her options and was unable to get an appointment until early January 2003. After talking to her lawyer she advised me that we should attend a mediation conference in late January 2003.

I provided my wife with a draft parenting plan based on shared residency that I had drawn up to use as a discussion point. We attended a mediation conference which failed to resolve any issues and were scheduled to attend another conference in mid-February 2003. On the day of the second mediation conference I was advised that my wife did not want to attend. No reason was given. During this period we continued to live in the same house and had not yet told the children that we were going to separate. Two days later I received a phone call from the Civic Police Station advising me that they had some papers that I was required to collect. On arrival at the Police Station I was presented with an Interim Protection Order issued by the ACT Magistrates Court. I have enclosed a copy of the order and the accompanying application for your information at Enclosure 1.

Because my wife had not told the children that she was applying for this order I had to tell my children that I might not see them again for 2 years if the court granted their mother's application. As someone who had served 22 years as an Officer in the Australian Army I had thought that telling parents that their son or daughter had died was the most harrowing thing I had ever done in my life. On the evening that I told my children about their mother's application for a Protection Order I discovered that I had been wrong. Trying to explain what might happen to my children was uncountable orders of magnitude worse.

In her application for the order my wife alleges that I am violent and that I threatened her to the point where she became frightened. It should be noted that the domestic violence legislation does not require proof in accordance with the rules of evidence, only that the applicant has a real fear of violence. There is no substance to my wife's allegation and she was never asked to provide any substantive proof. In her application she asks that, for a period of 2 years, I be restrained from coming within 100 metres of herself and the children, to have no contact with the children. The Magistrate did not grant her request but did provide what is referred to as an anti-harassment order (See Enclosure 1). I was advised, informally, by my solicitor at the time, that the ACT Magistrates Court rarely ever rejects an application outright, preferring to issue the anti-harassment order instead. The reason provided was that at some time in the past a Magistrate had rejected an application and the woman was later injured or murdered. My solicitor also advised me that the order was colloquially referred to by the legal profession as an "eviction order" because it was commonly used to force a husband to leave the family home. It is apparent that the legal system accepts this as a standard tactic and does not appear to care what effect this has on children.

As a result of being advised by my solicitor that there were significant risks in attempting to rebut the Protection order application in the ACT Magistrates Court because the ACT Magistrates Court would not provide me with a presumption of innocence, nor would it place a reasonable burden of proof on my wife, I was immediately placed in an untenable position. I was then offered a deal by my wife's solicitor whereby the application for the Protection Order would be withdrawn if I agreed to the Family Court consent orders that were offered. I was advised by my solicitor that I should agree to the proposed consent orders presented by my wife's solicitor. I have enclosed a copy of the orders for your information at Enclosure 2. As you can see the orders do not represent any concept of equity for my children or myself. My wife not only enjoys the benefits of the use of our home at no cost to herself she also receives full child support because I have been advised by my Child Support Agency (CSA) case officer that the calculation system used by the CSA does not recognise the provision of mortgage payments, free babysitting or health insurance as deductible amounts. Yet I would assume that the basal assumptions in determining what is included in the cost of residence would include factors such as these. It is a principle in law that you cannot enter into a contract when one party has placed the other in an environment of duress. Yet the Family Court permitted these orders to be issued because it was "unaware" of the actions in the ACT Magistrates Court and the professionals involved, mine and my wife's solicitor, did not advise the court that there was any impropriety in the method of obtaining the "agreement". If my wife had made an application for protection from domestic violence through the Family Court then I understand that she would not have been able to use the action to negotiate an advantageous set of consent orders hence the application had to be made in the ACT Magistrates Court.

One would assume that if my wife's application for a Protection Order was based on a real fear of violence that she would seek to maintain the protection that she had originally sought, in other words that I be restrained from contact with my children. Yet the moment she achieved a financially beneficial set of consent orders she withdrew the application for a Protection Order. I believe that my wife was acting upon advice from her solicitor but I understand that it is another of the professional fictions that solicitors are not involved in the applications for "eviction orders" as they cannot be seen to encourage an abuse of the court and legal process.

I later found out from my children that my wife had asked them repeatedly throughout January 2002 if I had ever hurt them, molested them or abused them. My daughter was extremely upset about it as she felt that she had betrayed me by telling my wife that I had once smacked her. I have had to constantly reassure my daughter that as long as she tells the truth then she should not feel guilty. My son has advised me that he told my wife that I had not hurt, molested or abused him despite his mother's increasingly strident demands that she tell him what I had done to him. I do not know what long-term damage has been done to my children by my wife, in following what I assume to be her solicitors advice, by inventing a domestic violence problem, where none exists, so as to gain negotiating advantage. Certainly this action by my wife would not appear to have been in the best interests of my children yet the Family Court will take no action as the matter is not within it's jurisdiction.

If the statistics that are misquoted by Dr McInnes are merely based on initial applications for Protection Orders but do not reflect how many were actually continued or granted then they are not a true representation of the level of violence in family breakdown. Discussions with others who have been through similar events to me suggests that there is anecdotal evidence that a majority of applications are used as "eviction orders".

I do not seek to minimise the issues relating to violence against adults or children but I do seek to ensure that the actual incidence of violence be viewed in the correct statistical context. In recent years approximately 55,000 Australian couples separate each year, using an estimate of 2 children per couple there are approximately 110,000 children involved in those separations. If approximately 4% of these families experience violence problems then at least 105,000 children should be given the opportunity to continue their growth and development in an environment of shared parenting rather than sole parenting.

If there was a rebuttable presumption of shared parenting embedded in the Family Law Act then the abuse of process I have described above would no longer be encouraged. I cannot say that it will be removed but I would hope that that was possible.

It would not be appropriate for a change to the legislation regarding domestic violence but a rebuttable presumption of shared parenting would go a long way to removing the temptation to use false allegations of domestic violence to gain advantage in Family Court negotiations.

A rebuttable presumption of shared parenting still ensures the safety of children and parents where there is demonstrable evidence, or risk, of violence. It places the burden of proof on the applicant and provides protection to both applicant and respondent.

4 ADVERSARIAL LEGAL SYSTEM

The current Family Law Act encourages adversarial conduct on the part of the solicitors involved. They are charged by their profession to achieve the best possible outcome for their clients. Since their clients are the parents involved they probably convince themselves that the best interests of the children are served by achieving the best outcome for their client. It would seem from my experience with the Family Court process that most legal professionals focus on the property settlement as the measure of their success and only pay lip service to the interests of the children.

Since the Family Court requires that residency issues be dealt with before property issues the legal professionals work to expedite the residency outcome from both parents view point. Early in my separation from my wife my solicitor advised me that she had two methods of payment for her services. The first was to pay as I went and the second was that she would take her fee out of my property settlement. She also advised me that the second option would cost me more as she would have to factor into account the period of time between the work done on my behalf and the likely effective date of a property settlement.

Further discussion on the matter revealed that if I opted for the second payment method then my solicitor would seek to get an expedited residency settlement, in which she encouraged me to agree to the then interim orders giving my wife sole residency, as this would reduce my overall costs. No mention was made in this discussion of the best interests of the children. I was just politely informed of the potential for increased costs versus a quick resolution. The interest rate discussed was between 5% and 10% depending on the time taken to achieve a settlement. During this discussion several references were made to the perceived attitudes of the Family Court that if residency issues were to go to a judicial determination then the longer the process went on the more likely it was that the judge would award sole residency to my wife. The picture painted was that nothing was going to get shared residency unless my wife voluntarily offered it. It was even suggested to me that best thing to do was get on with life and make the best of bad situation. As with most humans my solicitor was at great pains to pint out that she felt almost as powerless as I in helping my children but advised me that I shouldn't dwell on the problem and move on. It was quite clear that my solicitor's priorities, as I would guess all Family Law practitioners priorities, were, in decreasing importance, her

income, my property settlement and my children's residence arrangements. Yet the Family Court supposedly puts children first.

Almost all actions I have experienced in the Family Court have been based on an adversarial approach. I have not seen any evidence of the court attempting to determine what is in the best interests of our children, nor challenging the information presented by mine or my wife's solicitor, as being pertinent to the interests of our children.

In relation to the conduct of legal practitioners within the ACT it is interesting to note that the Professional Conduct rules of the ACT Law Society provide a simple excuse for improper conduct in the Introduction to the rules:

> *The Rules are intended to assist practitioners in the conduct of their practices. While it may indicate to the Society's Complaints Committee or the Court the opinion of the Law Society on matters of ethics and practice, it is not a penal code. A breach of the Rules may not necessarily amount to professional misconduct or unsatisfactory professional conduct. However, practitioners should abide by the terms of the Rules. If a practitioner does not do so, then the onus will be on the practitioner to justify his or her conduct.*

It should also be noted that despite civil matters making up the majority of legal practice the rules focus almost exclusively on criminal matters. Hence almost any conduct is permissible in civil actions such as those within the Family Court.

A presumption of shared parenting which requires demonstrated and tested rebuttal would alter the current balance of power and potentially remove the ability of solicitors to obtain inequitable benefits for their clients through inappropriate actions. It would focus the solicitors actions on dealing with the parenting ability of the father and mother and not on abuse of process through other means.

A definitive requirement to resolve residency issues before there is any consideration of property issues would also assist in retaining focus on the most important issue of the best interests of the children. Excluding property until such time as residency is resolved should serve to eliminate the tactical posturing that is common at present.

5 FAMILY COURT JUDICIAL ATTITUDES

The Family Court continually states that is not possible to provide a definitive statement of what is the best interests of the child. We are told that this is an extremely complex issue and can only be determined by a judge. I would agree that it is not possible to accurately define the problem but I do believe that we can set some guidelines that need to be considered. Since the Family Court has continuously refused to do so then it should be the role of the Parliament to embody those guidelines within the Family Law Act.

The Family Court has demonstrated that it's attitudes are not in accord with the community. Despite all the evidence of change with respect to parenting the Family Court has in fact not changed it's attitudes since before the Family Law Act was implemented in 1975. A recent statement by the current Chief Justice of the Family Court trumpets this attitude as a demonstration that The Family court knows best. In an address to the LawAsia Conference on 21 June 2003[2] the Chief Justice stated:

> *In a judgment delivered just 2 months after the Family Court opened its doors, (and when the previous concepts of custody and access represented the law) Justice Demack considered whether there was a case for joint custody or sole custody and the extent to which the father ought to have access to the child. In his judgment, he said*
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> > ``I find the concept of joint custody a very difficult one to understand, but under sec. 61(1) of the Family Law Act , Parliament has enacted that the married parents of a child have joint custody of that child. Whatever this means, it appears to me that it is a state of fact and law which can only continue where the parties are in full amicable agreement about all aspects of the care, protection, custody, control, education and welfare of the child. Once there is disagreement on any of these issues, there must be some source of authority to determine what the resolution of the disagreement is to be.
> >
> > It seems to me, therefore, that in most instances, once the matter comes to Court, there is no place for an order for joint custody. To make such an order once the parties have chosen the path of litigation is to either encourage further litigation or to require the parties to achieve some kind of compromise which will almost inevitably have a disturbing effect upon their relationship with the child."
>
> *The jurisprudence of this Court has been consistent, and very rarely have joint custody orders been made in contested proceedings under the Act, in either its original or current forms. Cases such as Padgen, H and H-K and Forck and Thomas established that these orders were not appropriate unless the parties were compatible, and were able to cooperate, communicate and trust each other. These factors are incompatible with litigation and are rarely present in contested proceedings.*

The Chief Justice seems to be stating that despite the Family Law Act of 1975 and the amendments to the Act of 1996 that in his judicial opinion the situation has not changed since at least the early 1970's and more probably long before. His statement automatically grants an inequitable negotiating position to mothers by declaring that the Court is biased against fathers. For a mother to gain sole residency all she has to do is refuse to agree with any proposals from the father. The court will then see this as failure to communicate and grant her sole residency.

Since the nature of family separation is fundamentally one of disagreement then the Family Court is saying that shared residency is, by definition, impossible. The statistics quoted by

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[2] LawAsia Conference, Brisbane, Children and the Law: Issues in the Asia Pacific Region. Address on Children and Children's Rights in the Context of Family Law by The Honourable Justice Alastair Nicholson AO RFD, Chief Justice, Family Court of Australia (URL http://www.familycourt.gov.au/papers/pdf/context.pdf), page 11.

Chief Justice Nicholson regarding shared residency orders versus sole residency orders do not take into account the inequitable situation created by his statements and attitudes. He implies that sole residency orders are granted because the parents believe that it is in the best interests of their children. My experiences indicate that this is not the case as the statistics reflect the fact that many parents simply cannot sustain the determination for shared residency in the face of the monstrous pressure created by the Family Court.

Chief Justice Nicholson has also stated that[3]:

> *For those somewhere in the middle I would be concerned that one or other parent – and it can, of course, be either the father or the mother – may put pressure on the other parent to agree to the child being 'shared' in circumstances where the child's best interests would be compromised by such an outcome.*

Yet he has already created an environment where undue pressure is applied to fathers to agree to the mother being given sole residency by:

- Choosing to pretend that actions outside his court have no influence upon the proceedings with the Family Court.
- Stating that the court automatically favours mothers over fathers where there is disagreement.

Obviously Chief Justice Nicholson fundamentally believes that the mother being given sole residency of her children is the only measure of the best interests of the child. It is unfortunate that he is in a position of undue influence and power to enforce his errant opinion in the face of continuing change within the community.

It is not just the heavily biased interpretation of the Act by the Family Court that predicates against a true regard for the best interests of the children. There are a range of attitudes that continually draw attention away from the children and on to other matters. One example is the process for submitting forms and information to the Family Court. Whilst there is no form for commencing the discussion with respect to residency there are numerous forms dealing with financial issues. Of the 88 forms currently listed on the Family Court web site 71 deal with procedural issues, 17 with financial issues and only 1 actually deals with children's residency issues. There are several forms that appear to be involved with children's issues but an examination of these forms indicates that they only seek procedural information, not information with regard to what is in the best interests of the children. The one form that allows for information regarding the best interests of the children's residency is the Parenting Plan kit which assumes agreement between the parties.

The attention directed towards property issues is re-inforced by the Family Court's requirements to submit a Form 17 – Financial Statement as part of the initial documentation in a matter. This immediately takes the focus off the best interests of the children as solicitors spend considerable effort in creatively interpreting the property division guidelines in favour of their client. In the several case conferences I have attended all discussion was directed towards property issues as the court once again regarded the children's issues as not in dispute since I had freely and willingly agreed to the sole residency arrangement then in place.

Despite section 43.(b) the current Family Court seems to be saying that fathers are not part of the family once parents separate. Surely we should be doing everything in our power to ensure that even if the parents have separated, and are by definition in dispute, that the impact

[3] Ibid, page 12.

on the children is minimised. A rebuttable presumption of shared parenting needs to be couched in terms that ensure that Family Court must consider demonstrable and refutable reasons for varying residency arrangements away from sole residency.

It is unfortunate that the 1996 amendments to the Family Law Act, to the effect 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 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*
> *(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."*

have been interpreted by the Family Court to[4]:

> *encourage parental responsibility, and exhort both mothers and fathers to focus on their children's future wellbeing rather than their own grief and anger. This concentration on responsibilities rather than rights appears to have been a resounding failure, if the media reports on 'joint custody' are accurately being reported.*

It has only been a failure because the Family court sought to re-interpret what the drafters of the legislation thought was a clear and unambiguous statement. Whilst legislation should always seek to ensure future flexibility of interpretation in the case of the Family Court it would seem that only prescriptive legislation will change the out-of-date and discriminatory attitudes of some members of the court.

The Chief Justice is also on record as saying that[5]:

> *One of the difficulties in this area is the high level of emotion and rhetoric, which unfortunately is not accompanied by clarity of argument.*

yet the Chief Justice goes on to say that[6]:

> *In addition to situations in which a parent is an inappropriate primary carer, there are a number of obvious other factors which militate against shared parenting.*
>
> *These include:*
>
> - *where the parents live considerable distances away from each other and consistency of schooling and peer relationships cannot easily be maintained (to say nothing of the travel difficulties encountered by the child) ,*
> - *Where the parents continue to express hostility to each other, are unable to cooperate with each other or are inflexible;*
> - *Where the parents cannot ensure that their work patterns and living arrangements can accommodate the demands of the children.*

[4] ibid, page 12

[5] ibid, page 9.

[6] Ibid, page 12.

- *Where the accommodation and other facilities to meet the needs of children in two households are not financially within the reach of both parents, given that separation frequently results in less resources being available.*
- *Where prior to separation one parent has had the major role in child care and the other parent does not have the parenting skills necessary to meet the needs of the children.*

Having claimed that there is too much emotion or rhetoric the Chief Justice has attempted to use emotion and rhetoric without reason or clarity. Is the Chief Justice suggesting that all parents will live great distances apart after separation? What are the statistics that suggest these issues may be a significant problem? A rebuttable presumption of shared parenting does not force the court to create an untenable arrangement if this situation occurs, it merely ensures that these types of issues are considered before a decision is made rather the current approach by the Family Court to have prejudged the outcome before hearing any propositions from the parents.

Another failing of the Family Court is its insistence on issuing ambiguous and contradictory orders. Ambiguous orders provide a breeding ground for dispute between parents but the Family Court advises applicants against using detailed orders because it is claimed that overly prescriptive orders prevent flexibility. Where there is the potential for ongoing dispute between parents then reasonable, well developed, orders will overcome the potential for dispute by limiting the requirement for parents to have to resolve issues through discussion. I have had personal experience with the conflict that my existing residence orders have created through poor expression. Given the length of time that the Family Court has been in operation I do not understand how ambiguous, difficult to interpret, orders could be approved by the court without reference to lessons learned from disputes over the same orders in the past.

The Family Court is, I believe, also concerned with the issue of appeal and does not wish to have its decisions questioned. Whilst nominally any litigant can appeal a decision in the Family Court the court is using the exorbitant cost of appeal to avoid review of its decisions. At the end of a length, costly and ultimately painful court process very few litigants have the capability to put themselves through the process again for an appeal. This is the behaviour of a coward who has no confidence in their ability to demonstrate the appropriateness of its decisions. The court is comfortable with the concept that whilst it can determine what is in the best interests of the children it should not be required to explain how it arrived at that determination. Considering the implications of these decisions by the court have ramifications extending over many years then the decisions need to be reviewed so that we can be sure that all factors were given appropriate consideration. The court should be required to articulate the reasoning behind its decisions in clear and unambiguous detail so that the parents and children can understand the logic used by the court to arrive at its decision. There should be a review process, that does not involve the cost of a full appeal, available to parents who wish to contest the decision.

The provision of parenting through shared residency should be independent of any perceived, or created, communication problems. Parents should be required by the court to manage their affairs in such a way as to provide their children with the best possible care. An excuse of "it is too difficult" should not be tolerated either from parents or judges. It may be that focussing on the welfare of their children will alleviate some of the disputes that may occur after separation. The court will still have the responsibility of determining what is in the best interests of the children but it should be done in an open and rebuttable manner not relying on

an assurance from the judiciary that whilst they cannot explain their reasoning we should accept that they know best.

6 CHILD SUPPORT CALCULATIONS

The current Act, and its implementation by the Child Support Agency (CSA), provide for a number of steps in the types of residency used in calculations. As a result a large number of the inequitable residency provisions made by the Family Court and agreed to by parents under the conditions I have described above are clearly designed to maximise the financial return to the payee and minimise the actual responsibility for care.

Take my case for example as shown in Enclosure 2 I agreed to orders that provide me with a base level of residency for my children of 83 nights per year on average. The definition of sole residence used by the CSA is where the child resides with one parent for 256, or more, nights per year. In other words the child resides with the other parent for 110 nights, or less, per year. The Family Court issues orders like mine on a regular basis where one parent is provided with 83-100 nights residency per year. If we assume that the children only spend the minimum of 83 nights per year then they reside with me for 23% of the year, or only 77% of the year with my wife. I think it would be fair to say that when a Family Court judge makes a determination with respect to residence and property he or she takes into account the acknowledged child support assessment system and seeks to maximise the benefits to the parent awarded sole residency.

The current system of child support calculations does not recognise the difference between children who reside for 70% of the year with one parent and those who reside for 100% of the year. I am aware of the arguments that suggest that since my children only spend weekends with me every fortnight that the costs of their residence with me are negligible but what about when they spend half the school holidays, especially the December-January period when they reside with me for up to 5 weeks. During that time I receive no financial recognition of their residence and my wife receives full child support without any need to cover my children's costs.

As can be seen from the orders at Enclosure 2 my wife not only enjoys the benefits of the use of our home at no cost to herself, she also receives full child support because I have been advised by my Child Support Agency (CSA) case officer that the calculation system used by the CSA does not recognise the provision of mortgage payments, free babysitting or health insurance as deductible amounts. Yet I would assume that the basal assumptions in determining what is included in the cost of residence would include factors such as these. This system has prevented me from providing my children with simple things such as a holiday away from home as I have insufficient spare funds due to the financial penalties to which I was forced to agree to gain a small amount of residency with my children. As a result my children do not receive equal standards of living when residing with each parent which I understand to have been the intent of the Act. The table below shows some simple calculations based on my current situation.

	Mother	Father
Base Taxable Income	$30,000	$80,000
Tax	-$5,400	-$25,000
Family Benefits	$4,000	$500
Child Support	$18,000	-$18,000
Effective Disposable Income	$46,600.00	$37,500.00

It should be noted that in my case I have to pay mortgage and rent, on two residences, out of what is left of my disposable income. It is usual to spend 20-25% of net income on rent or mortgage payments so my wife enjoys an even greater benefit as a result of the current changes which, according to advice from the CSA, cannot be recognised.

When I discussed my options to request a review of my child support payments with my CSA case officer I was dissuaded from my intentions by her description of what happens when the case is reviewed. According to her advice the CSA takes into account a range of other factors which often result in the amount of child support to be payed being increased rather than decreased. Whilst it is difficult to consider how this might happen I am financially only just able to meet my current obligations and could not take the risk that my review may make the current situation even worse. As a result I have been forced once again to succumb to pressure form our current system to continue what is an inequitable arrangement.

I have been told by my former solicitor that the orders I was coerced into signing are common and yet the CSA provides no recognition of this. The fact that CSA will not consider these arrangements is an obvious incentive to legal practitioners to gain inequitable advantage for their clients, once again ignoring the impact this may have on children by giving them the impression that they paying parent does not care for them as they cannot provide the standard of living that the payee parent can provide. This is quite clearly another case where the legal system is abusing what was supposed to have been an equitable arrangement between consenting adults.

The child support assessment system should be modified to provide for recognition of factors such as the provision of mortgage payments or other benefits to the payee. The calculation system and its basal assumptions should be clearly articulated in the Act and open to inspection and review.

The child support assessment system should not be based on a limited number of categories of residency as this only serves to encourage the Family Court to create residency arrangements that misuse the intentions of the Child Support (Assessment) Act. A more flexible sliding scale of residence should be instituted that is calculated on the actual number of nights of residence. Possibly using periods of 10 days as the units of measure which would allow for some change in number of nights without the need to re-calculate the assessment. In these days of computerised systems I am sure that it would be possible to create a system that provides maximum flexibility to payee and payer and therefore the maximum benefit to the children.

The child support assessment system should take into account all the financial arrangements that may be agreed to in family court orders. If this were the case then the incentive for punitive financial arrangements would be removed.

7 PRESUMPTIVE SHARED CARE

A rebuttable presumption of shared care will ensure that more children receive the benefits of both parents being actively involved in their upbringing post separation.

Opponents of the proposal for presumptive shared parenting argue that the proposal is being put forward by people and organizations who are acting in the interests of fathers rather than the children. Does this very argument suggest that there is something seriously wrong with our current system where there is a clear gender bias against fathers?

Shared care is the best outcome, post separation, for children as it maintains a family environment that is as close to a conventional family as can be given the fact of separation.

Changes to the Family Law Act to instigate a rebuttable presumption of shared residency must be such that there is no scope for the Family Court to nullify the changes as they did with the 1996 amendments. This is a clear case where a detailed, prescriptive amendment to the Act that leaves both the public and the courts in no doubt as to the intent and the implementation of the amendment is absolutely essential.

8 RECOMMENDATIONS

I recommend that:

(a) The best interests of the children must involve ongoing contribution to their parenting from both parents post separation. Attempts to portray either parent, by gender or other characteristic, as of lesser importance is not in the best interests of the children. The argument for presumptive shared parenting is not ã gender based issue where one parent is considered to be a better role model than the other, it is an argument which says that children are better prepared for life by being part of a complete family, not a divided family.

(b) A rebuttable presumption of shared parenting embedded in the Family Law Act would reduce the opportunity for abuse of process both within the family Court and in other jurisdictions.

(c) A rebuttable presumption of shared parenting would go a long way to removing the temptation to use false allegations of domestic violence to gain advantage in Family Court negotiations.

(d) A rebuttable presumption of shared parenting still ensures the safety of children and parents where there is demonstrable evidence, or risk, of violence. It places the burden of proof on the applicant and provides protection to both applicant and respondent.

(e) A rebuttable presumption of shared parenting which requires demonstrated and tested rebuttal would alter the current balance of power and potentially remove the ability of solicitors to obtain inequitable benefits for their clients through inappropriate actions. It would focus the solicitors actions on dealing with the parenting ability of the father and mother and not on abuse of process through other means.

(f) An amendment to the Family Law Act to implement a definitive requirement to resolve residency issues before there is any consideration of property issues would assist in retaining focus on the most important issue of the best interests of the children. Excluding property until such time as residency is resolved should serve to eliminate the tactical posturing that is common at present.

(g) Actions be taken to discourage the Family Court from it's past insistence on issuing ambiguous and contradictory orders. Where there is the potential for ongoing dispute between parents then reasonable, well developed, orders will overcome the potential for dispute by limiting the requirement for parents to have to resolve issues through discussion.

(h) The Family Court should be required to articulate the reasoning behind its decisions in clear and unambiguous detail so that the parents and children can understand the logic used by the court to arrive at its decision. There should be a review process, that does not involve the cost of a full appeal, available to parents who wish to contest the decision.

(i) The provision of parenting through shared residency should be independent of any perceived, or created, communication problems. Parents should be required by the court to manage their affairs in such a way as to provide their children with the best possible care. An excuse of "it is too difficult" should not be tolerated either from parents or judges. The court will still have the responsibility of determining what is in the best interests of the children but it should be done in an open and rebuttable manner not relying on an assurance from the judiciary that whilst they cannot explain their reasoning we should accept that they know best.

(j) The child support assessment system should be modified to provide for recognition of factors such as the provision of mortgage payments or other benefits to the payee. The calculation system and its basal assumptions should be clearly articulated in the Act and open to inspection and review.

(k) The child support assessment system should not be based on a limited number of categories of residency as this only serves to encourage the Family Court to create residency arrangements that misuse the intentions of the Child Support (Assessment) Act. A more flexible sliding scale of residence should be instituted that is calculated on the actual number of nights of residence. Possibly using periods of 10 days as the units of measure, which would allow for some change in number of nights without the need to re-calculate the assessment. In these days of computerised systems I am sure that it would be possible to create a system that provides maximum flexibility to payee and payer and therefore the maximum benefit to the children.

(l) The child support assessment system should take into account all the financial arrangements that may be agreed to in family court orders. If this were the case then the incentive for punitive financial arrangements would be removed.