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on Family and Community Affairs

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Representing Family Lawyers Throughout Australia

SUBMISSION BY THE FAMILY LAW SECTION OF THE LAW COUNCIL OF AUSTRALIA

TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

August 2003

INQUIRY INTO JOINT CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION AND INTO THE CHILD SUPPORT FORMULA

EXECUTIVE SUMMARY

- The imposition of a rebuttable presumption of joint parenting will distract parents and the courts from considering the best interests of children and will add to the length and cost of court proceedings to the detriment of the court system, parents and their children.

- Enhancing the parenting role of fathers is a desirable objective and is appropriately achieved by:

    - Promoting joint parenting in intact families.
    - Promoting flexible working arrangements for fathers in intact families and post-separation.

- The effect of the child support formula on families has probably been affected by important changes to the child support scheme which have been introduced since the original formula was devised.

- Whether or not the child support formula currently works fairly and consistently can only be determined by appropriate research and that research has yet to be carried out.

1. INTRODUCTION

1.1 Members of the Family Law Section of the Law Council represent parents and children in all States and Territories of Australia from the very beginning of their process of separation through their pathway to finalisation of their family arrangements. In the course of the journey, lawyers facilitate an infinite variety of solutions because each family is unique and the needs of each family are different. The guiding principle in each case is "what outcome best promotes the interests of the children in this family?"

1.2 Section 65E of the *Family Law Act 1975* provides that:

> "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

1.3 Lawyers are one of the largest groups of professionals in the family law system who provide information and advice to separating couples on their entitlements, obligations and expectations.[1]

1.4 The Annual report of the Family Court of Australia tells us that:

> "Historically, around 6% of applications for final orders have proceeded to hearing before a judge, the remainder resolving or settling at various stages in the case management process, and the proportion in 2001-2002 (6.2%) was the same as in the previous year."[2]

1.5 Not all families want or need to go to the Family Court. Many families resolve their arrangements after separation by agreement between them and without the need for Orders. Some of these families arrive at their arrangements after seeking legal advice. Some do not need legal advice and do not seek it. The figure of 6% represents a percentage of those families who commence court proceedings. If separating families are considered as a whole, those who are represented in that 6% are a far lower percentage of the overall group of separating families.

1.6 An overwhelming majority of families therefore resolve their parenting arrangements after separation by agreement between them, either without any intervention by lawyers or with the assistance of their lawyers.

1.7 However, given the fact that 94% of families who commence applications in the Family Law litigation system are able to resolve them by consent, it must be acknowledged that lawyers play a significant part in helping to achieve those resolutions.

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1 Report of the Family Law Pathways Advisory Group "Out of the Maze" 20 July 2001 at p21

2 Family Court Annual Report 2001-2002

2. WHAT IS JOINT PARENTING?

2.1 Most separating parents devise post-separation parenting arrangements which best suit their families and which are tailored to take into account the peculiar situations they face – working commitments, sporting commitments, school commitments, religious commitments, and the special needs of their children having regard to their ages and stages of maturity. In some cases parents agree on a shared parenting regime which involves both parents in the substantial care of their children.

2.2 However, the degree of co-operation which is involved in a shared care arrangement is far greater than that which was involved in an intact family. Shared parenting involves a high level of communication and willingness to compromise and to co-operate on the part of both parents and the children. Discussions which take place around the dinner or breakfast table in an intact family, discussions about "who can pick up the kids from soccer training tonight" or "the dentist rang to change the appointment" or "I have to work late on Wednesday" take place every day in a family where at least one parent has work commitments. If the parents don't live in the same house, the discussions have to take place by another means. A great deal of good will is required on the part of both parents to keep the channels of communication open and the flow of information current. Information about the day to day activities of the children and of the parents which would have been passed on in conversation in the evening now has to be the subject of deliberate and organised communication.

2.3 Experience tells us that these arrangements work because the parents involved really want them to work and are both prepared to make the effort and sacrifices entailed. For whatever reason, these parents have relationships characterised by a low level of conflict and a high level of co-operation.

2.4 Shared parenting is not merely a matter of children spending some days in one household and some days in another. Shared parenting involves ensuring that the needs of children as they change from day to day are met by both of their parents. It involves a high degree of communication between the parents about what is going on in the children's lives from day to day.

2.5 Unfinished homework assignments, changed sporting commitments, school play rehearsals – all of these things are handled and juggled by parents living together. How well will they be handled by parents who will not speak to each other and who may well detest each other? How do shared parenting arrangements work where that necessary degree of good will and co-operation is not present?

2.6 These issues have been the subject of expert evidence and consideration in the Family Court and in the Federal Magistrates' Court. In a recent decision of the Federal Magistrates Court, Magistrate Ryan has given consideration to the factors necessary to promote successful joint parenting. In Hitchcock and Hitchcock[3], dealing with an application for a joint parenting order, Her Honour summarised the relevant law and drew from it a number of factors:

> "Although not binding authority the Australian pre-Family Law Reform Act cases give useful guidance to those factual matters that a court adjudicating a 50/50 shared parenting application pursuant to the current legislation should consider. There is a core consistency found between the English and Canadian authorities. These countries share a similar jurisprudence in the adjudication of private family law disputes with Australia. This commonality is apparent in a number of respects. All jurisdictions implement a paramountcy principle. Although its statutory formulation may differ slightly, the essential premise is the same. That is the best interest of the particular child is the paramount or primary consideration. There are no presumptions that override the court's obligation to promote the child's best interests. Individual justice is fundamental and hence the exercise of judicial discretion critical. Nowhere is it more apparent that Australian courts exercising jurisdiction under the Family Law Act can look to Canada and England for guidance in the interpretation and application of Australian law than in *B and B: Family Law Reform Act (supra).* In that matter the Full Court of the Family Court of Australia addressed the impact of the *Family Law Reform Act 1995* upon the principles to be applied in parenting cases under Part VII of the *Family Law Act 1975.* In doing so they reviewed the English and Canadian authorities.
>
> Although there are consistencies in the applicable family laws between these countries there are differences that cannot be overlooked. The English law gives the person who has a residence order the authority to manage the child's daily life. In Australia that arises pursuant to a specific issues order. An order for residence will do no more than determine with whom a child will live. The English law also places greater emphasis on minimising judicial intervention in parenting cases. As John Dewar has explained: "there is an explicit direction to the courts [in the *Children Act 1989* (UK) s.1(5)] that they should only make an order if it can be shown that to do so would be better for the child than making no order at all (the "presumption of no order")."[4] One major respect in which the Canadian law differs from the Australian

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3 Hitchcock & Hitchcock (2003) FMCAfam 41 at paragraphs 45-47

4 John Dewar, "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) Compared-Twins or Distant Cousins?" (1986) *Australian Journal of Family Law.*

and English law is that the language of custody, guardianship and access have not been replaced with that of parental responsibility, residence and contact as they have in both the *Children's Law Act 1989* (UK) the *Family Law Reform Act 1995* (Cth) (though the concepts associated with these terms in Australian law are, as suggested above, not identical to the English concepts).[5] In Canada, decision-making authority is part and parcel of any order for custody. As noted above, in Australia, an order for residence (physical custody) will do no more than determine with whom a child will live. Furthermore, the Canadian legislation requires its courts to maximise the time a child spends with both its parents.[6] It is not surprising that the Canadian case law is replete with judicial analysis of factual indicia that work in favour or against equal shared residence orders (joint *physical* custody). The maximisation provision is, of course, not absolute. It will be restricted to the extent that it conflicts with the best interests of the child.[7]

Drawing then from the case law the factors that the court should particularly examine in cases where a party seeks orders that share a child's time equally between its parents (or others) include the following:

- The parties' capacity to communicate on matters relevant to the child's welfare.
- The physical proximity of the two households.
- Are the homes sufficiently proximate that the child can maintain their friendships in both homes?
- The prior history of caring for the child. Have the parties demonstrated that they can implement a 50/50 living arrangement without undermining the child's adjustment?

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5 See Brenda Cossman and Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" *Revue Canadienne de Droit Familial* Vol. 15 at 13-78.

6 *Divorce Act* s16(10). It is interesting to note that in *B and B (Family Law Reform Act 1995)* (1997) FLC 92-755, the Full Court stated (at para. 7.58) that the Canadian maximisation of contact provision has "*obvious similarities to the terms of ss. 60B(2)(b) and 68F(2)(d)*" of the Family Law Act 1975 (Cth). The Full Court also stated (at para. 9.60 – emphasis added): "*In cases where there are no countervailing factors the s.60B principles may be decisive, not only because they are contained in s.60B but because they accord with what is in the best interests of the particular children.* Where there are no countervailing factors, the Court may normally be expected to conclude that it is in the best interests of the children to have as much contact with each parent as is practicable. *However, to attempt to impose that approach in cases where the best interests of the children may not indicate that conclusion as appropriate is contrary to the legislation and contrary to the long established views of this and other courts which deal daily with the welfare or best interests of children.*"

7 See, for example, *Young v. Young* [1993] 4 S.C.R. 3 and Madame Justice Lachlin's judgment in the Supreme Court of Canada case of *Gordon v. Goertz* (1996) 134 DLR (4th) as cited by the Full Court of the Family Court of Australia in *B and B (Family Law Reform Act 1995)* (1997) FLC 92-755 at para. 7.67.

- Whether the parties agree or disagree on matters relevant to the child's day to day life. For example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern.
- Where they disagree on these matters the likelihood that they would be able to reach a reasonable compromise.
- Do they share similar ambitions for the child? For example, religious adherence, cultural identity and extra-curricular activities.
- Can they address on a continuing basis the practical considerations that arise when a child lives in 2 homes? If the child leaves necessary school work or equipment at the other home will the parents readily rectify the problem?
- Whether or not the parties respect the other party as a parent.
- The child's wishes and the factors that influence those wishes.
- Where siblings live.
- The child's age."

2.7 The Law Council respectfully agrees with Her Honour's assessment of the law and of the relevant factors necessary to ensure successful joint parenting.

2.8 The "Pathways Report"[8] confirms what we have all understood about separating families:

> "everyone is emotional and distressed at the time of separation. This affects their ability to put the children's interests first, their ability to access and process information, and their ability to make good decisions".

2.9 The suggestion that there should be a presumption that children will spend equal time with each parent is an emotional proposition born of distress. But does it take into account the welfare of children? The simplest reality test of the proposition is to put the reverse. Should there be a presumption that children remain in their accustomed home and the parents move in and out of the home, maintaining some alternate residence for both to share, as they care for the children? This suggestion commonly draws gasps of horror from parents. Adults recognise the importance of a "home", a "settled place", for themselves. Few adults can contemplate not having a place that is their home, their sanctuary. But they propose that such an arrangement should be imposed on their children.

2.10 It is not sufficient to counter with the argument "the children will have two homes". The fact is, they are simply deprived of any home.

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[8] Report of the Family Law Pathways Advisory Group op cit at page 6

2.11 The Committee will be referred to research conducted overseas in countries where a legislative scheme of equally shared parenting arrangements has been tried and to other research on parenting arrangements after separation. Some of this research is outlined in this submission.

2.12 Carol Smart[9] of the Centre for Research on Family, Kinship and Childhood of the University of Leeds in the United Kingdom refers to research based on a number of projects including a project where 65 children who were being "co-parented" were interviewed. Dealing with the physical consequences of moving from house to house was, she found, "irksome" –

> "However these practical issues were probably the most easy to accommodate – at least if the parents were attentive to the problems. However, we found that the children were not only traversing physical space but also emotional and psychological space and that this gave rise to rather different issues that require more attentiveness on the part of adults.
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> The journey between a mother's house and a father's house is also a journey between two emotional zones. Where once the family lived together, the physical separation of the parents symbolises the fact that they now occupy different emotional spheres in relation to one another. One parent may still be grieving the breakdown, one may be irritated with the other; one may be lonely, one may have a new partner and children. Thus children may be moving not simply from one house to another, but from one emotional landscape to another. Moreover, they are likely to feel the difference acutely and will have their own feelings about these emotional zones. Some of the children we interviewed had to spend time with aggressive, resentful or distressed parents and this could be a problem for them. Whereas when parents still lived together there might be one parent who could mediate the other's moods or behaviour (or even protect the child), after separation the co-parented child is obliged to spend time alone with the problematic parent without the other parent to mediate or deflect some of the problems. For some of the children this meant that they attempted to reduce the time they spent with the problematic parent, but this was not always easy, especially where the problem parent was committed to his or her equal share in the child."[10]

2.13 These observations highlight the emotional burden that may be faced by children who are subject to shared parenting regimes.

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9 Smart, Carol "Children's Voices" paper presented at 25th Anniversary Conference of the Family Court

10 op cit page 5

2.14 In the USA Judith Wallerstein and Julia Lewis[11] conducted a longitudinal study of the responses of children and adolescents to parental separation and divorce over a 25 year period. Their observations of the impact of parental separation on children for many years afterwards and into adulthood emphasise the need to consider post separation parenting arrangements from the child's perspective and the importance of taking into account the changing needs of children at different stages of development. They conclude, inter alia:

> "We are learning that mothering and fathering in the post divorce family is infinitely more complex and harder than we realized. Parenting in these families demands heroic efforts, and not everyone can be a hero."

2.15 A presumption that children should spend equal time with each parent would impose a lack of flexibility which would on the basis of the findings of Wallerstein and Lewis be highly detrimental to the ongoing well being of children whose parents separate. The promotion of the 'best interests' principle contained in the current legislation, without any presumption as to the outcome, would best enable to the court to take into account the needs of the child and the varying parenting abilities of the parents.

2.16 In her response to the paper by Wallerstein and Lewis, The Honourable Claire L'Heureux-Dubé of the Supreme Court of Canada quotes from one of her own decisions:

> ""Along with the quality of the relationship with the custodial parent and the ability to maintain contact with the non-custodial parent, there is substantial evidence that continuing conflict is the most important factor affecting the ability of children to readjust to the new family situation after divorce. It appears that, above and beyond the disruption caused by divorce or separation itself, it is the discord and disharmony within the family itself which are most damaging to children in the aftermath of divorce."
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> Ongoing conflict between parents which adversely affects the child must be minimized or avoided." [12]

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11 "The Long-Term Impact of Divorce on Children – A First Report from a 25-Year Study" Family and Conciliation Courts Review, Vol. 36 No. 3, July 1998 368-383

12 "A Response to Remarks by Dr Judith Wallerstein on the Long Term Impact of Divorce on Children" Family and Conciliation Courts Review, Vol. 36 No. 3, July 1998 384-391

2.17 Tom Altobelli of the University of Western Sydney in his paper "Contact Cases: Have we been getting it wrong?"[13] reviews recent research in the USA concerning overnight contact with very young children. Dr Altobelli's paper is relevant in the broader context of post separation parenting arrangements. Whilst some of the research to which he refers supports a more liberal approach to overnight contact for young children than has been the norm, Dr Altobelli cautions:

> "The research results may guide our professional thinking, but they are never any substitute for exploring the parenting history and relevant dynamics of a particular family, free from any ideological or philosophical position. This is not a gender debate. This is not about children's rights. Nor is it about father's or mother's rights. It is not about blindly applying research data to particular families, nor is it about rejecting research data because it is confusing or does not fit one's own bias. Family lawyers, with such help as they can muster, apply the research and the relevant provisions of the FLA to the specific circumstances of individual children and families. The research as a whole does not necessarily mean more or less contact between fathers and their children. Fathers who have had little to do with their children, both quantitatively and qualitatively, prior to separation, may not necessarily be encouraged by this research. Abusive, substance dependent and violent parents derive no benefits from the research. There may, however, be a significant category of fathers who were actively involved in the lives of their young children who may be able to argue for more developmentally appropriate parenting orders, not just because it meets their own needs to continue that role (a factor we consider legitimate in the context of motherhood) but predominantly because it is in the child's best interests as well."

2.18 The Canadian Federal-Provincial-Territorial Family Law Committee's Report on Custody and Access and Child Support 'Putting Children First' published in November 2002 considered the following option:

> *"Option 5-Replace the Current Legislative Terminology: Introduce the New Term and Concept of Shared Parenting*
> The terms custody and access would be replaced with a new concept, *shared parenting*. This shared parenting approach would not mean that children must live an equal amount of time with each parent. The starting point for any parenting arrangement, however, would be that children would have extensive and regular interaction with both parents, and that parental rights and responsibilities, including all aspects of decision making, but not including residence, would be shared equally or nearly equally."

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[13] Paper delivered at the Family Law Practitioners' Association of Western Australia 14th Weekend Conference 2003

2.19 The Committee's recommendation was as follows:

> "The Family Law Committee does not recommend Option 5 (shared parenting) for several reasons. Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child. There should be no presumptions in law that one parenting arrangement is better than another. It is also a term that seems to focus on parents' rights, rather than on the child. Its meaning and application is ambiguous and this itself may promote litigation. The Family Law Committee recommends that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be in the best interests of the child."

2.20 The body of research to which the committee will be referred demonstrates that the concept of joint and equal parenting meets the needs of adults but not those of children. The research shows that children will accommodate the desires of their parents to share their care equally even where it does meet their own needs. But children need to be protected from arrangements which are not in their best interests.

2.21 There are many practical difficulties that must arise when children spend equal time with separated parents, some of which have already been identified. Other issues that must be considered include:

(a) How would such an arrangement work in a blended family? It is not uncommon these days for children to grow up in a household with half siblings or step siblings. Very complex arrangements might be necessary if the children in such a household were each to spend equal time with their biological parents.

(b) When a couple separates it is rarely possible for both to enjoy a standard of living comparable to that which they enjoyed when they lived together. The parent with whom the children principally reside may struggle to provide adequate accommodation for the children. If the children are to spend equal time with each parent, how realistic is it to expect that both parents can house the children in a suitable manner? What is adequate for a weekend visit may not be adequate when there is a need to provide space for homework, visits from friends, sporting or music practice, private time and so on.

(c) How would parents who may have quite different attitudes to parenting assist their very young children to establish and follow appropriate routines for sleeping, eating and the like?

(d) Will parents who are victims of domestic violence or who are in emotionally abusive relationships be pressured into accepting shared parenting arrangements in circumstances where they believe these arrangements are contrary to the best interests of their children?

(e) Will the child support consequences of shared parenting further impoverish parents who before separation assumed the primary responsibility for the care of the children to the detriment of their own career development?

3. WHAT IS A PRESUMPTION IN LEGISLATION?

3.1 The purpose of a presumption in legislation is to relieve parties of the burden of proving a fact which is universal or which at least applies in most cases. Therefore, only those few fact situations which fall outside the facts presumed will need to go into evidence to rebut the presumption. The insertion of a presumption assumes that facts to rebut will be the exception not the most common event.

3.2 In the present consideration, the factors which are required to ensure that joint and equal parenting is successful will be in existence in a minimum of separating families. Where the relationship between separating parents is such that one (or both) of them finds it necessary to institute court proceedings in order to determine what should happen with their children, that fact alone suggests that they cannot find the degree of co-operation and good will necessary to conduct an effective regime of joint parenting to the benefit of their children.

3.3 To require parents to rebut a presumption that will not be valid in a majority of cases is to impose an unreasonable burden of costs upon them and to add an unnecessary layer of stress and emotional turmoil to the proceedings.

4. WHY PROPOSE A REBUTTABLE PRESUMPTION OF JOINT PARENTING?

4.1 At the present time the Family Law Act provides (Section 65E) that in deciding whether to make a particular parenting order in relation to a child a court must regard the best interests of the child as the paramount consideration. In Section 68F(2) a court is required to consider a range of relevant matters to decide what is in the best interests of a child but the court's discretion is not fettered by any assumptions or presumptions.

4.2 The imposition on courts considering parenting orders of a presumption is intended to produce changes in the outcomes for individual children. Indeed, if a change in outcome was not intended then there would be no point in imposing the presumption.

4.3 Proponents of the introduction of a rebuttable presumption of joint parenting consider that decisions about post-separation parenting arrangements should not be determined simply by reference to a particular child's best interests but should also be guided by the application of a legal presumption which would dictate the outcome of the proceedings except where one of the parents of the child could satisfy a judge, by calling appropriate evidence, that the presumption should not be applied.

4.4 If the introduction of a rebuttable presumption of joint parenting is to be effective then it must result in the making of orders for some children which would be different to the orders which a court might presently make in relation to those children and which are solely guided by the best interests principle. Proponents seem to see this as an effective way to bring about social change.

5. IS A REBUTTABLE PRESUMPTION OF JOINT PARENTING AN APPROPRIATE WAY TO GENERATE SOCIAL CHANGE?

5.1 FLS respectfully suggests that social change should never be achieved at the price of the best interests of individual children and therefore the best interests principle should never be fettered by any legal presumption.

5.2 If the Australian community seeks to change post-separation parenting arrangements there are some obvious areas that should to be addressed including:

(a) Changing pre-separation parenting patterns by:

- Creating more flexible working conditions for fathers (and mothers) so that they are able to spend more time caring for their children.
- Promoting greater involvement in parenting by fathers.

(b) Changing post-separation parenting patterns by:

- Promoting the role of both parents (in the manner that the Family Law Reform Act did).
- Providing more flexible working conditions for both fathers and mothers.

6. ARE THE COURTS THE APPROPRIATE MECHANISM FOR CHANGING SOCIETY?

6.1 Most post-separation parenting arrangements are reached, outside the court system, by agreement between the parents.

6.2 Generally they reflect the pre-separation roles which parents had within their family unit. Fathers are likely to be involved in full-time employment than mothers. There is a greater likelihood that mothers have had greater personal involvement in pre-separation parenting. It is therefore not surprising that many parents choose to continue these roles after separation.

6.3 Even parents who find themselves involved in parenting court proceedings reach, in about 95% of cases, their own agreement about future parenting arrangements.

6.4 This means that the role of a rebuttable presumption in determining the placement of a child will have its greatest effect on that very small percentage of families which has a judge determine the parenting orders. For those parties, their children and that Judge, the basic principle would be as enunciated in the statutory presumption of joint parenting unless one or both of the parents call relevant evidence that persuades the Judge that the presumption has been rebutted.

6.5 In some cases the court will determine that the evidence is insufficient to rebut the presumption and, though it may not be the ideal arrangement, a joint parenting order will result. In other cases the court will be satisfied from the evidence that the presumption has been rebutted. Either way, for the parents and the child the imposition of a rebuttable presumption is likely to lengthen court proceedings and add to their cost, and to distract the parties and the Judge from focusing on the best interests of the child. The presumption can only be rebutted by those who are prepared to proceed to a trial.

7. WHAT OTHER FACTORS SHOULD BE TAKEN INTO ACCOUNT IN DETERMINING PARENTING ORDERS?

7.1 Section 68F of the Family Law Act sets out the factors which are currently required to be taken into account by a court making a decision about parenting. The text of section 68F is set out below:

> "68F(1).....in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
>
> 68F(2)The Court must consider:
> (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 ought to 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 persons 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 relations 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 Straight 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 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 fact or circumstance that the court thinks is relevant."

7.2 It is obvious from any consideration of the very broad factors in section 68F(2) that the possibility of joint and equal parenting must be considered within a number of the sub-sections.

7.3 A court determining issues of parenting is not limited to considering only the proposals put forward by the parties it must consider all of the possible ways of achieving the objective of the child's best interests. The High Court in its decision of U and U[14] stated:

> "But the court is not, on any view, bound by the proposals of the parties. The court has to look to the matters stated in s68F and elsewhere in the Family Law Act in coming to a decision about the residence of a child, and the objective is always to achieve the child's best interests".

7.4 The Full Court of the Family Court of Australia has recently dealt with the principle in an unreported decision of Michalos and Theakos[15]. The Full Court in a unanimous judgement said:

> "This Court is not bound by the proposals of the parties when making an order in the best interests of the child: (referring to U and U) Whilst we note that the High Court was considering an international relocation case in U and U, we can see no reason why the principles are limited to residence cases....
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> While it is clear that the respondent father ran an "all or nothing" case, His Honour failed to consider what other orders could be made in the children's best interests."

7.5 The desirability of joint parenting is therefore always before the court, whether on the application of the parties or as one of the possible outcomes the court must, of its own motion, consider.

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[14] U and U (2002) FLC 93-112 per Gummow and Callinan JJ, (with Gleeson CJ, McHugh and Hayne JJ agreeing.

[15] ~~Michalos and Theakos~~ Appeal No.EA113 of 2002 judgement delivered 7 July 2003 at para 29 and 30.

8. CONTACT WITH OTHER PERSONS INCLUDING GRANDPARENTS

8.1 In intact families, parents decide together what contact their children will have with third parties, including the grandparents of the children. Those decisions are seen as being in the realm of matters peculiarly the province of parents. The Family Law Act gives jurisdiction to a court exercising power to determine an application for contact by a third party to the child of an intact family but that jurisdiction is seldom, if ever, exercised.

8.2 When parents separate, the courts can entertain applications for contact with children from third parties and in such applications the factors set out in section 68F are applied to determine what order best meets the interests of the child. Sub-sections (a), (b), and (c)(ii) are particularly relevant and the court makes its determination under the umbrella of the statement of principle set out in section 60B(2)(a) of the Family Law Act 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".

8.3 In the vast majority of cases, the mother's relatives and friends will see the children when they are with their mother and the father's relatives and friends will see the children when they are with their father. There will be no need for an order in favour of grandparents or other third parties in these cases. If there is such acrimony between parent and grandparents or other significant persons that contact does not occur in the normal fashion, then one must query whether it would be in the interests of the children to see these third parties, with all the conflict and hostility that would entail. There are certain cases where the intervention of the court may be appropriate. These would include cases in which a parent is unavailable for any of a number of reasons, such as death, imprisonment, mental illness or substance abuse; where the carer is opposed to contact with the absent parent's family; and where it is considered to be in the interests of the children to maintain contact with the absent parent's family. However, it is submitted that there is adequate provision for these cases in the current legislation.

8.4 The committee is again referred to the decision in Michalos and Theakos[16] where, dealing with an application for contact by grandparents where the father opposed contact, the Full Court said:

> "While it is clear that the respondent father ran an "all or nothing" case, His Honour failed to consider what other orders could be made in the children's best interests. This is of particular significance given the young age of the children, and evidence of Dr Q. as to the effect that severing contact will have upon them. In short, it was simply too early to give up on the idea of allowing these children the benefit of their grandparents. The principles contained in section 60B and the best interests of children demand that every attempt be made to give them a chance to have a relationship with their grandparents, particularly in the unusual factual circumstances of this case".

9. THE FINANCIAL IMPLICATIONS OF PARENTING ARRANGEMENTS.

9.1 When parents resolve parenting arrangements, whether by court order or by agreement, there are inevitably financial consequences for each of them. Unless the parties have equal incomes and also have equal parenting responsibility then there is likely to be a flow of financial support from one parent to the other. This is often uncomfortable for the payer and gives rise to many complaints which find expression in various places including to members of Parliament. The discomfort from post-separation financial arrangements arises in three ways:

(a) It costs much more to run two households than to run one household and after separation there rarely seems to be enough income for both households to maintain their preferred standard of living.

(b) There is a pervasive misapprehension by payers that child support is misapplied by payees. Payers rarely recognise the full breadth of the direct and indirect expenses of maintaining a child and often see childcare costs as being limited to the obvious expenses, such as food and clothing.

(c) Parents are, quite appropriately, often in a process of re-partnering and are sometimes starting new families. This creates real issues about financial priorities and it can further compound the feeling that a preferred standard of living cannot be maintained.

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[16] ~~Michalos and Theakos~~ op cit at paragraph 30

10. THE CHILD SUPPORT FORMULA

10.1 Notwithstanding important changes to the child support system, the child support formula itself, developed almost 20 years ago after extensive research, has not been revisited to our knowledge. FLS recently wrote to the Attorney-General, the Minister for Family and Community Services and to the Child Support Agency seeking access to research in relation to the current impact of the child support formula. No current research has been identified which assesses the actual impact on payers, payees and their families of the formula.

Changes Which Affect the Impact of the Child Support Formula

10.2 Since the formula was devised there have been important changes to the way in which it is applied:

10.2.1 The child support formula now includes an adjustment factor for whenever a child stays with a payer parent more than 30% of "nights" called "substantial or major contact" in a year. This adjustment factor assumes that actual costs of care of a child are aligned with the number of nights that it spends with a carer. Calculating nights might work if the principal costs of care were the provision of a bed in a bedroom. In reality direct and indirect costs are much broader and include food, weekly activity expenses, each term's school expenses, annual clothing costs, to mention but a few. While the Child Support Scheme has always used a calculation of "nights", this has not been a source of difficulty until the introduction of adjustments for major and substantial contact by reference to numbers of nights.

10.2.2 The adjustment for "nights" produces two important distortions:

(a) Parents tussle to maximise their numbers of "nights" because of the financial implications. For example, a payer may seek to return a child on the morning after a "night" rather than the evening before even if the latter would be a more suitable arrangement for the family. Both payers and payees carefully consider contact proposals with the assistance of a calculator to determine whether the proposal will produce 109 "nights" of contact in a year and a consequent financial effect for both parties.

(b) The payer who can reach 109 nights will receive a discounted child support liability notwithstanding that almost all direct and indirect childcare expenses may continue to be carried by the payee parent.

10.2.3 In recent years the Department of Family and Community Services has begun to divide Family Tax Benefits using the same approach, the calculation of "nights". This compounds the difficulties for the payee parent who faces most of the actual direct and indirect costs of caring for the children and it benefits the payee parent who can avoid those costs while maximising the number of nights. It further increases the incentive to maximise nights instead of reaching parent arrangements that suit the family.

10.2.4 Since the child support formula was devised a new adjustment factor has been introduced so that payer parents can unilaterally elect to pay certain nominated expenses, such as school fees, and thereby receive a discount of up to 25% of child support. The expenses which have been approved are generally extra costs, such as private school tuition fees, which would not have formed part of the calculations made of basic childcare costs when the child support formula was devised.

10.2.5 This provision can work unfairly because it allows a payer parent to shift to the payee parent an expense which ought to be carried by the payer parent on top of basic child support. For example, if there is a reasonable disparity in the income levels of a payer parent and a payee parent then a court, if asked, would be likely to order that the payer parent pay private school fees in addition to ordinary child support. However, the 25% adjustment factor allows the payer parent to pay the fees and then to reduce basic child support accordingly. The result is that the payee parent ends up indirectly paying the private school fees from the basic support for the children, notwithstanding that this support was never designed to met an expense of this type. The payer has kept his outlays to the level of basic child support.

10.2.6 There has been considerable growth in the level of personal discretion which staff of the Child Support Agency are able to exercise in determining child support assessments. This operates in two ways:

(a) Payees find that collection procedures work slowly and can involve lengthy dialogue between the Child Support Agency and the recalcitrant payer. The result can be lengthy delay in a payee parent's access to child support.

(b) Parties find that decisions about administrative assessment may be made after an informal process of dialogue by the CSA with the payer and the payee which is sometimes more like a lobbying process, followed by an exercise of personal discretion by a CSA staff member as to what assessment to make.

10.2.7 The CSA also has a formal administrative assessment review process, but FLS understands that this process does not require the persons undertaking the reviews to have any formal qualifications. The task of administrative review is a difficult one, requiring the application of detailed legal principles to what are often complex and disputed facts. Once again the impression that many clients from the Agency receive is that the review is one which is likely to be won by the party who is most effective at lobbying the Agency staff.