

House of Representatives Standing Committee  
on Family and Community Affairs

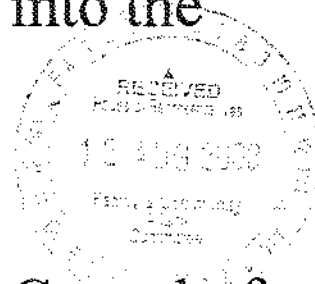
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Submission to the

Parliamentary Inquiry into the



Proposed Rebuttable Joint Custody for  
Children of Separated Parents

Commonwealth of Australia

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# CONTENTS

<b>Section</b>	<b>Page</b>
<b>Submission to Parliamentary Inquiry - Summary</b>	<b>i</b>
<b>1. Men and Women <i>are</i> Different!</b>	<b>1</b>
<b>2. Divorce is a Disaster for Society</b>	<b>7</b>
<b>3. Problems with the Present System of Determining Child Custody</b>	<b>13</b>
<b>4. Why an Automatic Joint Custody System would be Superior</b>	<b>18</b>
<b>5. Circumstances in which Automatic Joint Custody would be Rebutted</b>	<b>22</b>
<b>6. Commonly Stated Objections to Joint Custody</b>	<b>23</b>
<b>7. Comments on The Present Child Support Arrangements</b>	<b>27</b>
<b>8. Summary and Conclusion</b>	<b>31</b>



## **About the Author**

James O'Dea's formal qualifications are as an actuary. He qualified as a fellow of both the British and Australian Institutes of Actuaries some 20 years ago. An actuary's training includes statistics, demography, mathematics and finance. While the traditional areas of an actuary's training are superannuation and insurance, actuaries are increasingly moving into many other and quite diverse fields where they can use their strong analytical training to solve problems.

Three years ago the author's marriage broke-up, and at the time there were three small children. After much stress and anxiety, his former wife agreed to a shared parenting arrangement that, in the circumstances, has been of great benefit to all parties. He is very well acquainted with the Family Court of Australia (Sydney jurisdiction), so can speak first-hand of his experience and its workings.

He has analysed many of the available statistics, read many books on the topic and spoken to many marriage counsellors as well as many people and couples, whether still married or divorced, for their experiences. He has dealt with many separated parties and valued their superannuation benefits for the purposes of the Family Court. He is part of a rapidly growing actuarial consulting firm, Professional Financial Solutions Pty. Limited, which has performed many varied assignments for superannuation, insurance and legal clients.

## SUBMISSION TO PARLIAMENTARY ENQUIRY – SUMMARY

One doesn't need to look hard to see that families and society are today in very great peril:

- (i) The rate of divorce is 50% and rising, and the cost to society of family breakdown is immense;
- (ii) One million children are growing up in one parent families;
- (iii) One parent families are struggling to survive and often the non-resident parent is failing to take responsibility for child support or a share of the children's expenses;
- (iv) The non-resident parent, usually the father, often has little to do with his/her children and the other parent has to bring them up virtually alone;
- (v) The emotional and development effect on the children, especially boys, is devastating;
- (vi) The anger and resentment over the broken relationship often poisons the parents' future dealings with the children, and often these feelings are fanned by a legalistic approach to resolving the issues, or threat of legal action. The Court process can also produce perverse outcomes; and
- (vii) Other social and financial costs to society as a whole are immense.

*Clearly something must be done and done quickly.*

It is my very strong belief that we now stand at the cross roads over the decision on child custody. I believe that rebuttable joint custody, if carefully and thoughtfully implemented, has the potential to dramatically reshape our future society, and to re-shape it for the better.

A movement to rebuttable joint custody would represent a watershed change in the parenting of our children after relationship breakdown. It would also recognise the value of fathers to our children, and the crying need for greater positive male role models for our youth, especially those from broken families. Men bring different strengths than women to the parenting role, and both are needed to bring up well-adjusted and healthy children.

There are very serious problems with the present method of determining child custody after divorce. Most of these problems emanate from anger and resentment at the breakdown and the legal process that ties financial reward to the determination of custody of the children. There is a significant underclass of men who feel aggrieved by their loss of family and assets, and they perceive that the Family Court is biased towards women. The resentment of both men and women poisons their ongoing dealings with each other to the serious detriment of their children.

An automatic presumption of joint custody, subject to certain rebuttable circumstances, has the potential to significantly reduce the anger, frustration and expense of determining child custody at the time of separation. Under the proposal, those parties consumed with bitterness and anger would find it very difficult to use the children as a means of "getting back" at the other party. It also has the potential to dramatically reshape our society, increasing understanding and co-operation between the parties, and potentially leading to a better balance between work and family. Some suggestions for the conditions under which a presumption of joint custody could be rebutted are set out in section 5 of the report. It is emphasised that the number rebuttal conditions should be limited as much as possible, otherwise we would simply return to the present adversarial system.

The commonly stated objections to the rebuttable joint custody proposal are commented upon in section 6. In my view, none of the objections represents a valid reason for seriously questioning the appropriateness of the proposal.

The present child support payment system is clearly not working. There is enormous ongoing conflict and serious delinquency of payments. One of the major reasons for this conflict is the ongoing resentment of fathers that the system is biased against them. Fathers, rightly or wrongly, also perceive the support payments made as often providing support for the mother, instead of the children. The only way this perception can be changed is to restructure the way the Family Law Act operates so that both men and women perceive the entire process to be fair. In addition, the child support system would work much better if the payers could see a direct connection between the children's actual costs and the amounts they are required to pay. The proposal to introduce rebuttable joint custody would be a huge step in the right direction, because it should lead to increased co-operation between separated parents.

Section 7 provides some suggestions about how the Family Court processes might be radically restructured to remove the many areas of "moral hazard", i.e. the financial incentive of parties to act in their own interest to the detriment of the interest of the other party and indeed the long-term interest of their children. What we should be moving toward is a system that is quick, economical and fair to all, and also *perceived to be fair* to all.

I believe that the rebuttable joint custody proposal is a great first step in the right direction. However, much more needs to be done to make the system fair to men, women and, most importantly, their children.

## 1. MEN AND WOMEN ARE DIFFERENT!

### A Glimpse of "Maleness"

What is it to be truly male?

Today we live in a society where the media generally portrays men as:

- (i) insensitive, inarticulate and ignorant of practical realities, especially of family and relationships;
- (ii) incapable of making decisions for their family and children;
- (iii) driven too much by their own desires and self-interest;
- (iv) potential child molesters and abusers; and
- (v) too prone to violence to themselves, as well as to women and children.

Despite this very negative image, sometimes we catch a positive glimpse of what men are. When someone "special" dies, there appears to be an enormous amount of grieving, and not just because he was well known or achieved a lot, although this is clearly important. Think of Donald Bradman, Nelson Mandella (although he is still with us), Abraham Lincoln, our Anzacs, and even Jimmy Stewart to some extent. No-one would suggest for a minute that these men were perfect, but they had something special, some quality. I am sure that all of us can think of many personal examples – men who touched so many lives for the better, and who we truly admire and love.

But what is this quality? Is it because they were good? What is a "good" man?

I recall a movie made by Frank Capra in 1945 titled "It's a Wonderful Life" (in fact Capra made many other fine films in the 1930s and 1940s, exploring similar themes). In that movie, Jimmy Stewart beautifully played a small town bank manager and family man. Through the intervention of circumstances he remained stuck in that town struggling in his job but always holding to what he thought was right. Over time he was continually frustrated, and never achieved his ambition to be a major architect. He eventually came to believe he was a failure and attempted to commit suicide, crying it would be better "if he had never been born". In the story he was saved by a kindly old guardian angel called Clarence as he was about to jump into a frozen river. During the rest of the film Clarence went through all the major events in his life revealing what would have been the outcome if in fact he had "never been born". He showed that as a result of his integrity, responsibility and self-sacrifice, he had improved the lives of so many people in his town (and even saved lives), and helped stop the town descend into corruption. The final scenes are very moving. While the story may be somewhat dated now, I believe it provides a glimpse of what it is to be "truly male".

## **Men and Women are Fundamentally Different**

Despite decades of influential writers, particularly feminists and sociologists, emphasising not just equality between the sexes but similarity, in recent years it is once again becoming accepted that men and women are *fundamentally* different. Many popular books have been written on this subject, in particular John Gray's "Men are from Mars, Women are from Venus" (1992). I believe that this is very healthy.

In the following paragraphs, I describe in general terms some "male" characteristics, and how they are different to the "female". In any general discussion on this very complex topic, however, there are always exceptions to the observations made, and even a significant number of exceptions. This is to be expected and I apologise in advance to the reader, particularly those to whom the descriptions appear stereotypical. It is impossible to describe the important differences without some generalisation. Not only is everyone different, no two relationships are the same. However, I believe that my comments are generally reasonable background about how men and women relate to each other.

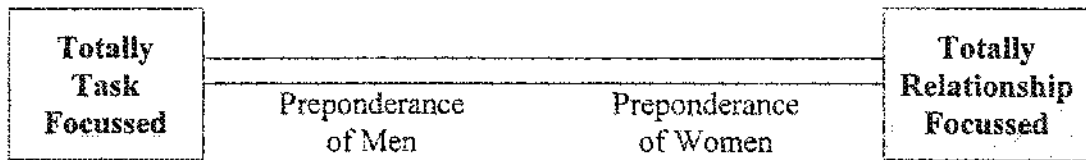
It is the contention of this submission that precisely because men and women are different, their children can benefit greatly from the strong input and influence of *both* parents, not just the mother. A male carer is not a "second rate" female carer, but a "different" carer/developer, bringing different strengths to his children. This is a universal comment that applies whether a relationship has broken down or not – *all children need the strong and active participation of both parents.*

## **Differences of Orientation in Men and Women**

One way of considering the differences between men and women is to consider the "spectrum of orientation" along which, I believe, everyone can be slotted. At one very extreme end of the spectrum are those who are totally organised and task focussed. Their only aim in life is to achieve things and to succeed materially. At the other end of the spectrum are those who are totally relationship focussed, who are solely concerned about how they relate to other people and what other people think of them. Everyone falls somewhere between these two extremes (hopefully not many are at the extremes!), but my contention is, backed by many psychologists and counsellors, that more men than women tend to be clustered towards the task focussed end of the spectrum, and vice versa, more women than men tend to be clustered towards the relationship focused end of the spectrum.

Naturally things are not as simple as I suggest, and there are many other dimensions that come into play. For example, general personality differences can appear to mask this general orientation. For example a man may appear very relationship focussed (for example, salesmen), but often his motivation will be very different to the female – he wants to use, or needs to work with, other people to achieve his aims. Similarly, many women can be very well organised, efficient and focussed, but often this will be centred towards relationships (or the home), not necessarily to achieve success for its own sake.

### *Spectrum of Orientation*



In my view, people will generally be happier and healthier (in so many ways), if they can maintain a **reasonable balance between the two extremes**, although as I contend, men by their make-up will generally be more task oriented and women generally more relationship oriented.

### **Primary Ideals of Men and Women**

It is my general contention, and also expounded by many psychologists, that men and women generally have different “primary” ideals, and these have a huge influence on their behaviour. These ideals also feed through into what they need from their partner. By primary ideals I mean that each gender *generally* considers certain ideals to be most important. I should emphasise that the list is not exhaustive and it does not mean that many women don’t also share some of the primary ideals of men, and vice versa. In fact, I would contend that everyone contains a mixture of the primary ideals of each gender, with men having on average more or a greater portion of the “male” ideals and women more of the “female” ideals. I strongly believe that the more each gender appreciates, and in fact attempts to emulate (as much as possible), the primary ideals of the other, the stronger our society and our families will be.

I should emphasise that living up to those ideals is another matter entirely - for both sexes!

### *Primary Ideals of Men and Women (no particular order)*

Men		Women	
Primary Ideals	Response Sought from Partner	Primary Ideals	Response Sought from Partner
• Career Competence	Admiration, Pride and Support	• Attractiveness (physical, personality, etc.)	Attraction and Pride
• Integrity	Appreciation and Support	• Caring and Love	Appreciation and Acceptance
• Duty and Responsibility	Trust and Acknowledgement	• Family Support and Nurturing	Appreciation, Support and Time
• Protection	Acceptance and Trust	• Openness in Relationships	Honesty and Acceptance
• Provision and Security	Appreciation and Support	• Conversation and Relating	Acceptance and Time
• General Order and Control	Acceptance and Trust	• In Touch with Feelings	Acceptance and Validation
• Companionship	Interest in Activities	• Home Decoration and Tidiness	Appreciation and Assistance

In most “traditional” relationships, the man will typically have a primary need to receive respect and admiration from his partner in order for him to be generous in “providing”, and the woman will have a primary need to feel loved and cherished and to “be provided for” in order for her to in return fully love and care. If the man receives the needed respect and admiration, this often has the very positive effect of encouraging his male nature to give more out of love for his mate, i.e. it encourages him to act in service and responsibility to others rather than out of self-interest. This in turn provides the woman with an increasing sense of self-worth and feelings of being loved and cherished, which in turn leads to her giving a stronger love and trust to the man, and so on. The old adage that “behind every warm, loving and successful man is a supporting woman” still has a lot of truth!

In general, men tend to be more “outward looking” (i.e. take a macro view) and women tend to be more “inward looking” (i.e. take a micro view). Most men *want* to have a passion for something, and can achieve great and good things, provided they can be “inspired” to do so. In my view, these characteristics demonstrate why men are capable of doing very good and selfless things, but also doing very bad things. It is the nature of their personality –hopefully for society the good things outweigh the bad! And it all comes down to what role models they are provided with, and the encouragement boys and young men receive.

### **Men and Women are Generally “Complementary”**

The foregoing leads on to my next contention - men and women are “complementary” to each other. There is a very well-worn saying that “opposites attract”. If everything is working well, men and women can *work beautifully together, not in competition with each other*. In so many ways, the strength of one is the weakness of the other, and vice versa. However to achieve this harmony there must be excellent communication and understanding of each other’s differences and needs, to enable each party to fully appreciate the other. I believe this is unfortunately all too rare, and after an initial period of trust and love, the relationship falters and steadily deteriorates. Too often each party becomes disillusioned with the other because he/she is not meeting their expectations, nor meeting their needs – they are each judging the other against their own ideals and standards, and naturally the partner comes up lacking.

If one accepts the different ideals and needs as set out in the table above, then it follows that the old cliché of the male being the “breadwinner” and the female looking to the male as the “provider” still is important despite the present position of more equal earning capacity of each gender, or even greater earning capacity of the female. Depending on the circumstances, it is possible for the man to be valued as the provider or having “responsibility” for the family even if he is not engaged in paid employment when the wife might still be.

From the multitude of counselling books I have read, and my conversations with counsellors and couples, it seems that the majority of men and women are generally happier when this basic model applies (as long as they understand each other’s strengths and meet the other’s needs!). On the other hand, when the roles of each party are



reversed, as may happen if the male is retrenched and remains unemployed, then this can place considerable stress on the relationship. If this situation continues for a considerable period, the man typically loses his self-esteem and the woman also tends to lose her respect for her partner. Both men and women in this situation can suffer depressive problems, and the relationship is at much greater risk of failing. I would contend, and I think most women would agree, that there is nothing worse than seeing a man who has lost the will and spark to achieve and get on and do things.

### **Male/Female Differences and the Development of Children**

The reader may or may not agree with the foregoing, and may think it is an interesting, but old-fashioned, theory. In fact, it could remain a theory if it weren't so important to the future development of our children - I believe that understanding these differences is crucial to a child's proper development. I believe that the outworking of the alternative view (that men and women are the same except for some physical differences) are everywhere to be seen in our society - relationship breakdown and conflict, and poor adolescent development of children, especially boys, and huge social costs. It is an indictment of our society that a million Australian children live with only one of their parents.

It is becoming increasingly recognised that to develop a child into a fully balanced adult requires the *active responsible input of both parents* - in fact, this also applies to marriages/relationships that have *not* broken down. The input of the mother, being traditionally a caring and nurturing role, is obvious and forms the basis of most judgements by the Family Court. However, the crucial role of the father has been neglected for far too long. His role is just as important for the long-term development of his children, through being the major contributor of confidence and self-esteem (in both sons and daughters), and providing a positive role model to counter what I see as a very negative view of men portrayed in the media, etc. Without a strong and active interest in his sons, as well as the influence of other strongly positive male role models, boys cannot grow up understanding those ideals of service and responsibility to others and society in general. The role model that he portrays to his daughters is also extremely important to the health of their future relationships with men.

If they don't receive few or any positive male role-models except what the media portrays, how can we expect the boys of today to grow into the good men of tomorrow that women will want as partners? You don't need to ask many psychologists to realise that people live up, or down, to the role images continually presented to them.

In my view, virtually all the "strong" male characters portrayed in film these days are "superficial facades". They do not exhibit true maleness. The only bright spot as role models for our boys are our sports stars, and even some of them have been tarnished with bribery and drug allegations and scenes of poor sportsmanship.

I hold a different view to the poor image presented of men, namely that the *vast majority are decent, hard working and supportive*, although men of this type are probably declining in number for the reasons discussed above (this is what I think women

continually complain about). The inaccurate and stereotypical image of men portrayed in our media must change if we are to have any hope of rescuing the next generation of children. It may also suit the cause of some feminists to denigrate men in this way, and men have also assisted the process by simply ignoring the criticism over the last few decades. When challenged, most women laugh off the criticism and exclaim "Oh well, men don't care what we say about them!" The fact of life is that *MEN DO CARE*. While men may not wish to admit it, it wounds them greatly, unless they already have a strong sense of "role" and can see the image portrayed for what it is. This should be self-evident by considering men's primary needs of admiration and respect, as described above. The tough "he man" image is often only a façade to hide their hurt.

The lack of strong *positive* male role models and the effect on the self-esteem of our sons is increasingly obvious. The evidence is all around us from declining school motivation, poor academic and emotional development, to anti-social behaviour to an unwillingness to accept responsibility and make commitments. Do women really want this? What hope do boys have when they have no fathers, experience virtually no male teachers in early childhood nor other positive male role models, and the only input they receive is from a very negative T.V. and media? I would further contend that boys generally are a lot more "fragile" than girls to develop into well-adjusted adults, essentially because in many areas more is expected of them, and the void of positive male role models.

#### **A Final Comment on the Problem of "Resentment"**

Finally, I would add to this rather brief discourse on male/female relationships a point that is crucial to the argument I am seeking to develop about having a pre-determined formula for child custody. Because women are generally much more relationship oriented, it means that they are susceptible to building-up resentments towards their partner over time if he is not (or perceived to be not) providing the love and care which she needs. Men on the other hand are susceptible to building-up frustrations that their wives are not supporting them, or "not better organised", or "don't see things the way they do" etc. It is this build-up of resentment in women that for so many is destructive of them, their ex-partner and their children. In addition, at the time of separation these resentments often lead to unreasonable demands in respect of the children and/or marital assets. This unresolved anger and resentment often leads to depression of one kind or other, and can also lead to difficulties in establishing subsequent relationships. The negative effect of this resentment, and the male response, is developed further in section 3.

I wish to again emphasise that in the short space of six pages I have necessarily been very general in my description of the major male/female differences. Naturally, everyone and every relationship is different, so all my comments do not apply identically in every relationship. However, I believe they are sufficiently common to represent the "average".

## 2. DIVORCE IS A DISASTER FOR SOCIETY

### The Basic Cause of Divorce

I would like to quote Dr. Willard F. Harley, Jr a renowned clinical psychologist, from his very successful book "His Needs, Her Needs":

"Marriage is a complex relationship, perhaps the most intricate of them all. Unfortunately, most of us don't realise what we're getting into when we say, "I do." We think the dynamics of a good marriage depend on some mysterious blend of the "right" people. Or if a marriage turns out badly, we call the two people "wrong" for each other. While it's true that two inherently incompatible people *might* marry, it's unusual. More frequently, marital break-ups occur when one or both partners lack the skill or awareness to meet each other's needs. More often than not, not being right or wrong for someone depends not on some mysterious compatibility quotient, but on how willing and able you are to meet that someone's needs"

I contend that, fundamentally, most men do not understand women and their strengths, ideals and needs, and vice versa. In total ignorance, when a relationship is in difficulties and much of the trust has evaporated, each gender tends to judge the other by its own standards. It is also true that the media and society itself are significant contributors to the epidemic of relationship breakdown. Everyone is constantly being bombarded with messages of self-gratification and the need to seek "one's own happiness and fulfilment". These messages are completely contrary to the rather old-fashioned idea of "commitment" (and appreciation and respect) that is so necessary to hold a relationship together for the long-term. It is also true that human nature is such that it is impossible to seek one's own happiness as an end in itself – in fact, counter to intuition, one can only be happy if one seeks to make others happy! This again leads back to why commitment is so important in a relationship.

It comes as a bit of a shock to men going through the divorce process for the first time, including me, that the majority of relationships are ended by the woman, and not in fact as a result of the commonly held myth of male unfaithfulness. This percentage is estimated to be as high as 70%. Perhaps one should not be so surprised that it is largely the woman who ends the relationship. Because women are generally more relationship oriented, they regard their closest relationship as the most important and central thing in their lives (after speaking to many women since my relationship breakdown, they have confirmed this as being correct). In my view, this is why many women with a partner who is not meeting her needs builds-up such resentment and anger over time, even depression, which boils-over at the time of divorce/breakdown. This resentment can often be hidden and suppressed for so long, and it simply builds up inside. Unfortunately, this resentment makes negotiation over the children and property extremely difficult, often to the severe detriment of the children, as indicated in the recent Pathways Report.

On the other hand, I believe that men tend to “compartmentalise their lives” and regard their partner as only one of a number of “things/events” that he wishes to “achieve” in his life, although the most important *person* in his life. Because of his make-up and ideals, men generally have to balance competing responsibilities, which often their partners find difficult to understand. The tendency in men is to become focussed on so many other things that many neglect their most important personal relationship, with disastrous consequences. Because of this compartmentalisation, a man is much more likely to put up with an unsatisfying relationship because he can overlook his frustrations with that relationship by throwing himself into the other aspects of his life, whether they be career, community service, various interests, children, etc. Unfortunately, however, this approach will generally make the relationship with his partner worse because she is receiving even less love than before.

When going through divorce, each gender forgets, or is not willing to meet, the needs of the other party and concentrates selfishly on their own needs. They are ready to jettison the relationship as tired or worn-out, as if the common experiences of the two parties, their children and what they had built together count for nothing. I concede that there may be very difficult situations of ongoing physical and sexual abuse that may make an ongoing marriage untenable, but these cases are only a small minority. In most cases the parties are outwardly sane and reasonable, but have determined that they have “grown apart”. As mentioned many times earlier, the root cause is a lack of communication and appreciation of the other’s strengths, and failing to provide for the needs of the other.

### **The Rate of Divorce is Extremely High and Getting Higher!**

The divorce rate is a staggering 50% using the crude form of measurement presently employed. This, however, is calculated, rather inaccurately, as the total number of divorces in any year divided by the number of marriages - this measure basically groups everyone together regardless of their age and duration of marriage, but it should be obvious that the older age groups have lower divorce rates than the younger age groups.

I believe we should be considering the following question:

“What is the chance of a young couple marrying today (or indeed entering any permanent relationship) becoming divorced or separated?”

As an actuary I would expect this to be much higher than 50%. Without having had the time so far to trawl through the available statistical data, I would expect the true rate to be at least 70%, and perhaps much higher. Given this huge rate of breakdown and the enormous potential for significant damage to our children, this problem is not one that can be lightly ignored.

It is ironic that as our society becomes wealthier, people are not getting any happier and our relationships are suffering (this is only one of the “counter-intuitive” ironies that keep cropping up – one of my favourite expressions!). Throwing money at the issue (for example, in the form of increased family allowances, etc.) will often do nothing to address the underlying cause of relationship breakdown, except perhaps for those families who are truly struggling.

### **Many Problems in Society are the Result of Divorce and Relationship Breakdown**

Despite the beliefs of most in our society that it is better to end a “bad” marriage than to continue in it, the view I hold is this – *divorce is an utter disaster for the individuals concerned and for society in general.*

In my view, it would be far better if everything possible were done to get people to understand each other and become reconciled. Unfortunately, I see very little positive action by governments in this regard (any further comment is outside the scope of the Inquiry).

Some of the many disasters caused by divorce in society are:

#### **(i) The Emotional Trauma is Immense**

All divorces are traumatic for the parties involved, men, women and their children. In my view, the Family Law Court must be the unhappiest building on earth. When a marriage is dissolving, every hurt and resentment comes to the surface, further poisoning the relationship with increasing anger. Following divorce it normally takes years for each party to recover, if they ever do. Once divorced, I believe it is impossible for a person to commit and trust again as they did in their first marriage, and I believe that this is one of the major reasons why second and subsequent marriages have a higher failure rate than first marriages (despite the belief that they should have learnt from the first experience!). Sadly, the introduction of the legal system poisons not just the difficult disputes where no other solution is possible (as often claimed), but **all** breakdowns because they all must run through the legal formalities, and each party must seek legal representation. Because our legal system is adversarial, each of the parties effectively become “enemies”, and the relationship is usually far worse after the process than before it. In my view, and the view of many others, *some other method must be found for dealing with these matters.* I return to this theme later in this submission.

Because women are usually the ones left looking after the children, they can find themselves in significant financial distress with few assets and little income, especially if the ex-partner is/was not well-off or responsible with money, and/or refuses to pay child support. Women can too often suffer from past and even ongoing physical abuse from their ex-partner. Even when these problems are not present, because women are generally more relationship-oriented they may have build-up significant resentments against their ex-partner that poisons their ongoing relationship with that person. This is most important where children are involved because there will necessarily be continuing

interaction between the two parties. Unresolved resentment often turns into depression, which many women suffer throughout the process and afterwards. This depression and negative attitudes to men in general can also poison their future relationships, and is, I believe, one of the major reasons why the remarriage rate for women is so low. In addition, as most divorced women are around 40 or older and often the sole or primary care giver to children, then the chance of entering into a subsequent and permanent relationship must be that much lower. This can further add to a woman's resentment and ultimately depression.

Men are often tremendously alienated and frustrated by a process that they see as favouring women, and all too often develop a sense of ongoing animosity and bitterness towards their ex-partner. In the process they often lose access to their children other than minor visitation rights (and some women make it difficult with even that small amount of time), they can lose most or all of their assets (certainly after legal costs), and often have to pay significant child maintenance despite having virtually no input into their children's development. Having been through the process, many men want to have as little as possible to do with their former partner, and move on and make a new life. Sadly, the fallout extends to their children, fractured as it is at separation, and of whom they will typically see less and less each year. Many middle age men (whether divorced or not) have the view that they "*lose everything*" through divorce. Because of men's disillusionment with marriage and the process of separation, many will choose to live alone or not commit fully to a subsequent relationship. No wonder there is so much bitterness, especially if the man cannot see or understand why his former partner wanted to end the relationship.

Sadly, the children of the relationship are the innocent pawns in the centre. They didn't want their parents to separate and want to have them both for their necessary support and development. They are naturally sad that they can't be with both anymore, and often see the breakdown as their fault. Because the Family Court system still has a preference for awarding the children to a "primary carer", usually the mother, they often see the other party less and less over time. Women are often frustrated that their ex-partner sees less and less of the children, but again this is only to be expected because the natural male tendency is to "move on and put a bad situation behind him". It is the contention of this submission that this is a disaster for the children.

## **(ii) The Financial Cost is Enormous**

As a result of the enormous stress on each party and the outpouring of resentment and anger, I believe that in going through the Court process one, or both, of the parties often lose sight of reality and what is best for everyone concerned, especially the children. For those who contest everything (it only takes one party to be completely unreasonable), legal fees can amount to hundreds of thousands of dollars each, especially if the children are contested every step of the way. I know of one couple who together virtually demolished the entire family assets of nearly \$1 million, due solely to the wife's extreme claims for the children and assets. Despite ultimately going to trial and the judge awarded a shared custody arrangement (though with a majority of time with the mother),

the former wife continues to fight for a level of child support unjustified by the father's income. Is this approach to resolving a breakdown in best interest of the wife, and particularly the children?

The cost also manifests itself in so many other ways. With what is left of the family's assets, each of the parties has to rebuild and establish two homes when previously there was one. They separately have to juggle their time between looking after their children and working, and this clearly cannot be done as efficiently as when they were living together in their relationship. Often, as a result of each having both domestic and work responsibilities, their productivity at work suffers and other workers may have to fill the breach.

It is also becoming more common that following such a traumatic experience the man will reassess his working role, either reducing it, or in extreme situations just giving up (perhaps to "live on the beach"). In many ways this reassessment can be a very positive thing if it brings more balance into his life and the lives of his children (see section 4), but many times it will be a negative response to what is perceived as an unfair result of the process. Following such an outcome many men simply refuse to pay child support. The statistics on delinquent payers are very disturbing.

It must be obvious that both parties, and especially the children, must be poorer (unless one or both of the parties subsequently marry or enter into relationship with someone well-off) than if they had stayed together and overcame their differences, pooled their resources and worked together.

### **(iii) The Cost in "Happiness" is Enormous**

I recall seeing the results of a study that traced the "happiness" score of 100 "unhappily married" couples at the start of a five-year period. As expected, half of the couples had divorced during the five years, so the researchers compared the happiness scores of the divorced couples with the couples that were still together. Contrary to societal expectations, the couples that stayed together scored more highly!

Not only does this confirm the view that it is foolish to think one can pursue one's own happiness, but confirms what is understood by counsellors – namely that every relationship runs in cycles, and if you are prepared to see the bad patches through, things can often improve.

### **(iv) Increased Housing Costs**

An incredible statistic just about floored me. Out of around 150,000 new housing units required to meet demand in Australia every year, over 100,000 were needed to cope with the "decreasing size" of the family. Naturally, one of the biggest contributors to this decreasing family size is the high rate of divorce and relationship breakdown! As part of this problem, many of those who were divorced will never marry again, choosing either

to live alone or in casual relationships. For many, the fear of relationship breakdown, as well as not being willing to commit to someone else, will keep many people single. And one doesn't have to be divorced to shy away from marriage these days - it is estimated that 50% of young men and nearly 40% of young women will never marry at all.

In respect of the strain on housing, divorce must be a significant contributor to:

- (a) the shortage of affordable housing;
- (b) increasing urban sprawl and infrastructure costs;
- (c) rising prices; and
- (d) increasing environmental degradation;

especially in the major cities.

To give an example in respect of my situation, we went from sharing a single home to, for a short period, tying-up four residences! I had one, and my former wife had three (one was vacant awaiting renovation).

#### **(iv) Other Devastating Social Costs**

Some other enormous social costs of divorce are, in the interest of brevity, just listed below:

- (a) A huge social welfare bill for sole parent support, etc.
- (b) Increased unemployment benefits.
- (c) Greatly increased crime, especially among our youth.
- (d) Increased prison costs.
- (e) Increased child and sexual abuse.
- (f) Significantly increased school difficulties and additional costs incurred.
- (g) Huge bureaucracies created to deal with divorce itself, child support collection, DOCS, etc.
- (h) Increased health costs and psychological services.
- (i) Increased problems of loneliness and general support for a population increasingly living alone, especially the aged.

**In short, divorce is virtually always a disaster, and for everybody!**



### 3. PROBLEMS WITH THE PRESENT SYSTEM OF DETERMINING CHILD CUSTODY

I do not intend to spend too much time addressing the problems of the present system because these have been addressed in great detail in the Pathways Report (particularly the need to reduce the adversarial nature of the proceedings and to facilitate conciliation and mediation). However, I would like to make some comments about the present system that could be overcome by adopting some sort of automatic joint custody for the children.

#### The Family Court has a “Female Bias”

It is curious that people have strong but mixed views about the Family Court and its processes. On the one hand the Court itself, and virtually all women, swear that it is fair (or even biased towards men in some situations), and virtually all men swear that it is biased towards women!

Who is right??

I actually think that *both* are correct, and the solution to this conundrum is that each gender is judging the outcomes *by its own standards*. How similar to marriage!

If one considers the processes and results by female ideals and standards of the woman having primary responsibility for child care and nurturing, and also with the man as the “provider” and the woman and children as the persons “being provided for”, then the process is generally fair.

On the other hand, if viewed from the male perspective of what is “fair” according to the relative contributions to the marriage (especially in a financial sense), and the common outcome that men lose their children and most of their assets, as well as having to meet significant ongoing child support (often without much input into his children’s development), then one can understand why men would perceive the process as extremely unfair. In addition, I believe that men can rightly argue that if the relationship bond is broken (often by the woman), then the obligation to “provide” (for the wife, but not the children) is also broken.

I believe that “*true fairness*” is something different, something that is:

- (i) fair to both parties, and *both* will see it as fair;
- (ii) will be a conduit to positive and generous co-operation in the care and development of the children (and hence fair to the children); and
- (iii) will also be a conduit (if at all possible) to a possible reconciliation between the two parties at some date in the future.

I personally *do not* believe that the Family Court, as it is presently constituted and run, acts in the best long-term interest of anybody, not even the children. Like any huge

bureaucracy, it takes its life from rigid legislation (interpreted by lawyers and case law), its own legalistic processes and the necessity to produce a "solution", but not necessarily the optimum one. It is an absolute fallacy to state, as some opinion writers do, that the Family Court only influences 5% of marital breakdowns through its Court decisions. The Court sets the standards, and these are always in the background when each party is negotiating a settlement. In the situation where the man sees the process as stacked against him, the most common response is to accept the offer by the wife in respect of the children and move on. The alternative is to consume up to hundreds of thousands of dollars in legal fees for potentially no gain. This "caving-in" by fathers can be a tragedy for the children.

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### **The Legal Process is a Disaster for Families**

I will not go into the major problems of our incredibly legalistic dispute resolution process. Suffice to say, I believe that it is more than extremely sad that there are so many law firms and barristers making so much money from other people's unnecessary anger and misfortune, and to make matters worse, taking money that could benefit the children. Indeed, I have seen or heard of so many cases where the total legal fees can amount to half or more of the family's total assets!

The stress of relationship breakdown, the destruction of dreams, and dealing with the children and family assets is traumatic enough without having to be burdened with the legal process and its incredible expense. I also have a major problem with lawyers generally in a system that encourages them to act unprofessionally (i.e. not in the best interest of their clients)

*It is my firm contention that a more consultative process must be urgently implemented.*

It *must* be possible to come up with some imaginative approaches, especially where there is the flexibility to do so with sufficient family assets and the ability of both parents to be flexible with their time in caring for the children. I would be pleased to pursue and analyse any ideas at a later date.

### **The Problem of Tying “Financial Reward” to the Children**

It should be a matter of great concern that the Family Court, despite its protestations to the contrary, treats the children (and associated assets) as the prize to be awarded to the winner. This form of institutionalisation creates a huge “moral hazard” for both parents, but especially the one with the greatest “merit” in the Court’s eyes in respect of child custody. By “moral hazard” I mean that financial incentives are provided, perhaps unintentionally, that leads people through self-interest to pursue a course of action that will not produce an optimum outcome for all parties involved, especially the children.

It may surprise people to learn that it is a common joke among the barristers of the Family Court that “the wife who before separation was more than happy that the husband helped and cared for the children, suddenly claims that he is incompetent and a danger to them after separation!”

While we can all cynically laugh at this, it is so obviously obscene that a party’s actions in respect of the children are motivated by the potential for greater financial reward, not just a greater share of the family assets but ongoing child maintenance. Of course this is always justified as “for the children”. All too often this can backfire disastrously because the huge legal costs incurred, if the other partner is determined to achieve a reasonable outcome, are larger than any increased benefit achieved, not to mention the ongoing anger and conflict.

Once again, with appropriate restructuring of the legislation and rules it *must be possible* to arrange the assets and child support so they *directly benefit the children involved*, not the parents who are fighting for them. In this regard, perhaps some form of trust arrangement could be investigated, where there are sufficient assets to warrant it. I would be more than happy to assist with the development of this idea if interest is shown.

One of the greatest resentments of the Court process comes from financially successful men who clearly produced the majority of quite significant assets for the family, only to see the majority of them transferred to the wife, partly because she “won” the children. In this case, it is hard for the man not to feel “betrayed” and “used”, and possibly to feel that all the hard work was for nothing. Worse than that, having significant assets in the marriage often increases the temptation for the wife to leave the relationship rather than work through the problems. In these cases, it would make a lot more sense if a portion of the assets were applied towards the children first, and then the balance apportioned between the husband and wife according to relative contribution, etc. This would also be much fairer than simply applying the “average percentages” to the total assets as is so commonly done.

## The Family Court Unintentionally Encourages Divorce

I know I will make no friends by saying this, but I believe that the Family Court *unintentionally* encourages divorce, despite its stated pre-eminent aim of seeking reconciliation between the two parties.

Obviously, the fact that it “is there” creates a legitimacy for divorce, and the ease with which one can achieve divorce without having to prove any “fault” are major factors. However, I would like to concentrate on other more “subtle” factors described below:

- (i) I believe that a significant cause of relationship breakdown is the building-up of resentment in each party over time, especially in the woman. When this is allied with an institution that has as its stated main aim the “best interest of the children”, and hence by extension, therefore, their main carers, then this can offer women a major encouragement to pursue divorce if they see no other option. As discussed earlier, one of the primary needs of women is to have their feelings heard and validated. It is very unfortunate that by introducing an institution that does exactly that, the wedge between the woman and her partner is driven in further. As expected, the man feels powerless and often becomes angry and frustrated with the process, which only serves to make their relationship deteriorate further.
- (ii) The Family Court and its child counsellors holds very strongly to the doctrine of “primary carer”, i.e. that the children have a special bond with their main carer (i.e. the mother), and that it is very dangerous to break this bond. This is a huge obstacle for men acting in the traditional role of the “breadwinner”, who for the sake of their family, and with both the agreement and active encouragement of the wife, had worked very hard to build-up substantial assets. Naturally, in this situation it made sense to leave the majority of the child rearing to the wife. However, by virtue of this doctrine, that man would *never* get the opportunity of being a great father to his children after divorce. While the idea of a “primary carer” has some validity especially in regard to very young children (i.e. under 2), it should not be set in concrete forever. Even quite young children readily adapt to having two loving and supportive parents – it just takes a bit of time and effort. Also, what is “optimum” for a child now *will not* be “optimum” in 5 or 10 years time, when the child would greatly benefit from the father’s input. Sadly, Court orders only consider the circumstances today, and do not make any allowance for changes over time. I believe that the circumstances of my wife and I is a powerful example of how a shared parenting arrangement can work, and *work extremely well*.
- (iii) The method of apportioning assets between the two parties needs major reform. It seems odd (and again counter-intuitive) that the couples that enjoy significant levels of assets and/or income suffer among the highest levels of divorce (I appreciate that enormous strains can also be placed on those who are struggling financially, thus making it harder for this group to stay together). Not only is there more money to go around after breakdown, if the husband is successful the process also grants more of the children and assets to the child caring party, making it easier for the aggrieved party to exit the relationship. The Family Court implicitly makes a major

presumption that the party who works the hardest (typically the man) will continue to want to do so, and he “doesn’t care” that he will rarely see or have little input into the development of his children. This presumption is both wrong and extremely damaging to the children over the long-term. Women going through the process quickly discover this presumption and how to make it work to their benefit (hence my earlier barrister joke) – and it is always the case that women going through the process gravitate to other divorced women for “support”. It is also extremely sad that the most intelligent and hard-working men are very often denied the opportunity of being terrific dads and role models to their children. This is a tragedy for society.

- (iv) Another point, allied to (iii) above, is that if one of the parties to a relationship has a much higher future earning capacity, then this will be used against that person to grant a greater share of the assets to the other party (usually the wife). This applies even if the wife chooses to end the relationship, as usually happens. This, and the treatment of assets brought into the relationship by the more “financially successful” party, also significantly increases the resentment of men. In fact, if one adds into the equation the order to pay a significant level of ongoing child support, then men feel that they are “paying twice” from their future income. Many “successful” men would agree with the statement: “the more one puts into a marriage, the more that is taken away from you”.
- (v) The method of determining child support also needs major reform because the formula approach adopted necessarily builds in a financial incentive *against* co-operative parenting. Under the present arrangements, women in particular have a major incentive to reduce the level of child-care by their ex-partner to just below the present care threshold in order to receive higher child support, and the converse is true for men!

There are many other subtle factors that I do not have time to address here. Naturally most women would dispute my comments that the Family Court encourages divorce because it is never a happy process to go through. They would also point to the fact that studies have shown that five years after divorce, men can often be in a better financial shape than their ex-partners, which somehow indicates the process was unfair to women. I think the more obvious answer to this observation is obtained from the personality differences described earlier – men are keener and are more “task-oriented” to get on and re-build their lives whereas women often take a long time to deal with their built-up resentment (and often depression). The symptoms of this depression manifest itself in many ways, usually to the detriment of genuine co-operative parenting, and the long-term interest of the children.

A small step in the right direction might be to rename the Family Court as the “Family Conciliation Centre”. Its processes could be restructured to genuinely reflect such a name (and even reconciliation!), rather than be centred on a legalistic court process.

The truth of the matter, again, is that *divorce is a disaster for everyone*, even for the women who “win”. As more and more men become aware of the potential disaster that befalls them if they marry, their willingness to enter into marriage will continue to decline. Is this in the long-term interest of women and children, and society generally?

#### 4. WHY AN AUTOMATIC JOINT CUSTODY ARRANGEMENT WOULD BE SUPERIOR

It is the contention of this submission that, if adopted, automatic joint custody, except under certain limited rebuttable circumstances, would be far superior to the current arrangements, and will work to the great benefit of not just the men and women involved, but most importantly the children of the relationship. *In fact I believe that this proposal may prove to be the seed that future generations will look back on and see as radically altering our society for the better.*

In my view, the care should be shared 50:50, or as close to this basis as possible, to be worked out in co-operation between the parties for the best interest of the children. However, if that seems too radical to start with, then something a bit lower would be adequate, say 6 days per fortnight during school term to the father, and half the holidays. The important thing is that *something is fixed as the default minimum* (without discretion) if no other basis can be agreed, because only this will produce the benefits listed below.

##### **Making the Arrangement Work**

If the proposal is adopted, I do not see a great deal of change in custody orders in the short-term. The majority of separated fathers will probably still wish to maintain a full-time career, and will find it too difficult (or will not have the desire or courage) to combine a reduced working week with the care of the children part time. However, over time this could change, as hopefully the workplace will adjust to the changed family circumstances of many people.

However, the greatest benefit will be for those separated families where the father genuinely wishes to maintain/develop a very active role with his children, because it will become a right, not something for which he has to fight through the Family Court as the underdog. To make the arrangement work, there will need to be active co-operation in many areas between the two parties, not least:

- (i) living close to each other and in close proximity to the children's schools and other activities;
- (ii) being prepared to adopt reasonable common upbringing principles, or at least accept the right of the other party to have differences (my wife and I have a comprehensive parenting plan)
- (iii) being flexible in their care time to enable each partner to fit in work priorities or trips away, etc;
- (iv) being flexible at holiday time;
- (v) coming to a mutually agreeable method of apportioning the children's expenses and perhaps a share of general household expenses of the party with the lower income. Where this cannot be agreed, then some formula may need to be applied.

There would also need to be rules as to each party's rights should one wish to unilaterally change the arrangement, in particular move residence and take the children with them. A suggestion might be that if the initiating party cannot show due cause as to why this is in the best interest of the children, then as a result of the disruption caused, they may need to forego some or all of their custody. This would be very sad, but hopefully relatively rare.

While this detail may seem complicated, even with only a modest amount of co-operation, much can be achieved for the great benefit of the children.

I wish to stress that the arrangement will work best if both parents *truly put the interests of their children first*, and if *both parties perceive the arrangements to be generally fair* all round. It is my experience that men, if offered an arrangement (children and ongoing support) *that they themselves consider fair*, and if mothers appreciate the effort and support of their ex-partners and tell them so, then they will often *over-deliver*. This may seem like "fantasy land", particularly after an acrimonious divorce, but it is consistent with the male primary ideals and needs described earlier. How different this approach would be to the current arrangements where hundreds of thousands of fathers are late or delinquent in their child support payments, with enormous ongoing conflict and bitterness on both sides.

Surely the current system's huge difficulties are only to be expected given men's ongoing resentment with a system they perceive as unfair, and which denies them equal access and care of their children. It is unfortunately true that if a man does not feel appreciated, or he feels he is being used, he will go out of his way to make life as difficult as possible for his ex-partner. The effect on the children is so obviously devastating.

### **Advantages of the Joint Custody Arrangement**

The major advantages of the joint custody proposal are as follows:

#### **(i) *It May Remove Some of the "Incentive" to Divorce***

I believe that for many women in quite well-off families, the option of divorce under the present system can often appear (on the surface) to be quite viable, compared to the difficulties of staying in the relationship and trying to make it work. If everything goes according to plan, she can have the children, the house, perhaps some other assets, an ongoing generous tax-free income from her former partner plus income from a bit of part-time work. In addition, if it works out well she may not need to see the former partner much at all!

The problem is, it doesn't always work that way.

I consider that many of these falsely perceived "viability of divorce" would evaporate under the proposed arrangement. At the very least, the woman would have to enter into a genuine co-operative arrangement to share the care of the children, and be flexible with her ex-partner (although this has great benefits to both sides and the children). Depending on what form the co-operation for payment of child support is

agreed, she may not receive as generous a “tax-free income” as such, but more a sharing of the direct children’s costs.

I postulate that faced with having to put the children first and co-operate regularly with her ex-partner (and not have it necessarily all her own way), she might be more likely to think twice about divorce, and perhaps seek other help to solve the problems in the relationship. A requirement to obtain genuine “other-person focussed” counselling for both parties may be of great benefit.

***(ii) Much Lower Levels of Conflict Over The Children***

If the arrangement is properly formulated, then much of the present conflict and “blackmail” over the children will hopefully be eliminated. Introduction of the joint custody proposal (allied to a change in the financial settlement rules and the rules for future child maintenance) would mean that those parties consumed with bitterness and resentment are less able to use the children as the means of “getting back” at the other party. Only where there are special situations, for example, ongoing child abuse or violence, will custody have to be determined by counsellors and, in the extreme, by the Family Court, as presently.

The Pathways Report clearly highlights the damage caused to a child’s development by ongoing conflict between the parents. It is clear to everyone that co-operative parenting is in the best interest of the children in the long term. It would appear that this proposal represents the best way of eliminating this conflict, in the absence of circumstances requiring special Court resolution.

***(iii) It Would Send a Strong Signal to the Community that Fathers Were Valued***

I believe that such a move would be a strong signal that fathers were at last valued by our society for the important contribution they can make to raising and developing our children. It is obvious that men desperately need something to help counter the very strong anti-male media image in our society. This could well be the start of a very positive movement for change.

It is clearly not before time for the sake of our children, both boys and girls.

***(iv) Creating More Balance in Our Lives***

One of the major issues in society today is how to establish more balance in people’s lives between work and family. While this may sound fanciful, I believe that if this proposal is introduced it will have a dramatic effect, over time, in achieving just that. In my personal situation, sharing the children has brought more balance into the lives of both parents so we each have separate time to dedicate to the children, and separate time to dedicate to our work or other interests. In addition, to a significant degree we both value more, and have developed somewhat, the primary ideals of the other gender. For example, I am now much more attuned to caring, domestic duties and relating to others generally, and my wife is much more attuned to being



responsible for her finances and going back to work. The children benefit by having two loving and caring parents who have more time for them than ever before. It is clearly a win, win, win situation.

I have a number of professional male colleagues who are also divorced and, to a greater or lesser extent, are doing precisely the same thing. Of course we are still a small minority in the workplace, and the workplace is still geared-up to full-time work. However, over time the change could be dramatic. Imagine how quickly things would change if all men had to care for their children for half the time!!

The proposed arrangement is not only great for the children but a huge benefit to the parents in quickly overcoming the anger and resentment that built up in the latter stages of the marriage. For the woman in particular, it permits her to re-establish or more easily develop her career and helps her greatly in her self-esteem. It will also reduce the feeling of dependency and the difficulty of breaking this cycle, which under the present system causes so much anger and conflict between the parties, and costs society so much.

**(v) *A Huge Saving In Legal Fees***

Most of the legal expense involved in the Family Court process is in respect of determining with whom the children will reside. Often the dispute over the assets will fall into place once the children's custody has been decided. Finally, co-operative parenting should remove many of the costly disputes that arise subsequently to the final determination.

As discussed in section 7 of this report, even under the proposed arrangement, one would need to alter the child financial support arrangements to remove some of the "moral" obstacles to co-operative parenting.

**(vi) *Increases Understanding between ex-Partners and Men and Women Generally***

With an increase in co-operation between the two ex-partners will come an increase in understanding. I believe this will be very healthy to them both, and to men and women generally.

**(vii) *Helps Mitigate the Disastrous Effects of Divorce on Society***

The benefits to society, especially to its children, should be obvious. It will do more than anything else to assist families, albeit split, to co-operatively provide stable, nurturing and loving environments, free of ongoing conflict.

I also believe that the joint custody proposal, and the associated co-operation it entails, provides the best chance of achieving eventual reconciliation between the two parents, in hopefully a new and stronger relationship. If this came to pass, this would ultimately be the best reason for adopting the joint custody arrangement.

## 5. CIRCUMSTANCES IN WHICH AUTOMATIC JOINT CUSTODY WOULD BE REBUTTED

If introduced, it is clear that an automatic presumption of joint custody could not be applied in all situations for practical reasons such as:

- (i) One of the parties is not interested in providing a major level of care for his/her children. Usually this will be the father who because of his career or, sadly, a lack of interest, is unable or unwilling to make this commitment.
- (ii) A child is very young and it would be impractical or unwise to separate from the mother for all but brief periods of time. In this situation, however, the limitation should rapidly phase-out by a fixed age, for example by 4 years.
- (iii) A child suffers from some form of disability and thus must be subject to special considerations by the parents, counsellors and possibly the Court. Once again the aim should be to move to a joint custody arrangement (if at all possible and practical) by some age.
- (iv) It is geographically too difficult to arrange (e.g. they live in different states or one lives overseas) and neither of the parties is willing to move closer to the other.
- (v) One party is incapable physically or mentally to care for the children on this basis.
- (vi) One party has a history of physical or sexual abuse or is likely to commit such abuse in the future.

There are probably other practical impediments, which in the short time available to prepare this submission I have not considered.

Many opponents of the proposal will suggest that it will be very "dangerous" because the other party (i.e. the father) does not have as much knowledge as the mother, or cannot care for them as well. Such objections should be strongly resisted for the very reason that the man is *not a woman*, and will bring a different type of caring and development, which is precisely what the child needs. I am yet to see an able-bodied and keen father who does not quickly rise to the occasion and quickly gets the hang of the routine of a parenting arrangement.

### Vexatious Claims

One of the main problems of the present system is that it is all too easy for one party (often the woman) to make exaggerated or just plain false claims about the other party in regard to abuse, which can be very difficult to defend. The conditions for rebuttal under (v) and (vi) must be very tightly controlled otherwise many of the benefits of moving to the new arrangement will be lost under the weight of vexatious accusations by the former partner.

## 6. COMMONLY STATED OBJECTIONS TO JOINT CUSTODY

It has been very interesting to observe the various opinion writers in our daily newspapers. Those who are violently opposed to the introduction of such an arrangement use emotive descriptions such as “we are entering uncharted territory” to “dangerous” to “it will unleash child abuse”. I believe these statements add nothing to the debate except reveal the resentments of many women.

Some of the stated objections are set out below:

### (i) It Will Involve Too Much Travel between Residences

I’m not sure I have ever heard a weaker excuse, except perhaps some of the excuses I heard given at school for not completing homework!

In all my experience, when there is a break-up the two parties will choose to remain in the general locality. Ask any real estate agent and he/she will tell you that when people move house they usually purchase another one within 5 kilometres of their previous home. Don’t think that only the children want to avoid unnecessary travel between homes, school, etc., so does any father or mother involved with the care of children.

Any why should there be any additional travel compared to current arrangements? Consider a common arrangement where the father only sees his children every second weekend and perhaps one night in the off-week. The travel between residences involved in this arrangement is actually *more* than an approach where each party cares for the children on alternate weeks.

I think the main objection here is that, initially, women, often because of anger and resentment, do not want to actively co-operate with an ex-partner. This is clearly not in the children’s best interest, and nor her own interest either.

### (ii) The Children Have a Special Bond with the “Primary Carer”

As mentioned earlier, many child counsellors claim that children have a special bond with their main carer (i.e. usually the mother), and that is very dangerous to “break” this bond. While this idea has some validity, especially in regard to very young children (i.e. under 2), I do not believe it should not be set in concrete forever, and even fairly young children readily adapt to having two loving and supportive parents – it just takes a bit of time and effort.

I further strongly believe that the enormous benefits of having a father actively involved with his children, being flexible and supporting the mother generally, and providing significant benefits through a positive male role model, is far more important than making the primary carer concept sacrosanct, especially when the child ceases to be very young.

### **(iii) A Single Residence is More Stable for the Children**

I find it difficult to comprehend this argument. One need only look at the problems with the present system, including ongoing conflict over custody and child support payments, to see that the aim of a stable, caring, nurturing and loving environment is not presently being met. In addition, the mother alone cannot provide all that a child needs for his/her proper development into a well-adjusted adult.

I fully agree that the pre-eminent aim should be that children grow up in a stable, caring, nurturing and loving environment. Clearly it is best where both parents co-operate fully *and live under the same roof*. Where this cannot be achieved because of divorce or relationship breakdown, the second best option is to retain this spirit of co-operation the best way one can – i.e. in shared custody.

### **(iv) Men are not Competent to Care for Children**

I know many divorced men who cope quite adequately with the care of their children. The simple fact is men and women are different, they care differently for their children and have different priorities. This is both healthy and necessary for a child's development.

The real problem is that under the present system women continue to resent the fact that men do things differently, rather than being prepared to co-operate and appreciate those differences. The same comment also applies to men!

### **(v) Men do not take even the Small Amount of Care they are Presently Granted**

It is true that when a relatively minor level of child-care is awarded to a father (for example, every second weekend and possibly an extra night in the off-week), over time this often steadily reduces, and eventually there may be little contact at all. This phenomenon occurs even when the father was very keen to pursue a shared custody arrangement, but was denied the opportunity. The children grow older and have their own interests, different partners enter the picture (some with their own children), and it becomes a lot more difficult. Add in potential difficulties to smooth transitions, often placed in the way by the mother, in some cases she might try to turn the children against their father, and one can see why men feel frustrated and powerless with the system, and give up. When the care routine becomes a "difficult and stressful chore", all the father can do is "move on and put the bad situation behind him". Sadly, the children miss out, and the mother has to bear the full burden of raising the children, and to the children's detriment as well.

The reduction of care over time *was always going to happen* when any parent has very limited custody, rather than a significant portion of time (e.g. half or nearly half). Where the sharing of care is significant and co-operative, it becomes part of each parent's and the children's lifestyle, rather than artificial or forced.

I believe that if the shared custody proposal is adopted, it should overcome this problem provided the father genuinely wants an active involvement with his children in the first place.

**vi) If Introduced, Joint Custody will become the Norm for All Splitting Couples**

I don't believe this will occur, although it would be great if it does (except in those clear cases where it is not appropriate – see section 5).

The sad fact is that it will not be practical or convenient for a significant proportion of “breadwinning” partners (typically the man), although that may change over time as the workforce hopefully moves to accommodate the dramatic societal changes.

The main benefit of the joint custody proposal is that it will hopefully remove a lot of the emotionalism and blackmail surrounding the children, and lead to a much better spirit of co-operative parenting, which really would be in the best interest of the children.

**vii) It Will Lead to a Sharp Increase in Child Abuse**

This is really the “Let's denigrate men” argument.

Only a very small proportion of men are involved in physical and sexual abuse of their children (some women also abuse their children), and this argument must not be used as an argument to deny *all* men the opportunity for an equal and important role in the development of their children.

The full force of the law should, and no doubt will, be applied to those who commit such atrocities, whether they care for children or not. It is totally unacceptable to abuse a child's trust in this way. One of the causes for rebuttal will of course be if a parent has or is likely to commit such abuse.

**viii) If Men Want 50% of the Care they should have done 50% of the work prior to Separation!**

This argument obviously comes only from resentment and anger, and really doesn't warrant a reply.

However, I would just say that typically the pre-separation care arrangements were agreed between the two parties as being in the best interest of the family generally, so this cannot be an argument against the proposal. There is also no reason why the father can't learn quickly about parenting to the great benefit of all concerned.

Men who really want to give it a go virtually always turn out to be fabulous fathers. Why should the children be denied this opportunity, especially from the best and brightest men in our society, because they were the "financially successful" ones in the relationship?

**ix) There may not be Enough Assets and Income to Permit Two Shared Households**

This argument is perhaps the only one with some validity, in circumstances where the family is really struggling.

I believe it should be up to both parties to decide whether the shared custody approach is practical or not, and should not be treated as a reason for rebuttal, because it could be abused by wide interpretation.

It will always be the case that it will be harder to maintain two households after breakdown, than one. However, the life of each ex-partner will be very different than previously, and, depending on attitude, often better and more balanced. I personally live a modest and fairly relaxed lifestyle, and my children share my home (nay, our home) around half the time. I believe that I am much happier now with my life and balance than I ever was in previous years. And very importantly, the children are very happy and well adjusted.

The old adage that "money isn't everything" is certainly true.

In my view, virtually all the arguments against automatic joint custody are inconsequential for most couples, compared to the very significant benefits that will accrue to our children (and their parents) from the joint custody proposal.

I cannot help but feel that the objections posed merely underline the fact that the motivation of a lot (but not all) women lies not in the best interest of their children, but elsewhere. I also believe that it is a major truth in this world that "one often needs to give more in order to receive more"

## 7. COMMENTS ON THE PRESENT CHILD SUPPORT ARRANGEMENTS

I do not intend to make detailed comments on this topic, because to do so would require a detailed analysis of many different types of split families, their circumstances and problems, etc. However, I will make a few observations.

The very fact that this question has been included in the submission is a strong indicator that it is at last accepted by government that there are major problems with the system. One need only look at the number of late and delinquent child support payments from fathers, and one gets a very clear idea that major reform is necessary. Of course, a significant number of delinquencies would be the direct result of the financially devastating effect of the divorce/breakdown and the difficulty of fathers making ends meet with a limited income.

### (i) Child Support Payments Cannot Be Considered in Isolation

To gain a complete understanding of the situation, and why so many fathers do not comply, one has to consider the total circumstances surrounding the break-up, i.e.

- (i) Who initiated the process of dissolution of the relationship (I didn't say breakdown because it is virtually always the case that both parties are at fault), and what were the circumstances?
- (ii) What role did each play in the relationship, who cared for the children and who produced the assets?
- (iii) Is there ongoing acrimony and resentment over the care of the children?
- (iv) Is there ongoing acrimony and resentment over the settlement of the assets?
- (v) Any other circumstances causing ongoing acrimony and resentment?

If the father (or sometimes the mother in the rare cases where she pays child support) feels resentful over any of these issues, and this resentment has not been properly addressed, then there will clearly be the potential for significant ongoing problems and conflict in respect of the payment of child support.

In my view, *only* if the child support payer perceives that the process of separation (children and assets) was "reasonably" fair will there be relative harmony in ongoing relations, and particularly in respect of child support. Once again, to some readers this may seem strange that a father might refuse paying money (ostensibly) for his children, but that is how the male mind works - he will see it as paying to his wife (to whom he considers he has perhaps already paid so much), not his children!

In my view, the only way to make a system of child support work is to go back and fix up the other parts of the system so that it is *fair to everyone, men, women and children*. The introduction of an automatic joint custody arrangement is thus a big step in the right direction.

While outside the scope of this Inquiry, some ideas for making the apportionment of the assets fairer include:

- (i) less of a financial loss if a party brings substantial assets into the marriage (i.e. greater quarantining of these assets);
- (ii) less of a financial penalty if one of the parties potentially will earn a higher future income (s75(2) adjustment), especially if the other party ended the relationship; and
- (iii) if the assets are significant enough to warrant it, consider earmarking a portion of the assets for the benefit of the children, perhaps through a trust arrangement. This would be available to support the children until they reached adulthood. I believe that if structured correctly, any resentment of the parties regarding the assets would be mitigated because they would clearly see them going towards the benefit of their children.

In respect of point (iii), I would emphasise that there are three parties to the relationship, not just two.

The more that the value of these components can be determined by some formula, or series of formulae, the better. To have the components determined by legal discretion and the "circumstances of each case" means that the lawyers determine everything, and we are back to the present system. What one party might lose through the use of a fixed formula will be more than compensated by speed of resolution, a much lower stress level, increased ongoing co-operation between the parties, and a huge saving in legal fees.

Point (iii) will require considerable work to develop something workable, assuming there is some interest in the idea. If created, perhaps the trust could lend money to the wife (at some rate of interest) to enable her to purchase (or maintain) the family home. Perhaps the trust could take a direct interest in the home. All sorts of approaches are possible, but much analysis and thought is needed.

As a quid pro quo, to offset the perceived significant re-alignment of assets, it might be appropriate to allocate the earnings from the trust assets, for example, to provide an income for the carer(s). Once again, all sorts of ideas are possible, even if the family has only modest assets.

My firm view, consistent with my training and experience over my entire career, is this:

**We will NEVER achieve fair outcomes for all parties, including the best interest of the children, unless we scrupulously remove all financial incentive that forces people to act for their own interest rather than for the family generally, and the children in particular.**

As mentioned earlier, this in actuarial terms is called avoiding "moral hazard".



How can we expect to achieve fair outcomes when the children are seen as the major battleground and to the winner “go all the spoils”? It may seem like a different form of words for a similar outcome, but if both sides can see that he/she is not being “poked in the eye”, and the children are winning something as well, then I am convinced that we will see much better co-operation in so many areas. In fact, if it is possible to achieve this we may not need to mandate joint custody at all – things might just naturally fall into place for so many families because the moral hazards are removed - those most interested in the children’s care will step forward, or will naturally agree to share it if they both want to. However, I am not so naïve as to suggest this will happen overnight – it will probably take a considerable time, and much fine-tuning of the system. In addition, I do not wish to underestimate the difficulty of overcoming the problem of unresolved anger and resentment built-up during the final stages of the relationship and during the breakdown itself, which may always require a certain amount of mandating of joint custody.

To ensure that most fathers understand the important role they *do* have, it is appropriate that the Family Court or some other body (e.g. “Family Conciliation Centre”?) provide extensive education sessions.

(ii) **Ensuring A Fair Child Support System**

**The major reason why the present system is not working, in my view, is that fathers, rightly or wrongly, perceive the payments made as support for the mother, not the children. If this perception can be changed, then we are a good part of the way down the road to finding a solution.**

I consider that if more goodwill could be shown during the breakdown process, encouraged by the Court acting in a conciliatory role, rather than a legalistic manner, using “fairer” principles regarding the children and assets, then this must have positive benefits regarding the payment of ongoing child financial support.

To this end, I am sure that most parents would be prepared to meet their share of:

- (i) the children’s direct expenses for the coming year (quite broadly described); and
- (ii) some allowance for the value of the carer’s time (unless this was dealt with in some other manner).

Total costs could be apportioned to each party based on income, or some other measure, with each person’s costs offset against the other to determine the net amount payable.

I believe that the present system of determining child support based on taxable income (as presently), and without regard to the actual expenses incurred, is seriously flawed. Most child support payers consider the amounts payable as an additional tax! The system is too bureaucratic and rigid, and only creates ill will between the parties.

I would also like to point out that the method of assessing child support where a shared care arrangement is in place **does not work**. I say this because technically no-one is responsible for actually paying the child's expenses – this needs to be agreed between the parties in some fashion. In situations of ongoing conflict, this can be extraordinarily difficult to achieve and it is quite simple for one of the parties to stop paying his/her share of the expenses, and only pay what child support emerges from the formula. This is potentially grossly unfair. In situations of joint custody, co-operation over expenses is essential, and in my view the Child Support Agency, despite trying to help, actually makes things worse.

In my view, a little bit of consideration and give and take goes an incredibly long way in resolving suspicion, hurt and resentment, to the massive benefit of the children and society generally.

I have learnt this from my own experience as well.

## 8. SUMMARY AND CONCLUSION

A movement to rebuttable joint custody would represent a watershed change in the parenting of our children after relationship breakdown. It would also recognise the value of fathers to our children, and the crying need for greater positive male role models for our youth, especially those from broken families. Men bring different strengths than women to the parenting role, and both are needed to bring up well-adjusted and healthy children.

More than half of families in Australia will be blighted by divorce or relationship breakdown. This is an enormous disaster for society and every effort must be made to ameliorate its tragic effects. Today there are one million children in Australia living with one parent and their other parent lives elsewhere. This is a very sad indictment of our society. The ongoing conflict between ex-partners is a serious problem for society, and the children of those relationships in particular (section 2).

There are very serious problems with the present method of determining child custody after divorce. Most of these problems emanate from anger and resentment at the breakdown and the legal process that ties financial reward to the determination of custody of the children. There is a significant underclass of men who feel aggrieved by their loss of family and assets, and they perceive that the Family Court is biased towards women. The resentment of both men and women poisons their ongoing dealings with each other to the serious detriment of their children (section 3).

An automatic presumption of joint custody, subject to certain rebuttable circumstances, has the potential to significantly reduce the anger, frustration and expense of determining child custody at the time of separation. Under the proposal, those parties consumed with bitterness and anger would find it very difficult to use the children as a means of "getting back" at the other party. It also has the potential to dramatically reshape our society, increasing understanding and co-operation between the parties, and potentially leading to a better balance between work and family (section 4). Some suggestions for the conditions under which a presumption of joint custody could be rebutted are set out in section 5. It is emphasised that the number rebuttal conditions should be limited as much as possible, otherwise we would simply return to the present adversarial system.

The commonly stated objections to the rebuttable joint custody proposal are commented upon in section 6. In my view, none of the objections represents a valid reason for seriously questioning the appropriateness of the proposal.

Some comments are made in section 7 regarding the suitability of the present child support arrangements. The present system is clearly not working. There is enormous ongoing conflict and serious delinquency of payments. One of the major reasons for this conflict is the ongoing resentment of fathers that the system is biased against them. Fathers, rightly or wrongly, also perceive the support payments made as often providing support for the mother, instead of the children. The only way this perception can be changed is to restructure the way the Family Law Act operates so that both men and women perceive the entire process to be fair. In addition, the child support system would work much better if the payers could see a direct connection between the children's actual costs and the amounts they are required to pay. The proposal to introduce rebuttable joint custody would be a huge step in the right direction, because it should lead to increased co-operation between separated parents.

Section 7 provides some suggestions about how the Family Court processes might be radically restructured to remove the many areas of "moral hazard", i.e. the financial incentive of parties to act in their own interest to the detriment of the interest of the other party and indeed the long-term interest of their children. What we should be moving toward is a system that is quick, economical and fair to all, and also *perceived to be fair* to all.

I believe that the rebuttable joint custody proposal is a great first step in the right direction. However, much more needs to be done to make the system fair to men, women and, most importantly, their children.

It has been a pleasure having the opportunity to comment on this important social initiative, and I would be delighted to answer any questions or provide further amplification on any of the points made. Please do not hesitate to call or contact me by email.

Yours faithfully

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