Submission of the New South Wales Young Lawyers Family Law Committee to the Parliamentary Inquiry into Joint Residence Arrangements in the Event of Family Separation

House of Representatives Standing Committee on Family and Community Affairs
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1. Terms of Reference

The terms of reference are as follows:

(a) given that the best interests of the child are the paramount consideration:

i. what other factors should be taken into account in deciding the respective time each parent should spend with the children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption should be rebutted; and

ii. in what circumstances a court should order the children of separated parents have contact with other persons, including their grandparents.

(b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

2. Who is Young Lawyers Family Law Committee?

The Family Law Committee of New South Wales Young Lawyers is made up of practitioners who are either in their first five years of practice or under the age of thirty six (36) years. These submissions aim to address the issues contained in the aforementioned terms of reference from the prospective of practitioners who specialise in the area of law the subject of discussion.

3. Commentary

(a) Applicable existing principles – shared care

Legislation

FAMILY LAW ACT 1975, SECTION 65E
Child's best interests paramount consideration in making a parenting order

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

Note: Division 10 deals with how a court determines a child's best interests.

FAMILY LAW ACT 1975, SECTION 60B
Object of Part and principles underlying it

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

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

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children.

FAMILY LAW ACT 1975, SECTION 68F
How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2) The court must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or
(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

> (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
>
> (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

(4) In paragraph (2)(f):

Aboriginal peoples means the peoples of the Aboriginal race of Australia.
Torres Strait Islanders means the descendants of the indigenous inhabitants of the Torres Strait Islands.

In some sense a presumption already exists in the object section (s60B), that is, that children have a right to know and be cared for by both their parents and other persons important to their care welfare and development. What the objects section does not do is to translate this into a concrete and inflexible arrangement which would apply to all children unless set aside. In *B and B: Family Law Reform Act 1995* FLC 92-755 (at para 9.59), the Full Court of the Family Court of Australia considered section 60B and the Family Law Act more generally and firmly rejected the concept of the application of presumptions in the determination of parenting issues (see discussion of *B and B* below).

Case law

a) Pre-Family Law Reform Act 1995 (Cth) Cases

The significance of the *Family Law Reform Act 1995* (Cth) for the way in which courts must determine applications for shared and equal residence, and parenting issues, more generally, is set out below in our discussion of the judgment of the Full Court of the Family Court in *B and B: Family Law Reform Act 1995* (1997) FLC 92-755. Whilst pre-*Family Law Reform Act* cases are not necessarily binding (see our discussion of the *Bartholomew v Kelly,* an unreported decision of the Full Court of the Family Court of Australia delivered on 14 August 2001 and *T and N* [2001] FMCAfam 222 below), they *"give useful guidance to those factual matters that a court adjudicating a 50 - 50 shared parenting application pursuant to the current legislation should consider"* (*T and N* [2001] FMCAfam 222 at para 91).

In ***Forck and Thomas*** **(1993) 16 Fam LR 516** (as discussed in *T and N, supra* 222 at para 52):

"the Chief Justice reviewed the literature about shared care in light of the facts and circumstances of the case then before him and highlighted the following (at pp 520-521):

- *That increased hostility between the parties in this case had placed a greater pressure on the joint custody arrangement than it had in the past;*
- *That the geographical proximity of the parents is an obvious practical consideration;*
- *That the "re-partnering of one or both of the parents can de-stabilise joint arrangements by giving rise to powerful emotions and new obligations";*
- *The parents' communication skills; and*
- *The parents' "ability to cooperate and the compatibility of their parenting values and styles.""*

His Honour Justice Kay in ***Halfiger and Halfiger-Knoll*** **(1990) 13 Fam LR 786** (as discussed in *T and N, supra* at para 56) found that the facts and circumstances of that case amounted to *"one of those rare occasions where a shared parenting order is more appropriate than a sole custody order."* He noted:

"It presents because of the tender age of the child. It presents because of the geographic proximity of the homes of each of the parties. It presents because of the wife's mother being a focal point for both parties, particularly being friendly with the father, and it presents because the child has already leant in its tender years to accept such an arrangement. In my view, at least for the next two or three years, providing the geographic proximity remains the same, there is no reason to conclude other than the child will continue to prosper in such an arrangement. Of course, as the child's education progresses and her needs to go into a more regimented regime of homework and continual supervision, such an arrangement may become inappropriate, but at least in my view, in the foreseeable future of this child's life, given that she has just turned four, this is one of the rare occasions where a sharing arrangement is appropriate."

In ***Pagden and Pagden*** **(1991) FLC 92-231** (as discussed in *T and N, supra* at para 59):

"the parties lived close to one another, were able to supervise and guide the child properly and possessed compatible parenting values. Despite the existence of various indications that

a shared parenting arrangement might be suitable. Rowlands J (at 78,585) held that "there remains the deficit in mutual trust, co-operation and good communications which appear to be desirable elements in a shared custody scheme" and refused to make orders for joint custody. His Honour suggested that the "mutual rift of trust, co-operation and good communications" was, in part, demonstrated by the Family Court proceedings. He went on to cite Kay J in the unreported judgment of Hall v. Fordyce: "I think it is fair to say that the Judges of this Court have not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties."

Bartholomew v Kelly, an unreported decision of the Full Court of the Family Court of Australia delivered on 14 August 2001 (as discussed in *T and N, supra* at paras 49-50) was *"an appeal against orders providing that the parties' children reside with each of the parents on a fortnightly basis. Here there were serious communication problems between the parents arising primarily because the mother found it impossible to communicate with the father. The trial judge found the father had "abused her most viscously" and that the mother had "lost confidence and trust in [the father] and she would find it very difficult ... to communicate about the children with [the father]." On appeal, the appellant took the Full Court to a series of cases decided before the introduction of the Family Law Reform Act 1995 (Cth). The Full Court said (at paras 42 and 43):*

> *"[I]n relation to matters of law and principle, it has to be said that the principles enunciated in the first instance decisions of Forck v Thomas (1993) FLC 92-372 and H and H (1995) FLC 92-599 concerning – to use the language of Counsel for the appellant wife – "the key elements in a successful shared residency arrangement", did not constitute binding authority on his Honour, such that it might be asserted that he erred in principle in not applying or following them. But in any event, as we read his Honour's reasons, he was very well aware of the difficulties for a shared residency arrangement (canvassed in those earlier decisions of this Court) where the parties cannot agree, and/or the parties cannot communicate, and/or there is tension or mistrust between them."*

Thus the Full Court was satisfied that the trial judge had considered the factors that would militate against a shared residence order that split the children's time equally between their parents. The children's relationship with their father and the success of the shared arrangement to date tipped the balance in favour of such an arrangement being ordered to continue."

b) *B and B: Family Law Reform Act 1995* (1997) FLC 92-755

In this case the Full Court of the Family Court of Australia addressed the impact of the *Family Law Reform Act* 1995 (Cth) upon the principles to be applied when determining parenting matters under Part VII of the *Family Law Act* 1975 (Cth). This case is particularly relevant to the current Parliamentary Inquiry into Joint Residence in two respects:

1. it explains the significant changes to the law since the introduction of the *Family Law Reform Act* 1995 (Cth) that are relevant in the determination of parenting matters (see heading "Family Law Reform Act 1995 (Cth)" below);
2. it sets out the manner in which a Court must conduct its inquiry into the best interests of the individual child in parenting cases and emphasises (at para 9.59) that *"any question of presumption or onus has the potential to impair the inquiry as to what is*

in the best interests of the particular children" (see heading "Inquiring into the Best Interests of the Individual Child: No Place for Presumptions" below).

i) Family Law Reform Act 1995 (Cth)

Children's Right to Contact on a Regular Basis

Paragraph 60B(2)(b) introduced by the *Family Law Reform Act* 1995 (Cth) provides that *"children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development".* The Full Court made the following comments in *B and B*:

"Paragraph [60B(2)(b)] refers to the right of contact "on a regular basis". (para 9.16)

...In considering this aspect the Court must make the order which it considers to be in the best interests of the child. The nature and degree of contact is ultimately influenced by that, par.(b) providing guidance in that respect. This Court has in the past consistently attempted to make orders for contact which are practical and maintain as much direct and indirect contact between the children and the contact parent as is appropriate in the circumstances of that case. That remains the approach. Contact generally and in the context of par.(b) normally encompasses direct contact but can include indirect contact of the type to which the Attorney-General referred. The object in s.60B(1) would not be likely to be achieved in most cases by providing only for contact which was regular but infrequent. Consequently, having regard to the previous approach of this Court and the requirements of the best interests of the children, par. (b) should not be narrowly interpreted. Fundamentally it emphasises the desirability of contact, and "regular" carries with it a clear understanding that it should also be as frequent as is appropriate and by the various means which are considered to be in the children's best interests." (para 9.18)

"Residence is not custody by another name"[1]

The Full Court in *B and B* stated that the changes in terminology introduced by the Family Law Reform Act were not merely semantic; rather, the changes ("custody" and "access" orders could no longer be made and "residence", "contact" and "specific issues" orders were introduced) emphasised the *shared* parenting responsibilities of parents and provided courts with greater flexibility in tailoring parenting arrangements to suit the particular circumstances of a case:

"Section 64B defines a "parenting order". It provides that a parenting order may deal with one or more of the following:-
(a) The person with whom a child is to live (residence order)
(b) Contact between a child and another person (contact order)
(c) Maintenance of a child (child maintenance order)
(d) Any other aspect of parental responsibility for a child (specific issues order). (para 9.37)

This section and the subsequent sections of Div.5 emphasise one of the fundamental differences between the amendments introduced by the Reform Act and the previous

[1] para 9.39

legislation. Under the latter, the Court usually made a custody order in favour of one parent and an access order in favour of the other parent. The custody order carried with it not only residence but also powers in relation to the day-to-day care of the children. Now the structure of the Act is that the norm is residence and contact orders which deal only with the matters described above, leaving all other powers, authority and responsibilities in relation to children to be shared between the parents. If either parent desires to alter that position it is necessary for that person to apply for a specific issues order. (para 9.38)

The aim of these provisions is twofold. Firstly, to underline the shared responsibilities of parents and to avoid, where it is unnecessary to do so, the apparent imbalance which was thought to arise from the custody/access regime. The changes are obviously far more than semantic. Residence is not custody by another name. It has a more constrained meaning, being limited to identifying the person or persons with whom a child is to live. In this it diverges from the English concept, in which authority to manage the child's daily life is conferred by reason of a residence order, which the other parent, even when in possession of an order for parental responsibility, cannot restrict. (para 9.39)

Secondly, it gives the Court a wider range of orders which it may make so as to tailor its intervention to the requirements of the individual case. (para 9.40)

In relation to s.64B, we should refer to one further matter. We have referred to a residence/contact regime. We agree with the submissions of the Attorney-General that it is open to the Court in an appropriate case to make a residence/residence order as the appropriate regime. Indeed there are many cases where such orders are desirable, reinforcing as they do the shared parenting responsibility concept contained in the new legislation. On the other hand, a residence/contact order should not be seen as a second best option. Rather, we think it should be used in circumstances where the contact is of relatively short duration, particularly where there is no overnight aspect." (para 9.41)

ii) Inquiring into the Best Interests of the Individual Child: No Place for Presumptions

In *B and B*, the Full Court firmly rejected the concept of the application of presumptions in the determination of parenting issues:

"For many years in child related cases the legislature and the courts have consistently emphasised that the welfare or best interests of the particular child in the particular circumstances of that case is the determinant, and have eschewed the application of fixed or general rules as the solution. That continues to be the case; the Reform Act should not be understood as suggesting otherwise. (para 9.57)

As a matter of proper practice and to ensure that this essential task is performed, a judge in the adjudication of such a case would be expected in the judgment to clearly identify s.65E as the paramount consideration, and then identify and go through each of the paragraphs in s.68F(2) which appear to be relevant and discuss their significance and weight, and perform the same task in relation to the matters in s.60B which appear relevant or which may guide that exercise. The trial Judge will then evaluate all the relevant issues in order to reach a conclusion which is in that child's best interests. (para 9.58)

In this approach no question of a presumption or onus arises. The analysis by McLachlin J in Gordon v Goertz, supra, [[1996] 2 S.C.R. 27, Supreme Court of Canada[2]] is compelling. The Act contemplates individual justice. Any question of presumption or onus has the potential to impair the inquiry as to what is in the best interests of the particular children. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating to the children's best interests to legal issues relating to burdens of proof. The task is not "to be undertaken with a mind-set that defaults in favour of a pre-ordained outcome absent persuasion to the contrary". See the judgment of Brennan J (as he then was) in Brown and Pederson, supra. (para 9.59)

In cases where there are no countervailing factors the s.60B principles may be decisive, not only because they are contained in s.60B but because they accord with what is in the best interests of the particular children. Where there are no countervailing factors, the Court may normally be expected to conclude that it is in the best interests of the children to have as much contact with each parent as is practicable. However, to attempt to impose that approach in cases where the best interests of the children may not indicate that conclusion as appropriate is contrary to the legislation and contrary to the long established views of this and other courts which deal daily with the welfare or best interests of children." (para 9.60)

In the passage of *B and B: Family Law Reform Act 1995* (1997) FLC 92-755 cited above the Canadian Supreme Court case of *Gordon v. Goertz [1996] 2 S.C.R.* 27 is cited with approval. In *T and N, supra* (paras 81-83), *Gordon v. Goertz* and other Canadian cases that establish that no presumptions are to be applied in determining what is in the best interests of the child are discussed:

"In MacDonald v. MacDonald and another British Columbia Supreme Court case, Larden v. Larden 2001 A.C.W.S.J LEXIS 2896, both cases in which joint custody was at issue, Macaulay J cited Robinson v. Filyk in which Huddart J.A. suggested "the inquiry into a child's particular circumstances mandated by s. 16 of the Divorce Act, as interpreted and affirmed by [the Supreme Court of Canada] in Gordon v. Goertz, [1996] 2 S.C.R. 27, requires that a care arrangement be tailored for each child" and that "[s]uch an inquiry must not be commenced with a mindset favouring either joint or sole custody" (para. [15]).

Gordon v. Goertz is Canadian authority for the proposition that presumptions do not apply in determining what is in the best interests of the child. An analysis of a care arrangement tailored to each child is required. This aspect of Gordon v. Goertz was cited with approval by the Full Court of the Family Court of Australia in B and B (Family Law Reform Act 1995) (supra). [footnote omitted]

Of particular interest are the following passages of Robinson v. Filyk as cited by Macaulay J:

> *"The only reason to review that order is the acceptance by the trial judge of what he called the "cautious" approach of [Baker v. Baker (1979), 8 R.F.L. (2d) 236 (Ont. C.A.) and Kruger v. Kruger (1979), 11 R.F.L. (2d) 52 (Ont. C.A.)] that suggests a threshold test before a joint custody order will be made. ... Even were I persuaded that the trial judge brought a mindset with pre-ordained default arrangements to the enquiry, I would not interfere with a sole custody order in the circumstances of the case. The evidence supports the trial judge's conclusion*

[2] Excerpts of the discussion in *T and N, supra,* of *Gordon v. Goertz* and other Canadian cases that establish that no presumption is to be applied in determining what is in the best interests of the child, have been reproduced below.

that joint decision-making by these parents would not be workable. ... It is now clear that legal and factual presumptions have no place in an enquiry into the best interests of the child, however much predictive value they may have. The Supreme Court of Canada has stated absolutely clearly that such presumptions detract from the individual justice to which every child is entitled (part of an extract from Robinson v. Filyk cited by Macaulay J in MacDonald v. MacDonald at para. [16])."

c) Shared Residence After *B and B*: *T and N* [2001] FMCAfam 222

In *T and N*, Federal Magistrate Ryan considered an application for shared and equal residence made by the mother. In determining whether an equal sharing of time between the parents would promote the best interests of the children, Ryan FM applied the approach to determining parenting matters set out in *B and B: Family Law Reform Act 1995* (1997) FLC 92-755 and examined recent Australian, English and Canadian case law with reference to the factual elements that indicate whether equal and shared residence may promote the best interests of the particular child.

The parties' children were 9 and 12 years of age at the hearing date. The parties separated when the eldest child was 4 years of age. After separation, both children lived with the mother who remained their primary care-giver until they were 5 and 7 years old respectively. For the four years prior to the hearing the children lived with father and his mother, both of whom then took on the role of primary care-giver and remained the primary care-givers at the hearing date. During the years in which the children resided with the mother the father had almost daily contact with the mother and, likewise, during the years that the children resided with the father, the children had extensive, often daily, contact with the mother.

Having considered Australian, English and Canadian authorities regarding shared residence, Ryan FM stated (at paras 91 and 93):

"Although not binding authority, the Australian pre-Family Law Reform Act cases give useful guidance to those factual matters that a court adjudicating a 50 - 50 shared parenting application pursuant to the current legislation should consider. There is a core consistency found between the English and Canadian authorities. These countries share a similar jurisprudence in the adjudication of private family law disputes with Australia. This commonality is apparent in a number of respects. All jurisdictions implement a paramountcy principle. Although its statutory formulation may differ slightly, the essential premise is the same. That is, the best interest of the particular child is the paramount or primary consideration. There are no presumptions that override the court's obligation to promote the child's best interests. Individual justice is fundamental and hence the exercise of judicial discretion critical.

...

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

- *The parties' capacity to communicate on matters relevant to the child's welfare.*
- *The physical proximity of the two households.*
- *Are the homes sufficiently proximate that the child can maintain their friendships in both homes?*

- *The prior history of caring for the child. Have the parties demonstrated that they can implement a 50-50 living arrangement without undermining the child's adjustment?*
- *Whether the parties agree or disagree on matters relevant to the child's day to day life. For example, methods of discipline, attitudes to homework, health and dental care, diet and sleeping pattern.*
- *Where they disagree on these matters the likelihood that they would be able to reach a reasonable compromise.*
- *Do they share similar ambitions for the child? For example, religious adherence, cultural identity and extra curricular activities.*
- *Can they address on a continuing basis the practical considerations that arise when a child lives in 2 homes? If the child leaves necessary school work or equipment at the other home will the parents readily rectify the problem?*
- *Whether or not the parties respect the other party as a parent.*
- *The child's wishes and the factors that influence those wishes.*
- *Where siblings live."*

Ryan FM's analysis of what was in the best interests of the particular children in this matter was an application of the analysis set out by the Full Court of the Family Court in *B and B*. This analysis was summarised (at paras 86-90) as follows:

"Residence and contact orders are parenting orders. The applicable law is well settled. Proceedings of this type are conducted under Part VII of the Family Law Act. Section 60B sets out the objects of Part VII and the principles which underline those objects. They are subject to Section 65E in that in determining the outcome the best interests of the child is the paramount consideration. That is the overriding principle.

Section 60B is important as it provides the context within which the relevant section 68F(2) factors are to be examined and ultimately weighed. The importance of section 60B factors varies from case to case. Where there are no countervailing factors, the section 60B principles may be decisive.

Section 60B(2)(b) has particular relevance in these proceedings. It provides, in effect, that children have a right of contact, on a regular basis, with both their parents and other people significant to their care, welfare and development.

Subparagraph (b) refers to the right of contact on a regular basis. Fundamentally, it emphasises the desirability of contact. Regular carries with it a clear understanding that contact should be as frequent as is appropriate and by the various means which are considered to be in the children's best interests.

In deciding the residence and contact arrangements that will promote the best interests of a particular child, the court must consider the various matters set out in Section 68F(2). Its sub-sections comprise a list of matters that must be considered to the extent that each is relevant to the particular case. Paragraph (l) permits the court to take into account "any other fact or circumstance that the court thinks is relevant". This ensures that the infinite variety of individual children's circumstances can be addressed. B and B: Family Law Reform Act."

Having considered each section 68F(2) factor in turn, Ryan FM made the following conclusions (at paras 143-149):

"These children have a well settled environment that has met their physical and intellectual needs for four years. Both parents undermine their emotional security by their open hostility towards each other. The arrangements were established at the behest of the mother and agreed to with alacrity by the father. Whilst relinquishing the care of the children to the father was a decision made by the mother with a heavy heart, the arrangement was made by her with her knowledge and consent. Although she regrets the decision deeply, her regret and change of circumstances are not alone sufficient justification to make the orders sought by her.

The children are settled and apparently secure. They are immersed in their Lebanese and Australian culture. Both are fluent in English and Arabic and fully participate in Islam. In their father's care they have maintained close relationships with their extended family. Both children are deeply attached to their paternal grandmother and her involvement in their lives is fundamentally important to their welfare.

Changing the children's circumstances as the mother proposes will be fundamentally disruptive for them. In the short term they will see considerably less of their paternal grandmother and father. Equally concerning, the arrangements proposed by the mother are arrangements that require the parents to be able to communicate with each other. This is important so that all the practical difficulties associated with living between two homes can be comfortably addressed. Unless the parents can communicate it will be the children's responsibility to organise themselves so that they manage without faltering attendance at doctor's appointments, sporting and social events. These boys do not have those superior organisation skills.

Five years of continuous bickering and open hostility between these parties indicates that they do not have the ability to communicate nor to cooperate with each other. Their evidence is that they do not wish to do so in the future. I am satisfied that they cannot and will not communicate cooperatively in the future. This finding is essential to my conclusion that an outcome that divides the children's time equally between the two parents will place the children at the centre of their parents' conflict. This will be emotionally and psychologically damaging for them, both in the short term and the long term.

It is an inadequate response to the level of conflict that the parties agree on matters concerning religion and style of education. There are too many matters that arise on a daily basis which require parental guidance and intervention on the child's behalf. These children are entitled to a meaningful relationship with both their parents. Their relationship with the mother is strong and important to their emotional well being and psychological adjustment. Contact that is exercised for short periods and artificially constrained during holidays will not allow the mother and children to sufficiently immerse themselves in one another's lives with all the benefits that can flow from this. Delivering the children to school, should she ever be able to arrange this, will give the mother the opportunity for spontaneous interaction with the children's teachers and friends. Although the mother can only take 4 weeks annual leave the children should spend half of the holidays with her. If she is at work either her husband or parents will be available to care for the children. These extended family relationships are important and this is an obvious way to promote them. Ordering the children to live with the mother as extensively will be ordered will not damage in any way the

children's relationship with the father or members of his family. Those are strong relationships that can easily withstand such periods apart.

Although the time the children will spend with the mother is extensive it will not of necessity require the sophisticated level of communication from the parents that an equal sharing of the children's time would need. There are essential differences between the two possible outcomes. The orders made will enable the children to continue to live in one home. During the school week they will live in the one home other than one night in two school weeks. Their possessions will be largely managed from the one base. Because of the structure of the orders they will not need to take many items between the parent's homes."

Ultimately, Ryan FM refused to make the order for shared and equal residence sought by the mother. The Orders provided that the children live with the father 10 nights per fortnight and live with the mother 4 nights per fortnight (each alternate weekend from Friday afternoon after school to Monday morning before school, and over night for one school night during the other week). Other Orders made included that the children were to live with the mother for half of the school holidays; that each party was to be responsible for the day-to-day care, welfare and development of the children whilst in their care; and, that the parties were to have joint responsibility for the children's long-term care, welfare and development.[3]

Literature review

(a) Social science

(i) Australia

B Smyth, C Caruana and A Ferro (2003) "Some whens, hows, and whys of shared care: What separated parents who spend equal time with their children say about shared parenting" Paper presented at the Social Policy Research Centre Social Policy Conference at University of New South Wales, 9-11 July 2003

This study looked at 7 fathers and 5 mothers in shared care arrangements. It is unique in that it is the only study undertaken in Australia. The study found that the shared care arrangements entered into by parents were often logistically complex. It also found that there were a number of relational and structural conditions that were necessary to make share care work which included:

- Geographic proximity
- Ability for parents to get along in a working relationship
- Child-focussed arrangements
- Commitment to making shared care work
- Family friendly work practices-especially for fathers
- Degree of financial independence
- Degree of paternal competence.

[3] Also see *H and H* [2003] FMCAfam 41 in which Ryan FM refused to make an order for shared and equal residence sought by the father and made Orders similar to those made in *T and N, supra.*

This study recognised its own limitations in that it, like the above studies, only presented data from the parent's views of shared parenting. There is a distinct lack of children's views.

(ii) Overseas

The empirical research on co-parenting is of vital relevance to the issue of whether or not there should be a presumption that children will spend equal time with each parent after their parent's separation. Before such major law reform can be implemented, it is imperative that the available social science research on this area is closely examined in order to determine whether or not it is a beneficial social policy.

Parental Orientated Research

J Arditti (1992) "Differences between fathers with joint custody and non-custodial fathers" in 62(2) *American Journal of Orthopsychiatry* 186

The study surveyed 212 fathers divorced between 1986 and 1990 from two counties in South Western Virginia.

The study found that joint custody fathers are more involved with their children. They also have higher levels of education and higher incomes than noncustodial fathers. Joint custody fathers also appear to pay more child support although this may be attributable to their higher incomes.

M Benjamin and H Irving (1991) "Shared and sole-custody parents: A comparative analysis" in J Folberg (ed) *Joint custody and shared parenting*, (New York : The Guidford Press) at 114

The study was conducted in metropolitan Toronto Canada and compared 201 shared parents and 194 sole parents. "Shared parenting" implied joint legal and joint residential custody. However, only 40% of the shared parents lived geographically closely enough to have 50:50 equal time with the children. Shared parenting was perceived as least damaging to the children and as most beneficial to the parents.

This study revealed that shared parents were more likely to be older and have a university education. Upon separation, shared parents were less likely to feel guilty about the breakdown, more likely to indicate that the breakdown was mutual and have low levels of pre-separation conflict. They were then more likely to reach a shared parenting arrangement without a lawyer. Shared parents were also more likely to perceive child satisfaction with their arrangement. Shared parents were also more likely to describe their ongoing relationship as 'friendly' and 'positive'. Finally, shared parenting men and women recorded almost identical responses but amongst sole custody parents, men and women recorded consistently different answers.

E Maccoby, C Depner, and R Mnookin (1991) "Co-parenting in the second year after divorce" in J Folberg (ed) *Joint custody and shared parenting*, (New York : The Guidford Press) at 132

Three patterns of parenting, maternal, paternal and dual-residence were compared. The sample included nearly 1,000 families in two Californian counties. The parents were divorced between 1984 and 1985 and parents were surveyed approximately 18 months after separation.

The report found that while dual-residence parents maintained higher levels of communication, their levels of conflict did not necessarily differ from those of primary-residence parents. The amount of conflict in co-parenting is shown to be related to the intensity of interparental hostility at an earlier time.

These three above findings (including B Smyth, C Caruana and A Ferro (2003) above) are consistent in that they all reveal that joint parents have higher levels of communication. This may be in part due to their higher levels of education which was observed by Arditti and Benjamin and Irving.

Child Orientated Research

M Kline, J Tschann, J Johnston and J Wallerstein (1989) "Children's adjustment in joint and sole physical custody families", in 25(3) *Developmental Psychology* 430

This was a study of 93 children aged 3-14 from the San Francisco Bay Area, assessed at intervals up till 2 years after divorce.

It was found that despite having more access to both parents, joint custody children show neither less disturbance nor better social adjustment after divorce than sole custody children. Custody and access arrangements appear to have little effect on children's social and behavioural adjustment 2 years after their parents have filed for divorce. The major predictor for children's well being after divorce is the quality of family functioning during divorce, as opposed to the structural nature of residence arrangements.

This study is unique as it is the only research located by this Committee purely focussed on children and their perspectives of co-parenting. This is highly valuable perspective when the law revolves around the primary concern of the best interests of the child, and includes as a factor in determining the best interests of the child any wishes expressed by the child/ren.

It is also significant in that it shows that co-parenting is not a factor that determines children's well-being as appears to be the assumption inherent in the proposal for a presumption of co-parenting.

Family Orientated Research

S Steinman (1981) "The experience of children in a joint-custody arrangement: A report of a study" in 51(3) *American Journal of Orthopsychiatry* 403

This study began in San Francisco Bay Area in 1978. Its subjects included 32 children from 17 divorced couples, 4 separated couples, and 3 couples who had never married. All families were highly educated and moderately comfortable in economic terms.

Generally the parents found joint parenting to be satisfactory. The parents chose and implemented joint custody on their own. It had not been imposed, advised or encouraged by the courts. The parents were all committed to joint custody and showed devotion to their children which took precedence over other needs. They valued each other as parents and their relationships were characterised by their capacity to tolerate difference in each other. All but one of the parents worked. Most fathers had flexibility in their work. One quarter of the families had week to week schedules. The rest had schedules which varied from daily, fortnightly, monthly, trimonthly and annually. Mothers and fathers felt positive about being able to pursue a career and parent.

The children, 17 girls and 15 boys aged between 4½ and 15 had lived in joint residential agreements for two to nine years. They had mixed experiences of joint custody. Children generally adapted to each household with a minimum of conflict and confusion. The differences in child rearing styles and values were not major in most families. Where parents did have conflict over these issues, the children were greatly troubled. Overall, children were not torn by crippling loyalty conflicts. They felt free to love and be with both parents. One third of the children were "hyper-loyal". They were hyper alert to their parents' feelings and concerned about being fair or both. Most children were able to maintain complex schedules. However 25% of the children did experience confusion and anxiety about their schedules and switching houses. Some children who knew their geography well coped well, for others it was frightening. There was a third group for whom it was stressful but who were able to master it. Overall children felt wanted by both parents and did not feel abandoned or rejected. However, they still saw joint parenting as inferior to the original family structure.

J Wallerstein and S Blakeslee (1989) *Second chances: Men, women and children a decade after divorce*, (New York : Ticknor and Fields) pp270-272

In 1981, 184 couples with 354 children between the ages of 3 and 14 were sampled. Two years after divorce, one third of the children were living in joint custody households while the rest lived in sole parenting households.

It was found that children in joint custody households are no better adjusted than children raised in sole custody homes. Other factors, like the parents' psychological well-being, the parents' emotional functioning, the amount of conflict, and the children's temperaments weighed more heavily. Children raised in joint custody arrangements that resulted from a court order with parents who fought a bitter battle, were much worse off compared to children raised in sole custody families who also fought bitter court battles. The study also found that where courts have imposed joint custody because they presumed that the cooperation that it takes would reduce the anger between parents has resulted in children appearing more depressed and withdrawn or aggressive and disturbed.

2) The investment of the parents in their children (parents who provided a loving, sensitive and caring environment had children who fared better than those who neglected their children's well-being or exposed them to severe parental violence and psychotherapy); and,
3) The parent's ability to keep interparental conflicts separate from those issues that concern the children.

For fathers, the joint custody relationship strengthened the father:child bond. This was a positive factor except where the child became a spouse substitute. For mothers, joint custody gave them greater capacity to combine work and parenting.
For children, those aged three and below were able to handle the transition to joint parenting better than three-five year olds. Family structure does not dictate the quality of family relationships.

M Brotsky, S Steinman and S Zemmelman (1991) "Joint custody through mediation: A longitudinal assessment of the children" in J Folberg (ed) *Joint custody and shared parenting*, (New York : The Guidford Press) at 167

Forty-eight families with 67 children in the San Francisco Bay Area attempting joint custody at the time of divorce were studied to distinguish the characteristics of those who were successful in their joint custody arrangements and those who were not. The families studied were grouped as "successful" (12), "stressed" (20), and "failed" (15).

Successful parents demonstrated:
1. A valuing of the other parent on behalf of the child;
2. A strong capacity for empathy for the child;
3. Basically good psychological functioning;
4. Low level of anger and capacity to suppress aggression;
5. Tolerance for a wide range of affect; and,
6. A strong ego capacity and capacity to self-reflect and engage in rational problem solving.

Stressed parents demonstrated:
1. Severe and long-standing psychological problems and greater frequency of drug and alcohol abuse;
2. Greater degree of hostility and conflict and less capacity to suppress aggression;
3. Intense and ambivalent feelings toward former spouse;
4. Less ability to see the child as separate from themselves; and,
5. Valuing of the other parent on behalf of the child but less respect for and trust in their parental ability.

Failed parents demonstrated:
1. Intense and unremitting anger and hostility towards the former spouse;
2. Projection of blame onto the former spouse;
3. Very low self-esteem, history of substance and physical abuse;
4. Deep mistrust and feeling of vulnerability and powerlessness in relation to former spouse;
5. Capacity to be rational, problem solve, control anger, and reflect were easily overwhelmed in relation to former spouse; and,
6. A view of the former spouse as a bad parent and an inability to see the child as separate from themselves.

In an assessment of the children, 28% were "doing well", 50% were "stressed", and 24% were "seriously at risk of major emotional disturbance". There was a high correlation between the "successful" parent and the children "doing well". There was also a correlation between the "failed" parent and children who did poorly. Those families where the court ordered or influenced joint custody but could not create a family structure to nurture and support their children also did poorly.

The above study suggests that not only can we not presume that co-parenting arrangements will serve a child's best interests, there is also a distinct chance that it will be damaging for some children.

D Luepnitz (1991) "A comparison of maternal, paternal, and joint custody: Understanding the varieties of post-divorce family life" in J Folberg (ed) *Joint custody and shared parenting*, (New York : The Guidford Press) at 105

Forty–three families in Philadelphia, 16 maternal, 16 paternal and 11 joint custody were studied on average 3.5 years after divorce. The 11 joint custody families had some kind of 50:50 time share arrangement.

The study found that,

1. Child adjustment and the family's emotional climate were both independent of custody type;
2. The children in families with continuing parental conflict scored lower on a self-concept test, were rated by parents as having more psychosomatic problems and had more behavioural problems than children in low conflict families;
3. Both joint custody and single parent custody have powerful advantages and disadvantages for both parents and children.

Advantages of joint custody included:

1. Most children considered having two houses to be advantageous because it allowed them a time and a place to have a wholesome relationship with each parent.
2. None of the joint families relitigated, whereas 56% of the single-custody parents had returned to court at least once to battle over money or visitation.
3. Joint fathers reliably supported their children financially while only half of the single-custody mothers in the study reported that they had received child support.
4. While one third of joint custody families said that they relied on the other parent exclusively for child care, the single custody parents cited child care as one of their greatest problems.
5. All of the single-custody families reported feeling overwhelmed by the pressure of parenting but joint custody parents have a built in "break".

Advantages of single parent custody:

1. Protection from abusive partners.
2. The ability of parents to move in order to find better jobs.
3. The stress children suffer from having to overcome the difficulties of their parents remarrying would be less. Joint custody families would be more complex.

D Donnelly and D Finkelhor (1992) "Does equality in custody arrangement improve the parent-child relationship?" in 54 *Journal of Marriage and the Family* 837

The study originally surveyed 10,367 households. In depth detailed information on family dynamics was gathered for 1,691 households.

This study arrived at two main conclusions. Firstly, there was no evidence for improved parent-child relationships in equal custody households. Children in equal custody households provided less support and affection to their parents than those in sole custody households. Secondly, parental disagreement appears to have an important effect on one major indicator of parent-child relations, the level of parent-child disagreement following divorce. When parents who argue frequently over child custody arrangements, their relationships with their children also suffer. Thus, what is important in child custody agreements may not be the child custody arrangement itself but the amount of parental disagreement that takes place.

D Donnelly and D Finkelhor (1993) "Who has joint custody? Class differences in the determination of custody arrangements" in 42 *Family Relations* 57

The study originally surveyed 10,367 households. In depth detailed information on family dynamics was gathered for 1,691 households.

This study produced evidence that equal custody is primarily being adopted by upper-income families with higher levels of education. It also found that non-white families had higher levels of joint custody and children from large cities were significantly more likely to be in a joint custody arrangement than those from smaller areas.

Several significant trends emerge from these studies:

1. Interparental conflict is always detrimental to the welfare and well-being of children. (Kline, Tschann, Johnston and Wallerstein (1989), Wallerstein and Blakeslee (1989), McKinnon and Wallerstein (1991), Brotsky, Steinman and Zemmelman (1991) Luepnitz (1991), and D Donnelly and D Finkelhor (1992))

2. Co-parenting itself is not a determining factor in the well-being of children. (Kline, Tschann, Johnston and Wallerstein (1989), Wallerstein and Blakeslee (1989), Pearson and Thoennes (1991), McKinnon and Wallerstein (1991) Luepnitz (1991), and D Donnelly and D Finkelhor (1992))

3. Voluntary co-parenting arrangements reached without legal assistance are more likely to be successful. (Steinman (1981), Benjamin and Irving (1991), Pearson and Thoennes (1991), and Brotsky, Steinman and Zemmelman (1991) and Luepnitz (1991))

4. Successful co-parenting arrangements are reliant upon parents being committed and dedicated to the well-being of their children and providing loving, nurturing environments. (Benjamin and Irving (1991), Wallerstein and Blakeslee (1989), Pearson and Thoennes (1991), Brotsky, Steinman and Zemmelman (1991) Luepnitz (1991), and Smyth, Caruana and Ferro (2003))

5. Fathers benefit from co-parenting by having more contact and greater involvement with their children. Mothers can benefit by being more able to easily combine working and

parenting. (Arditti (1992), McKinnon and Wallerstein (1991), Luepnitz (1991), and Smyth, Caruana and Ferro (2003))

6. Co-parenting requires basic logistical requirements such as economic well-being and geographic proximity. (Arditti (1992), Steinman (1981), Pearson and Thoennes (1991), Luepnitz (1991), Smyth, Caruana and Ferro (2003), and D Donnelly and D Finkelhor (1993))

7. Children raised in co-parenting arrangements as a result of court orders where the parents do not cooperate well to nurture and support the child fare poorly. (Wallerstein and Blakeslee (1989), and Brotsky, Steinman and Zemmelman (1991) and Luepnitz (1991))

See also Wallerstein, J and J Lewis, "The Long-Term Impact of Divorce on Children: A first Report from a 25-year study" *Family and Conciliation Courts Review*, (1998) Vol 36, No 3 368-391

(b) Legal

(i) Australia

Schepis and Formica, *Australian Family Lawyer* Vol 6 No 2
Compatability of parenting styles

Miranda Kaye, Julie Stubbs and Julia Tolmie, Negotiating child residence and contact arrangements against a background of domestic violence, Griffith University Working Paper No 4.

This was empirical research from a legal perspective. The interviewers collected data from forty women who had experience negotaiting contact arrangements with former partners who had been violent and separate interviews with other professionals involved with family law. Of these women all but one experienced violence and abuse after separation. As the authors of the study noted: "Negotations concerning the residence, contact and parenting of children are typically not a singular event but may be ongoing."

The women interviewed reported: "a high level of violence during changeover and contact. Of the 35 women who were resident parents a large majority (85.7%) described violence associated with the exercise of contact."

Much of the literature which has examined "best interests based" decision making in family law has looked to past conduct to determine future benefit. In that context the question: who has predominantly raised the children? Is an important and relevant one.

(ii) Overseas

See: J Elster, *Solomonic Judgments*, Cambridge University Press, Cambridge, 1989

Claire L'Heureux-Dube, "Making equality work in family law" (1997) 14 Can J Fam L 103

This article discusses the importance of social context in family law decision making. It encourages an approach which recognizes diversity of experience amongst families and cautions against a simplistic approach to "equality jurisprudence".

What does "joint custody" mean?

As family lawyers are aware, the *Family Law Reform Act* 1995 replaced the concepts of "custody" and "access" with residence and contact and introduced the notion of "parental responsibility". The Government's own comments on this Inquiry and the majority of media which it has attracted suggest to a family law audience that the nature of the *Reform Act* changes has not filtered down to the public.

In some North American jurisdictions the expression "joint custody" refers to decision making responsibilities (or rights). Unless removed by order of the Court, Australian parents have joint decision making responsibilities, whatever their "status" be it "residence parent" or "contact parent". It may be that such joint parental responsibility is not, in fact being exercised. This must be a matter for education, it cannot be a matter for law reform.

The easiest way to describe the difference is to draw a distinction between "joint physical custody" (the equal time model) and "joint legal custody" (shared parental responsibility). It should be emphasized that the law already provides for same and does so in the form of a presumption. Unless a court orders to the contrary all parents whether married, never married or never in a relationship share responsibility for children at law.

Conclusions

From the above the factors which mitigate against a presumption of shared care would appear to include the following:

1. The need to focus on the individual needs of the child/ren;
2. Parenting of children in intact families;
3. Parenting styles of separated parents;
4. The requirement of some children for stability;
5. Cooperation and communication issues;
6. Hostility and violence;
7. Geographical proximity;
8. Parents' availability to parent in a shared regime;
9. Parent focussed not child focussed;
10. Economic consequences for children and families

Recommendations

1. That there be no presumption of shared care.

(b) Applicable existing principles – contact with third parties, including grandparents

Reference

(b) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

Legislation

SECTION 60B
Object of Part and principles underlying it

(1) …

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

(a) …
(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
(c) …

SECTION 64C
Parenting orders may be made in favour of parents or other persons

A parenting order in relation to a child may be made in favour of a parent of the child or some other person.

SECTION 65C
Who may apply for a parenting order

A parenting order in relation to a child may be applied for by:
(a) …
(ba) a grandparent of the child; or
(c) any other person concerned with the care, welfare or development of the child.

SECTION 65E
Child's best interests paramount consideration in making a parenting order

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

SECTION 68F
How a court determines what is in a child's best interests

(1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).
(2) The court must consider:

  (a) ...
  (b) the nature of the relationship of the child with each of the child's parents and with other persons;
  (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
    (i) either of his or her parents; or
    (ii) any other child, or other person, with whom he or she has been living;

142. The importance of the section 60B principles varies from case to case. Where there are no countervailing factors, the section 60B principles may be decisive -- not only because they are contained in section 60B, but also because they accord with what is generally accepted to be in the best interests of children[8].

143. In deciding the residence and contact arrangements that will promote the best interests of a child, the Court must consider the various matters set out in section 68F(2).

  (d) ...
  (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
  (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
  (f) ...
  (l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

Case law

Stevens and Lee (1991) FLC 92-201 at page 78,384 the paternal grandmother sought access to her grandchild. The Honourable Justice Kay said:-

"There then comes a second stage, if I may place matters in degree of appropriateness, where a child has a long and well-established relationship with a person other than the parent. This can be a grandparent; it can be a cousin; it can be a godparent; it can be the next door neighbour; it can be the babysitter; or it can be a step-parent. In those cases, if the Court is satisfied that the relationship is of significance to the child, that a bond exists and that the child will suffer detriment if the bond is severed, the degree of suffering then has to be weighed against the degree of hostility which exists in the custodial parent.

In those circumstances if the court is satisfied that the welfare of the child will be best served by continuing the association the child has with the person the parent does not desire the child to associate with any longer, the Court will not hesitate but to continue the relationship. However, it starts from a different premise than it does with non-custodial parents, that is, when it starts dealing with people who are not the natural parents the Court does not necessarily commence from the assumption that access is going to be good for the child."

B and B: Family Law Reform Act 1995 (1997) FLC 92-755 the child's adult cousin sought residence orders. The Full Court said at pages 84,214 and 84,215:-

"9.7 It is to be noted that, in contrast to sub-s (2), sub-s (1) is not expressed to be subject to the child's best interests. But it was agreed by all parties in this appeal that all of s 60B is subject to s 65E, namely, that in deciding whether to make a particular parenting order the Court "must regard the best interests of the child as the paramount consideration". It seems likely that the amendment to s 60B(2) to include that exception was added as an abundance of caution. It also reflects article 9.3 of UNCROC, the text of which is set out in Section 3 of this judgment."

"9.12 Paragraph (b) is the critical one in this appeal and that is likely to be so in most proceedings under Part VII. It provides, in effect, that children have a "right of contact, on a regular basis, with both their parents" and other people significant to their care, welfare and development. In that latter respect, the right of a child to have contact with, for example, a grandparent or other siblings, is provided for by s 65C which enables "any other person concerned with the care, welfare or development of the child" to apply for a parenting order. In that respect it is no different from the position which existed prior to the Reform Act and the law which had developed around the right of non-parents to seek a contact order."

In *Re CP (1997) FLC 92-741* the child had been living with the respondent who sought a residence order since 1992. The child's mother and a female relative sought orders that the child "be in the custody of his extended maternal and paternal family at Bathurst and Melville Islands" and that FOB have "access to the child as agreed with the child's extended family. The child was Tiwi and born of parents of Tiwi descent.

The Full Court stated:

"By way of concluding our reasons, we would also wish to observe that this case has highlighted difficulties in the applicability of the Family Law Act to cultural systems of family care which, like the Tiwi way, contemplate circumstances where the child will live and be cared for within a kin network.

"It thus appears that the Act proceeds on the basis that orders will be made in favour of identified persons (who will usually be parties to the proceedings or have indicated their consent to orders being made in their favour). As the present case illustrates, the fluidity of indigenous care arrangements does not lend themselves to such a priori specificity and may give rise, as was again evident in this case, to criticisms about the uncertainty of arrangements for a child, which, depending on the facts found in a case, may be unwarranted. It appears to us that the legislative recognition of indigenous culture and heritage in S.68F may need to be complemented by provisions which take account of the kinship care systems of Aboriginal and Torres Strait Islander peoples.

In the absence of such provisions, it is for Judges to work out, as best they can, how to deal with these issues."

In *M & R & G [1998] FamCA 1896 (13 November 1998)* the applicant's application for contact was opposed by the biological mother and father. His Honourable Justice Burr found at paragraphs 5.1.1 to 5.1.5 of his Judgment that:

5.1.1. Any person may file an application for a parenting order.

5.1.2. A parenting order may be made in favour of a person other than a parent (Section 64C).

5.1.3. In order to proceed beyond the mere making of the application, the Applicant for a parenting order must demonstrate that they are a "person concerned with the care, welfare or development of the child". In my view this imposes a threshold test, it being a test to be determined on the individual facts and circumstances of each case.

5.1.4. That the degree or strength of the nexus or concern with the care, welfare or development of the child is again an issue for determination in each case, depending upon the facts and circumstances of each case. For example, as mentioned earlier in my reasons, it may be appropriate for a complete stranger, say in the form of an aunt who resides overseas, to be granted a parenting order by this Court in the event of the death or incapacitation of the child's parents. The nature and degree of her concern with the care, welfare or development of the child in that case, would be defined and determined by entirely different circumstances than those which exist in this matter... There may well be circumstances in this Court where a mere "interest in" or "concern about" the child in question is sufficient to satisfy the threshold test. Once the threshold stage has been passed, the individual facts and circumstances of the matter again must be viewed in order to determine whether or not a parenting order is appropriate and in the best interests of the child, as would be the nature and form of any such order.

5.1.5. The specific wording of Section 65C(c) appears to require demonstration of a concern with only one of the issues of care, welfare or development.

In *re C and D* (1998) FLC 92-815 in paragraph 4.2 at page 85,237, the Full Court repeated with approval the words of Hannon J, the Judge at first instance, as follows:-

"Pursuant to this section children have a right of contact, on a regular basis, not only with both their parents but with other people significant to their care, welfare and development which would include not only a person whom a child regards as his or her biological parent, but with members of the extended family of that person, if they are significant persons in the life of the child. The qualification to this provision is that the principles set out in the section do not apply when 'it is or would be contrary to a child's best interests' and therefore, it is incumbent upon the court to embark upon a dual exercise of inquiring as to who are significant persons in the life of the child and whether it would be contrary to his best interests to have contact with them or any of them."

In paragraph 4.3 of *re C and D the Full Court found that:-*

"Persons significant to the life of a child are not confined to those who are biologically related to the child, in the same way that the existence of a family is not determined by biological considerations."

The Full Court then reaffirmed the standing of non-parent applicants for parenting orders at page 85,243 when it said at paragraph 10.10:-

"This Court made it clear in Rice v Miller (1993) FLC 92-415 and more recently in Re Evelyn (1998) FLC 92-807 that the biological parent does not stand in any preferred position and that fact does not in any way impinge upon the principle that the best interests of the child are paramount."

WKM & LD [2002] FMCAfam 391 (4 December 2002) the applicant father sought orders that his four year old daughter resided with his parents and the mother have defined contact. The contact between the father and his daughter be as agreed with his parents. The child has spent most her life with the grandparents. The grandparents were elderly, 73 and 75, and the father suffered from a personality disorder.

Federal Magistrate Walters found that at paragraphs 142 and 143 that

142. The importance of the section 60B principles varies from case to case. Where there are no countervailing factors, the section 60B principles may be decisive -- not only because they are contained in section 60B, but also because they accord with what is generally accepted to be in the best interests of children[8].

143. In deciding the residence and contact arrangements that will promote the best interests of a child, the Court must consider the various matters set out in section 68F(2).

In his conclusion the Federal Magistrate's at para 205 concludes "I have borne firmly in mind, throughout my consideration of the parties' competing applications, the various factors and considerations referred to in B & B: Family Law Reform Act 1975[15], and in the other legislation provisions or authorities referred to in paragraphs 141 to 153 above. I have imposed no legal or other onus upon any party, and have applied no presumptions of any sort. I have deduced from the evidence, and my assessment of the parties and their witnesses, the essence of their competing proposals -- and I decide, having considered all relevant factors, that the mother's proposals would be more likely to advance S's best interests (which are the paramount consideration in these proceedings)."

Interestingly, the legislation also separately lists grandparents as persons who may apply for maintenance and recovery orders.

Case law

In *B and B* the Full Court said:

"9.12 Paragraph (b) is the critical one in this appeal and that is likely to be so in most proceedings under Pt VII. It provides, in effect, that children have a 'right of contact, on a regular basis, with both their parents' and other people significant to their care, welfare and development. In that latter respect, the right of a child to have contact with, for example, a grandparent or other siblings, is provided for by s 65C which enables 'any other person concerned with the care, welfare or development of the child' to apply for a parenting order. In that respect it is no different from the position which existed prior to the Reform Act and the law which had developed around the right of non-parents to seek a contact order.

Literature review

(c) Social science

(i) Australia

General observations

Some statistics on contact: physical proximity is found to be strong predictor of contact between grandparents and grandchildren [4] with both recent UK and Australian studies indicating that around 75% of grandparents under 70 years of age live within 30 minutes from at least one set of grandchildren and only 9% of older grandparents live more than 30 minutes away) - contact was only found to decrease with age of child (10+), lineage through son or step-son, being a non-married grandfather, and living in stepfamily.

Other studies also indicate that maternal grandparents are more important in the lives of children than paternal grandparents[5].

There has not been a lot of research into views of grandparents or grandchildren on their relationship after divorce as most research deals with parents' views. Therefore there is very limited material available for review.

The arguments FOR children having contact with grandparents and other parties after divorce

- Grandparents are easy going companions for children. They interact with them in light-hearted and non-disciplinary manner, acting as historians, mentors, models for ageing, care-givers and as other sources of support. Further, they may offset overly critical parents by their affirmation of grandchildren.[6]
- Studies indicate that young adult grandchildren see maternal grandparents frequently, feel close to them and like them. More than 80% of resident and non-resident parents have reported that contact with at least one set of grandparents has occurred at least weekly or monthly and a third reported such contact with both sets of grandparents.[7]
- Children engage in a wide range of activities, especially enjoyable ones, with their grandparents.[8]
- After divorce, some grandparents assume greater caretaking or supportive roles to try to reduce the disruption of the parents' separation[9]. Additionally, they provide stability, support, sense of identity, and 'roots' to grandchildren.
- A recent study showed that, regardless of with whom the child lived, around 70% of parents reported that divorce had no effect on the relationship between grandchildren and grandparent.[10]

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[4] "Grandparenthood in Britain" conference paper by Lynda Clarke, Centre for Population Studies, presented at 8th Australian Institute of Family Studies Conference, February 2003

[5] "Families after Marriage Breakdown" by Ruth Weston, *Family Matters* No. 32 August 1992 pp 41-45.

[6] ibid.

[7] ibid.

[8] ibid.

[9] ibid.

[10] ibid.

- Another recent study has shown that contact with grandparents can help children adjust to divorce.[11]
- Childcare - when parents are working, the principal source of childcare outside the household are grandparents followed by other relatives of the family.[12] This has increased in recent times as governments support of families decreases. (Regular childcare also implies grandparents are living relatively closely to their children). The Australian Living Standards Study (ALSS), which was conducted by the Australian Institute of Family Studies in several municipalities in 1991-92, is the most comprehensive data base relating to child care ever collected in Australia. This survey showed that, in most localities, the most common form of work-related child care was care provided by a member of the extended family, especially by a grandparent of the child.[13]
- (Extensive studies indicate that the extended family is the central core of the support networks of most Australians.[14]
- It's important and of value for the child to have relationship with grandparents, learn different sets of values and parenting ideas.[15]
- Given that grandparents often pass away before child's birth or during their early years, it would be a shame for Australian children to miss out because the parents cannot see past separation/divorce.[16]
- Sometimes it's only grandparents who have the time to spend with grandchildren to provide the special attention and care that children need.[17]
- Grandparents play an important role in shaping children's lives.[18] They are already contributing to parenting and taking responsibility for children before divorce. After divorce, they contribute by supervising contact, reassuring parties and provide protection and security for children.
- It's important to keep as much of the pre-divorce routine as possible after separation and to keep changes to a minimum, this is particularly important for younger children.[19] This will include any arrangements regarding grandparent/child time.
- Recent research suggests that that children of divorce who stay in touch with their grandparents are more likely to adjust well to the divorce and possible remarriage.[20] The study found that close contact with grandparents resulted in less anxiety and aggression by children.

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[11] Journal of Family Psychology 2002; 16: 363-376 quoted in "Caught in the crossfire - grandparents' contact after separation" , conference paper by Jennifer Hetherington, presented at 8th Australian Institute of Family Studies Conference, February 2003

[12] "The extended family in Australia: the family beyond the household" by Peter McDonald, *Family Matters*, No. 32 August 1992 pp 4-9

[13] "Social and Demographic Trends Relating to the Future Demand for Child Care", published on the webpage of the Commonwealth Child Care Advisory Council.

[14] The extended family in Australia: the family beyond the household" by Peter McDonald, *Family Matters*, No. 32 August 1992 pp 4-

[15] "Caught in the crossfire - grandparents' contact after separation" , conference paper by Jennifer Hetherington, presented at 8th Australian Institute of Family Studies Conference, February 2003

[16] ibid.

[17] "Grandparents" - Paper presented by Alison Shaw, Wallmans Lawyers, at LAAMS Conference on 7 December 2000 in Adelaide.

[18] ibid.

[19] "Family Matters: Helping Children Adjust to Divorce" by Steve Duncan, Montana State University-Extension Family and Human Development Specialist

[20] Study by Dr. Kirby Deater-Deckard published in *Journal of Family Psychology*, September 2002 and quoted at http://www.divorcemag.com/news/grandparents.shtml, article by Jeffrey Cottrill.

- Financial support - many grandparents spend money on basic support needs of their grandchildren with more than half paying educational expenses and almost half paying some basic living expenses (self reported).[21]
- Physical fitness - at least half of all grandparents in a UK study undertake physical exercise with their grandchildren. [22]
- Recent studies have shown that children tend to turn to their grandparents if they have been abused and grandparents are seen to be in a unique position of trust vis-à-vis their grandchildren.[23]

The arguments AGAINST children having contact with grandparents and other parties after divorce

- Grandparents may create tensions within nuclear family - there are many problematic relationships between mothers- and daughters-in-law. Most disagreements between grandparents and parents centre around child-rearing issues[24].
- They may not act in childrens' best interests when parents separate and a child may feel torn between resident parent and others including grandparents pressing for visitation rights.[25]
- 40% of parents in a recent study reported that the grandparent/child relationship was damaged after divorce.[26]
- There is temporary strain between parents/grandparents in times of crisis, as a result of parents' dependency on grandparents after divorce (although relationship usually improves once crisis is over).[27]
- A court order that grandparents also share the child's time may not be in the best interests of the child, as child's time is already full of commitments such as school, sport, extracurricular activities, leisure time as family, time with extended family and friends. Post- divorce these commitments are already juggled between 2 parents.[28]
- Grandparents *may* involve themselves in the parents' dispute and may attempt to subvert, undermine or denigrate one parent, imposing their own parenting values.[29]
- The degree of hostility between parents/grandparents may increase tension between family members, this additional tension will affect children.[30]

[21] "The Grandparent Study 2002 Report" by Curt Davies for AARP (UK), May 2002 and 'Social Change and Its Impact on the Grandparent - Role of Contemporary Australian Grandparents", conference paper by Jan Backhouse and Trevor Lucas, presented at 8th Australian Institute of Family Studies Conference, February 2003
[22] ibid.
[23] study by A. Kornhaber published in "Contemporary Grandparenting", 1996, Sage Publications California, quoted in Backhouse/Lucas conference paper.
[24] "Families after Marriage Breakdown" by Ruth Weston, *Family Matters* No. 32 August 1992 pp 41-45.
[25] ibid.
[26] ibid.
[27] ibid.
[28] "Caught in the crossfire - grandparents' contact after separation" , conference paper by Jennifer Hetherington, presented at 8th Australian Institute of Family Studies Conference, February 2003
[29] ibid.
[30] "Grandparents" - Paper presented by Alison Shaw, Wallmans Lawyers, at LAAMS Conference on 7 December 2000 in Adelaide.

- Recent studies indicate that where children live with fathers, they are more prone to having emotional problems if they have close contact with both maternal grandparents and new step-grandparents as well as paternal grandfathers.
- Grandparents, especially when they are retired from both work and parenting, often fear loss of their primary remaining identity - their grandparents identity. As they envision sharing or losing valued time with their grandchildren, their fears may prompt them to harp on their sons and daughters to fight for sole custody of the children, so they will not become "unemployed" grandparents[31].

(ii) **Overseas**

It is noted that third parties to parenting proceedings, including grandparents, in the England, must first obtain the leave of the Court before bringing an application for a parenting order.

Conclusions

That grandparents are already explicitly referred to in the legislation.
That in appropriate cases orders are made in favour of grandparents.
That no further legislative guidance is appropriate.

Recommendations

No legal reform required.

Our Committee would welcome any invitation to address a public forum or hearing.

[31] "*Preventing Parentectomy following Divorce*" - keynote address by Dr Frank Williams, Fifth annual conference, National Council for Children's Rights [Mens's Rights Group], Washington, 10 October 1990.

Child Support

THE FORMULA

At present, Child Support is assessed by use of a formula that has numerous variable factors including most importantly:

(a) the child support income amount of the liable parent which is defined as the parent's taxable income less their exempted income;

(b) the taxable income of the carer parent;

(c) the number of children for whom the liable parent is liable to pay; and

(d) the amount of nights spent in the care of each the liable and carer parents. At present the liable parent may claim a reduction in the child support payable to the carer parent if the child is in the care of the liable parent for more than 30% of nights in one year. This calculates to 110 nights. Prior to 1992, no reduction was available unless the liable parent had the children in care for more than 40% of nights.

The philosophy of Child Support is set out in Sections 3 and 4 of the *Child Support (Assessment) Act 1989 (Cth)* – being that children receive a proper level of financial support from their parents, who have a primary duty to maintain their children.

In keeping with the focus of the Terms of Reference regarding the proposals for presumption of shared care arrangements, under the current formula the Child Support paid by a liable parent to a carer parent would generally reduce if there was a shared care arrangement in place pursuant to such a presumption.

As it presently stands, the formula was based on extensive research into the costs of maintaining children including when children have contact with the liable parent. The formula provides a yearly sum of child support payable, which is then broken down into a weekly, fortnightly or monthly amount depending upon the payment arrangements either between the parties or between the Agency and the parties.

In 1988, the Child Support Consultative Group, which was responsible for developing the Child Support Formula still substantively in force today, stated that the Formula "recognise[d] that while a non-custodial parent may not have high costs of access... he or she may have some costs of access" (Child Support Consultative Group 1988:72). Accordingly it is submitted that the Formula already takes into account the non-resident parent's costs of contact.

As example, a typical arrangement of alternative weekend contact and half school holidays represents around 94 nights. Unless the liable parent has some other ground for reduction of child support, such as increased costs in exercising contact, the liable parent would be unable to seek a reduction in the amount of their child support liability on the basis of number of nights the child is in their care. Accordingly, despite the liable parent's costs in travel (which falls under the allowable reductions threshold), entertainment, accommodation (including bedroom furniture), food and clothing for the child/ren, the yearly sum assessed as payable will not fluctuate.

In a television interview (unfortunately we are unable to locate the source of this interview) the Hon. Larry Anthony MP suggested that the formula found in the *Child Support (Assessment) Act 1989(Cth)* be amended by reducing the number of nights that a liable parent must have with his or her child/ren before his or her child support liability is reduced. To the best of our knowledge It has been proposed to reduce the percentage of nights in care to 20%, or 73 nights per year. As 20% of the nights of the year may be achieved by the contact regime

of alternate weekends and half school holidays, a significant number of parents would be affected by this amendment.

Although there is some research on the costs of a liable parent in exercising contact with children in a typical contact regime, there is no available Australian comparative research on the carer parent's costs of maintaining children who exercise contact with a liable parent under this typical contact arrangement. There is certainly no available research of this type in relation to shared parenting arrangements. (*Australian Institute of Family Studies "Child Support and Parent-Child Contact", B Fehlberg & B Smyth, Family Matters No 57* at page 22). Of the research that is available, we know that US studies have found that a carer parent's costs of maintaining children do not reduce until there is a shared care arrangement of around 40% - 50% (*Australian Institute of Family Studies "Child Support and Parent-Child Contact",* B Fehlberg & B Smyth, Family Matters No 57 at page 22). Accordingly, as it already stands there are a sector of carer parents suffering financially in the bracket of 30% - 50% shared care, as their costs of maintaining children is highly unlikely to be reduced to the extent that the child support they receive is reduced.

There is substantial research available that 75% – 85% of single parent families are headed by single mothers (Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families*, Australia, Cat No 6224.0, AGPS, Canberra 2000). The carer parent normally experiences lower living standards, even poverty, after separation (See R Weston, 'Changes in Household Income Circumstances', in P McDonald(ed), *Setting Up: Property and Income Distribution on Divorce in Australia,* Australian Institute of Family Studies (1986) 100; R Weston, 'Income circumstances of Parents and Children: A Longitudinal View', in K Funder, M Harrison and R Weston (eds), *Setting Down: pathways of Parents After Divorce,* Australian institute of Family Studies (1993) 135.). Further reductions of the amount of child support payable to the carer parent in this nature can only contribute further to that financial hardship. Until more extensive research

indicates that such a reduction is reasonable for both carer and liable parents, the present formula should not be departed from.

At present if a non-resident parent exercises contact, the parent may claim a portion of the Family Tax Benefit usually paid to the resident parent. In order to achieve this benefit the non-resident parent must simply report to the Family Assistance Office the amount of contact the parent has with the child. The Australian Institute of Family Studies has found that almost 75% of non-resident fathers reported exercising contact with their children on a fortnightly basis, whereas 44% of resident mothers reported at least fortnightly contact between non-resident fathers and children (*Australian Institute of Family Studies "Child Support and Parent-Child Contact"*, B Fehlberg & B Smyth, Family Matters No 57 at page 22). Accordingly it is most likely that resident parents are receiving less benefits as a result of contact disputes.

It is of concern that further reductions to Child Support dependant on contact time would potentially bring about applications by liable parents to increase contact with their child/ren to reach this "threshold" in order to obtain financial benefit by way of a reduction in child support, and similarly there would potentially be applications by carer parents to reduce a liable parent's contact for financial advantage. Further it is at odds with the "core philosophical tenets of the Child Support Scheme and family law more broadly: that no link should be made between the payment of child support and having contact with a child" (Australian Institute of Family Studies *"Child Support and Parent-Child Contact"*, B Fehlberg & B Smyth, Family Matters No 57 at page 23)

As it presently stands, there is approximately $770 million in failed child support debt collections by the Child Support Agency in 2000 – 2001 and debts written off by the Child Support Agency in that period amounting to $74 million (Attorney General's Department, *Child Support Scheme Facts and Figures 2000 – 2001*, 2002).

Section 8A of the *Child Support (Assessment) Act 1989 (Cth)* contains provisions in relation to the implementation of court orders by the Child Support Agency (CSA) on the basis of "actual" or "legal" contact. This section operates to require the CSA to give effect to Court Orders in circumstances where this contact is not taking place, unless there is a "reasonable excuse" for contravention of those orders. It is our submission that the CSA is not adequately equipped to make determinations about whether or not a carer or liable parent has a "reasonable excuse" for contravention. The proposed amendment will have a number of consequences:

1. To require the CSA to make more decisions about contraventions. Again, as CSA officers may not have the necessary training to expertise to make decisions on sensitive issues in relation to children this may lead to greater dissatisfaction with the CSA.

2. To increase litigation in relation to contact arrangements for financial reasons, rather than considerations about the best interests of the children. The amendment will lead to carer parents commencing proceedings to vary contact orders in circumstances where liable parent is not exercising contact so that they receive an appropriate level of child support.

3. To place further pressure on legal aid services. Parents will require advice and representation in relation to variations to court orders for contact. As a majority of parents will be affected by this amendment this will have dramatic ramifications for legal aid resources.

OTHER OPTIONS

If an analysis is proposed into the Child Support Formula, we suggest that such analysis be broadened to include the following:

(a) review of the powers of CSA / ATO to compel parents to lodge tax returns where no return has been lodged for several years, particularly where the liable parent is self-employed – perhaps a deterrent in the form of an automatic assessment at the highest rate of Child support payable if returns are not lodged for a period exceeding three years;

(b) review of the powers of CSA to assess child support payable for self-employed parents outside the formula or use a different method of ascertaining taxable income to more properly reflect the real income of that parent;

(c) review of the powers of CSA to collect a Child Support Debt especially when there is substantial debt;

(d) review of the process of pursuing collection of Child Support Debt privately, making this process more "user-friendly" to self-represented litigants.

CONCLUSIONS

Until such time as there is research conducted on the costs of maintaining children for both liable and carer parents which considers different contact arrangements form 20-50% care ratios. The present formula should be departed from. A "one-size-fits-all" approach to child support formula amendments is inappropriate.

RECOMMENDATIONS

That funding is made available for research as proposed above, including review of CSA and ATO powers as referred to above.