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8 September 2003

The Committee Secretary
House of Representatives
Standing Committee on Family
& Community Affairs
Parliament House,
CANBERRA ACT 2600

Dear Sir/Madam,

Re: Inquiry into Child Custody Arrangements in the event of Family Separation

Please find enclosed the submission of the Law Society of New South Wales in the above matter. This version replaces the Family Law Committee's submission which was emailed previously. An electronic version of this paper was emailed to the Committee Secretariat on 28 August 2003.

I confirm approval for the Committee to publish this paper and await the Committee's authority for the Law Society to also publish the paper for the information of our members.

For anything further please contact Maryanne Plastiras on 9926 0212(tel) or by email at map@lawsocnsw.asn.au.

Yours faithfully,

Robert Benjamin
President

Enc

The Law Society
of New South Wales

Inquiry into Child Custody Arrangements in the event of Family Separation

Submission to the Standing Committee on Family & Community Affairs

by the

Law Society of New South Wales

August 2003

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THE LAW SOCIETY OF NEW SOUTH WALES

SUBMISSION TO THE STANDING COMMITTEE ON FAMILY & COMMUNITY AFFAIRS

INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

AUGUST 2003

Executive Summary

- There is some misunderstanding in the community about current family law and its application to disputes between parents as to how they will each spend time with their children. There is the need for further community education in this regard.

- There is the need to know and understand much more about patterns of parenting both before and after separation. It would be unwise to embark on potentially far-reaching legal reform without the benefit of much more research in this area.

- Decision making in family law needs to remain primarily focused on meeting the needs of children, and advancing *their* best interests. While the needs and interests of parents are also important, these must be subsumed to those of their children.

- In view of the above, the Law Society of New South Wales does *not* support any recommendation that there should be a presumption (rebuttable or otherwise) that children will spend equal time with each parent.

- There is no need to further strengthen the rights of non-parents, including grandparents, to have contact with children. Those rights are already well-established, very strong and

clear. There may be the need for better community education about these rights, as well as further research into patterns of contact between children and non-parents.

- There are aspects of the Child Support Scheme that work fairly, and other aspects that work unfairly for parents in the context of their care of and contact with their children. The Scheme is certainly better than its predecessor, but some fine-tuning may be necessary. Specific suggestions are made in this regard. The Law Society is deeply concerned about the possible adverse consequences of linking the amount of child support to the amount of contact.

1. Introduction

The Law Society of New South Wales welcomes the opportunity to make a submission to the Standing Committee in relation to this important area of public policy and looks forward to addressing the Standing Committee in person through its representatives including the Law Society President, Mr Robert Benjamin.

The issue of parenting arrangements transcends the social, economic and legal policy spectrum. Thus, the issue cannot realistically be considered just as one of law and legal policy, though that will be the focus of this submission.

There is no magical solution that the law can provide to wipe away the pain of loss suffered by families when relationships break down. Nevertheless, the law must not add to the burden of this loss but must rather assist all the parties to find the best solution available to resolve their parenting disputes and in doing so minimise the loss suffered.

2. Credentials of the Family Law Committee

The Family Law Committee of the Law Society of New South Wales advises the Law Society in relation to policy and practice issues in family law. It is chaired by the President of the Law Society, Mr Robert Benjamin. The members of the Committee collectively have over 300 years of experience in family law. This submission was also prepared with the contribution of two

senior family law academics. The submission represents the collective wisdom and consensus of the Committee and is, in the Committee's opinion, a sound indicator of the considered views of the legal profession in New South Wales.

3. Current Law

The background to the current legislation is well-known to the Standing Committee. Appendix 1 to this submission contains a summary of the relevant law. It is important to note in the present context that:

1. There is a very significant absence in the law of any presumptions in relation to children that are relevant in the present context[1].

2. Grandparents, and other people who are significant to children, already have well-established standing in relation to children.

4. Absence of Presumptions

The notable absence of presumptions when making decisions about children reflects many important features of contemporary family law and decision making in relation to children.

- It reflects the paramountcy of the best interests principle in relation to children, ie that the best interests of a child are paramount when deciding whether to make a particular parenting order[2]. Presumptions serve to undermine the best interests principle.

- It reflects the fact that decision making in relation to children depends entirely on the circumstances of each case, and that each order is tailor-made to fit the individual needs and circumstances of each family.

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1 Germane presumptions relating to paternity found in ss 69P of the *Family Law Act* 1975 have been excluded.

2 *FLA* s65E

- The absence of presumptions reflects the theory that individual justice is better than generalised justice when it comes to family law and children.

The absence of presumptions mean that the focus of any decision making exercise can remain quite properly on children. This is not to the exclusion of parental needs and interests but it does assert the paramountcy of the needs of children.

Presumptions in family law decision making have been consistently rejected both as a matter of law and policy for many years. Even the High Court's decision in *Gronow v Gronow*[3] which is now over 20 years old, is a comparatively recent statement of this rejection. To reverse that now is to go against the wisdom and experience of decades of family law and thousands of cases.

The Law Society of New South Wales recognises, however, that the Australian community should not always dogmatically accept conventional wisdom just because it has always been accepted as such. Neither should there be *rejection* of conventional wisdom without a thorough understanding of the complex issues involved. That thorough understanding is absent at this point in time. Not enough is known and understand about patterns of parenting before and after separation. Moreover, what is known and understood about shared parenting indicates that, unless it is a process adopted by the parents themselves and not mandated, it is highly problematic except in very specific circumstances. This will be discussed below.

5. Grandparents and other interested people

The standing and rights of grandparents and other interested people is simply beyond question. It is enshrined in the *Family Law Act*[4]. It is confirmed by cases decided under the *Family Law Act*[5]. If applications in relation to children are not being made by non-parents, this does not reflect the absence of rights, it reflects perhaps lack of community knowledge and understanding, difficulties in accessing the justice system, and a narrow social view of what constitutes a family.

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3 (1979) 144 CLR 513 per Mason and Wilson JJ at pp 526-529

4 ss60B(b), 64C and 65C

5 *Bright* (1995) FLC 920570, *KAM v MJR* (1999) FLC 92-347, *Rice v Miller* (1993) FLC 92-415.

6. Presumption of equal residence

After carefully considering the suggestions raised in paragraph (a)(i) of the reference to the Standing Committee, the Law Society of New South Wales does ***not*** support the recommendation that there should be a rebuttable presumption that "children will spend equal time with each parent". Indeed, ***the Law Society of New South Wales argues strongly against the introduction of any such presumption as it believes that it is not in the best interests of children and would focus parents in a pathway towards increased litigation and long-term hostility.*** The Law Society does not support the inclusion of any presumptions into Part VII of the *Family Law Act.*

While the Law Society of New South Wales recognises that many Australians are unhappy about family arrangements in the wake of family breakdown, there is no evidence in any national or international study that a presumption of equal residence would reduce parental grievances. It may in fact increase the level of disputation that exists. Any possible gains that such a presumption may achieve would be clearly outweighed by increased emotional and financial stress that would be placed upon the parents and children. The higher expenditure associated with duplicating resources and the emotional and social costs of managing complex parenting arrangements cannot be ignored.

The Law Society of New South Wales supports shared residence outcomes following a relationship breakdown if such is in the best interests of the child and notes that such an outcome is already possible under existing legislation. Indeed, if the Government wishes to signal to the community that a shared residence outcome is already a possible outcome, it could do so by explicitly referring to it in section 68F(2).

7. When does shared parenting work?

If there is to be a rebuttable presumption in favour of equal time with each parent, under which circumstances would it work?

The Law Society of New South Wales suggests that the answer to this question will demonstrate that the circumstances are so narrow as to make a presumption, even a rebuttable presumption, quite unworkable.

The decision of Federal Magistrate Ryan in *T and N*[6] contains an excellent, contemporary analysis of the law and of the factors which predicate for or against a successful shared parenting regime. The factors set out by Her Honour are as follows:

> "93 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."

The Standing Committee should note, with respect, that the list of factors is an inclusive one, not an exclusive one. There may be other factors that are also relevant in certain cases.

The Law Society of New South Wales wishes to make two significant observations about the factors referred to in *T and N*. Firstly, the factors set out by Her Honour are entirely consistent with the Committee's own collective experience in practice. Secondly, and perhaps more importantly, the Committee's collective experience in practice indicates that very few of the cases that are encountered are actually suitable for joint parenting. The reason for this is

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6 [2001] FMCA 222 The decision also contains a very useful discussion of how the issue of joint parenting is treated in other countries including England and Canada.

basically that some or all of the factors referred to in *T and N* were absent. That is not to say that shared parenting does not happen or cannot work. It certainly can, but the Committee's experience is that these cases are quite rare and generally do not enter the legal system anyway as the parents are able to reach and implement their own agreements.

Even with the relatively high threshold of factors before equal time parenting becomes suitable and in the best interests of children, the Law Society of New South Wales has grave reservations about the impact of a presumption, even a rebuttable presumption, on how parents reach agreement in relation to contact. The fear is that the presumption minimises the prospects of agreement, but greatly enhances the likelihood and intensity of conflict. This is directly contrary to recommendation 1 of the Pathways Report which states[7]:

> "The Advisory Group recommends that the family law system, in whole and in all its parts, be designed to maximise the potential for families to function co-operatively in the interests of children after separation. In doing so, it would ensure fair and equitable treatment for all, with particular attention to the ongoing parenting roles and support needs of both parents. The system will provide services for those family members who may face particular difficulties in adjusting to post-separation changes.
>
> Wherever possible, family decision making will be encouraged, with parents making their own decisions about their complementary roles, with appropriate support from the family law system."

The last thing that the legal system can cope with is increased conflict in the family arena. Delays in the adjudication of family law disputes are already unacceptable

Let us be clear, the Law Society of New South Wales believes this proposal will increase conflict and litigation and result in increased costs to the parties. Contrary to views expressed elsewhere such as in the media and by some other stakeholders, the Committee is opposed to any change which will have this effect.

8. Improving education about parenting and our family laws

The community debate that followed the announcement of the inquiry by the Standing Committee has demonstrated a lack of understanding and appreciation of the current family law system. All the key players in the family law system, in particular lawyers, the judiciary and the

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7 Report of the Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the Future for Families experiencing separation* – Commonwealth of Australia 2001, p5

government, must take some responsibility for this lack of community education. The concept of parental "custody" has no longer any legal relevance in Australia's system of family law yet it is a term that remains in popular usage. It is a term that was quite rightly removed because it implies and entrenches rights and control over children and was inconsistent with Australia's international obligations following Australia's ratification of the *United Nations Convention on the Rights of the Child 1989.*

In its submission to the Pathways Group, the Law Society recommended greater development and delivery of suitable education programs within the secondary school curriculum[8]. In the context of community education, the Law Society observed that the media often portrays unrealistic images of perfect family relationships[9]. Some sections of the media, particularly tabloids aimed at a younger demographic, perpetuate misinformation in relation to marriage relationships and parenting[10]. This often creates unrealistic expectations in the minds of younger Australians in their relationships with each other and their children, and may lead to difficulties in resolving the day-to-day tensions that can arise[11].

Given the issues outlined above, the Law Society of New South Wales endorses the following recommendations of the Pathways Report and believes these will assist in setting the right framework for any future debate and reform in this area:

> Recommendation 2[12]:
> That a long term community education campaign, with clear core messages and promoting the principles that underpin the family law system be developed. The campaign would:
> (a) focus on the interests and needs of children;
> (b) reinforce post-separation parenting responsibilities (including flexible parenting models that work); and
> (c) provide information about where to get help.
>
> Recommendation 3[13]
> That a national education package for schools consistent with national education goals, be designed, to develop individuals' capacities for healthy relationships, provide information about positive parenting models and demonstrate that it is 'okay' to look for help when difficulties arise.

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8 ibid
9 ibid, p4
10 ibid
11 ibid
12 Report of the Family Law Pathways Advisory Group, *Out of the Maze – Pathways to the Future for Families experiencing separation* – Commonwealth of Australia 2001, p25
13 ibid, p26

9. Joint Parenting Overseas

- While many overseas jurisdictions have presumptions of "joint custody" it must be understood that, generally speaking, there is a distinction made between *joint legal custody* and *joint physical custody.*

United States of America

The law in the United States varies from State to State, with most having a presumption of joint legal custody. Studies have found that initial equal split arrangements have resulted in one parent having greater physical contact[14].

The law in California is different to that of Australia in that the wishes of the parents are considered to be the most important factor when determining the best interests of the children[15].

United Kingdom

The United Kingdom has concepts of parental responsibility and parenting orders. It has been observed that UK courts do not consider "shared residence orders" to be good for children[16].

Canada

The current legislation in Canada retains the concepts of guardianship, custody and access. However, the situation in Canada is about to change following the introduction of Bill C-22 into the Canadian House of Commons in late 2002. The Bill follows upon the recommendations made in the Federal-Provincial-Territorial Report on Custody and Access[17].

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14 see Appendix 2
15 see Appendix 3
16 see Appendix 4
17 Canada, *Putting Children First: Final Federal-Provincial-Territorial Final Report on Custody and Access and Child Support,* Department of Justice, Ottawa, November 2002.

It has been observed that this recent review of Canada's custody laws "was triggered by fathers' complaints of gender bias in the existing system"[18]:

> "However, the approach taken by the Canadian Government to the reform process has resulted in legislation that is distinguishable from the Australian scheme in a number of important ways . . . The key difference between Pt VII of the Family Law Act and Bill C-22 is the latter's lack of any preference for sharing parental responsibilities. In this, it reflects the recommendations of the final report, (recommendations 6 and 7) and responds to the research evidence that shared parenting regimes have failed to reduce conflict and litigation . . . following the lead in England and Australia, Bill C-22 eliminates the concepts of 'custody' and 'access' from the Divorce Act. Unlike the English and Australian schemes, however, these terms have not been replaced with the language of residence and contact, or indeed with any language that recreates the kind of distinction that was the source of bitterness for 'access fathers'. Instead, 'parenting orders' would simply allocate 'parental responsibilities between parents (or between parents and others). This includes the amount of 'parenting time' each will undertake . . . as well as the allocation of 'decision-making responsibilities'".

Germany

German law allows for both parents to have "joint parental responsibility" over their children[19]. It is possible for a German Court to order sole parental responsibility[20]. Interestingly, under the relevant German legislation the starting point is that the child lives with one parent and has access to the other[21]. The Court may order access to a child even if the parents have shared parental responsibility.

10. Research into shared residence outcomes

So little is known in real terms about patterns of post-separation parenting.

A majority of men who are separated (64%) have contact with their children[22] and almost three quarters of these men have children staying overnight with them,[23] depending on the age of the

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18 Helen Rhoades, "Custody Reforms in Canada" (2003) 17 *Australian Journal of Family Law* 81 at p82; for discussions of the reform process see S Boyd, *Child Custody, Law and Women's Work,* Oxford University Press, Ontario, 2003; N Barla, "A Report from Canada's Gender Warzone: reforming the child related provisions of the Divorce Act", (1999) 16 *Canadian Journal of Family Law* 163

19 Eva Ryrstedt, "Joint Decisions – A prerequisite or a drawback in parental responsibility?" (2003) 17 *Australian Journal of Family Law* 155, at p196

20 ibid, p199

21 See Appendix 5

22 Australian Bureau of Statistics, *Family Characteristics Survey 1997*, Cat No 4442.0, AGPS, Canberra; See also Smyth B and Parkinson P; 'When the difference is night and day: Insights from HILDA into patterns of parent-child contact after separation', Paper presented at the 8th Australian Institute of Family Studies Conference, March. 2003, page 7 available at http://www.aifs/org/institute/pubs/papers/smyth3.pdf.

23 see Parkinson and Smyth above note 23 at page 9

children. There is no Australian research showing why more contact does not occur. A recent study on contact arrangements indicates that 25% of resident mothers believed that there was not enough contact[24]. This suggests that, where fathers have good relationships with the children, mothers are keen for contact to occur.

Family Court data reveals that the rate at which fathers are awarded residence of their children is increasing[25]. However, it is not known why this is the case and what are the factors predicating positive outcomes for children when this occurs.

Shared residence is the least common post-separation arrangement with only 3% of children from separated families in 'shared care' arrangements in 1997.[26] Less than 4% of parents registered with the Child Support Agency last year including those who have absolutely no conflict had equal (or near equal) care of their children.[27]

US studies have shown that where shared residence couples make these arrangements they do so voluntarily, often without legal assistance and irrespective of legislative provisions. These studies have also shown that relationship between shared residence parents are commonly characterised by cooperation between the parties and low conflict prior to and during separation.[28]

Research with children in the UK undertaken by Carol Smart has shown that, for children living in two homes, they had 'emotional and psychological space' to traverse as well as physical

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24 see Parkinson and Smyth above note 23 at p11

25 Residence Order Outcomes 1994/1995 – 2000-2001: Family Court data available on line at www.familycourt.gov.au/court/html/statistics.html. See Bordow, S; 'Defended cases in the Family Court of Australia: Factors influencing the outcome', *Australian Journal of Family Law*, volume8 , No 3, pp 252 – 263; and Moloney, L; 'Do fathers 'win' or do mothers 'lose'? A preliminary analysis of a random sample of parenting judgements in the Family Court of Australia', Presentation to Australian Institute of Family Studies, September 2000

26 Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra. 1997.

27 Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

28 Bauserman, R; 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangments: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, volume 16, no1, 91-102 at page 99. See also Rhoades, H, Graycar, R and Harrison M; 'The first years of the Family Law Reform Act 1995', *Family Matters* No 58, Autumn, 2001 page 80 available at http://www.aifs.org.au/institute/pubs/fm2001/fm58/hr.pdf

space. [29] The research showed that shared care was more likely to be organized to suit parents than to suit children. It found that the majority of children in 'shared residence knew how important the equal apportionment of time was for their parents. The study showed that children often carry the burden of shared care and found it emotionally straining to upset the balance between their parents. Children felt responsible for ensuring 'fairness' between their parents and in fact put their own interests below the interest of their parents for shared care. The research argues that being shared on a fifty-fifty basis can become 'uniquely oppressive' for some children.[30]

There needs to be an awareness of the unintended adverse consequences of well-intended but poorly conceived reform. This is clearly evident from certain aspects of the *Family Law Reform Act 1995*[31]. Despite the intentions of that legislation, confusion was created not certainty and disputes were increased not reduced.

There also needs to be care about the social and economic ramifications of a presumption of equal time with both parents. Eva Cox raises some of these issues in a submission to this Inquiry[32]. A rebuttable presumption may have a significant impact on social security, taxation, labour patterns, daycare and education. These possible impacts need to be rigorously explored. Another important issue is how property settlements would be affected. The Committee believes that there could be profound impacts here for many thousands of Australian families.

The Law Society of New South Wales believes that Australian society is not legally, socially or economically structured so as to support equal time post-separation parenting. Amongst other

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29 Smart, C., 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July, 2001, available at http://familycourt.gov.au/papers/html/smart.html.

30 Smart C; 'From Children's Shoes to Children's Voices' *Family Court Review*, volume 40, No 3 July 2002, pp 307 – 319 at page 314.

31 "The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?", Rhoades H, Graycar R and Harrison M, University of Sydney and Family Court of Australia, April 1999; "Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975", Dewar J and Parker S, Family Law Research Unit, Working Paper No 3, March 1999

32 "Response to the Inquiry into Child Custody Arrangements in the event of Family Separation: The socio-economic considerations and problems of implementing proposals for varying the Family Law Act to start with presumptions of children spending equal time with both parents"

things, we are a highly mobile society and yet geographic proximity seems to be an essential factor contributing towards successful equal residence.

There is to date no Australian research looking at predictors of successful shared residence arrangements in separated families. Little is known about parents who opt for shared care of their children, how these arrangements are structured, how well the arrangements 'work' and the effect of these arrangements on children.

It is simply unwise, therefore, to engage in significant changes to family law decision making about children without answering these questions and better understanding the dynamics of parenting before and after separation.

11. Child Support

The Law Society of New South Wales believes that compared to the system that existed prior to its implementation, the Child Support Scheme is relatively effective. It works fairly in some respects, but unfairly in other respects. The Society's greatest concern, however, is in relation to the adverse consequences of linking the amount of child support to the amount of contact. The Committee makes the following observations about the Scheme.

- One of the strengths and weaknesses of the Scheme is that child support is calculated having regard to capacity to pay of the paying parent, rather than the need of the child. The Committee believes that, based on the Committee's experience, for the majority this provides a reasonable contribution towards meeting the actual costs of child-rearing. However, this system ignores the reality that the needs of children differ at different ages, and also depend on geography amongst other factors.

- The Child Support Scheme is amazingly complex. One expert in the field has described it as ". . . incomprehensible to all but an elite of child support officers and specialist

family lawyers"[33]. Any amendments should make it easier to understand and operate for all the community.

- The Scheme does not satisfactorily meet the needs of parents and children who are entitled to receive support from self-employed payers. This category of payers has always been problematic because of their ability to manipulate their income.

- The current formula that is used by the Child Support Agency was devised in the mid 1980s when taxes were considerably lower as was the cost of living. The Law Society of New South Wales recommends that it is now an appropriate time to review the formula to consider, for example, whether assessments should continue to be made on taxable income and that relevant research is undertaken to confirm that the percentages used are still realistic.

It is noted that shared care arrangements are currently reflected in the child support formula as stated in the Child Support Agency website:

The following table shows the relevant child support percentage that would be payable for one child according to the number of nights that child spends in the payee's care.

Level of Care (in payee's care)	Number of Nights (1st 12 mths child support period)	Child Support %
Sole	256 nights or more	18
Major	220-255	14
Shared	146-219	12
Substantial	110-145	8

The percentages may vary according to the number of children and the number of assessments that the payer has.

As can be noted from this table, it was determined that a liable parent must have at least 30% of the number of "nights" before the child support liability is affected. This takes into account that the primary carer will have the bulk of the expenses, such as accommodation, school fees and so on. This "formula within a formula" creates difficulties and raises expectations in non-resident parents. Some parents may see money as being more important than the needs of their child and are mindful of the formula when contact arrangements are being finalised. This should never be a consideration in this

33 Professor John Wade, Child Support Handbook, CCH Sydney 1998 p90,104

determination. The Law Society of New South Wales suggests that in lieu, a scale could be introduced where credit is given for every 24 hours a parent has care of the child as opposed to the current "night" requirement.

If the Family Law Act is amended to allow for the presumption of shared care, it is certain that parents will use the amendments to seek an increase in contact in order to reduce their child support liability but may have no intention of continuing that contact.

The Committee has seen this effect time and time again. For example:

- when the formula was amended to allow for reductions of child support based upon contact time, we saw a quick increase in the fact of, and approach to, litigation about contact.

- many clients are aware of the thresholds and negotiate contact around these thresholds.

Difficulties are also envisaged as to 'which' parent will pay for 'what' in a shared care arrangement where the relationship between the parents is not good and this will result in further conflict.

- A better system for review is needed. Since the 1992 changes allowing for departure applications over 200,000 cases have been dealt with according to the latest draft figures from the Child Support Agency[34]. For 9 months ending March 2002, 86% of review applications were accepted and of those only 57.9% resulted in a variation of the assessment. Past figures indicate that almost equal numbers are payee and payer initiated.

  Strategies to administratively change assessments where necessary should be considered. It is suggested that there could be a provision for a more structured discretion relating to

34 Draft Child Support Scheme Fact and Figures 2001-02. Subject to change.

specific aspects of the care of a child[35] and particular costs associated with the child. The Law Society of New South Wales strongly believes that it is necessary to have a formula that is simple, otherwise there would be an increase in the number of reviews especially if there are softer guidelines.

A quick review mechanism is recommended, one that is similarly used for non-agency payment determinations, where there is power to reduce a child support assessment by up to 5%, having regard to things such as the cost of living of the payer or payee, the age of the child and the child's actual costs as compared to published research on the costs of raising children.

- Case Officers should have greater powers of enquiry and they should be able to use them. There is a problem obtaining child support from self-employed parents and there could be some additional requirements applicable to those parents, for example to provide their documentation as per their tax regime and for Case Officers to call for appropriate documents and have some knowledge of tax issues and accounting. Or, where there is evidence that the payer's standard of living is not commensurate with the level of disclosed income, assets and resources, a liability should be set based on the costs of published research in respect of raising a child. This would alleviate the problem of conclusions of insufficient information upon which to make determinations. It follows that there should be more funding for better educating Case Officers. If greater investigation takes place resulting in an increase in payments this will indirectly assist the government. This would lead to more equality between self-employed parents and PAYE earners.

  There also appears to be a predisposition amongst Case Officers to protect revenue on behalf of the ATO rather than having the child's best interests as the uppermost consideration.

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35 For example, factors in *FLA* s68(F)

The time restrictions within which Case Officers must hear reviews are 4 hours including interviewing the parties. This may be enough time for simple matters, but inadequate for complicated issues.

- There have been and will continue to be complaints that there should be no child support obligation if there is no contact. The Law Society of New South Wales believes that child support should ***not*** be linked to contact in any way. Family Law issues and child support must be separate. It is important to note that complaints generally reflect the anger and disappointment that is not uncommon when a relationship has broken down. Thorough research must take place before any changes are considered.

- Any review of child support needs to take into account the fact that the Child Support Agency is already under-resourced.

- A much simpler regime for departure applications needs to be devised. Sections 117-124 of the Act are difficult to understand and implement.

Appendix 1

Current Legislation

The laws that determine parenting disputes are set out in Part VII of the *Family Law Act* 1975 (Cth). Following recommendations made by a Federal Parliamentary Committee in 1992[36], these laws were significantly amended by the *Family Law Reform Act 1995* (Cth). The central object now enshrined in our laws:

> "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"[37]

Unless it would be contrary to a child's best interest, the principles underlying the central objective are that:

- children have a right to know and be cared for by both parents, regardless of whether their parents are married, separated, have never married or never lived together[38];
- 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[39];
- parents share duties and responsibilities concerning the care, welfare and development of their children[40]; and
- parents should agree about future parenting of their children[41].

Subject to court intervention or the registration of a parenting plan, each parent has parental responsibility for his or her child who has not attained the age of 18 years regardless of separation, divorce or remarriage[42]. A 'parenting order' confers particular parental responsibility for a child on a person[43]. There are four types of parenting orders[44]:

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36 *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act*, Australian Government Publishing Service, Canberra, November 1992

37 *Family Law Act 1975* (Cth) (*FLA*) s 60B

38 *FLA* s 60B(2)(a)

39 *FLA* s 60B(2)(b)

40 *FLA* s 60B(2)(c)

41 *FLA* s 60B(2)(d)

42 *FLA* s 61C (parental responsibility means "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children" *FLA* s 61B)

43 *FLA* s 61D(1)

44 *FLA* s 64B

- Residence Orders[45] – this deals with the question as to where a child will live;
- Contact Orders[46] – this deals with contact between the child and other persons
- Specific Issues Orders[47] – this deals with any other aspect of parental responsibility not covered by residence or contact orders
- Child Maintenance Orders[48].

A parent, the child, a grandparent or any other person concerned with the care, welfare and development of the child may make an application for a parenting order[49]. In deciding whether to make a particular parenting order in relation to a child, the court must regard the "best interests of the child as the paramount consideration"[50]. The legislation thereafter prescribes the following 12 specific factors that the court must consider in determining what is in the best interests of the child[51]:

(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

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45 *FLA* ss 64B(2)(a), 64B(3)
46 *FLA* ss 64B(2)(b), 64B(4)
47 *FLA* ss 64B(2)(d), 64B(6)
48 *FLA* ss 64B(2)(c), 64B(5) (the court cannot make a child maintenance order in relation to an eligible child under the *Child Support (Assessment) Act 1989: FLA* s66E)
49 *FLA* s 65C (as to the court's power to make a parenting order see s 65D)
50 *FLA* s 65E (the exception is a parenting order in relation to child maintenance where specific criteria applies)
51 *FLA* s 68F(2)(a)-(l)

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.

Resolution of parenting matters may occur informally (without court intervention) or formally via a parenting order (whether by consent or judicially determined) or registration of a parenting plan[52]. The vast majority of parenting matters are resolved without the need for the court to impose a parenting order[53].

Appendix 2

The Law in the United States

The United States, like much of the world, is a signatory to the United Nations Convention on the Rights of the Child 1989; the United States however has never ratified it. This clearly explains a preoccupation with parental rights rather than children's rights. Interestingly, it has also been observed that while some US couples opt initially for an equal split in terms of physical custody, this can reduce over time to a situation where one parent has the greater physical custody of the child than the other[54]

Moreover, some US studies have found that the number of children actually living equally with both parents post-separation is as little as 25%[55]

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52 As to the requirements for registration of a parenting plan see *FLA* ss 63A – 63H; further note that amendments dispensing with the requirement to register a parenting plan are contained in the Family Law Amendment Bill 2003

53 One current estimate is 90Y

54 Jody Grotzinger, *Dual Household Joint Custody and Adolescent Separation – Individuation,* a dissertation presented to the California Graduate Institute in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Clinical Psychology, July 2002 p62-63).

55 ibid p63

Appendix 3

The Law in California

California has been at the forefront of the parenting rights movement that has led to a joint custody outcome. The relevant legislation provides for "custodial allocation as joint in the best interests of the child"[56]. It has been observed that[57]:

> "This catch phrase lies at the center of much debate because the parents and attorneys are usually the decision makers, since children have no legal voice, and the system does not currently allow for the regulated input of children's opinions . . . The best interests of the child generally involve numerous factors, with the wishes of the parents as the single most important criterion ."

Appendix 4

The Law in the United Kingdom

The *Family Law Reform Act 1995* was, in part, modelled upon the *Children Act 1989* UK. The UK legislation removed the terms of guardianship, custody and access and introduced the concepts of parental responsibility, parenting orders. Parents have parental responsibility which may be subject to residence, contact and specific issues orders provided such is in the best interests of the child. In relation to the issue of residence, courts may grant shared residence orders. It should be noted, however, that where a parent is granted a residence order, the parent can make decisions independently of the other while the child is residing with that parent. This is different to the situation in Australia[58].

It has been observed that:

> "the main argument for this is that the child needs a well established home. When the court decides if it is suitable to issue a shared residence order, it is again the best interests of the child that is paramount. In *A v A* (Minors) (Shared Residence Order) [(1994) 1 FLR 669, CA], the Court of Appeal indicated that a Shared Residence Order was not suitable in conventional cases of separated parents, but only if special circumstances were at hand in the specific case. It was stated that it is important for the child to have a defined home, rather than move back and forward between parents. A new case, however, has paved the way for a possibly more flexible view on this issue. In that case, the couple had three children, which after the divorce came to spend a lot

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56 ibid p61

57 ibid

58 see John Dewar and Stephen Parker, "The Impact of the new Part 7 Family Law Act 1975" (1999) 13 *Australian Journal of Family Law* 96, p99

of time with both parents. On the request of the father, a Shared Residence Order was made [see *D v D* (Shared Residence Order) 1 FLR][59]."

Appendix 5

The Law in Germany

It has been observed that: "If the parents have joint parental responsibility, but disagree on the matter of residence, the court may give one of them the authority to decide concerning residence. This parent will then be able to decide that the child should live with only one of the parents as well as that the child should live alternately with both parents . . . A prerequisite for shared residence should however, always be that both parents want the children to live with them. A consequence of the fact that shared residence has been implemented for a certain amount of time can be that a parent who wishes to have decision-making authority concerning where the child shall live is denied this. Instead the shared residence shall stand as it was before."

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59 Eva Ryrstedt, "Joint Decisions – A prerequisite or a drawback in parental responsibility?" (2003) 17 *Australian Journal of Family Law* 155, at p163