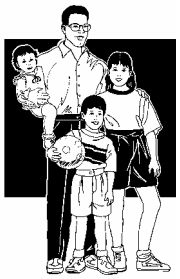

MEN'S RIGHTS AGENCY

P. O. Box 28, Waterford Queensland 4133 Australia
Tel: 07 3805 5611 Fax: 07 3200 8769 Mob:0409 269621
Email support@mensrights.com.au
Internet ewww.mensrights.com.au

A Submission to the Standing Committee on Family and Community Affairs

Child Custody Arrangements and Child Support

Authored by Sue Price, director and co founder of Men's Rights Agency

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Men's Rights Agency presentation to the Parliamentary Forum, Canberra 12 November 2002

"In 1970 I don't think we recognised the importance of a child having both parents the way we do now. My thinking has certainly evolved. The important thing for a judge is never to think you know it all. The longer I sit the more I feel I have to learn." [1]

Dame Elizabeth Butler-Sloss. President of the Family Law division, UK

A startling admission indeed from Dame Butler-Sloss, President of the UK Family Law division, but an important acknowledgement that children may not have benefited from past decisions of the court that were based on the removal of one parent or the other, most often the father.

Coincidentally, the President Dame Butler-Sloss and senior judges of the Family Law Courts, Mrs Justice Bracewell, Mr Justice Thorpe and Wall met last month with members of CAFCASS[2] and the Justice Department to discuss adopting changes to their interpretation of present custody laws and to signal their intentions to leading lawyers across the country.

These changes do not involve passing new legislation, but should mean many more fathers will see more of their children automatically, without the time delays and legal costs currently incurred.

Only time will tell whether these judicial intentions satisfy a child's need to have both parents involved as fully as they can be in their life, particularly after separation. Much will depend on the sincerity of the judiciary and the support received from psychologists, social workers, counsellors, the legal profession and academics who will eventually report, hopefully in an unbiased manner, on the success or not of the measure.

Meanwhile, Australia's Prime Minister, the Right Honourable John Howard MP has himself recognised the discontent and damage resulting from family law decisions that award residency to one parent and relegate the other to visitor status in their children's lives[3]. The Prime Minister has also put the child support

1 After the Split, marrying of minds;
Sunday Times, February 17, 2002 Margarette Driscoll

2 Child and Family Court Advisory And Support Service (CAFCASS)

3 Prime Minister's media announcement 18 June '03, and Radio 5DN interview, 19 June '03

scheme under close scrutiny in response to an unprecedented level of complaint from parents who are extremely dissatisfied with the Child Support Agency operation and legislation[4].

Since the Prime Minister expressed interest in the concept of rebuttable joint custody – where the court presumes a child should spend equal time living with each parent unless there are strong reasons against it – there has been an incredibly positive reaction from the Australian public. Three media polls, albeit straw polls, indicated substantial support for change and for the proposal in particular.

News Corporation [5] asked its readers, *Do you think joint custody should automatically be awarded when parents break up?* **62.68 per cent answered Yes;**

the ***Melbourne Herald Sun***[6] asked, *Should Australia's custody laws be overhauled?* **86.9 per cent said Yes**; and

the ***Sunday***[7] program on Channel 9 asked, *Should divorced parents be given equal shared custody of their children?* **82 per cent answered Yes**

Since then we have seen a deluge of articles and commentary about the proposal, many in favour, some just scaremongering and inconsequential in the end result, others raise valid queries as to how shared parenting (joint custody) really works.

We propose to look firstly at the current situation in family law and how we arrived at this point, particularly the changes to the Family Law Act in 1995 that removed parental rights[8] in favour of children's rights only; the change of terminology from custody and access to residency and contact and the somewhat surreptitious removal of "guardianship".

Secondly, we will put forward evidence to argue the case for shared and equal parenting and the benefits this will bestow on our families and consequently on Australian society.

Finally we will discuss the failure of the Child Support Agency to live up to its expectations and briefly explore another alternative that will ensure parents maintain financial support for their children in a way that is fair and equitable.

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4 CSA online survey Nov 2002, www.god.net.au/divorce
5 News Corporation http://news.com.au 22 June '03
6 Melbourne Herald Sun Phone-in poll 20 June '03
7 The Sunday Program Ch. 9 http://sunday.ninemsn.com.au/sunday 22 June '03
8 Family Law Reform Act 1995, Clause 3, s 61B-61D

Part One

Background:

The Family Law Act 1975, the brainchild of Senator Lionel Murphy was supposed to remove the angst normally associated with separations, where one party had to accuse the other of some misdeed in order to gain a divorce. He hoped to remove "fault" so that a marriage could be terminated on the unilateral wish of one of the parties – a period of 12 months separation being the only requirement to signify the irretrievable breakdown of the marriage.

Unfortunately, for a variety of reasons that need further exploration, it is questionable as to whether "fault" has been erased or not.

Father's emerge from the Family Court being allowed to see their children only 26 times a year, ordered to sign over up to 70 or 80% of the family assets[9] to the mother, who retains the day to day care of the children. If a man told you this is how he had been treated by the Court one would think he must have been an awful husband and father to be punished so. If one takes removal of children and loss of assets as a sign of punishment, fault has not been removed, just transferred to the father in most cases.

Perhaps the removal of "fault" has failed because of the nature of the court system needing to find a winner and therefore a loser; perhaps it became easier to award custody of children to the mother, together with inequitable amounts of family assets when believing the father to be a scoundrel, despite any allegations of domestic violence/ child abuse being unproven and unlikely.

One could imagine that if one can raise the spectre of your partner's alleged bad behaviour towards you, it makes it far easier to justify one's own bad behaviour in terminating a marriage, because you've just grown tired of your partner or have found someone else who satisfies more. Against common perceptions, studies have shown that women are in the majority when it comes to making the decision to terminate a marriage.[10]

The principle of no-fault, whilst written into law, seems to be neither acceptable nor workable. It is not in our human psyche to 'forgive and forget' so readily and neither should it be. It breeds bad behaviour and sends a clear message to

[9] Evidenced from MRA case files

[10] P. Jordan *Ten Years on: The effects of separation and divorce on men* Brisbane 27-29 Nov 1996

people that they can do anything they want and can trample on other people's rights, with impunity. And when justice is not seen to be done it erodes our confidence in the system that is in place.

Peter Duncan, Parliamentary Secretary to the Attorney General said in a speech to Parliament in November 1995 that :

> *"The original intention of the late Senator Murphy was that the Family Law Act would create a rebuttable presumption of shared parenting, but over the years the Family Court has chosen to largely ignore that."* [11]

In an effort to overcome the Family Court truculence, and as a partial response to the findings of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (JSC FLA) and recommendations made by the Family Law Council[12], the Labour government first introduced changes to the Act in 1994[13].

The major reforms were to: introduce the concept of the rights of the child to have contact with both parents and to be cared for by both; change the wording custody and access to residency and contact; remove the concept of parental rights and substitute parental responsibility, remove the terminology of guardianship; expand access to mediation and counselling services; define the relationship between contact orders and family violence orders.

Changing Names – does it make a difference

The Joint Select Committee tabled 120 recommendations to change the Family Law Act[14], however they did not propose changing the custody/access terminology or removing guardianship because they felt more evidence was needed "to be convinced that the terminology used had a significant effect on the behaviour of parents following separation".[15] The JSC also flagged 'the potential for problems unless amendments are undertaken jointly between the Commonwealth and the States."[16]

The JSC cited a submission by Mr Justice Joske[17] in which he argued that in the absence of demonstrated benefits flowing from a change in terminology, no

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11 Hansard 21 November 1995 Pg 3303

12 Comments on the Report of the Joint Select Committee on the Operation and the Interpretation of the Family Law Act, A Report to the Minister for Justice prepared by the Family Law Council January 1993

13 Bill's Digest 13 October 1994 Family Law Reform Bill 1994 No1 and No 2

14 Joint Select committee on Certain Aspects of the Operation and Interpretation of the Family Law Act November 1992

15 Joint Select Committee, op.cit; p110

16 Ibid, p 111

17 Bill's Digest 13 October 1994 Family Law Reform Bill 1994, Judge of the Family Court of Australia

change should occur because of the possibility that it would create confusion in enforcement both nationally and under the Hague Convention on Civil Aspects of International Child Abduction. The language of the Convention is that of 'custody' and 'access'. His Honour also took the view that:

* parents are normally possessive about their children and such attitudes will not be affected by changes in terminology; and

* confusion about custody and guardianship arise in the community as a result of what these terms are perceived to mean in fact, rather than as the result of legal labels.[18]

On the other hand the Family Law Council expressed disappointment that the JSC had not supported a change of terminology[19]. JSC recommendation 29 stated:

> 29. There be no change to the terminology of the Family Law Act 1975 in relation to custody and access, until such time as there is clear evidence that a change would be advantageous to the settlement of custody and access disputes.[20]

The Family Law Council associated the terms custody and access with winning and losing.[21] The FLC also noted that the language of family law is drawn from criminal and property law. In particular, they said it is based on 19th century concepts of ownership of the family by the father.[22]

The Family Law Council confirmed in a *Letter of Advice to the Attorney-General on the Operation of the (UK) Children's Act 1989* [23] that "while no formal evaluations have been done on the effect of changes to statutory language in the United Kingdom, anecdotal evidence suggests that the parties in family law proceedings find the new terminology (largely employed by the drafters of the Family Law Reform Bill) less adversarial, more meaningful and more realistic.[24]

The new language was also endorsed by the Chief Justice of the Family Court of Australia at the Sixth National Family Law Conference held in October 1994.[25]

By all accounts, the intention of the change was to eliminate the concept of ownership, but little else was achieved, if that.

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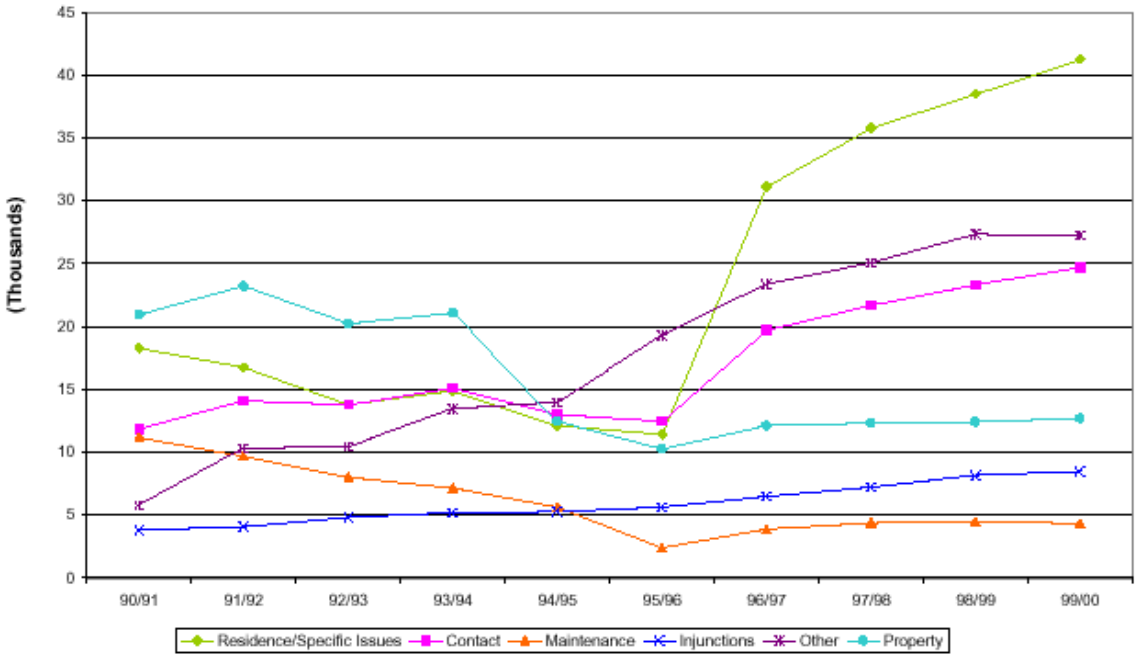
18 Joint Select Committee, op.cit; p110
19 Comments on the JSC FL Report, Family Law Council response, January 1993 (4.39)
20 JSC FL Report, Recommendation 29
21 Family Law Council, *Patterns of Parenting*, op.cit; p 31
22 Ibid p31
23 FLC, Letter of Advice to the Attorney General on the Operation of the (UK) Childrens Act 1989, 10 March 1994
24 Bills Digest 13 October 1994
25 Ibid 24

The wording still created a divide between the parents. One parent usually the mother is afforded greater importance by being granted 'residency' of the children and the other, usually the father, is consigned to become the 'contact' parent. It would seem to be somewhat hypocritical of the advisory and legislative bodies to criticise words such as custody and access because of connotations of goaling and ownership when the word residence[y] means permanent dwelling, a place where one resides, staying regularly, all of which imply stability and homeliness. The word contact, on the other hand, has connotations of brief touching, for example, in electrical circuitry, or brief acquaintance as in business – such words are far from suggesting a close, meaningful parent/child relationship. The imbalance between parents remained.

Evidence shows that since the change to the Family Law Act , there was an enormous upsurge in applications from parents concerning both residency and contact issues from the 1996/97 year, indicating that parents do want to have more contact, when the avenue is made available.

Orders sought 1990-91 to 1999-2000[26]



Contact applications increased from 13,814 in 1995/96 to 21,897 in 1996/97. [27] Residence/Specific Issues applications increased from 12,595 in 1995/96 to 33,304 in 1996/97.[28]

Undoubtedly the 1995 changes to the Family Law Act boded well for the family law industry. The growth in the industry is still evident. Contact applications have

26 http://www.familycourt.gov.au/court/html/statistics3.html
27 http://www.familycourt.gov.au/court/html/statistics 15.html
28 http://www.familycourt.gov.au/court/html/statistics 14.html

continued to grow, reaching 27,307 in 1999/200[29], with residency applications at 44,191.[30]

The outcomes for fathers and their children are slowly improving. Successful 'residency' applications by fathers rose from 15.3 per cent in 1994/95 to 19.6 per cent in 2000-01.[31]

The impression is given in the statistics that the increase in success for "father" residency, and "split" or "others" (non parents) residency applications seems to have decreased the number of "joint custody" outcomes. They have dropped from 5.1 per cent in 1994-95 to 2.5 per cent in 2000-01.[32] The statistics could be giving a false impression because of the name changes ie the joint custody expression is no longer being used and preference given to "residency/residency" applications. Though the Family Court data does not specify this to be the case.

Despite the stated political intention to ensure "the child's right to know and be cared for by both parents and to have contact with both parents and with other people significant to his or her care, welfare and development"[33] the courts have been slow to adopt the principle.

As we have discussed the changes in terminology would have contributed little to progress as the differences between parents still remains.

To ensure a seed change takes place will need far more than just name changes - a complete attitudinal change is required to emphasise the importance of BOTH parents to their children's lives. The terminology used should not be different for either parent apart from to define "father" or "mother" parenting time. Obvious though it may seem today, perhaps the intention in 1994/95 had little to do with ensuring a child's right to good contact with both parents and more to do with increasing the power and control the courts could exert over parents in general.

Removing Guardianship changes a parent's standing:

Guardianship issues have been consigned to 'special interest"[34] clauses in Consent Orders. The result - some people fail to address guardianship because they do not realise the significance or are not advised properly. Previously, guardianship guaranteed that even though a parent may be having irregular contact, they should still be actively involved and consulted when major decisions of a medical, educational or religious nature need to be made. If a parent has not

29 http://www.familycourt.gov.au/court/html/statistics 15.html
30 http://www.familycourt.gov.au/court/html/statistics 14.html
31 Residence Order Outcomes 1994-95 to 2000-01 www.familycourt.gov.au/court/html/residence orders.html
32 Ibid 31
33 Hansard pg 3303 21 November, 1995. P. Duncan speech to Parliament
34 Family Law Reform Act 1995, Clause 3, s 60H

ensured guardianship status (completed the special interest clauses) he/she has consigned all decision making powers concerning their child to the other party.

The JSC recommended firstly, under the heading Parenting after Separation[35] that:

> *27. The concept of guardianship be retained in the Family Law Act 1975.*

And secondly:

> *28. Every order for custody/access made by the Family Court specify guardianship rights and responsibilities of both parties, and particularly of the non-custodial parent, and the extent of those rights and responsibilities.*

The Family Law Council agreed that guardianship should be retained but believed that : ''… joint guardianship is rarely severed".[36]

The Chief Justice of the Family Court, Alastair Nicholson stated in oral evidence to the Joint Select Committee that:

> *"My concern is that I do not think many people understand what guardianship means and the Act does not say. All it talks about is all the powers, all the attributes that normally do with guardianship. The person in the street I do not think understands what that means. I am quite sure a lot of lawyers do not understand it either."*

Despite both the JSC and the Family Law Council endorsing the retention of 'guardianship' the legislators chose to eliminate the term. Guardianship had already been criticised as a term representing ownership, but more importantly it signified some rights in one's role as a parent.

Could it be the terminology "guardianship" needed to disappear from the legislation as did "custody"? Maybe those terms were it was too closely associated with the concept of rights, particularly parental rights and the Family Court would have difficulty implementing its wish to become the sole arbiter of children's matters if parents with rights still stood in the way?

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35 JSC FL PARENTING AFTER SEPARATION Recommendations 27 - 30 (para 4.43)

36 Family Law Council 6.13 Parenting Patterns

Parental Rights eliminated in favour of responsibilities only and children's rights:

The Parliamentary Secretary to the Attorney General, Peter Duncan signalled in his second reading speech[37] that forthcoming changes to the Family Law Act would remove "parental rights" from Australian families. He said:

> *"Further, the bill clarifies a general community misconception that parents have rights in respect of children. The bill gives legislative recognition to the common law principle, enunciated in the UK case of Gillick v. West Norfolk and Wisbech AHA and adopted by the majority of the High Court in Secretary of the Department of Health and Community Services v. JWB and SMB--known as Marion's case--that:*
>
> *. . . the principle of law is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."*

However, Duncan referred to a legal explanation given by a UK High Court judge, that did not in any sense of the meaning, remove parental rights to propose exactly that – the removal of parental rights in Australian law.

Duncan quotes two cases - the first case, Gillick v West Norfolk and Wisbech AHA was based on a UK mother's objection to a National Health Service pamphlet advising GPs that they would not be acting illegally if they were to give advice and prescribe contraceptives to a girl under 16, as long as the GP was acting in good faith to protect her from the harmful effects of sexual intercourse. Mrs Gillick, who had 5 daughters under 16 years old objected to the pamphlet and the advice that GPs could give contraceptive advice and prescribe contraceptives without her knowledge and parental consent.

Mrs Gillick sought an undertaking from the NHS that advice would not be given to her children without her parental consent. The NHS refused to comply. Mrs Gillick applied to the court for two declarations that the advice contained in the circular was unlawful, because it amounted to advice to doctors to commit the offence of causing or encouraging unlawful sexual intercourse with a girl under 16 and that a doctor or other professional person employed by it in its family planning service could not give advice and treatment on contraception to any child of the plaintiff below the age of 16 without the plaintiff 's consent, because to do so would be unlawful as being inconsistent with the plaintiff 's parental rights.

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[37] Hansard November 8 1994 pg Peter Duncan speech to Parliament

In the first hearing Woolf J refused to grant Mrs Gillick the two declarations.

An Appeal before Justices Eveleigh, Fox and Parker overturned the lower court decision and Mrs Gillick's declarations were granted.

A final appeal to the House of Lords dismissed the declarations. Two judges dissented preferring to uphold the need for a parent's consent. Some interesting comments on parental rights were made through the case – I have taken the liberty of bringing them to this Committee's attention so a better understanding can be gained of the depth of deception used when Duncan quoted this and Marion's case as justification to remove 'parental rights.

Lord Scarman, one of the three judges who upheld the NHS appeal on the first declaration made the comment referred to by Duncan, but prior to the comment, the judge also said,

> ***"Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child: custody, care and control of the person and guardianship of the property of the child."***[38]

Duncan chose not to repeat Lord Scarman's comments in full! For to do so would have destabilised the proposal to remove parental rights from Family Law legislation and acted as a reinforcement for Australians that they did retain some rights in regards to their children.

The ramifications for the medical profession if Mrs Gillick's case had been successful would have been disastrous. So much so, the case was unlikely to be allowed to succeed.

The Gillick case has been accepted as a precedent setting decision for discussion about parental rights. The Australian High Court judges in Marion's[39] case said they thought that findings in Gillick reflected "…. the common law in Australia" They noted also that the Gillick case "…..is of persuasive authority".

Their Honours referred to Lord Scarman's words that:

> *"Parental rights ... do not wholly disappear until the age of majority. ... But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with*

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38 Gillick v West Norfolk and Wisbech AHA pg 19

39 SECRETARY, DEPARTMENT OF HEALTH AND COMMUNITY SERVICES v. J.W.B. AND S.M.B. (MARION'S CASE.) (1992) 175 CLR 218 F.C. 92/010

> *capacities and rights recognised by law. The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."*[40]

And that:

> *A minor's capacity to make their own decisions depends on when they achieve "a sufficient understanding and intelligence to enable him or her to understand fully what is proposed"*[41]

In Marion's case the High Court was asked to determine whether in the Northern Territory, the applicant parents could lawfully authorise the carrying out of a sterilisation procedure upon the said child without an order of a Court.

Their daughter Marion was mentally handicapped and unable to care for herself.

The second question to the High Court asked if the Family Court had jurisdiction.

CJ Nicholson had previously decided that the powers of the Crown as the historic parens patriae were more extensive than those of a parent. He took into consideration the consequences if the court's consent was held to be unnecessary by referring to the previously decided sterilisation case of Jane[42] where he said:

> *" The consequences of a finding that the court's consent is unnecessary are far reaching both for parents and for children. For example, such a principle might be used to justify parental consent to the surgical removal of a girl's clitoris for religious or quasi cultural reasons, or the sterilisation of a perfectly healthy girl for misguided, albeit sincere, reasons. Other possibilities might include parental consent to the donation of healthy organs such as a kidney from one sibling to another."*

Furthermore the Chief Justice did not accept the unqualified trust in the medical profession as expressed by Cook J. in Re a Teenager[43] saying in the "Jane" case[44] that:

> *"Like all professions, the medical profession has members who are not prepared to live up to its professional standards of ethics ... Further, it is also possible that members of that profession may form sincere but*

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40 (39) ibid., at pp 183-184

41 (39) ibid., at p 189, and see pp 169, 194-195.

42 Re Jane (1988) 94 FLR, at p 26; 85 ALR, at p 435; 12 Fam LR, at p 685; (1989) FLC, at p 77,256:

43 (49) (1988) 94 FLR, at p 223; 13 Fam LR, at p 122; (1989) FLC, at p 77,226,

44 Re Jane (1988) 94 FLR, at p 26; 85 ALR, at p 435; 12 Fam LR, at p 685; (1989) FLC, at p 77,257:

misguided views about the appropriate steps to be taken."

The High Court agreed in Marion's case that it would to be advisable to seek the approval of the court, not because parents may make the decision for the wrong reasons as alleged by Nicholson but because the

> *"……features of a sterilisation procedure or, more accurately, factors involved in a decision to authorise sterilisation of another person which indicate that, in order to ensure the best protection of the interests of a child, such a decision should not come within the ordinary scope of parental power to consent to medical treatment".*[45]

The Australian High Court acknowledged that parents do have a power to authorise 'ordinary' medical procedures and confirmed further on that the powers and rights conferred on parents as guardians do exist:[46]

> *"….our conclusion is that the decision to sterilise a minor in circumstances such as the present falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian under s.63E(1) of the Family Law Act.*

Judge Brennan dissented from the majority opinion and made some useful comments on parental rights.

Under the heading of Powers of Parents and Guardians he said[47]:

> *27. The parents of a child are his or her natural guardians and custodians. Section 63F(1) of the Family Law Act 1975 (Cth) ("the Act") recognizes their status as guardians and custodians, subject to any order of a court, until the child attains the age of 18 years. Guardianship and custody impose responsibilities and confer powers sufficient to enable parents to discharge those responsibilities. Section 63E(1) and (2) defines the extent of those responsibilities and powers:*
>
> *"(1) A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than:*
>
> *(a) the right to have the daily care and control of the*

45 (39) Ibid p48
46 (39) Ibid p 53
47 (39) Ibid pg 33 p 27

child; and
(b) the right and responsibility to make decisions concerning the daily care and control of the child.
(2) A person who has or is granted custody of a child under this Act has:
(a) the right to have the daily care and control of the child; and
(b) the right and responsibility to make decisions concerning the daily care and control of the child."

28. The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child(149) cf. the powers of a custodian described in Fountain v. Alexander (1982) 150 CLR 615, per Gibbs C.J. at p 626. They extend to every aspect of the child's life.
Limits on parental authority are imposed by the operation of the general law, by statutory limitations or by the independence which children are entitled to assert, without extra-familial pressure, as they mature. Within these limits, the parents' responsibilities and powers may be exercised for what they see as the welfare of their children.

Judge Brennan referred to Lord Fitzgibbon's words in the O'Hara case[48] when he said:

"In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

And Judge Brennon expressed doubt as to whether[49]

"the primacy of parental responsibility was sufficiently recognized in the leading English case of Gillick v. West Norfolk AHA(164) (1986) AC 112 in relation to so much of the declaration sought by Mrs Gillick as related to the welfare of her own children and her ability to discharge her duties as parent and custodian of those children(165) cf. Ginsberg v. New York (1968) 390 US 629, at p 639.

48 Fitzgibbon L.J. in In re O'Hara(161) (1900) 2 IR 232, at p 240 and adopted by the House of Lords in J v. C(162) (1970) AC 668, at p695:

49 (39) Ibid pg 38 p31

Judge Brennan also voiced his disagreement to CJ Nicholson's decision when he said:[50]

> *"Leaving aside for the moment the possibility of statutory investiture of a specific jurisdiction in that behalf, the only legal explanation advanced is that a court, in exercising its parens patriae jurisdiction, enjoys a wider power than parents or guardians possess in respect of the personal integrity of their children.*
>
> ***That proposition, in my respectful view, is erroneous in law and disturbing in its social implications."***

In the most telling critique of the assumed power of the court Brennan J said:[51]

> *Though the desirability of protective procedures and criteria is manifest, their prescription gave the Courts' decisions a legislative character in the eyes of Rosselini J. who, speaking for the minority in Matter of Guardianship of Hayes, expressed his concern that the courts not become "an imperial judiciary"(178) ibid., at p 646. I share his concern. The hypothesis that a court is empowered to authorize the non-therapeutic sterilization of intellectually disabled children is asserted in order to satisfy what the court perceives to be a lacuna in the powers which ought to be available to satisfy the exigencies of the situation of some disabled children. But the court is an instrument of State power, and the powers of the State to authorize interference with the personal integrity of any of its subjects otherwise than for therapeutic purposes is not self-evident.* ***If such a power can be exercised to secure what the court may deem to be the welfare of an intellectually disabled child, may not a like power be exercised to secure what the court may deem to be the welfare of any child? It is a power which would be exercised not by an anxious and anguishing parent or guardian who can be called to account, but by a judge to whom the case is assigned in a court's list and who, having exercised his or her discretion, is discharged from all responsibility for the consequences.***

Judge Brennan decided the Family Court did not have the power to authorise a non therapeutic sterilisation of Marion:[52]

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50 (39) Ibid pg 39 p33
51 (39) Ibid pg 39 p35
52 (39) Ibid pg 42 p42

> *Unless such a power were a recognized incident of the parens patriae jurisdiction so that it formed part of the well-known and traditional exceptions - and clearly it is not - a law of the Commonwealth could not commit the exercise of such a power to a court. However, I do not construe Pt VII of the Family Law Act as purporting to do so. In my opinion, neither the parens patriae jurisdiction nor the "welfare" jurisdiction of the Family Court confers on that Court a power to authorize any invasion of a child's personal integrity which could not be authorized by its parents or guardians. It follows that the Family Law Act does not, in my view, confer power to authorize the non-therapeutic sterilization of Marion. No question arises as to the jurisdiction which the Supreme Court would have if Marion were a ward of that Court nor as to the jurisdiction of the Family Court if, by cross-vesting, that Court was vested with wardship jurisdiction.*

By relying on the findings of these two cases, (Gillick and Marion), that could be regarded as unusual circumstances and not at all representative of most family law situations, the legislators proceeded to remove all parental rights from Australian parents.

It is strange that Peter Duncan would quote the Gillick and Marion cases as justification to remove the concept of parental rights when it was clearly acknowledged in the Gillick case that parental rights do exist. The Australian High Court clearly knew and understood the extent of parental rights. So why were parental rights removed in such an undignified, secretive manner – hardly a whimper accompanied their extinguishment?

Perhaps now, parents will understand exactly why their child comes home from school saying "you can't tell me what to do – my teacher said so" or why the police refuse to return a 14 year old to the parent's home if he /she has run away.

Reported evidence to this Agency, tells us the police will not act as long as the child does not appear to be in imminent danger. In these circumstances the courts would be likely uphold the child's right to determine their future on the basis that they understand their circumstances and the consequences of their actions, so are able to make their own choice, whether that means living on the streets, prostituting themselves for their survival, dying in a back alley from a drug overdose, or not.

Parents now have no rights according to the Australian family law legislation, just responsibilities. The shared parenting provisions, ie joint custody intention of Murphy and Duncan converted to a shared financial responsibility concept, where recovery of money for support of the child seemed to become the primary issue.

The Prime Minister and the Coalition have already recognised that rights and responsibilities fit rather well together as evidenced by the proposed changes to the Human Rights and Equal Opportunity Commission whose new catchcry will be *"Human rights - everyone's responsibility".*[53]

Parental Rights and the Australian Constitution

The Australian Constitution makes special mention in Section 51 (XXI) of "parental rights"

> PART V.-POWERS OF THE PARLIAMENT.
>
> Legislative powers of the Parliament.
>
> 51. The Parliament shall, subject to this Constitution, have power* to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

We have been reminded by a constitutional lawyer that the Australian Constitution does not afford the people of Australia any particular rights, and for any guarantee of continuing rights to exist they would need to be enshrined in a Bill of Rights. But one would be hard pressed to understand why our forefathers would have made special mention of parental rights in the Constitution. Surely it was not so that parental rights could be written out of our laws, rather upheld?

The Attorney General told the National Schools Constitutional Convention[54] that he does not believe a Bill of Rights is necessary because our rights are protected by a *"unique combination of strong democratic institutions and constitutional, common law and statutory protections".*

The Attorney General Daryl Williams also confirmed our belief that the Constitution was not written without a great deal of consideration as to how to protect Australians from the excesses of government, the state and the judiciary when he said[55]:

> *"These arrangements did not come about by accident. At the time of Federation, our leaders put a great deal of thought into*

53 A. Summers, *The priority that no longer rates*, Sydney Morning Herald 28 Apr '03

54 Writing the Rights - Does Australia Need a Bill of Rights? National Schools Constitutional Convention Old Parliament House, Canberra ACT, Friday 28 March, 2003

55 (54) Ibid

> *how human rights could best be protected. They consciously put their faith in the ability of parliamentary democracy to protect individual rights. And they deliberately decided not to import the United States-style bill of rights into the Australian Constitution."*

As it is clearly specified and understood that Parliament should be protecting our rights, including 'parental rights' it is hard to understand how the removal of parental rights was allowed to happen and why this Parliament has yet to move to reinstate those rights.

Being a parent means more than just duty and responsibilities:

People take on parenthood expecting to be faced with joys, duties and responsibilities. They also expect to be regarded as the people best able to decide how to care for their children and in the majority of families, parents are quite capable of doing so.

Our legislative stance is onerous in the extreme and ignores the expectations of parents to enjoy raising their children in the secure atmosphere of the family.

The editor of "Everyman", Canadian David Shackleton expressed what it means to have a family when he wrote[56]:

> *For most of us, men and women having children is a trade-off. We do it for the pleasure of watching a new life grow and take shape, seeing the first steps, hearing the first words, sharing the excitement of correctly tied shoelaces, wiping away tears and sharing laughter. We do it to love and be loved in return. Above all perhaps we do it to feel needed.*

Shackleton points out parents are willing to do the work to support their children in exchange for these satisfactions, but our life as parents is made doubly difficult when legislation does not support our relationship with our children and our right and duty to protect them from harm or to discipline them when needed.

The result of the breakdown in family relationships can be seen everywhere, none more evident than in single parent situations.

Children's rights and their relationship with others' rights:

Canadian social scientist K.C. Wilson suggests, in his book *Co-parenting for Everyone*[57], that children have only two rights. His suggestion does not diminish the protection of children as you will see:

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56 D. Shackleton, Everyman Magazine

57 KC Wilson, *Co-parenting for Everyone*, pg 20 Harbinger Press

1: The same right as any member of society to freedom from abuse and exploitation. This does not require new laws, but applying those we have. You often hear, "Children are our future". Not true. They are part of society now and deserve that consideration.

2. The right to its entire family. The right to the advocacy and care and nurturing of both its parents equally, and through them the parent's families. Why should the parent's marital status have anything to do with this?

Children certainly have rights, but so do others and rights afforded to any person should not inflict disadvantage on another when they exercise those rights.

By natural extension, all people including children not only have rights, but duties and responsibilities. The two go hand in hand and one should not be allowed to exist without the other.

The very fact that legislators have worked so hard to remove any connotations of rights from family law legislation, proves that rights do in fact exist. Changing names and eliminating phrases associated with parental rights still does not remove our inherent if somewhat hidden rights that enable us to live our life free from undue pressure and interference in the choices we make in raising our children and 'living' our lives.

The best interest of the child

Although this inquiry has specified the provision that the "paramount consideration should be the best interests of the child" it is necessary to qualify how this terminology can, in our opinion, be misinterpreted and misused which will create a negative effect on the child rather than a positive one.

There is also the risk in using the 'best interest" as the "paramount" concern. It allows a court, such as the Family Court of Australia to presume itself to be the sole arbiter in matters concerning children and their family, overriding any rights that exist for parents or the child.

Professor of Philosophy Donald Hubin questioned what the best interest of the child really means.[58]

> *The best interest of the child should always be the ultimate objective. However, the best interest of the children serves poorly as a practical criterion for courts to employ directly. This is true for several reasons. First, the best interest of the child is an "essentially contested" concept. Parents who disagree about*

[58] Donald C Hubin Dept of Philosphy, Ohio State University email correspondence.19 Jul 1999

> *who should have exclusive custody (or about custodial arrangements in general) disagree about what custodial arrangements are in the best interest of the children. That is, no parent goes to court with the position that the children would suffer under his/her plan, but that plan should be adopted by the courts anyway. And, parents who disagree about what is in the best interest of the children, typically disagree about what counts as being in the children's best interest. Like the Thomistic injunction to "Do good and avoid evil", the objective of promoting the best interest of the child is rejected by no one. The dispute is over *what* is in the best interest of the children. Given this, the state's commitment to promote the best interest of the children is, in practice, no commitment at all. It is empty rhetoric."*

Warren Farrell, author of Father and Child Reunion also asks the question is the "best interests of the child theory in the best interests of the child?[59]

He suggests that because divorce makes everyone feel guilty about the best interests of the child, we take it to the extreme. He introduces "the paradox of the best interests of the child" – that the real best interests of a child do not come from focusing on only its interests, but that a child's best interests are served only when everyone's interests are considered."

Farrell maintains that:

> *To raise a child with only its own best interests in mind creates an adult who keeps only its own interests in mind. It is healthier to raise a child who understands that its own interests are best served when everyone else's interests are carefully and consistently considered.[60]*

Hubin comes to the same conclusion that the "best interest" should include others and asks, "*….. what sort of guideline presumption can be expected to promote the best interest of the child (and, I'll say because I think it matters, too, the parents)".[61]*

He explains that :

> *"Before the industrial revolution, divorce was much less common, of course, and custody was almost always awarded to the father. This was at least partly due to the thought that this was in the best interest of the children …… With the advent of the*

59 Father and Child Reunion Finch Publishing page 111-112
60 (59) Ibid pg 111-112
61 (58) Ibid

> *"tender years" doctrine, custody of young children (0-7 years old) typically went to the mother. Custody of older children typically went to the father. This standard was based on a conscious attempt to promote the best interest of the children.*
>
> *With the rejection of *de jure* sex discrimination in the law, the maternal standard gave way to either no standard or the "primary caretaker standard". The primary caretaker standard was conceived in sin and has not repented of its original sin. I mean by this that the primary caretaker standard was explicitly endorsed by those who wanted to continue maternal preference and saw this as a legal way to continue to do what was illegal.*
>
> *Typical descriptions of what counts toward being a "primary caretaker" include doing the laundry, washing the dishes, cleaning the house. None of these essentially involve time with the children and many of them are "hired out" in wealthier households. Absent from these lists are, fixing things around the house, mowing the lawn and maintaining the car.*
>
> *But, for our purposes now, the point is the primary caretaker standard was never defended as a replacement of the best interest of the child objective. It was defended as a presumption to help us attain that goal.*

Sophy Bordow made mention of the existence of the maternal preference doctrine in her 1992 study about the outcomes of defended custody cases in Australian Family Court Registries. She said:

> *"While the current legal statutes instruct the courts to award custody in the best interest of the child, many litigants and social observers believe that the maternal preference presumption continues to have an influence even though it is no longer explicitly mentioned in judgments. Furthermore, the primary caretaker concept which took precedent over parental gender, continues to be seen by many as merely being the old maternal preference in gender neutral terms."*[62]

Australia faced its own problems when equal opportunity and discrimination laws[63] came into being, and particularly after the signing of the UN Convention on the Rights of the Child.[64] The Australian Family Court was faced with the difficulty of appearing to be gender neutral yet maintain their preference to place children

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62 S. Bordow 1992, Australian Journal of Family Law 1994

63 HR&EO Commission Act 1986

64 Australia ratified the UNCROC in 1990

with the mother, whilst ensuring the best interest dictum contained in the UN CROC was initiated.

The "best interest of the child" principle also drew criticism from the Director General of the Swedish Justice Department, Goran Lambertz who discussed with a small audience at an International Family Law Conference in Brisbane, the changing face of the concept "in the best interests of the child". He raised the prospect that strict adherence to the principle ignored other stakeholders such as the parents, who also have a right to enjoy 'family life'.

He counselled caution to ensure undesirable behaviours are not ignored in deference to the best interest's principle. For example, he believes it sometimes wrongfully leads to a result where a parent who has kidnapped or retained a child is given sole custody on the basis that a child requires continuity. This is in sharp contrast to the other parent's interest in family life.

He reminded the forum that the European Court of Human Rights had just decided with a 13 to 4 majority that denying a father access to his child is against human rights (basic family rights).[65]

The court awarded him costs and compensation to the total of about US$40,000.

Since then more cases have been determined by the European Court producing a similar outcome.[66]

We raised the issue of a "right to family life" in the MRA submission to the Family Law Pathways Inquiry. (See Appendix A, Family Law Pathways Submission Page 15)

U.N. Convention on the Rights of the Child influence in custody decisions:

According to the Director of Massey University's Centre for Public Policy Evaluation, Stuart Birks, the UNCROC has "a direct bearing on issues of parental contact and involvement".

The convention talks about parents providing "direction and guidance" (Article 5); a child's "right to know and be cared for by his or her parents" (Article 7); "respecting the parents rights and duties and if applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner

65 Elsholz v Germany, European Court of Human Rights, 13/7/00 Strasbourg

66 Strasbourg European Court Oct 11 2001 The judges decided that such inferior treatment of non-married fathers (in 3 cases) violates the prohibition against discrimination expressed in Article 14 of the European Human Rights Convention. All-in-all, Germany has to pay the claimants DM143,000 (US$66,500) in damages and costs.

consistent with the evolving capacities of the child" (Article 14.2); leading Birks to find these conditions require "regular contact" with both parents.

Article 9, paragraph 3 further emphasises the intention of the Convention to guarantee "the right of a child to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest:. (See Appendix (B) S. Birks UNCROC and Parental Contact)

All of which should have provided a sound basis to ensure parents would remain actively involved in their child's life and each party would be able to enjoy their right to a family life with their children, whether they remained together as a couple (defacto or married) or not.

However, the intrusion into the United Nations of special interest groups with agendas that are far from family friendly has served to undermine the fundamental role of the family. UN committees are pushing policies that ultimately will weaken the married family. Patrick Fagan, from the Heritage Foundation believes the "overall agenda" of the UN is now to change *"the laws of each nation that will weaken the freedom and authority of parents to direct the moral education and attitudes of their children"*.[67]

Furthermore Fagan points to the fact that the UN rejected the inclusion of a statement about the role and importance of marriage, parents and families to the upbringing of youth in the UN Declaration of Youth, formulated in Lisbon in August 1998[68] as proof positive of the UN's disinterest in supporting the family.

Conclusion – removal of parent rights and focusing only on the best interest of the child to the exclusion of the family's best interest, does nothing more than leave our children to the vagaries of people who have little more than a passing interest during the course of their employment.

Unfortunately, hidden behind the concept of the "best interests of the child" is the ability for the judiciary to become the only arbiter allowed to make decisions that will affect a family for the rest of its life.

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67 How U.N. Conventions on Women's and Children's rights undermine Family, Religion and Sovereignty, Patrick Fagan, Heritage Foundation Feb 5, 2001, pg 12

68 Ibid pg 12

Part 2

The Need for a Rebuttable Presumption of Joint Custody:

Considerable confusion has been created over the years by those administering laws relating to children of divorce by the use of different words to describe parents' relationship with their children after separation.

The care of children has been variously described as custody/access, residency/contact, shared parenting, shared and equal parenting, joint custody which could mean joint legal custody as often occurs in the United States, or joint physical custody or joint physical and legal custody. But even the latter terminology does not adequately provide a true reflection of the need to ensure parents spend equal time with their children after family separation.

Not all parents will be able to achieve 50/50 parenting time, due to a number of factors, primarily working hours and location. It is essential, however that each parent is regarded as being equally important to their children whether they are still in a marriage/relationship with the other parent or not. That is the crux of the problem to date. The absent parent has been regarded as not important to their child's wellbeing, apart from fulfilling a financial support role. There is more to being a parent than just a blank cheque!

Under current policy, when parents separate they are presented with the standard model; the children stay with the mother and the father sees them every second weekend and half the school holidays. Unfortunately this scheme has resulted in more than 50 per cent of children losing contact with one parent usually their father within a relatively short period of two years.[69]

Counsellors, mediators and their own legal team will often only offer this option. The every second weekend model is firmly entrenched in our system. The Family Court statistics confirm few parents share the care of their children on a 50/50 basis[70]. and there has been little or no improvement in shared-care since the 1995 reforms to the Family Law Act.

The scheme is more suited to the latter half of last century. Family circumstances have changed and many families need both parents in the workforce to support their chosen lifestyle which is based on ever increasing consumerism.

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69 Dr Martin Richards, Centre for Family Research at Cambridge University, is an expert on divorce. He and his colleagues have studied 17,000 children from the National Child Development Survey who were born in Britain during one week in 1958 and were followed up at the ages of 7, 11, 16 and 23. He concluded "a half of all divorced fathers lose contact with their children within two years".

70 (32) Ibid

The need to find a better scheme is obvious. Families, particularly children and estranged fathers are not faring well under these arrangements.

If a child is raised in a separated family they will be more likely to:

- Exposed to or involved in higher rates of crime, drug use, child abuse, and child neglect;
- Perform poorly in reading, spelling, math tests, repeat grades and drop out of high school and college more frequently;
- Have higher incidences of behavioural, emotional, physical, and psychiatric problems, including depression and suicide; and
- Have an increased probability of divorce as adults and cohabit more frequently.[71]

Many studies have been conducted to illustrate the problems faced by children who do not have a relationship with both parents, especially when the father is removed from their lives.

Barry Maley, Centre for Independent Studies program director found Australian and Queensland data on the connection between family type and the incidence of abuse and neglect to be "very illuminating".[72]

> *"In 1997-98 there were 6323 substantiated cases of child abuse and neglect in Queensland. Abuse or neglect in sole-parent families accounted for 3038 cases out of this total.*
>
> *Step-parent or blended families accounted for an additional 1209 cases, and other relative, strangers or unidentified persons for another 779.*
>
> *So, 5026 cases out of 6323 occurred in not-intact families or other circumstances. The remainder, 1297 cases, occurred in natural, two-parent families.*
>
> *Although intact, natural-parent families constitute about 74 percent of all families, they account for only 20 percent of abuse cases; whereas sole-parent, step- or blended families who constitute about 30 percent of Queensland families, account for about two-thirds of cases.*

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71 Encouraging Marriage and Discouraging Divorce by Patrick F. Fagan Mar 26, '01, Heritage Foundation

72 Broken Homes and violated innocence, Barry Maley, Brisbane Courier Mail 9/11/99

The pattern in other states is comparable, and international data yields much the same picture."

Further investigation undertaken by this Agency reveals in later figures that substantiated abuse cases in Queensland comprise 22% physical abuse, 32% emotional abuse, 41% neglect and only 5% sexual abuse.[73]

Of those, it was found that 24% of substantiated abuse occurred in two parent natural families, 22% in two parent other (blended) families, 42% in single female parent families and 4% in single male parent families.[74]

Again the pattern is similar in other states and overseas.[75]

The UK National Society for the Prevention of Cruelty for Children overturned a number of common stereotypes about child abuse when the largest ever study into child maltreatment found that children are seven times more likely to be beaten badly by their parents than sexually abused by them and violent acts towards children are more likely to be meted out by mothers than fathers[76].

Confirming overseas trends, the New South Wales Child Death Review Team has for the first time identified the primary perpetrator in 60 child murders that occurred between January 1996 and July 1999. Forty of the deaths could be described as 'family' murders where the primary suspects/perpetrators were identified as follows: 25 mothers, 5 mother's boyfriends, I boarder (living in) and 6 biological fathers. In three cases more than one child was killed – two mothers killed 2 children each and 1 father killed two children.[77]

Clearly NSW mothers are four times more likely to kill their children than biological fathers.

Sexual abuse of a child is an effective and disastrous allegation to make against a father. In the current climate of moral hysteria associated with child sexual abuse he may find himself ousted from his child's life even though the allegations remain unproven. For a Court that places little credence on fact or evidence and fails to prosecute perjurers it is less hazardous for Family Court judges to cover their back by disallowing the

73 Child Protection Australia 2001-02, Australian Institute of Health and Welfare
74 Child Protection Australia 2001-02, Australian Institute of Health and Welfare
75 US, Third National Incidence Study of Child Abuse and Neglect (NIS-3) Table 6-3, 6-3[4]
76 UK National Society for the Prevention of Cruelty for Children (NSPCC) child abuse prevalence study published in November 2000
77 NSW Child Death Review Team, Fatal Assault of children and Young People, June 2002

father contact with his children than to find him innocent of the allegations.[78]

UK research in the NSPCC[79] found that father/daughter incestuous relationships were rare, less than four in a thousand cases and that the most likely relative to abuse within the family is a brother or stepbrother.

Sociologist Bettina Arndt commented in a recent article[80] "It hasn't helped that so many professionals remain wilfully ignorant of the statistical realities. International research now shows that less than 1 per cent of children are sexually abused by their fathers[81]. So it is shocking that a recent survey commissioned by the Department of Family and Community Services showed 35 per cent of female health, education and welfare professionals believe up to 24 per cent of fathers abuse their children."

A third of children are sexually abused by adolescents[82] and women, in their attempts to find a mate, may unwittingly be putting their children at greater risk for sexual abuse from the men they date. If the mother remarries, according to a survey done by Russell,[83] the "stepdaughters are over eight times more at risk of sexual abuse by the stepfathers who reared them than are daughters reared by their biological fathers." "As some researchers have begun to suspect, it may be the case that a growing number of stepfathers are really 'smart paedophiles', men who marry divorced or single women with families as a way of getting close to children." [84]

On the other hand child sexual abuse by women is a taboo subject because there is a general unwillingness to believe that women can be perpetrators of such abuse.[85] It has been estimated that 5 per cent of the abuse of girls and 20 per cent of the abuse of boys is perpetrated by women.

This Agency does not wish to enter in a gender war of who commits the abuse of children, but we find ourselves having to expose the truth because of the attacks launched on fathers by radical groups claiming to be protective parents or in support of positive shared parenting, what ever that terminology implies, but whose sole intention we believe, is to derail the move towards 50/50 residency.

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78 M&M 1988 FCof FCA [91-958] Judgement delivered 8 Aug 1988

79 UK NSPCC, Child abuse prevalence study, November 2000

80 B. Arndt,*The current moral alarm over child sexual abuse masks statistical realities*, Sydney Morning Herald, 19 March 2002

81 Ferguson DM & Mullen PE, 1999 Childhood Sexual Abusers: an evidence based perspective, Sage Publications

82 In a report prepared for the NSW Department of Community Services, Humphreys (1993) found that 31.6% of child victims had been abused by perpetrators under 16 years of age. HMSO 1988, Finkelhor 1986).

83 Russell, 1986, p. 103, 31 *"Incest / Sexual Abuse of Children"* Patricia D. McClendon, 1991

84 Crewdson, 1988, p. 31 *"Incest / Sexual Abuse of Children"* Patricia D. McClendon, 1991

85 Banning 1989, as cited in Tomison 1995

It should not surprise us that hastily formed groups will gather together to oppose reforms to protect and nurture our children. When a group of parents in Colorado, USA moved for constitutional recognition of parental rights they came under assault from a counter-coalition of left-wing activists assembled to defeat the measure. William Grigg reported that "the anti parental rights lobby drew heavily from teachers' unions, left-wing pressure groups and hard-core homosexual activists – called itself "Protect Our Children""[86]

Men in general, but particularly in their role as father to their children have become the prime target for vilification in the media despite statistics showing fathers are the least likely to abuse their children and children are in fact safer in the care of the intact family or with their father.

When seeking to clarify the perpetrators of abuse against children there are a number of pitfalls, mostly relating to terminology and definition. In cases of neglect and physical abuse, data will be listed under parents, non parents, but will not specify whether the parent is the mother or father or the biological father, a step father or defacto boyfriend or other family member.

The author of the NSW Child Death Review team expressed horror when I telephoned to confirm the figures, that I should think of presenting the bare statistics of just who kills children. He threatened that if I hoped to change policy I would have no credibility if I didn't take into account the reasons why mothers kill their children.

It may be appropriate to take into account the reason a person kills when sentencing, or to assess methods to reduce the likelihood, but for our purposes we were purely searching for the number killed, by whom and their relationship to the child.

Research in this country and around the western world has fallen prey to self advocacy research, mainly supporting the feminist position used to portray women as victims of a patriarchal society.

Some statistics have undoubtedly been manipulated. Asking the right question will always produce the desired result as happened with the Women's Safety Survey. Questions used to produce the estimate - 1 in 4 women have been subjected to domestic violence were so wide ranging that they were bound to gather in a large number of positive responses.

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86 Whose Children? William Norman Grigg, The New American 21 July 1997

For example Q319 asked "Has a man EVER touched you, against your will, in a sexual way, such as unwanted touching grabbing, kissing or fondling?"

The explanation delivered by the questioner to accompanying this question was:

Q 319 Unwanted sexual touching is any intentional sexual touching, such as grabbing, kissing or fondling which is carried out without a woman's consent. It is a momentary or brief touching or contact. It includes groping or brushing against a breast or bottom.

Thousand of dollars are controlled by bodies who have a vested interested in maintaining their funding rather than providing valuable research that could usefully identify the problems, if any.

Unfortunately there seems to be little independence between the bodies authorised to advise the government, conduct research within those organisations and those responsible for academic based research. The same names appear on the committees and are closely associated with the Family Court and the Family Law Council. The Australian public who have experienced the family law system have little confidence in the advice offered to government from these advisory boards – they research seems to have little to do with reality. Men's and father's groups are never represented on these committees.

Recently Garry Watts, a past chairman of the Family Law Council and of the Family Law section of the Law Council of Australia emailed practising family law solicitors urging them to reject the joint custody proposals because they would "never work".

Positives of Joint Custody 50/50 equal parenting:

The following is a summary of research showing the positive aspects of joint custody – 50/50 prepared by Eeva Sodhi, a writer and former head of serials cataloguing at the University of Ottawa, Canada.

1.. Parents with joint physical custody are less likely to litigate than parents with only joint legal custody. Joint custody parents are less likely to litigate when they must bargain in the shadow of a strong joint custody statute. (Alexander, Ilfeld, & Ilfeld, 1982);

2. When parents were asked to imagine themselves in one of three custody situations, the sole custody arrangement when compared to the joint custody one encouraged punitive behavior and concern for self-interest. (Patrician, 1984);

3. Fewer joint custody cases than sole custody cases were relitigated. (Phear, Bech, Hauser, Clark, & Whitney, 1984);

4. Joint custody fathers were significantly more involved than sole custody fathers and indicated less court use (Bowman, 1983);

5. A report to the U.S. Commission on Child and Family Welfare on June 14, 1995 by Division 16, School Psychology, American Psychological Association concludes that "The research reviewed supports the conclusion that joint custody is associated with certain favorable outcomes for children including father involvement, best interest of the child for adjustment outcomes, child support, reduced relitigation costs, and sometimes reduced parental conflict." The APA also noted that "The need for improved policy to reduce the present adversarial approach that has resulted in primarily sole maternal custody, limited father involvement and maladjustment of both children and parents is critical. Increased mediation, joint custody, and parent education are supported for this policy."

6. In an article called "Joint custody: The option of choice" (Journal of Divorce & Remarriage 21 (3/4): 115-131. 1994) W.N Bender argues that joint custody is also the preferred option in high conflict situations because it helps reduce the conflict over time - and that is in the best interests of the children." Bender reviews current and historical research on the 'myths' of joint custody, i.e. - that joint custody should not be awarded when the mother objects or in high conflict matters. The article describes the benefits of joint custody including that children adjust better post-divorce in joint custody as compared to sole custody awards, children's attachment to both parents post-divorce is essential for healthy child development, joint custody leads to higher levels of financial compliance, relitigation is lower as compared to sole custody, and joint custody leads to the best outcome for children even in high conflict situations because it forces resolution and best leads to reduction of child stress in the long term.

7. Joan Kelly also remarked her article "Further Observations on Joint Custody" that appeared in vol. 16 of the University of California at Davis Law Review that "I am concerned about the position that argues that joint custody should not be awarded when parents do not agree. In these cases it is almost always the woman who is opposed to joint custody. Women do not need to ask for, not agree to, joint custody. They are presumed by society, lawyers, the courts, and themselves to have a right to keep the children in their care and protection. It is the father who must ask for joint custody and it is often in the mother's power to agree or disagree. The mother's position is particularly enhanced if she knows

that a refusal to share parenting with her spouse will preclude a joint custody order regardless of her reasons for denying joint custody. In this context, it would be important to study women who refuse a request for joint custody"

8. Pearson and Thoennes " . . . conflict between divorcing parents in our sample did not appear to worsen as a result of the increased demand for interparental cooperation and communication in joint legal or joint residential custody arrangements. To the contrary, parents with sole maternal custody reported the greatest deterioration in the relationships over time." [in their "Custody after Divorce: Demographic and attitudinal patterns" (American Journal of Orthopsychiatry, vol. 60, 1990)].

9. Alexander, Shanon J., M.A., Family Relations division of Home Economics, Florida State University in an article called "Protecting the Child's Rights in Custody Cases" (The Family Coordinator - Oct. 1977) says that results show better results for joint custody than sole custody. (The) relitigation rate for joint custody was half that for sole custody (16% vs. 32%).

10. "It is also possible that the increase in disagreements occurs specifically because the custodial parents are resisting the non-custodial parents' new parenting efforts" [Virginia Knox, Cindy Redcross. Parenting and Providing: The Impact of Parents' Fair Share on Paternal Involvement.]

11. In his written statement, titled "THE JOINT CUSTODY OF CHILDREN AMENDMENT ACT OF 1993" Ronald K. Henry, Esquire, Co-Chairman of the American Bar Association Federal Legislation Subcommittee of the Custody Committee, [and] Advisor to the American Law Institute Family Law Project and as an advisor to the National Commission on Uniform State Laws Project on Interstate Visitation Enforcement in support of Bill 10-442, in Washington, said: "If we want to reduce conflict between parents, we must end the barbaric practice of forcing them through the winner-loser combat of sole custody trials. . The most mean-spirited opposition to joint custody is the claim that it should be barred or restricted for the population at large because of the risk of domestic violence among some families. These opponents argue from a presumption of pathology an urge a rule that would assume that the worst behavior of the most extreme individual is the norm. Policy cannot be made by anecdote, and the law should not be based upon this presumption of pathology

12. Thirty-four percent of the unequal shared custody cases had parents who were in dispute about custody, while only 6 percent of those with the outcome of equal shared custody were in dispute. Although only 53 percent of both divorcing parents were represented by legal counsel in their divorce, 70 percent of the cases with an unequal shared custody outcome involved legal representation for both parents. Unequal shared custody cases required a much longer time period to reach resolution (320 as compared to 252 median days). Unequal shared custody parents also return to court at higher rates, both before and after the final divorce judgment. [Physical Custody in Wisconsin Divorce Cases, 1980-1992 Institute for Research on Poverty Discussion Paper no. 1133-97]

Further research has been undertaken by the Parental Equality organisation, Dublin. They have published a paper detailing expert evidence available in favour of shared parenting. (Appendix C)

Parental Equality has also produced a further bibliography of studies showing the effects and benefits of shared parenting. (Appendix D)

Justice La Poer Trench has compiled a considerable amount of evidence that he used in a decision to grant shared parenting over and above the recommendation of the expert family witness. This judgement is submitted to the Committee as support for shared parenting 50/50 but we feel it must be submitted "in confidence" to avoid the consequences of breaching S 121 of the Family Law Act. (To be hand delivered Monday 18/8/03)

The secrecy surrounding this case and the difficulties involved in obtaining a copy would suggest the Family Court prefers not to release cases that may prove beneficial to fathers seeking the support of previously heard cases. The case in question is not available from CCH or Butterworths and can only be obtained by a legal professional writing directly to the Family Court. Other cases that we thought would be of interest have not been published either.

The benefits to be gained by Australian families and society in general from the introduction of legislation that will reduce the loss of fathers from family life will be untold. A rebuttable presumption of joint custody and/or equal shared parenting is a standard that will presume that the best interest of children is promoted by having two divorced parents share equally in all aspects of child-rearing.

It is important to say that this doesn't constitute "forced shared parenting" as some critics like to say - at least not in any objectionable sense, because it is a *rebuttable* presumption. Courts are free to make other orders whenever they have good grounds for concluding that these other arrangements would promote the best interests of the children.

Parents are free to make other arrangements as they see fit, too. Of course, any arrangement can be court ordered over the objections of one or both parents. But this is nothing unique to a system that has a presumption of shared parenting.

The real "best interest of the children is the objective; the presumption of shared parenting is the default assumption we make to help guide us to that end".[87]

Also attached an MRA paper - Just who is assaulting our children August 2003 Appendix E – refers to the findings of just who is committing physical abuse, neglect, sexual abuse and murder of children.

Continue to Part 3 CSA

Sue Price
Director
Men's Rights Agency
P.O. Box 28
Waterford, Qld 4133 Australia

Tel: 07 3805 5611
Fax: 07 3200 8769
Email: support@mensrights.com.au
Web: www.mensrights.com.au

87 (58) Ibid

Part 3 Child Support Scheme Recommendations

The Child Support scheme has now been fully operational for fifteen years. Little improvement in the client satisfaction rate with the Child Support Agency and the scheme has been noted. Frustration levels for those enmeshed in the scheme have escalated to a level where we are now seeing 24 men a week take their own lives[88]. Many of these are attributable to family separation and the final insult of all to a father – the automatic garnisheeing of his income, often at exorbitant rates sending a very clear message to him that the government does not trust a father to 'do the right thing'.

What an insult, how degrading! A father who has just discovered he is no longer wanted by his wife, told he cannot see his children if the mother refuses or until the court orders contact, he is then subjected to notification that the CSA will automatically take money directly from his account to pay to the mother. This sends a very clear message that the previously perfectly adequate father is no longer to be trusted with the duties and responsibilities of fatherhood. A recent study has found that "shame" or "humiliation" is a major contributor to male suicide.[89]

The CS scheme is fatally flawed and instead of improvement, since the record number of complaints to the JSC inquiry in 1992, the system and its operation have become more draconian and irresponsible in its attitude toward the clients they are supposed to be helping!

There is an agenda within the organization that transcends any notions of fairness, respect for separated paying parents. The demands made of payers, mostly fathers if they fall into the trap of seeking to reduce their payments via the change of assessment process (a review) can be not only horrendous, but ludicrous in their reasoning.

An applicant for employment with CSA was shocked to learn when he made it to the last 80 out of 2000, to be told that if he held any ideas of "social justice" and how they could help payers/payees, to "…. just forget it! CSA is only interested in collecting the money"!

According to Diana Bryant who spoke at a conference in Gladstone[90] immediately after her appointment as Chief Magistrate of the new Federal Magistrates Service, the formula (still used today) was never intended for long term use. Just as an interim measure until the Australian government could determine the cost

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88 1997 Professor Pierre Baume, Suicide Prevention Research, Griffifth Uni found that 70 per cent of adult male suicides were associated with relationship breakdown

89 Kenneth Kendler, Archives of General Psychiatry, August 2003

90 Gladstone Family Law Reform Conference 2000

of raising children in separated households. Ms Bryant concluded her address with the words "…child support – it's a mess!"

The BSU research into the cost of raising children in Australia was published in 1998, but the government has not adopted the figures which would reduce the child support payments to a more equitable level when shared between the two parents.

The current state of CSA is abysmal. According to research conducted by PIR (Appendix F, Child Support 2002 PIR.pdf) and based on CSA's own figures, 39% of payers are unemployed or low income earners. That represents 76% of the adult male unemployed. It is estimated that it costs the government $2.80 in unemployment benefits and lost taxation returns to collect every dollar. The weekly amount paid to a child has reduced from $48.64, CPI indexed from $35.35 in 1995 to just under $26.50 today.

Child support is doing its best to improve its performance by questionably deeming incomes for almost every parent who mistakenly applies for a Review – the process that was introduced to supposedly provide an easy, inexpensive avenue to change the formula when necessary. It's certainly not inexpensive - it can cost a payer a great deal more than the cost of a court hearing when a review officer makes a determination that the payer has an ability to pay more, based on their capacity to earn. This happens frequently when the Review Officer uses a previously higher income to change the amount a payer must pay. Imagine earning $35,000 yet being ordered to pay on an old income from better times of $60,000.

The Child Support Agency has deliberately perverted the original intention of Parliament. Payment was always meant to be based on a **capacity to pay**[91], not a **capacity to earn**, but when the Review process legislation was put into place, instead of writing a new set of rules by which ROs should make their decisions they allowed them to use the rules set down for the judiciary[92]. A judge can deal with **capacity to earn** and does so when a person is rich in assets, but not showing comparable income.

A Review Officer has no ability, nor is there any requirement to investigate thoroughly the circumstances of the payer and payee. They take a simplistic view that if a person earned more in previous years or if they resign from a job and take a lower paying job they have a capacity to earn the higher income. This amounts to peonage –

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91 Child Support Consultative Group Report, *Formula for Australia* Page 4 May 1988

92 Child Support (Assessment) Act 1989 S98C (2) & (3) and S117

INVOLUNTARY SERVITUDE & PEONAGE - a condition of compulsory service or labor performed by one person, against his will, for the benefit of another person due to force, threats, intimidation or other similar means of coercion and compulsion directed against him.

CSA actions the collection of debts via a series of threats, followed by court recovery action, when they will force the sale of the payer's home if they have no money left to satisfy the debt.

The formula is flawed. It was rushed through a consultation process and introduced to Parliament in just 7 weeks. Even Senator Vanstone is on record complaining about the limited print run and the lack of time to respond[93].

The government of the day paid $20,000 to an American, Irwin Garfinkel and others[94] who promoted the Wisconsin version of child support which was designed for low income families –those earning around the $20K mark. Having decided on a flat percentage formula, they then proceeded to apply this to all income levels and all ages.

Not logical I'm afraid. Any mathematician will tell you that the higher the income the less of a percentage of that income is spent on an individual item, including in this case, the children. Wealthier parents may well spend more on their children[95], but not 5 times more. Research tells us this is two or two and a half times as much.

However, the formula working papers have gone missing and CSA can give no satisfactory explanation for the formula construction.

Just a quick look at the following comparison shows how the payer and payee are treated differently and in our opinion unfairly.

- The payee is allowed an exempt income before they are even considered to be partially liable to support their child of $36,213, nearly three times greater than the payer's amount for their own support of $12,315.

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93 Senate Hansard Speaker: Vanstone Sen A.E. (LP, SA) Discussion Paper and Text of Ministerial Statement 16 October 1986

94 Hansard 13 November 1986 QON: DSS: Consultants
Responder: Howe The Hon B.L. (RICHMOND, ALP) Page: 2951 Proof: No
Question_no: 4625 (vii) Maintenance Secretariat-The consultants are required to assist the Maintenance Secretariat in developing legislative reform packages on child maintenance. $20,000 Deena Shiff, Professor Garfinkel, Peter Waters

95 Natsem, THE PUBLIC AND PRIVATE COSTS OF CHILDREN IN AUSTRALIA, 1993-94 Pg 12Generally speaking, families in the top quintile spent more than twice what families in the bottom quintile spent on their children. Percival and Harding

	Payee	Payer
Disregarded/exempt income for single payer (Called 'Disregarded income' for the – payee but called 'Exempt income' for payer)	36,213	12,315
Disregarded/exempt income for payer with dependent child Dependent child allowance under 13years (Called 'Disregarded income' for the – payee but called 'Exempt income' for payer)	36,213	20,557 2,235 ——— 22,792

- When the payee has the child of the payer and the payer has another child to a subsequent relationship the amount allowed the payee is $36,213. (plus additional amount claimed for child care if applicable) Whilst the payer is allowed only $22,792

- When payer and payee both have one child (under 12yrs) of the marriage living with each of them, (split residency) both the payee and the payer have the same exempt/disregarded income level of $22,792

- Again when the parents both SHARE the care of one child (under 12 yrs) then the payee disregarded income is $22,792, the same as for the payer.

- When a payee is earning an income above the disregarded income amount of $36,213 the excess amount is used to reduce the payer's income by 50cents in the dollar.

  If the payee then decides to have another child and stop work their excess income is no longer available. The payer's child support amount then increases.

  On the other hand when the payer decides to have another child to a subsequent relationship the amount paid to the payee is reduced by the increase in their exempt income amount.

  Both of these situations give rise to accusations of unfairness and could be seen as one parent subsidizing the other to have a child with another

person. This impression will remain whilst child support calculations are made on a percentage of income.

Other basic complaints about the formula have focused on the following:

- The percentage used to determine the amount of child support should not be applied to gross income. People do not calculate how to allocate their expenditure using a gross income, why should this happen for child support?

- Pension payments made to the payee are not used when assessing payments or taken into account when reassessing child support.

- Why are different non-agency payment categories used by DSS and CSA? CSA's list is far more restrictive suggesting a double standard when the Government is engaged in recovering money as against handing out money.

- Payees are not held accountable to ensure the money is spent on the children.

- The percentages include 2 per cent as compensation for looking after the children, which could be described as surreptitious spousal maintenance.

- No allowance provided for the high cost of access until 30 per cent of the year is spent with the other parent.

- Numerous difficulties associated with the change of assessment process as detailed in MRA's CSA Reports – including deemed incomes based on higher earnings from previous years, rejecting legitimate business expenses, depreciation on equipment etc, disallowing genuine expenses in facilitating contact with children that include travel, accommodation and even legal expenses incurred in trying to gain contact.

- Blatant disregard by the Agency when forms are submitted with incomplete information from the payee.

- Blatant disregard when Agency is alerted to the fact that information on the forms is incorrect. MRA has been told when inquiring whether any payee has been prosecuted for making incorrect statements – "(with a laugh) ….. that's not likely to happen!"

- The Agency's refusal to keep accurate statistics.

- Refusal to release statistics relating to suicide of Agency clients.

- The Agency's willingness to accept the word of the payee and to disregard evidence produced by the payer.

- The lack of accountability of Agency staff.

- CSA Departure from Assessment decisions not subject to review by external authorities or courts.

- The Agency's unwillingness to enforce garnishee collection on 'one of its own' i.e. someone who is a payer and works for Centrelink, or other bureaucracy associated with the administrative arm of Government.

- CSA operation is based on deception to gain people's cooperation and compliance. They fail to alert people to their rights under the legislation.

A large question mark exists as a result of comments made in the Luton v Lessels High Court Decision that seem to indicate that the relationship between the Assessment Act and the Registration and Collection Act is not such a smooth transition as the legislators may like. According to Justices Gaudron and Haynes

> "Section 79 of the Assessment Act provides that an amount of child support under the Act, which is due and payable by a liable parent to a carer, is a debt due and payable by the liable parent to the carer. It may be sued for and recovered in a court. What is important for the purposes of the present inquiry is, first, that the Registrar can take no step to enforce an assessment made under the Act - that is a matter for those who have the benefit or burden of the assessment and it is to be done by recourse to the courts in the same way as any other debt is enforced. There is not that capacity (so often found when judicial power is exercised) to make a decision enforceable by execution [Para 67 Pg 14 of 44]."

Which indicates that instead of just transferring the liability created under the Child Support Assessment Act by a request of the parent seeking child support, they need to apply to a court before any debt and subsequent collection can be enforced.

Five years after the JSC report Dr Robert Kelso wrote "…the constitutional/legal doubts, the conflict of interests, the appalling client service delivery, the inappropriateness of the formula, the lack of accountability for child support payment and the lack of contact with children have not been addressed. Despite

repeated complaints and negative reports, the Agency continues to hide behind the ideology of "helping parents manage their responsibilities".[96]

The Child Support Agency's problems are compounded each year as they gather into their system more and more low income parents, who struggle to pay their child support until they eventually find they cannot afford to work any more.

The cost to the taxpayer since the inception of the Agency is estimated to be $2,700 each. (Appendix F, Child Support 2002 PIR.pdf) The cost to the community is so much more than just of a monetary value.

MRA has files full of people who tell us that when they separated they had "made their own arrangements that were working for them, but once the Child Support Agency became involved 'mayhem broke loose'".

Many children will not benefit from the efforts of a parent when they lose their incentive to work as a result of stress. Many will lose their father permanently either through suicide or death as a result of ill health caused by stress.

The Minister Larry Anthony said the changes would be "evolutionary not revolutionary".[97] Tinkering around the edges of the formula to reduce the amount paid for a small number of parents when they have between 10 – 30 percent care of their children will not be an adequate enough response.

The Child Support Agency in its present form needs to be disbanded. The legislation needs to be repealed. Fifteen years of band-aid responses have not fixed the problems, nor will they. A radical re-think into how to financially support the children of separation is needed, starting from the presumption that most parents will in future, share the care of their children, thereby eliminating much of the need for child support.

MRA would recommend future child support guidelines should be structured on the basis of the cost of raising Australian children at different ages. For the purpose of calculation, that cost should be divided equally between both parents.

There should be no adjustment for amount of time with either parent. One parent pays 50% and the other pays 50%. There could be a difference in the drawing allocation of the money, but no alteration to the amount each parent contributes.

Just for example, let us suppose it costs $100 per week to support a 13 year old child, equaling $5,200 per year. Each parent would then contribute half that amount $2600. Imagine each parent places this amount in a joint account. The parent who has the child in residence with them at the beginning of a week would

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96 The Parliamentary JSC on Certain Family Law Issues: Five years later, Dr R. Kelso Nuance Journal December 1999

97 November 11 2002 Parliament House Ken Ticehurst meeting

be able to withdraw $100. If the child spends 26 weeks with them they withdraw $2600, if 30 weeks then $3000.

If a parent is not able to find work then the responsibility for that parent's contribution would need to be funded by the taxpayer.

The scheme needs to be simple and easy to operate.

When parents are free to make their own arrangements and they have good contact/shared care of their children they prove to be more than generous.[98]

Understandably there will be a great deal of debate about the child support scheme.

Unfortunately many divorces/separation are predicated with the expectation that the government will step in with both parenting payments and family payments for the children. Additionally the parent with the children will expect the contact/ working parent to contribute as well.

This can amount to a considerable sum. For example a father who has two boys living in another state has calculated that with the money the mother gets from Centrelink and with his payments based on his income of $50,000 she would have to earn the equivalent of $70,000 to produce a similar tax free income.

Others have suggested and we agree that mothers who mainly decide the marriage relationship is over may not be so willing to sever the relationship if the expectations associated with custody of children are removed.

States in America where joint physical custody (shared and equal parenting) have been promoted are showing a considerable decrease in the number of divorces. That can only be for the good of Australia's future families.

Sue Price
Director
Men's Rights Agency
P.O. Box 28,
Waterford, Q 4133 Australia

Tel: 07 3805 5611
Fax: 07 3200 8769

Email: support@mensrights.com.au
Web: www.mensrights.com.au

98 Sanford Braver, Divorced Dads