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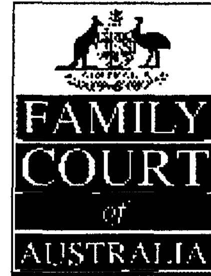


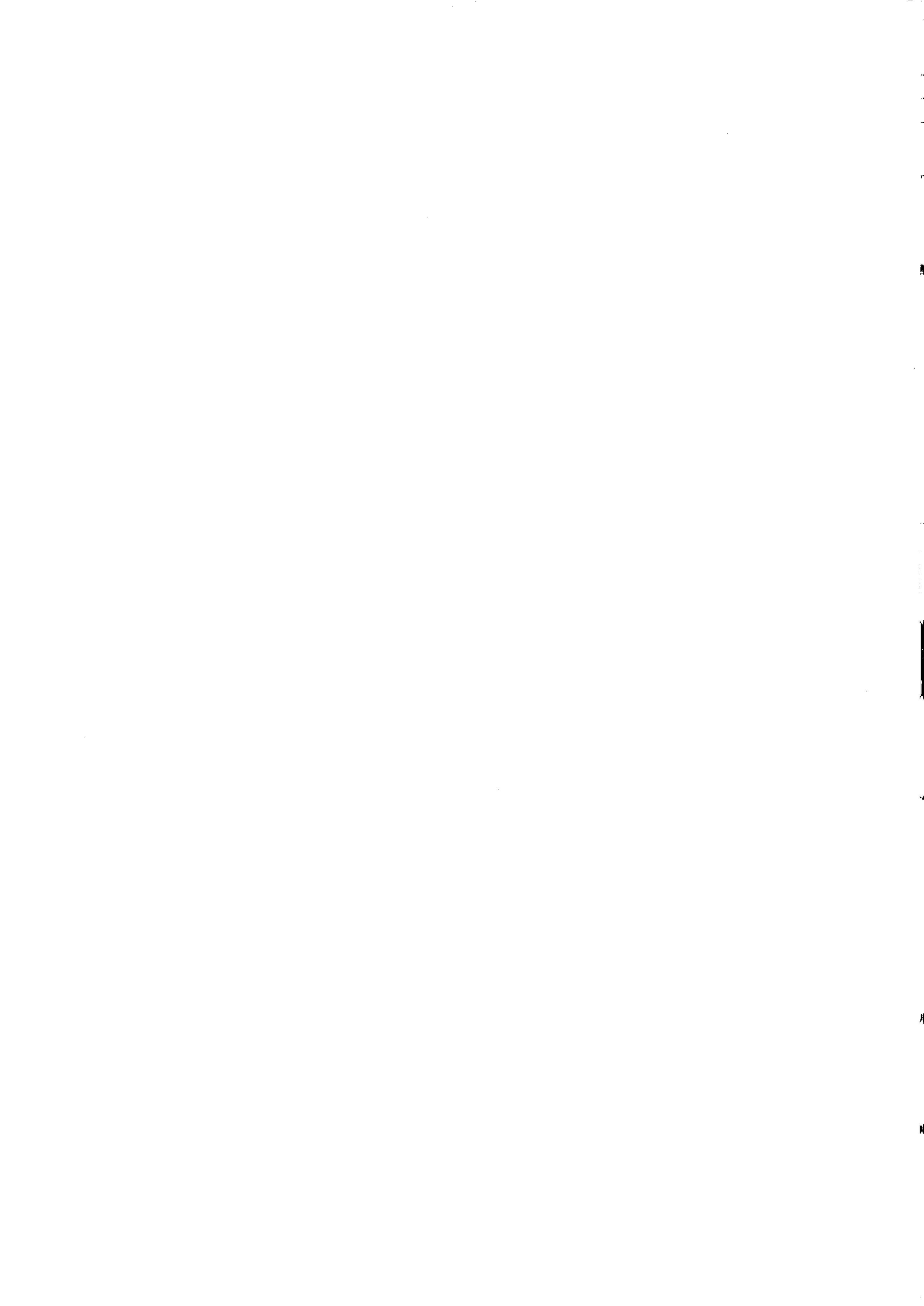
SUBMISSION

of

THE FAMILY COURT OF AUSTRALIA

Standing Committee
On
Family And Community Affairs
Inquiry Into Joint Custody Arrangements
In the Event of Family Separation

Prepared by the Family Court of Australia 16 August 2003



Executive Summary

This submission explains the relevant provisions of the Family Law Act ('the Act') and the operations of the Family Court of Australia ('the Court') as they relate to the children of separated parents.

It concentrates on the Committee's term of reference in which it is asked to consider *what factors (other than the best interests of children) should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted*

The Court does not contend that the current system of family law is problem free. It agrees with the Pathways report (Out of the Maze) that the system is fragmented, poorly resourced and confusing to clients. It also seriously questions the reliance on the adversarial system in the resolution of children's matters and discusses ways in which this reliance may be reduced.

In a supplementary submission to the Committee the Court will provide a statistical overview of parenting and an analysis of unreported first instance decisions, appeal decisions and consent agreements. The principal aim of this material will be to assist the Committee's understanding of how the current system is working.

The submission does not make any recommendations as to what the Committee should do, as it is for the Parliament, not the Court, to determine questions of policy which Parliament may then incorporate into legislation.

The Limits of the Law

The family law system itself must be seen as forming only a small part of a much larger environment. Issues such as the interaction between workforce participation and child care availability, social security and taxation policies have direct impacts on decisions about parenting styles and the roles played by fathers and mothers. Family law reform is thus only one part of a complex 'jigsaw puzzle' of laws, policies and practices that affect family life; particularly in the area of parenting

Where family disputes are involved the limitations of the law, as much as its strengths, must be understood. Its ability to provide an appropriate and long lasting solution in a frequently hostile and violent environment will be restricted, as the law is by nature a fairly blunt instrument and the family structures of separating adults and children are inevitably complex and diverse.

It is not sufficient to focus only on reform of statute law. To provide effective outcomes, consideration needs to be given to how legal *and non legal* services might be directed at better outcomes for children.

Conversely, the law is not a powerful force in the lives of those who do not seek or need a legal resolution. Only 6% of those who file applications in the Court have their cases determined by a judge. Many parents who separate do not come near the Court other than possibly (in the case of married parents) to apply for a divorce.

The 1995 reforms, which were implemented by the *Family Law Reform Act* , attempted to change attitudes and behaviour, but there is little evidence that they have been successful in this regard. It may be that not enough time has yet passed for long term objects to be achieved. Greater effort may be needed to inform the public on these issues.

The Diversity of Families

Children may be born into a long-term loving relationship between their parents, or may result from a single incident between parents who have never shared a relationship. The parents may have been married or unmarried and the child may be living as one of a number of siblings from different relationships. The same situation may apply in relation to the other parent with whom the child spends time. To incorporate presumptions into this area therefore requires great caution.

Neither the *Family Law Act* nor the *Child Support (Assessment) Act* differentiate between the responsibilities biological parents owe to their children according to the status of the parental relationship. Nevertheless, the facts and circumstances of each family are always relevant to considerations of what is in the best interests of those children.

Family Transitions

All families go through a series of transitions over the life cycle. When parents separate, these transitions frequently include their re-partnering, the inclusion of additional children from different relationships, and geographic mobility. All these factors have a propensity to impact significantly on children, and to change the relationships children have with their parents and with other family members. Family life is never static and rarely is it predictable, which makes legal responses particularly difficult.

Children's developmental stages must be taken into account when considering their capacity to manage disruptions and variations in their living arrangements during the course of their childhood. Children must progress from infancy to adolescence and eventually adulthood, each individual stage having its own individual, unique characteristics and developmental tasks which affect a child's suitability for different parenting arrangements .

The capacity of children to manage in a shared equal arrangement is also affected by their individual temperaments and resilience to deal with change – particularly their capacity to adapt to stressful and high risk environments.

It is not an easy matter for separated or divorced parents to maintain consistency between two households. With the passage of time there is often a reduction in the frequency with which parents talk to one another about their children. As parents remarry and residential moves take place it becomes ever more difficult to reach and sustain cooperative agreements and arrangements.

Focus on Children

Any recommendation that the law be changed in this area should be preceded by and based on sound research evidence that children's best interests will be protected as a consequence, and that outcomes for them will be improved.

A number of factors within the child's environment will impact on the family's capacity to manage a joint shared arrangement. These include the physical or psychological health of the parents and children or care givers, the presence of high conflict or family violence, allegations of child abuse, geographical distance between households, the implication of step family arrangements, sibling groups and their arrangements, and competing or different cultural and religious issues.

Since it was passed in 1975 the Act has placed considerable emphasis on the need to conciliate rather than litigate family disputes. To this end, the Court employs psychologist/social worker mediators and staff lawyers (deputy registrars), whose primary function is to help the parties reach agreement. Services are provided without charge to clients.

There is a growing focus on listening and responding to the individual voices of children, in Court processes and elsewhere. Empirical studies which have asked children about their preferred living arrangements report that their satisfaction was associated with the arrangements being flexible, having parents who were able to co-operate with each other and consult them. Quality of time with their parents, not quantity per se, was what children valued most.

There is now a large body of literature that addresses the impact of violence on children. In families where there have been allegations of child abuse or where children have witnessed violence between their parents, the primary issue must always be one of safety. In such circumstances any presumption around shared equal parenting is extremely problematic and could well place the child at ongoing risk.

Children require a living arrangement that best supports a stable base and allows them to attend their school, social and sporting activities and develop peer relationships over time. A shared equal arrangement that provides for these cannot be achieved when parents live far apart and this is generally regarded by the Court as being a reason not to order residency involving similar amounts of time with each parent.

Second Parliamentary Joint Select Committee

The 1992 report of the second Joint Select Committee found there was considerable uncertainty about the meaning of joint custody, which it equated with shared parenting involving both parents having children living with them for considerable periods of time.

It noted that such an arrangement requires co-operation and communication between the parents and probably a reasonably close physical location of the two residences. It found the reluctance of the Court to order joint custody in contested cases to be fitting and appropriate, despite the criticisms of men that their parenting was being restricted.

Terminology

It is important to define terminology when considering the current law, possible changes to it and the experiences of overseas legal systems.

In particular, references (predominantly in overseas literature and case law) to **'joint'** custody may mean shared **legal** parental rights and responsibilities (as is the current law in Australia), or they may (but far less commonly) refer to shared **physical** possession of a child.

The term 'custody' was removed from the Act in 1996.

1995 Family Law Reform Act:

Reforms to the Act, which came into effect in mid 1996, made a number of significant changes to the law relating to children.

These included:

- The inclusion of section 60B, which provides an object to the amendments , namely to *ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*
- The inclusion (also in section 60B) of underlying principles that, *except when it is or would be contrary to a child's best interests:*
  - *(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married; or*

    have never lived together; and
  - *(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and*
  - *(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and*
  - *(d) parents should agree about the future parenting of their children.*
- The retention of the principle that the best interests of the child are paramount, albeit with a revised list of factors, including an emphasis on keeping children safe from family violence. Judges continue to have considerable discretion in determining the weight to be given to each factor. Presumptions do not operate, and proposals concerning the child must be examined and evaluated on their merits in a case by case basis.
- The removal of the terms "guardianship", "custody" and "access" in an attempt to minimise power imbalances, eliminate the concept of "children as property", and of parenting disputes being perceived as involving 'winners' and' losers'.
- The introduction of parenting orders for "residence", "contact" and "specific issues."
- An emphasis on the importance of primary dispute resolution, ie mediation and counselling services.

Amendments to the Act in 2000

The Act was also amended in late 2000 and a three stage parenting compliance regime was introduced. Failure to comply with orders affecting children is now dealt with separately from failure to comply with other orders. The three stages cover prevention, mediation and sanctions.

The Application of the Law

Although the Act now provides that each parent has parental responsibility for their children in the absence of a Court order to the contrary, this has not been construed, (nor was it the intention), that children should be physically shared between their parents on an equal basis.

In practice, most arrangements about children made after parents separate result in there being a primary carer, who inevitably makes more child-related decisions than does the contact parent. This is a practical rather than a legal consequence of separation.

Court mediators and registrars encourage parents to maintain a strong and viable relationship with their children, and it is very rare for parents to be denied contact, or discouraged from exercising it.

The literature and their own professional experience also make mediators aware that frequent contact between parents and children is usually only beneficial to children in the absence of conflict and violence. Unfortunately many of the families with whom the Court has contact have experienced such conflict and violence.

Judicial Considerations of 'Joint Custody'

The few disputes which require a judicial determination very rarely result in orders that the children involved will be shared equally between their parents. The Court's reluctance to make such orders has been consistent over the life of the Act. The reasons for this reluctance may be found in a number of decisions and include:

> *"The best interests of a child and the full promotion of his welfare are not generally served by orders for joint custody unless his parents have demonstrated that degree of maturity and such an ability to communicate and co-operate with each other as to give a court some confidence that the order for joint custody will be workable, or that, with assistance from the counselling services of this court, it can be made workable.[1]"*

> *"The most crucial and beneficial components of joint custody lie in the attitudes, values and behaviour of their parents. The cooperative and respectful relationship between the parents for the purpose of child rearing and each parent's support of the child's relationship with the other parent seem to be more significant in helping the children to adjust than making sure that time the children spent with each parent was precisely equal"[2].*

Possible Consequences of a Change in the Law

If separated parents are expected to share their children equally (as opposed to sharing the responsibility of parenting) the legislation will create a normative standard which will be unattainable in practice for many, and which may jeopardise the best interests of the children. A parent who has been living in a violent or oppressive relationship, may be persuaded to' agree' to a shared care relationship in inappropriate circumstances.

The implementation of family law reforms in 1996 and 2000 encouraged more applications for parenting orders and for enforcement of those orders. More people therefore entered the litigation pathway, more private and public funds were used, and there were more opportunities for parents to disagree rather than co-operate about their children.

If a rebuttable presumption of equal time is incorporated into the Act cases will continue to be determined according to their individual facts and circumstances. Parents who seek to rebut the presumption will be required to put before the Court evidence that equal time would be detrimental to their child.

The raised expectations which accompany inquiries and the amendment process inevitably produce a groundswell of hostility towards the Court and the Parliament, because in many cases the expectations cannot be met

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[1] Foster and Foster [1997] FLC 90 281 at 76, 511.

[2] Forck and Thomas (1993) 16 Fam L R 516.

Parental Expectations

The Act influences agreed outcomes, in varying degrees according to the nature of the case and the parties' belief about what the legal principles are. Those with no or poor legal advice will have inaccurate beliefs, and their agreement might reflect their mistaken beliefs, rather than the actual law

Parties may misunderstand the law, and this is not unusual in family disputes, where particular outcomes are keenly sought and a great deal of emotion is invested in those outcomes

Even publicity about possible changes to the law can be interpreted as meaning that the changes have been implemented, or are imminent

Relocation of Parents

Perhaps the most obvious circumstance in which shared physical parenting is inappropriate occurs when parents live some distance from each other, or one parent moves away after an arrangement or order has come into operation

The determination of relocation cases has been described by the High Court *as "a contemporary judgment of Solomon*"

Overseas family law systems – an international perspective

The laws in the United Kingdom and the United States of America are very similar to the Australian law in emphasising the sharing of legal parental responsibility after separation, although the situation in the United States is made more complicated by the fact that each State has its own divorce law.

United Kingdom

The Children Act *removed references to 'custody' and 'access', and emphasised the sharing of parental responsibility rather than parental rights over children. However, the English legislation is clearer in spelling out how parental responsibilities are exercised than is the Family Law Act, and provides that each parent can discharge his or her parental responsibility independently of the other, subject to a court order to the contrary.*

United States of America

Most legislation draws a distinction between *legal* custody and *physical* custody, and even in the few States that promote joint *physical* custody there still remains a distinction between a designated principal caregiver/primary residence parent and the visiting/access/sharing parent.

The recurrent characteristic of the North American statutes is that so many areas require parental co-operation, that the mere opposition to the grant of a shared arrangement almost guarantees that no shared order will be imposed.

Canada

Canada is currently in the process of amending its law. The changes contained in a Bill currently before Parliament include the removal of references to 'custody' and 'access' and an emphasis on protecting the child. However the Canadians have rejected the inclusion of presumptions about shared parenting, and have also decided not to include provisions regarding a child's right of contact.

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1. INTRODUCTION

1.1 Purpose of the Submission

This submission is intended to explain the relevant provisions of the Family Law Act (Cwlth) 1975 (referred to throughout as 'the Act') and the operations of the Family Court of Australia ('the Court') as they relate to the children of disputing parents. It also seeks to reject some perceptions that the Court is biased in its determinations, or in some way motivated by considerations other than the best interests of children.

The Court is mindful of the conclusions and recommendations of the report of the Family Law Pathways Advisory Group, '*Out of the Maze*', to which it made a significant contribution. It is also aware of the large body of research into how children's best interests might be promoted in the context of parental separation, and the emphasis given in recent research to children being protected from physical and emotional violence and protracted parental conflict. It is also acutely aware of society's concerns about the impacts of relationship breakdown on children, and of overseas attempts to grapple with these difficult issues and of the imperfections in the family law system.

The family law system itself must be seen as forming only a small part of a much larger environment within which intact and separated families operate. Issues such as the interaction between workforce participation and child care availability, social security and taxation policies have direct impacts on decisions about parenting styles and the roles played by parents and others who are significant in children's lives. It is also essential that there be sufficient services which can provide information, advice and support to enable parents to minimise conflict, maintain their parenting relationship with each other and focus on the needs of their children. The Pathways Advisory Group report identified this need and called for a coherent and integrated family law system to minimise the distress and disruption that frequently accompanies family breakdown. Family *law* reform is thus only one part of a complex 'jigsaw puzzle' of laws, services, policies and practices that affect family life; particularly in the area of parenting.

1.2 Focus of the Submission

It:

(1) explains the major provisions, philosophy and effects of the current law and the rationale for its being comprehensively changed in 1995;

(2) provides some background of previous Parliamentary considerations of this aspect of the law;

(3) explains how diverse are the clients who seek assistance from the Court, and the many situations in which it would not be in the best interests of their children for a presumption of equal shared parenting to be imposed;

(4) explains how the Court operates, in relation to its conciliation and adjudication of parenting disputes and its manner of dealing with the enforcement of parenting orders;

(5) cautions about the unintended consequences of amendments in this area, particularly the likelihood of increased litigation involving children, and increased confusion and disappointment amongst parents for whom expected outcomes are not achieved;

(6) canvasses, briefly, the characteristics of legal systems of several countries similar to our own, and explains the processes they have undertaken in attempting to reform the law in this area;

(7) warns of the inherent dangers involved in amending one part of the 'jigsaw puzzle' of legal provisions relating to parents and children without considering the possible impacts (a) on other pieces of the puzzle and, (b) on a large number of children.

(8) provides information about children's developmental levels and psychological needs in the context of parental separation .

(9) emphasises that family law reform cannot be restricted to legislative change, but should also include reference to the provision of services and education and a consideration of the efficacy of dispute resolution and litigation processes.

The Court does not contend that the current system of family law is problem free. It agrees with the Pathways report that the system is fragmented, poorly resourced and confusing to clients.

A well planned family law system does not exist in this country and has never done so. Instead, there is a wide range of government and private institutions, agencies and service delivery bodies, most of which operate in ignorance of each other. The situation is particularly confusing to clients who often have to access different parts of the system. The Court also seriously questions the reliance on the adversarial system in the resolution of children's matters and the submission includes some material which proposes changes to the management of children's matters.

Although there *are* difficulties, the Committee needs to be aware that the 1995 reforms to the law relating to children were criticised for being introduced in the absence of either a reform agenda or of documented evidence suggesting that the previous law had been unfair or inadequate[3]. Dewar and Parker[4] also refer to an absence of empirical research here or elsewhere on what the practical effects of the reforms might be. They note that the problem is not confined to Australia and quote an American commentator who, (referring to the spread of joint custody laws in the United States) wrote ..the *'new legislation was rarely the fruit of long study by the legislature or any other governmental body. Rather, it was introduced by legislators who found the idea attractive but who had given it little prior study'.*[5]

Recent Australian social science research has also indicated that, (although many parents are undoubtedly unhappy about seeing their children less than they would like), 64 per cent of separated fathers have contact with their children, and almost three quarters of this contact involves overnight stays. In addition, 25 per cent of mothers in the study believed their children had insufficient contact with their fathers[6].

3 Rhoades, Graycar and Harrison interim report, April 1999.
4 Dewar, J and Parker, S The Impact of the New Part VII, (1999) AJFL, vol 13, no. 2, 97
5 op cit
6 Smyth, B and Parkinson, P 'When the Difference is Night and Day:Insights from HILDA into patterns of parent-child contact after Separation', paper presented at the Australian Institute of Family Studies Conference, March 2003.

Previous reforms to the provisions relating to children led to substantial increases in applications for parenting orders and their enforcement, which in turn increased pressure on Court resources, the parties and legal aid costs, as well as causing more confusion to parents – as well as lawyers and others working in the system. Such factors increase the hostility of parents towards the Court and the Parliament, and minimise the chances of parents cooperating about their children.

1.3 Limitations of the Legal System in Family Law

The legal system provides a framework for negotiation and determination and, when necessary, sanctions. However, where family disputes are involved the limitations of the law, as much as its strengths, must be understood. The system's ability to provide an appropriate and long lasting solution in a frequently hostile and violent environment will be restricted, given that the law is by nature a fairly blunt instrument and the family structures of separating adults and children are inevitably complex and diverse. Not only do families form in a variety of ways, they also go through a series of transitions over the life cycle. When parents separate, these transitions frequently include re-partnering, the inclusion of additional children from different relationships, and geographic mobility.

All these factors have a propensity to impact significantly on children, and to change the relationships children have with their parents and with other family members. Family life is never static and rarely is it predictable, which makes legal responses particularly difficult.

People in the throes of relationship breakdown are also often not amenable to rational discussion, or to obeying Court orders and they may have difficulty focussing on which arrangements will be best for their children. They also have a propensity to believe that the system/the law and/or the Court is unfair because they have been unsuccessful in obtaining the outcome they sought[7].

For a variety of reasons which this submission discusses, any recommendation to change the law relating to children should be preceded by and based on sound research evidence that children's best interests will be protected as a consequence, and that outcomes for them will be improved.

The inquiry provides an opportunity to focus on children, to analyse how legal and non legal services might be directed at better outcomes for them and to suggest some avenues for reform of the current law.

1.4 Overview of the Case Management System of The Family Court of Australia

From the time a party first contacts the Court with any dispute arising from their separation, the Court provides information and services which are designed to meet the individual needs of the client and family

The Court has developed a process of case management, the overriding objective of which is to enable it to deal with cases justly and expeditiously

7 Chisholm, R, (2001) 'Family Law and Perceptions of Unfairness', paper prepared for the Opening Address, Family Law Day, College of Law (NSW)

The Case management process comprises three phases:

- Phase One: **Prevention** – the Court informs and refers clients to services to assist resolution of disputes and management of separation issues
- Phase Two: **Resolution** – the Court assists parties to focus on the needs of the individual family and provides Court events which maximise the family's opportunity to resolve their issues through negotiation and other resolution strategies
- Phase Three: **Determination** – where parties are unable to resolve a dispute the Court ensures parties prepare for the hearing (trial) at which the dispute will be determined.

Details of the case management pathways are attached as *Appendix 1.*

1.5 Statistical Survey of Cases before the Family Court

The Court will be providing the committee with a supplementary submission at a later date. This will include samples of parenting cases and an analysis of the outcomes of parenting matters, and the contexts in which they occur. Its purpose is to provide the Committee with a clearer perspective on areas such as settlement rates and stages, and residence and contact outcomes in consent and litigated matters (at first instance and on appeal).

It is important to be aware that the proportion of parents whose disputes are determined by a judge has for many years been approximately only 6% of applications filed. The other 94% of clients either reach an agreement (which is then filed with the court for its approval), or resolve their dispute as a result of mediation, or for some other reason, prior to trial.

It must, of course, be recognised that the cases that **are** resolved do not necessarily achieve resolution because the parties have reached a reasonable compromise. Many have done so, but others have resolved because of fear of the other party, imbalance of resources and the expense of proceedings, or a feeling that they cannot go on. One of the more insidious factors that contribute to the latter response is what the Court regards as a myth that husbands/fathers are inevitably at a disadvantage in Court proceedings.

This is the view advanced by many fathers' groups in particular, but also conveyed by the media. It is not uncommon for the Court to receive correspondence from aggrieved persons who assert that they have resolved proceedings because they have been informed by their friends, the media, or even their lawyers that they have no hope of success because of the alleged bias of the Court. The Court takes a great deal of exception to this myth being used to criticise it, in circumstances where there is no objective evidence to support it.

Some lawyers may in fact take advantage of this false perception to persuade their client to settle, in circumstances where it is fairly obvious that there is little chance of success in any event.

In particular, it is noted that statistics are often cited in the media and elsewhere which purport to support various propositions about parenting after family breakdown, but it is not clear that such statistics provide a valid or informed picture of what is really occurring. For example, it is not sufficient to merely examine what parenting orders are being made by the court, as frequently in the context of a trial, parties may agree to an order on a specific matter being made, even though other aspects of the case are in dispute. A true understanding of the situation can only be obtained by also placing orders made in the context of what parenting orders the court is being *asked to make*, not simply in the originating documents, but at trial.

This contextual information is important for those seeking to understand how the system really operates, rather than relying on anecdotal or misleading material.

The survey aims to identify a random sample of sufficient magnitude (also taking account of the restricted time frame available) that is representative of parenting cases in the court system.

1.6 Terminology

Because a major rationale for the current inquiry is a consideration of 'joint custody arrangements', it is important to consider what is meant by this phrase, both at law and in common parlance. There will often be a variance between the two, and inconsistencies within and between different systems and different populations. The importance of terminology is reinforced by the fact that:

(1) The 1995 amendments to the Family Law Act removed any reference to 'custody' as a legal concept,

(2) Considerable public discussion continues to refer to overseas legal systems and the success or otherwise of 'joint custody' in those jurisdictions,

(3) Terminology and the legal consequences that flow from particular orders vary considerably from country to country and (particularly in the USA) from State to State,

(4) Because of the uncertainty surrounding the language it is frequently difficult to understand what particular lobby groups are seeking when they argue for change.

(5) The misunderstandings often extend beyond language to a lack of knowledge of the substantive law and what it provides.

Most importantly, references (predominantly in overseas literature and case law) to '**joint**' custody may mean shared **legal** parental rights and responsibilities (as is the current law in Australia), or they may (but far less commonly do) refer to shared **physical** possession of a child. This issue will be developed in more detail later in this submission.

2. BACKGROUND

2.1 Previous Parliamentary Inquiries

The Court was established by the Family Law Act and commenced operations in January 1976. Both the Court and the Act have received considerable public scrutiny and comment, almost since their inception, beginning in 1978 when the first Parliamentary Joint Select Committee (the JSC) was asked to consider (inter alia) 'the ground of divorce and whether there should be other grounds'. The Committee's Report on the *Operation and Interpretation of the Family Law Act* was tabled in Parliament in 1980.

Given the frequency and diverse impacts of marriage breakdown, the social context in which Australian families function, and the centrality of family life in a civil society, it is appropriate that family law be the subject of review and monitoring. Previous reviews have highlighted particular areas of concern and have, on occasions, been the catalyst for the introduction of legislative amendments and changes to Court processes.

2.2 Relevance of the 1992 Second Joint Select Committee to this Inquiry

The report of the second Joint Select Committee, *The Family Law Act 1975 Aspects of its Operation and Interpretation,* was published in late 1992. This Committee's terms of reference were wide - ranging and dealt predominantly with the conduct of disputes involving children and property. In relation to children, the Committee was asked to consider the proper resolution of what were then known as custody, guardianship, welfare and access disputes. Other terms of reference with aspects of relevance to the current inquiry included the adversarial nature of proceedings, and judicial discretion, including whether it was desirable to better structure the exercise of discretion in relation to children.

The Court provided a major submission to the second Joint Select Committee in which it pointed out some of the advantages and disadvantages of joint custody/shared parenting (at 5.22 to 5.28). The report considered these in some detail within the context of the then current law.

The Committee's conclusions, and the analysis of the reasons for those conclusions, are contained primarily in paragraphs 5.17 to 5.35 of the report and are discussed later in this submission, as they continue to have relevance.

Many submissions to the second JSC were made by fathers who claimed that mothers were the preferred parents in custody determinations. In fact, Court statistics showed that judges were far more likely to **order** that fathers have custody in contested proceedings than were parents to reach this outcome themselves by consent.[8] Furthermore, Bordow's analysis of data from the United Kingdom and United States showed that such outcomes were characteristic of different legal codes and other countries. She concluded that, as mothers are predominantly the primary carers of children in families, it is easy (but false) to construe their greater propensity to be the primary carers after separation as a gender bias argument. Although her article was published almost a decade ago, there is no recent evidence to suggest that there are significant differences in the roles of fathers and mothers in intact families currently.

In summary, the second JSC found there was considerable uncertainty about the meaning of joint custody, which it defined as shared parenting involving both parents having children living with them for considerable periods of time. It noted that this arrangement requires co-operation and communication between the parents and, probably, a reasonably close physical location of the two residences. It found the reluctance of the Court to order joint custody in contested cases to be fitting and appropriate, despite the criticisms of men that their parenting was being restricted. Most pertinently, it concluded

[8] Bordow, S, (1994) 'Defended Custody Cases', Australian Journal of Family Law, vol. 8 number 3.

'The Committee agrees with the Family Court that only in reasonably rare cases would court ordered joint custody be a workable solution. For the most part, the Committee accepts that joint custody or shared parenting will only be an option if the parties work towards that arrangement with minimal involvement of, or intrusion by, the Family Court" (5.34, page 106)

The report also referred to difficulties with terminology, in particular confusion arising from the use of the words 'custody' and 'joint'.

Example

The father's application sought shared parenting of a 4 month old baby on an interim basis. The mother suffered from post-natal depression, requiring medication and was dealing with various issues. There was a history of the father's significant involvement in the child's care. The interim decision gives effect to history of parental co-operation and supports appropriate sharing of care for the child, the appointment of child representative and short term review to monitor family.

2.3 Other Reviews and Research by the Court and External Bodies

Research projects and policy analyses have been conducted since the late 1970s by bodies such as the Family Law Council, the Australian Institute of Family Studies and the Australian Law Reform Commission .

These have informed the Parliament and the public, and contributed to major amendments to the Act in 1983, 1987 and 1995 and to numerous minor amendments in other years. Overseas research findings have also been valuable, despite the variance in the legal systems and legislation of those countries when compared with Australia.

The Court has also undertaken a number of reviews of various aspects of its practices and procedures, and has published research reports on the performance of its mediation service, its management of self represented litigants, family violence policies, and child representation. Attorneys-General from time to time have also initiated examinations of the law, either by way of referral to the Family Law Council or to their Department.

3. MAIN FEATURES OF CURRENT LAW AND PRACTICE

3.1 Operation of the Family Law Act as it Relates to Children

The Family Law Act has been the subject of several major and many minor amendments since its passage in 1975. For the purposes of the current inquiry the passage of the Family Law Reform Act 1995[9] is particularly significant, as the amendments contained in that legislation comprehensively changed the law as it relates to separating parents and their children. The background and rationale for those amendments also provide the context for the changes, and the experiences of clients and stakeholders since then go some way towards an assessment of their effectiveness.

9 Which came into effect in June 1996.

3.2 Promoting more Co-operative Parenting Post Family Breakdown

The 1995 amendments were influenced by the Family Law Council's Report, *Patterns of Parenting After Separation* (1992), and its subsequent *Letter of Advice to the Attorney-General* (1994). In 1987 the Family Law Council's Report, *Access - Some Options for Reform* had acknowledged that concepts of custody and access tended to encourage a win/lose mentality in which parents may appear to be pitted against each other to the detriment of the children.

The report of the second Joint Select Committee considered whether there should be changes in the terminology of custody and access and recommended against such changes until clear positive evidence was available to justify them. By the time the Government responded to the JSC in December 1993 support in Australia for the terminology and conceptual changes in the UK Children Act had increased, possibly because of the Family Law Council's 1994 report, *Patterns of Parenting after Separation.*

This report concluded that the family law system, as it then operated in Australia, had failed to encourage co-operative parenting, which would be likely to be beneficial for children. It also found that the division of post separation parental roles into custody vs access reinforced a combative attitude and discouraged ongoing parental responsibility.

Additional reforms regarding the enforcement of parenting orders were introduced in late 2000 and will be discussed later in this submission.

It is also important in the light of this inquiry to note that the removal of 'custody' and 'access' from the family law lexicon was intended to do more than change the language. It was designed to minimise the power imbalance which the law until then had appeared to give the person who was granted custody; effectively giving him or her residence of the children, in addition to the powers relating to their day to day care. The changes in terminology were also seen as removing any suggestion that children were a form of property subject to ownership by the parent who had 'possession' and control' of them.

The 'success' or otherwise of the 1995 reforms is a matter of some contention, and the criteria of what constitutes success are very unclear. Family law, in Australia and elsewhere, attracts considerable criticism and media attention because of the nature of its subject matter. The cases decided since then suggest that there are few, if any, differences in litigated outcomes as a result of the reforms and, (given the statutory requirement that the best interests of children are paramount), this is unsurprising[10].

Whether the reforms have acted as a form of positive social engineering, by modifying behaviour and encouraging a more child focussed approach to disputes is doubtful, as the emotional bitterness that so often accompanies relationship breakdown is unlikely to dissipate in the face of statutory provisions. To the extent that the words 'custody' and 'access' continue to be used – especially by the media – this aspect of the changes appears to have failed.

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10 In B and B[10], (Family Law Reform Act 1995) (1997) FLC 92-755 the Full Court made it clear that the pre-*Reform Act* case law principles that had been developed to deal with custody and access disputes continue to be applicable to residence and contact applications made since mid 1996.[10]

However, it should also be said that in contrast to what occurred in England following the passage of the *Children Act 1989*, there was a minimal attempt by Government at conducting a public education program to inform the public about the changes. Such publicity as did occur tended to be misleading and to create false expectations as to what was intended by the legislation. It may be that if greater attention had been directed to this area, better results would have been achieved in terms of public awareness. The Full Court in B and B said[11]:

> *"It is clear that many of the aims of the Reform Act are long-term, educative and normative. That is, they are directed towards changing the ethos where parents separate in the ways in which they think and act in their role as parents, in their approaches to resolving disputes about their children, in the ways in which lawyers act for the parents (and the children), in the approach by the Court in the adjudication of disputes and, more broadly, in the attitudes of society generally."*

It may be that not enough time has yet passed for those long term objects to be achieved, and that greater effort is needed to inform the public as to these matters. In many ways the nature of public comment that preceded the giving of these terms of reference to the Committee supports this view.

3.3 Major features of the current Part VII of the Family Law Act

The reforms introduced into the Act a statement of objects and the principles underlying them. These are expressed in section 60B as follows: [12]

> *(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*
>
> *(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:*
>
> *(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married; or*
>
> *have never lived together; and*
>
> *(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and*
>
> *(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and*
>
> *(d) parents should agree about the future parenting of their children.*

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11 See B and B at 9.2

12 *Family Law Act 1975* (Cth), s60B(1) and (2).

In recent years issues relating to the rights of children have begun to loom large in Australian family law. A particular impetus has clearly come from the United Nations Convention on the Rights of the Child (UNCROC), which Australia ratified in 1991. Australia has not acted to incorporate the Convention into domestic law in this country, although recently the majority of the Full Court of the Family Court expressed the view that the 1995 reforms had the effect of incorporating aspects of the Convention into Australian law[13]. This view has more recently been confirmed by the majority of the Full Court in *KN & SD & Secretary, Department of Immigration & Indigenous & Multicultural Affairs*[14].

The decision in *B (Infants) & B (Intervener) v Minister For Immigration & Multicultural & Indigenous Affairs* is being appealed to the High Court. Whatever the outcome of that challenge might be, it is clear that the Convention heavily influenced the wording of the 1995 Family Law Reform Act, which the Minister acknowledged in the second reading speech introducing the legislation[15].

In relation to the objectives and principles of the children's provisions of the Family Law Act Article 9 of the Convention is particularly relevant. It states :

> *"1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*
>
> ....
>
> *3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."*

This correlation of international and domestic law acknowledges and confers significant rights on children. It also assists in the interpretation of those rights "*in the context of the relationship between the parents having broken down, which means that the practicalities of achieving the object of maintaining regular contact have to be taken into account*"[16]

The 1995 amendments also introduced the single concept of parental responsibility, and removed references to guardianship (long-term responsibility) and custody (day-to-day responsibility). A new range of "parenting orders" replaced the previous custody and access orders, namely, orders for "residence", "contact" and "specific issues".[17]

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[13] B (Infants) & B (Intervener) v Minister For Immigration & Multicultural & Indigenous Affairs [2003] FamCA 591.
[14] [2003] Fam CA 610
[15] See Hansard, House of Representatives, 8 November 1994, p 2759.
[16] *KN & SD & Secretary, Department of Immigration & Indigenous & Multicultural Affairs* [2003] FamCA 610 at para 71
[17] s64B.

Section 65C sets out who may apply for a parenting order. The Act permits either or both of the child's parents, the child; or a grandparent of the child; or any other person concerned with the care, welfare or development of the child to do so.

Grandparents were added specifically in 1995, but they had always been entitled to apply on the basis that they are frequently relevant to children's best interests. Section 64C provides that a parenting order may be made in favour of a parent of the child or some other person.

Example

Maternal grandparents applied for residence of a grandchild aged 9. One parent was not involved in the care of the child. The other parent had a history of psychological issues and drug usage with associated criminal history. At birth the baby was drug dependent and there was involvement with the State child welfare authority. The Grandparents, parent and child livedin the same residence. A factual dispute as to who had been the primary carer arose.. The parent was frequently absent from the home and the child was left for extended periods in the care of the grandparents.

The grandparents obtained a residence and sole parental responsibility order, with contact to the parent consistent with the child's needs.

The legislation now makes it clear that parental responsibility for children remains unaffected by the parents' separation or the children's living arrangements.[18] In addition, unlike custody orders, a residence order does not give a person sole decision making power for day-to-day matters,[19] nor does it take away any aspect of the non-resident parent's responsibility for the child:[20] it simply names the person or persons with whom the child will live.[21] In order to give one parent sole day-to-day or long term parental responsibility for a child, a specific issues order to that effect now needs to be made.[22]

Parties may consent to or the Court may make residence orders in favour of *both* parents, and these are sometimes referred to as residence/residence orders. These orders provide for the child to live with each parent at specified times, as opposed to living with one parent and having contact at specified times with the other. They have the advantage, in appropriate cases, of signalling the importance of joint parenting, regardless of the actual time spent with each parent, and can also be a useful resolution tool. They are an effective way of conveying the message that the parent who has less time with the child is no less important in their lives.

There is a revised list of matters in section 68F(2) which a court must consider when determining the child's best interests for the purposes of making a parenting order.[23] The list now includes as relevant matters any family violence "involving a member of the child's family",[24] the existence of family violence orders,[25] and the need to maintain an indigenous child's connection with his or her culture.[26]

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18 s61C.
19 s64B(3).
20 s61C.
21 s64B(3).
22 s64B(6).
23 s68F(2).
24 s68F(2)(i). This provision gave effect to recent Family Court decisions. See for example, *In the Marriage of JG and BG* (1994) 18 Fam LR 255; *In the Marriage of Jaeger* (1994) 18 Fam LR 126. See also Juliet

A number of statutory provisions are designed to ensure that children and their carers are protected from violence. Judges are now required to ensure their orders for residence and contact do not expose any person to an 'unacceptable risk' of family violence.[27] In addition, a new Division 11 deals with the problem of inconsistent contact and domestic violence orders. It requires the Court to refrain from making any contact order that is inconsistent with a family violence order unless it is in the child's best interests to do so.[28] Where a judge intends to make an inconsistent order, she or he must comply with a number of requirements, including an obligation to explain the reasons for the order to the parties.[29] State or Territory magistrates are also empowered to vary or suspend a contact order when making a family violence order.[30]

The emphasis on the protection of family members from violence is seen again in section 43 of the Act, which sets out its objectives. The *Reform Act* added to the list of existing principles in section 43 'the need to ensure safety from family violence'.[31]

The amendments also include a range of provisions aimed at encouraging parents to use mediation and counselling to resolve disputes about children before resorting to litigation.[32] These emphasise the importance of mediation, counselling and arbitration which are now referred to as 'primary dispute resolution'.

4. SHARED PARENTING

4.1 Practical Considerations

Although the Act now provides that **each** parent has parental responsibility for their children in the absence of a Court order to the contrary, this has not been construed, (nor was its intention), to mean that children should be physically shared between their parents on an equal basis. However, the provision has led to confusion amongst many parents, not assisted by the unhelpful definition of parental responsibility in section 61B as being *"all the duties, powers and responsibilities and authority which, by law, parents have in relation to their children"*.

The legislation has always required an individualised approach to be taken to the resolution of disputes about children, using their best interests as the paramount consideration.

In reality, most arrangements about children made after parents separate result in there being a primary carer, who inevitably makes more child-related decisions than does the contact parent. This is a practical rather than a legal consequence of separation, which frequently provides more stability for the child, but may lead to the contact parent feeling unfairly disempowered and aggrieved. However, these arrangements are usually amicable (or at least not contentious) or occur by default, although their frequency is unknown, and these families are most unlikely to come to the attention of mediators, deputy registrars or judges.

Behrens, "Ending the Silence, But ... Family Violence Under the Family Law Reform Act" (1996) 10 *Australian Journal of Family Law* 35.

25 s68F(2)(j).

26 s68F(2)(f).

27 s68K.

28 s68K(1).

29 s68R.

30 s68T.

31 s43(ca).

32 s14.

The difficulty is that if separated parents are exhorted to share their children equally the legislation will create a normative standard which will be unattainable in practice for many, which may jeopardise the best interests of the children and/or may bear no resemblance to the parenting responsibilities assumed in the pre separation family.

The concept that parents should share their legal parental responsibilities after separation has been a characteristic of reform agendas in a number of overseas family law systems in recent years. It must, however, be distinguished from the far less common concept of parents sharing equal time with their children. A short discussion of the law operating in several overseas jurisdictions is contained in the latter part of this submission.

Over the past few decades many jurisdictions have searched for ways to improve outcomes for families, whether it be in parenting disputes or those involving property, child support and maintenance.

Concerns have been expressed about the appropriateness of the best interests of children doctrine,[33] the gendered basis of the primary caretaker presumption and the severity of the clean break approach, some or all of which have featured at one time or another in the legislation of many western countries.

In relation to children's matters, the emphasis on shared parenting has been described as an attempt to redistribute inequalities, and address complaints received from fathers that they believe they are marginalised in the post-separation family, despite their continuing to have child support responsibilities imposed upon them[34]. It is supported by a combination of factors such as women's increased workforce participation, child development theories, research showing that men and women can perform equally well as parents and that children suffer through lack of contact with their fathers.

Sharing responsibilities for their children has been found to be associated with more participatory parenting and to greater willingness to pay child support. This in turn translates into children having higher self esteem, higher educational attainments and better psychological health.

Where they consider it appropriate, Court mediators and registrars encourage parents to maintain a strong and viable relationship with their children, and it is very rare for parents to be denied contact, or discouraged from exercising it. However, sadly, it is not uncommon in counselling sessions for the focus of a counsellor to need to encourage parents (often fathers) to stay involved, rather than retreat altogether from the children. There is a tendency for some men to avoid acknowledging that their relationship is at an end, which they must face when they attend a counselling session. These parents are often in shock, and may deal with their emotional distress by withdrawing, perhaps rationalising that it would be better for everyone if they stopped having contact with the children altogether. What is actually happening is that the pain of being separated from their children is so great that they cannot bear to re-visit it every week or fortnight. Counsellors spend a considerable amount of time being supportive to these parents and reinforcing how important it is for their children that they do not abandon them.

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33 Robert Mnookin, (1975), 'Child Custody Adjudication:Judicial Functions in the Face of Indeterminancy', 39 Law and Contemporary Problems 226.

34 Rhoades, H (2002) The Rise and Rise of Shared Parenting Laws: a Critical Reflection, Canadian Journal of Family Law vol 19 at pages 75 – 85.

Many primary carer parents are supportive of this. From the counsellor's perspective this threatened withdrawal by such parents occurs as frequently as does the scenario of primary carers wanting to exclude the other parent from their children's lives, or being over-protective of their children in relation to contact.

However, counsellors and judges are also aware that increased contact may provide some parents with opportunities to control and harass both their children and former partners. The literature and their own professional experience also make them aware that frequent contact between parents and children is only beneficial to children in the absence of conflict and violence. Unfortunately many of the families with whom the Court has contact have experienced such conflict and violence and continue to experience it.

4.2 Judgments Relating to Shared Parenting

The disputes which require a judicial determination very rarely result in orders that the children involved will be shared equally between their parents. The Court's reluctance to make such orders has been consistent over the life of the Act. In a judgment delivered just 2 months after the legislation came into operation, (and when the previous concepts of custody and access represented the law[35]) Demack J considered whether there was a case for joint custody and the extent to which the father ought to have access to the child. In his judgment, he said:

> *"I find the concept of joint custody a very difficult one to understand, but under s 61(1) of the Family Law Act, Parliament has enacted that the married parents of a child have joint custody of that child. Whatever this means, it appears to me that it is a state of fact and law which can only continue where the parties are in full amicable agreement about all aspects of the care, protection, custody, control, education and welfare of the child. Once there is disagreement on any of these issues, there must be some source of authority to determine what the resolution of the disagreement is to be.*
>
> *It seems to me, therefore, that in most instances, once the matter comes to Court, there is no place for an order for joint custody. To make such an order once the parties have chosen the path of litigation is to either encourage further litigation or to require the parties to achieve some kind of compromise which will almost inevitably have a disturbing effect upon their relationship with the child."*[36]

In *Foster and Foster* [1977] FLC 90-281 at 76,511 the Full Court held:-

> "The best interests of a child and the full promotion of his welfare are not generally served by orders for joint custody unless his parents have demonstrated that degree of maturity and such an ability to communicate and co-operate with each other as to give a court some confidence that the order for joint custody will be workable, or that, with assistance from the counselling services of this court, it can be made workable."

In *H v H-K* (1990) 13 Fam LR 786 Kay J made an order for a week about arrangement for a 4 year old child. He said

35 And before the reference of powers to the Commonwealth which enabled the Court to make orders in relation to the children of unmarried parents.

36 Yann and Yann (1976) FLC 90-027, at 75,120.

"There are some cases when shared parenting is the appropriate answer. Shared parenting does not necessarily involve equal time. It does involve significant time of both parents of the child.

This case, in my view, presents one of those rare occasions when a shared parenting order is more appropriate than a sole custody. It presents it because of the tender age of the child. It presents it because of the geographic proximity of the homes of each of the parties. It presents it because of the wife's mother being a focal point for both parties, particularly being friendly with the father, and it presents it because the child has already learnt in her tender years to accept such an arrangement and to function adequately under such an arrangement.

In my view, at least for the next two or three years, providing that the geographic proximity remains the same, there is no reason to conclude other than the child will continue to prosper in such an arrangement. Of course, as the child's education progresses and her needs to go into a more regimented regime of home-work and continual supervision, such an arrangement may become inappropriate, but at least in my view, in the foreseeable future of this child's life, given that she has just turned four, this is one of those rare occasions where a sharing arrangement is appropriate."

The example below illustrates how important it is for parents to focus on improving their relationship with each other, and that as children develop they become increasingly aware of the tension and arguments that exist. Conflict makes it increasingly difficult for children to focus on the developmental and educational tasks they must master

Example

A young child spent a different number of days per week with each parent, within a four week cycle (one third in her father's care and two thirds in her mother's care). The father sought an equal shared care arrangement, whilst the mother sought to reduce contact. The child enjoyed a good relationship with both extended families, and the parents lived in close proximity to each other. However, the dominant impediment to the proposed equal, shared care arrangement was not the child's age or ability to cope with the arrangement, but the continued conflict between the parties.

The counsellor assessed the child as being happy spending time with both parents and having no particular preference about residency. It was noted that this child was at an age where she required stability and routine to help her meet her physical, emotional, cognitive and social developmental milestones. It was also noted that shared care arrangements are demanding and complex and, while acknowledging that they can be highly satisfying, concluded for this young girl, any conflict between the parties would increase the complexity and decrease the enjoyment of such an arrangement.

The communication between the parents had deteriorated (over 18 months) and the child, then 6 ½ years was becoming more aware of this. The little girl was quoted as urging her parents to "not fight any more" and to "like each other again".

In Forck v Thomas [37]Nicholson CJ dealt with the desirability of an order for joint custody and equal shared time. His Honour said:

> *"At first glance, it might be assumed that spending roughly equal time with each parent is confusing for the child and leads to conflicts of loyalty..... It has also been suggested that in such situations, children can become a go-between in their parents' battles. Empirical studies find that such concerns are valid in some cases and not in others. The reaction of children is highly individualised:*
>
> *"The most crucial and beneficial components of joint custody lie in the attitudes, values and behaviour of their parents. The cooperative and respectful relationship between the parents for the purpose of child rearing and each parent's support of the child's relationship with the other parent seem to be more significant in helping the children to adjust than making sure that time the children spent with each parent was precisely equal".*

In a recent (unreported) decision of *M and G* [38] Kay J referred to a summary of factors matters set out by Ryan FM[39] when considering a proposal that residence of a child should be shared. These were:

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

[37] (1993) 16 Fam LR 516
[38] Judgment dated 15 July 2003
[39] In H v H (2003) FMCA Fam 41

Such decisions mirror the Court's submission to the second JSC on joint custody, and the concerns it expressed then that children's welfare would be compromised by advancing *parental* interests over those of children.

The following example demonstrates the importance of good communication between the parents and a co-operative parenting style to a satisfactory equal, shared arrangement is to for a child. Both parents need to share an understanding of the child's age and developmental needs.

> **Example**
> **A boy aged three been in an equal shared arrangement hah, since his parents separated 18 months previously. . While the mother had some reservations about the arrangement, it worked satisfactorily for the family until both parents repartnered and the level and quality of communications between them, and their capacity to be flexible in terms of responding to their son's needs, deteriorated**
>
> **The counsellor noted that developmentally the child was unable to form an attachment. This child was also dealing with issues of control and social expectations in relation to his behaviour, and in turn, his parents were dealing with compliance and discipline issues. The child's capacity to accept and learn behavioural expectations of him required consistency of expectations, rules and routines, which would be greatly facilitated by a secure, consistent parental relationship. She further noted that such a young child does not have the cognitive capacity to understand the concepts of time and dates, and therefore seeks reassurance through direct contact. The counsellor noted that these developmental tasks are optimally achieved when a child is in a stable home environment and the learning takes place in the context of a secure and stable parental relationship.**
>
> **The counsellor recommended that the child be in the care of his mother, who she found demonstrated a greater understanding of the child's developmental needs and who was available to care for him on a full time basis.**

5. RIGHT OF CONTACT

The right of contact expressed in section 60 B(2)(b) of the Act is specifically phrased in terms of the right **of the child**, to be exercised *except when it is or would be contrary to a child's best interests* (emphasis added) Judges are required to ensure that a contact order 'does not expose a person to an unacceptable risk of family violence'[40]. Pre 1995 case law established that there was no parental right of access to a child[41], although the Court generally regarded continuity of the parent-child relationship as beneficial, in the absence of contrary factors, which are discussed throughout this submission.

Research into the early years of operation of the 1995 reforms revealed a tension between the right to contact principle on the one hand, and the protection from violence principle on the other.[42] Solicitors reported that fathers were obtaining contact orders where they would previously have been unsuccessful, particularly at interim hearings where allegations of violence cannot be tested and family reports are not available. Judges reiterated these

40 Section 68K(1) (b)

41 Brown and Pedersen - (1992) FLC 92-271, and confirmed in B and B (1997) FLC 92-755

42 H, Rhoades, R,Graycar and M Harrison;'The Family Law Reform Act 1995: the First Three Years', Rhoades, H (2000) 'Child Reforms in Australia –a Shifting Landscape, Child and Family Law Quarterly, vol. 12, no. 2.

concerns, and reported that lawyers were reluctant to ask for contact to be suspended (even in the face of allegations of serious violence) because shared parenting considerations were overshadowing others.

Rhoades concluded in 2000 that: 'For all practical purposes, Australia now has a 'presumption' (although not a legal one) favouring contact with the non-resident parent.[43]

The researchers also argued that the lack of clarity in the legislation, (particularly in relation to what is meant by 'shared parenting' and the 'right of contact') had exacerbated disputes between parents, and demonstrated this by showing increases in the numbers of applications for child related orders in the years following the introduction of the reforms, and increased numbers of applications for contravention of contact orders.

The Court's statistics as set out below demonstrate this increase in activity.

Number of child-related final and interim orders sought by financial year in the Family Court of Australia				
Financial Year	**Residence**	**Contact**	**Specific Issues**	**Total Orders Sought Children**
1996 – 1997	16884	19720	14253	50857
1997 – 1998	19042	21690	16756	57488
1998 – 1999	20295	23306	18190	61791
1999 – 2000	21817	24681	19424	65922

Exact comparisons cannot be made because of the legal and terminology changes which occurred in mid 1996. However, by way of illustration 11,430 custody/guardianship and 12,464 access applications were filed in the financial year 1995/96.

Number of Contravention of Child Order Applications lodged by financial year in the Family Court of Australia	
Financial Year	Number lodged
1995 – 1996	786
1996 – 1997	1434
1997 – 1998	1659
1998 – 1999	1765
1999 – 2000	1976
2000 – 2001	1858
2001 – 2002	1464

43 Rhoades ibid at 130

6. CHILDREN'S BEST INTERESTS

Although the wording has undergone change, Federal family law statutes have, since 1959, given considerable prominence to the position of children in family law disputes. The Matrimonial Causes Act 1959[44] required the court to regard the *interests* of the children as the paramount consideration in child related proceedings, the Family Law Act between 1975 and 1995 changed this to the *welfare* of the child, and section 65E of the amended Act now refers to the *best interests* of the child as being the paramount consideration for the court in deciding whether to make a particular parenting order in relation to a child. Section 43 (c) sets out as a principle to be applied by courts exercising jurisdiction under the Act the requirement that regard must be had to the need to protect the rights of children and to promote their welfare.

A list of criteria against which welfare/best interests of children may be measured was inserted into the Family Law Act in 1983 and these have been supplemented in the intervening years. The current law is that where separated parents are unable to agree about the arrangements for their children and apply for parenting orders from the Court as a consequence, the Court must, in determining whether it should make orders or in determining what orders should be made, regard the best interests of the child as the paramount consideration[45]

Section 68F requires the Court to consider the following matters in determining what is in the best interests of the child in so far as they might be relevant in each particular case:

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

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

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

> *(a)* *either of his or her parents; or*
>
> *(b)* *any other child, or other person, with whom he or she has been living;*
>
> *(c)* *the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;*
>
> *(d)* *the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;*
>
> *(e)* *the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the Court thinks are relevant;*

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44 section 85(1)(a)

45 section 65E

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

(g) *being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or*

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

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

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

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

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

(m) *any other fact or circumstance that the Court thinks is relevant.*

Judges must consider each factor separately (where it has relevance to the particular facts and circumstances of the case before them), but they have considerable discretion in determining the weight to be given to each factor. Presumptions do not operate, and each case and each proposal concerning the child within each case must be examined and evaluated on its merits.[46]

6.1 Perspective of Court Mediators

It is important to note that since its original passage the Family Law Act has placed considerable emphasis on the need to conciliate, rather than litigate, family disputes. To this end, the Court employs psychologist/social worker mediators and staff lawyers (deputy registrars), whose primary function is to help the parties resolve disputes and reach agreement. Services are provided without charge to clients. Recent Government policy has been to divert some of this work into the private sector. This has forced a reduction in the numbers of counsellors employed by the Court and has restricted its capacity to provide this opportunity for resolution, particularly the capacity to mediate disputes before parties have filed an application with the Court. Before the services were reduced, the counsellors were successful in resolving 75% of disputes which came to the Court prior to an application having been filed. Because of budget cuts the Court is unable to provide pre-filing conciliation in major registries, but it works with community based services to support their work with separated families. The Court is still a significant force for conciliation and mediation for clients who have filed applications for parenting orders. Save in very rare circumstances no parenting case goes to a final determination without at least one, and usually two, attempts to resolve it through Court based, free mediation and conciliation.

46 See for example the Full Court of the Family Court decisions in *Burton and Burton* (1979) FLC ¶90-622; *Smith and Smith* (1994) FLC ¶92-488.

Mediators see many families who disagree with each other about aspects of the living arrangements proposed for children, and those involved may include grandparents, and other family members. The Court may order parents to attend a confidential mediation session, and may also order that a family report be prepared for the judge to consider at a final hearing

Mediators are alert to the fact that each child has his or her individual characteristics, as do each set of parents. They consider the dynamic interaction between the individuals, the family and the environment in which they live, to ensure that any arrangement made will genuinely promote the best interests of the child.

6.2 Taking Account of Children's Developmental Stages

Children's developmental stages must be taken into account when considering their capacity to manage disruptions and variations in their living arrangements during the course of their childhood. Children must progress from infancy to adolescence and, eventually, adulthood. Each stage has its own individual, unique characteristics and developmental milestones. Children must successfully achieve mastery at each stage of development in order to successfully embark on, and move through to, the next stage. These form the building blocks which allow individuals to become fully functional, effective, resilient and capable adults.

Any assumption that children experience each stage of their development in a similar way and at a similar age is problematic and may be detrimental for some.

For example, the primary task of an **infant** is to bond and attach to a primary carer, and to develop basic trust in him or her. This occurs through nurture, as well as predictable and consistent parenting responses. The area of attachment and bonding is one of the most researched areas in the social science arena and there is general agreement of the importance to children of its successful attainment.

The long term effects and consequences of a negative or disrupted early experience have been shown to include developmental delay, social and emotional behavioural problems and difficulties in forming and maintaining relationships in adulthood [47]. To quote, "Disorganised attachment is associated with disorganised care giving". [48]

Infants also have no concept of time, so extended periods of separation from the primary caregiver (irrespective of who that person is) can be deleterious to their ability to develop attachment. The imposition of an equal parenting arrangement on infants may threaten the development of a positive primary attachment, and result, for example, in pressure being placed on the mother not to breast feed her infant.

Pre school children can cope with longer separations if they have formed good quality attachments, but they still require routine, consistency of care, and clearly defined limits and boundaries. Parents who share care must therefore be able to communicate easily with each other, co-operate and respect each other's value systems.

Parents must also live in close enough proximity for children to establish themselves and develop a sense of belonging to a kindergarten, school and peer group. Disruption in these areas can result in children's learning being arrested, because their energy becomes diverted

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47 Goldberg, S (2000), 'Attachment and Development,' Oxford University Press, New York.
48 Solomon, J, "The Caregiving system in Separated and Divorcing Parents, Zero to Three"2003.

into a focus on mastery and organisation of their world[49]). Children at this age benefit from having a stable psychological base and a predictable and familiar physical environment, particularly when their external world is being disrupted by parental separation, loss and, often, conflict.

Research on pre school children shows that they do not benefit from joint custody or frequent access arrangements when parental conflict continues. Girls in particular have been found to be more depressed, withdrawn and uncommunicative and to have more somatic complaints, while boy's social competence is more likely to be disrupted[50].

Adolescents and teenagers have a greater capacity to adjust to a variety of living patterns than do younger children. They can, however, experience more difficulties unless their parents can provide a conflict free environment and co-operative parenting, combined with high levels of communication. The needs of older children to be part of a peer group become increasingly important at this stage. If stressed, teenager's school performance, self-esteem and self-efficacy can be effected`[51]. In the face of high parental conflict teenagers are particularly vulnerable to seeking out destructive coping strategies, such as school avoidance and substance abuse, in order to deal with their emotional turmoil.

The capacity of children to manage in a shared equal arrangement is also affected by their individual temperaments and resilience to deal with change – particularly their capacity to adapt to stressful and high risk environments[52]. Children vary. Some are, by nature, more anxious, shy and insecure, while others are more confident and gregarious. The former have less resilience to disruption than the latter.

The medical and psychological health of children adds a further dimension which must be taken into account. Not surprisingly, those diagnosed with psychological difficulties such as Aspberger's syndrome or autism do not cope with change. The needs of individual children (even within the same family system) may therefore differ, and their capacity to manage different living patterns will also be different.

As mentioned elsewhere in this submission, there is a growing focus on listening and responding to the individual voices of children. Some will inevitably prefer not to live in a shared arrangement which involves them in spending equal time with each parent, as Smart's interviews with children illustrate. For example, pre pubescent girls may prefer to spend extended periods of time with their mothers, while others may experience a closer affinity with their father.

Parents with an expectation of entitlement can place a significant burden on a child, who must either challenge their parent's wish and fear the consequences, or sacrifice their own needs to those of their parents to maintain the presence of both in their lives. Counsellors must sometimes deal with parents who threaten to abandon the child rather than agree to what they perceive as unsatisfactory arrangements.

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49 'Children's Voices', paper presented at the Family Court 25th Anniversary Conference, Justice, Courts and Community, the Continuing Challenge on 29 July 2001 and available at http://www.familycourt.gov.au/papers/html/smart.htm

50 Johnston, J and Campbell, L (1988) 'Impasses of Divorce: the Dynamics and Resolution of Family Conflict, Collier Macmillan, London.

51 Folberg, J (1991) "Joint Custody and Shared Parenting", 2nd edition, The Guildford Press.

52 Graham-Bermann, S.A and Edelson, J (2002), 'Domestic Violence in the lives of Children', American Psychological Association, Washington, DC.

7. FAMILY SYSTEMS

A number of factors within the child's environment will impact on the family's capacity to manage a joint shared arrangement. These include the physical or psychological health of the parents and children or care givers, the presence of high conflict or family violence, allegations of child abuse, geographical distance between households, the implication of step family arrangements, sibling groups and their arrangements, and competing or different cultural and religious issues.

At times the physical health or parental psychopathology will impact on the child's living arrangements. For example, either short or long term health problems may interrupt the parent's capacity to provide physical and emotional care for the child. Mental illness, alcohol and substance abuse also complicate parenting issues and frequently lead to adverse changes, for both the ill parent and the child. Increased stress on children will disrupt their personality development and adjustment[53].

A normal aspect of parenting is the desire to impart cultural and religious beliefs and values to children. However, separation can polarise parents, and set up or exaggerate differences in value systems. This occurs not only when parties come from different racial or religious groups, but also where levels of observance or participation are different. Children in equal shared arrangements can then be placed under a great deal of stress, for example, where they are subjected to different rules in each home, or the level of observation of rituals is different or at odds in each home. An example was a boy seen by a court counsellor who refused to eat in his mother's house because she did not maintain the Kosher dietary laws that his father had taught him to observe.

The diversity of 'modern' family types and lifestyles is frequently commented upon, and nowhere is this more apparent than in families where one or both parents have a child or children from a previous relationship.

Children whose parents have separated often have two households, may include step-parents and often half and/or step-siblings. Mothers may have several children with different fathers, and fathers, similarly, may have other children by several mothers. Family disputes which are mediated or litigated in the Court not uncommonly involve conflict between parents, grandparents, aunts, uncles and other significant adults.

The construct of the family tree was previously portrayed as a two dimensional diagram of an individual's family of origin. This has been challenged as being overly simplistic, and some writers are describing the picture in broader terms as a 'family forest'. Families which fit this description may function well, but they also require considerable adjustment for many children, and have the capacity to create stressful intra-familial tensions. Children in 're-constituted families' must establish and maintain relationships with all members of each household, as well as a meaningful place for themselves.

In practical terms, if all children in these families – which may include three or more households - are the subject of shared equal residence, the task of achieving stability, harmony or a sense of core family within any of the homes becomes increasingly harder to achieve. Added to this, the children within each family are likely to span different developmental stages, have different personalities, temperaments, needs and preferences, all of which make any presumptions or inflexible arrangements difficult to implement.

53 Galatzer-Levy and Kraus (1999), 'The Scientific Basis of Child Custody Decisions', Wiley and Sons.

Some parents' inability to focus on the needs of the child as demonstrated below, can be exacerbated when they are also given expectations that a particular arrangement *should* exist.

Example

This example involved a young infant whose parents lived more than 15 hours drive away from each other. One parent believed that the child could successfully live in two states simultaneously, and proposed fortnightly changeovers of residence. There had been very little communication between the parents since the child's birth, yet this parent was confident the child could cope with two kindergartens, two schools and two parallel lives. There was little understanding of of the child's developmental needs, or of the impact on a child so young being subjected to travelling in a car for very lengthy periods of time, on such a regular basis.

Under the current legal framework counsellors can encourage parents to focus on their child's individual needs and the parenting arrangements that will best meet those needs. If the law were to change and a presumption of equal sharing introduced there is a major concern that the focus will shift from the child to the parent and his or her rights as the above example indicates. It will become more difficult to address these issues constructively in a counselling environment, and to encourage parents to be flexible and mindful of their children's circumstances. It is highly likely that more clients will seek to litigate in such a climate in order to enforce what they perceive as their rightful outcome rather than that of the child/children.

Example

A recent matter relating to a little 5 year old boy with a life threatening illness and his younger sister, resulted in some concerning outcomes. Given the circumstances of the boy's illness, those involved understandably want to maximise the opportunities for both parents to spend time with and care for the boy.

However, in this instance both parents have responded to the child's condition in a dramatically different manner and are also unable to agree about his medical treatment. There is also a cultural issue, as the child is a first born son and is as a consequence treated differently by his parents. His mother continues to try to foster a normal life style for the child, while the father cares for him to an excessive degree. As a consequence the boy participates actively at kindergarten when attending with his mother, but is unable to perform even minor tasks for himself when attending with his father. The parental conflict focuses on the boy who is acting out out their anger to the extent that his kindergarten teacher and treating psychologist have become extremely concerned about his behaviour.

In contrast, the boy's little sister is a cheerful and bouncy child, who is coping extremely well. She does not share her brother's vulnerability and is able to move reasonably freely between her parents. This example also illustrates how, (within the one family), children may have different needs and be differentially able to deal with a shared arrangement. It also challenges the notion that one can make assumptions about children or families without the prior, necessary investigation and assessment

As referred to above an equal, shared residence arrangement may be put in place as an interim measure pending a final determination of residence. While this practice is time limited, it can still prove problematic for some children.

An assessment of the residence arrangements for 3 children who had been living in an equal, shared care arrangement since separation revealed that they were experiencing differing degrees of difficulties with the arrangements.

Example

The oldest boy aged 10 spoke of experiencing difficulty with the transitions and said he preferred to spend more time with one parent, but did not want to appear to be choosing between them. His younger brother aged 8 was more anxious and agitated, stressing "I can't choose ...that's all I have to say". He said his mother would miss him if he spent more time with his father, and that he would miss his father if he spent more time with his mother. This child was described by his school as suffering from low esteem and struggling with social issues. The youngest aged 4, was unable to speak about his relationship with his parents but he was also reported to be experiencing difficulties emotionally and socially at kindergarten

The counsellor assessing the case formed the opinion that there was no compelling reason for a significant change in the shared residence arrangements and that it was in the children's best interests that they spend significant time with both parents. The counsellor concluded that the lack of communication and co-operative decision making between the parents was affecting the children, not the fact of shared residence.

What is illustrated in the above example is the pressure children can experience as a result of their need to care for their parents, and the impact on children's emotional development when shared arrangements are made but the parents cannot communicate or work co-operatively with each other

As has been described in relation to United States' attempts to impose joint custody:

> *"While dividing the child in half may seem fair to adults, it fails to provide a just answer to Solomon's dilemma. It ignores the child's interest in living a reasonably stable and stress-free childhood"*[54].

8. DOMESTIC VIOLENCE AND ABUSE

There is now a large body of literature that addresses the impact of violence on children, and such violence is unfortunately a factor in the lives of many who come to the attention of the Court. Children must be protected from being either the subject of violence, or from witnessing violent behaviour, as sections 68F(2) (g) and (i) of the Act acknowledge. Such protection becomes more difficult when there are increased opportunities for intra parental conflict, or child abuse.

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54 Barbara Bennett Woodhouse (1999), 'Child Custody in the Age of Children's Rights: the Search for a Just and Workable Standard', Family Law Quarterly (Millennium Issue: Family Law at the End of the Twentieth Century), vol 33, no. 3 at 825.

Although its statistical incidence is hard to calculate, considerable research conducted in Australia and elsewhere has documented the frequency with which intra familial violence occurs and the damage it causes. Such research also identifies relationship breakdown as a being a catalyst (and sometimes a cause) of such violence, the term 'separation abuse' having been introduced to refer to its high rate of occurrence for family law clients. Anecdotal reports from judges, registrars and counsellors refer to family violence as being a major factor in a high proportion of matters coming before them, in mediation sessions, pre trial proceedings and in fully contested matters. Many studies also show the importance played by power imbalances in family violence.

In families where there have been allegations of child abuse, the primary issue must always be one of safety. In such circumstances any presumption of shared equal parenting is extremely problematic and may place the child at ongoing risk.

Some parents will leave relationships in an attempt to break the cycle of domestic violence and abuse and to protect their children. However, children may then be in greater danger if contact occurs with a violent parent from whom they have no protection[55]. The primary carer parent may also feel intimidated and fearful as a result of an imbalance of power in their relationship, and may agree to shared arrangements in order to try and appease the child's father, or to satisfy legal aid requirements[56]. Establishing an equal shared parenting presumption perpetuates the cycle of intimidation where this occurs, and can compromise the protection necessary for both children and adult victims[57].

The level of stress and anxiety felt by children exposed to violence between parents at exchange, particularly when they have already witnessed domestic violence, can be traumatic, destabilising and debilitating. Children's Contact services have been established in a number of areas of Australia in recognition of this. Although the services vary in their location, funding and functions, they generally provide a safe environment in which contact can be effected, and/or a supervised location in which contact can take place. Where safety of children is a concern it may be a condition of a contact order that it be supervised by a centre, or by a trusted relative or friend.

8.1 Child Abuse and Protection

Children who experience or witness violence between family members not only suffer similar physical or emotional damage to those of the battered parent, but are also likely to repeat the pattern of behaviour exhibited by adult role models, either becoming perpetrators or victims when they reach adulthood.

As mentioned earlier in this submission, the Act includes a number of statutory provisions aimed at protecting both adults and children who have experienced family violence. The Court also encourages clients to inform staff if they have safety concerns, and separate mediation sessions are provided for those who have security concerns about face to face contact with a former partner. The Court is currently revising its family violence policy to ensure that its processes and practices provide protection for vulnerable clients.

55 Rathus, Z (1995), 'Rougher Than Usual Handling', second edition Women's Legal Service, Brisbane.

56 'Rendell, K, Rathus, Z and Lynch, A (2000) An Unacceptable Risk, A Report on Child Contact Arrangements Where There is Violence in the Family', Women's Legal Service.

57 Galatzer-Levy and Kraus, 1999 The Scientific Basis of Child Custody Decisions, Wiley and Sons

The Court's jurisdiction and powers are restricted and the types of matters about which it can adjudicate are limited. The Australian Constitution divides legislative powers between the Federal Parliament and the various State and Territory Parliaments. The Federal Parliament has power to legislate in respect of specific matters identified in the Constitution, with State and Territory Parliaments being empowered to legislate without such restrictions, providing their laws are not inconsistent with any federal law[58]. Subject to the exercise of legislative powers relying on the external affairs power and UNCROC no constitutional power permits the Federal Parliament to make laws concerning children or their protection - what may be generally termed "public family law matters" in which the state is a party. Such matters are left to the States and Territories, which have developed their own children's courts and laws governing child protection and juvenile justice. The Constitution provides that the Federal Parliament may legislate in respect of: marriage, divorce and related parental rights, custody and guardianship of infants which is essentially the primary jurisdiction of the Court[59].The Court does however have a general welfare power of considerable breadth. The precise limits of this jurisdiction are unclear and the matter is likely to be the subject of an appeal to the High Court that is currently pending. The Court in a recent decision held that in enacting the Family Law Reform Act the Parliament had given legislative recognition to UNCROC which could be supported by the external affairs power.

The Court is also limited in the way in which apparently criminal behaviour can be handled. Its jurisdiction is confined to disputes between individuals and it cannot investigate allegations of abuse nor impose criminal sanctions. The High Court in *M v M,* a unanimous judgment handed down in 1988 said:

> *"it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence...the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child".*[60]

In *M v M* the High Court also spelt out the test which precludes the Court from making a parenting order where sexual abuse is alleged where to do so would expose the child to an unacceptable risk of sexual abuse[61].

Child protection issues usually arise when one or more parties seeking orders relating to their children allege that the child is being physically or sexually abused in the household in which he or she lives, or during contact visits. The alleged perpetrator may be a family member, carer or de facto spouse of either parent. Allegations may arise in affidavit material filed by a party or a witness. They may take the form of statements made in the presence of Court staff in the course of dispute resolution conferences, or during the interviews that take place when a family report is being prepared by a counsellor for a hearing. Sometimes no allegation is actually made, but a member of the Court's staff has reasonable grounds for forming a suspicion that a child has been or is at risk of being abused.

Family courts are increasingly concerned about the increased incidence of such allegations in private law disputes and the ways to best manage them. In Australia, and elsewhere there is a

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58 The Australian Constitution, section 109
59 The Australian Constitution, section 51 (xxi) and (xxii).
60 M and M (1988) 166 CLR 69 at 75-76
61 ibid at 78.

tendency by some to assume that child abuse allegations in family law disputes are false, motivated to gain a tactical advantage, or merely an hysterical outpouring by a disgruntled parent who is engaged in a war of attrition with the other. Locally, that perception has been challenged by two Australian studies that have independently concluded that the false allegation rate in Family Court matters is approximately 9%, a proportion equivalent to that found in all abuse allegations.[62]

The Court has no investigative arm and staff do not conduct forensic investigations of child abuse allegations or suspicions. Their work is directed at short-term interventions and preparing assessment reports to assist the Court in fulfilling its responsibility to make orders that are in the best interests of the child. It is constitutionally the province of State and Territory courts to investigate, and the Family Court has no power to become involved.

Child abuse is defined in the Act as:

> "(a) *an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or*
>
> (b) *a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.*"[63]

Where the allegation or suspicion meets this definition, the Act requires that information about the allegation or suspicion must be transmitted to the protective authority of the State or Territory. The obligation upon Court personnel is accompanied by explicit protection against criminal or civil liability or a claim of ethical breach[64].

Other circumstances may nonetheless constitute "ill-treatment" or the child's exposure or subjection to "behaviour which psychologically harms the child". These latter expressions are not defined in the Act and do not attract the statutory obligation to report.

However, where the suspicion does not concern abuse, but relates to ill-treatment or psychological harm, Court personnel may make such a notification to the relevant authority without risking liability or breaching professional ethics. These notification provisions in the Act are complemented by protocols involving the Court and most relevant State or Territory child protection authorities.

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62 Brown, T, Frederico, M., Hewitt, L. and Martyn, R. (1995), 'The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia:The First Report', a paper presented to the Vth European Congress of the Prevention of child Abuse and Neglect, Oslo, Norway examined 30 cases; Hume, M. (1997), 'Child Sexual Abuse Allegations and the Family Court', Thesis for Masters of Social Science (Research) Faculty of Humanities and Social Sciences, University of South Australia

63 Section 60D, Family Law Act

64 See ss 67ZA and 67ZB, Family Law Act

8.2 Special Case Management of Child Abuse - The Magellan Project

A study carried out in 1997 by researchers at Monash University[65] involved an examination of 200 cases involving what were then called custody and access disputes in which child abuse allegations had been recorded. Such allegations were found to represent 5% of the workload in children's matters, with a very high 30% going through to trial (contrasted with 6% for all other applications). In addition, the families involved were not usually known to the State protection services, and the cases took a very long time to resolve, often requiring multiple hearings and changes of living arrangements for the already vulnerable children. Reasons for delays to resolution included the intrinsic difficulties involved in family violence issues and poor coordination of the various services such as legal aid, the state welfare system and the Children's Court.

At about the same time as the study findings were released the Court reviewed its pending cases list, which provided evidence that complemented the Monash research, and again highlighted the frequency with which child abuse allegations were being raised in the Court. Indeed, cases involving these allegations have been described as its 'core business'.

As a consequence the Chief Justice decided to trial a pilot program in Melbourne, (subsequently called Magellan), in which child abuse cases would be specially case managed. The Magellan project involves rigorous judicial management of cases identified as involving allegations of serious physical and sexual child abuse. Major features include the imposition of strict time lines, early 'front loading' of resources such as the appointment of a child representative, provision of information from the State welfare authority, legal aid funding in appropriate cases and close liaison on case management between external information providers and a small team of Court mediators.

The Magellan project was piloted over an 18 month period in the Melbourne registry of the Family Court and its effectiveness was evaluated by Professor Thea Brown et al in a report entitled *Resolving Family Violence to Children.*

The evaluation showed that the 100 cases selected for the project were more likely to resolve before trial, had fewer hearings, resolved more quickly and outcomes were less likely to break down than had been experienced by a sample of similar cases heard several years earlier. Importantly, it determined that the outcomes for children were better as a consequence of the project. The Court is now implementing the Magellan project on a national level.

9. PARENTS RELOCATING

Perhaps the most obvious circumstance in which shared physical parenting is inappropriate occurs when parents live some distance from each other, or one parent moves away after an arrangement or order has come into operation. Children require a living arrangement that best supports a stable base and allows them to attend their school, social and sporting activities and develop peer relationships over time. A shared equal arrangement that provides for these cannot be achieved when parents live far apart. The move may be to another town or city, another State or another country. Depending on the distance involved and the financial and

[65] Brown, T, Frederico, M Hewitt L and Sheehan, R (1998), 'Violence in Families Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia', Department of Social Work and Human Services, Monash University.

other circumstances of the parties, this may result in contact with the child being severely curtailed, or rendered impossible.

Relocation cases are thus extremely difficult and often controversial, and their determination has been described by the High Court as *"...a contemporary judgement of Solomon."*[66] The opportunities which separation provides for parents to re-partner, to reframe their lives and to put distressing experiences behind them makes them a particularly mobile population.

When hearing relocation disputes courts have always considered a variety of factors, some assuming more or less importance from time to time. However, the overriding principle has been affirmed as the best interests of the child.

The 1995 amendments were examined by the Full Court of the Family Court in the relocation case of B and B which emphasised that, (as with any applications for parenting orders), the principle of paramountcy of the best interests of the child remained. The Court held that-

> *"relocation cases are not a special category. They are governed by the provisions of Part VII in the same way as any other case relating to parenting orders for children..."*[67]

As such, these disputes require consideration of the relevant principles and matters contained in s 60B and s 68F(2).[68] To assist in the assessment of best interests, the Court in B and B set out a list of reasons for relocation which could be considered "*compelling*". These were:

- A new job or promotion of the parent that will improve the financial circumstances of the household;
- There-marriage of the parent;
- Reunion with family, especially where the parent is otherwise isolated;
- Health issues; and
- To escape violence or abuse.[69]

The approach which constitutes the current law in this difficult area resulted from the Full Court decision of In *A v A: Relocation Approach*[70] which in turn followed the decision of the High Court in *AMS v AIF; AIF v AMS.*[71]

A v A emphasised that the best interests of the child remain the paramount, but not the sole consideration. To the extent that the freedom of a parent to move impinges upon those interests that freedom must give way.

Particulars of the decision are set out in *Appendix 2*

66 *AIF v AMS* (1999) FLC ¶92-852, per Gleeson CJ, McHugh and Gummow JJ at par 34.
67 Band B (Family Law Reform Act (1997) FLC 92-755 at . 84,176.
68 ibid at p. 84,240.
69 ibid at p. 84,196-7.
70 *A v A: Relocation Approach* (2000) FLC 93-053
71 (1999) FLC 92-852

10. INTERIM APPLICATIONS

When parties separate, disputes may arise concerning the short-term arrangements for children. Interim applications are made where that family cannot agree on an arrangement which will operate until a final hearing.

As an interim application does not determine the long term rights and obligations of the separated family, the hearing of such an application is an "*abridged process where the scope of the inquiry is significantly curtailed. ...Ordinarily, at interim hearings, the Court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties. Accordingly in determining what orders should be made, the Court traditionally looks to the less contentious matters..*"[72] Such hearings are generally limited in time to less than 2 hours, affidavits are relied upon, and there is generally no cross-examination of witnesses.

Example

A father and mother filed competing applications for residence of a school age child. The mother has an admitted history of alcohol abuse and a relatively recent suicide attempt. The father is facing charges for rape of a person unrelated to the proceedings and taking pornographic videos of an adolescent girl. The mother is in supported accommodation and provides evidence of positive progress since separation.

An initial interim hearing resulted in short term residence with mother. Prior to a second interim hearing, the paternal grandmother and aunt filed applications for contact. They had a history of extended family involvement in child's care in the past.

An interim order was handed down for limited contact (which was not to be exercised in the presence of the father) to the aunt and grandmother. A family report including all parties was also ordered and a date set for a further review.

The decision of *Cowling v Cowling*[73] established criteria which the Court has regard to in determining interim applications:

> *"Firstly, having regard to the provisions of section 65E, in determining what interim parenting order should be made, the court must regard the best interests of the child as the paramount consideration.*
>
> *Secondly, given the mode by which interlocutory proceedings are conducted, those interests will normally best be met by ensuring stability in the life of the child pending the full hearing of all relevant issues. Accordingly, as a general rule, any interlocutory order made should promote that stability.*
>
> *Thirdly, where the evidence clearly establishes that, at the date of hearing, the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or*

72 *Cowling v Cowling (1998) FLC 92-810 at 85,006*
73 (1998) FLC 92-801

overriding indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's welfare would be really endangered by his/her remaining in that environment.

Fourthly, the court is entitled to place such weight upon the importance of retaining the child's current living arrangements as it sees fit in all the circumstances. In determining what weight to place upon that factor, it is appropriate for the court to take account of the circumstances giving rise to the current status quo. In particular, the court may examine the following issues:-

- whether the current circumstances have arisen by virtue of some agreement between the parties or as a result of acquiescence;
- whether the current arrangements have been unilaterally imposed by one party upon the other;
- the duration of the current arrangements and whether there has been any undue delay in instituting proceedings or in the proceedings being listed for hearing.

Fifthly, where the evidence does not establish that at the date of the hearing the child is living in an environment in which he or she is well settled, some limited evaluation of the relevant matters referred to in section 68F(2) needs to be undertaken to ensure that the result embodied in the order promotes the child's best interests. In undertaking that evaluation, regard must be had to the interim nature of the proceedings and the procedure referred to in C and C [(1996) FLC 92-651].

Finally, in determining whether at the date of hearing, a child is living in a settled environment, consideration should be given, inter alia, to the following:-

- *the wishes, age and level of maturity of the child;*
- *the current and proposed arrangements for the day to day care of the child;*
- *the period during which the child has lived in the environment;*
- *whether the child has any siblings and where they reside;*
- *the nature of the relationship between the child, each parent, and any other significant adult and his or her siblings;*
- *the educational needs of the child.*

Example

An interim application was made for shared residence of 3 school age children. A history of initial primary care by the mother with the father undertaking responsibility for primary care for several years upon the mother being diagnosed with bi-polar disorder. The mother subsequently resumed primary care for 4 years prior to an interim hearing. Psychiatric and psychological evidence positive regarding mother's health. Interim order for the father to care for the children 2 out of 3 weekends and one overnight each week and mother to care for children for the balance time.

11. PARENTAL EXPECTATIONS

An important issue when considering changes to legislation relates to parental expectations of what the changes can and will achieve. How the message is conveyed to and understood by the people for whom it is intended is a vital component of any reform process, particularly in family law.

The extent to which men and women are aware of the written law, and negotiate in accordance with that knowledge, is of central importance to an inquiry such as this. It is therefore important to consider the role of legislation and its impacts, particularly where the proportions of clients who are legally represented in Court proceedings is declining. Research commissioned by the Court[74] has shown that 30% to 40% of Court clients have no legal representation at some stage throughout their proceedings, and that those involved in children's disputes are more likely than those involved in property disputes to be unrepresented.

The law establishes rules which govern the determination of contested proceedings. It also provides a framework, or background to parties negotiating the resolution of disputes. Depending on the nature and source of the advice they receive, many clients negotiate "in the shadow of the law[75]", knowing that if they do not reach agreement the Court will impose an outcome based on legislation.

Thus, the Family Law Act influences agreed outcomes, in varying degrees according to the nature of the case and the parties' belief about the relevant legal principles. Those with no, or poor, legal advice may have inaccurate beliefs, and their agreement may reflect those, rather than the actual law.

Parties may misunderstand the law, and this is not unusual in family disputes, where particular outcomes are keenly sought and a great deal of emotion is invested in those outcomes. The written law itself may be unclear or ambiguous. The interpretation by some parents that sharing parental responsibilities means that both parents have an entitlement to equal time with their children is an example of a lack of clarity. As mentioned earlier in this submission, this aspect of the 1995 reforms has been criticised for failing to spell out what is meant by shared parental responsibilities, or how parents are meant to share.

Conversely, the law is not a powerful force in the lives of those who do not seek or need a legal resolution. Early research into the impacts of the 1995 reforms showed that a group of parents were using an equal time arrangement with their children which appeared to be working satisfactorily. Significantly, they had come to this arrangement without seeking any advice from a lawyer or counsellor, and they were unaware of the shared parenting provisions of the Family Law Act. Their pre separation parenting patterns had been co-operative ones and both had been active caregivers of their children[76].

The circumstances of the parents who had engaged lawyers and/or had become Court clients because they were unable to agree about their children were quite different, causing a Family

[74] J Dewar, B Smith and C Banks (2000) 'Litigants in Person in the Family Court of Australia'.
[75] Robert Mnookin, (1975), 'Child Custody Adjudication:Judicial Functions in the Face of Indeterminancy', 39 Law and Contemporary Problems 226
[76] H, Rhoades, R, Graycar and M, Harrison (2000), 'The Family Law Reform Act 1995: The First Three Years page 1.

Court registrar interviewed for the research project to comment that '*the shared parenting concept is totally at odds with the types of parents who litigate'*. ([77])

Another source of apparent confusion is the interpretation by some that a *child's* right of contact is really the right of the *parent*, although this is clearly spelt out in section 60B(2)(b).

Legislation can play a part in attempting to change community attitudes, or to establish community standards, as the 1995 amendments sought to do.

Even publicity about possible changes to the law can be interpreted as meaning that changes have been implemented, or are imminent. For example, in mid 1999 the Attorney-General suggested that the law relating to property required amendment, and circulated a discussion paper which considered two possible options[78]. One option proposed that equal sharing of property be the starting point for its distribution on marriage breakdown, subject to a Court order departing from this principle. Although it was ultimately decided not to amend the law in this area, and the equal sharing proposal was always intended to be a starting point only, solicitors, and mediators reported a number of clients coming to them and seeking – or demanding – 'their' 50 per cent.

Anecdotes are circulating in relation to the current inquiry, and parental perceptions that the law now gives each a right to spend 50 per cent of their time with their children, regardless of circumstances. Counsellors and legal practitioners are already seeing parents who argue that an equal shared arrangement is "my right".

This may be indicative of parents seeking to meet their own needs, rather than those of their children, especially if they are unable to set out clearly the measures needed to address the children's issues that may arise from an equal shared arrangement. The distress that some parents experience arising from unresolved feelings of anger and bitterness about the relationship breakdown can inhibit their capacity to make child-focussed decisions which take account of the child's age, needs and capacities.

The English sociologist Professor Carol Smart[79] has described '*one of the most dispiriting consequences of the growth of interest in shared residence after divorce is the tendency of this to mean an exact division of children's time so that each parent gets precisely equal amounts.....The problem with apportioning time is that it is more likely to be organised to suit parents than to suit children."*

The raised expectations which are generated by Inquiries and by the amendment process inevitably produce a groundswell of hostility towards the Court and the Parliament, because in many cases the expectations cannot be met. If a rebuttable presumption of equal time is incorporated into the Act cases will continue to be determined according to their individual facts and circumstances. Parents who seek to rebut the presumption will be required to put before the Court evidence that equal time would be detrimental to their child (whether because of the issues discussed in this submission, such as distance, violence, the child's particular mental or physical temperament), or others.

77 Rgoades, Graycar and Harrison . ibid
78 'Property and Family Law, Options for Change', Commonwealth of Australia
79 Smart, C (2002) 'From Children's Shoes to Children's Voices' Family Court Review, vol. 40, no. 3

This will have significant consequences in terms of increased time for matters to be resolved, increased public and private legal costs and increased opportunities for dissension between the parties.

12. INVOLVING CHILDREN

Professor Smart has interviewed children, in several influential studies[80]. Her research is valuable for its concentration on children's perspective, and for its sensitivity to their points of view. She has described her methodology as requiring those involved in the research to 'stand in children's shoes'. Smart's research included interviewing children whose parents she had interviewed previously. She found that adults' experiences were very different from those of their children, as were parents' interpretations of their children's experiences.

The terms of reference to this inquiry suggest that it needs to consider whether or not courts exercising jurisdiction under the Act **are** complying with their statutory requirements, and (whether they are or not), whether the legislation is adequate in protecting children's best interests. If the committee is considering the introduction of a rebuttable presumption that children share time with each parent, it is important for there to be before it reliable psychological research findings which demonstrate that such a regime would assist children, rather than parents. An important precursor to any changes in this difficult area is to speak to children themselves about their experiences of being parented across two households.

Professor Smart's interviews asked children how they felt about having parents living in different places and about spending time with both parents. In reporting their feelings she describes the physical, emotional and psychological spaces which children have to navigate in this process. Some are obvious: transportation, organising clothes, toys, homework and friendships. Other possibly less obvious aspects include: having to manage the anger, grief or depression of a parent on their own, sharing bedrooms with step-siblings, experiencing different parenting styles and attitudes, worrying about the other parent, and missing whichever one s/he has just left.

Smart refers to the fact that the majority of children she interviewed who were living in shared arrangements were acutely aware that the equal apportionment of time was very important to their parents an observation which is also made by Court counsellors. This makes it very hard for children to suggest changes to the arrangement, even when they are unhappy about it.

Smart also points out that the children in her study were not universally unhappy with the sharing of time, and emphasises that the *nature* of the parental/child relationship and the parents' ability to manage the situation are of central importance to its success for children.

She places great emphasis on the importance of *quality* rather than *quantity* of parenting, and concludes that children's happiness and adjustment are associated with having flexible arrangements, being consulted and feeling supported by parents. *'it is hard to see the wisdom in seeking to resolve family strife through the simple regulation of space and time rather than emphasising the qualities of relationships.'*

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80 see 'Children's Voices', paper presented at the Family Court 25th Anniversary Conference, Justice, Courts and Community, the Continuing Challenge on 29 July 2001 and available at http://www.familycourt.gov.au/papers/html/smart.htm,

12.1 Children's Voices in Australian Family Law

The Family Law Act provides that children whose parents are litigating may be separately represented by a lawyer appointed for that purpose[81]. Such a provision recognises that parents are not always able to put aside their own adult concerns, and that on occasions children require a separate advocate to argue for their best interests.

For several years after the Act's passage the role of the child's representative was unclear, as the legislation provided no guidance. In 1994, in the case of *Re K*[82], the Full Court reviewed the role and functions of the child's representative and suggested a list of criteria to be considered as indicia of the need for a child to have independent representation. These criteria include:

- cases involving allegations of child abuse (whether physical, sexual or psychological),
- intractable conflict,
- significant medical, psychiatric or psychological illness or personality disorder of a party or child or person having contact,
- mature child's expressed views,
- where the child is apparently alienated from one or both parents,
- where none of the parties is legally represented and
- where it is proposed to separate siblings.

The Court has recently issued a set of comprehensive guidelines for child representatives. These lay down minimum standards for their conduct in areas such as the relationship with the child, the information the child should receive, case planning and additional skills and information required for those representing indigenous children, and those with disabilities.

Of course, what a child may *want* is not necessarily what is most appropriate for the promotion of his or her best interests. Recognising this, the guidelines require the child's representative to act according to what *she or he* considers to be in the best interests of the child. This, where the child is verbal, requires the legal representative to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others.

The guidelines also stipulate that a child who is unwilling to express a wish must not be pressured to do so, and must be reassured that it is his or her right not to express a wish even where a sibling may want to do so.

Section 68F(2)(a) of the Act requires the Court to consider the wishes of a child, and give them such weight as the age and maturity of the child require. Providing an appropriate mechanism for the obtaining of such wishes is very important, but it is not always easy. Similarly, considering what weight should be given to children's views at particular ages presents a number of difficulties. Sections 68G and H of the Act respectively deal with the manner in which the court may be informed about the child's wishes, and make it clear that children are not to be required to express wishes.

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81 Section 68L
82 (1994) FLC 92-461

Children's wishes are commonly conveyed to the Court in a family report provided pursuant to section 62G of the Act which provides that in children's cases the Court may direct a family and child mediator or welfare officer to give the court a report on "such matters relevant to the proceedings as the Court thinks desirable"[83]. Such a report may then be received in evidence in the proceedings and its author will frequently be examined and cross examined on its contents. Family reports can be useful settlement tools, as they provide the parties with an objective assessment of the children's circumstances, wants and needs.

Family reports are often written on the basis of a series of interviews with the children and adults relevant to them, such as parents, family members and, possibly, teachers. This frequently involves the mediator observing how the children and adults interact with each other, either in an office or home environment. The children are interviewed and may be asked their preferences about their future living arrangements, but report writers are skilled social workers or psychologists who are very aware of the dangers associated with their responses. They may reflect parental pressure or loyalty to one or other. In some cases a bald description of what a child said may result in a breakdown in the child's relationship with the non-preferred parent, or some form of reprisal.

Sometimes, but rarely, a judicial officer will see children during the course of the hearing, possibly because they indicate that they would like to express their views directly to the judge, or because there is some apparent limitation in the evidence being presented at the trial[84].

There are difficulties associated with this, not the least being that the Family Law Rules provide that information given in an interview with a judge is inadmissible in any court, and as a result the Judge may act on information that is unknown and untestable by the parties[85]. Children may also feel intimidated by the process of judicial interview, but such difficulties can usually be avoided by obtaining the views of the counsellor and taking submissions from the child representative.

Nevertheless, the process usually employed (of children being interviewed by an experienced counsellor) is the way in which their voice can be 'heard' in most cases.

In some cases parties agree to the preparation of a report by a psychologist or social worker who is not employed by the Court, and in those circumstances that report will be tendered by consent and its author can be cross-examined by each party.

The extent to which different registries of the Court involve children, to varying degrees, in mediation sessions is being examined with a view to uniformity and best practice. This includes the carrying out of an audit of child inclusive practices across all registries.

The Court has also established a committee to examine how children might be encouraged to be more consistently involved in the family law system. Particular areas being considered include the provision of age-appropriate information about the process and giving children more consistent opportunities to be involved and heard.

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83 Section 62G(2)

84 Order 23 Rule 4(1), Family Court Rules. Note that where this occurs and the child is separately represented, the consent of the separate representative is required (Rule 4(2)). Those present at the interview may include a family and child counsellor, a welfare officer or another person specified by the judicial officer (Rule 4(3)).

85 Order 23, Rule 4(4).

13. THE ENFORCEMENT OF PARENTING ORDERS

A new compliance scheme for the enforcement of parenting orders came into operation by reason of the Family Law (Amendment) Act in December 2000. Prior to this, enforcement was effected by the traditional means of fines, community service orders and/or imprisonment and good behaviour bonds. That was not without its difficulties, particularly in high conflict cases.

Judicial Registrar David Halligan has conveniently summarised the details of the new regime in the following way:[86]

- Failure to comply with orders affecting children is dealt with separately from failure to comply with other orders...
- Part VII now contains a 3 stage "parenting compliance regime" for orders affecting children, covering prevention mediation and sanctions.
- Under Stage 1 of the parenting compliance regime, parties entering into parenting plans and persons affected by parenting orders must be provided with information about the obligations the parenting plan or order creates and the possible consequences of failing to comply with those obligations. People entering into parenting plans must be given information about the availability of programs to help people who experience difficulties in complying with a parenting plan. People affected by parenting orders must be given information about the availability of programs to help people understand their responsibilities under parenting orders and the availability and use of location and recovery orders to ensure parenting orders are complied with.
- Under Stage 2 of the parenting compliance regime, the court may refer either or both of the parties to a post-separation parenting program, and/or make a compensatory contact order, or adjourn the proceedings to allow either or both of the parties to apply for a non-maintenance parenting order that discharges, varies or suspends the order contravened or revives an earlier parenting order.
- Under Stage 3 of the parenting compliance regime, the court **must** make a community service order against the respondent, require the respondent to enter into a bond, make an order varying the order contravened if it is a parenting order, fine the respondent, or impose a sentence of imprisonment on the respondent.

Enforcing parenting orders has long been a source of frustration and futility[87], both here and in overseas family law systems. One of the major difficulties is that the imposition of a penalty such as fining or imprisoning the resident parent, or providing compensatory contact for the non resident parent, may have obvious but unintentional detrimental effects on the child.

Most orders of Australian courts which provide for the imposition of a fine or sentence of imprisonment are made in criminal proceedings, and in a context very different to that of

[86] D. Halligan "Enforcement of Parenting Orders Under the New Parenting Compliance Regime' A Paper for the Sydney Annual Family Law Intensive, 17 February 2001.

[87] National Seminar Series on the Family Law Amendment Act 2000, (March 2001), Family Law Section, Law Council of Australia, Family Court of Australia and Federal Magistrates Service. page 1

family law disputes. They are not usually projected many years into the future as are parenting orders . They rarely involve parties who have been in an intimate relationship such as marriage, or who are required, by dint of parenthood, to continue to associate, if only for the purposes of contact, over a period of many years. In addition, most criminal orders are made in a static environment and their subject matter is often a commodity, not children whose needs and preferences change as time passes. Many parents will re-partner and this of itself often alters the dynamic of the original parties' relationship and may introduce aggravating or, at the least, different factors.

Those difficulties were considered in the 1992 report of the second JSC in which the Committee recommended that the Family Law Council conduct a review of penalties that may be applied in cases of non-compliance with orders. The Council's final report, *Child Contact Orders: Enforcement and Penalties*, was released in mid 1998 and is the major source of the current three stage approach.

Resident parents may see contact orders as an interference with their family life. Such orders may involve a restriction in the location of residence that, in turn, may constrain the capacity to take up job or study opportunities or form new partnerships. These are common features of contested relocation cases (discussed elsewhere in this submission), or of applications for leave to remove the child from the jurisdiction.

Contact parents may see contact through a different lens. They may feel deprived of the child's company, and may blame the former partner for what is perceived to be the injustice of being rationed to limited periods of time. Indeed, feelings of resentment are often mutual, and in some cases intractable, and may be used to manipulate advantage by bitter resident parents.

Of particular significance is the perspective of the child. The transformation of a relationship into a timetabled obligation can involve children feeling that their time is overly regulated and, (particularly with older children), their opportunities to spend time with friends is limited and controlled. The attractiveness of contact can be undermined by the hostility that children may see or sense between their parents, particularly at hand-over points. There are also cases where children feel they should side with the resident parent from feelings of security and loyalty, and themselves devalue contact. Both residence and contact parents may manipulate their children in a variety of ways, and seek to punish their former partners through the children. This may be conscious or unconscious.

Some contact parents are unable to devise meaningful experiences during contact periods or resort to bribery, interrogating the child about the residence parent or their partner, or putting the child in a position where he or she feels guilty and disloyal. Some children are bored with the regime, and some may be anxious about spending time away from their primary caregiver. Achieving successful contact arrangements is not a simple matter which can be solved by a single, simplistic or formulaic solution.[88]

The post separation parenting program regime, which is an intrinsic component of the new enforcement provisions, has proven to be a source of considerable concern. The legislation got off to an unfortunate start when the relevant Department was unable to provide a list of the programs available. Whilst there is now such a list, it does not always give an accurate picture of what is available. Sometimes a service provider has discontinued a particular

[88] Dewar, J. (1997) "Reducing Discretion in Family Law" Vol 11 No. 3 *Australian Journal of Family Law* 309.

program, or it runs sporadically, or personnel with appropriate expertise have left the particular organisation. There may be no programs available for someone who does not speak English or who has a physical or intellectual disability, and service providers can determine whether a person referred to them is suitable or not. Contact orders pilot programs operate in Hobart, Parramatta and Perth and, following positive evaluations, government funding has recently been announced which will allow their expansion into other areas. These programs are designed to assist parents who are having significant difficulties with contact, but they cannot meet the demands of the many parents who would benefit from them.

Anecdotally self represented litigants (particularly fathers) are often showing signs of exasperation, and have difficulty understanding or accepting the onus of proof required in enforcement proceedings. Court figures show that since the implementation of the amendments in January 2001 the Court has made a total of 119 post- separation parenting orders. Thirty nine notices have subsequently been received from providers informing the Court that the person ordered to attend was found to be unsuitable, or failed to attend. In all, 33% of the orders made did not result in the parent actually attending a program.

In some cases the trigger for an enforcement application is an imprecise or inappropriate order, often made by consent. An easy response might be that the Court should not sanction such orders. But unless the matter is litigated, it is unlikely that the judicial officer concerned will have sufficient material to form that judgment. Consent orders are usually a compromise. At the time they are made one or both parties may not have fully appreciated the effect of the orders, or the orders may reflect an imbalance of negotiating power or skills between the parties, referring to some arrangements with specificity and not to others. Circumstances of the parties may change and orders can become out of date or have unforeseen and onerous effects.

The complexity of difficult parenting cases must not be under-estimated. Even after the final determination of some matters and where final orders are in place, some families require ongoing assistance and the Court may in such cases appoint a counsellor to assist them in the implementation of the orders. In some registries, counsellors carry a heavy case load of such matters.

Enforcement of such orders is different in kind from the enforcement of orders made in civil proceedings in other courts, or financial orders in the Family Court.

14. QUESTIONING THE ROLE OF THE ADVERSARIAL SYSTEM IN PARENTING PROCEEDINGS

The manner in which proceedings concerning the parenting of children are dealt with by courts needs to be re-considered. Litigation about the parenting of a child is unusual in that (unlike other civil litigation or family law financial proceedings) the child, who is most effected by the outcome, is not a party to the proceedings. The parties instead are usually the parents, who are focussing on their interests, albeit according to their belief about what is in the best interests of the child. As stated by Hayne J in *U v U*[89]:

[89] (2002) FLC 93-122 at 89,102-89,103.

"the Family Court "must regard the best interests of the child as the paramount consideration", but that does not deny the fact that there are at least three persons who will be affected by the order that is made: two adults and the child. And very often, of course, there will be other relatives of the child whose contact with the child will be curtailed if the child lives in one place rather than another."

The adversarial approach to the adjudication of proceedings under the Act was emphasised by the High Court in *R v Watson; Ex parte Armstrong*[90] and set out more recently by Hayne J in *U v U.* Although advocating an alternative approach, Hayne J made the following qualification:[91]

> " That is not to say that the Family Court is to embark upon some roving inquiry about the matter, unfettered by any regard for the evidence led and the matters which the parties seek to contest. Due account must be taken of the fact that proceedings in the Family Court are conducted in a framework of adversarial procedure familiar to the common law."

The Court has endeavoured to play a less adversarial and more active role in parenting proceedings than it does in financial proceedings, and this less adversarial approach was recognised by the High Court *Re JRL; Ex parte CJL*[92] where Dawson J said:

> *"Proceedings in the Family Court in relation to the custody, guardianship or welfare of, or access to, a child are, in an important respect, not of the ordinary kind. Under s.64(1) of the Family Law Act the court is required in such proceedings to regard the welfare of the child as the paramount consideration and under s.43(c) the court is required generally in exercising its jurisdiction under the Act to have regard to the need to protect the rights of children and to promote their welfare. Thus the jurisdiction being exercised in this case, whilst essentially judicial, was not entirely inter partes because the paramount consideration was the welfare of the child. In this respect it was a jurisdiction analogous to the jurisdiction of the Court of Chancery in wardship cases which was of a special kind, permitting procedures which would not be permitted in judicial proceedings of the ordinary kind: see In re K (Infants) (1965) AC 201. The very procedure laid down by the Family Law Act with respect to the compilation of reports by court counsellors at the direction of the court where the welfare of a child is relevant (see s.62A(1)) and the reception of those reports in evidence demonstrates the special nature of the jurisdiction arising from the purpose of the inquiry undertaken by the court. In the exercise of such a jurisdiction, some modification at least is required of the ordinary rules of evidence and procedure in order to achieve that purpose: see Sing v Muir (1969) 16 FLR 211."*

Despite his caution, in *U v U,* Hayne J suggested an almost inquisitorial role for the Court in determining a proposal in the best interests of the child, in the context of relocation cases. In the following passage he was concerned that in confining such cases to the adversarial nature of competing proposals, the Court may overlook the bests interests of the child in preference to the needs of the parents[93]:

> *"it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular "proposals" that the parents may make for the residence of, and contact with, the child. So to confine the inquiry would, in this case, have required the Family Court to ignore admittedly relevant evidence*

90 (1976) FLC 90-059. See Barwick CJ, Gibbs, Stephen and Mason JJ at 75,269-75,270.
91 (2002) FLC 93-112 at 89,102 and 103
92 (1986) FLC 91-738 at 75,391-75,392.
93 (2002) FLC 93-112 at 89,102

that was led about what the mother would do if it were decided that the child should live in Australia rather than India. More fundamentally, it would confine the Court's inquiry to what the parents suggested would be in the best interests of the child, regardless of whether those suggestions were informed, even wholly dictated, by the selfish interests of one or other of the parents. To confine the inquiry in this way would, therefore, disobey the fundamental requirement of the Act that the Court regard the best interests of the child as paramount. Those interests may, or may not, coincide with what one or both of the parents put forward to the Family Court as appropriate arrangements for residence and contact."

The Full Court of the Family Court has also identified and implemented elements of less adversarial procedures in relation to proceedings with respect to children. In doing so it has maintained a clear distinction with property matters, which are dealt with in a purely adversarial approach.

In *the Marriage of Harris*[94] the Full Court stated that "this Court has an undoubted inquisitorial role where the welfare of a child is concerned." In *Re Z*[95] Fogarty J discussed in detail the best interests of the child and traditional court process. In the result, currently in the Family Court there are procedures or approaches in parenting proceedings which could be described as less adversarial. These include the appointment of a child representative, court experts, family reports and assistance to self-represented litigants. An important example is also the Magellan project, which is discussed elsewhere in this submission.

Notwithstanding the adoption of certain less adversarial approaches to the resolution of parenting proceedings, the current position is that the parties through their lawyers, if legally represented, essentially determine the issues in each case and determine what evidence is to be adduced and in what manner this is to occur. The weaknesses in the current system have also been exacerbated in recent years as the proportion of litigants who represent themselves has increased[96]. However, whether parties are self represented or not, Judges are increasingly being presented with reams of unnecessary/irrelevant material, usually dwelling on events long past. This material is frequently adult and not child focussed and replete with allegations about what each party is alleged to have done to the other. It usually fails to focus on a future workable solution and involves the calling of witnesses who provide little or no relevant information.

As a consequence, trials become lengthier and more expensive, and the relationship between the parents (if it is not already irreparably damaged) deteriorates further, to the extent that they are unable to effectively co-parent their children in the future, to any extent, without hostility. In these circumstances the loss to the children is self-evident and the loss to the public interest is also apparent with the waste of precious resources.

The current approach weighs the Court down with irrelevant evidence, which is often focussed on the parents and their disagreements, rather than on the interests of the child. This 'false conflict'[97] between the parents clouds the judge's ability to determine the best interests of the child.

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94 (1993) FLC 92-378 at 79,930.

95 (1996) FLC 92-694.

96 'Self Represented Litigants – a Challenge: Project Report, December 2000 – December 2002, Family Court of Australia..

97 This term is taken from Langbein J H, "The German Advantage in Civil Procedure" (1995) 52 *The University of Chicago Law Review* 823 at 841.

Whilst most lawyers are competent and conscientious, they are instilled by the obligation to 'go into bat' for their clients. To act otherwise in civil and criminal proceedings would be inappropriate and may attract complaints as to competence, and even professional misconduct claims.

The Court has been examining the less adversarial approaches applied throughout Continental Europe, particularly in France and Germany. These provide a stark contrast to proceedings in the Court, despite its efforts to reduce adversarial processes. In these less adversarial systems the judge plays an active role in defining the issues to be determined, decides whether a witness is necessary and how his/her evidence is to be provided. The proceedings are conducted within a short period of time after they are commenced, and the hearings are of limited duration. Characteristically they are actively managed by the judge whose task is largely to look for a solution and who emphasises what will be best for the child in the future, rather than what might have occurred in the past.

In considering how the system might be improved the Family Court is very aware that merely grafting on another system's approach to these cases will not solve the problem, and in fact may increase existing problems. Similarly, adopting untested proposals could be disastrous. The Court is therefor proposing that once a workable model has been developed it should be piloted in a particular registry or registries and carefully evaluated to ensure that there are no unintended consequences.

There is a fair degree of consensus among experienced judges and other relevant professionals that the adversarial system developed in England for the determination of criminal and civil cases a number of centuries ago is not currently an appropriate method for the determination of family law disputes concerning children.

Many people say that they have a fear of the Court's and the time and expense involved in litigation and that they will do anything to avoid it. This attitude and approach is understandable. The Court has gone to considerable lengths to simplify its procedures, to encourage the early resolution of disputes and to make the Court more user friendly. However, it is necessary to consider whether the whole system of dealing with children's cases needs to be rethought from start to finish. While reform of trials is important it may be that more focussed intervention by the Court at an earlier stage would produce even more satisfactory results.

The Court's view is that the problem in parenting proceedings is not one of the substantive law, but rather one of the procedural law.

The Court has examined the issue of adversarial children's proceedings in Australia, and has studied the nature of less adversarial inquisitorial proceedings in certain Continental European legal systems.

The Court consequently recommends that a significantly less adversarial process would facilitate the most appropriate solution to parenting proceedings based on the best interests of the child rather than considering changes to the substantive law.

The Court believes that the best interests of the child would be more appropriately determined through a less adversarial process than a presumption of shared residence. Such procedural reform would allow for the most relevant issues to be clearly identified and examined within a

child-focussed and settlement-inducing atmosphere, with proceedings controlled by the judge rather than the disputing parties.

15. OTHER LEGAL SYSTEMS

One aspect of concern to the Court is the extent to which suggestions have been made that 'joint custody' in the form of equal time is operating successfully in the United Kingdom and the United States of America. The assumption, apparently, is that this justifies such an arrangement being trialed in Australia. The first point to be made is that the laws in these countries are very similar to our own in emphasising the sharing of parental responsibility after separation, **not** the joint equal sharing of children. The situation in the USA is made more complicated by the fact that each State has its own divorce and family law. There are thus 50 different legislative schemes, frequently augmented by different approaches taken by counties as well.

15.1 United Kingdom

As mentioned earlier, the English Children Act[98] was a blueprint for the 1995 changes to the Australian law, insofar as that legislation operates in relation to private law disputes. The Children Act came into effect following a Law Commission study and a subsequent report called *Review of Child Law and Guardianship and Custody (1988).* Its implementation was accompanied by a handbook prepared by the Department of Health, which explained that shared residence orders were not expected to become the norm as a consequence of the shared parenting provisions, as 'most children will still need the stability of a single home[99]'.

The 1988 review had previously noted:

> *"It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged."*[100]

The Children Act was also monitored for several years after its implementation by a committee chaired by a Family Division judge. This committee reported to the Lord Chancellor, the Secretary of State for Health and the President of the Family Division on whether the Act's guiding principles were being achieved and the court processes operating satisfactorily.

The Children Act removed references to 'custody' and 'access', and emphasised the sharing of parental responsibility, rather than parental rights over children. However, the English legislation is clearer in spelling out how parental responsibilities are exercised than is the Family Law Act, and provides that each parent can discharge his or her parental responsibility independently of the other, subject to a court order to the contrary. Dewar and Parker describe this as enshrining a joint independent model of shared parenting rather then the "weak

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98 Which came into operation in 1991.

99 Department of Health(1991) The Children Act1989 Guidance and Regulations vol. 1, Court Orders, London HMSO, cited in Smart, C, Neale, B and Wade, A The Changing Experience of Families and Divorce, (2001) at page 126

100 at 4.12

consultative model" which operates in Australian law, whereby obligations to consult are merely *implied* [101].

The Children Act also contains a provision that courts should only make an order if it can be shown that it would be better for the child than not making an order. This is referred to as the 'no order principle', which is not a component of the Australian law. As in Australia, the principle of the best interests of the child is enshrined in the legislation.

Where parenting disputes are litigated the English courts take an identical approach to that taken by the Family Court of Australia. In *A v A (Minors) (Shared Residence Order)* [1994] 1 FLR 669; Butler-Sloss LJ (as she then was) at 677 said this:

> *"...it will be unusual to make a shared residence order. But the decision whether to make such a shared residence order is always in the discretion of the judge on the special facts of the individual case. It is for him alone to make that decision. However, a shared residence order would, in my view, be unlikely to be made if there were concrete issues still arising between the parties which had not been resolved, such as the amount of contact, whether it should be staying or visiting contact or another issue such as education, which were muddying the waters and which were creating difficulties between the parties which reflected the way in which the children were moving from one parent to the other in the contact period."*

Her Ladyship went on to say (at 678):

> *"If a child, on the other hand, has a settled home with one parent and substantial staying contact with the other parent, which has been settled, long-standing and working well, or if there are future plans for sharing the time of the children between two parents where all the parties agree and where there is no possibility of confusion in the mind of the child as to where the child will be and the circumstances of the child at any time, this may be, bearing in mind all the other circumstances, a possible basis for a shared residence order, if it can be demonstrated that there is a positive benefit to the child."*

Concerns have recently been expressed about the extent of allegations concerning family violence, and the damage caused to children who witness such violence. In *Re L, V, M and H (Contact: Domestic Violence)*[102] the Court of Appeal heard four appeals by fathers against orders which had denied them contact with their children where there had been proven domestic violence.

The evidence included a report prepared by two psychiatrists at the Court's request which looked at the implications for children and adolescents of such violence.[103]

All appeals were dismissed. The Court of Appeal endorsed the assumption that contact with the non-resident parent is generally beneficial to a child, but held that it can no longer be assumed, where violence is alleged, that contact is in the child's best interests. The judgments stressed the need for courts hearing such applications to consider the conduct of the parties towards each other and towards the child, the effect of the conduct on the child and the resident parent, and the motivation of the parent who seeks contact. Partner violence involves

101 Dewar, J and Parker, S (1999) The Impact of the New Part VII , 13 AJFL 96 – 116 at 99.
102 [2000] FLR 334
103 'Contact and Domestic Violence – the Experts' Court Report', C, Sturge and Glaser, D, [2000] Family Law, September 615

a significant failure in parenting and a failure to protect the child's carer and the child emotionally.

At almost the same time the Advisory Board on Family Law: Children Act Sub-Committee released its *Report to the Lord Chancellor on the Question of Parental Contact in cases Where There is Domestic Violence.*

15.2 United States of America

Legislative responsibility for divorce in the United States rests with the States, not the Federal government, and as a consequence the laws vary, sometimes quite considerably, across the country, both between States and sometimes even within States, at county level. In addition to the volume of different legislation, a serious impediment to any analysis of those laws is the use of different terminology.

Most legislation draws a distinction between *legal* custody and *physical* custody, and even in the few States that promote joint *physical* custody there still remains a distinction between a designated principal care giver/primary residence parent and the visiting/access/sharing parent.

The American sociologist Isolina Ricci is the author of a very popular and widely read book, *Mum's House, Dad's House, Making Two Homes for your Child.* In the second and most recent edition she comments[104]:

"For most people, the term "joint custody" conjures up an expectation for strict and equal division of time and authority of a child, going back and forth. Nevertheless, most legal interpretations of "joint custody" are that each parent is significantly involved in raising their child. It does not have to mean equal time. Although an equal division of time between homes is more popular now than it was twenty years ago, a strictly equal division of time is chosen by only a small percentage of families. A more common division is 65-80% time in one home and the remainder in the other. How often the children go between homes should depend on the children's TLC needs and their adaptability".

A useful summary of the current American position is provided by Joan Kelly in "The Determination of Child Custody in the USA" as follows: [105]

> *"Nearly all states have distinguished in their legislation, either explicitly or implicitly, between legal and physical custody.* ***Legal custody*** *refers to the parental right to make major decisions regarding the child's health, education, and welfare.* ***Physical custody*** *refers to the living arrangements of the child on a day to day basis. There are two basic custody arrangements in the United States, sole custody, the most common, and joint custody. Sole custody assigns to one parent all legal rights, duties, and powers as a parent, including the right to make all decisions. In sole custody, the child resides with the custodial parent; the noncustodial parent is given the right to visit the child. The limited rights and privileges of the noncustodial parent have been expanded in most states over the past decade to provide equal legal access to child-related*

104 (1997) At page 167.
105 ~~http://wwlia.org/us-cus.htm~~

information of an educational and medical nature, and to make medical decisions in emergencies when the child is in the noncustodial parent's care.

In joint custody arrangements, each parent retains certain rights and responsibilities with respect to the post-divorce parenting of the children.

Considerable variation exists between states in the definition of joint custody, and under what circumstances it will be permitted and denied. With joint legal custody, both parents retain power to make decisions about their children, although in many states, the particular decisions to be jointly made must be specified in order to preserve the authority.

Joint physical custody statutes are intended to indicate that the child lives with both parents on some shared basis, each parent assuming day to day parental responsibilities. Joint physical custody statutes do not define how much time the child resides with each parent, and are not interpreted as dictating a 50/50 residential timesharing. Thus, parents may elect joint physical custody, but the child may spend anywhere from 25% to 50% of his time with one of his parents, and the remainder with the other. The intent, for many fathers seeking joint physical custody language, is to avoid the label of "visitor" in the child's life, and to have the child "live" in that parent's home more than the usual limited visitation time.

The legal trend over the past decade has been to favor shared parental legal authority over shared residential custody. While in most states, parents can agree to both or just one of these legal arrangements, the most common arrangement remains that of joint legal custody and sole or primary physical custody to one of the parents, most often the mother. In very unusual circumstances, with a history of extreme conflict over educational, medical, or religious values, parents may have joint physical custody, but one parent is assigned sole legal custody."

A careful reading of the legislation of States that are said to have a presumption in favour of joint custody shows that their law is essentially the same as is contained in ss 60B and 61C(1) of the Family Law Act, namely that parents are encouraged to share their legal parental responsibilities for their children after they separate, but that the best interests of the child predominate.

The recurrent characteristic of these statutes is that so many areas require parental co-operation, that the mere opposition to the grant of a shared arrangement almost guarantees that no shared order as to time will be imposed.

15.3 Canada

The Canadian government has been considering the introduction of family law reforms relating to child support and parenting for several years. A Special Joint Committee on Child Custody and Access reported in 1998 and argued that further Canadian research should be undertaken before any legislative change was recommended. The following year the Ministers Responsible for Justice[106] reviewed and adopted a work plan, agreed to hold public

106 In Canada the Federal, Provincial and Territory legislatures all have some responsibility for family law.

consultations and formulated a set of principles to guide the reform process. In March 2001 the Federal, Provincial and Territorial governments published a consultation paper *Putting Children's Interests First: Custody, Access and Child Support in Canada.* Public participation was encouraged via both written submissions and oral hearings and one of the options for public discussion was the introduction of shared parenting. This was described as not meaning *'that children must live an equal amount of time with each parent. The starting point for any parenting arrangement, however, would be that children would have extensive and regular interaction with both parents, and that rights and responsibilities, including all aspects of decision making, but not including residence, would be shared equally or nearly equally'.*

The final report of the Family Law Committee was published in November 2002 and was the product of extensive research and consultations with family law professionals, parents, advocacy groups and interested Canadians, as well as ministers and officials from the Federal, provincial and Territorial tiers of government. The report did not reach a consensus on any of the parenting options, although it agreed specifically *not* to recommend shared parenting because *"Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child.*

There should be no presumptions in law that one parenting arrangement is better than another. It is also a term that seems to focus on parent's rights rather than the child. Its meaning and application is ambiguous and this may itself promote litigation"[107].

The report also recommended quite substantial amendments to the Divorce Act, including the promotion of non adversarial dispute resolution mechanisms and the retention of court hearings as mechanisms of last resort.

The 1998 report of the Special Joint Committee had several years earlier come to the same conclusion as the Family Law Committee in relation to the introduction of a shared parenting presumption. The Joint Committee report had noted:

> *"Presumptions in favour of joint custody or the primary caregiver have been adopted in a number of jurisdictions, but in some cases legislatures have subsequently withdrawn them after finding that they have not had the intended desirable effect. Presumptions that any one form of parenting arrangement is going to be in the best interests of all children could obscure the significant differences between families.*[108]*"*

The federal Minister of Justice introduced Bill C-22 in December 2002. If enacted, the Bill will remove the concepts of "custody" and "access" from the legislation, will provide for the making of parenting orders which will regulate the exercise of parental responsibilities and will include a list of mandatory criteria under the best interests umbrella in a similar vein to the Family Law Act's section 68F(2). These criteria emphasise family violence considerations such as (i) the safety of the child and other family members, (ii) the child's general well-being, (iii) the ability of the person who engaged in the family violence to care for and meet the needs of the child and (iv) the appropriateness of making an order that would require the spouses to cooperate on issues affecting the child.There is neither an explicit statement regarding a child's right of contact, nor a shared parenting presumption or exhortation in the Canadian Bill.

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107 Ibid at page vii.
108 Canada, Special Joint Committee (1998:42)
110 *A v A: Relocation Approach* (2000) FLC 93-053

16. CONCLUSION

The Court does not make a specific submission as to what the Committee should do.

It does not do so advisedly, for it is for the Parliament and not the Court to determine what the law is.

The Court will, as the law requires it to do, implement any legislation that is passed by the Parliament. It has the task of interpreting such legislation and will do so according to well-established methods of statutory interpretation. If the Committee's recommendations are adopted by Parliament, the Committee's own report will be one of the source documents to which the court will refer in interpreting that legislation.

The Court does have a wealth of experience in the area however and what it has attempted to do in this submission is point to the complexity of the problems involved in determining issues of residence and contact, and to warn against what may appear to be simple solutions.

A system of "one size fits all" is rarely appropriate to children, who after all are aged anything between zero and 18 years of age and who are at different developmental stages, quite apart from having their own individuality as human beings. In addition their environment, cultural background and upbringing differs markedly from family to family.

They may be the result of anything from a long-term loving relationship between their parent to a single incident between parents who have never shared a relationship. The parents may have been married or unmarried and the child may be living as one of a number of siblings from different relationships. The same situation may apply in relation to the other parent when the child spends time with him/her. To incorporate presumptions into this area therefore requires great care.

This is a most important area of the law affecting the lives of many Australian children. A heavy responsibility is thus placed upon the Committee to act judiciously and in a way that will best advance the lives of the children affected. The Court urges that the Committee take care to approach its task from the point of view of the children and their best interests, rather than those of the parents.

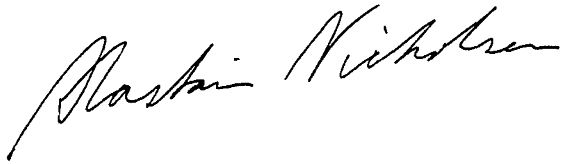
Family law issues should not be gender issues as so many try to suggest and the maintenance of a child focus is the best way to avoid this.

The Committee is urged to treat with great care the assertions of the various pressure groups which will no doubt make submissions to it. The Court's experience is that there are usually two sides to the story in family law matters and the situation is rarely black and white, but rather various shades of grey.

The Court suggests that the Committee may well find that the solution to such problems as currently exist in the family law area is not a legislative one.

There are many improvements the Court considers could be directed at process and the issue of the proper representation of people in family law matters is another that requires consideration.

The court remains ready to assist the Committee in any way that it can and looks forward to providing any assistance that it may require.



The Hon Alastair Nicholson AO, RFD
Chief Justice
Family Court of Australia

APPENDIX 1

OVERVIEW OF THE COURT'S CASE MANAGEMENT SYSTEM

From the time a party first contacts the Court with any dispute arising from their separation, the Court provides information and services which meet the individual needs of the client and family.

A process of Case management has been developed by the Court. The overriding objective of this case management system is to enable it to deal with cases justly and expeditiously. So far as practicable, this means dealing with each case in ways which are proportionate to the:

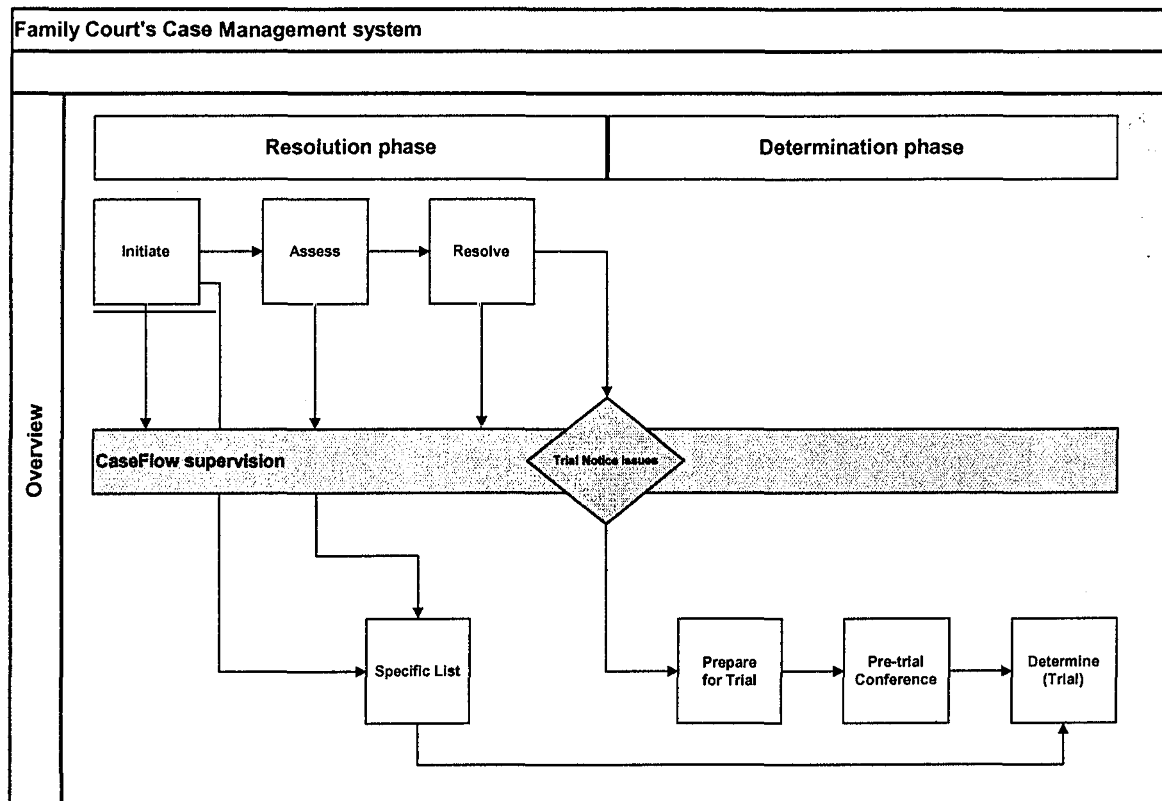
- complexity of the issues;
- gravity of the matters alleged;
- unresolved risks involved for children;
- concerns raised in relation to the welfare of children;
- amount of money involved; and
- financial position of each party.

In addition the Court has the responsibility to:

- facilitate the just resolution of disputes, promptly and economically.
- do justice and ensure promptness and economy.
- provide timely intervention, whether by conciliation, mediation or judicial determination.
- ensure uniform access to its services nationally.
- set realistic time limits for case preparation which have regard to the interests of individual parties and their children.
- inform parties that the overwhelming majority of cases are resolved by agreement and encourage the parties to believe that settlement is the likely outcome.
- facilitate the commitment and co-operation of the Court, parties, legal representatives, the legal professional associations and other relevant agencies to the administration of family law and of the case management system.

The case management pathway is a flexible process which enables events to be selected and conducted to meet the individual needs of each family. The Court also recognises that some cases involve features or issues which require special management. Judicial officers, Deputy Registrars and Mediators identify these cases which benefit from management involving judicial officers, for example the Magellan initiative, Special Medical Procedures, Hague Convention child abduction applications, and long cases.

An overview of this process is illustrated below:



In some circumstances, where the best interests of the child warrant, the court may appoint a legal representative for the child. The child representative assists the Court to make decisions in the best interests of the child by obtaining and placing evidence before the Court as to what is in the child's best interests. During the course of a case the child representative assists the court and the family to adopt a case management plan appropriate for that family.

A number of resources provide clients with assistance and information regarding the court's processes and that of outside agencies including:

- Family Court Book
- Family Court website, in particular Self Represented Litigant's section – Step by step guide Case Management Directions

The Court is aware that parties may have concerns regarding personal safety and family violence. In managing a case the Court has regard to these concerns.

The Case Management pathway applies to all applications before the Court including financial and parenting cases. This summary is limited to parenting cases which are the focus of this submission.

The Three Phases of Case Management

The Case management process (detailed in the Case Management Directions and supported by the Family Court Rules) comprises three phases, Prevention; Resolution; Determination.

Prevention Phase

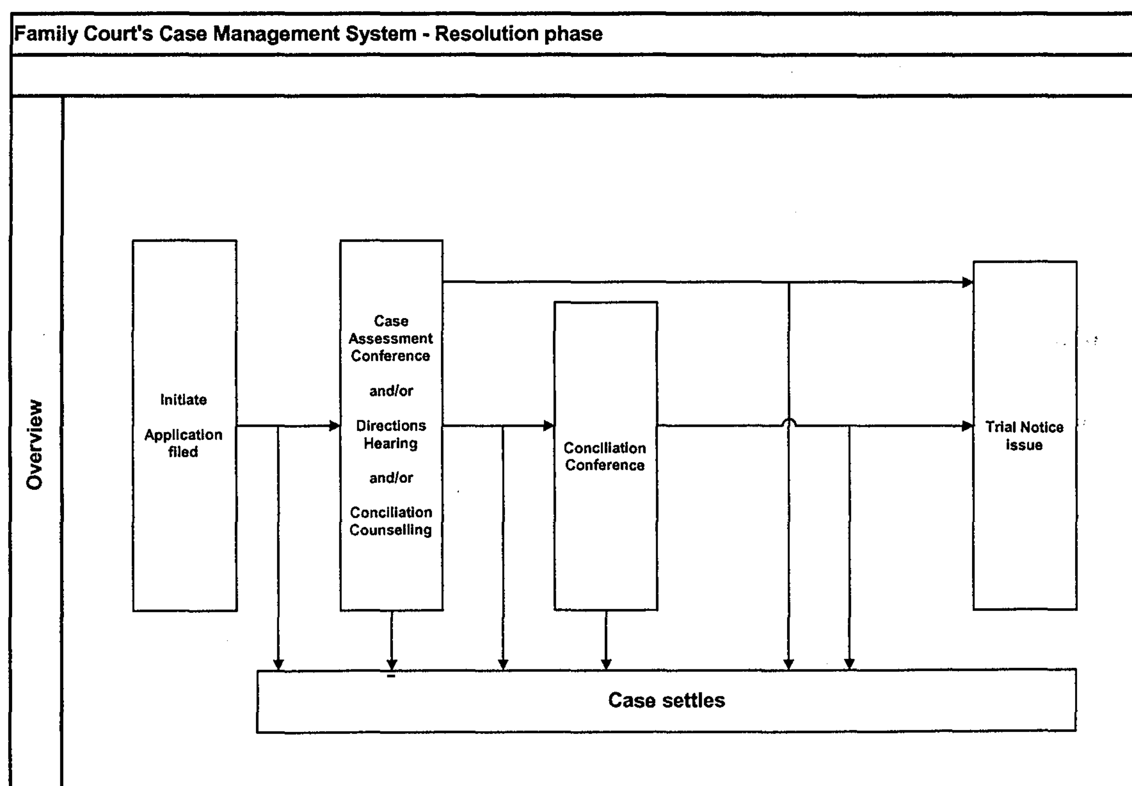
The purpose of this phase is to provide information and assistance to separated families. In particular the Court is concerned to:

- ensure provision of with relevant information;
- ensure that parties are referred to external agencies,
- ensure, where resources permit, that voluntary counselling is made available to discuss issues relating to their children.

Resolution

In this phase the Court assists parties to focus on the needs of the individual family and provide Court events which maximise the family's opportunity to resolve their issues through negotiation and other resolution strategies. This stage commences upon a party filing an application in the Court.

The case management pathway in the resolution phase is illustrated below:



During the resolution phase, parties participate in a range of events which are tailored to meet the requirements of that particular family.

Resolution events are able to be conducted in a flexible manner which has regard to any concerns relating to personal safety and/or family violence. One example of such flexibility in the Court's approach is the ability to conduct conferences with parties in separate rooms or by telephone link.

Resolution events include :

- Information Session
- Case Assessment Conference
- Directions Hearing
- Interim and/or Procedural Hearing
- Joint Conciliation Conference
- Conciliation Counselling

Information Session

The Information session is a general session where the Court provides information concerning:

- Separation and common emotional experiences that arise when relationships break down
- The needs of the children , and the responsibilities of parents after separation
- How Family Court mediation services may help to resolve disputes and build parenting skills
- How the Family Court operates
- The role of lawyers and how to maximise their services.

In many cases, this general information session is immediately followed by a Case Assessment Conference which is convened by a Court mediator and/or Deputy Registrar (court lawyer).

Case Assessment Conference

This is the first major event most people will attend at the Court after the filing of an application. Parties and their lawyers (if represented) generally participate in these conferences by attending personally except where factors such as distance can be addressed by telephone attendance.

The **purpose** of the Case Assessment Conference is to assist the parties and their lawyers to identify, communicate and negotiate issues in dispute. In particular this process enables parties to :

- identify areas of agreement
- identify areas of disagreement.

In respect of those **areas of agreement** concerning proposed arrangements for children, the Court mediator and/or Deputy Registrar will discuss with the parties the practical implications

and where appropriate make Consent Orders. This allows the separated family to resolve their dispute at the earliest opportunity .

Where **areas of disagreement** are identified the Court has a range of case management options available to facilitate and encourage parties to reach agreement in respect of arrangements for their children, including those set out in the diagram below:

Category	**Option**
Dispute resolution	• Mediation (children's cases) • Conciliation conference (financial cases) • Joint conference (children and financial cases) • Arbitration (financial cases) • Referral of a single issue to case management judge list • Judicial settlement conference
Specialised Court program	• Parenting after separation group • Programs for special management of abuse cases • Utilising the Aboriginal family consultants
External referral	• Facilitating contact pilot program • Mediation and relationship counselling • Referral to the child support agency
Case Management	• Order for a family report • Order for an order 30A expert report • Order for children's representative to be appointed • Notification of suspected abuse or risk of abuse of a child under s.67ZA • Long cases list • Judicial management • Transfer to the Federal Magistrates Service • Copy of the personal protection order to be placed on the Court file • Assessment of jurisdiction (judge, judicial registrar or FMS) • Direct lawyers to provide costs advice • Orders to serve third parties • Directions for obtaining valuations • Directions for discovery and inspection of documents • Granting leave to issue subpoenas • Set down for interim hearing • Set down for final hearing

The Deputy Registrar adopts the case management options appropriate to the needs of the individual family through consultation with the parties and their lawyers.

Directions Hearings

A Directions Hearing is conducted by a Deputy Registrar and is the first Court event scheduled in circumstances where the case is not allocated a Case Assessment Conference or interim hearing.

The Directions Hearing date is an opportunity for the parties and their lawyers(if represented) to negotiate the issues in dispute. If the dispute is resolved through negotiations the Deputy Registrar can make Consent Orders to finalise the case and remove the application from the Court list. Where the issues are not resolved, the Deputy Registrar will consider with the parties and lawyers the most suitable case management options for the individual case and

make appropriate directions tailored to aid the parties to resolve the issues in future resolution events.

Interim and Procedural Hearings

Where parties are unable to reach agreement concerning short term arrangements for their children and require an interim decision a party can apply to the Court for an interim Order.

Some interim applications are urgent and upon assessment by the Court the case may be listed urgently. Once the interim application is decided, the Judicial Officer makes appropriate directions tailored to aid the parties to resolve issues in future resolution and/or determination events.

Joint Conciliation Conferences

A Joint Conciliation conference is conducted by a Deputy Registrar and Mediator in circumstances where the parties disagree concerning issues of property and their children. The Conference is an opportunity for the parties to explore the issues in dispute and reach an agreement on some or all issues.

Conciliation Conferences

This is conducted by a Court Mediator who guides the parties through discussion on separation issues and the needs of the children. These conferences can be tailored to meet the needs of the clients, for example. If distance is an issue, the conference can be held by confer-link, if family violence is an issue the conference can be conducted using separate interviews. The focus is to consider the impact of the parental separation on the needs and welfare of the children and to assist in negotiating living arrangements or contact arrangements. During such a process the parents may be able to achieve a problem-solving strategy that will allow for future conflict resolution in their case.

Determination Phase

There are some disputes which parties are unable to resolve by agreement. When all reasonable options for the individual family in the Resolution phase have been explored and it is decided that a case should be prepared for trial, parties enter the Determination Phase.

The purpose of this phase is to ensure parties are prepared for a trial (having filed all necessary material) and the trial is appropriately listed.

In this phase, opportunities to negotiate and resolve issues in dispute are still available.

The determination events are focussed on ensuring parties are prepared for trial where they cannot resolve the remaining disputed issues

The events include:

- Issue Trial Notice;
- Preparation of a Family Report (where appropriate)
- Pre Trial Conference
- Trial

Issue Trial Notice

The purpose of this event is to ensure that orders made are appropriate to the individual case and enable each party to prepare their case for trial. This event is generally conducted by a Deputy Registrar who obtains information from the parties which identifies unresolved issues and makes appropriate orders. These generally include orders for:

- Parties (and lawyers, if represented) to attend a Pre Trial Conference on a particular date (this is the next step in the case management pathway);
- Parties to file and serve all affidavits containing the evidence of any witnesses by a particular date;
- In appropriate cases, parties to participate in the preparation of a Family Report; and
- Particular steps to be taken by parties to ensure the judge has sufficient information available at the trial to make a decision.

Parties are given information about the order and the steps which need to be taken. Self represented parties are also given the "Preparation for Trial" brochure. This brochure is available to represented parties. It provides information concerning preparation for and conduct of a trial.

During this phase cases are managed by case coordinators. Parties are able to contact that person to obtain procedural information and assistance regarding their particular case.

Preparation of Family Report

In matters involving children the Court may decide to order that a Family report be prepared. Its primary purpose is to assist the Judge at the Trial, however it can have the benefit of assisting the parties and their legal practitioners to reach an agreement. Family Reports are prepared by family and child counsellors (which include court counsellors) and welfare officers appointed under Regulation 8 of the Family Law Regulations.

A Family Report is a professional appraisal of the family from a non-legal and non-partisan perspective, independent of the case presented by either party to a dispute. This comprehensive and impartial social science perspective is otherwise not available to the Court, and has the functional value of contributing to informed and child-centred judicial decisions.

The social science perspective is unique as it draws on the skills of qualified professionals who have the experience and knowledge to interview and assess children, in order to report to the Court on the attachments, wishes and needs of children and their relationship with their parents.

Court counsellors, other family and child counsellors and welfare officers appointed under Regulation 8 are expert witnesses. Like any expert, if the counsellor believes that there are other matters which are not included in the order of the Court but which nonetheless are relevant to the proceedings, inasmuch as they may assist the Court in the determination of that course which best promotes the welfare of the child (the paramount consideration), then the Act by s.62G(4) recognises the counsellor's privilege, if not the counsellor's obligation, to include these matters in the report. Furthermore the counsellor's positive duty to protect the welfare of children was outlined by the Chief Justice in Re Karen and Rita (1995) FLC 92-632.

Like any other expert giving evidence to the Court, the court counsellor must be able to justify the reasons for forming a view or opinion. These reasons should be clearly stated in the report and the Counsellor should be prepared to be examined on their report in Court during the hearing of the matter.

Pre Trial Conference

The Pre Trial Conference is conducted by a Deputy Registrar to decide whether a matter is ready for trial, and if it is, to set Trial dates. The conference involves all parties and lawyers (if represented).

The Deputy Registrar also provides information to parties and lawyers (if represented) regarding procedural issues and makes orders for final steps to be taken by parties in the period before the trial date.

The Trial

This is the final hearing of parties' dispute before a Judge or Judicial Registrar who, after hearing all arguments and from all witnesses, will make a decision and orders that will finalise the matter. The length and conduct of the trial is tailored to meet the individual needs of the parties in that case and ensure the disputed issues are addressed.

APPENDIX 2

RELOCATION – THE CURRENT LAW

A v A: Relocation Approach

In *A v A: Relocation Approach*[110] the Full Court constituted by Nicholson CJ, Ellis and Coleman JJ delivered a judgment which set out the specific steps which must be addressed in a relocation dispute. That approach constitutes the current law in Australia and is in the following terms:

> *"In determining a parenting case that involves a proposal to relocate the residence of a child either within Australia or overseas, courts of first instance should adopt the following guiding principles:*
>
> *(a) The welfare or best interests of the child, as the case may be under the relevant legislation, remains the paramount consideration but it is not the sole consideration.*
>
> *(b) A court cannot require the applicant for the child's relocation to demonstrate "compelling reasons" for the relocation of a child's residence contrary to the proposition that the welfare of the child would be better promoted by maintenance of the existing circumstances.*
>
> *(c) It is necessary for a court to evaluate each of the proposals advanced by the parties.*
>
> *(d) A court cannot proceed to determine the issues in a way which separates the issue of relocation from that of residence and the best interests of the child. There can be no dissection of the case into discrete issues, namely a primary issue as to who should have residence and a further or separate issue as to whether the relocation should be "permitted".*
>
> *(e) The evaluation of the competing proposals (properly identified) must weigh the evidence and submissions as to how each proposal would hold advantages and disadvantages for the child's best interests.*
>
> *(f) It is necessary to follow the legislative directions espoused in ss 60B and 68F of the Family Law Act 1975 (Cth). The wording of s 68F (2) makes clear that the Court must consider the various matters set out in (a) - (l) of that subsection.*
>
> *(g) The object and principles of s 60B provide guidance to a court's obligation to consider the matters in s 68F (2) that arise in the context of the particular case.*
>
> *(h) It is to be expected that reasons for decision will display three stages of analysis, namely:*

1. *A court will identify the relevant competing proposals;*

2. *For each relevant s 68F (2) factor, a court will set out the relevant evidence and the submissions with particular attention to how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to s 60B:*

As one, but only one, of the matters considered under s 68F (2), the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue. Paragraph 9.63 of B and B: Family Law Reform Act 1995 (1997) FLC 92-755 is no longer an accurate statement of the law.

The ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way.

Even where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves, despite the inevitable implications they have for the child's contact with, and access to, the other parent.

On the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration.

The process of evaluating the proposals must have regard to the following issues:

1. *None of the parties bears an onus:*

   In determining a parenting case that involves a proposal to relocate the residence of a child, neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child.

   That decision must be made having regard to the whole of the evidence relevant to the best interests of the child.

2. *The importance of a party's right to freedom of movement:*

   In determining a parenting case that involves a proposal to relocate the residence of a child, care must be taken by a court to ensure that where applicable, it frames orders which in both form and substance are congruent with a party's rights under s 92 of the Constitution, where applicable.

   In determining a parenting case that involves a proposal to relocate the residence of a child and in deciding what is in the best interests of the child, the court must consider the arrangements that each parent proposes for the child to maintain contact with the other and, if necessary, devise a regime which would adequately fulfil the child's rights to regular contact with a parent no longer living permanently in close physical proximity. If the court is not satisfied that suitable arrangements have been made for the child to have contact with the other parent, it may be necessary for the court to order

a regime which would best meet the right of the child to know and have physical contact with both its parents.

3. *Matters of weight should be explained:*

   In determining a parenting case that involves a proposal to relocate the residence of a child, a court must consider all the relevant matters referred to in ss 60B and 68F (2) and then indicate to which of those matters it has attached greater significance and how those relevant matters balance out.

In a parenting case that involves a proposal to relocate the residence of a child, no single factor should determine the issue of which proposal is preferred by a court."

Glossary of Terms

Access – contact
The use of the word "access" was replaced by the word "contact" in changes to the Family Law Act 1995. Access arrangements can be made by agreement or by Court order.

Appeal
A procedure which enables a person to challenge Court decisions.

Applicant
The person who first comes to Court asking for an order to be made.

Case management
A system used by the Court to help clients to achieve a just, prompt and economical resolution of their dispute.

Consent orders
Orders made when both parties come to an agreement. The orders are lodged in writing (known as 'Terms of settlement') for approval by the Court.

Custody – residence
The use of the word "custody" was replaced by the word "residence" in changes to the Family Law Act 1995. Residence arrangements can be made by agreement or by Court order.

Directions hearing
The date when a matter first comes before the Court either at the conclusion of a case conference or in a separate list.

Filing
Lodging a document, in person or by post, with a Court Registry.

Interim and procedural orders
Hearing of an application for an order other than a final order. The list of such hearings may be called a 'Duty List' or 'Judicial Duty List'.

Mediation
Conferences held by mediators trained in law, social work, or psychology which aim to settle child related or combined child-related and finance issues by agreement rather than at a hearing.

Parties
Parties to proceedings. They include the applicants and the respondents.

Pre trial conference
Case heard by a deputy registrar and an opportunity to settle before the case is listed for trial

Pre-filing Conciliation
Conference held by legally trained registrars which aim to resolve financial disputes by agreement rather than at a hearing.

Respondent
The person who responds to an application by agreeing to, or opposing, the orders sought by the applicant.

Self-represented litigants
Parties who are not legally represented.