Submission

to

The Standing Committee on Family and Community Affairs

Inquiry into Child Custody Arrangements

In Family Separation

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SANCTUARY POINT NSW 2540

11 August 2003

Introduction

This submission has been prepared by myself having what I believe to be an unusual position. I have a close male relative who has been separated and divorced from his former wife, the mother of his teenaged son, for five years. I have seen the issues of child custody and support that have arisen there. I also have several friends, mothers and fathers, in various stages of child custody issues. I am a grandparent of a teenaged child of divorced parents.

I also have close friends and relatives who are professional social workers dealing with family issues. I hold a double major degree in psychology and education (gained in 1985 at UNE) that I believe helps give me an ability to analyse some of the issues involved in the problems.

My submission is not in all respects the views of any one or more of the above persons. It is the result of my gathering evidence and views of those people, and reading the extensive literature available to professional workers in the field, plus discussions with many members of the general community who see the problems that arise under the present system.

I realise that there are many more issues than those I have dealt with here.

Please note that I have outlined several cases to illustrate my points under the heading Term of Reference (b): *'Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children'.* The cases have been placed on pp. 16-17 and headed CONFIDENTIAL. I request those cases to be Confidential to the committee and not published because, although names have been suppressed, friends and relatives of the parents would recognise the cases if published.

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Structure of this submission

Complying with requests from the committee, this submission will be in the following order, with my hope that members will read further than the Summary.

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Summary of this submission

Item 1 — General

(Discussed in full on page 7)

In my experience some parents, when they realise that their relationship has broken down, are able to come to agreements about child custody arrangements with minimal conflict. These parents are cooperative, flexible, understanding, respectful of the rights and views of their ex-partner, and loving of their child or children. When one or both parents in a failed relationship don't have these qualities, the result is usually conflict, stubbornness, hatred, and children raised in a tense atmosphere.

Separating parents have to be shown ***and convinced*** that cooperation, flexibility and understanding by both parties are necessary to avoid wasting very large amounts of their money and their time, with a strong possibility of no gain for themselves and an unhappy childhood for their children. If they can be convinced of this, the result should be fewer cases coming before the judicial, counselling and mediation systems, less anger in the community, and less public and private expenditure on the problems that currently exist. Most of all it should mean children growing up to be better-adjusted, useful and happier citizens.

From my research, fathers are not being listened to. This could be the result of a hidden bias, reflecting society in the 1970s, but not 2003.

Recommendation:

A more proactive, positive, coordinated approach must be brought into the system at an early stage. Editors skilled in plain English should be used in cooperation with professional writers and social workers aimed at producing attractive, readable, informative booklets that will convince separating parents to act in a sensible manner when deciding what to do about their children. Skilled speakers at meetings of parents can also be employed. Secondary school pupils should also be targeted.

Any hidden biases need to be eliminated by improved staff training in both the Family Court and Child Support Agency.

Item 2 – The existing child support formula

(Discussed in full on page 9)

There is currently some dissatisfaction in our society with the financial aspects of the child support system. In my experience and research, this is mainly due to what can appear to be large amounts of money being paid by fathers to mothers especially when mothers come into better circumstances than in the immediate separation. In spite of the known formula of 18% for one child, 27% for two children, etc. additional formulae seem to be operating at the Child Support Agency that are difficult to fathom. Several fathers have told me that if a review is requested because of changed circumstances, fathers are asked to provide firm, precise, documentary evidence in support of their case, while mothers often appear to have their claims accepted on their verbal statements. Research shows that some fathers can be put into financial circumstances that stop them providing adequate accommodation for over-night stays by their children. Greater transparency of exact factors operating in the child support agency would settle many reasons for anger.

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My personal knowledge of six broken families—four fathers, and two mothers unrelated to the fathers—show that those fathers are living in difficult circumstances and are bitter about the lack of fairness in the system. Both mothers, while unhappy about the way their marriages turned out, are reasonably happy about the system (see Confidential Cases at end of this submission). None of these is a complex case, due mostly to the flexibility and wish by one parent to avoid conflict. But the fathers have good reason to feel badly treated.

Recommendation:

Monthly amounts of child support, possibly above a petty cash item of, say $100, should be subject to a written account. Accounting forms should be available free from the Child Support Authority, completed and signed by the person receiving the child support, and to be forwarded to the person paying the child support. In cases where there is a contribution to child support from both parents (that is where both parents have an appropriate income), the person to whom child support is paid should indicate his or her contribution to each item. When a residential parent moves into a new partner's home, CS payments should be modified to take this into account.

An educational trust fund should be established for each child to which a proportional amount of the child support payment payable by each parent be contributed.

Item 3—What are 'the best interests of the child' (Page 10)

This term is widely used, but is so difficult to define or for experts to agree upon that it should only be used sparingly. What is in the best interests of one child might not be in the best interests of another.

Vague concepts such as 'a loving and caring environment' are obvious and accepted by everybody, but many more factors must be considered when decisions and judgements have to be made about what is 'in the best interests of a child'. We can offer more detailed views on what we think is ***not*** in the best interests of the child, such as the *Law Reform Commission Report No. 73, (1995)* does, but no complete all-inclusive definitions can be prescribed.

Recommendation:

I can see no solution to this dilemma other than what is stated in the Family Law Council Report to the Attorney General (1996); Involving and representing children in family law (1996): 'Council confirms the view expressed in its discussion paper that the "best interests" principle is a matter which must be determined in (each) individual case'.

Item 4—A presumption of equal time (Discussed fully on page 12)

The practical use of a concept of equal contact time will be so difficult to implement and adhere to that other concepts need greater investigation. The gender-based role modelling and age-based development issues need more emphasis than concepts of equal time. Private agreements between sensible

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parents are the most desirable. Where parents cannot agree, mediation by trained, experienced, unbiased mediators is the next most desirable method of determining what time arrangements can be adopted. A Family Court judgement is the most rigid and expensive method of determining a residential or contact time arrangement for a child and the most likely method to leave one or both parents still unhappy with whatever finding is arrived at regarding residential or contact time.

Recommendation:

I recommend that any proposed policy for 'equal time' be not adopted until further research has shown that:

a: It can be applied without an increase in conflict and bitterness.
b: It can be applied in 'the best interests of the child'.
c: It can be applied without increasing costs of child support for both parents.
d: Counselling is available to parents and children if stress becomes a problem.
e: Having two homes does not affect the stability of children.
f: Education is not interrupted.

Item 5—Contact with grandparents and other persons (Page 15)

Contact with other persons, including grandparents, is an issue that needs close examination. Contact with aunts, uncles, cousins and grandparents is desirable, but is loaded with difficulties. Separated parents in conflict are unlikely to agree when, where, who and how contact with extended family is to be carried out. One researcher makes the observation that the resident parent (usually the mother) is in the position of *'gatekeeper'*, controlling contacts of the child (*Parkinson & Smyth 2003*, p.15). If there is serious conflict, visits to the extended family of the non-resident parent can be difficult or impossible.

It would be reasonable to introduce an order mandating visits by grandparents to a child on birthdays and Christmas so that gifts could be given in person. New rules for court orders could be introduced, but these would probably be necessary only in the cases where serious conflict occurs. Handling complaints and enforcement would add a significant burden to the system. Proactive information and education for separated parents needs to be carried out in coordination with any rules about contact.

Recommendation:

Orders for contact with extended family might be desirable, but would need serious examination before introduction. A possible minimum could be visits by grandparents on or near the child's birthday and at Christmas time. In the absence of grandparents, an aunt and uncle could be appropriate.

Main Submission

Some general comments

The very nature of divorce and relationship breakdown, together with the adversarial nature of any subsequent family court proceedings and decisions on what is in the best interests of children, makes the whole process difficult for all concerned — the immediate family, extended family, judges, magistrates, legal representatives, social workers and others.

The persons most affected are the children of conflicting parents. Children can carry the scars of parental conflict for most of their lives, especially when they believe, rightly or wrongly, that they might have been the cause of the breakdown.

One of the common comments to me from fathers who have been through 'the system' is that they have not been listened to. I know that both the Family Court and the Child Support Agency have policies stating that they are **NOT** biased towards either side. On further discussions with those fathers, I have a distinct impression that some, but not all, staff in contact with parents seem to have outdated views on society, more appropriate to the 1970s than the present. I, personally, believed in the 1970s that most broken marriages were the result of desertion by husbands, and that those mothers needed extra assistance because of the poor likelihood of them earning sufficient income. My observation on the current situation (2003) in society is that mothers and fathers are now equally likely to have broken the partnership, and mothers are usually just as likely to have a well paying job as the father. Admittedly, in the first few months of a new-born child's life, the mother is (and should be) focused totally on the welfare of the child and needs special consideration at that time.

I would advocate training for face-to-face staff that ensures old well-meaning biases have been eliminated.

After the experiences of my own long life, my own long-term (46-year) marriage that still exists, the raising of four children, my field of study, and my reading of the professional literature made available to me, I believe that the most beneficial effects for the children involved in parental relationship breakdown is an effective form of information and education for the parents. Separating parents have to be shown that unless they become cooperative, flexible, understanding, respectful of the rights and views of their ex-partner and loving of their child or children, they will become involved in wasting very large amounts of their money, their emotions and their time, with a strong possibility of no gain for themselves.

They already get this information from a variety of people, often without much effect. A more proactive, successful, coordinated approach must be brought into the system at an early stage. This might mean attracting people

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with different skills than those currently working professionally in the field. Or it might mean recognising people at present in the field, such as social workers that show particular talents as teachers, writers and/or behavioural trainers. It will probably mean offering increased salary levels for the best people who can apply their full skills to the new approach.

This approach will probably include literature in the form of pamphlets and booklets. These must be written in plain English, or other languages as needed. It must not be written in the jargon-laden and academic language often used in professional reports and results of Inquiries. Editors skilled in plain English should be used in cooperation with writers and experienced social workers with the aim of producing attractive, readable, informative pamphlets that will convince separating parents to act in a sensible manner when deciding what to do about their children.

Hopefully, it should mean fewer cases coming before the judicial system, less anger in the community, and less public and private expenditure on the problems than currently exist. Most of all it should mean children growing up to be better-adjusted, useful and happier citizens.

Recommendation:

A more proactive, positive, sensitive, coordinated approach must be brought into the system at an early stage. Editors skilled in plain English should be used in cooperation with professional writers and social workers aimed at producing attractive, readable, informative booklets that will convince separating parents to act in a sensible manner when deciding what to do about their children. Skilled speakers at meetings can also be employed. Secondary school pupils should also be targeted.

Concurrently, a modified training scheme for face-to-face staff in the Family Court and the Child Support Agency should be implemented. The modified scheme should concentrate on updating obsolete 1970s views on society and bring all staff into the society of 2003 and the future.

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Term of Reference (b): 'whether the existing child support formula is fair for both parents'

This issue has caused considerable controversy in society. My personal knowledge of six people from failed marriages—four fathers, and two mothers unrelated to the fathers—shows that the fathers are living in difficult circumstances and are bitter about the lack of fairness in the system. Both mothers, while unhappy about the way their marriages turned out, are reasonably happy about the system that sees them in reasonably satisfactory living circumstances compared with the fathers (see *Confidential Cases* on p.16 of this submission and *Parkinson & Smyth*, 2003, p.ii).

I can understand the reasons why many other fathers are not happy with the current system. While 18% for a single child support is probably reasonably fair in many cases, there are many others in which the formula is quite unfair. Without any knowledge of where the money is going, I believe those fathers who pay up to $1200 per month for one child and $1800 for two are entitled to be angry if they don't know what the money is paying for. Related to this is the situation when a mother and child move into the home of a new partner. This should reduce the child's share of accommodation, but in several cases in my knowledge Child Support has refused a reduction.

Some fathers have complained to me that their child support payment is calculated before tax, while mothers' child support payment is calculated after tax. I have been unable to find anything in writing that either verifies or denies this. If it is true I cannot see how it can be considered fair. I know that causation in break-up is now not an issue, and Family Court and Child Support staffs insist there is no bias in their counselling and mediation, several fathers have complained to me that some individual mediation staff appear to assume that fathers are the cause of break-up, and therefore don't deserve their views to be given any value. My research shows that the cause of break-up now is about half for mothers and half for fathers.

One proposal that has value is the establishment of an educational trust fund for each child. Both the mother and the father should contribute to the fund an appropriate proportion of their child support payment.

Recommendation:

Monthly amounts of child support, possibly above a petty cash item of, say $100, should be subject to a written account. Accounting forms should be available free from the Child Support Authority, completed and signed by the person receiving the child support, and to be forwarded to the person paying the child support. In cases where there is a contribution to child support from both parents (that is where both parents have an appropriate income), the person to whom child support is paid should indicate his or her contribution to each item. When a residential parent moves into a new partner's home, CS payments should be modified to take this into account.

An educational trust fund should be established for each child to which a proportional amount of the child support payment payable by each parent be contributed.

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Term of Reference (a): 'The best interests of the child are the paramount consideration'

In my experience it's impossible to define the term 'the best interests of the child'. While it is reasonably easy to define what is **not** in the best interest of the child, (for example: parents having bitter arguments in the presence of a child, or a history of violence in the presence of the child [Aust. Law Reform Commission Report No. 73 (1995): *Complex contact cases and the Family Court]*) there can be many problems with making fixed statements about what **is** best for a child. Consider these examples:

Case 1: A decision needs to be made between a child residing mainly with an indulgent parent who does not enforce attendance at school and homework, or the same child residing mainly with a disciplinarian parent who does ensure school attendance and strictly supervises homework. The child will have an enjoyable childhood with the indulgent parent and probably poor school results. With the disciplinarian parent the child might have a less enjoyable childhood, but will probably leave school with results that will lead to an adult life of professional or commercial achievement.

Which childhood will be 'in the best interests of the child'? Everybody has very strong opinions on this, but my research agrees with several others that opinions differ for many reasons. For example, some believe that a happy childhood will give the child a strong basis from which to pursue further useful education in young adult life. Others that an indulged life as a child will lead to a wasted adult life. Some believe that a disciplined childhood will produce a self-disciplined adult, while others believe that a strictly enforced childhood will produce a narrow-minded adult. Of course, some people believe that it doesn't matter at all. Both styles of childhood can produce both a worthwhile and a less than worthwhile adult life.

Case 2: A decision needs to be made between a childhood with one parent in the overseas service of the Australian public service with a change of posting every two years, and the other parent in a fixed position in Australia. What lifestyle will be 'in the best interests of the child'?

Some child development professionals say that residing in three or four different nations during childhood will give a child a wide experience, with knowledge of the world and foreign languages that will be interesting in childhood and useful in adult life. Other child development professionals say that the lack of a fixed base during childhood has a poor effect on the growing child and will adversely affect him or her in adult life. Which lifestyle is in the best interests of the child?

I believe that it is impossible to prescribe what lifestyle is in the best interests of the child.

In my experience, and from research, the skills, presence, attitude and role modelling of the parent are far more valuable in producing a worthwhile environment for a child than any of the situations described above.

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Again, with those parental factors, we know what is **probably** not in the best interests of the child. A lack of skills, a lack of attention, a poor attitude, an adversarial environment, and poor role modelling can all work against a child's best interests. But I would advocate that we cannot prescribe what skills, how much attention, what comprises good attitudes, and exactly what comprises good role modelling sufficient to be important in producing the best interests of a child.

My conclusion on the term *'the best interests of the child':*

It is impossible to define or determine what is in the best interests of a child, other than vague concepts such as 'a loving and caring environment'. We can offer more detailed views on what we think is not in the best interests of the child, such as the Law Reform Commission Report No. 73, (1995) does, but no complete all-inclusive definition can be prescribed.

I can see no solution to this dilemma other than what is stated in the Family Law Council Report to the Attorney General (1996), Involving and representing children in family law (1996): Council confirms the view expressed in its discussion paper that the "best interests" principle is a matter which must be determined in the individual case.

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Term of reference (a)(i): 'Presumption of equal time'

This clause causes some concern. The idea of equal time can have many different aspects. It can be short term equal time or long term. Short term can mean one day with one parent and the next day with the other. Or one week rotation; or one month. Long term can mean three months, or six months or 12 months. With two siblings the equal time principle could be applied keeping them together, or the parents could have each one separately to minimise the difficulty at any one time. So the equal time principle, although sounding good and well-meaning, has many possible methods of application — all of which have aspects that are good and other aspects that are not good.

For instance, some occupations require a person to be away from home for varying periods, sometimes on short term notice. What does the currently residential parent do? Send the child or children back to the other parent who should be currently non-residential? Get in a grandparent to be a baby sitter? Pay for a professional child minder? If the child goes back to the non-residential parent, it becomes necessary to start keeping an account of who owes who time. Braver and O'Connell (1998) state, quoted in Smyth et al. (2003), " . . . *a parent overly concerned that he sees his child exactly the same amount of time as his ex-spouse becomes more of an accountant than a parent (and) . . . sets the stage for many future arguments . . .* " (p.5).

In practice, equal time can only occur in perfect circumstances. That is, parents who:

are on good terms and are flexible,
live close to each other,
are equally able to have access to school for parent/teacher conferences and for pick ups and deliveries etc.,
will not have changes to accommodation facilities,
will not have major employment or occupational location changes,
do have similar views on nutrition, education, participation in sport, etc.,
can cope with the child's friends equally for 'sleepovers', meals, etc.,
can assist with school homework equally; etc.

and children who:

are past breast-feeding,
love both parents equally,
are well-adjusted to the fact that their parents are separated, etc.

Any of these factors that can't be met will tend to create a situation making the concept of equally shared time difficult or impossible to achieve. Of course, I have previously recommended that a major effort be put into a program that will encourage separated parents to display cooperative, flexible qualities. There will not be a 100% success for any such program — 60% would be a satisfying achievement.

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If 60% ***was*** achieved, that would still leave many parents who would be in costly conflict over time.

The tricky question of gender compatibility is an '*appropriate time*' issue that cuts across the '*equal time*' concept. Many people would advocate that a boy above an age of about seven years should spend increasing time with his father, and a girl the same age should spend increasing time with her mother in order to promote realistic role modelling as it occurs in an average complete family.

It could be argued that, starting from equal time, a formula could be applied that compensates the child for time with one parent or the other for the various factors. For example, a girl of 12 years have 2 hours per week extra with her mother for the role modelling process, but the girl have 3 hours per week extra with her father because he is a teacher and can help with the girl's homework better than the mother. Then because the mother is working part-time and can pick up the girl from school every day and because she can accommodate 'sleepover girlfriends', she gets an extra 4 hours per week, and so on, going through all the factors that could be applied. But all these times and factors would be theoretical and arguable, converting parents into accountants of time and therefore just as contentious as the current system.

Therefore, in my experience and research, the concept of ***'equal time'*** can only be seen as a theoretical issue. I can only offer the view that good commonsense by both parents in a loving, giving and respectful environment is essential for negotiating the time each child spends with each parent. This sometimes occurs now, and rules or formulae are superfluous when both parents are sensible, cooperative, and respectful of the child's welfare.

But we are talking mostly about situations in which mediation and the courts are required to give advice and judgements. These situations are when separations and divorce involve bitterness, resentment and ill-will that can blind one or both parents to the welfare of the child. I have seen parents who are willing to lie about actions of ex-partners in order to deny the ex-partner access to a child. I have known of parents who can skilfully coerce a child into making false statements about the other parent, using bribery, threats and other methods to minimise the other parent's access to their child.

There is a demand and a need for guidelines regarding the allocation of time for each parent to spend with a child, and whether this time be residential or visiting only. But what will those guidelines be?

Perhaps a small committee of a child psychologist or psychiatrist, a social worker experienced in family work, a male parent, a female parent, a solicitor experienced in family law, and a judge or magistrate experienced in family court proceedings, be formed to draw up 'average' or 'desirable' proportions of time that mothers and fathers should spend with male and female children.

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This can then be used as a guide by 'sensible' separating parents to work out their own residential arrangements. It can also be used in mediation proceedings, and in family court proceedings.

It will be necessary for an objector parent to produce his or her reasons or evidence that these proportions *'are not in the best interests of the particular child'.*

As in the current situation, the difficulties will arise when one or both parents are borderline dysfunctional. By this term I mean a parent who can carry on a normal life in most circumstances, but who can become irrational, illogical, stubborn, bitter and aggressive in certain situations. In my experience, these people can easily lie to police and courts to obtain an Apprehended Violence Order against the other parent in order to deny access.

Recommendation:

I recommend that any proposed policy for 'equal time' be not adopted until further research has shown that:

a: It can be applied without an increase in conflict and bitterness.
b: It can be applied in 'the best interests of the child'.
c: It can be applied without increasing costs of child support for both parents.
d: Counselling is available to parents and children if stress becomes a problem.
e: Having two homes does not affect the stability of children.
f: Education is not interrupted.

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Term of reference (a)(ii): 'Contact with other persons'

Most professionals working in areas of child development would agree that a growing child needs to have contact with siblings, grandparents, aunts, uncles and cousins so that he or she gets an idea of their own place in an extended family and in society. Once again, sensible separated parents will see how essential this is, and will not object to the other parent organising appropriate visits. This already happens where a child has those two sensible parents.

But it can be a difficult situation for children of separated parents where there has been bitterness and conflict. Bitterness against a former partner is likely, but not always, to extend to his or her relatives. A parent might object to a child visiting the extended family of the former partner on religious grounds or on grounds that they are not known well enough to entrust a small child to them. Other arguments could be raised.

I know personally of grandparents who preferred **not** to have contact with grandchildren on the grounds that it had caused so much upset to the grandchildren and increased bitterness between the parents that they felt it was better to avoid the issue. The situation is referred to by Parkinson & Smyth, 2003, (p.15): they refer to resident mothers *'often act as the gatekeepers of contact'*. This is sad. A compulsory ruling would be an answer to **that** situation. In a separate case of my knowledge, birthday and Christmas presents were mailed from grandparents to a child but they were returned by the mother by mail without the child knowing. In a case such as this, a court order mandating that grandparents visit on or around the child's birthday and at Christmas time would allow grandparents the opportunity of giving gifts in person, as well as seeing that the child is in good health and receiving proper care.

Mandating other visits by grandparents or extended family could provoke more problems and conflicts than would be desirable for the best interests of the child.

Recommendation:

The Family Court should mandate birthday and Christmas visits by grandparents to grandchildren in access orders. These visits can be at either the residential home, the non-residential parent home, or the grandparents' home. Gifts must remain with the grandchild. No orders need to be made about other extended family members, unless grandparents cannot make a visit, in which case an uncle and aunt of the child may attend.

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End of submission

Committee Secretary
Child Custody Arrangements Inquiry
Standing Committee on Family and Community Affairs
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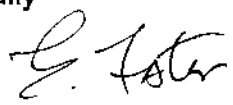
Dear Secretary

Herewith my submission to the Inquiry. You will recall that last week I had applied for a one week extension of time for submission.

Yours faithfully



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