

POLICY MONOGRAPH

JOINT PARENTING
ASSOCIATION

BACK TO THE BEST INTERESTS
OF THE CHILD

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TOWARDS A REBUTTABLE
PRESUMPTION OF JOINT RESIDENCE

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BACK TO THE BEST INTERESTS OF THE CHILD

TOWARDS A REBUTTABLE PRESUMPTION OF JOINT RESIDENCE

Although the dispute is symbolized by a 'versus' which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgement and experience. The child does not forfeit these rights when the parents divorce."

*Presiding Judge Dorothy T. Beasley,
Georgia Court of Appeals,
"In the Interest of A.R.B., a Child," July 2, 1993*

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Executive Summary

This paper argues that current family law pathways seem to be wrong with only limited attention given to the emotional, social, and financial well being of all members of the defunct family system. Even a cursory look at the evidence documents that children are victimised by sole custody decisions in at least three ways: emotional victimisation, economic victimisation, and increased risk for child abuse.

Research results on joint custody have changed and consensus has emerged in the psychological literature, which suggests joint custody should be a rebuttable presumption of the Family Court. The available literature also supports the following conclusions:

- Children adjust much better to divorce in joint custody compared to sole custody;
- Children's attachment bonds to both parents are essential for healthy development, and those bonds should be protected by the Family Court;
- Non-custodial parents are often intentionally victimised through contact denial, and children are hurt when the relationship with either parent is broken in that manner;
- Joint custody leads to much higher compliance with financial child support;
- Mothers are much better adjusted and supported more in joint custody situations;
- Fathers are much better adjusted in joint custody arrangements;
- Litigation and re-litigation is lower in joint custody situations;
- Divorce rates are much lower in jurisdictions which have a presumption for joint custody;
- Joint custody is the preferred option in high conflict situations, because it helps reduce parental conflict over time—and that is in the best interests of children;
- The current winner-loser system is irrational. The typical custody dispute involves two fit and loving parents who each want to avoid being cast out of the role of parent and into the role of visitor;

The purpose of this paper is to review the research with three goals in mind:

- To synthesize this research in order to state the conclusions which seem to be suggested by the data;
- To suggest areas of research for continued exploration; and
- To recommend changes in social policy in certain highly specific areas.

We do not believe that government officials should delay legislative action in anticipation of future research findings. To do so would jeopardise the well-being of at least 50,000 children who experience either divorce or unwed motherhood each year, as well as countless others who are currently struggling to cope with the confusion and adversity foisted on them by misguided adults. We now have had the advantage of approximately 25 years of research studies to inform our legislative decisions. It is time to act on this accumulated wisdom.

In line with recent changes in terminology introduced by the Family Law Reform Act 1995, residence and contact rather than custody and access will be used in the rest of this paper to describe these roles. However, custody will still appear in this monograph where it is a direct quotation from another source or where there is reference to a specific law that uses custody. Australian Bureau of Statistics data show that following divorce it is mothers who retain day-to-day care of young children in 96% of cases. Consequently, for the purposes of this paper we have considered resident parents to be mothers and non-resident parents to be fathers unless otherwise indicated.

The term, joint residence refers to a post-divorce arrangement that attempts to approximate the parent-child relationships in the original two-parent home (Its closest analogue would be what used to be called joint custody). In this arrangement, both parents not only have equal rights and responsibilities for their children's welfare and upbringing, but also have an active role to play in the daily routines of their children's care and development. Each remain as salient attachment figures in their children's lives, the child having frequent and continuing, but not necessarily equal contact with each parent. As the living arrangement that most closely resembles the pre-divorce family in cases where both parents had an active parenting role before divorce, joint residence encompasses both shared physical care taking (the actual day-to-day care of children) and equal authority regarding the children's education, medical care, and religious upbringing (Edward Kruk, Associate Professor of Social Work, University of British Columbia).

Recommendations stemming from the arguments in this report are as follows.

The Commonwealth should:

1. Clearly establish joint residence as the normally expected and preferred parenting arrangement upon divorce. This would be accomplished through a presumption of joint residence in all cases where both parents are fit and willing to accept residence of the child, even if not agreed upon joint residence, unless the court finds, based upon substantial evidence, that such an award would be detrimental to the children involved, or the parents agree to sole residence (see statutory proposal, notated as Appendix A);
2. Implement a system of mandatory mediation as the method of achieving agreement among parents and children regarding how the family relationship will be restructured following divorce (see statutory proposal, at Appendix C);
3. Develop a contact register to provide children of separated parents with a service similar to that provided to adopted children;
4. Establish a Prime Minister's Council On Father Involvement;
5. Encourage the establishment of State Commissions on The Status of Fatherhood and Child Welfare;
6. Create welfare policies that encourage family togetherness;
7. Establish education and sensitivity training for judicial officers and support staff regarding anti-father gender bias;
8. Require each Family Court judge to keep an independent file of all rulings relating to children in divorce, paternity, or adoption proceedings. Such files should be available for public review as an expected part of judicial accountability.
9. Encourage rules of professional conduct for divorce lawyers that reduce the tendency to over-litigate for family law clients; and
10. Promote and encourage men to be elementary school teachers.

Overview

Child residence matters are in great need of review, analysis and change. From this concern has emerged the exciting concept of joint residence, which redefines the post-divorce relationship between the child of divorce and both parents.

Over the centuries, child residence considerations have changed to accommodate to the changing needs of the times. The pendulum has swung from paternal preference, followed in the last century by maternal preference and now joint residence, an idea that is gaining increased support. All that we know about the growth and development of children indicates that children need two parents and that from the first day of birth, the father's contributions to the process of growth and development is just as important as the mother's. Parental love, be it paternal or maternal, comes in different colours, and all colours are important in creating the mosaic of child development. If a child is to discover all the colours within him or her, she or he must also be aware of and influenced by the colours within both parents.

It is time to realistically and fairly redefine the post-divorce relationships between the child and both parents. Just as children have a right to two parents, both parents have an equal right to parenting time with their children and equal rights to make major decisions regarding the health, education and welfare of their children. Under sole residence, a child finds himself/herself with one and one-half parents—a resident parent (usually the mother) and a non-resident parent (usually the father) who has been legally reduced to the frustrating, demeaning and disenfranchised level of *visitor*. Sole residence creates a contrived, unnatural and unfair structure for parenting. It makes effective parenting for both parents more difficult and offers the post-divorce family an unstable foundation of unnecessary stress as well as unfulfilled needs for parents and children alike.

It is on this kind of weak foundation that we expect families to rebuild their lives. If one were asked to invent a divorce-related concept that would keep the family off balance, one could not do better than to propose sole residence, a concept that contributes to the following sources of family stress: keeping the pot boiling, depriving children of divorce of their right to two parents, poor follow through on child support and time spent with one's children, post-divorce litigation as a means of venting anger, weakening children's ties with grandparents and other family members, reinforcing a power struggle between parents and a winner/loser relationship. Additionally, sole residence contributes to the corrosion of self-esteem.

Regrettably, some members of the legal and the mental health professions continue to resist the acceptance of joint residence, despite increasing evidence that joint residence promotes the welfare of both child and parent after divorce. This resistance also keeps the public in the dark regarding the availability of joint residence as a post-divorce-parenting alternative.

Sole residence is often cruel and unusual punishment inflicted by society on the non-resident mothers and fathers of divorce, and a form of societal child abuse for the children of divorce. For example, on any given day in this nation there takes place a sad scene that symbolises our society's insensitivity to the needs and rights of the divorced family, a scene that grows out of sole residence. The scene, a fleeting vignette in the life of many non-resident parents, takes place in one of the numerous fast food chains. It could be MacDonald's, KFC or Hungry Jacks.

Here, if we look carefully, we will find numerous divorced non-resident parents *visiting* with their children. It is probably not a happy scene, and how can it be? This is a visit. It is a frustrating effort on the part of parent and child to reach each other and all this takes place against the ticking clock which will soon let parent and child know that the visit is

over, that it is time to say *goodbye* again; to begin another period of separation, loss, longing and sadness. Thus when the non-resident parent returns the child to the resident parent, there will be present, in varying degrees, an incomplete feeling, perhaps some guilt and self-blame that the *visit* did not go better, as well as anger at such an unreasonable way of parenting. Whether it is the first or hundredth visit, the pain persists. The closer the relationship between parent and child, the greater the pain felt. This is the structure of sole residence a structure that impedes effective parenting and does not fulfil needs.

Effective parenting cannot be fragmented into a series of visits of *hellos* and *goodbyes*. There is a rhythm to effective parenting as there is to all things that are well done. In sole residence, we have created, not continuity and stability, which all children (and adults) need, but fragmented parenting. Sole residence has not proved to be in the best interest of children and parents alike. We cannot continue to dichotomise the best interest of the child and the best interest of the parents. The two are interrelated and affect each other. Joint residence may not be applicable to all divorced families. However, where it is appropriate, there are many benefits and advantages to children and parents.

Joint residence affirms that *Parents Are Forever*. A divorce ends the legal relationship between husband and wife, but it does not end their roles as parents, their responsibilities to the child, nor their parent-child relationships. Ideally, both parents should continue to be involved with their children. This is more easily accomplished when courts, lawyers and society give parents permission to do so.

The message now being given is that parents should not be expected to cooperate with each other, that it is okay to hate each other. A more positive message is that it is important for divorced parents to maintain an amicable parenting relationship, not only for the sake of the children but for their sake as well. Joint residence helps create two homes and reinforces the concept that families are forever. A divorce ends a marriage but not the family. The relationships among the family members are rearranged in a variety of ways, depending on the family's needs and lifestyles. The law should recognise that two separate, but interrelated homes can emerge from the original family following divorce.

Joint residence tends to equalise the authority for the child's physical and emotional development between the parents. Unequal authority in any relationship engenders ongoing feelings of impotence, frustration and hostility. Unequal authority in divorce creates a *winner/loser* relationship which breeds anger, impeding personal and familial growth and development. Additionally, unequal authority may result in a parent 'kidnapping' the child, as well as more post-divorce litigation.

It was only in the late 1960's that the child development field discovered the importance of the relationship between the non-resident parents and their children (typically fathers). Joint residence ensures ongoing father-child contact. By its very nature, joint residence eliminates the demeaning, alienating and artificial concept of *contact* from the divorced family's vocabulary and feelings. The child has two functioning homes—not one home and a *visitor*. Residence and contact cannot be separated—they are always interrelated.

In sole residence, children often have the problem of divided loyalty. Joint residence reduces this conflict and gives children psychological permission to love and be with both parents. Sole residence divides the family; joint residence integrates it. When parents develop a joint residence plan, the children may feel less rejected and abandoned. Children may perceive such a plan as evidence of the ongoing concern and love of both parents for them and the family as a whole. The fearful question of the child is, *who will take care of me?* This is answered by the parent's reply, *we will*. Under joint residence

the fear of losing a parent is diminished. It protects the child's right to the involvement of two parents in the child's life.

Children of divorce need family stability and continuity of contacts. Joint residence, more than sole residence, fulfils this need. A joint residence plan that is successfully implemented also reduces the risk of the children losing contact with their kinship network, particularly the grandparents who are able to provide a special kind of love, support and connection with the family's roots. Joint residence is a more flexible approach than sole residence. It encourages parents to personalise and tailor a plan to fit the family's unique needs rather than forcing the family to fit into a general one-size fit all plan as in sole residence.

Joint residence also reduces the child's fantasies about the qualities of each parent. Reality is often less frightening than fantasy. In joint residence, both parents have more time for themselves and new relationships. They do not feel *trapped* with any relief from rearing the children. There is less likelihood of having *overburdened* resident parents and *under burdened* non-resident parents. In a dysfunctional marriage, the ego is torn to shreds and self-esteem reaches new lows. It is important for divorced parents to experience success through their own accomplishments. Joint residence, according to research findings, can increase self-esteem. It is well known that if we expect more of people, they usually rise to the occasion. Joint residence creates greater expectations of parents and addresses itself to their strengths rather than their weaknesses.

The winds of change have brought with them two more important missing links in the divorce process—joint residence and divorce mediation. The two are interrelated in that they deal with post-divorce planning that emphasises self-determination. Research indicates that when divorce mediation is available, the divorcing family will, in more cases, opt for joint residence. This suggests that both public and private divorce mediation services should be made available to all divorcing families as they redefine their futures.

Finally, it may be said that joint residence is as much an attitude as anything else on the part of the law and behavioural sciences, as well as the parents. For the parents it is an attitude of commitment to their child, for the law and behavioural sciences it is an attitude of a willingness to let go of inappropriate traditions and false assumptions that close the mind to the positive part that joint residence can contribute to the post-divorce family as it strives to meet its needs as an ongoing and viable reorganised family.

The Solomon Parable

And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither thine, nor mine but divide it. Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof (I Kings 3:24–27).

Critics of joint residence often argue the account of the first recorded custody dispute, between biological parent and stranger supports the assertion that two competing parents cannot jointly nurture their child after divorce. However, a reading of the parable does not support such a conclusion. The lesson of the Solomon fable illustrates that in a child residence dispute between natural parent and non-parent, other things being equal, the claims of the birth parent are to be preferred, as *a natural parent is likely to be more solicitous about the welfare of his or her child than a stranger*.¹

The Hearing

Two women came to King Solomon both claiming to be the biological parent of the same infant. Unable to determine which woman was in fact the mother of the child, he commanded that the child be cut in two by a sword and then divided equally between the claimants. One woman spoke up, pleading with the King to spare the child and to give the infant to the other woman. Solomon decided this woman, willing to forego her claim to the child, was probably the parent. She preferred that the child be given to her rival, rather than have the child suffer death because of their quarrel.

This contest was relatively straightforward for Solomon to settle. The King reasoned that a biological parent would normally have a greater concern about the welfare of their child than a stranger. After hearing the replies from the two women, Solomon knew that even if his assumption was wrong, he could clearly make the correct decision according to the best interest of the child.

But what if both women who claimed to be the child's mother had retracted their claims, how then to determine the issue? Perhaps the Royal drawing of lots would have enabled the hard choice to be made.²

If it had been a mother and father contesting residence, Solomon would have decided the case according to the prevailing Jewish law at the time—residence to the father (the sole residence solution). Joint residence does not require splitting a child away from any parent as do sole residence decisions, but permits the child to continue and retain an equal relationship established with both parents—just as prevailed prior to separation or divorce.

References

¹ Dickey A. Family Law. The Law Book Company (2nd edition), Sydney (1990) p 358

² Some commentators have seriously suggested the drawing of lots as a solution in the average residence dispute. See *infra*, The Case For Sole Residence. p 51

The Failed Pathway

Today in Australia, nearly one in two marriages fail,¹ bringing psychological, economic and social vulnerability, to approximately fifty thousand children whose parents divorce each year.² From a child's viewpoint, these divorces are unexpected, inexplicable and unwelcome. Probably the most traumatic aspect of the divorce experience for children is the sudden loss of a parent from the home. In effect *they awake one morning to find one parent gone*.³

Divorce is so common today that the greeting card industry has begun to package what it assumes are appropriate sentiments for the occasion. Well over ninety thousand adults⁴ are in a position to send their announcement each year and it does not appear that the market has peaked. Court officers' talk with some pride about the new simplified Divorce kit: *It's sort of like a tax pack—you just tick a few boxes* one explains.

With the growing numbers of children affected by divorce there is increasing legal and community disquiet that after twenty seven years of the Family Law Act, present day methods of dealing with residence and contact issues are not working satisfactorily.

- Why are there such proposals for change? The answer is self evident, because no one likes the present system. The children of divorce, parents, legal and health professionals increasingly complain that the exclusivity of sole residence is not benefiting anyone.
- Children complain that they miss their non-resident parent; they experience guilt, tension and loyalty conflicts as a result.
- Non-resident parents complain that they miss their children; they feel depressed, alienated and powerless. They become *non-parents*, in effect *visited* aunts or uncles.
- Resident parents complain that they are over-burdened, have too many responsibilities and that seeking work and having the responsibility of full time parenting is too stressful.
- Judges complain that the court calendar is congested, that child residence decisions demand the Wisdom of Solomon and no matter which parent is awarded residence of the child, the case will be back in court within a short period of time.

To these complaints can be added those of psychiatrists, psychologists and sociologists who say that the current legal system does not pay sufficient attention to human development, children's needs, and the available data showing what is psychologically in the best interests of children.

Others complain that the *winner take all* concepts implied by sole residence treats the child as an object to be fought over within the legal system.

As the tangle of divorce has been unpicked it has become evident that divorce is a multi-faceted process, spanning years rather than months. It affects children variously according to their age and sex, where they are in the divorce process and how that process is managed (Hetherington, Cox, & Cox 1977; Roman & Haddad 1978; Wallerstein & Kelly 1980; Family Law Council 1992)^{5,6,7,8} Data in Australia has confirmed overseas evidence reporting that the children of divorce long for frequent ongoing contact with their absent parent and suffer immensely if this relationship is severed or severely limited (Family Law Council 1992).⁹

It is well documented that sole residence, which has had a long trial period, leaves serious problems for children and their parents (Hetherington, Cox, & Cox 1977; Roman

& Haddad 1978; Wallerstein & Kelly 1980).^{10,11,12} However, there is empirical and clinical evidence that joint residence encourages responsible behaviour and is psychologically sound (Roman & Haddad 1978; Lentz 1982; Collar 1988; Sharply & Webber 1992; Kruck 1993; Thompson 1994; Farrell 2001).^{13,14,15,16,17,18,19}

What seems to be clear is that the interests of parents and children do not usually coincide when a marriage breaks down. We have yet to read a study that concludes children prefer their parents to go their separate ways than to stay together—even when the domestic atmosphere is tense. The work undertaken so far suggests that the ready accessibility of the non-resident parent, is likely to be of considerable value in assisting children come to terms with the reality of their changed predicament and in keeping both parents alive for them (Wallerstein & Kelly 1980; Hetherington, Cox, & Cox 1982; Hetherington & Hagan 1985; Warshak 1986; 1992; Braver & O'Connell 1998).^{20,21,22,23,24,25}

Research suggests that the best and perhaps only way to achieve true continuity of family relationships is through the medium of joint residence which aims to preserve the child's perception of both mother and father as an integral part of his or her life, a positive role model, and a continuing and consistent source of love, security, respect, discipline, and exposure to a varied range of life experiences (Roman & Haddad 1978; Coller 1988; Farrell 2001).^{26,27,28}

It is the purpose of this paper to demonstrate four points: First, that joint residence is usually the preferred approach to child residence questions, so that it is appropriate for a rebuttable presumption of joint residence to be established.²⁹ Second, the current Family Law Act, which permits joint residence, is inadequate. Third, the judicial adjudication of child residence should be replaced by a system of mandatory mediation as the method of working out an agreement among parents and children regarding how the family relationship will be restructured following the divorce.³⁰ Finally, although the Family Court could independently establish joint residence as the preferred method of resolving residence decisions within the present statutory framework, a new statute is desirable. Such a clear legislative mandate would enhance the public's acceptance of joint residence, and make it easier for courts and parents to consider applying. Further, legislative changes in the administration of residence decisions will facilitate the successful implementation of joint residence.

References

¹ Australian Bureau of Statistics. Marriages and Divorces, Australia (Catalogue number 3310.0) Australian Bureau of Statistics, Canberra (1998). Hereinafter *Marriages and Divorces*

² In 2000, the parents of 49,600 children divorced representing around 1% of children aged less than 18 years. This is not a cumulative total, and therefore does not include children whose parents divorced in previous years. In 1997, 28% of dependent children lived apart from one or both of their natural parents, and 11% (well over a third) did so because of divorce (Buckingham J. State of The Nation: A Century of Change. Centre For Independent Studies. St Leonards NSW (2001) at pp 33–35 citing Australian Bureau of Statistics data).

³ Wallerstein J S, & Kelly J B. *Surviving The Break Up: How Children and Parents Cope With Divorce*. Basic Books, New York (1980) p 39

⁴ *Marriages and Divorces*, *supra* note 1

⁵ Hetherington E M, Cox, M, & Cox R. The Aftermath of Divorce. In Stevens & Mathews (Editors), *Mother–Child, Father–Child Relations*. NAEYC, Washington D C (1977)

⁶ Roman M, & Haddad W. *The Disposable Parent: The Case For Joint Custody*. Holt, Rinehart & Winston, New York (1978)

⁷ Wallerstein & Kelly, *supra* note 3

⁸ Family Law Council. *Patterns of Parenting After Separation: A Report To The Minister For Justice and Consumer Affairs*. Australian Publishing Service, Canberra (April 1992) p 16, para 2.31(a)

⁹ *ibid*

¹⁰ Hetherington, Cox, & Cox, *supra* note 5

¹¹ Roman & Haddad *supra* note 6

¹² Wallerstein & Kelly, *supra* note 3

¹³ Roman & Haddad, *supra* note 6

¹⁴ Luepnitz D A. *Child Custody: A Study of Families After Divorce*. Lexington Books, Massachusetts (1982)

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¹⁶ Sharply C F, & Webber R F. Co-Parenting: An Alternative To Consider In Separation Counselling. 10(3) *Australian Journal of Sex, Marriage and Family* (1992) pp 111–117

¹⁷ Kruk E. Promoting Shared Parenting After Separation; A Therapeutic/Interventionist Model of Family Mediation. 15(3) *Journal of Family Therapy* (August 1993)

¹⁸ Thompson R. The Role of The Father After Divorce. 4(1) *The Future of Children*. (1994) pp 210–235.

¹⁹ Farrell W. *Father and Child Reunion: How To Bring The Dads We Need To The Children We Love*. Tarsher/Putman, New York (January 2001)

²⁰ Wallerstein & Kelly, *supra* note 3

²¹ Hetherington E M, Cox M, & Cox R. Effects of Divorce On Parents and Children. In M E Lamb (Editor), *Non-traditional Families: Parenting and Child Relationships*. Lawrence Erlbaum, Hillsdale, New Jersey (1982) pp 223–288

²² Hetherington E M, & Hagan M S. Divorced Fathers, Stress, Coping, and Adjustment. In M E Lamb (Editor), *The Fathers Role: Applied Perspectives*. John Wiley, New York (1985) pp 103–134

²³ Warshak R A. *Father Custody and Child Development: A Review and Analysis of Psychological Research*. 4 *Behavioural Science and The Law* (1986) pp 185–202

²⁴ Warshak R A. *The Custody Revolution: The Father Factor and The Motherhood Mystique*. Simon & Schuster, New York (1992)

²⁵ Braver S L, & O'Connell D. *Divorced Dads: Shattering The Myths*. Tarcher/Putnan, New York (1998)

²⁶ Roman & Haddad, *supra* note 6

²⁷ Coller, *supra* note 15

²⁸ Farrell, *supra* note 19

²⁹ The proposed new model of post divorce parenting, should be one which ensures the child of maximum exposure to both parents and a continuation of the joint parental rights and responsibilities which existed during the marriage, after the marriage has ended. It is suggested here that although divorce terminates the marriage, and the two parties to the marriage no longer occupy the roles of husband and wife, they nevertheless retain the roles of father and mother in relation to the children and since the same parent–child relationships continue to exist after parents separate, the present statutory scheme, permits, encourages and perhaps even requires a rebuttable joint residence presumption. The declaratory nature of section 61C(1) of the Family Law Act 1975 translates logically into a presumption of a continuation of the equal and joint residence which existed while the parents were married and living together, than into a choice of one parent as the *resident provider* and exclusion of the other as an integral part of the child's life:

Each of the parents of a child who is not 18 has parental responsibility for the child (subject to court order).

Parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority, which, by law, parents have in relation to children. (Section 61B).

³⁰ Moreover, the agreement should encompass the specific details of how the children's time spent with each parent will be divided, how the decision making and financial responsibilities will be handled by the parents, and equally importantly should establish a procedure for resolving differences between the parents. Judicial adjudication should be considered only as a last resort.

The Two Thousand Year Odyssey of Joint Residence

A review of the history of child custody decisions illustrates how the law of custody has changed to accommodate the requirements of the day. New theories of child development and changing societal values have led courts to re-examine their custodial preferences (Bordow 1994).¹ The chronicle of child custody however, cannot be seen apart from the long history of woman's subordination to man, which is always buttressed by ideological attitudes that coincide with economic needs and her struggles to break free from this inequality (Roman & Haddad 1978).² This historical review is necessary to better understand why the current judicial bias against joint custody (now known as joint residence) is ripe for scrutiny and change. In the twilight world of child custody, it defies reason and what we know about human potential, to think that those capable of joint custody constitute only five percent of the divorcing population.³

The exclusive possession of children by one parent after divorce is a tradition that can be traced back at least two thousand years. In Ancient Rome, under the doctrine of natural rights, the father had absolute authority over his minor children, including the power of putting his children to death, or of selling them (Blackstone 1857).⁴ Similar absolute powers existed in ancient Persia, Egypt, Greece and Gaul (Abbott 1949).⁵ During the first century, the father's absolute authority over his children gradually became more limited following an edict from the Emperor Constantine expressly holding the father liable for punishment in the case of infanticide (Forsyth 1860).⁶ Within the Roman *gens*, or family, wives were a sort of dual property, their persons subject to both husbands and their fathers, their property to a guardian (De Beauvoir 1975).⁷ This Roman notion of paternal dominion continued into English common and canon law where it prevailed until the fourteenth century.

In the middle ages, English law on child custody reflected the image of feudal patriarchy (Bratt 1978).⁸ The property of the household did not strictly belong to the family as in the time of the Roman *gens*. Feudalism meant that women and children belonged not only to the father, but also to the manor lord who ruled over them all. It was the manor lord who chose a woman's husband and her children belonged to him, not their father and they became in time, vassals who would protect his wealth (Bratt 1978).⁹

Among the masses of enslaved men and women, feudal patriarchy may not have meant that much as the will of the father was likely to be exercised in a privileged household, primarily to protect and ensure the orderly passage of property from one generation to the next. The eldest son inherited all family rights and wealth and the Lord's other children were usually apprenticed out at the age of seven (Aries 1962).¹⁰

Childhood as we know it did not exist. At the age of ten, the child was considered to be an adult who might dress as his or her elders and most importantly, work. The child had no special rights, only duties (Aries 1962).¹¹ It was not until the seventeenth century that the doctrine of *parens patriae* (parent of the country) developed to care for those who had no protection. The court of Wares and Liveries established during the reign of Henry VIII advanced some measure of protection for children (Foster & Freed 1964).¹² A 1660 statute transferred its jurisdiction to Chancery, which assumed the crown's prerogative of *parens patriae* (parent of the country).

Gradually the idea began to evolve that child custody involved not only rights, but also responsibilities for the care of the child (Roman & Haddad 1978).¹³ With the erosion of feudalism, society's perception of children began to change. The child slowly began to emerge as a person with certain rights, privileges and duties and by the close of the eighteenth century, a sense of the parent's responsibilities to the child; a developing individual was taking hold (Roman & Haddad 1978).¹⁴

As the nineteenth century unfolded, agrarian lifestyles gave way to urban industrialisation. Increasingly the family became the social, but not necessarily the economic centre of life. At this time, and paralleling the demise of a society controlled by landed estates and inheritance by primogeniture, the supremacy of the father was gradually eroded (Roman & Haddad 1978).¹⁵

If one were to arbitrarily set the date at which paternal control was relaxed, it would be 1817.¹⁶ In that year the poet, Percy Bysshe Shelley lost the custody of his children because of his atheistic beliefs and unacceptable lifestyle.¹⁷ Lord Eldon in effect held the poet morally unfit as a parent, thus qualifying the father's absolute right to custody. Before this controversial case, English law clearly endorsed the father's paramount right to the custody of his children, regardless of their age or sex. The presumption that the father was the person entitled to the custody of his children was almost irrefutable (Blackstone 1857).¹⁸

For instance, in 1804 Lord Ellenborough was quite positive that the father of a legitimate child was entitled to the custody of his children to the exclusion of the mother:

The father is the person entitled by law to the custody of his child. If he abused that right to the detriment of the child, the court will protect the child. But there is no pretence that the child has been injured for want of nurture or in any other respect. Then he, having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him.¹⁹

After Shelley's case, the English parliament, by a series of statutes culminating in Justice Talfourd's Act in 1839,²⁰ diluted the rights of the father, and extended the claim of the mother so that chancery was permitted to award custody to the mother if the children were less than seven years. This later statute was the origin of the *tender years doctrine*²¹ in England and enabled Sir John Romiley in 1865 to declare:

No thing, and no person, and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place. It is the notorious observation of mankind that the loss of a mother is irreparable to her children, and particularly so if young. If that be so, the circumstances must be very strong indeed to induce this court to take a child from the guardianship and custody of her mother.²²

Experts believe that while no absolute reason can be pinpointed as the cause of the shift toward an indelible preference for mother-custody, the Industrial Revolution figured prominently in this transformation (Warshak 1992).²³ Requiring fathers to work away from the home ensured the diminution of their role in the family. As the family unit experienced physical separation like never before, the role of fathers as protectors and guides for their children began to diminish (Warshak 1992).²⁴ This cultural change, coupled with decades of the *tender years doctrine*, resulted in an upward extension of the age of *tender years* (Warshak 1992).²⁵ Eventually, *the tender-years presumption became the rationale for awarding custody of children of all ages to the mother on a permanent basis* (Warshak 1992).²⁶

Roman & Haddad (1978)²⁷ in attempting to sketch early American fatherhood, persuasively argue that the separation of work from family life that occurred alongside the urbanisation and industrialisation of society proved to be a significant factor in the decline of fatherhood as a culturally valued status and as a central life role for men. Increasingly, during the course of the nineteenth century, men were drawn away from

their families towards income-producing work. As the central activity of fatherhood (work) and the father's central role as provider became located outside the household, being a father meant being separated from one's own children for the working day, and the intergenerational transfer of occupational skills became increasingly removed from the context of family relationships. They write:

As our culture became both urban and industrialised, the father worked away from the house and left the raising of children, for all practical purposes, in the hands of the mother... He could not be at two places at once; making a living for his family on the street, and staying at home to see that no harm befell them. Bottle warmer versus breadwinner: these were the prescribed roles for women and men within the family... And since the child was raised by the mother, it was assumed that her influence was paramount, not because anyone could prove that this was intrinsically so, but because, *de facto*, it was the case.²⁸

In popular literature, men came to represent the world outside of the family, a world both dangerous and hard, in contrast to the cosy, quiet domestic world inhabited by women and children, a contrast exemplified in the following verses taken from a nineteenth century poem entitled *Father Is Coming*:²⁹

The clock is on the stroke of six,
The father's work is done,
Sweep up the hearth and tend the fire,
And put the kettle on:
Hark! Hark! I hear his footsteps now;
He's through the garden gate,
Run, little Bess, and ope' the door,
And do not let him wait.
Shout baby shout! and clap thy hands,
For father on the threshold stands.

These historical developments found their fullest cultural expression in the figure of the Victorian patriarch—authoritative, benevolent and remote. Roman & Haddad (1978)³⁰ show that the real pattern of fatherhood was somewhat different from the caricature, but a general development can nevertheless be said to have occurred in which men were pushed outwards towards the edges of family life. Family roles were divided ever more sharply along gender lines at the expense, for men, of involvement in nurturing and care giving roles.

As a result, society's view of fathers changed dramatically since the days when courts rarely intervened between the father-child relationship. Mothers, viewed as physically and temperamentally weaker, were deemed incapable of adapting to the rigorous demands of the workplace and were singularly charged with the management of the domestic sphere (Abramovitz 1994).³¹ The feminisation of the home front resulted in mothers replacing fathers as the *primary* and *irreplaceable caregivers* in both *law and custom*, effectively leading to a progressive loss of substance of the father's authority in the family (Blankenhorn 1995).³² The stereotypical images of fathers as familial breadwinners and mothers as domestic caretakers and primary child-rearers were born (Warshak 1992).³³

Over the period 1880–1940, the Australian home became a *haven for the work-worn alienated male* and it became women's responsibility to ensure that the home was a warm, inviting and relaxing environment for men. By the late 1940's *emphasis was put on the mother as being the natural caregiver for children* (Greenway 1986).³⁴ Fathers'

main parenting responsibilities were considered to be outside the home, working to ensure the financial security and independence of the family (Reiger 1985).³⁵

While men were programmed to equate their external economic productivity with their maleness and value as fathers, middle class women were programmed by society to accept subservient roles and, to be viewed as good mothers, to stay at home to care for their children (Faludi 1991).³⁶ Devoting one's life to childrearing ensured external societal validation and, subsequently, personal confirmation of female self-identity (Abramovitz 1994).³⁷ Consequently, although women were denied economic independence in the work force, they held greater leverage in custodial decisions (Farrell 1993),³⁸ resulting in financial awards in the form of child support to ensure that they remained out of the employment arena.

Whereas effective fatherhood ceased to be an indicator of the validity of one's maleness, effective motherhood continued to serve as the standard by which a woman's worth was measured (Farrell 1993).³⁹ Woe to the mother who did not choose to selflessly and altruistically place her children above all else, for she would be deemed a failure as a mother, and as a woman (Abramovitz 1994).⁴⁰

These societal imposed roles ensured the continued economic subjugation of women by requiring their dependence on men for economic survival, following divorce in the forms of maintenance and child support, as social etiquette demanded that mothers not work (Abramovitz 1994).⁴¹ Courts promoted society's prescribed stereotype of the women who did work as weak and in need of state-instituted protection by upholding workplace legislation designed to restrict women from working beyond a certain amount of hours, frequently in industries deemed unhealthy to their alleged gentler constitutions, or from working in particular jobs.⁴²

In custody decisions, courts continued to promote the image of the mother as venerated and worthy of sentimental safeguarding. Mothers were called *God's own institution for the rearing and upbringing of the child*.⁴³ One court beamed:

In her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental . . .⁴⁴

By implementing stereotypical ideals of women into their decisions, courts furthered *romantic paternalism*⁴⁵ and the *motherhood mystique* (Warshak 1992).⁴⁶ Consequently, by the 1920s, mother-custody preference was firmly rooted in the Family Court system (Blankenhorn 1995).⁴⁷ In time, the *best interests of the child standard* replaced the *tender years doctrine*.⁴⁸ This standard purported to focus attention away from the gender attributes of the parents and toward the custody situation deemed best for the child. In application, however, there was little difference in the two standards because of the comparatively low expectations regarding the role of fathers in child rearing and the nearly fanatical mythologies surrounding women's roles in childcare. This result should not have been surprising: a test focusing on a child's *best interests is an inherently subjective test that will naturally include, both consciously and subconsciously, a judge's understanding of the contemporary culture's determination of 'best'* (Fitzgerald 1994).⁴⁹

For example, while stating that the welfare of the children is the *paramount consideration* in custody litigation, Australia's highest court in 1945 held that:

The first and paramount consideration is the welfare of the child... but there is another principle, while though it can hardly be called a rule of law, has assumed almost the proportions of one, and that in the case of an infant of tender years, and more particularly a female infant, the mother is

entitled to custody except where there is the strongest evidence that her custody would be detrimental to the child.⁵⁰

Thus, *the best interests of the children* standard continued to assume it was best for young children to remain with their mothers upon divorce. While the statutes declared that neither parent had a greater claim to custody and instructed the courts to consider the child's welfare as the *first and paramount consideration*,⁵¹ the judicial interpretation of the law held that it was in the child's best interests not to be separated from the mother, unless she was shown to be absolutely unfit. The High Court of Australia in 1961 concluded:

What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young child, particularly a girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together.⁵²

In furtherance of these ideals, psychological studies were conducted that purportedly legitimised the special role of the mother in custody decisions (Blankenhorn 1995).⁵³ The father's role was not similarly examined, and thus the definition of fatherhood became diffused and unspecified (Benson 1968).⁵⁴ With greater attention focused on the stereotypical role of mothers, and less attention on fathers, fathers became even more culturally unimportant and relegated to an insignificant and secondary role in the family unit (Blankenhorn 1995).⁵⁵

Freudian⁵⁶ psychoanalytic dogma based on family lifestyles in nineteenth century Vienna, asserted that women were uniquely suited for the task of child-rearing, the mother-child dyad was more important than the father-child dyad and that mothers had an *inherent* nurturing ability which disposed them to be more interested in and able to care for children.⁵⁷ Thus after divorce, mothers should be at home rearing the children of divorce.⁵⁸

The climax of the scenario came with the publication in 1973 of *Beyond The Best Interests of The Child*.⁵⁹ This book advocated the concept that it was in the child's best interest to be placed in the care of only one parent, and that parent have the total authority to regulate contact (if any) between the child and the other parent.⁶⁰ With this opinion as support, the courts, lawyers, and social workers received the necessary justification for what they were already doing—excluding fathers from their children. In custody decisions, courts continued to promote the image of the mother as venerated and worthy of sentimental safeguarding. One Sydney Court in 1976 went so far as to poeticise the mother-child relationship by noting that:

The bond between a child and a good mother (as this applicant was found to be) expresses itself in an unrelenting and self-sacrificing fondness, which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it and on occasions do so in tolerable manner. But the mother's attachment is biologically determined by deep genetic forces, which can never apply to them.⁶¹

Ironically, while courts devalued the importance of fathers upon divorce – or followed the cultural devaluation of them—some social policies recognised the critical importance of fathers. In the early years of World War II, for example, fathers were the last men to be conscripted for military service. Moreover, early television programs portrayed the father as—in addition to out of the home during the day—omniscient. Television programs such as *The Adventures of Ozzie and Harriet*, *Father Knows Best*, and *Leave It to Beaver* are prime examples. A cultural schizophrenia of fatherhood developed.⁶² While married fathers were decidedly revered, divorced and unmarried fathers, however, were

positively *disposable* (Roman & Haddad 1978).⁶³ That stereotype invaded the Family Court system, and continues today.

There is of course, an obscene fraudulence involved in exalting motherhood. Woman is kept in her place through praise, whereas in earlier times, the same result was achieved by denigrating her. The Roman law restricting the rights of women, and the legal custom of assigning children to the mothers' exclusive care are not so different. Finlay & Bailey–Harris (1989)⁶⁴ point out that:

Quite apart from any supposed biological considerations affecting the respective roles of a father and a mother in relation to a child, the former attitude favouring a mother, particularly where the child was young, was the accepted respective role expectation which society entertained as regards men and women. On this view, it was considered 'natural' that a young child's needs would be better met by a mother because those needs were of a kind, which a woman was expected to be able to discharge. Those 'needs' involved the performance of domestic chores, mostly of a mechanical, indeed 'inferior' kind, such as washing and cleaning, cooking and other routine household tasks.⁶⁵

Barbara Wearing (1983),⁶⁶ an eminent sociologist and feminist advocate has been highly critical of this perceived role of women in the family and the institutionalisation of a *motherhood myth* in Australian society:

Caretakers of the ideology of motherhood accept domestic labour as the preserve of women and perpetuate the existing structure of male–female relationships, legitimating women's relegation to the responsibility for the domestic sphere by an emphasis on the biological mother as the primary caretaker for her children during the early years. For these caretakers sex roles are fairly rigidly defined and appear as functional both for individual members of the family as well as for society as a whole.⁶⁷

In the 1970's the woman's movement and growing concern about sex discrimination paradoxically weakened the maternal advantage regarding child custody. Uncritical sentimentality toward mothers came to be insupportable as the feudalistic premise that the father–husband was lord and master by natural right. As the *battered child* syndrome appeared on the scene, we came to know that some mothers abused or neglected their children (Meadows 1977).⁶⁸ In addition, there was a growing awareness by a number of experts about the important influence of the father on the emotional development of his offspring (Lynn 1974; Park & Swain 1976).^{69,70}

Australian appeals courts in 1976⁷¹ and again in 1979,⁷² recognised that the maternal presumption could no longer be justified either on sociological or scientific grounds and reduced the preference to the status of a tie–breaking factor:

We are of an opinion that the suggested preferred role of a mother is not a presumption, a preference or even a norm. It is a factor to be taken into consideration where relevant⁷³... the precise weight to be given to it as a factor will necessarily depend on the particular circumstances⁷⁴... where the mother stays at home and looks after the children, while the father works and has little to do with them, the factor has more weight than it has in the case where the mother works on a full time basis and makes other arrangements for the care of the child.⁷⁵

The sexism in the reasoning of the court's decision has been justifiably criticised by legal commentators, who point out that there is an incurable flaw in rules of law that accord different treatment to men and women on the basis of rigid and outdated stereotypes.⁷⁶

“Sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon members of a particular sex because of their gender would seem to violate the basic concept of law that legal burdens should bear some relationship to individual responsibility.”⁷⁷

In today's world, the judicial *mother factor* is no more acceptable as a consideration than it was earlier as a presumption. A parent's suitability as a caregiver should not be based on their gender, race, or employment status.

The Need For Change

Society has moved a long way from the family situations of late nineteenth century Vienna. The families with which the psychoanalytic movement are most familiar have largely disappeared—or at least are not the families presenting themselves to the divorce courts. The last 20 years have seen the movement of far greater numbers of mothers into the paid workforce (Sullivan 1997).⁷⁸ The 1970s phase of the women's movement is generally credited with bringing feminist ideals to the forefront of the Australian culture. As women increased their consciousness of feminist issues, the attendant change in traditional mother roles forced many fathers to re-evaluate their positions within the family. Many women decided that they would rather work outside the home than perform domestic labour that forced them to be financially dependent on their husbands (Cleminger 1984; Faludi 1991; Griswold 1993).^{79,80,81}

Simultaneously, numerous women were forced into the workplace due to a change in household economics caused by *the collapse of the fathers' ability to support their families solely on their earnings* (Griswold 1993).⁸² For children, this has meant less contact with mothers, a decreasing emphasis on the mother-child relationship, and the exposure of children to a greater range of child-care experiences, including care giving by their fathers.

With the re-emergence of feminism many women realised that they needed a man about as much as *a fish needs a bicycle* (Chavas 1996).⁸³ Justifiably, the male-female relationship was long overdue for a reconfiguration. However, in the quest to throw off the shackles that commonly constrained women in marriage, women, the state, and society overlooked the reality that children needed—and still need—the love and support of their fathers about as much as *a fish needs water* (Levine & Pitt 1995; Warshak 1992; Farrell 2001).^{84,85,86} Only lately have we begun to understand that children suffer serious negative consequences when fathers are marginalized (Warshak 1992; Farrell 2001).^{87,88}

At the same time women began to free themselves from stereotypical, secondary, and dependent roles within the family economic structure—whether because of family finances or feminism, fathers increasingly found themselves judicially *liberated* from the family as women sought divorce in record numbers (Arndt 1986; Australian Institute of Family Studies 1999).^{89,90} This increase in divorce promoted the marginalization of fathers far more extensively than the Industrial Revolution because divorce literally severed the father from the home on a permanent basis. Many fathers resigned themselves to continuing their role primarily as financial providers for their children and their now ex-wives, and adjusted to seeing their children approximately four days each month.⁹¹

Confronted with the realisation that it was very difficult to balance work with parenting, some still-married mothers demanded that fathers share more substantively in childcare (Griswold 1993).⁹² However, this call for sharing parental responsibility did not always include divorced fathers, as self-report studies indicated that 40% of sole custody mothers admitted that they had refused to allow fathers to exercise contact as a retributive measure, while 20% believed that fathers should be totally cut out of the lives

of their children and sought to achieve such an end (Blankenhorn 1998).⁹³ Rarely did courts intervene to enforce contact orders (Joint Select Committee 1992).⁹⁴

Because they were excised from their roles as family breadwinners and *heads of households*, many fathers were forced to seek a redefinition of self-identity. Fathers struggled to understand the societal message that they were still perceived as providers yet without the full-time family and attendant benefits. Frustrated and confused by state relegation to an even-more-undefined existence, some divorced fathers instead chose to cut off all contact with their children rather than deal with the pain of being alienated from them (Griswold 1993).⁹⁵

Like women before them, some formed support groups to deal with the emotional distress and exasperation, and to analyse mixed cultural messages of what their proper roles were to be (Griswold 1993).⁹⁶ Many decided that the traditional father roles taught to them by their fathers were no longer valid in an era of rampant divorce. Some realised that society, particularly divorce courts, nonetheless compelled them to remain in the outdated role as aloof financial caretakers, and they began to question and confront this gender bias. Family court judges in response attempted to punish fathers critical of family law processes.⁹⁷

The state's treatment of divorced fathers has become a self-fulfilling prophecy. By sending a distinct message to divorced fathers that they are not essential to the raising of children beyond supplying a percentage of their pay checks to the mother of their children, and limited *contact* with their children, the state has encouraged divorced fathers to abandon true fatherhood (Ewing 1995).⁹⁸ Yet, society looks on with bewilderment and disdain when some divorced fathers fade from a meaningful relationship with their children.

Sole custody arrangements developed when divorce was unusual. The major short coming of sole custody—that it frequently deprives the child of divorced parents of a close relationship with each parent—was seen as inevitable and, perhaps, as not altogether undesirable when divorce was viewed as a sign of the moral weakness of at least one spouse (Davis 1944).⁹⁹ Today, as the divorce numbers indicate, parents are increasingly unwilling to remain in unsuccessful marriages for the sake of their children.¹⁰⁰ It is therefore, necessary to develop new post-divorce care giving arrangements to deal with the needs of children whose parents no longer live together.

Demographic figures (Australian Bureau of Statistics various)¹⁰¹ reveal much about the loss of fathers from families:

- The percentage of births to unmarried mothers has increased sixfold from 5% of all births in the early 1960s to 29% today;
- The divorce rate has tripled over the same period. Divorce and separation are the main reasons for single parenting;
- About one child in four is living in a home in which one of the natural parents—usually the father—is absent;
- The percentage of intact *original* families has declined since the 1960s from 88% to about 70% today; and
- Approximately 9% of couples, and consequently 7% of children are living in de facto relationships, and the break-up rate of such relationships is many times higher than the divorce rate.

The *usual way of divorce* (mother gets residence (custody), father gets *contact* and *financial obligation*),¹⁰² is based on outmoded, erroneous, and damaging concepts concerning men's and women's parenting roles, abilities, and parent-child relationships (Fitzgerald & McCread 1981; Jacobs, 1986).^{103,104} As such, it serves primarily to prolong

and intensify the suffering and thereby to inflict great emotional harm on our children (Warshak 1986; Kelly 1988a; Farrell 2001).^{105,106,107}

Today, while we rightly address the problems of single mothers and *their* children, we ignore the plight of the *other* parent and *his* child. We assume, that the other parent is really no longer a parent. Implicit in this damaging myth is that non-custodial fathers want it that way (Gibson 1992; Macooby & Mnookin 1992; Braver & O'Connell 1998).^{108,109,110} As a society, we must come to grips with the obvious social reality that parental integrity begets parental responsibility, while parental disenfranchisement quite logically begets parental despair, dysfunction, and even disappearance (Kruk 1992).¹¹¹

This tragic symptom triad constitutes the *Disposable Parent Syndrome*, a rampant and terrible psychosocial affliction that is treatable and, more importantly, preventable (Roman & Haddad 1978; Collier 1988; Kruk 1993; Farrell 2001).^{112,113,114,115} As with all *diseases*, a thorough understanding of its aetiology is essential before fruitful efforts at treatment (and prevention) can reasonably be expected.

The *Disposable Parent Syndrome* is not a disease peculiar to fathers. It is a human problem, seen frequently in mothers, too, when parental destruction is their lot (Lovorn 1991; West & Kissman 1991; McMurray 1992).^{116,117,118} As for the plight of children, we fail to acknowledge that these children suffer as much, or more, from the loss of their father as they do from a diminution of family income. Clinicians have seen the psychological carnage, and it is the lack of a parent, not lack of food or shoes, from which they primarily and most severely suffer (Wallerstein & Kelly 1980; Mitchell 1985; Kelly 1988a; Warshak 1992).^{119,120,121,122}

While we decry the *feminisation of poverty*, we ignore the *masculinization of child loss* and ignorantly picture the fathers who have lost their children and parenthood as miserable, selfish, non-caring oafs.¹²³

The Need For A Joint Residence Presumption

The present *winner-loser* system is irrational. The typical residence dispute involves two fit and loving parents who each want to avoid being cast out of the role of *parent* and into the role of *visitor*. Society should rejoice to find children with two parents who each want to do all that they can for the child. Instead, we place those parents against each other and declare that one will be the *winner* and the other will be the *loser*, a mere *visitor*. Such a system only guarantees that the child will be a *loser*. For that child walks into court with two parents and walks out with only one. With the tragic consequences of inadequate parenting all too apparent on the streets of our cities, we can no longer afford a legal system that discards one of the two most important people in the child's life.

Under current legal process there is no incentive for the potential resident parent (usually the mother) to cooperate with the other parent. Existing law grants residence to one parent absent an agreement of joint residence. Thus the parent who in all likelihood prevails is being told that they need not cooperate with the other parent. They are, instead, entitled and encouraged, by existing law, to be disagreeable.

A change of law to presumptive joint residence sends a very different message to parents. By enacting a rebuttable presumption in favour of joint residence, society is imposing upon parents a public policy of requiring them to put their personal differences aside to work together for the benefit of their children.¹²⁴ How can such a message, to put their child's interest ahead of individual desire, be anything but in the child's best interest?

Children are born with two parents. At birth, all children enter into joint residence and remain in joint residence unless and until it is broken by court order. Both parents have full parental responsibility and privileges unless and until they are restricted by a court

order. The proposed joint residence legislation advocated in this paper states simply that the party seeking to restrict these existing parental responsibilities and privileges should be required to provide a well-founded reason to do so.

A parenting order is an injunction. It takes away rights or prohibits action that previously was unrestricted. The law, with respect to all other injunctions, is that the party seeking to impose the restriction has the burden of proof to establish the need for the restriction. So it should be with post-divorce parenting. The parent seeking sole residence seeks to restrict the other parent's relationship with the child and should be required to come forward with a reason to do so. The presumption in the proposed legislation merely states that the pre-existing joint residence will continue in the event that neither parent comes forward with a sound reason for sole residence.

Everything we know about the needs of children teaches us that it is in the best interest of children to maximise the involvement of both parents for the benefit of the child. The amount of time a parent spends with a child directly affects the parent's competence in dealing with the child. One major difficulty in *visiting* with one's child, beyond the time-limited dimension, is the artificial structure. Parents and children are deprived of the daily intimate contact that living together provides—putting a child to sleep, helping with homework, preparing a meal together, etc. Joint residence is the means of preserving the child's right to two parents and, where both parents seek to continue their role as parents, the court should reduce neither parent to a mere *visitor* unless the other parent comes forward with a clear and compelling reason to do so.

Children want, love and need two parents. In all but the vanishing small number of pathological cases, the court should strive to maximise the involvement of both parents. If extreme distance or other factors prevent a substantially equal relationship with both parents, the preference should go to that parent who shows the greater willingness and ability to nurture the child's relationship with their other parent. That's what being a caretaker is all about.

References

¹ Bordow S. Defended Custody Cases In The Family Court: Factors Influencing The Outcome. 1(8) Australian Journal of Family Law (1994) pp 253–263

² Roman M, & Haddad W. The Disposable Parent: The Case For Joint Custody. Holt, Reinhart, & Winston New York (1978)

³ See, Bordow, *supra* note 1 at 255. In Bordow's 1994 study of 294 custody cases decided by the Family Court, sole custody orders were made in 91% of contested matters (31% in favour of the father and 60% in favour of the mother). Joint custody was ordered in just 5% of cases. Non-parent orders were made in 1% of cases and the remaining 3% of matters resulted in split custody (in this type of order one child is placed with one parent and the other child with the other parent). In the situation of Consent Orders the study shows that mothers obtained custody in 79% of the cases and fathers obtained custody in 18 % of the matters. Split custody was the result in 3% of cases.

⁴ Blackstone W. Commentaries On The Laws of England. 19th edition (1857) pp 372–373

⁵ Abbott G. The Child and The State (1949) p 3

⁶ Forsyth W. A Treatise On The Law Relating To The Custody of Infants In Custody Cases of Differences Between Parents Or Guardians (1850) p 79

⁷ De Beauvoir S. The Second Sex Vintage Books, New York (1975) p 115

⁸ Bratt S C. Joint Custody. 67 Kentucky Law Journal (1978)

⁹ *ibid*

¹⁰ Aries P. Centuries of Childhood: A Social Science History of Family Life. Knopf, New York (1962)

¹¹ *ibid*, but for *contra*, see, Herlihy D. Medieval Households. Harvard University Press, Cambridge (1985) pp 112–113 & 125:

Were medieval people really cold and indifferent towards their closest relatives with whom they shared the most personal and penetrating experiences of life? The judgement seems dubious indeed, and is at all events more truly based on silence than on documented evidence... Few today support Aries' thesis that medieval parents ignored their children. On the contrary, as civilisation grew more complex, more critically based on learned skill, medieval society had to invest heavily on the training of the young. And where treasure is, so is the heart.

¹² Foster H H, & Freed D J. *Child Custody* (part 1). 39 *New York Law Journal* (1964) pp 423-443

¹³ Roman & Haddad *supra* note 2

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *Shelley v Westbrooke* (Ch 1817) 37 *Eng Rep* 850

¹⁷ Shelley, the son of a Whig Aristocrat and MP was expelled From Oxford for writing a pamphlet on *'The Necessity of Atheism'* which he mailed to all the Bishops and Heads of Colleges. Subsequently Shelley eloped with Harriet and later left her with one child and pregnant with another to take up life with Mary. After the suicide of Harriet, the poet sought custody of his two children from the maternal grandparents. Deprived of their custody and companionship, he spent his last four years in self exile in Italy.

¹⁸ Blackstone, *supra* note 4

¹⁹ Lord Ellenborough, C J. *Rex v De Manneville* (1804) 5 *East*, 211, 102 *Eng Rep* 1054

See also, *Re Agar-Ellis*, 24 *Ch. D.* 317 (1883) (England):

When by birth a child is subject to a father it is for the general interest of children and really for the interest of the particular infant that the Court should not, except in extreme cases interfere with the discretion of the father but leave to him the responsibility by exercising that power which nature has given by the birth of the child.

²⁰ Justice Talfourds Act 2 and 3 *Vict*, c 54 (1839), also referred to as an act to amend *The Law Relating To The Custody of Infants*, contained the first expression of the *tender years* policy and allowed mothers to have custody of children under the age of seven years. A later amendment gave mothers the right to custody of children until the age of sixteen.—*An Act To Amend The Law Relating To The Custody of Infants*, 36 and 37 *Vict*, c 12 (1873). The age of sixteen when a child could be given into the custody of his or her mother was extended to twenty-one by the Guardianship of Infants Act (1886) and was described by Lindley L J as *essentially a mother's act*. *Re A & B* (1897) *Ch* 786 at 790. In the same case, Rigby L J said:

The court is not to forget the rights of the father; but throughout the act an intention is shown to modify those rights and cut them down and make them totally different from what they had been at common law or under the previous acts (*ibid* at 793).

²¹ The *tender year* doctrine presumes that a child requires a quality of love, attention and affection that only a mother can give. However, studies of maternal deprivation, many of which were studies of parental deprivation since both parents were absent have shown that the essential experience for the child is that of *nurturing* and not the gender of the parent performing the *nurturing* function. See Yarrow L J. *Maternal Deprivation: Toward An Empirical and Conceptual Re-Evaluation*. 58 *Psychological Bulletin* (1961); Yarrow L J. *Research In Early Dimensions of Early Maternal Care*. 9 *Merill-Palmer Quarterly* (1963) pp 101-114.

²² Romiley J, in *Austin v Austin* (1865) 85 *Beav* 257, 55 *ER* 634, 626–637

²³ Warshak R A. *The Custody Revolution: The Father Factor and The Motherhood Mystique*. Simon & Schuster, New York (1992) at p 29

²⁴ *ibid* at 30

²⁵ *ibid* at 31

²⁶ *ibid*

²⁷ Roman & Haddad, *supra* note 2. See also, Roberts H. *Doing Feminist Research*. Routledge & Kegan Paul, London (1981)

²⁸ *ibid* at 37-38

²⁹ Cited in Demos J. *The Changing Faces of Fatherhood: A New Explanation In American Family History*. In Cath *et al* (Editors) *Father and Child: Developmental and Clinical Perspectives*. Little, Brown & Co, Boston (1982) at p 429

³⁰ Roman & Haddad, *supra* note 2

³¹ Abramovitz M. *Regulating The Lives of Women. In Poverty Law: Theory and Practice*. (Julie A. Nice & Louise G. Trubek (editors) (1994) at pp 28-29

³² Blankenhorn D *Fatherless America: Confronting Our Most Urgent Social Problem* (1995) at p 13 (footnote omitted); see also, Carlson A C. *From Cottage To Work Stations: The Family's Search For Social Harmony In The Industrial Age* (1993) at p 4 (describing the *great divorce of labour from the home* as *one of the defining factors in American domestic life since the 1840s*). This Paper in no way suggests that fathers should have authoritarian power over the family today.

³³ Warshak, *supra* note 23

³⁴ Greenway A. *The Role of The Father In The Australian Family*. Australian Association of Marriage and Family Counsellors Newsletter No 28 (January 1986) pp 2-9

³⁵ Reiger K. *The Disenchantment of The Home*. Oxford University Press, Melbourne (1985)

³⁶ Faludi S. *Backlash: The Undeclared War Against American Women*. Crown, New York (1991) at p 52.

³⁷ The only period prior to the 1970s during which women were told by society that they could work while simultaneously having a family occurred during World War II, when women were needed in the workplace (Faludi, *ibid*; Roman & Haddad, *supra* note 2). After the war, the media bombarded women with the message that careers were *unattractive* and good mothers remained at home (Faludi, *ibid*). Society ensured that women chose childrearing over work by valuing female-identified employment (e.g., teaching, secretarial, nursing, and child care positions) less than male-identified jobs through the assignment of lower wages. See Teresa L. Amott & Julie A. Matthaei, *The Transformation of Women's Wage Work*. In *Poverty Law: Theory and Practice*. Julie A. Nice & Louise G. Trubek (Editors) (1994) pp 304, 306–309, 322–324.

³⁸ Abramovitz, *supra* 31 at 31

³⁹ Farrell W. *The Myth of Male Power: Why Men Are The Disposable Sex*. Simon & Schuster, New York (1993) (noting that *discrimination in favour of men at work meant discrimination in favour of their wives at home*).

⁴⁰ *ibid* (Significantly, however, effective maternity was seen as less valuable than material-based successes such as those obtainable only through access to the workplace, and therefore only available to males).

⁴¹ Abramovitz, *supra* note 31 at 31

⁴² *ibid*

⁴³ *Hines v Hines*, 185 N.W. 91, 92 (Iowa 1921)

⁴⁴ *Jenkins v Jenkins*, 181 N.W. 826, 827 (Wis. 1921)

⁴⁵ *Frontiero v Richardson*, 411 U.S. 677, 684 (1973) (*Sex discrimination was rationalised by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage*)

⁴⁶ Warshak, *supra* note 23 at 36 (defining the mystique in terms similar to *romantic paternalism*)

⁴⁷ Blankhorn, *supra* note 32 at 68

⁴⁸ At least since the *Guardianship of Infants Act 1925* (Eng) the paramount interest or welfare of the child has been the dominant principle governing questions concerning minor children—whether these questions dealt with the management of their persons (custody, contact, upbringing) or of their property (including income) the courts have been required to observe that principle in their decisions concerning minor children. Section 1 of the Act stated:

Where in any proceeding before the court... the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

However, the growth of the paramount interest of the child principle is not quite clear because until its recognition under the Act, it was sometimes acted upon by the courts (*R v Gyngall* 1893. 2 QB 232; *Re McGrath* 1893 Ch 143) and sometimes not: *Re Agar–Elliss*, *supra* note 19; *R v New* (1904) 20 TLR 583.

Later Australian legislation proclaimed its adherence to the paramount interest or welfare principle. For example, Matrimonial Causes Act 1959 s 85; Family Law Act 1975 s 60 d; Family Law Reform Act 1995 No. 167 of 1995 which refers to the best interests of the child (see s 65E. In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration). No difference in any essential respect inheres in any of these variations.

⁴⁹ Fitzgerald W A. Maturity, Difference, and Mystery: Children's Perspectives and the Law. 36 Arizona Law Review (1994) pp 11, 56

⁵⁰ Latham. C J. cited in *Storie v Storie* (1945) 80 CLR

⁵¹ See, *supra* note 48 and accompanying text

⁵² The High Court of Australia in *Kades v Kades* (1961) 35 ALJR 251

⁵³ Blankenhorn, *supra* note 32 at 19. A prime example is a 1951 study commissioned by the World Health Organization and conducted by John Bowlby, a pre-eminent psychoanalyst. Bowlby set up a study to follow the effects of maternal deprivation. Paternal deprivation was not studied. Yet, Bowlby felt confident enough to report that *the child's relation to his mother... is without doubt in ordinary circumstances, by far his most important relationship* (Bowlby J. *Maternal Care and Maternal Health*, World Health Organisation Geneva 1951). Despite major flaws in his work Bowlby's ideas played a central role in the widespread idealisation of motherhood in the western world during the decades following the Second World War Even in his later work, *Attachment and Loss Vol 1: Attachment*. Basic Books, New York (1969), Bowlby would only concede that fathers were merely *subsidiary attachment figures*.

Bowlby's findings were widely implemented by childcare institutions and reinforced court findings that children should be kept with mothers at all costs. Consequently, to reduce the toddler-mother *separation anxiety* as reported by Bowlby, psychologists recommended that fathers be denied overnight contact to their children. Studies such as these have been incorporated into our Family Court system and have become unquestioned aspects of our family law. See, Warshak, *supra* note 23 at 35-36; also see, Cox M J & Paley B. Families As Systems. 48 Ann. Rev Psychol (1997) pp 243-244 (noting that child development studies have focused on the role of the mother–child relationship)

⁵⁴ Benson L. *Fatherhood: A Sociological Perspective* (1968) at p 12 (*Father is not a very impressive figure in American life, and, in slighting him, American social theorists may simply confirm the fact that the behavioural sciences can be influenced by cultural predispositions*).

⁵⁵ Blankenhorn, *supra* note 32 at 19

⁵⁶ A critique of Sigmund Freud's work (see e.g. Freud S. *An Outline of Psychoanalysis*. J Strachey, (Editor & Translator), Norton, New York 1940) is emerging within the scientific community exposing Freud's writing for what it is—creative literature that emerged from the mind of a deeply confused and unhappy man addicted to cocaine. Eysenck H. *The Decline and Fall of The Freudian Empire*. Viking Press, New York (1985) sums up the literature well when he writes of Freud's theory of child development:

It portrays a complete lack of scientific attitude in Freud, a naive reliance on interpretation of a highly speculative nature, a disregard and disrespect for observational and other facts, a failure to consider alternative theories, and a Messianic belief in his own infallibility, together with a contempt for his critics.... we are no nearer to having any acceptable evidence for Freud's speculations about Oedipus complexes, castration fears and early infantile sexuality. He was, without doubt, a genius.... of literary art. His place is.... with Hans Christian Andersen and the Brothers Grimm, tellers of fairy tales (*ibid* at 114 & 208).

⁵⁷ Roth A. The Tender Years Presumption In Child Custody Disputes. 15 Journal Family Law (1976). Roth shows how misguided Bowlby *supra* note 53, and his followers were in assuming the primary importance for infants of an exclusive continuous relationship with their mother. Bowlby made no mention of fathers or their central and important contribution in child rearing. See also, Jones C. The Tender Years Doctrine: Survey and Analysis. 16 Journal of Family Law (1977).

⁵⁸ Notwithstanding the serious methodological flaws in John Bowlby's (*supra* note 53) work, Dally A. *Inventing Motherhood*. Burnett Books, London (1982), has shown how psychoanalytic theory was used by post-war governments to restrict women's roles to the domestic sphere and thus create re-employment opportunities for men.

⁵⁹ Goldstein J, Freud A, & Solnit A J. *Beyond The Best Interests of The Child*. Free Press, New York (1973)

⁶⁰ *ibid* at 37–38

⁶¹ Glass J A, in *Epperson v Dampney* (1976). 1 Fam Law Note No 29, 10 ALR 227

⁶² Today, society's attention to the married father's family role has shifted its focus sharply from his role as financial provider, and mediator between the family and the outside world, to his contribution to the daily emotional life of the family and the relationships between family members. Media images of politicians as family men, intimately and emotionally involved in the lives of their children, are nowadays almost obligatory.

⁶³ Roman & Haddad, *supra* note 2

⁶⁴ Finlay H A & Bailey–Harris R J. *Family Law In Australia* (8th Edition), Butterworths (1989)

⁶⁵ *ibid* at 179

⁶⁶ Wearing B. *The Ideology of Motherhood: A Study of Sydney Suburban Mothers*. Allen & Unwin Sydney (1983)

⁶⁷ *ibid* at 198

⁶⁸ Meadow R. Munchausen Syndrome By Proxy: The Hinterland of Child Abuse. 2 *Lancet* (1977) pp 342-345. See also, Asher R. Munchausen Syndrome. 1 *Lancet* (1951) p 339; Finch S M. *Sexual Abuse By Mothers*. *Medical Aspects of Human Sexuality* (1973) pp 191–197.

⁶⁹ Lynn D. *The Father: His Role In Child Development*. Brookes & Cole, California (1974):

The research on the relationship between father absence and the general level of the child's adjustment reveals that the loss of a father for any reason is associated with poor adjustment, but that absence because of separation, divorce, or desertion may have especially adverse effects (*ibid* at 279).

⁷⁰ Park R & Swain D. *The Fathers Role In Infancy: A Re-Evaluation*. 25 *Family Coordinator* (1976) pp 365-371

⁷¹ The Full Court of The Family Court of Australia in *Raby v Raby* (1976) 2 *Fam Law Report* 11 at 348

⁷² The High Court of Australia in *Grasnow v Grasnow* (1979) 5 *Fam Law Report* at 727, 730

⁷³ *Raby v Raby*, *supra* note 71

⁷⁴ *Grasnow v Grasnow*, *supra* note 72

⁷⁵ *ibid*

⁷⁶ See for example, the comments of the editors of *The Family Law Service* (Nygh & Turner) who argue that *the claims of each parent should be on par* and that the judicial mother factor should be discarded. Cited in Finlay H. *Guide to the Family Law Act 1975* (4th edition), Butterworths 1979, p 187, para 653-654.

Sexual stereotypes also work against women. In *Ward v Ward* (1987), number A D 1039 of 1985, Family Court of Australia at Adelaide, 6 August, 7 October 1987, the mother's career was a factor against her. The father never offered to give up his occupation, nor was he ever questioned about it. The mother told the court that she wished to complete her specialist qualifying examination continue to work part time and that she planned to have another child with her new husband. During the trial the court characterised the mother as *wanting her cake and eat it too – unremarkable in these days of equality of opportunity*.

On the 6 August 1987 the mother was awarded custody but only on the condition that she resigned her job and was pregnant by the 7 October 1987. In its judgement the court stated:

The major question mark hanging over the wife... is whether she would be prepared to sacrifice her career for the child.

When the parents came back on the 7 October 1987 and the mother had not become pregnant by her new husband, the court awarded custody to the father. It would be misleading to suggest that this case is clear evidence of a trend against working mothers and demonstrates the courts

favouring fathers. However, it illustrates how the *mother factor* oppresses both sexes and should be legislatively discarded.

⁷⁷ *Frontiero v Richardson*, *supra* note 45

⁷⁸ Sullivan L. *Rising Crime In Australia*. Centre For Independent Studies, Sydney (1997)

⁷⁹ Cleminger, *Beyond The Stereotypes: An Illuminating Perspective On Australian Women*. Melbourne, Victoria 1984. Cleminger's 1984 market research survey found that 68% of women and 61% of men interviewed agreed that a woman's career is as important to her as a man's career is to him. Compared with 47% of the men, 56% of the women believed that *career-minded women should be mothers*. Only 26% of all women interviewed, whether in the workforce or at home, preferred to run a house as a full time job. An updated survey found that only 32% of the men and 27% of the women interviewed agreed *a career is not as important to a woman* (Cleminger, *Hometruths: How Australian Couples Are Coping With Change* 1986).

⁸⁰ Faludi, *supra* note 36 at 53

⁸¹ Griswold R L. *Fatherhood In America* (1993) at p 222

⁸² *ibid* at 237, 245 (*Changes in the household economy and the re-emergence of feminism have been the two most critical forces changing fatherhood*).

⁸³ Chavez L. 'I Want You.' Uncle Sam As Mr. Right? 19 *Harvard Journal Law & Public Policy* (1996) at 739, 741 (quoting Gloria Steinem).

⁸⁴ Levine J A, & Pitt E W. *New Expectations: Community Strategies For Responsible Fatherhood* (1995) at 26-27 (explaining that nurturing father-involvement during infancy dramatically improves a child's cognitive, intellectual, and social development throughout childhood)

⁸⁵ Warshak, *supra* note 23 at 46-47 (noting that researchers have concluded that *the best way to predict who will become an empathic adult is to measure the amount of time spent with the father while growing up, and that boys with fathers at home demonstrate higher levels of 'moral maturity'— understanding right versus wrong behaviour—than boys from father-absent homes*)

⁸⁶ Farrell W. *Father and Child Reunion: How To Bring The Dads We Need To The Children We Love*. Tarsher/Putman, New York (January 2001)

⁸⁷ Warshak, *supra* note 23

⁸⁸ Farrell, *supra* note 86

⁸⁹ Arndt B. *Private Lives*. Penguin, Melbourne (1986)

⁹⁰ Nationally, women are more likely to initiate divorce. In the Australian Institute of Family Studies' Australian Divorce Transitions Project, conducted in 1997, 64% of women compared to 21% of men indicated that it was mostly themselves who had made the decision to separate. Reported in Wolcott I & Hughes J. *Towards Understanding The Reasons For Divorce*. Working Paper Number 20, Australian Institute of Family Studies (1999). See also, Faludi, *supra* note 36 at 268 (In U.S. national surveys, less than a third of divorced men say they sought divorce, *while women report they... actively sought divorce 55 to 66 percent of the time*).

⁹¹ Every other weekend contact arrangements were and remain fairly common.

⁹² Griswold, *supra* note 81

⁹³ Blankenhorn, *supra* note 32

⁹⁴ See, The Parliament of The Commonwealth of Australia. *The Family Law Act 1975. Aspects of Its Operation and Interpretation*. Report of The Joint Select Committee On Certain Aspects of The Operation and Interpretation of The Family Law Act 1975 at 168. In response to the demonstrated problem of contact interference by resident (custodial) parents, the Australian parliament amended the Family Law Act in 1999, providing judges various discretionary options to enforce improperly denied court-ordered contact. The parliament intended that the law should discourage resident parents who are malicious from improperly denying court-ordered contact and indicated the clear intent that the community does not support the power of a spiteful resident parent to improperly deny court-ordered contact.

Also see, Caroline Milburn. *Family Law Fails Fathers*. The Age, Monday 20th April 1998 (*Men are being denied access to their children by the former wives under a legal system failing to protect parental rights according to a national inquiry...The inquiry by the Family Law Council revealed that some men have been forced to give up seeing their children because their former wife have repeatedly disobeyed Family Court orders on contact arrangements. Contact orders were often*

breached on Friday afternoons or weekends. But the inquiry found that the legal system was unable to deal with breaches quickly whenever they occurred).

⁹⁵ Griswold, *supra* note 81

⁹⁶ *ibid*

⁹⁷ See Bernard Lane. Family Law Critics For Trial. The Australian, Wednesday 19 January 2000 reporting on the trial of four father critics charged with 'scandalising the court.' But see Sir Michael Hardie Boys. Governor-General New Zealand. The Dominion (25 August 1997) p 8

Ironically it is generally those fathers who were most involved with children before separation who feel most betrayed. Those who were less involved believe that the limited contact with their children is a consequence of their failure to be active enough as parents during the marriage. Those who were active realise that it has no effect. They are being judged according to negative stereotypes. Their claims that they did much of the care giving are not believed.

The denial of these men's roles as fathers results in denial of other roles for them in society also. As active fathers they can participate in school activities, family-based community groups, sporting activities and social events. They can be role models to their children's friends and share their interests and activities. Many of these fathers are currently being shut out, with harmful effects all round. There are approaching 140,000 New Zealand fathers who are paying child support. This suggests that we are not just losing the involvement of a few individuals. There will be a major impact on the nature of our society both now and in the future. We only have to consider the importance that adopted children place on finding their natural parents to realise that the systematic large-scale exclusion and marginalisation of fathers is a serious matter. It is one which the Family Court has taken very lightly. As a result, men who should be acting as role models and teaching our teenagers to respect society's institutions are turning their backs on the Family Court because they have no faith in it.

⁹⁸ See, testimony of Cynthia L. Ewing (Senior Policy Analyst, Children's Rights Council, before the U.S. House of Representatives Committee on Ways and Means; Subcommittee on Human Resources (6th February 1995). Her comments are directly applicable to the local situation:

First, as a direct result of our country's archaic child custody laws, judicial practices and bureaucratic policies, millions of fit, loving, and dedicated parents have been literally pushed away from their children. The misguided notion that upon divorce or separation of their parents, children need only ONE parent permeates our country's judiciary, legislative bodies and social service agencies. Because of this attitude, we typically assign complete ownership and control of these children to ONE parent—the custodial parent. We relegate the OTHER parent, regardless of his/her fitness or demonstrated history of responsibility, to the status of 'visitor' and 'non-custodian,' whose primary function is to send money. The first disincentive to being a financially responsible parent is provided at the onset of this process. Stripping a parent of his/her parental rights, referring to him/her in denigrating terms, and treating him/her as only a financial resource is a highly effective DEMOTIVATOR! Congress must recognize that parental rights and responsibilities go hand in hand and that any policy it formulates or supports which diminishes the role of either parent will be counterproductive to its child support and child welfare initiatives.

⁹⁹ Davis J. Sociological and Statistical Analysis. 10 Law & Contemporary Problems (1944) at p 707

¹⁰⁰ In 1997, 28% of dependent children lived apart from one of their natural parents, and 11% (well over a third) did so because of divorce (*Children, Australia: A Social Report*. ABS Catalogue 4119.0). The number and the proportion of dependent children living in single parent households increased markedly in the period from 1969 to 1999. In 1999, 19% (more than 936,000) of children were living in homes with only one natural parent compared with 6.9% in 1969. Around two-thirds of single parent households in 1997 were the result of divorce or separation of marriages. The proportion of never-married and widowed single parents changed markedly over the same period, with the proportion of never-married single parents increasing from 11% to 30% of all single parents and the proportion of widowed single parents falling from 27% to 6% (*Social Indicators 1984*. ABS Catalogue 4101.0; *Marriages and Divorce 1994*. ABS Catalogue 3310.0; *Labour Force Status and Other Characteristics*. ABS Catalogue 6224.0).

¹⁰¹ Australian Bureau of Statistics (ABS) Various Years, *Births, Australia*. ABS Cat. No. 3301.0; ABS 1991. *Australian One Parent Families*. ABS Cat. No 2511.0; ABS 1997. *Australian Social Trends*. ABS Cat. 4102.0; ABS 1998. *Australian Social Trends*. ABS Cat. 4102.0.

¹⁰² After separation, children of all ages were more likely to live with their mother than their father. Australian Bureau of Statistics, Family Characteristics Survey (1997) data showed that 96% of 0-4 years olds, 89% of 5-11 years olds and 82% of 12-17 years olds whose parents had separated were living with their mother (Australian Bureau of Statistics. Family Characteristics, Catalogue Number 4442,0, Australian Bureau of Statistics, Canberra 1997).

¹⁰³ Fitzgerald H, & McCreed C. Fathers and Infants. 2(4) *Infant Mental Health* (1981). See also, Gunsberg L. Selected Critical Review of Psychological Investigations of The Early Father-Infant Relationship. In S. Cath *et al* (Editors), *Father and Child*. (1982); Pruet K. *The Nurturing Father*. Warner Books, New York (1987)

¹⁰⁴ Jacobs J W. Divorce and Child Custody Resolution: Conflicting Legal and Psychological Paradigms. 143 *American Journal of Psychiatry* (1986) pp 192–197

¹⁰⁵ Warshak R A. Father Custody and Child Development: A Review and Analysis of Psychological Research. 4 *Behavioural Science and The Law* (1986). pp 185–202

¹⁰⁶ Kelly J B. Longer–Term Adjustment In Children of Divorce: Converging Findings and Implications For Practice. 2 *Journal of Family Psychology* (1988a) pp 119–140

¹⁰⁷ Farrell, *supra* note 86

¹⁰⁸ Gibson J. Non–Custodial Fathers and Access Patterns: Family Court of Australia. Office of The Chief Executive. Summary of Key Findings. Research report No. 10. Australian Government Publishing Service, Canberra (1992).

¹⁰⁹ Maccoby E E, & Mnookin R H. *Dividing The Child: Social and Legal Dilemmas of Custody*. Harvard University Press, Cambridge, Massuttettes (1992). The real level of support that many fathers feel for joint residence may be officially underestimated. It seems to be the case that fathers may in general seek a closer involvement with their children after divorce or separation than the sole residence and reasonable contact model can provide.

In the Stanford University Study of 1100 divorcing Californian couples carried out in the mid-1980s, Maccoby & Mnookin compared parents' initial preferences for custody awards shortly after the divorce petition with what parents formally requested in the court process, as well as with the actual custody awards made by the court. It was found that 82 per cent of mothers expressed an initial preference for sole custody; most of them formally requested sole custody and a majority were awarded sole custody by the court. Fathers, however, initially expressed preferences for a wider variety of custodial arrangements—one-third wanted sole paternal custody, one-third wanted maternal custody and one-third wanted joint custody. An important finding however was that about one-third of all the fathers did not formally request as much custody in the divorce petition as they really wanted. Fathers who had expressed a desire for sole paternal custody or joint custody did not request it formally. There is an argument here for saying that the real extent of support amongst fathers for joint residence is suppressed. On Maccoby & Mnookin's evidence, about one-third of divorcing fathers prior to filing divorce papers express a preference for joint custody with another one-third expressing a desire for sole custody.

¹¹⁰ Braver & O'Connell, *supra* note 25

¹¹¹ Kruk E. Divorce and Disengagement. Fernwood, Halifax, Nova Scotia (1993). See also, Kruk E. Psychological and Structural Factors Contributing To The Disengagement of Non-Custodial Fathers. 30 *Family and Conciliation Courts Review* (1992) pp 81-101

¹¹² Roman & Haddad, *supra* note 2

¹¹³ Coller D R. Joint Custody; Research, Theory and Policy. 27(4) *Family Process*, (December 1988) pp 259-269

¹¹⁴ Kruk E. Promoting Shared Parenting After Separation; A Therapeutic/Interventionist Model of Family Mediation. 15(3) *Journal of Family Therapy* (August 1993)

¹¹⁵ Farrell, *supra* note 86

¹¹⁶ Lovorn R. Why Women Join Fathers Rights Groups. *Athens Banner Herald*. Athens Georgia (Thursday 3 October 1991)

¹¹⁷ West B, & Kissman K. Mothers Without Custody: Treatment Issues. 16 *Journal of Divorce & Remarriage* (1991) pp 229–238

¹¹⁸ McMurray A. Influences On Parent–Child Relationships On Non–Custodial Mothers. 13(3) Australian Journal of Marriage and Family (1992) at 138

¹¹⁹ Wallerstein J S, & Kelly J B. Surviving The Breakup: How Children and Parents Cope With Divorce. Basic Books, New York (1980)

¹²⁰ Mitchell A. Children In The Middle: Living Through Divorce. Tavistok Publications, London & New York (1985)

¹²¹ Kelly, *supra* note 106

¹²² Warshak, *supra* note 23. See also, Warshak, *supra* note 105

¹²³ See for example, Graycar R. Equal Rights Versus Fathers Rights: The Child Custody Debate In Australia. In Child Custody and The Politics of Gender. C. Smart & S. Sevenhuijsen (Editors), Routledge, London, 1989 (The writer, Regina Graycar is associate professor of law at the University of Sydney and is a well–known holder of excessive feminist views hostile to joint residence. She often uses the mischievous term *fathers rights groups* as an attempt to diminish the bona fides of separated fathers as being more interested in themselves than in their children). Also see, Samela Harris. *Dads Score As Deserted Wives Take A Pay Cut*. The Advertiser (18th October 2000) p 018

¹²⁴ A survey conducted by the Australian Institute Of Family Studies after the enactment of the Family Law Reform Act but just prior to the 1996 commencement of the reforms indicates that there is strong community support for the notion that the duties and responsibilities for caring for children should be shared. For example, 78% of Australians think that both parents should always care for children where they are married. Where parents are separated or divorced, 50% of Australians believe that both parents should always care for children, and a further 33% believe it should mostly be the case. Amongst divorced or separated parents, 54% believe that care should always be shared and 26% believe it should mostly be shared (Carberry F. Parents Sharing Care of Children–Family Law and Income Support. Paper, 6th Australian Institute of Family Studies Conference, Changing Families, Challenging Futures, Melbourne 25-27 November 1998)

Implementing Joint Residence

Joint residence is the idea that, following divorce or separation, mothers and fathers should retain a strong positive role in their children's lives, with the children actually spending substantial amounts of time living with each parent. Sometimes this arrangement has been called joint physical custody or joint/shared parenting. It is to be differentiated from the pre-Reform Act 1995 concept of joint guardianship or the post-Reform Act 1995 judicial approach of investing long-term responsibility in both parents (i.e. the former Joint Guardianship) and day-to-day responsibility to one (i.e. the former sole custody).

Definitions of joint residence are not precise but include arrangements where children spend significant amounts of time living at the homes of both parents. In American divorce research, joint residence living arrangements are categorised as joint physical custody when the child lives with one of the parents from 30% to 50% of time (Arditti 1992).¹ A local rule of thumb might be that anything up from a 40% to 60% split could be called joint residence.² It is important to distinguish joint residence from notions of *reasonable contact* with one parent and sole residence with the other. Advocates of joint residence see the whole idea of contact as a demeaning, alienating and artificial concept (Greif 1979).³

With joint residence, each parent takes a turn in sharing day-to-day responsibility for his or her child's care. This may be accomplished with an evenly balanced, alternating week arrangement, or through other arrangements that provide ways for the children to spend significant amounts of time with both parents. A parenting plan is worked out, which states when each parent is responsible for his or her child. A child then has two homes and lives with the mother part of the time and with the father part of the time. There are many kinds of joint residence plans from which to choose. The particular plan that parents select should make sense for each child, and adjustments should be made as required meeting the changing needs of the child.

Tangential to joint residence is the legal concept of joint long-term parenting responsibility. This means that both parents have an equal say in major decisions regarding their children's health, education, and general welfare. For example, unless restricted by court order, both parents have the right to go to their children's schools, speak to their children's teachers, receive progress reports, and to attend parent-teacher conferences, school open houses, and special activities at which parents are permitted. Both parents also have the right to obtain emergency medical treatment for their children at hospitals, speak with their children's doctors and dentists, obtain medical records, and request additional medical consultations.

As joint residence equalises the balance of power between parents, giving neither one more than the other, parents who participate in joint residence tend to feel less threatened about losing their children than a non-resident parent often does in sole residence (Williams 1987; Kelly 1988a; Arditti 1992).^{4,5,6} This balance of power generates fewer power struggles, less need to compete, less litigation, less tugging back and forth on the children, and an all-around better outcome for the children. Once the principle of joint residence has been established and the fear of loss of the child by either or both parents has been dispelled, the practical availability of child-rearing time can be decided by the parents according to their own and their children's preferences. Joint residence can encompass some of the following suggested provisions.⁷

- Three days and four days of each week alternating between homes. Parents decide how weekends will be split between them.

- Two weeks and two weeks, one week and one week. Holiday and other special periods are decided by mutual agreement.
- One month in one home, one month in the other home. At least one weekend with other parent during the time children are in one home.
- Alternating three months and three months. Special *overnights* with the other parent.
- Alternating six months and six months. Special *overnights* with the other parent.
- Alternating years, with one home as residence for one year, and the other home as residence for the next year. The parent whose turn it is to be the *second-home* parent takes weekends and long stretches of unbroken time during the holidays—two or three weeks or more—with the children.
- School year at one home, all holidays at the other home. This works best for children and parents separated by many miles and where weekend times together during the year are impossible because of distance.
- Children stay for the school year at one parent's home, with scheduled times to live at the second parent's home during the month, (e.g. every weekend, every other weekend). Long stretches of unbroken time, for example, summer holidays are spent with the *second-home* parent.
- Children remain in one home, the parents move in and out of the house according to a schedule that works best for them.

Parenting Time Schedules For Infants and Toddlers

A recent paper prepared for judges in Los Angeles Superior Court by Doctor Mary Lund, of the courts Family Law Psychiatrists Office points to definite conclusions about appropriate post-divorce parenting arrangement for children.⁸ For instance she argues that fortnightly contact with non-custodial fathers is totally unsuitable for babies under a year of age. She suggests that if infant children are to bond to their non-custodial parents, a schedule of up to 3 hours contact every other day is advised with one overnight a week. Dr. Lund reports that children who have been deprived of one parent often express a need to live with that parent—this is particularly true of boys who have been deprived of contact with their fathers. Research shows non-custodial parents who are deprived of contact are unlikely to remain involved in their children's lives (Arndt 1996).⁹

Most experts agree that children, especially very young ones, need consistency and routine. Unfortunately, too many of these people, relying on outmoded sexist stereotypes about men and women, believe that infants and toddlers should live with the *primary parent* (the mother) and that the father should be allowed to *visit* only two or three hours every weekend with no overnights (Warshak 2000).¹⁰ This kind of schedule however, is *absolutely inappropriate for infant contact*, writes paediatrician Fay (1995):¹¹

The First Month

If the infant is being breastfed, contact should occur at least once or twice each day for an hour or two each time. If the child is being bottle-fed, Dr Fay recommends a minimum of four hours each day and eight hours on the weekends. These hours can be divided up into two shifts if needs be. At this stage activities such as holding, feeding and

changing the baby, are laying the foundation for a secure relationship between child and parent.

One–Three Months

For breast–fed babies, a minimum of one three hour session each day, with eight to twelve hours on the weekends. Even at this age, the infant can tell differences between the mother and father and knows to expect different things from each parent. More time is advised for bottle–fed babies.

Three–Six Months

At least four hours a day, with twice as much time on weekends for breastfed infants. For bottle–fed children at least two full days each week, including overnights.

Six–Twelve Months

If the infant is being breastfed eight to twelve hours twice a week, if the baby is being bottle–fed, overnights are important and its fine for the baby to spend the whole weekend, three nights in a row with father a week. If possible a fourth or others days should be accommodated as well.

One–Two Years

After the first year, a less intensive schedule can be supported, but the father should still spend at least three or four hours with his toddler three times a week, plus a two or three overnight every other weekend. Children at this age still do not understand time very well and let alone a week without the father might as well be forever. Toddlers may feel abandoned and rejected. When loved, secure and bonded, children can adept well to changing environments (Kelly 1991; Warshak 2000).^{12,13}

Unfortunately, too many people who should really know better advise the cutting back of time (Warshak 2000)¹⁴ This is exactly the wrong approach and will lead to adjustment problems later (Lund 1996; Kelly & Lamb 2000).^{15,16}

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Law Reform

United States of America

In state legislatures and courtrooms throughout the United States, child custody law following divorce is being reformed. Prompted by evolving parental expectations and roles, the law is changing to reflect new post divorce family patterns and social science evidence that two *psychological parents* are required to promote a child's welfare.

In 1975, joint physical custody (i.e. joint residence) existed in the statutes of only one state, North Carolina. Since then 47 additional states have enacted joint custody laws. The legislatures in most, if not all of the remaining states have joint custody laws under study.¹ Unanticipated by any observers in the mid 1970's,^{2,3} was the sudden and growing popularity of joint custody. As the former rule—maternal custody—is falling away, a new rule—joint custody appears to be emerging. The dramatic changes in the law parallel the no-fault divorce movement in which the grounds to divorce were altered in accord with the reality of marital breakdown. Today, a presumption or preference for joint physical custody exists in at least 23 states plus the District of Columbia. Joint physical custody preferences and presumptions typically take one of three forms:

- A rebuttable presumption that joint custody is in the best interests of the child;⁴
- A stated preference by the legislature, without a strict presumption;⁵
- A presumption that joint custody is in the child's best interest where both parents agree.⁶
- Recently passed legislation has tended to favour stronger presumptions that protect the child's right to both parents.⁷ Two states have passed laws shifting away from custody and access labels,⁸ and a further four states have made joint legal custody (i.e. joint guardianship or long-term parenting responsibility) a presumption.⁹ Many states now permit a judge to order joint custody where only one parent desires it¹⁰ or even when neither has sought the arrangement.¹¹

Some state laws couple a preference for joint custody with a provision favouring sole custody to the parent who appears the most willing to facilitate or allow the child frequent contact with the other parent.¹² This inducement is also reflected in appellate decisions, whether or not provided for by statute.¹³ Some states require¹⁴ and many offer,¹⁵ counselling or mediation in order to promote cooperation and resolve disputes.

To assist parental understanding of joint custody decrees California courts must detail when the consent of both parties is required to exercise legal control and what happens in the absence of mutual consent. In all circumstances beyond those specified in the award, either parent alone may exercise legal control.¹⁶

To assure that the legislative preference or presumption for joint custody is not taken lightly, a number of statutes require the court to state in its decision the reasons for denying a request by one or both parents for joint custody.¹⁷ Idaho specifies that a denial of joint custody must be based on a preponderance of the evidence.¹⁸ The Louisiana specifically mandates an explanation of the reasons and requires more than a conclusion that joint custody would not be in the best interest of the child.¹⁹

Some of the statutes list factors to be considered in ordering or denying joint custody.²⁰ The most prominent of these factors requires a parental plan for implementation of joint custody. For instance Louisiana child custody law allows the court to order joint custody in the absence of parental agreement, but the court must require the parents to submit a plan for implementation of joint custody unless waived by the court for good reasons.²¹

The Ohio statute lists some of the factors to be covered in the joint custody plan, and authorises the court to *require the parents to make appropriate changes to the plan*.²²

Restrictions against geographical moves with the child, particularly out of state, are common in joint custody agreements and decrees. Courts will generally enforce such restrictions unless the parent wishing to move with the child meets the burden of proving the move is in the child's best interests.²³ Some courts have considered a move with the child to be a modification to sole custody and require proof of a substantial change of circumstance before allowing the move.²⁴

One safeguard often found in joint custody decrees prohibits a move with the child by either parent without the court's prior approval and designates that upon any unapproved move out of state, sole custody will vest in the remaining parent.²⁵ Joint custody agreements or orders that are silent on geographical moves with the child have been held to place on the objecting parent the burden of proving the move will be detrimental to the child.²⁶ Generally appellate courts have been quick to find that an unauthorised move out of state would adversely affect the child in a joint custody situation, particularly if there was no compelling necessity for the move.²⁷

However, living in the same geographical area is not essential to a workable joint custody arrangement. Courts may also rule on a specific dispute without terminating joint physical custody. A Pennsylvania appellate court held that joint physical custody should not have been terminated when the father moved 120 miles. The court remanded the case with instructions for the lower court to consider a plan for shared physical custody that would reflect the distance between the parents' homes.²⁸

Questions have arisen following divorce concerning parental access to records about the child. These questions are answered in a number of the custody statutes that ensure that access to records pertaining to the child's schooling, health, and activities are available to both parents.²⁹ Thus, information regarding the child will not be denied to the non-custodial parent. These provisions are generally applicable whether or not joint custody or sole custody is decreed.

Another item appearing in some joint custody legislation relates to the modification of previous custody determinations made prior to the joint custody enactment. Most legislation contains a provision allowing modification of pre-existing sole custody awards to joint custody if it is shown that a change to joint custody would be in the best interest of the child.³⁰ The feared flood of motions to modify earlier sole custody determinations does not appear to have materialised in those states providing for such modification without a substantial change of circumstances.

Many statutes provide child support formulas or other methods for allocating the child support obligation when both parents share custody of the child. The Colorado law states that in order to provide the child with two homes, child support may continue even though the child is not residing in the home of the payee.³¹ Similarly, Michigan's law specifies that child support orders may include payments for a portion of the other parent's housing expenses necessary to provide two adequate homes for the child.³²

The Delaware statute requires the judge, in setting child support, to consider the relative percentage of the times the child spends with each joint custodian.³³ Both Iowa³⁴ and Minnesota³⁵ list the factors to consider in calculating support in their measures. Some states establish mathematical child support formulas applicable to joint custody by case law,³⁶ in other states, statutes stipulate that support should be paid in proportion to the relative financial ability or resources of each parent.³⁷

Although the reforming of joint physical custody law is not yet complete, three common issues are emerging. In contrast to the traditional assumption that the court had to choose one parent after divorce, the laws emphasise the importance of a child's post-

divorce relationship with both parents and the need to continue that relationship after divorce to promote the child's well being. .

Second, the new laws reject the assumption that divorcing parents should not be expected to cooperate in the care of their children after divorce. Preference usually favours joint custody or sole custody to the parent who demonstrates tolerance for a child's frequent and continuing contact with the other parent. Consequently an antagonistic parent is less likely to be awarded sole custody and may jeopardise the opportunity to participate equally in joint custody.

Finally, the laws recognise that in today's society the sole residence concept is a product of a Victorian family model that no longer exists. Many mothers pursue careers outside the home and fathers nurture their children.

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⁴ Arkansas, Idaho, Iowa, Kansas, Louisiana, New Hampshire, New Mexico, Texas, West Virginia, Washington District of Columbia,

⁵ e.g. Alabama, Georgia

⁶ California, Connecticut, Mississippi, Vermont, Nevada, Tennessee, Washington state

⁷ e.g Oklahoma (1999); Maine (LD 1406, effective 21st September 2001)

⁸ Florida, Washington state

⁹ e.g. Delaware, Minnesota, Missouri, Wisconsin

¹⁰ *Beck v Beck*, 432 A2d 63 N J, 1981

¹¹ *In re Wesley, J K.*, 445 A2d 1243 P A. 1982

¹² e.g. Louisiana; Montana, District of Columbia

¹³ re: *Clemente v Clemente*, 627P. 2d 1263

¹⁴ e.g. California

¹⁵ e.g. Connecticut and Florida

¹⁶ California Civil Code s4600.5 (3)

¹⁷ e.g. Louisiana, Montana

¹⁸ Idaho Code s 32.717B (4)

¹⁹ Louisiana Civil Code Article 147

²⁰ e.g. Alaska Statute s 25.20.090, Louisiana Article 147

²¹ Louisiana Civil Code Article 147

²² Ohio Rev Code Ann s 3109.04 (D)

²³ *Osborn v Osborn*. 24 Wash App 862, 604 p.2.d 954 (1979)

²⁴ *ibid* 24

²⁵ See, language in *Sherry v Sherry*, 622 P.2d 960 (Alaska 1981)

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²⁷ *Yeo v Cornaire*, 91 A.D. 2d 1153, 458 N.Y. s 2d 743, *aff'd* 59 N.Y.2d 875, 453 N.E. 2d 544, 466 N.Y. S2d 315 (1983)

²⁸ *Smith v Smith* 297 Pa. Super 348, 453 A. 2d 1020 (1982)

²⁹ e.g. Alaska, California, Louisiana, Massachusetts, Mississippi, Missouri, Montana, Pennsylvania and Nevada

³⁰ e.g. Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Michigan, Mississippi, Montana, Nevada, New Mexico, Ohio and Pennsylvania

³¹ Colorado Rev Stat s 14-10-123.5 (2) B

³² Michigan Comp Laws Ann s 722.269

³³ Delaware Code Ann s 598.21 (3)

³⁴ Iowa Code Ann s 598.21 (3)

³⁵ Minnesota Stat Ann s518.17 (4)

³⁶ e.g. *Belt v Belt* 65 OR.APP.606, 672 P.2d 1205 (1983)

³⁷ e.g. Mississippi Code Ann s 93-5-2324; Michigan Comp Laws Ann s722.26a

Australia

The Family Law Reform Act 1995—A Snapshot

Late in 1995 the Federal Parliament took steps to promote a child's human right to love and to be cared for by both parent through amendments to Part VII of the Family law Act.¹ "In doing so it delivered a strong censure to the Family Court for the way it had handled the issue of the parenting of children following divorce or separation. The Family Court got it wrong was the message by Minister Peter Duncan as he moved the government's amendments." His words made clear that, in the view of the Parliament the Family Court had handled the issue of care giving post divorce inappropriately:

The original intention of the late Senator Murphy was that the Family Law Act would create a rebuttable presumption of shared parenting, but over the years the Family Court has chosen to ignore that. It is hoped that these reforms will now call for much closer attention to this presumption and that the Family Court will give full and proper effect to the intention of Parliament.²

"Under the amendments that became law in June 1996, children have a right of contact on a regular basis with both parents who share duties and responsibilities concerning the care, welfare and development of their offspring.³ The revisions are in response to the accumulated evidence that contact with both parents is a critical factor in the children's well being after divorce. The new Act has thrown out the concepts of custody and access which may lead to the belief that the child is in the possession of the parent who is granted custody, explained the memorandum which accompanied the new Act."⁴

It is significant that the new legislation is prefaced by a statement of general principles drawn in substances from the UN Convention On The Rights of The Child,⁵ declaring, the child's right to know, to be cared for by and to have contact with both parents, and the parents' obligations to share responsibilities over their children.⁶ Some legal observers argue this provision may be seen as creating a rebuttable presumption in favour of contact (e.g. Dewar 1996).⁷ However, the Family Court has rejected this view.⁸

In relation to children, the object is to ensure that children receive adequate and proper parenting to help them achieve their potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of the children.⁹

The introduction of more neutral terminology such as parenting orders for *residence*, *contact*, *specific issues* and *child maintenance* replaces the language of *custody* and *access*. Division 8 Subdivision C of the Reform Act creates three new types of order called a *Location Order*, a *Commonwealth Information Order*, and a *Recovery Order*; these respectively address the increasing problem of parental abduction of children.

It is of some interest that s 64B(6) provides, as the only stated example of a *specific issues order* that the court may make, is an order conferring upon a person responsibility for the *day-to-day care*, or for the *long-term care*, welfare and development of the child. This provision bears a strong resemblance to the definition of *custody*¹⁰ and *guardianship*¹¹ in the former legislation. Thus, it is possible to seek orders in the shape of a specific issues care order as provided in s 65ZB which will operate to divide parental responsibility in the same manner as the former sole custody/joint guardianship orders did. In the cases where it is considered to be in the child's best interests to exclude a parent from parental responsibility altogether, this could be achieved by seeking a

specific issues order vesting responsibility for both day-to-day and long-term care totally in one parent.

At first sight the changes are to a large extent semantic. The concept of parenting responsibility replaces that of the custody and guardianship with which each parent was invested under the former law. Parenting responsibility is defined as covering all the *duties, powers, responsibilities and authority which by law parents have in relation to their children*.¹² There are two important omissions. Unlike its English parallel there is no reference to parental rights. Under the definition parents have *powers* and *authority* to carry out their *duties and responsibilities*. This contrasts with the United Nations Conventions On The Rights of The Child that speaks of the rights *and duties of parents and guardians*.¹³

Whether this omission has any practical significance remains to be seen. Further, beyond the generic definition contained in the legislation we simply do not know what parental responsibility is. Some legal commentators (e.g. Dewar 1996)¹⁴ suggest that the lack of precision in the meaning of parental responsibility calls into question the extent to which the Reform Act can accomplish the aims that *parents share duties and responsibilities*¹⁵ and *agree about their future parenting of their children*.¹⁶ The question that is raised is whether this can be done without a satisfactory definition of what such duties and responsibilities are (Dewar 1996).¹⁷

Where a parent who has the child in their care makes it difficult for the child to have contact and a relationship with their non-resident parent their are sanctions—such as a fine or even change of care from the parent who is making life difficult for the child and their non-resident parent. None of this is ideal and it is always best that matters be resolved by agreement. But if they are not, and one parent decides to sabotage the child's right of contact with their other parent, the law must be seen to come down hard based on such behaviour. The judicial argument that this will affect the welfare of the child does not stand up to scrutiny. The child's welfare is already suffering if contact is denied to a capable parent. To change residence to them may actually alleviate suffering, as long as it is done quickly before the child's relationship with their non-resident parent has been affected by the denial of contact.

The Cruel Hoax Perpetrated Against Children

The promise of the Family Law Reform Act that it would make the lives of the children in divorce whole again has not been honoured. Whilst the law allows courts to make decisions that would promote joint residence, there is no guarantee that the courts will do this. Despite its clear legislative intent explained to parliament by Minister Peter Duncan in the above quotation, the Reform Bill 1994 stopped a very long way short of presumptive joint residence.¹⁸ Regrettably for children, this omission has enabled traditionalist judges of the Family Court to ignore its statutory intent.

The typical parenting order made by the court invests long-term parenting responsibility for the child in both parents. A *contact order* regulates the child's contact with their non-resident parent and a *specifics issue* order invests day-to-day responsibility for the child in the resident parent. This is not joint residence. The scheme adopted by the court simply continues the failed sole custody/joint guardianship/limited contact model—the catalyst for the 1980 and 1992 Joint Select Committee's examination of family law. As noted previously, for parent and child there is qualitative differences between *visiting together* and *living together*. In the typical case, there can really be no place for the notion of a parent as a mere caller who has *contact*.

Antagonists of joint residence as a statutory presumption claim that judges of the Family Court are leaning towards joint residence (see, e.g. Rhoades, Graycar, & Harrison 2000).¹⁹ Empirical data, however, shows otherwise. Family court statistics compiled since 1996 clearly indicate judicial attitudes are still opposed to the general principle of

joint residence. Statistics show that the Family Court has ignored parliament with impunity.

The following table outlines the numbers of sole residence and joint/split residence orders made by the Family Court from 1993 to 1999 (joint residence is where the order is for each child to spend some time residing with each parent and split residence is where the order is for each parent to have one or more of their children residing with them on a full time basis).²⁰

It will be noticed that for the period 1995–1996 and 1996–1997 the % figures do not sum to 100%. This is due to an error by the court statistical division. Furthermore, as the Family Court’s computer system is unable to provide separate details, joint residence and split residence orders are grouped together along with orders made by consent and orders made as a result of contested hearings (Orders made in the Family Court of Western Australia are excluded as figures are unavailable. Data for the Darwin Registry have been available since 1996–1997).

Custody/Residence Order Outcomes From 1993–1994 to 1998–1999

Numbers

Year	Sole	Joint/Split	Other	Total
1993–1994	11533	899	357	12789
1994–1995	11775	1061	373	13209
1995–1996	11804	1021	419	13244
1996–1997	12325	1211	570	14106
1997–1998	13356	1190	665	15211
1998–1999	12914	1162	577	14653

Percentages

Year	Sole	Joint/Split	Other	Total
1993–1994	90.2%	7.0%	2.8%	100.0%
1994–1995	89.2%	8.0%	2.8%	100.0%
1995–1996	89.2%	7.7%	3.2%	100.0%
1996–1997	87.3%	8.6%	4.0%	100.0%
1997–1998	87.8%	7.8%	4.4%	100.0%
1998–1999	88.2%	7.9%	3.9%	100.0%

To give substance to the expressed intention of the 1995 revisions, this monograph proposes the enactment of clarifying amendments to the Family Law Act 1975 (Cth) establishing joint residence as a statutory presumption with the possibility of rebuttal. Legislative reform should focus on the fundamental right of every child to the continuing

companionship of both parents in an everyday situation following parental separation. Sole residence demonstrably frustrates this basic human right of the children in divorce.

The degree of public opposition to comparable family law revision in the American state of Washington may shed some light on the current debate on how to promote the interests of children following parental separation or divorce. Like the Family Law Act 1975 (Cth) the terms *custody* and *access* are absent from the 1987 *Washington Parenting Act*, which refers instead to *parenting functions* and *residential schedules*. The statute has proved to be so unappealing to the general community and many lawyers, that in 1989, two years after its enactment, joint residence supporters obtained 135,000 signatures opposing the enactment.²¹

The data indicates that unless the actual daily care and daily responsibilities for the children are substantially but not necessarily equally shared, the designation of parental responsibility may be limited in its practical significance for the child's upbringing (Saposenek 1983; Kruk 1994).^{22,23} The limited research conducted in Australia to date, indicates that many parents who do not have day-to-day care and control of their children after separation give up the struggle of maintaining contact (Maloney 1982; McMurray 1993; Jordan 1996).^{24,25,26} To paraphrase the Family Law Act 1975 this cannot be *in the best interests of children*.

References

¹ Family Law Reform Act 1995 (Cth)

² Duncan P (Parliamentary Secretary to Michael Lavarch the former Federal Attorney General). *Consideration of The Senate Message*. House of Representatives Hansard, 21 November 1995 at p 3303.

³ See, cl s 60B

⁴ The Parliament of The Commonwealth of Australia, House of Representatives Family Law Reform Bill 1994, *Explanatory Memorandum*

⁵ Australia signed the convention on 22 August 1990 and ratified it on 17 December 1990. The Convention entered into force on 16 December 1991. The Convention creates binding obligations in international law but is not automatically part of Australian domestic law.

⁶ The convention recognises a number of rights and protection for children including:

- Children have a right to know and be cared for by both parents, regardless of whether the parents are married, separated, have never married or have never lived together (article 7.1);
- 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, except if this is contrary to the child's best interests (article 9.3). (i.e. the state should only fail to support the maintenance of a child's personal relations and direct contact with a parent on a regular basis if it is demonstrably contrary to a child's best interest);
- Parents share duties and responsibilities concerning the care, welfare and development of their children (article 18.1) (This article identifies parental responsibilities as being focussed on the best interests of the child. This is important in understanding the meaning of parental rights, which are a requirement to enable parents to meet their responsibilities);
- Parents should agree about the future parenting of their children (This arises as a consequence of article 18.1;

The first four principles in this list are included in the Family Law Reform Act 1995 cl 60B, the objects clause of Part V11 which deals with children:

- Children have a right to protection against abuse, mental violence or neglect (article 19.1) (This article referring to mental violence could be considered to apply to emotional abuse in the form of parental alienation);
- Children have a right to be heard in matters that concern them (article 12.2);

Other articles are also relevant. Hence, to take some clear examples:

Article 5

State parties shall respect the responsibilities, rights and duties of parents...to provide...appropriate direction and guidance;

Article 9.1

State 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 (this could possibly be interpreted to mean that interim sole residence arrangements are questionable, and that alternatives to joint residence should only be considered when they can be shown to be superior according to a best interests of the child criterion);

Article 14.2

State parties shall respect the rights and duties of parents and, if applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (in practice the rights of guardianship, are exercised by the parent who is the residence provider);

Article 18.2

For the purpose of guaranteeing and promoting the rights set out in the present Convention, State parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of the child (this article requires the state to develop appropriate institutions, which would include the Family Court)

There are other internationally specified rights which merit consideration. These include:

Article 16.1 of the Universal Declaration of Human Rights provides *that men and women of full age have the right to marry and found a family; and relevantly they are entitled to equal rights as to marriage, during marriage and at its dissolution;*

Article 16.3 provides that *the family is the natural and fundamental unit of society and is entitled to protection by society and the state.*

⁷ Dewar J. The Family Reform Act 1995 (Cth) and The Children's Act 1989 (U K) Compared—Twins Or Distant Cousins. 10 Australian Journal of Family Law (1996) pp 18-34. See also, Dewar J, & Parker S. Parenting, Planning and Partnership: The Impact of The New Part VII of The Family Law Act 1975. 13(2) Australian Journal of Family Law (September 1999)

⁸ See eg B V B

⁹ cl s 60B

¹⁰ See, former s63E(2)

A person who has or is granted custody of the child under this Act has:

- (a) the right to have the daily care and control of the child; and
- (b) the right and responsibility to make decisions concerning the daily care and control of the child

¹¹ See, former s63F(1):

Subject to any order of a court for the time being in force, each of the parties to the marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child; See also, former s63E(1): A person who is the guardian of a child under this Act has responsibility for long-term welfare of the child and has, in relation to the child, all powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than:

-
- (a) the right to have daily care and control of the child; and
 - (b) the right and responsibility to make decisions concerning the daily care and control of the child

¹² cl s 61B(1)

¹³ e.g. articles 5 & 14.2, *supra* note 6

¹⁴ e.g. Dewar, *supra* note 7

¹⁵ cl s60B

¹⁶ *ibid*

¹⁷ Dewar, *supra* note 7

¹⁸ While these reforms did not achieve the object of joint residence, members of parliament were led to believe that they made a genuine attempt to pass laws to implement shared parenting as a rebuttable presumption. See Peter Duncan. *Judges In The Dock*. The Age 22nd October 1996. p A 19

¹⁹ Rhoades H, Graycar R, & Harrison M. *The Family Law Reform Act 1995: The First Three Years*. University of Sydney & Family Court of Australia, Sydney (2000).

²⁰ The assistance given by S A Senator Jeannie Ferris in obtaining these data from the Family Court is acknowledged and greatly appreciated.

²¹ See, Cook J. *Eliminate Joint Custody Terminology?* Joint Custodian. March 1990 p 4

²² Saposnek D. *Mediating In Child Custody Disputes*. Jossey-Bass, New York 1983 pp 8-9

²³ Kruk E. The Disengaged Non Custodial Father; Implications For Social Work Practice With The Divorced Family. 39(1) *Social Work* (1994) pp 15-25

²⁴ Forward By Lawrie Maloney, Director, Family Court Counselling Melbourne. In G. Banks. *A Practical Guide For Access Fathers*. Dove Communications, Blackburn Victoria (1982) p v

²⁵ McMurray A. Influences On Parent-Child Relationships On Non-Custodial Mothers. 13(3) *Australian Journal of Marriage and Family* (1993) p 138

²⁶ Jordan P. *The Effects of Marital Separation On Men: 10 Years On*. Research Report No 14, Family Court of Australia, Canberra (November 1996)

The Case For Sole Residence

The traditional view of the courts has been that children are best left in the physical and emotional care of one parent following divorce. Thus, sole residence orders have usually been the option of choice.¹ Support for this approach is found in the work of Joseph Goldstein (Walton Hale Hamilton Professor of Law, Science and Social Policy Yale University Law School), Anna Freud (Director Hampsted Child Clinic London) and Albert Solnit (Director of the Yale University Child Study Centre) who, as an attempt to assist judges in making child custody decisions published the provocatively titled book, *Beyond The Best Interests of The Child* in 1973² and again in 1980 (hereinafter cited as *BBIC*).

The tract having been written with the acknowledged purpose of changing the law relating to adoption, foster care and child residence, it is appropriate to assess its arguments. The stature of its authors had assured the book considerable attention and may have influenced judges, legal and mental health professionals involved in post-divorce child placement. If so, we believe this to be very unfortunate. Not only do we strongly disagree with almost all that the book argues with regard to child residence, the authors have failed to support their views, or to take into account the evidence available on the development of children in various home settings. Moreover, psychoanalytic sources are evoked without acknowledging the major criticisms that have been levelled at many of these studies (Katkin, Bullington, & Levine 1974).³

In an effort to apply psychoanalytic and attachment theory to legal issues involving the placement of children, Goldstein, Freud, & Solnit introduced the term the *psychological parent*. They asserted that children have only one psychological parent and recommended that this psychological parent should retain sole residence. They argue that authority over a child's life needs to be clearly allocated to one parent, and that children suffer painful loyalty conflicts if they maintain contact with two parents who are not in a harmonious relationship with each other. They recommend that the power to decide whether the child should have *contact* with the *outside* parent should be left entirely in the hands of the resident parent. An implication of their position is that exposure to continuing parental conflict is more endangering to a child than losing touch with their non-resident parent.

On the other side of this issue are Roman & Haddad (1978)⁴ who argue in *The Disposable Parent* that, joint residence is the optimal post-divorce arrangement and that courts should begin with a rebuttable presumption of joint residence. Roman & Haddad share with Goldstein, Freud, & Solnit, the idea that children need consistency and continuity of affection. The difference is that Roman & Haddad feel that it is precisely joint residence that allows that consistency to continue. To break the bond between the child and one parent arbitrarily is to destroy continuity of care. They argue that joint residence allows both adults the gratification of parenting.

'One reason why the publication received such notoriety was that in the first flush of enthusiasm for the new approach to family law the book offered a way beyond a perceived decision making impasse which had been created by the abandonment of fault. The lure of an all encompassing and relatively straight forward principle via which post-divorce decisions could be made, was as strong then as it is now' (Maloney 1993).⁵

In reviewing the author's position, we will largely confine ourselves to those areas that involve child residence. The position taken in regard to foster care and adoption is beyond the scope of this paper. Though each of the volume's steps could be regarded as bold and controversial if the *BBIC* terminology were used, such dispositions are not far away from what many judges have been doing anyway. The faustian character of its *psychological parent* doctrine has been accepted by the Family Court, which has made it

quite clear that biological parents hold no absolutely privileged position in the life of a child.⁶

BBIC may be seen as having two major thrusts—one relates to the objectives that courts ought to pursue in child residence cases; the other relates to psychoanalytic propositions which, it is argued, ought to be built into the law. While agreeing *that the law must make the child's needs paramount*, the authors are concerned that limitations on existing knowledge make it impossible to ever know with certainty what is *best*. In their model statute, the current *best interests of the child* standard is replaced by *the least detrimental alternative* serving they say *to remind decision-makers that their task is to salvage as much as possible out of an unsatisfactory situation*.⁷ The statute states:

The least detrimental alternative... is that specific placement and procedure for the placement which maximises in accord with the child's sense of time and on the basis of short term predictions, given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuing basis a relationship with at least one adult who is or will become his psychological parent.⁸

The authors concern with psychological concepts gives rise to the other major thrust of the book; they advocate that the traditional biological standards that have dominated child residence law be replaced with psychological standards. If the law's concern is the best interests of the children, these authors maintain, it must protect the child's relationship with *psychological parents*. In divorce cases the interests of each biological parent are protected by the assignment of contact privileges, and sometimes by a division of residence rights (e.g. the child lives with one parent during the school year and with the other during school holidays).

The problem with all this, according to *BBIC*, is that it fails to recognise the importance of continuous stable, and gratifying psychological relationships. Psychological parents are those who, regardless of biological relationship, provide children with stability and who meet their physical and emotional needs. The psychological parent provides the stimulation for social and intellectual development, and the basis for inter-personal trust that is essential to the success of future relationships. Thus, a radical child placement law is proposed.

It provides first, for the abolition of waiting periods in adoption cases on the grounds that the uncertainty generated by the lack of finality hampers the development of psychological parenthood in the new setting. Second, it tends to favour foster parents who want to adopt or otherwise retain the residence of children over natural parents of those children on the grounds that every change in residence undermines the stability that is essential to healthy child development. In addition, the model statute provides that children whose divorced parents cannot agree on residence and contact terms are to be assigned by the courts to the exclusive care of one parent because children caught in the middle of parental conflict may have difficulty establishing sound relationships with either. The act also provides that children involved in such contests shall have a right to separate and independent legal representation.

Central to the authors' thesis is the claim that a child's development depends upon the continuity and character of his or her relationship with the adult the child perceives as his or her parent, and this perception, rather than the fact of biological parenthood is the basis of their relationship. The authors describe this adult as the child's *psychological parent*. They stress that biological or natural parenthood is not in itself a reason for the child's emotional attachment to an adult. Rather, they point out that a biological parent becomes a psychological one only from *day-to-day interaction companionship and shared experiences*.⁹ In their view, it is this day-to-day interaction that defines parenthood; since the biological tie does not in any way guarantee the psychological

one, it is not very important. Indeed the authors claim that natural parenthood confers no *special right*.¹⁰ Psychological parenthood, which may or may not coincide with biological parenthood, is their focus, so much so that they continually characterise a birth certificate as an *allocation*, implying that it is no more than a trifling record-keeping device. The authors propose that once such a psychological relationship is formed it should not be disturbed (except in the extreme cases of abuse or neglect).¹¹

It will be noticed that the *BBIC* statute presupposes the existence of but *one* psychological parent following divorce. This is because Goldstein, Freud & Solnit are certain that an inevitable consequence of divorce is parental disharmony and thus one parent must bow out, paradoxically to safeguard the child's relationship with the other parent. Their solution is that residence be awarded to only one parent with whom the child will maintain a continuous, day-to-day relationship and emotional bond, and that the non-resident parent be stripped of his or her legal rights to parent the child:

Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or her wishes to raise the child. Thus, the non-custodial parent should have no legally enforceable right to contact with their child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.¹²

Moreover, the authors are quite clear that contact with the non-resident parent, even if allowed is not worth much. As they readily, even blithely acknowledge, *a visiting or visited parent has little chance to serve as a true object of love, trust, and identification, since this role is based on being available on an uninterrupted day-to-day basis*.¹³

So much for the non-resident parent. But what if both parents are equally acceptable as the psychological mainstay in their child's life? How then to determine the issue of residence? In such a case, the authors propose *a judicial drawing of lots... might be the most rational and least offensive process for resolving the hard choice*.¹⁴

The luck of the draw—the *most rational* of routes to take! Quiet obviously, a humane society could hardly disagree with the writers more, nor with those who may make decisions based on the recommendations of *BBIC*. Even on its own terms Goldstein's, Freud's & Solnit's arguments are very weak. The authors of *BBIC* are serenely unencumbered by evidence. While they tell us that *psychological theory...calls into question those custody decisions which split a child's placement between two parents or which provide the non-custodial parent with the right to visit*,¹⁵ it is there that their case rests. However, as Roman & Haddad (1978)¹⁶ noted:

The authors do not cite, nor does their exist, any social science data to support the proposition that a single official parent is preferable to two.¹⁷

Earlier we referred to Goldstein's, Freud's, & Solnit's belief of the desirability of one parent custody. Their theory is that unlike adults, who are generally capable of maintaining a number of positive ties with a number of different individuals, unrelated or even hostile to each other, children lack the capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children become prey to severe and crippling loyalty conflicts.¹⁸

But this is simply their observation. Again, as with so much else in their argument, it is never demonstrated. It's reverse, however, is self-evident: children have relationships with both their parents. When given any chance at all, children reveal remarkable tenacity about continuing to love both parents (Wallerstein & Kelly 1980; Mitchell 1985).^{19,20}

In all cases even when adopted children have never seen their real parents the parent–child bond is a psychological and emotional reality which does not disappear by decree. Children and parents continue to feel the curiosity, loyalty, the sense of loss, the fears of abandonment, and the emotional attachment and ambivalence that comes simply from knowing that “you are my daughter—I am your child.”²¹

As adults, people who have given up a parent—sacrificed a love object—continue to feel the pain. Deirdre Laiken (1981),²² in her book compiling the reactions of women who are the daughters of divorce explains:

Just the thought of a choice between parents is frightening; it is a situation that was never meant to be. In the normal course of development, girls feel alternating loyalties, alternating identification... If we are asked to make a choice, this important process is disturbed. If the choice is made for us, there is a residue of anger and feelings of loss. ‘Sacrificing a love object’ is an act some of us performed unconsciously others of us in full view of the judge our parents and our relatives. But it was a sacrifice that has long-range effects on our personalities and our lives.²³

When divorce occurs are we prepared to write off, as *BBIC* does, one of the parents? (Insofar as the non-resident parent has no legal standing under the *BBIC* statute, he or she is completely at the mercy of the resident parent who might indulge in any amount of extortion or blackmail with regard to the children). Beyond the considerable evidence demonstrating that the child and his or her non-resident parent feel a strong reciprocal attachment (Thompson 1983; Rohman, Sales, & Lou 1987),^{24,25} and, in fact, need one another, the slightest sense of compassion suggests that under most circumstances a parent should not be legislated out of existence simply because their marriage has ended. Yet the authors of *BBIC* disregard the needs of one parent just as they ignore the ties that exist between that parent and his or her offspring. Such ties are strong, built on the sum of the years that parent and child have shared. To this degree, the biological and *psychological parent* are quite often one, an equation that *BBIC* chooses to ignore.

They also ignore or are cavalier about the way their guidelines discriminate against the poor and minorities in general. *Whatever the court decides*, they write, *there will be hardship. It may be the biological parents, already victimised by poverty, poor education, ill health, prejudice, their own ambivalence, or other circumstances, who are denied their child.*²⁶

It is hard to understand why being poor should mean that one’s children are as revocable as the goods that minorities purchase on time. Nor, for that matter, is the statute specific about what length of time a child must be separated from his or her parents in order to be *at risk*. It appears that the authors believe that the pre–oedipal child is *at risk* within days; but does this short separation apply to the extended families of minorities? Among minorities, child–rearing patterns often entail temporary separations or, quite commonly, an extended kinship network (Stack 1976).²⁷ Is the presence of but one adult the only way for a child to feel secure?

In sum, the psychological basis of *BBIC* is simply not sound; nor is the books assertion that the guidelines offered are more practical than the current *best interest* approach. Not surprisingly, the disposable parent philosophy behind *BBIC* drawn from the Japanese Civil Code was not without its critics.^{28,29,30,31} As (Stack 1976)³² in one of the many negative critiques of *BBIC* makes clear, its authors ensure that:

... the court is required to make a decision that increases rather than diminishes the role and responsibility of the courts in child custody cases. Instead of encouraging the example of the numerous cases where parents agree and work out custody arrangements out of court, the authors’ recommendations encourage bitter custody battles. In addition to the

social and emotional costs, such litigation requires a time consuming investigation to determine the 'better' custodial parent—procedures that also require specialised personnel and advisers who increase the cost and further complicate the judicial process³³

An early irreverent review published in the *Williamette Law Journal* is the one by Professor Henry H. Foster Jr (1976).³⁴ A highly respected and prolific legal author, Professor Foster began with the appropriate acknowledgments that “Since the prestige of the three psychoanalysts... is such that any caveat or disagreement in some quarters will be regarded as heresy, or, at best as divisive, one assumes a heavy burden of persuasion...in reviewing their book and that it must be an obsessive compulsion neurosis that impels us to enter where angels fear to tread and to tell it like it is, from our point of view.”³⁵

Professor Foster took the view that when the authors abandon the couch for the bench they leave their expertise behind and acquire a Jehovah complex, and that their draconian imperatives bring new rigidity to that very area of law that most needs flexibility. This regrettable and unnecessary development may perhaps have come about, he speculated, because the authors switched to the role of advocates and adopted partisan techniques of exaggeration, over-simplification, and one-sidedness.³⁶

Foster especially deplored the inflexibility of the anti-contact rules, suggesting that such a position ignores the child's needs and desires as well as those of other parents and in the name of continuity and autonomy encourages spiteful behaviour. He envisioned blackmail and extortion flowing from the resident parent's absolute discretion over contact. Echoing the fear of many readers, Foster found that the no contact rule the most objectionable statement in the whole book.³⁷

He concluded that the authors despite their declaration of ambitious intention had not provided a sound and workable alternative to the present system. Acknowledging the limits of legal criticism of such a foray of scientists onto legal ground, he did hazard the opinion that the inflexible position taken by these three authors *invited challenge by other distinguished behavioural scientists who are in the best position to argue that Beyond The Best Interests of The Child goes beyond the pale.*³⁸

If one wishes to read only one review for perspective and thorough analysis it should probably be the lengthy discussion by law professor Peter Strauss and Joanna Strauss, a social worker and Associate Staff Member of The Post-Graduate Centre for Mental Health at Columbia University (1974).³⁹ Expressing a different viewpoint about contact, the writers agree that loyalty conflicts might be damaging for children but question whether divorces were sufficiently acrimonious to create serious risks of this kind. They argue further that allowing the resident parent full power to block contact would foster conflict over residence.

While the Strausses praised the *BBIC* authors for their insights into the failings of the present system they suspected that the frequency of residence litigation *is more likely to rise than fall with the adoption of either/or regimes*⁴⁰ and that *the temptation to viciousness is surely increased when the odds are heightened by narrow restriction of the possible outcome.*⁴¹ They were entirely unpersuaded that witnessing the civil death of one parent is more healing for a child of divorce than the strains necessarily attendant upon continuing some sort of relationship with two separated parents, and they knew of no studies showing that the drastic recommendations against contact rights *with the complete subordination of the child to the other's possibly distorted view* favours child development.⁴²

Perhaps the most thought provoking of all commentaries on *BBIC* however, is one that appeared in the relatively esoteric *Law and Society Review*. After the customary recitation of the impressive credentials of Goldstein, Freud, & Solnit, and fitting

acknowledgments that the publication of any joint effort by such dazzling figures is an *intellectual event*, the three reviewers Daniel Katkin, Bruce Bullington, & Murray Levine (1974),⁴³ from the Pennsylvania State University and the State University of New York at Buffalo voiced the sad misgivings that the *book's greatest utility may be as an example of the wrong way to employ social science to solve problems of social policy.*⁴⁴

They pointed out that *BBIC* does not contain a single reference to any empirical study in the extensive literature. They went on to cite several dismaying instances to substantiate the accusation of what they politely termed *disregard for evidence, and for its limitations* and added that *disregard for evidence, and for its limitations, might be less disconcerting were it not for the fact that some of the unsubstantiated claims contradict everyday experience.*⁴⁵

The reviewers found such disregard in Goldstein's, Freud's, & Solnit's arguments that in a very short number of days psychological ties to natural parents are broken and replaced by new ties in the interim caretakers – a theory which spells peril for any parent who would leave the child with grandparents or other temporary caretakers while holidaying or hospitalised. As to *BBIC* they conclude:

It is to be hoped that legislators and others responsible for the formulation and implementation of policy will not be dazzled by the reputations of these authors. Decisions that might influence the lives of millions need to be based on more satisfactory data and on a more thorough examination of alternatives than has thus far been presented.⁴⁶

“Curiously enough, the research that has been done on the issue of children's needs after divorce consistently points to conclusions that are diametrically opposed to those recommended by these three authors. Specifically, it has been demonstrated that children need, frequent and continuous contact with both parents. Thus if we were to follow the proposal of Goldstein, Freud, & Solnit, the first of these needs would be frustrated by the tenuousness and insignificance of the child's relationship with the non-resident parent, and the second would be frustrated by the escalating power struggles that would doubtless characterise many, if not most, of the inter-parental relationships. Such conflicts would ensure as a direct result of the severe imbalance in parental control over the child's relationship with the parents” (Saposonek1989).⁴⁷

It is now clear that joint residence does not pose the kind of threat foreseen by *BBIC* and that in most cases it offers substantial benefits to both children and parents (Luepnitz 1982).⁴⁸ The work undertaken so far suggest the ready accessibility of each parent, is likely to be of considerable value in assisting children to come to terms with the reality of their changed circumstances and keeping both parents alive for them (Family Law Council 1992).⁴⁹ As research shows again and again, the children who fared best after the divorce were those who were free to develop loving and full relationships with both parents (Folberg & Graham 1979; Family Law Council 1992).^{50,51} It was the fact that children and their non-resident parents became, in affect divorced from each other that has led to many of the problems uncovered in these studies (Roman 1977).⁵²

Joint residence, insofar as it allows them to continue their relationship with both parents is what children want. Each of the studies which sought the views of children indicates that while they would prefer the intact family of origin, they are satisfied with joint residence and value the opportunity to continue their relationship with both parents (Abarbanel 1979; Luepnitz 1982).^{53,54} In the Luepnitz (1982)⁵⁵ work nearly all the joint residence children were content with the arrangement. These children echoed the sole residence children in responding to the question, *With whom would you have wanted to live after the divorce?* by saying, *With both.*⁵⁶ Not only were joint residence children not confused by the arrangement they were able to cite specific advantages in the two-

household lifestyle. They described their arrangement as *more fun, more interesting or more comfortable*.⁵⁷

A study conducted by the University of Michigan (1979)⁵⁸ which asked 165 school children in grades three to six from divorced and intact families their residence preference, found that the majority of interviewed children wanted to live half the week with one parent and the remaining half of the week with their other parent. None of the children in the divorced group had experienced this type of parenting. The high prevalence of reconciliation fantasies among children in sole residence arrangements would also seem to indicate a strong desire for continued involvement of both parents in children's lives.

Insofar as joint residence is concerned critics often raise two objections and these parallel positions adopted in *BBIC*. One involves parental conflict and the other is that children might be negatively affected by dual living arrangements. First, it is argued that parents who could not reconcile conflicts while living together are even less likely to be accommodating to one another while living apart. Unaccountably this argument is sometimes paired with its opposite—that parents in a joint residence arrangement cannot emotionally separate and by implication use their children to stay together. “While this may or may not be the case, it seems not to be a particularly relevant argument as far as the children are concerned and does not articulate the ways in which such a continuing emotional marriage might be detrimental to the children” (Kelly 1991).⁵⁹

Looking first at the issue of parental conflict, the evidence demonstrates that joint residence arrangements show reduced friction because joint residence appears to more fully satisfy the needs of both parents (Ilfeld, Ilfeld, & Alexander 1982; Luepnitz 1982).^{60, 61} It provides a combination of *time off* for one parent and enhanced involvement in child rearing for the other (Roman & Haddad 1979; Luepnitz 1982).^{62, 63} Studies constantly report parental satisfaction, even from parents who initially had reservations about joint residence (Luepnitz 1982; Sharpley & Webber 1992).^{64, 65} Further, we see no evidence that under the common sole residence model of divorce discord is minimised, if anything sole residence exacerbates conflict. The parents still must deal with one another in connection with all aspects of the child's life, but they do so in an unstable and unhealthy relationship of *victor* and *vanquished*.

As the recently separated non-resident father discovers very quickly, the prospects for a continued meaningful relationship with his children are grim indeed. Such a relationship, especially with younger children, will be subject to mother's *approval and permission* (Teyber & Hoffman 1987).⁶⁶ Sadly, few resident mothers, dealing with feelings of vulnerability, anger, and guilt, are willing freely to grant such permission. This autonomy (power) over their children's contact with the father, often in tandem with revenge for real or perceived misdeeds, is one of the few compensating or *positive* emotions they may be experiencing at this time. The evidence is clear and convincing upon examination of the research. Fulton (1979),⁶⁷ and others (Wallerstein & Kelly 1980; Jacobs 1983; Koch & Lowery 1984; Kelly 1988a),^{68, 69, 70, 71} demonstrate assertively that large numbers of post separation children are denied their decreed (and deserved) contact to their non-resident fathers on many occasions, often with cold and calculating regularity. The reasons are often frivolous and ridiculous and are usually misstated.

Fulton (1979)⁷² for example, interviewed 560 divorced adults about the impact of the divorce in their lives and in the lives of their children. Fully one third of those fathers were not satisfied with the residence decision, and indicated they wanted a change. However, the clearest evidence of victimisation in the study were the self-reports of resident mothers, 40% of whom indicated that they had denied contact between father and child at least once out of spite.⁷³ Even more of the non-resident fathers (53%) claimed that their ex-wives had refused to let them see the children at one time or another.⁷⁴ Further, the majority of the mothers did not involve their former spouses in matters concerning the children. Voicing the sentiments of many mothers, one said, *and what's more, I don't*

*intend to.*⁷⁵ Because of the nature of the data and the unflattering light cast upon the resident mothers answering that particular question, the 40% figure may be an understatement.

In a study by Wallerstein & Kelly (1980), mothers, fathers, and children were assessed over a five-year period. As in most of the available research, the resident parent was the mother for all but one of the families. Only half of the resident mothers indicated that they valued the continued contact between the father and his children. 20% of the custodial mothers in their research sample directly attempted to sabotage the relationship between the children and their fathers. A further 20% indicated that they saw no value in continuing the relationship and may have sabotaged it in more subtle ways. Clearly placing the parenthood status of fathers in the hands of those sole residence mothers assures the intentional victimisation of many fathers as well as their children.

A similar pattern of contact obstruction has been reported by local researchers (Gibson 1992; McMurray & Blackmore 1992).^{76,77} The Gibson (1992)⁷⁸ survey documented that 50% of non-resident fathers had a problem with the breakdown of court ordered contact due to opposition by an ex-spouse. Murray & Blackmore (1992)⁷⁹ indicated that 20% of the mothers in their research sample saw no use in the relationship between the child and their non-resident father and tried to actively sabotage contact.

Because of the small number of fathers who receive residence, there is a lack of research evidence on this type of victimisation that may result from paternal residence decisions. There are simply no comparable figures available in the research on how frequently non-resident mothers may be victimised by sole residence fathers. However, numerous non-resident mothers have reported the same type of contact interference as non-resident fathers (Lovorn 1991; McMurray 1992).^{80,81} The lack of data on non-resident mothers is a continuing problem in this research and much more data is needed.

This would seem to indicate that contact denial is not a gender-based emotional abuse and that regardless of the sex of the sole-resident parent, resident parents who out of spite ignore the needs of children quite often emotionally traumatise the non-resident parent and their child. While some inescapable pain will always be involved in divorce, these data indicate intentional and planned actions on the part of one party to emotionally injure another party.

This conclusion is further strengthened by the fact that this evidence comes from several different sources, including self-reports from the mothers who are denying contact, as well as self-reports of the fathers who cannot see their own children. When one group is empowered with all the authority, victimisation of the powerless can and often will occur. In sole residence determinations, which empower one parent and disenfranchise the other, the non-resident parent is open to victimisation in a varied array of forms, and the data indicate that such victimisation is both rampant and pervasive. The other often forgotten victim is the innocent child.

Researchers recommend that in a child's best interests, and quite apart from the victimisation of the non-resident parents and grandparents, the job of the courts is to protect children from emotional damage by safeguarding the child's relationship with each parent to the fullest extent possible (Williams 1987; Kelly 1988a).^{82,83} But do children receive the protection of the judiciary from this form of child abuse?

Past commentary by Chief Justice Alistair Nicholson of the Family Court of Australia may provide the answer. In 1995 the judge stated:

The court is frequently accused by the non-custodial parent of not enforcing its orders... It must be remembered that it is no part of the court's function to act as some sort of an enforcement or police agency...

All too often it finds that the applications that are brought are brought for tactical or vindictive reasons.⁸⁴

The 1992 Joint Select Committee examining the operation of family law in Australia did not accept this interpretation of the role of the Family Court. The Select Committee was highly critical of the Family Court for not taking many of its orders seriously enough and concluded in its final report:

The frustration of court ordered access, which is not only a breach of the law, can irrevocably damage the relationship between parent and child. The Family Court must recognise that the new penalties provided in the legislation could be appropriately and effectively used so that children are not denied contact with their non-custodial parent through selfish or vindictive acts on the part of the custodial parent.⁸⁵

In the context of the evidence on contact denial reviewed above, Alistair Nicholson's comments are disturbing and can only encourage parental disharmony. Understandably, non-resident parents who simply want to be a part of their children's lives are concerned such remarks can only act as a further disincentive to post-divorce parental cooperation. As the Chief Justice provides no statistical support his charge needs to be examined more closely. Those who work in the field know that it is not always the case, and there are many situations where the resident mother's decisions are seriously harmful to the children (Williams 1987).⁸⁶ Furthermore, malicious resident mothers who engage in alienating behaviour rarely have to face penalties for such actions (1992 Joint Select Committee).⁸⁷ In addition, most non-resident fathers cannot afford the financial requirements involved in every instance of blocked parent/child contact (Family Law Pathways Advisory Group 2001).⁸⁸ As such, the cycle of contact interference perpetuates itself.

"The claim that applications brought by non-resident fathers are *trivial* may sometimes be true. However, in many instances what seems *trivial* to a judge or registrar may not be so on proper investigation, or may mask some real difficulty in the post-divorce parental relationship. Judicial officers confuse repeated attempts to achieve court ordered *contact* with a desire to control or harass. Do they really believe that the great majority of non-resident fathers enjoy going to court, particularly if they are unrepresented?" (Green 2000)⁸⁹ Moreover, the Chief Justice's comments suggests a stubborn refusal to acknowledge that an unhealthy rupture of the relationship between the non-resident father and his child is damaging to the child and is in reality a form of child abuse.⁹⁰

Both research evidence and anecdotal reports by nonresident parents indicate that emotional blackmail is another frequently used victimisation mechanism (Wallerstein & Kelly 1980; Burmiester 1991b).^{91,92} Emotional blackmail consists of threats to leave the state or region of the country with the children (or to deny contact), unless the non-resident parent agrees to do whatever the resident parent wants (e.g. remain socially disengaged during contact or increase child support above that awarded by law). Like contact denial, the anecdotal evidence suggests that some non-resident mothers are victims of the same type of emotional blackmail (Lovorn 1991; McMurray 1995).^{93,94}

Non-resident parents and children who are attached to each other are frequently injured emotionally when the resident parent chooses to relocate in a geographic area that is far removed, from the non-resident parent. The resident parent's right to out-of-state flight is typically defended in terms of that persons right to seek a support group for assistance in raising the children (free baby-sitting, day care in the grandparent's home etc) and many resident parents do move near their own parents in order to secure assistance in raising the child. However, this rationale seems relatively thin, when one becomes aware of the evidence on the documented need which children of divorce have for a continuing relationship with both parents (Wallerstein & Kelly 1980; Kelly 1988a).^{95,96}

These move away decisions are tragic for many reasons and rarely are they in the best interests of the child. Emotionally and psychologically, parental relocation is disastrous for children. A 1996 report by the U.S. Federal Department of Health and Human Services stated:⁹⁷

Recent research has demonstrated a strong relationship between residential stability and child wellbeing, with frequent moves being associated with a number of negative outcomes including dropping out of high school, delinquency, depression, and non-marital teen births. Some researchers theorise that these negative associations may result from a lack of rootedness in the local community and its institutions on the part of frequent movers.

JAMA (Journal of The American Medical Association), in its 1993 publication⁹⁸ highlights the devastating impact of wrongful relocation on children:

A family move, regardless of its reason, disrupts the living environment of the child and can require important adjustments for the child and family. Children in families with fewer resources are probably more at risk of experiencing psychological or behavioural problems due to the stress of a move, especially when a move is compounded by other negative family events such as divorce, eviction from the family home, or parental job loss. As such family moves can potentially contribute to psychological morbidity or behavioural problems. These and other 'morbidity' are being recognised with increasing frequency by providers of health care for children.

Lawyers argue the right to travel. This is true for the individual, but there is a compelling state interest in protecting a child against the damage of arbitrary parental relocation. A child is not a suitcase, nor personal property. However, this is a lonely argument in an emotionally charged family law case. Put simply, the child's psychological attachment to the non-resident parent is much more important than the resident parent's convenience. Taking children out of their communities, schools, and away from their other parent, grandparents and friends must be condemned. It is a significant cause of anger, anguish and resentment in children. Both mothers and fathers ought to be restrained from leaving town.

In view of both the lack of effective legislation, and the lack of more solid research data on the extent of emotional blackmail, researchers should focus on this infrequently researched issue. Solid data based studies, based on large samples, preferably with interviews that include all parties in the divorce, are desperately need here.

Another objection frequently heard against joint residence is that children are unable to make regular transitions from one parent's home to another. No evidence is brought to bear on this assumption, and indeed ample evidence exists to support the alternative conclusion that developmental capabilities, of even young children, enable them to make healthy transitions from one environment to another. It is clear that many children in intact families routinely move between a number of childcare settings (as in movement from mother to father care, home to day-care, baby-sitter's residence, school, sometimes boarding school and grandparent's homes).

These changes are ordinarily accepted and are not generally seen as being destabilising. Evidence on shared care in *normal* families has been provided by Hill (1987)⁹⁹ who observes that in his sample of 63 families, a majority of children had experienced care from people other than their parents for a major part of their second and third year at frequencies that varied from several times a week to once a month. On what basis then, should we conclude that even young children couldn't make the

transition from one loving parent to another? Do the minor inconveniences outweigh the positive contributions of a highly involved caring parent?

In attempting to fashion developmentally sensitive residential schedules, some courts, with the endorsement of mental health professionals, routinely deprive infants and toddlers with overnights with their fathers.’ Warshak (2000)¹⁰⁰ in an important work ‘analyses the contributions, misuses, and limitations of theory and research knowledge to such restrictions and discusses their scientific status with respect to current knowledge about child development.’ An abridged version of Professor Warshak’s article published in the *Family And Conciliation Courts Review* (October 2000)¹⁰¹ follows:

“Therapists who propose restricting children’s night-time contact to a parent (referred to as *overnights*) disagree on the age at which such restrictions should be lifted. In some cases, therapists designated as experts in court have testified that infants would suffer irreparable damage if separated from their mother for even one night. Other therapists routinely testify that children are not ready for *overnight contact* with their fathers until the age of five. None of these guidelines are grounded in systematic, methodologically valid research about the direct impact on children of overnight contact with divorced parents because such research does not yet exist. However, overnight restrictions are endorsed by many evaluators and expert witnesses.

Proponents of overnight restrictions generally cite certain theories and concepts of child development to defend their recommendations. Concerns about the harmful impact of two different night-time caregivers, or two different settings, are most often voiced in the context of attachment theory (Bowlby 1969; 1980),^{102,103} and psychoanalytic theories of development (Erikson 1963; Mahler, Pine, & Bergman 1975).^{104,105} Even when the theoretical framework is not explicitly identified, terms such as *primary attachment object*, *basic trust*, *splitting*, and *separation and individuation* signal contributions from these theories

In his final book, Sigmund Freud (1940)¹⁰⁶ championed the mother’s role as unique, without parallel, established unalterably for a whole lifetime as the first and strongest love-object and as the prototype of all later love relations.¹⁰⁷ Freud based this claim on his interpretation of his patients’ histories.

Bowlby (1951; 1969)^{108,109} shared the assumption that relationships in infancy are a major influence on later relationships. He developed attachment theory in part, to explain more specifically how early experiences influence later development. Bowlby proposed that infants form internal working models of relationships that they construct out of interactions with their mothers. He believed that children form primary attachment relationships to their mothers who then serve as havens of safety and sources of comfort to the children. When a child is separated from the mother, the child suffers *separation anxiety*.

As Bowlby (1951)¹¹⁰ put it, *Prolonged deprivation of the young child of maternal care may have grave and far-reaching effects on his character.*¹¹¹ Included in the concept of maternal deprivation were quite brief mother–child separations as well as long-term foster or institutional care (Bowlby, Robertson, & Rosenbluth 1952).¹¹²

Bowlby’s concept of maternal deprivation was extended by others to include children in group day care and those whose mothers worked outside the home (Rutter 1995b).¹¹³ His formulations led some writers to emphasise the supposed trauma caused by brief mother–child separations. Kelly (1991)¹¹⁴ believes that the concept of separation anxiety has played a key role in discouraging overnight contact between young children and their divorced fathers.

Contemporary psychoanalytic theorists share the emphasis on the mother’s role in early development (Erikson 1963; Mahler 1965; Mahler, Pine, & Bergman 1975).^{115,116,117} On the basis of her observations of infants and their mothers, Mahler (1965; Mahler, Pine, &

Bergman 1975)^{118,119} described a theory of how and when a child develops a sense of self as an independent individual. She believes that the child acquires a sense of psychological separateness along with the commensurate ability to comfortably tolerate separations from parents through a process of separation–individualism. Through this process, which takes place during the first three years of life, the infant emerges from a state of symbiosis with the mother and acquires a sense of psychological separateness and independence. The mother's availability plays a key role in the successful navigation of this process. Similarly, Erikson (1963)¹²⁰ theorised that the capacity for trust and subsequent self-confidence are promoted through gratifying infant-mother interactions.

It is easy to appreciate how Bowlby's conclusions about maternal deprivation, and subsequent interpretations of his ideas, would lead to a general reluctance to separate infants from the person designated as the *psychological parent*. Such reluctance would extend to separation at night. But does this theory of child development hold up in the court of empirical research? Bowlby's original inferences about the harmful effects of maternal deprivation were based almost entirely on studies of children who experienced prolonged institutional care as a result of being orphaned or separated from their families for other, often severely traumatic reasons. It is an error to attribute the emotional problems of these institutionalised children to maternal deprivation. Today, researchers would conceptualise their problems as trauma reactions and, in many cases, responses to the inadequate treatment they received in institutions whose care was far below current standards (Provence & Lipton 1962; Yarow 1963).^{121,122} Indeed Bowlby's 1951 monograph¹²³ led to major reforms in the care young children received in hospitals and residential institutions.

Apart from the traumatic and institutional aspects of these studies, other factors limit their applicability to residence decisions. The phrase *maternal deprivation research* is itself a misnomer – these studies describe children who were deprived of contact with their mothers and their fathers. The situation of children separated from both parents is not comparable to the residence situation in which children are separated from one parent and left in the care of the other parent. Also, the mothers of the children in these studies had been full-time, stay-at-home parents; their children had no experience with the routine separations that our society expects of young children who attend preschool, day care, and so forth.

Although Bowlby's work initially focussed on the harm caused by mother–child separations, his more lasting contribution was the extensive theory of attachment that he developed. Bowlby's attachment theory has spawned a major, valuable, line of research in academic developmental psychology. The current literature supports several key tenets of attachment theory. But, research findings have also contributed to some crucial modifications of attachment theory. One of these revisions has particular relevance for child residence decisions.

Contemporary attachment theory has abandoned the notion of *monotrophy*¹²⁴—the idea that children have a biological need to develop selective attachment to just one person. The notion that children have only *one psychological parent* has been thoroughly discredited by a large body of evidence that has demonstrated that infants normally develop close attachments to both of their parents (Thompson 1983; Rohman, Sales, & Lou 1987; Biller 1993),^{125,126,127} that this occurs at about the same time (approximately 6 months of age), and that they do best when they have the opportunity to establish and maintain such attachments (Parke 1981; Warshak 1992; Biller 1993; Lamb 1997).^{128,129,130,131} These attachment bonds which meet different needs of the developing child are not interchangeable one type of attachment cannot typically make up for the absence of the other (Thompson 1983).¹³²

The recognition that children usually have more than one loving relationship that provides emotional security has led to a greater realisation of the importance of facilitating attachments and a corresponding de-emphasis on the trauma of separations

(Rutter 1995a; 1995b).^{133,134} In fact, in his later work, Bowlby (1988)¹³⁵ acknowledged the enduring attachments bonds between father and child. And his own research published just 5 years after the maternal deprivation monograph concluded that the dangers of separation had been overstated (Bowlby, Ainsworth, Boston, & Rosenbluth 1956).¹³⁶

It is now generally accepted that the finding that children are distressed when separated from a parent and left with a stranger is not at all relevant to the situation where children are separated from one parent to whom they are attached and spend time with another parent to whom they are attached. Lamb (1994),¹³⁷ a leading authority on attachment, summarised two decades of research as demonstrating that the presence of one attachment figure provides sufficient emotional security to allow a child to avoid separation anxiety when separated from another attachment figure. He concluded that extended separations, including overnights apart from either parent, usually do not distress infants when they are with the other parent.

What is puzzling is that the writers, who advocate overnight restrictions, simultaneously express a deep appreciation of the importance of fostering young children's relationships with both parents. It is as if they have joined attachment theorists in abandoning the notion of monotrophy without shedding the corresponding over emphasis on the risks of separation trauma.

Perhaps the most controversial position that stemmed from concerns about maternal deprivation was that routine non-maternal care, such that occurs with day care, would undermine the security of the infant's attachment to the mother (Sroufe 1988; Brazelton 1985; Barglow, Vaughn, & Molitor 1987).^{138,139,140} The literature on the effects of non-maternal day care has obvious implications for child residence decisions. If infants and toddlers can spend considerable amounts of time in the care of paid day care attendants, adapt to such transitions, and still develop and maintain secure attachments to their mothers, there would be no logical reason to deprive infants of extensive contact with their fathers, unless one believes that fathers are incapable of providing care comparable to that provided by day care workers.

Multi-study analysis conducted in the 1980's found that infants who experience extensive non-maternal child care had higher rates of insecure attachments than did those with more limited child care experience (Belsky & Rovine 1988; Clarke-Stewart 1989; Lamb & Stemberg 1990).^{141,142,143} Nevertheless, the majority of infants with early and extensive child care—about 60%—developed secure attachments to their mother. A more recent investigation found no effect of childcare experience on attachment security (Roggman, Langlois, Hubbs-Tait, & Reiser-Danner 1994).¹⁴⁴

By far the best study to investigate the effects of childcare on infant-mother attachment is the US National Institute of Child Health & Human Development (*NICHD*) study of early childcare (*NICHD Early Child Care Research, Network 1997*).¹⁴⁵ It was conducted in nine states by a national consortium of leading researchers in the field who, at the study's onset, held different views regarding the impact of day care on children. They agreed on a state-of-art design and methodology and followed 1,153 mothers and children through the children's first 3 years. Among the variables examined were characteristics of child care, type (including care provided by fathers and care provided by other relatives), quality, amount, age of entry, and stability; characteristics of the child, especially sex and temperament; and characteristics of the family, including social, psychological and economic resources. Because of its superior methodology, this study's findings merit substantial weight. The results were clear and consistent:

There were no significant differences in attachment security related to child-care participation. Even in extensive, early, unstable, or poor-quality care, the likelihood of infants insecure attachments to mother did not increase, nor did stable or high-quality care increase the likelihood of developing a secure attachment to mother.¹⁴⁶

The report continued, *Childcare in the first years of life does not have a direct, main effect on infants' attachment security.*¹⁴⁷ Also, Childcare by itself constitutes neither a risk nor a benefit for the development of the infant-child relationship.¹⁴⁸ Consistent with substantial theoretical and empirical literature, infants who received poor quality childcare combined with less sensitive and responsive care from their mothers had the highest rates of insecurity.

This research provides firm support for recommending that infants spend extended periods during the day with their fathers and away from their mothers. However, it does not directly address the issue of impact on children of sleeping away from their mothers.

One line of study, though, does contribute data on this use. In traditional Israeli kibbutzim, infants are placed in-group homes between the ages of 6 and 12 weeks. During their mothers working hours, the infants are cared by the same childcare worker for about one year. Each evening, the children go home with their parents for about 3 hours and then return to the infant home to sleep. Women are assigned on a weekly rotation basis to provide care at night. In some kibbutzim, one-person monitors all the children through intercoms placed in each infant home. In others, the caregiver walks from residence to residence. And, in some cases, the caregiver sleeps in the building. Thus, an infant distressed in the night may receive care from an unfamiliar attendant, and this care may be given after a considerable delay. Clearly, kibbutz child-rearing practices deviate from those that attachment theorists would generally recommend.

In the past three decades, changes in kibbutz practices have created a natural quasi-experiment that shed light on the impact of sleeping away from parents. Most kibbutzim have shifted away from the communal sleeping arrangements to a system in which young children stay with their parents at night and return to the infant home early the next morning. At a time when there were still some kibbutzim adhering to the communal sleeping arrangements, Sagi, & colleagues (1995)¹⁴⁹ compared the attachment security of 108 infants in the communal versus family settings. They found no difference between the two groups in the percentage of infants classified as securely attached to their mothers. The study was published in the prestigious series *Monographs of The Society For Research In Child Development*. Though it is only one study, it does provide some reassurance that infants can regularly sleep away from their mothers, with multiple nighttime caregivers, and still develop and maintain secure attachments to their mothers.

A more recent cross-cultural analysis by van Ijzendoorn & Sagi (1999)¹⁵⁰ concluded that collectively sleeping infants are attached to specific caregivers and the majority are secularly attached. Earlier studies of generally weaker design, found no effects of communal versus familial sleeping arrangements on thumb sucking, bed wetting, aggression, peer relations, self-image, autonomy, and psychopathology (see Lavi 1990, for a review).¹⁵¹ In general, the kibbutz literature suggests that collective sleeping may weaken the link between mother's behaviour and her infant's attachment status, but it does not prevent the majority of children from developing secure attachments to their mothers (Averiezer, Sagi, Joels, & Ziv 1999).¹⁵² This literature may assuage the concern that overnights with fathers necessarily promote anxiety.

Some people might object that the kibbutz experience shows only that other women can provide adequate nighttime care for young children; it does not demonstrate that fathers can do the job. This argument collapses in the face of solid evidence of fathers' competence in caring for infants (Park & Swain 1976; Pruet 1987; Biller 1993).^{153,154,155} Pruet (1987)¹⁵⁶ studied fathers who stay home to raise their children. He summarises the consensus of father-infant research:

We know for certain that men can be competent, capable, creative caretakers of newborns. This is all the more remarkable, given that most men are typically raised with an understanding that they are destined through some natural law to be ineffective nurturers...The research on the

subject, some of it now decades old, says this assumption is just not so. And it says it over and over again, in data from many different disciplines.¹⁵⁷

The studies reviewed thus far, suggest that children can sleep away from their mothers and can be adequately cared for by their fathers at night. But, does this care have to be provided in the same setting? These studies did not address this issue. To draw the inference that infants can adjust well to more than one sleep setting, we need to call on common experience and commonsense.

No formal studies exist that assess the impact, on younger children of sleeping in more than one setting. But, most parents have enough experience with this arrangement to assuage concerns about its harm to children. Infants and toddlers often sleep away from their mothers and away from their home cribs. They sleep in prams, car seats, bassinets, and parent's arms. They sleep in day care, in church, and in grandparents' homes. Any married couple that take a holiday in the first few years of their child's life leaves the child in someone else's care. Clinicians do not routinely advise parents against taking such holidays. If infants can tolerate sleeping away from both parents during nap time at day care centres, on what basis can it be argued that sleeping away from one parent, in the familiar home of the other parent, would harm children? They cannot provide no basis for assuming that the children could tolerate different surroundings while awake but could not tolerate such surroundings while they are asleep and mostly unaware of their environment.

When mental health professionals offer opinions that obviously violate logic, common experience, and common sense, we cannot rule out the possibility of intellectual dishonesty. This is the case, for example, when an expert's opinion on overnights changes from case to case depending on which side has retained the expert. More often, though, irrational opinions on overnights are the product of other non-scientific factors, such as cultural or personal biases and countertransference reactions

Gender bias is suggested when therapists or judges regularly restrict overnight contact of children to their fathers when mothers have sole residence, but endorse overnights with mothers in families where the father has sole residence (Warshak 1996).¹⁵⁸ We can rule out gender bias when overnight restrictions are routinely recommended regardless of which parent has residence. Instead such recommendations may be traced to misapplication of psychological theories or uncritical acceptance of traditional guidelines. This is especially likely in the case of experts who predict harm to young children who spend overnights in both parents' homes but who also endorse the practice of leaving children in a day care centre for 10 hours. Such experts may have never considered the inconsistency of their position.

In other cases, mental health professionals formulate opinions based on their own upbringing or family situations. They draw unwarranted generalisations from their personal experiences or feelings. Another possibility is that some therapists who advocate overnight restrictions are projecting their own feelings onto those of infants a process that might be called *adulthood morphizing*. Such therapists may themselves feel uncomfortable with more than one sleeping environment, and they may imagine that infants feel the same way.

Based on the analysis thus far, there is no support in theory, research, or common experience for the proposition that overnights harm children. Numerous studies have shown that children do best when they maintain rich, close relationships with their parents following divorce (for a review and consensus statement see Lamb, Stemberg, & Thompson 1997).¹⁵⁹ They are more likely to escape psychological harm than children denied the chance to maintain relationships with both parents. Thus, post-divorce arrangements should maximise the opportunity for children to develop and consolidate relationships with both of their parents.¹⁶⁰

Developmental psychologists have learned that the best way to promote deep attachments is to allow children to interact with parents in a wide variety of settings. High-quality relationships are best achieved when children experience each parent in all aspects of daily life, including getting up in the morning, preparing for the day, dropping off at school or day care, picking up from school or day care, feeding, bathing, preparing for bed, soothing when the child awakes in the middle of the night, and so forth (Greif 1979).¹⁶¹ Overnights are important because they provide opportunities for a wider range of involvement (Kelly & Lamb 2000).¹⁶² This contributes to the establishment and consolidation of the parent-child relationship, which in turn benefits the child's long-term adjustment.

A Stanford University study of 1,100 families provide indirect evidence that overnights help strengthen the foundation for ongoing meaningful relationships (Maccoby & Mnookin 1992).¹⁶³ At the study's onset, 4 out of 19 children younger than 3 had overnight contact with their fathers. Three years later only 1.6% of these children lost contact with their fathers. By contrast, 56% of the children with daytime-only contact suffered loss of contact with their fathers. Fathers with overnights retained their relationships and remained committed to their children. This carries significant implications because many studies have an association between father dropout and non-compliance with child support payments (Luepnitz 1982; Kruk 1993; Clark-Stewart & Hayward 1996; Braver & O'Connell 1998).^{164,165,166,167}

The potential benefits of overnights have led several professionals to challenge restrictive guidelines and endorse overnights for young children (Kelly 1991; Warshak 1992; Maccoby & Mnookin 1992; Fay 1995; DeLipsey, Bain, & Garcia 1998; Kelly, & Lamb 2000).^{168,169,170,171,172,173} Maccoby & Mnookin (1992)¹⁷⁴ reason:

Because our evidence suggests that the probability of a father maintaining a connection with the child overtime is greater if there are overnight visits, we believe visitation should ordinarily be construed to permit overnight stays if that is what the secondary parent desires.¹⁷⁵

Kelly (1991)¹⁷⁶ concludes, Our body of child development knowledge would suggest, in fact, that infants and toddlers with a bond to a nurturing father must have more overall contact, including some overnights with their fathers, rather than less time.¹⁷⁷ She believes that the concept of separation anxiety has played a key role in discouraging overnight contact between young children and their fathers. Similarly, Lamb (1994)¹⁷⁸ endorses the importance of giving children ample opportunities for overnights. He concludes that overnights during infancy help provide the psychological support needed for optimal subsequent development. And Kelly & Lamb (2000)¹⁷⁹ summarise their understanding regarding overnights:

There is substantial evidence regarding the benefits of these regular experiences. Aside from maintaining and deepening attachments, overnights provide children with a diversity of social, emotional, and cognitively stimulating experiences that promote adaptability and healthy development.¹⁸⁰

Although empirical research directs our attention to factors that place children at risk or optimise their development, the specifics of any one case might outweigh general conclusions drawn from research. Overnight restrictions may be recommended, for example, when a parent remains sober during the day but gets drunk every night.

Many court evaluators explicitly rely on certain theories to guide their observations and inform their recommendations. Attachment theory and psychoanalytic theory figure prominently in the rationale for overnight restrictions. Contemporary attachment theory has been modified to incorporate the revised analysis of maternal deprivation research

and the knowledge that infants form multiple attachments (Thompson 1983; Rohman, Sales, & Lou 1987; Biller 1993).^{181,182,183} These revisions imply that most infants can tolerate without harm separations from their mothers when they are left in the care of their fathers. Unfortunately, such revisions seem to have escaped the notice of many mental health professionals who routinely give advice on child residence matters.

Attachment theory has generated a wealth of research on early child development. Some propositions of attachment theory enjoy the support of robust, replicable data and general acceptance. These include the notions that an infant is more easily soothed by the adults who provide regular care than by those who do not, is less distressed by the unfamiliar when in the presence of these adults, and seeks these adults for solace under stress and for play at other time. Other propositions of attachment theory, though accepted by many developmental and psychoanalytic psychologists, lack sufficient empirical support. These have not achieved consensus among scientists.

One component of attachment theory that lacks empirical support but that has been used to justify overnight restrictions is the idea of a fixed sequence of attachments. This idea assumes that the infant first forms a relationship with one person, usually the mother. The primary relationship then serves as a template and foundation for all subsequent relationships (Stahl 1994).¹⁸⁴ Although some regard the fixed sequence notion as self-evident, it has not been supported by empirical research. To the contrary, the evidence shows that children form multiple attachments and that a child can have an insecure attachment to the mother but a secure one to another person (Lewis & Schaefer 1981; Fox, Kimmerly, & Schaefer 1991).^{185,186}

Aside from the specific propositions of attachment theory that have not stood the test of empirical research, courts and clinicians should be aware that attachment theory itself has a significant share of its critics. The main objection to attachment theory is with the idea that early attachment histories determine later personality development. Several prominent psychologists believe the evidence demonstrates that early experience, excepting severe abuse, does not inexorably shape our lives (Scarr 1996; Lewis 1997).^{187,188} They cite data showing the lack of association between a person's attachment status in infancy and later development. In place of the overriding emphasis given to the mother–infant relationship, these theorists point to other factors that have as much to do as behaviour.

Scarr (1996)¹⁸⁹ argues behaviour genetic research has shown that genetic viability is far more important than environmental differences in determining individual differences in psychological functioning. Furthermore, observed environmental differences are themselves a product of genetic differences; differences among children cause them to evoke different responses from those around them. Scarr concludes, *Good enough, ordinary parents probably have the same effects on their children's development as culturally defined super-parents.*¹⁹⁰

Harris (1995)¹⁹¹ agrees that heredity accounts for much variation in developmental outcomes but points out that 40% to 50% of the variance in adult performance is unexplained environmental influence. Nevertheless, she believes that the evidence does not support the theory the way parents treat children (assuming no severe abuse) has important and lasting effects. Instead, Harris advances the theory that peer groups play the key role in shaping personality characteristics

Alternate theories of child development, such as those discussed, have significant implications not for just the issue of overnights but for residence dispositions in general. At the very least, those involved in making residence recommendations should exercise caution in overextending the significance of infant attachment relationships. Even those who believe that its concepts have been over generalised and misinterpreted in a simplistic manner (Rutter 1995b).¹⁹² Misguided attempts to facilitate healthy mother-child

relationships, based on a faulty understanding of attachment theory, may instead erect unnecessary obstacles to healthy father–child relationships

Blanket restrictions requiring young children to spend every night with the same parent after divorce are inconsistent with current knowledge about the needs of young children and their parents. In particular, the opinion that children can tolerate sleeping during the day in their father's presence, and in the presence of hired attendants in day care centres, but not at night with their fathers cannot be said to express a scientific judgement. It reveals a bias often rooted in inaccurate assumptions about early child development. Experts, who endorse blanket restrictions, cannot provide adequate scientific justifications for their opinions. Courts, lawyers, and parents should be aware of such limitations.

The lack of systematic well–designed research comparing children with and without overnights makes it more difficult to achieve professional consensus on the issue. Furthermore the political agendas of some researchers may influence the type of questions they ask, which, in turn, defines the range of possible answers. The potential use and misuse of research findings in child residence decisions demands that every effort is made to rise above such agendas. One way to increase confidence in research is for scientists with opposing viewpoints to collaborate on phases of research following the example set by the NICHD discussed earlier (NICHD Early Child Care Research Network 1997).¹⁹³ Warshak (2000)¹⁹⁴ provides a thorough discussion of collaborative research.

Although future studies may demonstrate an empirical basis for blanket policies against overnights, no such work has yet been cited by those who advocate such restrictions. Absent such studies, the practice of discouraging overnight contact cannot be supported by appeals to theory, research, clinical experience, common experience or commonsense “

Yet the position taken in *Beyond The Best Interests of The Child* is the accepted one. It has been assumed, in the absence of any evidence, that after a divorce one parent and one household are not merely the arrangement of choice, but the only possible arrangement. Children need stability, and stability comes in a variety of forms. We need not assume that stability equals one primary parent and one primary home. Stability can also mean a relationship of constancy and permanence with two parents in two separate homes. A child's life may be temporarily disrupted by separation, but it can become stabilised again in new forms. Children need to know that their needs will be taken care of. They need to be able to predict that their lives will go on much the same way as before their parents' separation. Children need to identify positively with both parents—not be pushed into situations in which they are forced to express loyalty to one parent over another (Galper 1977).¹⁹⁵

Although a joint residence arrangement may not be the answer for all those who raise children after a divorce, it appears to be the most logical and emotionally sound choice. Unlike sole residence, it does not sever ties between one parent and their child and, just as important, it does not banish one parent or overburden the other. Quite the reverse, by maintaining the family structure in a reorganised form, joint residence, we believe, on the current evidence resolves most of the problems associated with sole residence examined in the following section.

References

¹ Bordow S. Defended Custody Cases In The Family Court: Factors Influencing The Outcome. 1(8) Australian Journal of Family Law (1994) at 255

² Goldstein J, Freud A, & Solnit A J. *Beyond The Best Interests of The Child*. Free Press New York (1973); Burnett Books London (1980)

³ This point is made in Katkin D, Bullington B, & Levine M. Above and Beyond The Best Interests of The Child—An Inquiry Into The Relationship Between Social Science and Social Action. 8 Law and Society Review (1974). In their detailed critique of *BBIC* they write:

Goldstein, Freud and Solnit rely on work done by Bowlby, Spitz and others to support their contention that separation from mother is inherently detrimental to a child's psychological development. Neither their footnotes nor their discussion acknowledges the existence of Pinneau's (1955) devastating critique of Spitz's work which appeared in the Psychological Bulletin. Both of these articles have been widely cited in the child development literature. A trenchant criticism of the literature on separation by O'Connor (1956) was similarly ignored. A 1962 World Health Organisation monograph by Ainsworth et al, is cited as supportive of Goldstein, Freud and Solnit. The Ainsworth article in that monograph, however, contains a chapter called 'Review of Findings and Controversy,' in which the distinction between separation from a parent and parental deprivation is carefully set forth. That chapter also discusses the variability in the degree of damage caused by deprivation (damage is not manifested in every case, nor are the effects always severe), and the possibility that the damaging effects of deprivation are only temporary. The same monograph contains an article by Prugh and Harlow which emphasises the limitations on existing knowledge in this area, and an article by Barbara Wootton which reviews a substantial body of literature which fails to confirm Bowlby. In addition, Baroness Wootton's book *Social Science and Social Pathology* (1959) which is cited in her monograph article reviews the literature in still greater detail. All this material is published in both British and American sources, and was clearly available to Goldstein, Freud and Solnit. Yet they write as if no questions exist about the concepts they use (*ibid* at 684-685).

⁴ Roman M, & Haddad W. *The Disposable Parent: The Case For Joint Custody*. Holt, Rinehart & Winston, New York (1978)

⁵ Maloney L. *Beyond Custody and Access: A Children's Right Approach To Post-Separation Parenting*. 7 Australian Journal of Family Law (1993) at 252

⁶ Finlay H A, & Bailey-Harris R. *Family Law In Australia* 4th edition Butterworths, Sydney (1989) p 233, point out that Goldstein, Freud & Solnit's arguments on *psychological parenthood* have been accepted by the Family Courts of Australia and Western Australia and the application of these theories have particular relevance in the jurisprudence *status quo* principle. The term *status quo* applied in *residence* cases refers to arrangements for the care of children existing from the time of separation up to the residence hearing.

Judicial statements concerning the importance of the *status quo* rule are not as frequent, nor as firm as those concerning a maternal preference once were. But in practice the *status quo* has an overwhelming significance in determining the outcome of a residence application. The most likely outcome of a residence petition is the child will remain with the parent who, prior to the legal proceedings, was caring for the child (Bordow, *supra* note 1)

Family Court statistics show that the *status quo* was maintained in 68% of defended matters and changed in 21% of cases. In the remaining 11% of actions, the *status quo* situation had not been clearly established. However, mothers who had children in their care tended to retain residence in 86% of cases as against fathers (64%). Overall this resulted in mothers retaining residence in 60% of the cases as against fathers (31%). The majority of these cases were decided on the basis of a *status quo* which existed only for a period of between three to twelve months (Bordow, *supra* note 1 at 258-259)

Critics of the *status quo* principle contend that there is little social science justification for legal policies which as a general principle identify the caretaker at the time of the residence hearing as the child's only *psychological parent* or which insist on the absolute continuity of that caretakers care. Social science unease is based on evidence which shows that a child has two *psychological parents* as bonds can and do develop from an early age between the child and *both* parents.

It is argued that application of the *status quo* principle to award sole residence cuts these attachments arbitrarily and in the absence of abuse or neglect joint residence is the optimum post-divorce parenting arrangement which allows the continuity of established relationship between the child and *both* parents (Maidment S. *Child Custody and Divorce: The Law In Social Context*. Groom Helm, London 1984). Professor Susan Maidment sums up the issues when she says:

...judicial espousal of the status quo principle is based on inconclusive social science evidence. The protection of continuity of caretaker from a psychological point of view in

divorce cases, though not in fostering cases, is too simplistic. Apart from circumstances where one parent has 'disappeared' from a child's life for some length of time, a child who has lived with both parents in an intact family will have attachment bonds with both parents, regardless of who his physical caretaker is for the time being. The case for continuity of environment appears to be stronger...But continuity of environment is not directly related to who is the caretaker (*ibid* at 212-213).

Instead of continuity of an arbitrary care taking status quo, the evidence suggests that the law should be concerned with the child's successful adjustment to divorce by protecting continuity in the child's relationships. Empirical studies are unanimous that one of the most important indicators of success is the quality of post-divorce relationships with both parents...the principle of continuity is therefore less relevant to the question of which parent gets custody, where the child commonly has an attachment to both parents, but is of far greater relevance to issues of how to minimise the effects of divorce by maintaining as far as possible relationships with both parents. In other words, the principle of continuity, rather than suggesting a custodian, indicates that the Courts' concern out to be to ensure that the best possible custody and access arrangements are made to protect the child's relationship with both parents. The principle of continuity is therefore the central concern in discussion of joint custody and access (*ibid* at 214-215).

Furthermore, the issue of continuity of caretaker introduces arbitrariness and chance as the circumstances surrounding the marriage breakdown usually result in immediate short-term decisions made in emotionally difficult circumstances. Other problems may arise when knowledge of the *status quo* principle is used to try to influence the outcome of a residence hearing (Richards M P M. Post-Divorce Arrangements For Children: A Psychological Perspective. *Journal of Social Welfare Law* (1982) pp 133-151).

For instance, the party who has actual custody of a child may try to delay a hearing so that the period of this custody is as long as possible. Another difficulty is that a parent may try to obtain the actual custody of a child by undesirable means before a case comes to court in order to establish the status quo they desire' (*ibid* at 135).

Thus the impact of initial child-care arrangements originating at an early stage of the divorce process, if arranged without legal advice, the parents may become polarised and harden their bargaining positions. Arrangements which make 'good legal' but 'bad psychiatric' sense may predominate over bad legal but 'good psychiatric' ones (Andry R G. *Family Relationships, Fathers and The Law*. In E Miller (Editor), *Foundations of Child Psychology*. Pergamon, Oxford 1968).

Rather than fostering post-separation cooperation, the *status quo* guideline promotes a situation where parents are pitted against each other in a *winner take all* battle. A high premium is placed on gaining *physical residence* at the first available moment so that a history of *continuity* can commence. Vying for control of the child at the earliest stage of separation becomes essential and the parent who manoeuvres the child into his or her possession at the time of the residence hearing will have a strong advantage/ What is often not noticed however, is the application of this principle, rests upon a more important and general presumption – namely, the presumption of sole residence. The presumption is that one parent alone, rather than both parents together, should have residence of the children following a divorce.

⁷ Goldstein, Freud, & Solnit, *supra* note 2 at 62-63

⁸ *ibid* at 53

⁹ *ibid* at 19

¹⁰ *ibid* at 17

¹¹ Thus, according to the psychological parent theory, when a child of divorce has been placed with one parent, and, over time is integrated into a new home, death of the sole residence parent ought not entitle the surviving biological parent automatically to assume residence of the child as against the surviving non-parent. Even if the evidence shows that the non-resident parent was suitable and willing to assume residence at the original child placement hearing.

Support for this line of thinking is seen in *Stambi v Inzitari* (1977) 2 Family Law Report 607 at 11609-11610. The plaintiff was the natural father of a daughter, the residence of which he was seeking. After the death of his ex-wife, his daughter was brought up since shortly after birth, as a

member of a non-related family. The judge after hearing evidence from the defendants, that contact between the natural father and his daughter was sporadic in the five years since her birth, made the little girl a ward of court. Her residence was committed to the defendants until further order. The father was allowed limited and restricted contact to his child. Allen., C J, explained the considerations in this case as follows:

In any contest between parents and stranger concerning the custody of a young child, the preferred position of the parent is understandably based on the closeness of the natural parent/child relationship. However, the welfare and interests of the child itself must be the dominant consideration and the parents' claim may have to yield to that of the present custodian if the child has become well settled in a secure home and integrated into the only family ever known

But see Eve, J, in *Re Thain* (1926) L 676 at 684, a case also involving parent and non-parent.

I am satisfied that the child will be happy and well cared for in the one home on the other, and in as much as the rule laid down for my guidance in the exercise of this responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration, but the paramount consideration, it necessarily contemplates the existence of the other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stands first. It is my duty therefore to order the delivery up of this child to the father

See also, section 65C Family Law Reform Act 1995

65C. A parenting order in relation to a child may be applied for by:

either or both of the child's parents; or

the child; or

any other person concerned with the care, welfare or development of the child.

What happens when parenting order that is or includes residence order does not make provision in relation to death of parent with whom child lives?

65K. (1) This section applies if:

a parenting order that is or includes a residence order is in force determining that a child is to live with one of the child's parents; and

that parent dies; and

the parenting order does not provide for what is to happen on that parent's death.

(2) The surviving parent cannot require the child to live with him or her.

(3) The surviving parent, or another person (subject to section 65C, may apply for the making of a residence order in relation to the child.

(4) In an application under subsection (3) by a person who does not, at the time of the application, have any parental responsibility for the child, any person who, at that time, has any parental responsibility for the child is entitled to be a party to the proceedings.

Also see, former section 63F(5) of The Family Law Act 1975 (*Death of custodial parent*):

On the death of a parent in whose favour an order has been made under this part for the custody of a child:

(a) the other parent is entitled to the custody of the child only if the court so orders:

(b) the other parent or another person may make an application to the court for an order placing the child in the custody of the applicant: and

(c) in an application under paragraph (b) by a person who does not, at the time of the application, have the care and control of the child, any person who, at that time, has the care and control of the child is entitled to be a party to proceedings.

See also, *supra* note 6 and accompanying text

¹² Goldstein, Feud, & Solnit, *supra* note 2 at 38

¹³ *ibid*

¹⁴ *ibid* at 153

¹⁵ *ibid* at 6

¹⁶ Roman & Haddad *supra* note 4

¹⁷ *ibid* at 109

¹⁸ Goldstein, Freud, & Solnit, *supra* note 2 at 12

¹⁹ Wallerstein J S, & Kelly J B. *Surviving The Breakup: How Children and Parents Cope With Divorce*. Basic Books, New York (1980).

²⁰ Mitchell A. *Children In The Middle: Living Through Divorce*. Tavistok Publications, London & New York (1985)

²¹ It has been argued in the context of searches by adoptees for their natural parents that a child has a deep psychological need to know his or her parents See, Comment: Confidentiality of Adoption Records: An Examination. 52 Tul Law Review (1978). pp 817, 824-825. Also see, Note: The Adult Adoptees Constitutional Right To Know His Origins. 485 Cal. Law Review (1975) pp 1196, 1200-1204

²² Laiken D. *Daughters of Divorce*. William Morrow, New York (1981)

²³ *ibid* at 102-103

²⁴ Thompson R. The Fathers Case In Child Custody Decisions: The Contributions of Psychological Research. In M E Lamb, & A Sargi (Editors), *Fatherhood and Social Policy*. Erlbaum, Hillsdale, New Jersey (1983). pp 50-100

²⁵ Rohman L W, Sales B D, & Lou M. The Best Interests of The Child In Custody Disputes. In L A. Weihorn (Editor), *Psychology and Child Custody Determinations*. University of Nebraska Press, Lincoln, Nebraska (1987)

²⁶ Goldstein, Freud, & Solnit, *supra* note 2 at 108

²⁷ Stack C B. Who Owns The Child? Divorce and Child Custody Decisions In Middle Class Families. 23 Social Problems (April 1976)

²⁸ Strauss P & Strauss J. Review of Beyond The Best Interests of The Child. 74 Columbia Law Review (June 1974) p 997

²⁹ Reinman B. A Manual On How To Destroy Poor Families, Beyond The Best Interests of The Child. Paper distributed at the annual meeting of the American Psychoanalytic Assoc. New York (December 1976)

³⁰ Foster H H. Book Review. 12 Williamette Law Journal (1976) pp 545-551

³¹ Richards M. Beyond The Best Interests of The Child – An Examination of The Arguments of Goldstein, Freud and Solnit Concerning Custody and Access At Divorce. 77 JSWL (1986)

³² Stack, *supra* note 27

³³ *ibid* at 510

³⁴ Foster, *supra* note 30 at 545. See also, Benedek J & Benedek E. Post-Divorce Visitation: A Child's Right. 16 Journal American Academy of Clinical Psychiatry (1977) at 256. The authors write:

...experience has shown that custodial parents may be motivated to deny visitation by a number of reasons or emotions to which the child's best interests are entirely irrelevant. Ironically, it is the most meaningful relationships between children and non-custodial parents that are frequently the most threatening to custodial parents and, consequently, such relationships would often be in the greatest jeopardy.

The Benedeks additionally suggest that permitting the resident parent to terminate contact at will may often make the child resentful of the resident parent.

³⁵ *ibid* at 551

³⁶ *ibid*

³⁷ *ibid*

³⁸ Strauss & Strauss, *supra* note 28

³⁹ *ibid*

- ⁴⁰ *ibid*
- ⁴¹ *ibid*
- ⁴² *ibid*
- ⁴³ Katkin, Bullington, & Levine, *supra* note 3
- ⁴⁴ *ibid* at 669
- ⁴⁵ *ibid* at 674
- ⁴⁶ *ibid* at 683
- ⁴⁷ Saposnek D. *Mediating In Child Custody Disputes*. Jossey-Bass, New York (1983). pp 8-9
- ⁴⁸ Luepnitz D A. *Child Custody: A Study of Families After Divorce*. Lexington Books, Massachusetts (1982) at 42
- ⁴⁹ Family Law Council. *Patterns of Parenting After Separation: A Report To The Minister For Justice and Consumer Affairs*. Australian Publishing Service, Canberra (April 1992). Hereinafter *Patterns of Parenting*
- ⁵⁰ Folberg J, & Graham M. *Joint Custody of Children Following Divorce*. 12 *University of California Davis Law Review* (1979) p 535
- ⁵¹ *Patterns of Parenting, supra* note 49
- ⁵² Roman M. *The Disposable Parent*. 14(2) *Conciliation Courts Review* (1977)
- ⁵³ Luepnitz, *supra* note 48
- ⁵⁴ Abarbanel A. *Shared Parenting After Separation and Divorce: A Study of Joint Custody*. 49 *American Journal of Orthopsychiatry* (1979) pp 320-329
- ⁵⁵ Luepnitz, *supra* note 48
- ⁵⁶ *ibid* at 46
- ⁵⁷ *ibid* at 47
- ⁵⁸ 5 *Fam. L. Rep* (1979) at 2395
- ⁵⁹ Kelly J B. *Examining Resistance To Joint Custody*. In, J Folberg (Editor), *Joint Custody and Shared Parenting* The Guildford Press (2nd edition), New York (1991) pp 55-62. (See Appendix D for a transcript)
- ⁶⁰ Ilfield F, Ilfield H, & Alexander J. *Does Joint Custody Work? A First Look At Outcome Data of Relitigation*. 138 *American Journal of Psychiatry* (1982) pp 62-68
- ⁶¹ Luepnitz, *supra* note 48
- ⁶² Roman & Haddad, *supra* note 5
- ⁶³ Luepnitz, *supra* note 48
- ⁶⁴ *ibid*
- ⁶⁵ Sharply C F, & Webber R F. *Co-Parenting: An Alternative To Consider In Separation Counselling*. 10(3) *Australian Journal of Sex, Marriage and Family* (1992) pp 111-117
- ⁶⁶ Teyber E & Hoffman C. *Missing Fathers*. *Psychology Today* (April 1987) pp 36-39
- ⁶⁷ Fulton J A. *Parental Reports of Children's Post-Divorce Adjustment*. 35 *Journal of Social Issues* (1979) pp 126-139
- ⁶⁸ *ibid* at 133
- ⁶⁹ *ibid*
- ⁷⁰ *ibid*
- ⁷¹ Wallerstein & Kelly, *supra* note 19
- ⁷² Jacobs J W. *Treatment of Divorcing Fathers: Social and Psychotherapeutic Considerations*, 140 *American Journal of Psychiatry* (1983) 1294-1299
- ⁷³ Koch M A P, & Lowery C R. *Visitation and The Non-Custodial Father*. 8 *Journal of Divorce* (1984) pp 47-65
- ⁷⁴ Kelly J B. *Longer-Term Adjustment In Children of Divorce: Converging Findings and Implications For Practice*. 2 *Journal of Family Psychology* (1988a) pp 119-140
- ⁷⁵ Fulton, *supra* note 67

⁷⁶ Gibson J. Non-Custodial Fathers and Access Patterns: Family Court of Australia. Office of the Chief Executive. Summary of Key Findings. Research report No. 10. Australian Government Publishing. Service Canberra (1992). 50% of fathers had a problem with the breakdown of court ordered contact due to opposition by an ex-spouse; 66% of fathers reported that contact periods were always too short; 73% of fathers wanted increased contact with their children; 75% of fathers rated as poor the relationship with an ex-spouse

⁷⁷ McMurray A, & Blackmore A M. Influences On Parent-Child Relationships On Non-Custodial Fathers. 14(3) Australian Journal of Marriage and Family (1992) pp 151-159 at p 153. See also, McMurray A. Parenting Without Custody: A Guide For Survival. Harper Collins Publishers, Sydney (1995).

⁷⁸ Gibson, *supra* note 76

⁷⁹ Murray & Blackmore, *supra* note 74

⁸⁰ Lovorn R. Why Women Join Fathers Rights Groups. Athens Banner Herald. Athens Georgia (Thursday, 3 November 1991)

⁸¹ McMurray A. Influences On Parent-Child Relationships On Non-Custodial Mothers. 13(3) Australian Journal of Marriage and Family (1992) p 138

⁸² Williams F S. Child Custody and Parental Cooperation. Paper presented at American Bar Association Family Law Section (1987). See Appendix E for a transcript

⁸³ Kelly, *supra* note 74

⁸⁴ Chief Justice Alistair Nicholson, *Family Law and The Court of Controversy*, Melbourne Herald-Sun (6th March 1995) p 34. See also Chief Justice Alistair Nicholson's comments when interviewed by Susanna Lobez for ABC Radio National (The Law Report, Tuesday, 26th September 1995). The Chief Justice said:

I think that probably men do better out of the Family Law system than women, overall. I think very often the marriage, or their approach to a marriage, may have been conditioned by older ideas. And I think there is very much a power factor comes into this. And I think the loss of that power that stems from the breakdown of the marriage is something that some men just cannot cope with. They in fact expected to control their wives, they expected to control their children, and they expected that they would do what they were told by them. And once that ceases to happen, I think they find that almost unbearable from the point of view of their ego...

The ones that I've observed, anyhow, that seem to have the greatest problem, are the ones who are in access situations where they are, for one reason or other, unable to get their former partner or the children to comply with the access orders that have been made. And they then come to the court and expect the court to solve the problem for them. And the court can't always solve that problem for them

This view by Justice Nicholson is a convenient way to dismiss father's dissatisfaction with their treatment in the Family Court. He fails to mention that one reason for the dissatisfaction is that the mothers in question are able to disregard the law with impunity and have full control (See, The Parliament of The Commonwealth of Australia. The Family Law Act 1975. Aspects of Its Operation and Interpretation. Report of The Joint Select Committee On Certain Aspects of The Operation and Interpretation of The Family Law Act 1975. Australian Government Publishing Services, Canberra November 1992 at p 168. Hereinafter *Committee*).

Presumably the *contact* orders were made for good reason, so the mothers are not acting in the best interest of the children. It is also interesting that Justice Nicholson considers it the father's responsibility to ensure that the mother complies with the order, even if it is the court that the mother is holding in contempt. This is a regrettable attitude to take because any action aimed at enforcing the orders can be represented to the children by the mother as the father attacking and controlling her and them. In other words, it can be used to alienate the children from the father. This is less likely to happen if the matter were portrayed clearly as one between the mother and the court. The cost to the father of seeking lawful remedies is shown in the following by N Z Judge Ellis in *R v C*:

In situations of conflict between parents over custody and access, it is a primary concern that children have the benefit of contact with both parents. However, in some cases this is not possible. Here it can be said without being unfair to either parent that Mr R has done all in his power to obtain some form of contact with S and Ms C has done all in her power to make sure that he does not. Mr R has pursued a wide variety

of Court procedures, and Ms C has on occasion taken steps outside the law. This pertinency and stubbornness has created a situation where those consulted agree access by Mr R to S is impossible. So too is any form of reporting which would involve Ms C. ((Butterworths. Butterworth's Family Law In New Zealand. Butterworths 7th edition, Wellington, New Zealand 1995 p 441).

⁸⁵ See *Committee ibid* at 169, paragraph 7.32

⁸⁶ Williams, *supra* note 83

⁸⁷ See, *Committee, supra* note 84

⁸⁸ Family Law Pathways Advisory Group. Pathways To The Future For Families Experiencing Separation. Report of The Family Law Advisory Group. Commonwealth of Australia (July 2001)

⁸⁹ Green M. Current Controversies: Knowing The Enemy. Nuance No 2 (December 2000) at p 5

⁹⁰ In 1994 Judge Blaikie of the Family Court of New Zealand recognised that alienating strategies by separated parents (otherwise known as *parental alienation*) constitute child abuse, and has suggested possible remedies by the Family Court (Blaikie E O K. Emotional Abuse of Children: Some Responses From The Family Court. Butterworths Family Law Journal, March 1994. pp77-82).

This is an interesting paper, although it is noteworthy that there is no discussion of false allegations of physical and sexual abuse. Although his suggestions are very mild, he is unlikely to get support from some of the Court's experts. Some consider it more appropriate to ignore the issue.

⁹¹ Wallerstein & Kelly, *supra* note 19

⁹² Burmiester H W. Presentation To The U.S. Commission On Interstate Child Support. 1(4) Voices For Children (1991b) pp 1-2

⁹³ Lovorn, *supra* note 80

⁹⁴ McMurray, *supra* note 81

⁹⁵ Wallerstein & Kelly, *supra* note 19

⁹⁶ Kelly, *supra* note 74

⁹⁷ U.S. Federal Department of Health and Human Services. *Trend, The Well-Being of America's Children and Youth*. U.S. Federal Department of Health and Human Services (1996)

⁹⁸ JAMA. *Impact of Family Relocation On Children's Growth, Development, School Function, and Behaviour*. JAMA (15 September 1993)

⁹⁹ Hill M. Sharing Child Care In Early Parenthood. RKP (1987)

¹⁰⁰ Warshak R A. Blanket Restrictions: Overnight Contact Between Parents And Young Children. 4(38) Family And Conciliation Courts Review (4 October 2000) pp 422-445

¹⁰¹ *ibid*

¹⁰² Bowlby J. Attachment and Loss: Vol 1. Attachment. Basic Books, New York (1969)

¹⁰³ Bowlby J. Attachment and Loss: Vol 3. Loss: Sadness and Depression. Basic Books, New York (1980)

¹⁰⁴ Erikson E H. Childhood and Society. Norton, New York (1963)

¹⁰⁵ Mahler M S, Pine F, & Bergman A. The Psychological Birth of The Human Infant. Basic Books, New York (1975)

¹⁰⁶ Freud S. An Outline of Psycho-Analysis. (J Strachey, Editor & Translator), Norton, New York (1940)

¹⁰⁷ *ibid* at 45

¹⁰⁸ Bowlby J. Maternal Care and Mental Health. World Health Organization, Geneva, Switzerland (1951)

¹⁰⁹ Bowlby, *supra* note 102

¹¹⁰ Bowlby, *supra* note 103

¹¹¹ *ibid* at 46

¹¹² Bowlby J, Robertson J, & Rosenbluth D A. Two Year Old Goes To Hospital. 7 Psychoanalytic Study of The Child (1952). pp 82-94

¹¹³ Rutter M. Maternal Deprivation. In M H Bornstein (Editor), 4 Handbook of Parenting. Lawrence Erlbaum, Mahwah, New Jersey (1995b) pp 3-31

¹¹⁴ Kelly, *supra* note 59

¹¹⁵ Erksion, *supra* note 104

¹¹⁶ Mahler M S. Mother-Child Interaction During Separation. 24 *Psychoanalytic Quarterly* (1965) pp 483-498

¹¹⁷ Mahler, Pine, & Bergman, *supra* note 105

¹¹⁸ Mahler, *supra* note 116

¹¹⁹ Mahler, Pine, & Bergman, *supra* note 105

¹²⁰ Erikson, *supra* note 104

¹²¹ Provence S, & Lipton R. *Infants In Institutions*. International Universities Press, New York (1962)

¹²² Yarow L J. Research In Dimensions of Maternal Care. 9 *Merrill-Palmer Quarterly* (1963). pp 101-114

¹²³ Bowlby, *supra* note 108

¹²⁴ Bowlby, *ibid* argues that there is a bias for a child to attach himself or herself especially to one figure (a characteristic he has called *monotrophy*), and this attachment differs in kind to other *subsidiary attachment figures*. However, among attachment theorists there is lack of supporting evidence for this claim (See for instance, Schaefer H R. *The Growth of Sociability*. Penguin (1971); Rutter M. *Maternal Deprivation Reassessed*. Penguin 1972).

Rutter, *ibid* points out that, Bowlby's views on the supposedly special importance of *the mother* (and virtual irrelevance of the father) have not been substantiated:

Two issues are involved the first is whether or not the main bond differs from all others...most children develop bonds with several people and it appears likely that these bonds are basically similar. The second concerns the assumption that 'the mother' is the person to whom the child is necessarily most attached...But it should be appreciated that the chief bond need not be with a biological parent, it need not be with the chief caretaker and it need not be with a female.

See also, Grote D F, & Weinstein P J. Joint Custody: A Viable and Ideal Alternative. 1 *Journal of Divorce* (Fall 1977). pp 43-53:

...an infant is not confined to just one bond...once he has reached the stage of forming specific attachments, he is capable of maintaining a number at the same time...(*ibid* at 43 & 48)

Moreover, being attached to several people does not necessarily imply a shallower feeling to each one (Schaffer R. *Mothering*. 1977 at 100).

Roman & Haddad, *supra* note 4 at 86 who write:

Like many others Bowlby confuses biology and culture. His is the mathematics of sexism, which manages to quantify and endorse two mutually exclusive sex-defined roles for parents to act. And it is more dangerous: herein a psychoanalyst gives credence to the view of the father as a non-parent, a 'useful' financial and emotional presence for his contented wife.

Virtually ignoring how the father actually does behave with his children...in this he is not alone. Almost any aspect of men's lives – from their work to athletic prowess – is subject to scrutiny, except their role as father. This role has exceptionally low priority for methodological inquiry, record keeping and conjecture.

¹²⁵ Thompson, *supra* note 24

¹²⁶ Rohman, Sales, & Lou, *supra* note 25

¹²⁷ Biller H B. *Fathers and Families: Paternal Factors In Child Development*. Auburn House, Westport, C T (1993). See also, Jackson B. *Fatherhood*. Allen & Unwin, London (1984)

¹²⁸ Parke R. *Fathers*. Harvard University Press, Cambridge, Massachusetts (1981)

¹²⁹ Warshak R A. *The Custody Revolution: The Father Factor and The Motherhood Mystique*. Simon & Schuster, New York (1992)

¹³⁰ Biller, *supra* note 127

¹³¹ Lamb M E. *The Role of The Father In Child Development*. (M E Lamb, Editor, 3rd edition). John Wiley, New York (1997)

¹³² Thompson, *supra* note 24

¹³³ Rutter M. Clinical Implications of Attachment Concepts. 36 *Journal of Child Psychology and Psychiatry* (1995a). pp 549-571

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- ¹³⁴ Rutter, *supra* note 113
- ¹³⁵ Bowlby J. *A Secure Base*. Basic Books, New York (1988)
- ¹³⁶ Bowlby J, Ainsworth M, Boston M, & Rosenbluth D. The Effects of Mother-Child Separation: A Follow-Up Study. 29 *British Journal of Medical Psychology* (1956) p 211
- ¹³⁷ Lamb M E. Brief For The Texas Supreme Court Committee On Child Visitation. Austin, Texas (3 November 1994). See also, Lamb, *supra* note 113
- ¹³⁸ Sroufe L A. A Developmental Perspective On Day-Care. 3 *Early Childhood Research Quarterly* (1988). pp 283-291
- ¹³⁹ Brazelton T B. *Working and Caring*. Basic Books, New York (1985)
- ¹⁴⁰ Barglow P, Vaughn B, & Molitor N. Effects of Maternal Absence Due To Employment On The Quality of Infant-Mother Attachment In A Low Risk Sample. 58 *Child Development* (1987) pp 945-954
- ¹⁴¹ Belsky J, & Rovine M. Non-maternal Care In The First Year of Life and The Security of Infant-Parent Attachment. 59 *Child Development* (1988) pp 157-167
- ¹⁴² Clarke-Stewart K A. Infant Day-Care: Maligned Or Malignant? 44 *American Psychologist* (1989) pp 266-273
- ¹⁴³ Lamb M E, & Stenberg K. Do We Really Know How Day-Care Effects Children? 11 *Journal of Applied Developmental Psychology* (1990) pp 351-379
- ¹⁴⁴ Roggman L, Langlois J, Hubbs-Tait L, & Reiser-Danner L. Infant Day-Care, Attachment, and The File Drawer Problem. 65 *Child Development* (1994) pp 1429-1443
- ¹⁴⁵ NICHD Early Child Care Research Network (1997). The Effects of Infant Child Care On Infant-Mother Attachment Security: Results of The NICHD Study of Early Child Care. 68 *Child Development* (1997) pp 860-879
- ¹⁴⁶ *ibid* at 875
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The Case For a Rebuttable Presumption of Joint Residence

There is growing body of overseas research showing the emotional damage to children produced by divorce. The Exeter Family Study published in 1994 for example, showed children from divorced families are five times more likely than children from intact families to experience problems at school, medically, in relationships and with self esteem.¹ Little notice however, has been paid to Australian research, which supports the overseas data—namely, the West Australian Child Health Survey involving a random sample of more than 2700 children in 1994.² Conducted by the Perth-based Research Institute For Child Health, it produced solid evidence destroying the modern tenet that conflicted marriages are worse than divorce and that it is in the best interests of children to end troubled marriages. Significantly, it shows that children in intact two-parent homes present notably fewer mental-health problems than children in single parent or blended families, even if the marital relationship is poor (Arndt 1995).³

Few family policy questions arouse greater public concern than the question of how to reduce the negative impact of divorce on children and parents. It is clearly established that children, parents and the legal system fare best when children and parents are permitted to continue and develop loving and full relationships (Folberg & Graham 1979, Wallerstein & Kelly 1980, Ahrons 1983).^{4,5,6} This leads to the public policy consideration – what legal structures or family policies best promote meaningful and continued joint parenting after divorce?

Based upon the preponderance of the evidence available about factors affecting children's well being in post-divorce families, it is reasonable to take the position that public policy for divorcing families should be directed towards three objectives. It should firstly protect the ties between children and both parents. Secondly, it should minimise parental conflict, and thirdly, ensure that adequate child support is provided. A fourth objective, that residence laws be gender neutral, is grounded in ethical and political values.

There seems to be little doubt that joint residence is a superior post-divorce child-rearing alternative to the common sole residence model for those parents who choose it. The current debate centres on whether joint residence should become the norm encouraged by family law through some type of presumption statute.⁷ With a presumption law it is presumed that joint residence is in the best interests of the child unless there is sufficient evidence to rebut the presumption.⁸

In this discussion, joint residence is defined as the aggregate of three characteristics that distinguish joint residence from sole residence arrangements. Foremost, is the proposal that the child lives with each of his or her parents for substantial, but not necessarily equal amounts of time.⁹ Second, there is an acknowledgment that both parents assume equal responsibilities for the physical, emotional and moral development of the child. Third, there are shared rights and responsibilities for making decisions that directly affect the child.

It has been argued that to advocate a presumption in favour of joint residence is coercive (Schullman & Pitt 1982).¹⁰ But those who argue along these lines conveniently forget that the current bias in favour of sole residence is itself coercive. (Roman & Haddad 1978, Danzig 1980).^{11,12} They also forget that courts must not only reflect prevailing social standards,¹³ but must also be the final arbiters of the justice inherent in such standards.¹⁴

Children's Adjustment

Child residence contests are recognised by experts as presenting great dangers to the emotional welfare of the children involved. Most existing studies on the impact of divorce indicate that it is a highly complex process, which represents a major source of stress and readjustment for children and parents. It is well documented that sole residence, which has had a long trial period, leaves serious problems for children and their parents. Let us look at what happens to children during divorce and under exclusive sole residence in particular. The accumulated data suggests that children who are not forced to divorce a caring parent are more likely to be better adjusted after divorce.

(A) Feelings of Loss and Abandonment

The central event of the divorce process for most children is the parental separation...The child frequently perceives the parents departure as a departure from him personally...(T) he central event of divorce for children is psychologically comparable to the event of death, and frequently evokes similar responses of disbelief, shock and denial (Wallerstein & Kelly 1976).¹⁵

There is some evidence that sole residence arrangements victimise children emotionally by denying them the relationship with two parents which is crucial for reasonably healthy post-divorce adjustment (Nunan 1980; Wallerstein & Kelly 1980; Hetherington 1982).^{16, 17, 18} As the evidence on contact denial reviewed above shows, the *sole residence for the mother/contact for the father* arrangement does not protect the right of the child to be cared and loved by their non-resident father, and the importance of the relationship with the father has now been decisively documented (Kelly 1988a).¹⁹ The link between post-divorce contact with the non-resident father and positive child outcomes has been revealed in a wide array of outcome variables. Increased contacts, in meaningful care giving situations, lead to improved behaviour, improved peer relationships, more positive self-esteem, and even improved academic scores in numerous subjects (Kelly 1988a).²⁰ Infrequent paternal contact, on the other hand, has been associated with poor self-esteem, depression, and high levels of anger in children (Kelly 1988a).²¹

A 1970 study of children in a North American psychiatric facility found that *virtually all* of the children of divorced parents experienced depression. This was not true of the children in the facility from intact homes:

There was a common theme of children being made to feel small, weak and incredibly vulnerable by the whole divorce process. The disruption marked by the divorce itself, as well as its management, echoed in the child for some time.²²

In 1988, a survey of preschool children admitted to New Orleans hospitals as psychiatric patients over a 34-month period found that nearly 80 percent came from fatherless homes (Block *et al* 1988).²³

In spite of the relative inability of children to articulate their feelings (at least compared to the average adult), there is increasing evidence that children, when presented with the opportunity to do so, have articulated their desire to maintain a loving, involved relationship with both parents after divorce. This desire on the part of children is understandable, given the evidence that children form meaningful attachment bonds to both parents (Thompson 1983).²⁴

Wallerstein & Kelly (1980)²⁵ in their well known longitudinal study of 60 California families and 131 children aged two through eighteen found that preschoolers feared being abandoned after their parents separation and that children of all ages expressed verbally

and behaviourally a great sense of loss if one parent was absent. Among the twenty-six seven and eight year old children studied, the most pronounced reaction to the parental divorce was the sense of loss suffered with regard to the departed father. The study noted that the effects of being left almost exclusively in the care of only one parent were negative. In other research²⁶ the authors recorded children's intense dissatisfaction with the traditional two weekends contact per month, dictated by the sole residence model, and their desire for more frequent contact with their non-resident parents. Only the children who could see their fathers several times a week were even moderately content.

These feelings of loss have also been reported in subsequent British studies (Lund 1984; Mitchell 1985).^{27,28} Mitchell's (1985)²⁹ account of her interviews with 116 Scottish adolescents which were conducted five years after separation, provides a moving record of the initial loneliness and bewilderment of children that results from the inaccessibility of one parent following separation (and sometimes in emotional terms, both). The remarriage of one or the other parent constituted a second crisis for some of the children in her sample because it dispelled the last vestiges of hope (however unsubstantiated) that their parents might eventually come back together again – often the precondition children believed necessary for recovering two parents. They emphasised again and again their need to be kept informed about what was happening. Mitchell argued that doctors, lawyers, teachers, and social workers were important attendants upon the process of marriage breakdown who therefore had a primary mental health care role to play in the reconstruction of family life after divorce. The case for educating professionals about the known effects of divorce on children and their parents is well made by Mitchell and other writers.

An important Australian study by Amato (1987)³⁰ interviewed 402 Victorian children and asked them about relationships with parents and their general feelings about family life. It sought to connect their responses to how the children were doing in their lives. For the broad range of children support from both mothers and fathers was associated with positive development. When fathers had little association with their children, these children had relatively low self-esteem, strongly desired more contact with their fathers, and were doing poorly compared to other children whose fathers were more involved in their lives.

Loyalty conflicts (Wallerstein & Kelly 1976),³¹ attachment and separation anxiety (Weiss 1976)³² have also been found to be associated with sole residence arrangements. Some researchers believe that the psychological process underlying post-divorce symptoms in children resemble mourning or bereavement (Hetherington, Cox, & Cox 1978).³³ Even those authors, who do not ascribe to the mourning theory, note that loss, or severe attenuation of the parent-child bond is a real possibility among children and non-resident parents.

Another study (Greif (1979)³⁴ found that limited contact by the non-resident parent severely restricts the opportunity to provide the daily nurturing needed to strengthen the parent-child relationship. Often non-resident parents, reacting to the pain of being forced to see their children only intermittently cope by seeing them infrequently (Hetherington, Cox, & Cox 1982).³⁵ Roman & Haddad (1978)³⁶ concluded that:

... for the child, an awareness of his or her parent's joint involvement is crucial. There is not only the most solid evidence of being loved by both parents, but the chance to express rather than bury, whatever angers and conflicts the divorce engenders. This chance is absent in the sole custody household. Children are not only deeply pained by one parent's absence, but they interpret it as abandonment; as a consequence, they feel devalued and guilty,³⁷ yet they find they have few ways to express their anger and confusion.

Findings from research projects in Virginia (Hetherington, Cox, & Cox 1982; Hetherington & Hagan 1985),^{38,39} California (Wallerstein & Kelly 1980),⁴⁰ Arizona (Braver & O'Connell 1998),⁴¹ and Texas (Warshak 1986; 1992)^{42,43} support the position that in most cases, children benefit from post-divorce arrangements that foster continuing relationships with both parents and more contact with non-resident fathers than was typically taking place.

(B) Increased Risk For Child Suicide

The evidence that family functioning is related to the well being of children and adolescents is overwhelming, and mental health is no exception. It is therefore reasonable to expect that the significant changes in family structure and functioning in the post-war years—such as the increase in sole parent and blended/step households due to increased rates of divorce and ex-nuptial births—would have some effect on the psychological well being of children and adolescents.

According to the Western Australian Child Health Survey (Silburn *et al* 1996),⁴⁴ children in single parent and step/blended households have up to two times greater incidence of mental health problems than children in intact families (two natural parents). Garrison *et al* (1997)⁴⁵ documented an almost 15 times higher prevalence of depression in 12 to 14 years olds not living with both of their natural parents.

Higher divorce rates in a society lead to higher suicide rates among children. Prior to the *divorce revolution* of the 1970s unemployment was the biggest correlate with suicide, but that has changed. The work of Professor Patricia McCall (1994)⁴⁶ of the Department of Sociology of North Carolina State University now shows that the largest demographic indicator of suicide is the family structure within which the person resides, and that the divorced family structure is most dangerous. This link between the rise in adolescent suicide in the past three decades with parental divorce has been found again and again in the literature, and in cross-cultural studies of Japan and the United States. For children the suicide is often triggered by thoughts that their parents have rejected them (Nelson, *et al* 1988; Noevi Velez & Cohen 1988; Larson, Swyers, & Larson 1995),^{47,48,49} or have lost interest in them (Wodarski & Harris 1987).⁵⁰

Such a perception on the part of children may sometimes be based in reality and not be just a figment of their imagination. Not only do parents divorce each other, a divorce or *mini* divorce happens between them and their children (Kershet & Rosenthal 1978).⁵¹ Unlike the experience of their parents, the child's suffering does not reach its peak at the divorce and then level off (Wallerstein & Blakeslee 1989).⁵² Rather, the effect of the parents' divorce can be played and replayed throughout the next three decades of the children's lives. These long-lasting effects are found in country after country no matter what the socio-economic status of the family. In 1998 the Parliament of Australia through the House of Representatives Standing Committee on Legal and Constitutional Affairs came to similar conclusions in its report *To Have and To Hold*.⁵³

(C) Strained Interactions Between Parent and Child

Children of divorced parents exhibit negative behaviour to a greater degree than do children of intact families; these behaviours are most marked in boys and have largely disappeared in girls by the second year following divorce (Hetherington, Cox, & Cox 1978).⁵⁴ The misbehaviour is directed primarily toward the sole resident parent (usually the mother).

It has also been found that boys from divorced families often exhibit delinquent-like behaviour and have difficulty in controlling their impulses (Biller 1981; Buckingham 2000).^{55,56} Investigators believe that boys need a firm, positive identification with their fathers in order to be able to develop internalised controls over their behaviour. The fact that post divorce boys have much less contact with their fathers⁵⁷ would explain their higher incidence of delinquent-like and generally aggressive behaviour.

Australian data indicates the proportion of children with mental health problems – including behavioural, affective (mood), and attention deficit disorders – is lowest in intact families. The highest proportion of children with problems occurs in single parent households, but boys are most likely to suffer from mental health problems in step/blended households (Sawyer *et al* 2000).⁵⁸

Sole residence children are likely to develop a fantasised image of the non-resident parent, which may lead to false impressions about others of the same sex as the absent parent (McDermott 1970).⁵⁹ They may also find it difficult to express conflicting feelings to the non-resident parent (Greif 1979).⁶⁰ Similarly, non-resident parents have reported their reluctance to discuss painful issues with their children for fear of *spoiling* the short time they have to spend together (Greif 1979).⁶¹ Finally, single parents offer their children a more restricted array of positive characteristics to model than do married parents (Hetherington, Cox, & Cox 1979).⁶²

Children's relationships with both their parents change after a divorce: they become more distant from both, more so even than children living with married but unhappy parents (Amato & Booth 1991; 1997).^{63,64} Children of divorced parents rate the support they receive from home much lower than do children from intact homes. These negative ratings become more pronounced by the time they are in high school and university. This emotional distance between children and parents lasts well into adulthood, and may become permanent.

As adults, children of divorced parent families are half as likely to be close to their parents as children of intact families are. They have less frequent contact with the parent with whom they have grown up, and have much less contact with the divorced parent from whom they have been separated by the divorce. The financial assistance, practical help, and emotional support between parents and children diminishes more quickly than that in intact families. Also, they are less likely to think they should support their parents in old age. This finding alone portends a monumental problem for the much-divorced baby boom generation when it becomes the dependent elderly generation in the first half of the twenty first century

Children whose parents divorce later in life such as late teenage years and early adulthood have fewer difficulties than children whose parents divorce during their childhood, but they deeply dislike the strains and difficulties which arise in long-held family celebrations, traditions, daily rituals, and special times, and see these losses as major. Furthermore, even grown children continue to see their parents divorce very differently than do the parents. Wallerstein & Blakeslee (1989),⁶⁵ clinical psychologists from San Francisco, disturbed America with their widely reported research on the effects of divorce on children. The research has continued in many follow-up studies on these children. Fifteen years after the divorce only 10 percent of children felt positive about their parents' divorce even though 80 percent of the divorced mothers and 50 percent of the divorced fathers felt that it was good for them.

Guidubaldi (1980)⁶⁶ concluded a special issue of the *School Psychology Review* with the following statement:

We are beginning to recognise the impact of pervasive family disruption on a wide range of children's school behaviours. We are becoming uncomfortably aware that the increasing divorce rate isn't just a passing fad or a temporary artefact of the post World War II baby boom. Most importantly, we are beginning to understand that the growing lack of commitment to child rearing may be one of the most significant societal changes in our lifetimes.⁶⁷

U.S. Secretary of Education, William J. Bennett, cited continuing evidence of socialisation failure seven years later in an issue of the *American Psychologist* (1987).⁶⁸

After describing massive expansion of federal spending during the 1960's and 1970's to improve the well being of American children, Bennett asks, *How did American children fare during those 20 years of unparalleled financial commitment?* He then reported that the birth-rate for unwed teenagers rose 200%, the rate of homicide among young people more than doubled, juvenile arrests more than doubled, and that there was no way to even estimate the proliferation of drug use.⁶⁹ Bennett concluded that the absence of fathers was a likely cause of these juvenile problems.

(D) Increased Risk For Child Abuse

Some evidence has suggested that children in sole residence arrangements may suffer an increased risk for child abuse (Ditson & Shay 1984).⁷⁰ This potential may be understood as an increased risk resulting from three factors. First, numerous authors have expressed concern about the injury to children when a parent with psychological problems is given total responsibility for the children (Wallerstein & Kelly 1980; Williams 1987; Kelly 1988a).^{71,72,73} Even in the best of circumstances, judicial decisions in favour of sole residence will result in awarding residence to a small number of parents who have serious psychological problems. Given the total authority which parents in sole residence situations have, the potential for child abuse, in that context, is almost unchecked.

A second potential for abuse is contact denial, the evidence reviewed previously (Fulton 1979; Wallerstein & Kelly, 1980; Lovorn 1991; Gibson 1992; McMurray & Blackmore 1992)^{74,75,76,77,78} indicated that contact denial was a pervasive problem, and because parental loss injures the child in terms of post-divorce adjustment, contact denial may be viewed as one form of emotional abuse in a large percentage of sole residence households. Available evidence suggests that both sole residence mothers and sole residence fathers are guilty of that form of child abuse (Lovorn 1991; McMurray 1992).^{79,80}

Perhaps the most striking information suggesting that sole residence arrangements victimise children are several reports which indicate an increased risk for all forms of child abuse for sole maternal residence (Ditson & Shay 1984; Webb 1991).^{81,82} Ditson & Shay (1984)⁸³ presented data which indicates that 63% of all confirmed child abuse in one American city during one year took place in the homes of single parents and that the mother was the perpetrator of the abuse in 77% of those cases.

Other U.S. data from various state departments of human resources suggest that, in most cases of child abuse and neglect, the mother is the perpetrator (Webb 1991; Wright 1992)^{84, 85} and this is consistent with research reports by various advocacy groups for non-resident parents and children (Anderson 1990; Burmeister 1990).^{86, 87} A study of all state child protective services agencies by the Children's Rights Coalition (a child advocacy and research organisation in Austin Texas), found that biological mothers physically abuse their children at twice the rate of biological fathers. The majority of the rest of the time, children were abused because of the single-mothers' poor choices in the subsequent men in their lives. Incidences of abuse were almost non-existent in single-father-headed households (Anderson 1990).⁸⁸

These data could result from the increased stress associated with single parent responsibilities, since the Ditson & Shay (1984)⁸⁹ data also indicated that in married families the abuse was evenly split between male and female perpetrators (i.e., the mother and the father). Also these data based conclusions may result from the fact that following divorce more children live with mothers than with fathers. Further, no information is currently available on such increased risk among sole paternal residence children. Finally, some studies indicate directly conflicting results (Rosenthal 1988).⁹⁰ However given the potential risk of child abuse, which may be associated with sole residence, these reports must be investigated

National data collected by the Australian Institute of Health and Welfare (AIHW) show much the same pattern. Child abuse and neglect statistics collated by Angus & Hall (1996)⁹¹ of the AIHW show an over-representation of single-parent households. For the three states (Vic, Qld, & WA) and two territories (ACT & NT) for which data were provided, more cases involved children from female single-parent households (39%) than families with two natural parents (30%) or other two parent households such as step parent households (21%).⁹² The over-representation becomes even more apparent when the abuse statistics are compared with Australian Bureau of Statistics (1995)⁹³ data on the relative frequency of different family types in Australia.

Both Angus & Hall (1996)⁹⁴ and Broadbent & Bentley (1997)⁹⁵ acknowledge the over-representation, but fail to comment on its large size. Angus & Hall (1996)⁹⁶ say:

In all, 34% of substantiated cases of physical abuse occurred in families with two natural parents and 32% in female single-parent families. More substantiated emotional and sexual abuse and neglect cases involved children from female single-parent families than from other types of family – 38% of substantiated cases of emotional abuse, 34% of sexual abuse and 47% of neglect cases. In comparison, 31% of substantiated cases of emotional abuse, 30% of substantiated cases of sexual abuse and 26% of neglect involved children from families with two natural parents.⁹⁷

The data strangely missing from the above statement is the relative incidence in the community of single-parent households compared with two natural parent families. When this factor is taken into account, the difference in child abuse rates becomes more starkly apparent. Since 81% of Australian children 0-14 years live with both their natural parents (Australian Bureau of Statistics 1995)⁹⁸ and 30% of child sexual abuse occurs in this type of family, while 13% of children live in female single parent households (Australian Bureau of Statistics 1995)⁹⁹ and 34% of child sexual abuse occurs in this type of household—it follows that the relative risk of child sexual abuse in a female single parent household is over seven times the risk in a two natural parent family ($34/13 \times 81/30$). The relative risk of any kind of abuse in a single parent household is eight times that of a two natural parent family.

The situation is becoming more serious. The Australian Bureau of Statistics reports that *between 1982 and 1992, the number of families headed by a lone parent grew by more than 180,000, reaching an estimated 619,000—an increase of 42% in just ten years* (ABS 1995).¹⁰⁰ The data provided by Angus & Hall (1996)¹⁰¹ and the Australian Bureau of Statistics (1995)¹⁰² shows the dramatic relative risk of child abuse and neglect in single-parent families, and even more in stepfamilies. The proportion of two natural parent families in the community has decreased since 1992 (ABS 1995),¹⁰³ with a corresponding increase in the proportion of single parent and blended families but the relative risk of child abuse in the non-traditional family types remains much higher than for two natural parent families.

Child abuse is intimately related to later delinquency and violent crime, and here too divorce is implicated (Fagan 1997).¹⁰⁴ Higher levels of divorce mean higher levels of child abuse. Remarriage does not reduce this level of child abuse and may even add to it. Serious abuse is much higher among stepchildren compared with children of intact families. Adults who were sexually abused as children are more likely to have been raised in stepfamilies (Fergusson, Lynskey, & Horwood 1996).¹⁰⁵ The rate of sexual abuse of girls by stepfathers ranges from six to seven times as likely (Russell 1984),¹⁰⁶ and may be as much as 40 times more when compared with such abuse by biological fathers in intact families (Wilson & Daly 1987).¹⁰⁷

Australian Human Rights Commissioner Brian Burdekan (1989)¹⁰⁸ has reported that sexual abuse of girls is very much higher in households where the adult male is not the

natural father. National statistics indicate that the relative risk of child sex abuse in a family where only one of the parent figures is a natural parent, is much higher than in a single-parent family and enormously higher – around 17 times – than in a two natural parent family. In a stepfamily, the abuser may be an older stepsibling – not necessarily the stepparent.

Family structure predicts huge differences in rates of fatal child abuse. Professors Margo Wilson and Martin Daly (1987)¹⁰⁹ of the Department of Psychology at McMaster University, Canada, report that children two years and younger are seventy to a hundred times more likely to be killed at the hands of stepparents than at the hands of biological parents. Younger children are more vulnerable because they are so much weaker physically. British data is milder but the research is not as rigorous as the Canadian research. There the fatal abuse of children of all ages occurs three times more frequently in stepfamilies than in intact married families. Neglect of children, which frequently is more psychologically damaging than physical abuse (Emery 1989),¹¹⁰ also is higher – twice as high – among separated and divorced parents.

Stepparents always have had a difficult time establishing close bonds with new stepchildren as even traditional fairy tales recount. Sole residence is the judicial preferment of stepparents. Difficulties between children and stepparents are not confined to *Grimm's fairy tales*. The fairytale theme is confirmed in the research literature: The rate of bonding between stepparents and stepchildren is rather low. By one study only 53 percent of stepfathers and 25 percent of stepmothers may have *parental feelings* toward their stepchildren, and still fewer to *love* them.

A Melbourne study (Hodges 1982),¹¹¹ indicated considerable difficulties were experienced by adolescents on the re-marriage of the resident parent (usually the mother). The majority appeared uncomfortable. There is a vast biological literature regarding parental solicitude, which shows that it is discriminative. Parents favour their own children. Bi-parental care is universal in our species and is a fundamental attribute (Dally & Wilson 1980).¹¹²

With these recorded results, it is somewhat surprising that the factor of sole maternal residence is not considered in much of the literature on child abuse. Numerous factors are considered as correlates of child abuse including age and sex of the child, race, family income, number of siblings and social status. While a number of Australian studies have considered the effects of the family structure on child victimisation, most merely refer to structure as part of the family demographic information, noting the over-representation in their sample (e.g. Goodard & Hiller 1992).¹¹³ However, results are not reported which would indicate whether mothers were more prone to child abuse than fathers, or if sole maternal residence—as compared to joint residence, sole paternal residence, or intact family status—contributed to an increased risk for child abuse. These are simple questions. Yet these fundamental questions are not being addressed.

In this context, the decision taken in 1997 by the Australian Institute of Health and Welfare (Broadbent & Bentley 1997)¹¹⁴ to no longer publish data indicating the sex of perpetrators in substantiated child abuse cases must be reversed. The action was taken just one year after the data was first published in 1996 (968 men and 1138 women).¹¹⁵ The omission was justified on the wobbly basis that only one state (WA) and two territories (ACT & NT) had furnished statistics and a lack of publishing space.¹¹⁶ Interested parties were advised that they could obtain the data under a Freedom of Information request at a cost of \$200.¹¹⁷

Curiously, these reasons did not preclude the publication of these data in 1996. In fact, Angus & Hall (1996)¹¹⁸ observed that the information base *provide an extra dimension to data previously presented*.¹¹⁹ Quite obviously, the non-publication of these important data can negatively impact on child abuse policy and the allocation of resources. If the AIHW

decision does indeed represent bias reporting then such slanted views clearly have no place in scientific endeavours.

We must be wary of assuming that all sole parent households, step-parent households and cohabiting couples are inevitably risky for children, or that married parents are an absolute guarantee of safety and happiness, for this is clearly not so. But what does seem to be the case is that on average, the risk to children increases as we move away from an environment in which the biological parents of the child are married. Many single parents do a good job in difficult circumstances and many stepparent households function well. However, we should not be surprised when statistics prove that two natural parents generally cope better than a sole-parent, or that step-parent households often experience resentment, jealousy and other tensions, or that unrelated boyfriends of the mother do not have the commitment to the mother's children that a natural father is likely to have. This is common sense.

These data showing the dramatic relative risk of child abuse and neglect in single-parent households and even more in step families should alarm governments and the community—particularly as researchers point out that there has been an increase in child abuse notifications of more than 80% in six years, with substantiated cases increasing by 56%. While some of the increase may stem from changes in the law and increased reporting, it is also likely to be due to other factors, since the Western world has seen more sociological change in the past decade than perhaps any other in human history. Given the potential risk of child abuse, which may be associated with sole residence, these reports must be investigated. According to the Australian Institute of Family Studies (Tomison 1996):¹²⁰

... there has been a failure to date to extensively investigate the role of parental characteristics and family structure. There is a need for further investigation, in Australia and overseas, into the impact of family structure on child maltreatment in reconstituted or single parent families. Such an investigation should incorporate an assessment of the positive aspects of such families in constitution with the more negative consequences.¹²¹

There seem to be two fruitful areas of research. First, when parenting responsibilities are totally loaded totally on one parent, that residence decision may lead to increased parental stress, and research has associated increased maternal stress with increased violence against children (Whimple 1989).¹²² More research that delineates this potential link between sole residence, stress, and a higher risk for abuse should certainly be conducted. Further, the research should be based on multivariate procedures, which allows for partialling out the independent effects of inter-parental conflict, economic stress and sex of the resident parent. If this evidence continues to mount, these data could become an important concern in future residence determinations.

(E) Disturbance In Cognitive Performance

It is abundantly clear that existing divorce procedures have not worked *in the best interests of the child*. Repeatedly, in study after study since the mid-1970's, divorced-family children have been shown to function more poorly than children from biologically intact two-parent families on a wide range of academic, social, and emotional measures.

The Western Australian Child Health Survey provides evidence of the relationship between family structure and school attainment – the proportion of children with low academic competence was almost twice as high for sole parent households as for couple families – 30% and 17% respectively (Zubrick *et al* 1997).¹²³

Even after controlling for income it has been found that children whose parents are divorced or separated have lower levels of educational attainment than children from intact families (Guidubaldi 1983; Spruijt & de Goede 1997).^{124,125} If economic hardship

were the main predictor of school performance, there would presumably be no difference between children in step-parent households and children in intact families where both received similar incomes. Yet children in stepparent households still generally perform less well, according to research (Amato & Keith 1991).¹²⁶

In the Impact of Divorce Project of Ohio's Kent State University—the first nationwide sample study of 699 elementary students from 38 American states—children from divorced homes performed more poorly in reading, spelling, and maths, and repeated a grade more frequently than did children in intact two parent families (Guidubaldi 1989).¹²⁷ These results were confirmed at two follow-up periods in sub samples from the original study—one that included 220 subjects at 2 and 3-year follow-ups and another that included 81 adolescents and young adults in a 7 and 8-year follow-up study. The study also concluded that (a) the effects of divorce are not temporary stressors but rather long-term influences, (b) boys have more difficulties adjusting to divorce, particularly as they approach adolescence, (c) contrary to the position of some professionals (e.g. Bane 1979)¹²⁸ the decline in socio-economic status after divorce is not a sufficient explanation for children's decreased performance, and (d) authoritative child-rearing style and structure in home routines such as bedtimes, mealtimes, and television viewing habits relate to better child outcomes.

One of the most striking findings was that 51% of children from sole mother custody families see their fathers *once or twice a year or never*. In a smaller 7 and 8-year follow-up sample researchers found that even after an average of 11 or 12 years following the divorce event, adolescents who have good relationships with their non-custodial fathers have fewer teacher-ratings of behaviour problems, fewer attention or aggression problems, higher grades in Language and Social Studies, and are less likely to abuse drugs or alcohol according to their own self-ratings.

In the only other nationwide study in the U S, Furstenberg, Nord, & Zill (1983)¹²⁹ found almost the exact percentage (50%) of father absent cases. One can speculate whether this high incidence of absence stems from fathers' selfish interests in pursuing less responsible lifestyles, or whether their parenting efforts are thwarted by restrictions imposed by custodial mothers or gender biased court orders. This interpretation is supported by Kruk (1992)¹³⁰ who notes the most frequent reason for fathers' disengagement (90%) was obstruction of paternal contact by the child's mother and her desire to break contact between father and child. Fathers also mentioned that they ceased contact because of their inability to adapt to the constraints of the *visiting* situation (33%). Regardless of interpretation of motives, the fact remains that sole maternal custody relates strongly to ultimate father absence.

Another salient research issue is the highly replicated finding that boys fare much more poorly than girls in post-divorce households (Guidubaldi *et al* 1986)¹³¹ and that time spent in single-mother households has a significantly stronger, adverse effect on boys' educational attainment than girls (Krein & Beller 1988).¹³² This might be because boys in sole parent households frequently lack a positive male role model and miss the discipline exercised by most fathers. Since more than 94 % of divorced-family children are in sole mother-custody homes (Department of Social Security 1996),¹³³ and as half of these youngsters see their fathers on the average of only six times a year or even less (Australian Institute of Family Studies 1991; Australian Bureau of Statistics 1997),^{134,135} it is clear that many boys are being reared without benefit of a same-sex parental figure. Thus father absence may reasonably be hypothesised as an explanation for the strong gender differences in post-divorce child adjustment—a condition not easily ameliorated by the school environment, which is populated by female role models for at least the first seven years of formal schooling.

The relationship of father absence to child adjustment in unmarried mother households presents additional evidence for a policy of joint residence. In studies of urban children in special education (e.g. Guidubaldi & Duckworth, 1996),¹³⁶ 70% of children (mostly boys)

with severe behavioural handicaps have no father contact at all according to the mothers' ratings. These children and adolescents are often the most disturbed or potentially dangerous students in school. One is compelled to ask how many of them would exhibit more cooperative behaviour if their fathers were available and influencing their daily lives. Research summaries document an impressive array of significant relationships between father involvement and better child adjustment for the total sample of urban children in special education, including categories such as learning disability, mental retardation, severe behaviour problems, and sensory handicaps.

The absence of the father lowers cognitive test scores for young children in general (Powel & Parcel 1997),¹³⁷ but especially for girls' math scores (PoPONoe 1996).¹³⁸ On the other hand a girl's verbal capacities increase when the father is present and especially when he reads aloud to her when she is young (PoPONoe 1996).¹³⁹ By the age of thirteen there is an average difference of half a year in reading abilities between children of divorced parents and those from intact families (Stevenson & Fredman 1990).¹⁴⁰ Even the most effective preventative work on reading and math skills does not eliminate the drop in performance at school (Alpert-Gillis *et al* 1989).¹⁴¹

Changes in IQ or cognitive performance seem to be especially sensitive to the quality of care in the single-parent home and to the extent to which both mother and father are involved in child rearing after divorce. Poor control of the custodial parent, inconsistency and family disorganisation are often reported in single-parent households, and lead to inattention ultimately resulting in poor performance on tasks requiring sustained attention (Hetherington, Cox, & Cox 1978).¹⁴² Paternal availability seems to be especially important in the IQ performance of boys of all ages and girls in later latency (Parke 1981).¹⁴³

Moving home is likely a big culprit in the poorer performance of these children, for such moves tend to decrease school achievement for most children, regardless of family background (McLanahan & Sandefer 1994).¹⁴⁴ But compared to children of intact families, children of divorced families move much more frequently, regardless of whether they are children of divorced parents, of step-parent households, or of never married single parents (Goldscheider & Goldscheider 1998).¹⁴⁵ Such moves tend to increase behavioural, emotional and academic problems for all adolescents regardless of family structure (Hoffman & Johnson 1998).¹⁴⁶ When very young children leave their original family home for another, because of their parents' divorce, the move is even more traumatic because they tend to become even more attached to their family home during the break up of their parents (Stirtzinger & Cholvat 1990).¹⁴⁷

Divorce affects the educational level that children attain. Among girls who have completed high school there is a 33 percent lower divorce rate among their parents compared to girls who drop out of high school (Bumpass, Castro Martin, & Sweet 1991).¹⁴⁸ Step family life does not wipe out educational losses. Schools may expel as many as one in four stepchildren (Dawson 1994)¹⁴⁹ though this ratio can fall to one in ten when stepparents are highly involved with the children's school (Larson, Swyers, & Larson 1995).¹⁵⁰ Children raised in intact families complete more total years of education and have higher earnings than children from other family structures (Powell & Parcel 1997).¹⁵¹ This also holds for children from inner city poor families (Hardy, *et al* 1997).¹⁵² This disruption in education—for all ethnic groups (Heiss 1996)¹⁵³—translates into less income and less hours worked as an adult (Powell & Parcel 1997).¹⁵⁴

The divorce of parents reduces the likelihood of attaining a university education. Studies indicate among women who completed university there was a massively lower divorce rate (88 percent lower) among their parents compared to women who did not get a college degree (Bumpass, Castro Martin, & Sweet 1991).¹⁵⁵ Wallerstein (1991)¹⁵⁶ found that, among university-age students who went to the same high schools in affluent Marin County, San Francisco, only two thirds of the children from divorced families attended university, compared with 85 percent of students from intact families.

(F) Sex Role Identification

Potential problems in the area of sexual identification also are associated with the structure of the care giving after divorce. Many researchers agree that when a meaningful relationship is maintained with two parents, their role in the identification process is more nearly performed (Benedek & Benedek 1977).¹⁵⁷ Studies have often found a relationship between fatherless post divorce families and boys' loss of both masculine interests and a positive masculine self-concept (Billar 1981).¹⁵⁸ Through modelling and the verifying of identity, fathers play a key role in their sons' development of a firmly internalised sense of masculinity. Divorce however, as noted above typically leads to a substantial reduction in interaction between fathers and sons.

Boys in single parent, mother headed households are especially vulnerable to problems with sex role identity (Adams & Milner 1984).¹⁵⁹ Preschool boys and boys in their early school years from mother-headed households have been described as more dependent, less masculine (Santrock & Wohlford 1970),¹⁶⁰ more feminine in self-concept and sex role preference and less aggressive than boys in intact families. They have been shown to have play patterns and game preference more characteristic of girls than boys and to display feminine patterns of behaviour (Sears 1951).¹⁶¹

Many teenagers struggle with feelings of inadequacy in their teens, and frequently turn these feelings into erroneous judgements of rejection by others. Daughters of divorced parents have a particularly difficult time with this struggle and are more likely than their peers from intact families to have feelings of diminished self-worth in regard to their femininity. The absence of a caring, consistently involved father can lead the girl to wonder whether a man can love her. In fact the girls often entertain the immature eccentric fantasy that their fathers left home because they (the daughters) were not sufficiently attractive or lovable (Kalter 1984; Frost & Pakiz 1990).^{162,163} Sons of divorced parents suffer in their own way, and frequently have less confidence in their ability to relate with women, at work, or romantically (Kalter 1987).¹⁶⁴

If children, especially pre-adolescent children (aged 9-12), maintain contact with their father after the divorce they are greatly aided in maintaining their self confidence, because attachment to their mother alone does not suffice (Frost & Pakiz 1990; McCurdy & Scherman 1996).^{165,166} But as noted earlier, such contact with fathers generally diminishes over time. Potential problems in the area of sexual identification also are associated with the structure of the care giving after divorce.

(G) Disturbance In Children's Play and Social Relations

The pattern of findings reported for play and social relations parallels those for personal interactions. During the first year following divorce there seems to be an increase in problem behaviour following divorce and a marked improvement by the end of the second year. Play is more fragmented and less cognitive and socially mature in children from divorced families in the first year following divorce. More hostile, anxious and less happy behaviour marks the play of boys even at two years, following divorce.

In a longitudinal study of 1,197 fourth-grade students, researchers observed greater levels of aggression in boys from mother-only households than from boys in mother-father households (Vaden-Kierman et al 1995).¹⁶⁷ Children from mother-only families have less of an ability to delay gratification and poorer impulse control (that is, control over anger and sexual gratification). These children also have a weaker sense of conscience or sense of right and wrong (Hetherington & Martin 1979).¹⁶⁸

Difficulties in assuming the role of others and a high use of aggressive themes in fantasy have been observed in play among boys. Both girls and boys from divorced families have exhibited immature, ineffective and negative social behaviours in social interactions, with these characteristics disappearing more quickly among girls than boys (Hetherington, Cox, & Cox 1978).¹⁶⁹

(H) Increased Risk For Adolescent Delinquency and Subsequent Adult Criminality

Divorce significantly affects the rate of crime, as the following local and overseas data dramatically illustrates. In her Centre For Independent Studies report *Rising Crime In Australia*, Lucy Sullivan (1997)¹⁷⁰ notes that assault rates more than doubled in the decade from 1980 to 1990 and that there is a statistical association between rising crime and rising rates of divorce. (There is no such association between crime and unemployment or the number of young men in society). She reports, in support of her contention that intact families are generally the most effective way to socialise the young, that disturbed behaviour among young people was noted during World War II, when many fathers were away from their families. Sullivan suggests that our present way of dealing with this problem, through intervention at the individual level by social workers and the police, has little effect, and calls for a public health approach, preventing the problems before they occur by encouraging intact families.

Child neglect is currently the most powerful social predictor of juvenile crime. A 1997 report from the NSW Bureau of Crime Statistics and Research (BOCSR) implicates neglect as the strongest underlying factor in juvenile crime participation (Weatherburn & Lind 1997).¹⁷¹ Child abuse, however, cannot be disregarded in the context of juvenile crime as abuse and neglect usually occur together. Abuse has been shown to be related to violent juvenile crime, but not to property crime (Farrington 1978; Patterson 1982; Widom 1989).^{172,173,174} An intact family is a significant protective factor. Without it, there is a much greater chance that a child will be exposed to the underlying risk factors that precipitate long-term offending. As noted earlier, Australian statistics show that children living in a sole-parent household, or a blended or stepparent household are up to eight times more likely to suffer child abuse or neglect than children living with both of their natural parents.

Although government has become more aware of neglect as a problem, it is seen as less serious than emotional, physical and sexual abuse. Dubowitz (1994)¹⁷⁵ suggests that the greater focus on child abuse over neglect, despite the greater adverse affect of neglect, is due to the problem of defining and diagnosing neglect. The most recent report from the NSW Child Death Review Team shows that neglect is one of the major causes of non-accidental, non-natural child deaths. The perilous circumstances of many of the children who died as a result of neglect (or abuse) were known to the Department of Community Services prior to their deaths.

While it would be difficult to prove that the prevalence of individual risk factors for juvenile crime is increasing, it can be shown that the incidence of at least some of the underlying factors has increased. For example:

- Rates of child abuse and neglect have increased over the period since such statistics have been collected. Between 1989 and 1998-1999, annual substantiations of child abuse and neglect have increased from 21447 to 26025 (Australian Institute of Health and Welfare 1999).¹⁷⁶
- The number of children in divorced families has been steadily increasing in the twenty-five year period from 1992 to 1997, the number of children entering a non-intact family (either by ex-nuptial birth or by divorce) each year increased by 270%, from 18 to 49 children per 100 children born (Australian Bureau of Statistics, various years).¹⁷⁷

From these data we can infer that the increased prevalence of risk factors for juvenile crime is the most probable source of an increasing juvenile crime rate.

Children of divorced parents are significantly more likely to be delinquent by age fifteen, regardless of when the divorce took place, than are children of intact families (Frost & Pakiz 1990).¹⁷⁸ Adolescents from single-mother households are consistently more likely

to be delinquent than those from intact families, though the same holds for children from intact conflict ridden families (Demo & Acock 1988).¹⁷⁹

In Britain, a longitudinal study of males aged eight to thirty-two conducted by David Farrington (1990)¹⁸⁰ Professor of Criminology at Cambridge University found that the divorce of parents before the children were aged ten was one of the major predictors of adolescent delinquency and adult criminality. An earlier review of the literature on the relationship between family background and crime indicates how the mixture of hostility and peer rejection can shepherd children towards other similarly hostile children and pave the way towards delinquency and crime (Fagan 1995).¹⁸¹ Divorce puts many of these family conditions in place. A recent Australian parliamentary review of the literature came to the same conclusion.¹⁸²

These findings are not confined to boys. Girls are not immune to these effects, and among adolescent girls there is a strong correlation between family structure, delinquency (Heimer, 1996),¹⁸³ hostile behaviour (Pakiz, Reinherz, & Giaconia 1997),¹⁸⁴ drug use, larceny, skipping school (Kalter, Reimer, Brickman, & Chen 1985),¹⁸⁵ and alcohol abuse (Frost & Pakiz 1990).¹⁸⁶

One U.S. study (Rickel & Langer 1985)¹⁸⁷ tracked one thousand families with children aged six to eighteen for six years and found that those children living in intact married families exhibited the least delinquency, while children with stepfathers had the greatest risk of the most disruptive behaviour. (In this study single-parent children fell in between).

The same picture emerges of the effects of divorce on crime when research moves from one-time samples to national surveys. Robert Sampson (1995),¹⁸⁸ Professor of Sociology at the University of Chicago, found that the divorce rate predicted the rate of robbery in any given area, regardless of the economic and the racial composition, when he studied 171 American cities with populations over 100,000. In these communities, he found that the lower the rates of divorce the higher the formal and informal social controls, and the less the crime.

Sociologists, psychologists, criminal justice experts, and others have begun to closely examine the issue of fatherhood in American culture and how and why fathers came to be ousted from a significant role in childrearing. Statistics clearly show that children without fathers are more likely to suffer increased psychological, educational, behavioural, and health disorders, and society is more likely to suffer increased crime and violence.

In 1988 for example, a United States Department of Health and Human Services study¹⁸⁹ found that at every income level except the very highest (over \$50,000 a year), children living with never-married mothers were more likely than their counterparts in two-parent families to have been expelled or suspended from school, to display emotional problems, and to engage in antisocial behaviour.

A decade later, in 1999 the United States Federal Department of Health and Human Services summed up the understanding of paternal deprivation research in this way:

Girls without a father in their life are two and a half times as likely to get pregnant and 53 percent more likely to commit suicide. Boys without a father in their life are 63 percent more likely to run away and 37 percent more likely to abuse drugs. Both girls and boys are twice as likely to drop out of high school, twice as likely to end up in jail and nearly four times as likely to need help for emotional or behavioural problems.¹⁹⁰

Other American data indicates that 43 percent of prison inmates grew up in a single-parent household—39 percent with their mothers, 4 percent with their fathers—and an additional 14 percent lived in households without either biological parent. Another 14 percent had spent at last part of their childhood in a foster home, agency or other

juvenile institution (US Bureau of Justice 1991).¹⁹¹ Sixty percent of rapists and seventy-two percent of adolescent murderers in America grew up in homes without fathers (Davidson 1990).¹⁹² Notably, Mitchell Johnson, the 13-year-old who allegedly participated in the March 1998 slayings of four children and one adult in Jonesboro, Arkansas, had remarked in recent weeks that he had been missing his father, who remained in Minnesota after the boy and his mother moved to Arkansas one year earlier following his parents' divorce (O'Brien 1998).¹⁹³

The one factor that most closely correlates with crime is the absence of the father in the family. This relationship is so closely related that controlling for family configuration erases the relationship between race and crime and between low income and crime. This conclusion shows up time and again in the literature (Karmack & Galston 1990).¹⁹⁴

In response to these and other significant findings, policy makers in some overseas jurisdictions have met, brainstormed, and implemented programs intended to encourage and promote fathers' involvement in their children's lives. For example, in 1996, the Florida Legislature created the 25-member *Commission On Responsible Fatherhood*,¹⁹⁵ the first legislatively created commission on fatherhood issues in the U.S. The Commission's purpose is:

...to raise awareness of the problems created when a child grows up without the presence of a responsible father, to identify obstacles that impede or prevent the involvement of responsible fathers in the lives of their children, and to identify strategies that are successful in encouraging responsible fatherhood.

Recently at the federal level the U.S. Congress in 2000 passed the *Fathers Count Act* that would fund services for absent fathers, and also *provide modest support for groups that would promote marriage and responsible fatherhood* (O'Beirne 2000).¹⁹⁶

Adjustment of Parents

Since children are not doing well under the present system, how are the parents faring? Studies indicate the following problems associated with divorce generally and sole residence in particular. This and other research shows that parents face major difficulties also in adjusting to sole residence arrangements.

(A) Loss and Separation Anxiety

Researchers report symptoms in divorced parents similar to bereavement; both parents experience feeling of loss, previously unrecognised dependency needs, guilt, anxiety and depression (Hetherington, Cox, & Cox 1978).¹⁹⁷ The pervasive sensation of the non-resident parent is that of the loss of their child (Hetherington, Cox, & Cox 1978).¹⁹⁸

(B) Loss of Familiar Activities and Habit Systems

Non-resident parents, for example, face the loss of familiar activities and habit systems (Weiss 1975).¹⁹⁹ The stress imposed by the necessity to revise longstanding habit and lifestyles is probably more intense for those who were married longer (Gubrium 1974).²⁰⁰ The continued presence of children and a familiar home setting, however, gives sole resident parents a greater sense of continuity (Hetherington, Cox, & Cox 1978).²⁰¹

(C) Role Loss Especially Among Non-Resident Parents

Social institutions such as schools, which often fail to discuss a child's performance and adjustment with a non-resident parent, reinforce the sense of role loss. Joint residence parents who have more contact with their children generally do not report this sense of role loss. The conclusion *that it is not just the fact of having children, but the experience*

*of an active ongoing relationship with them, that is ego-producing supports the work of Erikson, Biller and others who have noted the importance of such involvement parenting for healthy adult development (Greif 1977).*²⁰²

(D) Increased Risk For Suicide Especially Among Non-Resident Parents

Each year in Australia, more than 1000 men aged 25-44 take their lives.²⁰³ The rate of suicide among these adult males is more than twice the teenage (15-19) suicide rate. The issue of male suicide in the middle-aged group was made more public following the suicide death in 2000 of a prominent Labor MP in his early forties, who had been suffering from depression following his marriage break-up. This tragic suicide shocked the Australian community, a community so accustomed to hearing that suicide was a *youth issue*. Why would a man, at his stage in life, take his own life?

This death highlighted the very real problem of depression amongst men in general, and its links to male suicide in particular. Perhaps the MP's own words can shed some light on the issue. In a speech made to Federal Parliament in 1997, he said that *...people have a strong desire to feel needed, to feel that they are loved, and to feel that they have some worth and role in life... men kill themselves due to an inability to cope with life events such as relationship break-ups.*²⁰⁴ He concluded by saying:

There is certainly a need for our community to work towards an environment in which people feel a sense of belonging and meaning...If we can achieve such a state, then the incidence of all suicides.... will no doubt be reduced.... if we can tackle some of the fundamental problems in society, such as the quality of education, unemployment and job security, there will no doubt be a flow-on to reduced family breakdowns, and ...fewer suicides.²⁰⁵

While the male teenage suicide rate has been stable for the past decade, the rate for adult males has been rising since the 1970s. Most of them are casualties of family breakdown. A Queensland study of 4000 suicides found more than 70 per cent were associated with a relationship break-up (Baume 1994).²⁰⁶ The study conducted by Professor Pierre Baume, Head of the Australian Institute for Suicide Research and Prevention at Griffith University in Queensland showed men were nine times more likely to take their lives following a break-up than women.

The work by Cantor & Slater (1995)²⁰⁷ is particularly valuable in that it identified people who were separated from various other categories of suicide. Statistics normally classify people as married, single, divorced or widowed, which creates the problem that people in the high-risk separated group get classified as married, thereby creating misleading outcomes both for the married group, who would appear at increased risk, and the separated group, on whom no accurate data had been available, but whom are shown here at extreme risk. Interestingly, marriage seems to *protect* people from suicide. Married people show lower suicide rates than those who have never married, or who have been divorced (Hassan 1996).²⁰⁸ Overseas investigators are reaching similar conclusions (e.g. Trovato 1986).²⁰⁹

Marriage breakdown is a significant characteristic of male suicide in the 24-39-age bracket. The anxiety and emotional pain of separation and divorce appear to affect men differently. Recent research into male suicide in this age group revealed that males in the *separation phase* of a marriage break-up were most at risk of suicide, compared with widowed or divorced males (Cantor & Slater 1995).²¹⁰ Whilst these are only preliminary findings, they suggest that the severe disruption of separation and the high levels of interpersonal conflict that were associated with it, were perhaps the greatest contributing factor, along with separation from children. It seems highly likely that most of the suicide problems associated with separated men may relate to child contact problems (Cantor & Slater 1995).²¹¹

Cantor & Slater (1995)²¹² show the risk of suicide is far higher for men in the period following marital separation—the suicide risk among separated men was 18 times that of separated women—but, after divorce, the rates for men declined to three times those of women. Separated men are also six times more likely to commit suicide than married men, with separated men under 29 being particularly vulnerable.

Whilst suicides may simply be recorded as statistics, it is the increasing number of murder/suicides, involving children that have brought the tragic reality of male suicide, and male mental health issues in general into the public arena. Following two murder/suicides in Western Australia in 1999,²¹³ where fathers gassed both themselves and their children to death, Allan Huggins, Director of Men's Health, Teaching and Research at Curtin University, said:

There is a whole range of psychological issues for them to deal with, but ultimately they see their situation as being totally hopeless and then a realm of fantasy begins where they want to take their children with them to what they perceive as being a better place.²¹⁴

Where children are concerned, there is evidence to suggest that many men sense they are being discriminated against in Family Court judgements, and often find themselves in financial straits having to pay legal fees and child support payments (Price 1998; Family Law Advisory Group 2001).^{215,216} The difficulty in maintaining contact with their children also heightens the frustration and isolation of separated and/or divorced men (Gibson 1992; Jordan 1996; Trezise 1999).^{217,218,219} It seems that *stressed fathers will keep killing* both themselves and their children, until adequate support services are provided (Mendez & Barton 1999).²²⁰

Sadly, mothers, too, have been unable to take the stress of losing their children (Vogel 1998).²²¹ In the past three years, three QLD mothers killed themselves and their children in almost identical circumstances to the much-publicised Perth murder/suicide. The recent murder/suicide in November 2001 by a divorcing mother in South Australia is a further distressing example of this developing tragedy.²²² Certainly neither child abduction or child murders/death threats are solutions but unless some change occurs, we can expect to see more of such madness.

The research suggests that non-resident mothers may be in the same boat as non-resident fathers, since women with children are less likely to commit suicide than similarly aged women without children (Cantor & Slater 1995).²²³ Since most children end up with their mothers following divorce (Bordow 1994),²²⁴ it could be that family responsibilities reduce these mothers' suicide risk. As two thirds of separations are now being instigated by women (Arndt 1986; Family Law Advisory Group 2001),^{225,226} and that in most cases, married men did not want to separate and had tried to resolve the problems it is fathers who are most likely to show the distress associated with being left (Jordan 1996).²²⁷

“Add to this the social isolation of males, the loss of close relationship with a loved child, homes, and assets; it's hardly surprising more men seek a permanent way out” (Arndt 1999).²²⁸ Further evidence suggests that the period of separation is one of the most stressful times in a man's life, and often this anxiety and frustration continues for many years (Attorney General's Department 2000).²²⁹ Moreover, men are not inclined to access relationship services, or to seek advice and support when they are in times of need (Price 1998).²³⁰

Epidemiological studies show a strong correlation between divorce and separation, and mental health problems (National Health and Medical Research Council (1996).²³¹ Alcoholism and depression are much more common in those who have experienced relationship breakdown. Whilst it is not clear whether depressed people, or alcoholics are predisposed to relationship problems leading to suicide, or that these symptoms come

about following, and as a result of relationship breakdown, there is no doubt that men in particular are at risk. According to the Australian Institute of Suicide Research, the NSW central coast area has the highest suicide rate in Australia and one of the highest in the world. Every day one man is feeling so unsupported and desperate that he takes his life.

Clearly relationship breakdown isn't the whole story in the worrying increase in father suicide – there are numerous other relevant factors, such as substance abuse, mental illness, and unemployment. But given the evidence suggesting it could be a key factor, at least it offers policy makers somewhere to start. The semi-orphaning of children resulting from father suicide can no longer be ignored.²³²

(E) Decline In The Ability To Parent

One study reports that divorced parents made fewer maturity demands on their children, were less consistent, had less control over their children and communicated less well. The mother-son relationship seems particularly problematic in divorced families. The single mother may confront specific problems of authority in discipline, and may have to be super-mother to counter the image of greater authority and power vested in males (Hetherington, Cox, & Cox 1978).²³³

Another study states, the combined needs of the children may be intolerable to the emotionally unsupported solitary parent. Since the emotional requirements of children are very likely to take the form of demands for physical attention or personal service, the remaining parent may be subject to physical as well as emotional exhaustion (Glasser & Navarre 1965).²³⁴

(F) Physical Symptoms Related To Both Separation & Loss of Parental Role

The desire of children in response to the abruptly diminished role of fathers in their lives is echoed in the distress by many non-resident fathers (and by implication non-resident mothers) at becoming a substantially less than important figure in their children's lives due to the *visiting* role assigned to them after divorce. Some of the physical symptoms reported include dramatic weight loss, eye and dental problems thought to be nerve-related, high blood pressure, psychosomatic complaints, increased alcohol consumption, as well as changes in sexual performance. Divorced parents have also reported difficulties in sleeping, eating, working and socialising (Hetherington, Cox, & Cox 1978; Greif 1979).^{235, 236}

Adjustment of Grandparents

I receive so many phone calls from grandparents who spend Christmas alone. Some will pull down the blinds and sit and eat alone rather than admit that they are cut off from their grandchildren.... The best way to punish an ex-partner is to keep the children away from their grandparents. Unfortunately this punishes the children as well (Friedman 1994).²³⁷

Although researchers have focused our attention on the central participants of divorce, mothers, fathers and their children, there is growing recognition that court orders may also cut off grandparents from their grandchildren. Just at a point when a child is faced in most sole residence decisions with the loss of a parent, he or she also must bear the loss of grandparents and other relatives (Folberg & Graham 1979).²³⁸

However, when residence is considered in context of extended family life, there is virtually no research available. Ambert (1988)²³⁹ presented evidence, which suggested that relationships between non-resident parents and ex-affines (parents of their ex-spouses) were quite limited, but no data was available in that study on relationships between grandparents and the children. Anecdotal information indicates that some grandparents feel excluded from the lives of their grandchildren, as a result of sole

residence determinations in favour of their child's ex-spouse (Lovorn 1991; McMurray 1995; Council On The Aging 2001).^{240,241,242} Further, if that anecdotal evidence is to be believed, grandparents are joining advocacy groups and demanding more *grandparents rights* in ever increasing numbers (Friedman 1990; Head 1991a; Lovorn 1991).^{243,244, 245}

Clearly, more research is needed of the potential victimisation of grandparents and all other relevant extended family members as a function of sole residence, particularly family members who live in or near the family home or share in childcare during the marriage. It would seem reasonable that curtailing the relationship between the non-resident parent and their child, through either court order or contact denial by the resident parent, would also victimise children, grandparents and other extended family members who may wish to stay involved after the divorce.

This is an unexplored area and given the political demands which are being made by *disposable* grandparents.²⁴⁶ Research will become increasingly necessary. In order to document the potential influence both positive and negative, which this group of extended family members has on the children of divorce, researchers should wherever feasible include grandparents in their study design. Forty-nine states in the U.S. presently allow judicial consideration for some type of grandparent contact privileges, although the procedures vary widely (Grandparents Rights 1985).²⁴⁷

Joint Residence

One of the principal attractions of joint residence is the promise that the child in divorce will not lose either parent, but will be able to maintain a close relationship with both. The following synopsis of data on joint residence research leads to the conclusion that a rebuttable presumption in favour of joint residence is preferable to the judicial *flip of the coin* currently being employed as a solution to the average residence disposition. Let us look further at the psychological factors affecting divorcing families. The accumulated evidence suggests that children who are not forced to divorce a caring parent are more likely to be better adjusted after divorce.

Adjustment of Children

A number of studies indicate that children adjust much more successfully in the immediate post-divorce period when a strong positive relationship is maintained with both parents. Clearly a stronger relationship with two parents is much more likely in joint residence arrangements where one parent does not have the opportunity to prevent contact between the child and the other parent. In this sense, judicial decisions resulting in sole residence tend to abrogate the human rights of the child—to know and love two parents in an every day setting—as much as these abrogate the fundamental privileges of non-resident parents and grandparents.

Children living in joint residence arrangements have described a sense of being loved by both parents and reported feeling close to more than one parent (Luepnitz 1982; 1986).^{248,249} Contrasted with children in sole maternal residence, joint residence youngsters were more satisfied with their arrangements (Handley 1985; Luepnitz 1982; 1986)^{250, 251,252} and did not struggle with a sense of loss and deprivation so characteristic of children in sole residence households (Steinman 1981; Luepnitz 1982).^{253,254}

Most children considered having two homes advantageous and worth the effort of making the transition between homes because it enabled them to remain close to both parents. Joint residence does not create uncertainty and confusion for most youngsters about either the arrangements or about the finality of the divorce (Luepnitz 1986; Shiller 1986b).^{255, 256}

Reviews of the evidence on post-divorce adjustment of children as a function of post-divorce are consistent in indicating the importance of a continuing relationship with both

parents (Kelly 1988a; Lerman 1989; Bauserman 2002).^{257,258,259} In one of the more recent meta-analytical studies, Bauserman (2002)²⁶⁰ from the Maryland Department of Health and Mental Hygiene, compared child adjustment in joint residence with sole-residence settings, including comparisons with paternal residence and intact families. Children in joint residence were better adjusted than children in sole-residence. Children in joint residence were better adjusted than children in sole residence settings, but no different from those in intact families. The positive adjustment of joint residence children held for separate comparisons of general adjustment, family relationships, self-esteem, emotional and behavioural adjustment, and divorce specific adjustment. Moreover, joint residence parents reported less current conflict than did sole residence parents. The results are consistent with the hypothesis that joint residence can be advantageous for children, possibly by facilitating ongoing positive involvement with both parents

Isabel Lerman (1989)²⁶¹ compared 90 children in various post-divorce situations, with equal groups in joint guardianship, sole maternal residence and joint residence. The type of parenting order and the amount of father-child contact were significant predictors of child adjustment, with higher father-child contact associated with better adjustment of the children. The results in this study, as in the vast majority of this research, suggest that joint residence is much more beneficial for successful post-divorce adjustment of children than sole residence.

Steinman (1981)²⁶² evaluated 24 couples who chose joint residence arrangements for their children at divorce. The children felt that they were strongly attached to both parents and were not troubled by the loyalty conflicts predicted by Goldstein, Freud, & Solnit (1973),²⁶³ but a small number of these children felt a strong need to be *fair* to both parents and were meticulous about dividing their time equally between them. Perhaps even more important, while these children did perceive their parents divorce as undesirable, and in some cases harboured fantasies of reconciliation, they did not experience the overwhelming sense of rejection found in the more usual maternal sole residence/father-absent post-divorce arrangement (Wallerstein & Kelly 1980; Mitchell 1985).^{264, 265}

Only about 25% of the children interviewed by Steinman reported experiencing confusion or anxiety relative to the residence arrangement, and this is a fairly low figure, given the children who experience confusion in any divorce situation. Consequently the argument that children in joint residence experience more confusion and frustration was not supported in that study, as it has not been supported in other research (Luepnitz 1980).²⁶⁶ Based on this research result, and many other similar studies, it is known now that the argument that *children need the stability of one home etc* is not valid. Children obtain emotional stability from important emotional relationships with two parents and two sets of grandparents, and these are much more important than where a child sleeps on weekends (Kelly 1991).²⁶⁷

Luepnitz (1982)²⁶⁸ contrasted children in joint residence with children in sole residence arrangements. Whereas children in sole residence situations did not maintain strong healthy emotional relationships with both parents, children in joint residence situations did. Also, the children in joint residence arrangements indicated that they were generally satisfied with their level of involvement with both parents, in marked contrast, children in sole residence indicated that they were not satisfied. She found:

- There was no evidence that joint residence families sustained more post divorce conflict than sole residence households;
- Contrary to the claims of Goldstein, Freud, & Solnit (1973)²⁶⁹ there was no evidence that children experience disruption from living in two houses. In fact, most children felt their new lifestyles held certain advantages over the nuclear family household;

- Children in sole residence desired more contact with their non-resident parents;
- Many non-resident parents but no joint residence parents lost contact with their children;
- No joint residence fathers had ceased to support their children financially, as many non-resident fathers had;
- Joint residence children had maintained meaningful relationships with both parents, in contrast with single residence children for whom the *visit* was a vacation;
- Single residence parents reported feeling *burnt out and overwhelmed* in a way that joint residence did not.

The results of the Luepnitz study refute the unsubstantiated claim by Goldstein, Freud & Solnit (1973)²⁷⁰ that the children of divorce need one primary parent and one primary home. All of the joint residence children valued the arrangement and said they would have chosen it. By contrast, half of the sole residence children were dissatisfied with their arrangements and wanted more contact with the non-resident parent. Moreover, the responses of the children to parental authority were not shown to be adversely affected by the fact that their parents no longer cared for each other. Luepnitz found that points six and seven form the essence of the case that joint residence should be a rebuttable presumption at law.²⁷¹ She concluded that joint residence at it's best is superior to sole residence at its best.²⁷²

In summary, both boys and girls in joint residence have reported more positive experiences during their lives after divorce than children in sole residence arrangements. These children had much higher self-esteem than children in sole residence situations. Further, the boys in joint residence have reported fewer negative life experiences after divorce than boys in maternal residence (Cowan 1982; Shiller 1986b).^{273, 274}

This last reported result, and other similar results have led some experts to recommend paternal residence as a preference for boys and maternal residence for girls (Thompson 1983; Rohman, Sales & Lou 1989).^{275, 276} However, such a legislative mandate would be inappropriate at present for two reasons. First, no child should ever be denied the right to know and love two care-giving parents (except, obviously, in abuse situations). Second, no parent should be denied his or her parental rights (i.e., human rights) without conclusive evidence that the exercise of those rights is destructive of the child).

No study has found that joint residence is disadvantageous to children. Where researchers have found significant differences, they favour the joint residence arrangement. Only a few empirical studies raise any concerns at all about joint residence and these have been given an unwarranted anti joint residence *spin*. It is interesting to note that even those researchers who currently oppose joint residence do not argue that sole residence leads to a better adjustment of the children (one can find little evidence for that proposition). Kline, Tschman, Johnston, & Wallerstein (1986)²⁷⁷ for example, merely argue that children in sole residence do not do any worse than children in joint residence. In the context, of the evidence of victimisation of non-resident parents and grandparents in sole residence situations reviewed above, the overall weakness of the argument is readily apparent.

What is clear from the available evidence is that children in joint residence situations do have a much better prognosis for positive post-divorce adjustment (Roman & Haddad 1978; Collier 1988; Kruk 1993; Thompson 1994).^{278,279,280,281} Increased contacts in meaningful care giving situations, lead to improved behaviour, improved peer relationships, more positive self-esteem, and even improved academic scores in numerous subjects (Kelly 1988a).²⁸² Infrequent paternal contact, on the other hand, has

been associated with poor self-esteem, depression, and high levels of anger in children (Kelly 1988a).²⁸³

At the very least there is now a general consensus that children who are able to maintain a loving, involved relationship with both parents after divorce adjust much better than children who find their relationship with either parent curtailed (Luepnitz 1980; Cowan 1982; Shiller 1986a; Kelly 1988a; Lerman 1989; Ilfeld 1989).^{284,285,286,287,288,289} In addition to the preponderance of the available evidence, this result seems to be generally supported by the outcry among educators and other professionals for more effective male role models in children's lives. Youngsters simply do better with two parents, even when those parents are no longer married.

As this conclusion receives increasing support, it becomes axiomatic that denial of that relationship which the child has formed with their non-resident parent is emotional victimisation of the child. Consequently, the evidence earlier regarding contact denial by large numbers of sole residence parents is not only a demonstration of victimisation of the non-resident parent, but also a demonstration of victimisation of the children at the hands of the sole resident parent.

Further, these data suggest that judicial decisions resulting in sole residence may abrogate the human rights of the child—to know and love two parents—thus victimizing those children needlessly. If, as seems increasingly evident, sole residence determinations place the child's relationship with the non-resident parent at risk, then the child's emotional well-being is also at risk, and the child is open to further victimisation by the resident parent.

Fathers

For the past two and half decades articles and books have appeared which have published the research on fathering. The conclusion of the research seems to be that *one thing is clear*—fathers are perfectly capable of caring for children, even young babies. They are not simply substitute mothers and fathers have a distinct style of parenting. Research has shown that: fathers are no longer, if they ever were, merely a biological necessity – a social accident. They are an important influence on their children's development, and a close relationship between father and child benefits the father as well as the child. Children need their fathers, but fathers need their children too (Parke 1981).²⁹⁰

The central and most compelling argument in favour of joint residence is that it helps children and fathers maintain their relationship (mothers being most frequently the resident parent). This is a powerful argument because a number of studies have documented that a father's continued involvement with his child is associated with a positive outcome for the child (Hetherington, Cox, & Cox 1978; Hess & Camera 1979; Wallerstein & Kelly 1980; Kurdek & Berg 1983):^{291,292, 293, 294}

Research has shown that the fathers greatest impact on his children occurs primarily in those areas involving psychosexual, personality, social and intellectual development. In essence, current research has suggested that there is more to the parent-child relationship than that involving the mother and the child (Kurdek & Berg 1983).²⁹⁵

While maternal attachment has been widely recognised for several decades, the more recent literature on attachment clearly demonstrates that children form important bonds with both parents (Thompson 1983; Rohman, Sale, & Lou 1987).^{296,297} Further, evidence has mounted which demonstrates the importance of the attachment developed between father and child (Thompson 1983).²⁹⁸ This attachment bond is the beginning of the development of social skills, and social relationships, and, in the broader context of

society cannot in any way be considered *secondary* to the mother-child attachment (Warshak 1992).²⁹⁹

The father's vital role in giving his child the start to a successful future was confirmed by the results of a 40-year Oxford University's study (Flouri & Buchanan 2002)³⁰⁰ that tracked the lives of 17,000 individuals born in 1958, monitoring their progress at the ages of seven, eleven, sixteen, twenty three and thirty three. They were given scores at each stage according to how big a part their fathers played in such pursuits as reading, helping with homework and accompanying them on outings. The study released in March 2002 found that close paternal involvement not only improves academic performance but also relationships and health. The benefits are greatest for youngsters who establish a strong bond from at least the age of seven. The highest scorers performed best at school, socially and in their marital relationships. After inspection of all the factors influencing a child's later marital success, such as mental health, academic achievement and emotional behaviour, the influence of a father was most telling. Daughters benefiting from a strong paternal bond were less likely to have mental health problems and boys were less likely to get into trouble with the police.

Similar results have been documented by other long-term investigations. A thirty-six year longitudinal study in the U.S. found that the children of affectionate fathers were much more likely in their forties to be happily married and mentally healthy and to report good relationships with friends (Franz, McClelland, & Weinburger 1991).³⁰¹ Furthermore, the child with an available father, both in the early and the adolescent years, is more companionable and responsible as an adult (Warshak 1992; Snarey 1993).^{302,303}

The conventional view of the sole residence and reasonable contact model is that where there is a resident parent the non-resident parent will spend four days a month with the children. As noted earlier, the reality is that most children of divorce rarely see their fathers (mothers being the usual resident parent). Internationally the rate of paternal disengagement is well documented. It is estimated that over one half of non-resident divorced fathers in the USA gradually lose all contact with their children (Furstenburg *et al* 1983).³⁰⁴ This figure has been repeated in British (Lund 1987)³⁰⁵ and Australian studies.

Local findings highlight that for more than half of the children of separating families, contact with their non-resident fathers did not occur to a significant degree, culminating in a complete break or near break after two or three years. Survey data collected by the Australian Bureau of Statistics (ABS, April 1997),³⁰⁶ indicated that 42% of children in sole residence had contact with their other natural parent just once a fortnight, while 36% had contact with their other natural parent either rarely (once per year, or less often) or never. Of those who had contact with their natural parent rarely or never, 33% aged 2 years and over had contact only by phone or letter.

Other research by the Family Court shows that within a few years of the divorce, less than a quarter of fathers have contact with their children, and more than half have contact only twice a year or not at all. Family Court researcher Gibson (1992)³⁰⁷ found that most non-resident fathers wanted to see their children more often, but almost half of the fathers reported that their former wives frequently opposed contact and employed strategies to reduce it. Overall the men presented a bleak view of the role of the non-resident father. Many feel it painful and unrewarding. *It is totally devastating* said one. *The child cannot understand how I am forced to see so little of him its breaking my heart* said another.

Loewan (1988)³⁰⁸ has suggested that the explanation for the fall off in contact does not lie in background variables like economic factors, parental involvement prior to the break-up or the age of the child, but in the structure of contact itself. Under this analysis the marginalisation and disengagement of fathers is an inevitable consequence of the sole residence and reasonable contact model. Kruk (1992)³⁰⁹ has argued a similar

position in his analysis of *disengaged* fathers and has suggested that fathers who had a close pre-separation relationship with their children are more likely to become disengaged because of the artificiality and limitations of contact parenting.

Often the non-resident father reacts to a sole residence award as if they have lost their child, and soon loses contact with the child as a parent and instead becomes a holiday parent or *Disneyland Dad* bringing gifts. Contact becomes a frantic effort to entertain and court the child in order to retain the child's affection. This pseudo-relationship is not an adequate substitute for a meaningful non-holiday parent-child interaction (Greif 1979).³¹⁰

Caring for ones children is a parental function that is learned, and learned best from daily face-to-face contact. The amount of time a parent spends with a child directly affects the parent's competence in dealing with the child. One major difficulty in visiting with one's child, beyond the time-limited dimension, is the artificial structure. Parents and children are deprived of the daily intimate contact that living together provides – putting a child to sleep, helping with homework, preparing a meal together etc (Greif 1979).³¹¹

The negative effect of a sole residence order is that the law is seen to be designating one psychological parent for the child (Wallerstein & Kelly 1980).³¹² This interpretation can prove to be emotionally devastating for both parent and child. The non-resident father begins to appreciate the depth of the gulf (physical and psychological) that now exists and is widening between him and his children. Even the most caring father may subsequently withdraw from the child in order to deal alone with the profound feelings of loss, rejection and depression.³¹³

Fathers could not endure the pain of seeing their children only intermittently, and by two years after the divorce coped with this stress by seeing their children infrequently, although they continued to experience a great sense of loss and depression (Hetherington, Cox, & Cox 1978).³¹⁴

The ongoing catastrophe that has befallen his children seems beyond his control or ability to change, reverse, or even mitigate and he distances himself emotionally from his child to deal with the pain. Roman & Haddad (1978)³¹⁵ write:

The father's anxieties centre around having lost his children, so he courts them. But after a while the frantic drive to maintain contact with his children during a hurried meal, a visit to the zoo, the park and other entertainment places is too painful. He feels as if his son or daughter has become his guest, someone he amuses for a few hours. He has lost meaningful, that is to say non-holiday, contact with his children and, in time, often withdraws. He protects himself by moving away from his children since the situation, as it exists, is emotionally too difficult for him and he can see no way to change it.³¹⁶

Nor is this sense of loss restricted only to non-resident fathers (McMurray & Blackmore 1992).³¹⁷ Schaefer's (1989)³¹⁸ investigation of children's' adjustment in mother resident, and father resident homes reported that compared to non-resident fathers, twice as many non-resident mothers failed to maintain contact.

Children are often bewildered by their parents' divorce. The withdrawal by a parent intensifies the feelings of confusion and rejection experienced by the child, inducing trauma similar to that suffered at the death of a loved one (Wallerstein & Kelly 1980):³¹⁹

Central to this younger group of children was the very strong sense of loss with regard to the departed father...Many felt abandoned and rejected, and

expressed their longing in ways reminiscent of grief for a dead parent...The intensity of the response in this age group was striking...The degree of closeness and gratification in the pre-divorce father-child relationship, at least from our perspective was not a factor in determining this acute reaction (Wallerstein & Kelly 1980).³²⁰

Studies confirm that a continuing broad based relationship with the child, an inherent component of joint residence, considerably diminished the negative psychological effects on the non-resident father and his child (Greif 1979; Luepnitz 1982).^{321,322} Mitigating the parental sense of loss has legal and practical ramifications. In reaction to depression caused by the loss of one's child, a parent may result to renewal of litigation.—A potentially devastating course for both parent and child (Wallerstein & Kelly 1980).³²³

D'Andrea (1981)³²⁴ studied groups of non-resident fathers and joint resident fathers, and self-report results indicate that fathers receiving joint residence had a much higher self-esteem than fathers receiving sole residence. Further, the fathers with joint residence reported much more contact time with their children and higher overall satisfaction with their parenting status.

Other research has also shown that fathers were much more involved with their children in joint residence situations than in maternal residence (Greif 1979; Luepnitz 1982; Luepnitz 1986; Kelly 1988a).^{325,326,327,328} Judith Greif (1979)³²⁹ for example, reported that fathers with joint residence perceived no loss of influence in their child's life, and those fathers were much more satisfied with their post-divorce relationships than fathers who were forced to become *visitors* by the courts. Father *drop out* occurred to a significantly greater degree in sole residence arrangements compared with joint residence situations (Luepnitz 1986; Shiller 1986a).^{330,331}

Joint residence also provides an opportunity for the child to develop a more individualised relationship with both parents (Greif 1979).³³²

For fathers with more than one child, a limited visitation period severely restricts the opportunity for much needed time alone with each child... fathers with limited access to their children are reluctant to see one at a time because of the long wait until they may see the other again. Yet repeatedly, they talked of missing the intimacy of time alone...in contrast to the fathers with greater child absence, those fathers with joint custody and greater contact describe relationships with open expression of a whole range of emotions. They did not feel shut out from their children's inner life and sense that their continued availability to the child over time allowed for the child's more spontaneous sharing of feelings (Greif 1978).³³³

Clearly, if judges believe that contact with the father and mother are both important to a child's development (as indeed the research has now demonstrated – Kelly 1988a),³³⁴ parenting orders, which empower both parents, are the option of choice. At any rate, the research demonstrates a great deal of dissatisfaction among non-resident parents with the status of *visitor* in the lives of one's children (Kelly 1988a; Lovorn 1991; Gibson 1992; McMurray & Blackmore 1992; Jordan 1996).^{335,336, 337,338,339}

Investigators conclude society needs more effective father role models in the lives of children – not fewer male role models and this research on the involvement of the non-resident father is clearly supportive of the presumption of joint residence (Warshak 1992; Farrell 2001).^{340, 341}

Other Factors Favouring Joint Residence

In addition to the research concerning children's adjustment in the post-divorce period, there are other factors to consider which indicate a rebuttable presumption for joint

residence is preferable. The advantages of joint residence include specific advantages for mothers, less litigation, dramatically higher compliance with child support orders, falling divorce rates and equity.

Mothers

Research has been fairly consistent in identifying several advantages to the mother in joint residence situations as opposed to sole residence situations (Luepnitz 1982; Hanson 1985; Kelly 1988a; Maccoby, Depner, & Mnookin 1990).^{342,343,344,345} First, a number of studies have indicated that sole residence mothers have considerable difficulty in raising the children after divorce particularly little boys (Hetherington, Cox, & Cox 1978; Wallerstein & Kelly 1980; Kelly 1988a).^{346,347,348} The problems may be disciplinary in nature, or a more general deterioration of the relationship. Although the parental role may remain superficially unchanged following divorce, the added pressures of the increased supervisory and financial responsibility may overwhelm the sole residence mother channelling her life to the raising of the child. This in turn adversely affects the parent-child relationship. As one study (Hetherington, Cox, & Cox 1978)³⁴⁹ explained:

The divorced mother is harassed by her children, particularly her sons. In comparison with fathers and mothers in intact families, her children in the first year don't obey, affiliate or attend her. They nag and whine, make more dependency demands and are more liable to ignore her. The aggression of boys with divorced mothers peaks at one year then drops significantly but is still higher than that of boys in intact families at two years. Some divorced mothers described their relationship with their child one year after divorce as declared war a struggle for survival.³⁵⁰

However, the reasons for the poor relationships between the sole residence mother and her children are more often found in the social situation than in the mother herself. Especially if she does not have friends and family to emotionally and practically support her (Hetherington, Cox & Cox 1978):³⁵¹

The demands of the sole parent for the fulfilment of individual emotional needs normally met within the marital relationship may prove intolerable and damaging to the children, who are unable to give emotional support or to absorb negative feelings from this source...since the emotional requirements of children are very likely to take the forms of demands for physical attention or personal service, the remaining parent may be subject to physical as well as emotional exhaustion from this source (Hetherington, Cox & Cox 1978).³⁵²

These studies confirm that sole residence mothers (and by implication sole residence fathers) by virtue of the parenting pressures that divorce especially imposes upon them are often trapped in what has been described a *coercive cycle*³⁵³ affecting both themselves and their children. Hetherington, Cox, & Cox (1978)³⁵⁴ found that even more so than intact homes, how effective the sole residence mother's relations with her children depends in large part on low conflict with her former spouse and how involved the father is with his children:

Other support systems such as that of grandparents, brothers, sisters and close friends or male friends with whom there was an intimate relationship, or a competent housekeeper, also were related to the mother's effectiveness in interacting with the child.... However, none of these support systems were as salient as a continued, positive, mutually supportive relationship of the divorced couple and continued involvement of the father with the child (Hetherington, Cox, & Cox 1978).³⁵⁵

Maccoby, Depner, & Mnookin (1990)³⁵⁶ showed that sole residence mothers were resentful over having been left with total responsibility for raising the children alone. Wallerstein & Kelly (1980)³⁵⁷ indicated that the relationship between sole residence mothers and children deteriorated in 40% of cases studied, during the five years after divorce. Improving the sole residence parent's position in this way can indirectly benefit the child. As one psychiatrist noted, *I have seen many a divorced mother who resented her children because they limited her own activities. These mothers feel trapped at home and deprived of the various alternatives in the outside world* (Saxe 1975).³⁵⁸ In turn, the children may sense that they are a burden on the mother and that they are confining the mother to a child's world (Folberg & Graham 1979).³⁵⁹

During a marriage, one parent's ideas concerning discipline and child rearing are, presumably, not the sole source for disciplinary action in the family, and one parent's mistakes can be balanced by the thoughts and disciplinary interventions of the other parent (Wallerstein & Kelly 1980).³⁶⁰ Of course this option is usually lost in sole residence situations, but joint residence relationships tend to foster the discussion of disciplinary problems and other problems in child rearing, and that type of support for mothers is necessary at an otherwise stressful time in their lives. Kelly (1988b)³⁶¹ indicated that parents who were otherwise in conflict often could communicate about disciplinary issues during the post-divorce period.

Mothers, like everyone else confronted with the responsibilities of child rearing, need support, and sole residence arrangements typically cannot provide that support as readily as other residence arrangements (Luepnitz 1980; Hanson 1985).^{362,363} Shirley Hanson (1985)³⁶⁴ as one example, compared the mental health of parents in several care giving situations and reported that mothers in joint residence arrangements had much more support than mothers who were sole residence parents.

She further suggested that joint residence arrangements actually contribute to improved mental health of mothers. Maccoby, Mnookin & Depner (1986)³⁶⁵ reported that mothers in joint residence were more satisfied with those arrangements than were mothers in sole residence arrangements in which the father exercised contact. Compared with sole maternal residence mothers, joint residence mothers had more respect for the former spouses' parenting ability, and perceived their former spouses to be more supportive and understanding (Shiller 1986a).³⁶⁶

Furthermore, for women who may not want to assume the stereotypic role of women as full time mother, joint residence provides an acceptable compromise for the mother who is unable or unwilling to assume the burden of sole residence, but does not desire to relinquish for personal reasons or societal pressures, the privilege in the sharing of the rearing of her child. These results certainly suggest that sole residence determinations may not be in the best interests of the sole residence mothers, even though those mothers are typically the active proponents of such a residence determination.

If this proposition is true, why do some women oppose a legal presumption in favour of joint residence? There are a number of reasons. First, lawyers often tell mothers to oppose joint residence, because, given the outdated maternal preference used by some judges (Goldstein 1983; Bordow 1994)^{367,368} opposition to joint residence is the quickest way for that lawyer to be perceived as *winning* the case. Second, there have been several objections raised to the widespread adoption of a rebuttable presumption of joint residence, not so much from traditionalist quarters as, oddly enough from one of the groups that stands to gain the most from such a presumption—feminists (e.g. Polikoff 1982; Weitzman 1985).^{369, 370}

Luepnitz (1982)³⁷¹ for instance, as noted above, after completing a comparative study of joint and sole residence and finding virtually nothing negative to say about the former, rejects the idea of mandatory joint residence based on her concern for the protection of wives from abusive husbands. It is unclear, however, whether Luepnitz is referring to

judicially mandated joint residence over the objections over one or both parties, or some sort of immutable, legislatively mandated joint residence—but, as no one is arguing for the latter, it would appear that she would like individual litigants to retain veto power rather than allowing the courts to impose joint residence over one or both unwilling parents.³⁷² There are several problems with this:

- it places the interests of parents ahead of the best interests of the child (Kelly 1983; Mclsaac 1986);^{373,374}
- it would tend to predispose litigants to lengthy, bitter court battles (Williams 1987; Mclsaac 1986);^{375,376}
- it does not guarantee that residence would go to the *better* parent (Williams 1987; Kelly 1991);^{377,378} and
- it is extremely unlikely that judges would award joint residence in a family violence situation.³⁷⁹

Whereas conventional wisdom holds males guilty of most physical family violence, a U.S. study of 140 divorcing couples from different socio-economic backgrounds, reported that three quarters of the survey population were physically aggressive, with women perpetrating as much physical and verbal abuse as men (Johnston 1992).³⁸⁰ The study carried out in California by an Australian expert Dr. Janet Johnston, discovered the highest aggression rates were among couples entrenched in litigation, and children were the ones who suffered.

The lack of discrepancy between women and men was supported by other national studies in the U.S. Of violence in marriage (Straus, Gelles & Steinmetz 1985; Marriage & Divorce Today 1986; Straus 1993).^{381,382,383} Several other studies have suggested that women may be more violent (Malone Tyree & O'Leary 1989, Stets & Straus 1989; O'Leary *et al* 1989).^{384,385,386} For example, in the Stets & Straus (1989)³⁸⁷ study of family violence against adults, the most frequent pattern of abuse was mutual abuse, in which both the male and female engaged in violence against each other. However, in situations, which were not mutually violent, females were more violent towards males than males were towards females. These results, while running contrary to the current popular view which holds males guilty of most family violence are consistent with local research which indicates that women are as guilty as men of violence in the home (Sherrard *et al* 1994; Stuart 1996; Headey, Scott, & de Vaus 1999).^{388,389,390}

Becker (1992)³⁹¹ argues for a maternal deference standard where courts defer to a mother's wishes. The argument is that women invest more than men in childcare, are more involved and have greater empathy with children. Residence awards should be made in light of the emotional needs of women. For Becker even a sole residence/primary caretaker presumption does not protect the interests of women because of what she sees as a bias against women in the judicial system.

Fineman (1988)³⁹² is also critical of joint residence and supports a sole residence/primary caretaker presumption. She argues that there is a qualitative difference between the contribution that mothers and fathers make to children's welfare. She states that sole residence is the only way to ensure a good future for children by encouraging nurturing and concern for children in a concrete way.

In the British context, Brophy (1989)³⁹³ contends that, joint residence disempowers women because power relationships that existed before divorce would inevitably carry on in any future joint residence. The argument put is that, as men do not share childcare within marriage why do they seek to share it when marriage ends? It is puzzling that feminist argue that joint residence presumptions usurp the power of the courts for this argument assumes courts should be given more discretion, rather than less, to decide what is in the best interests of children (Bartlett & Stack (1991)).³⁹⁴ This argument is

inconsistent with the prevailing feminist view that our courts already bring too much white, middle class, male bias into residence decisions (Polikoff 1982),³⁹⁵ and the unfettered *best interests* test gives too much play to the predispositions of individual judges and allows them to make findings based solely upon their own experience and bias (Reece 1983).³⁹⁶

Ironically, the very conditions that feminists decry within the intact family are encouraged in the divorced one. Once again women are being placed willy-nilly in a position that traps them with their children. By sanctioning the entrapment of divorced mothers in the home while advocating the liberation of women (and men) from sex-prescribed roles, the women's movement is caught in a grave contradiction. As everyone knows, it is a central tenet of feminism that fathers ought to be more involved with childcare, mothers less so. But what has not been recognised is that feminist theory is largely restricted to intact families. At the same time, it is surely true that feminists (along with psychiatrists, social scientists, judges and others) are not free of cultural stereotypes. This sexism takes the form of doubt or negativity about the capacity and commitment of fathers to care for their young. There is near complete disregard for the father of the divorced family and the need for his continuing participation in the life of his children. If child residence is mentioned at all, the tendency is to call for more stringent enforcement of child-support and so on, implying that sole maternal residence is taken for granted.

There is, however, a split in feminist thinking on child residence. Fineman (1988),³⁹⁷ Brophy (1989),³⁹⁸ and Becker (1992),³⁹⁹ represent a cultural feminism of difference. Another strand of liberal feminism puts a different view. Bartlett & Stack (1991)⁴⁰⁰ present a feminist case in support of joint residence. They argue that a preference for joint residence is essential for any realistic reshaping of gender roles within parenthood. They say that only when it is expected that men, as well as women, take a serious role in child rearing will traditional patterns in the division of child-rearing responsibilities begin to be eliminated.

Whereas Hoggett (1994),⁴⁰¹ has suggested that changes in the law are unlikely to lead to a significant increase in the participation of fathers in their children's upbringing. Bartlett & Stack (1992)⁴⁰² argue that the law has an important expressive or symbolic power to alter social expectations and norms. They conclude their argument by asserting that joint residence preferences in law *may contribute to a transformation of both male and female values, as men through parenting learn nurturance and co-operation in their intimate relationships and women learn independence without abandoning their values of care taking.*

Salka (1989)⁴⁰³ indicates that feminist opposition to joint residence may be based on self-interest rather than what is best for the developing child. She says:

Since the publication of Lenore Weitzman's controversial book certain of my feminist sisters...have lobbied for equalisation of financial bargaining power between men and women by awarding mothers a primary caretaker presumption, although they have not always been candid that this is the main reason for the proposed presumption.... On the issue of remedying financial inequality through child custody presumptions favouring mothers I cannot condemn these efforts strongly enough. Children cannot again be the pawns of the divorce wars, as they were in the pre joint custody era. The concept of joint custody was an inspired notion to permit children to share in the lives of both their parents. Reverting for a presumption in favour of a primary caretaker may give women some financial clout, but it is at the expense of the children and flies in the face of reality. i.e. that children need the care of both parents, each in their own way.⁴⁰⁴

(The destructive impact of Lenore Weitzman's 1985 treatise, *The Divorce Revolution*⁴⁰⁵ referred to by Fern Salka in the above quote, and its subsequent effect on the shaping of social policy and hardening gender feminist⁴⁰⁶ opposition to joint residence is discussed below).

Karen DeCrow (1994)⁴⁰⁷ the former moderate president of the present day extremist California based National Association For Women (NOW) summaries liberal feminist support in the following way:

If there is a divorce in the family, I urge a presumption of joint custody of the children. Whereas it is impossible to change thousands of years of sex-role stereotyping through legislation, we can hope, in an existential fashion, that attitudes can be changed through education and via the passage of laws.

...Part of ending sexism involves eliminating the inhuman practice of awarding a parent 'visitation' to his or her own child. Shared parenting is not only fair to men and to children; it is the best option for women. After observing a women's rights and responsibilities for more than a quarter-century of feminist activism, I conclude that shared parenting is great for women, giving time and opportunity for female parents to pursue education, training, jobs, careers, professions and leisure.

There is nothing scientific, logical or rational in excluding men and forever holding the women and children, as if in swaddling clothes themselves, in eternal loving bondage. Most of us have acknowledged that women can do everything that men can do. It is now time to acknowledge that men can do everything that women can do.⁴⁰⁸

Finally, societal prejudices always take some time to change, regardless of the level of victimisation of one group over another. In the past women have been seen as the primary caretakers of children, and because of this there has been great emphasis in child development studies and psychological theory on the mother/child relationship. The corollary has been a lack of interest in fatherhood and the father/child relationship. In terms of residence outcomes this has meant the evolution of a maternal presumption (Warshak 1992).⁴⁰⁹

Specifically, women have been told for years that maternal attachments dictates that the primary caregiver raises the child alone – that all a child needs is *mummy* in order to develop happy and healthy emotionally. This is not true, as research has adequately demonstrated (Ditson & Shay 1984; Kelly 1988a; Thompson 1994).^{410, 411, 412} Research evidence has mounted which demonstrates the importance of the *secondary* caregiver attachment – (a bond usually developed between the child and the father). This attachment is less focused on specific care giving activities and more focused on stimulating play, social interaction, and curiosity. When an infant is well fed and not distressed, the baby will actually show a paternal preference for the secondary caregiver for social stimulation.

In the U.S. as women and legislators have become more aware of research on these issues, legal presumptions for joint residence received increasing acceptance, and as noted above, such preferences are the norm in 23 states. As recently as 1996 The National Centre for Women, a liberal feminist organization with a membership of over 128,000, supported presumptive joint custody laws enacted in Washington D C.

Conflict Resolution

Another area of concern often discussed is that joint residence outcomes lead inevitably to a continuation of conflict between separating partners, with disastrous consequences

for the children. Again, we need to unravel the argument. It is by no means clear how the sole residence model itself is supposed to work effectively in reducing hostility. Indeed it has been suggested that the present adversarial system unnecessarily polarises separating parents and provokes conflict (Saposonek 1989).⁴¹³ Some writers have asserted that joint residence may lead to a reduction in parental conflict over time (Williams 1987).⁴¹⁴ It should also be stated that in intact families there are often disputes about parenting, and in many separating families the primary dispute is not about parenting styles but about the relationship between the adults (Kelly 1988a).⁴¹⁵

While there are some who argue that joint residence causes more litigation and relitigation, the facts are decidedly otherwise. In one California study by Iffeld, Iffeld, & Alexander (1982),⁴¹⁶ parents in joint residence arrangements entered post-divorce litigation 16% of the time, while parents in sole residence arrangements were involved in such relitigation 32% of the time. However, this figure must be examined in light of the fact that those parents in joint residence had chosen that option, and that choice may have resulted in less relitigation for those comparison groups. Fortunately, the same study also included a number of couples that were awarded joint residence even when one parent did not want such an arrangement. For that third group, the relitigation rate was exactly the same as the relitigation rate for sole residence. Taken together these data demonstrate that joint residence results in considerable less relitigation than sole residence. Also, as the authors noted, the typical assumptions that joint residence will only work when both parents agree is wrong. Joint residence works at least as well as sole residence whether the parents agree or not. The authors concluded that, unless subsequent research refuted these data, the court should start from a rebuttable presumption of joint residence.

The Luepnitz (1982)⁴¹⁷ study also included data on relitigation, as related to joint and sole residence. In that study 56% of the families in sole residence arrangements had returned to court over child support or other child related matters, whereas none of the families in joint residence arrangements had. The joint residence parents also scored lower on an inventory of current conflict. This finding is important because the sole residence couples had much less differences about their initial residence decision than did the joint residence parents. The sole residence mothers reported that it was just assumed that they would have residence, whereas in half of the joint residence situations, one party had initially opposed the arrangement and 27% had litigated their disputes. Luepnitz's findings suggest that conflict about the initial residence decision does not necessarily preclude subsequent parental cooperation on child rearing, or, conversely, that a mutual agreement about residence does not preclude later conflict. The study by Luepnitz does not support the argument that one parent's opposition to joint residence should be a sufficient basis for preventing court ordered joint residence.

Further, the 1995⁴¹⁸ survey by the Australian Law Reform Commission of 67 protracted contact cases indicates lower relitigation rates in joint residence families. The report documented that joint residence families were represented in just 4.2% of protracted matters.⁴¹⁹ In marked contrast, 93.7% of the relitigated cases involved sole residence households.⁴²⁰ The remaining 2.1% of cases involved a non-parent arrangement.⁴²¹

Essentially these results suggest that by empowering both parents at the time of divorce, the Commonwealth could cut the expenditure for extended post-divorce litigation. If social policy makers cannot be moved to support joint residence on moral – human right – grounds, or on research grounds (i.e. advantages in children's' adjustment etc) they can usually be moved on financial grounds. From the perspective of funding the court system, rebuttable joint residence presumptions are, simply, cheaper. Parents start out on a more even playing field in the litigation process, and that leads to more settlements overall prior to the divorce, and to less litigation after the divorce, as all of the available data show.

When Parents Are In Conflict

Research has been very consistent in suggesting that conflicts between parents, where the parents begin to involve their children in these conflicts, are destructive to the child (Kelly 1988a).⁴²² However, this result should not be used as a rationale for the continuation of antiquated sole residence presumptions for several reasons. First, as noted earlier, research suggests that joint residence results in less relitigation—i.e. less conflict (Ilfed, Ilfeld, & Alexander 1982; Luepnitz 1982),^{423,424} and there is no research evidence of increased long-term conflict because of joint residence presumptions.

Next, a surprisingly small number of parents report active hostility at the time of the final divorce. Many people divorce because of a gradual loss of affection, rather than high levels of conflict. Kelly (1988b)⁴²⁵ found that only 15% of parents describe themselves as *extremely angry* or *very angry* immediately after the divorce. Only 20% of the parents indicated that they could not co-operate with the other parent regarding the children. Of this small percentage, only a smaller percentage would use the children as *weapons* in the inter-parent conflict. Clearly, this small percentage should not be used to argue against the rebuttable presumption of joint residence, given all the evidence of positive outcomes of joint residence arrangements for children and everyone else in the system.

Further, even the small percentage of parents who are very angry may be able to work out procedures to alleviate the anger so the child is not caught in the middle. Divorcing parents report much less *child specific* conflict at the time of divorce than marital conflict (Kelly 1988a).⁴²⁶ Finally, many parents in conflict find ways to reduce ways to see each other – by picking up the child from school, as one example, rather than at the ex-spouses home. All these data suggest that even angry parents can, and often do, cooperate on child rearing, and very few parents (i.e. less than the 15% who say they still angry) would begin to use the child as weapons.

Even when parents are experiencing high levels of conflict there is a case for joint residence. Research has shown that the relationship which the child has with each parent was much more influential in predicting successful adjustment outcome, than the quality of the relationship between the parents (Rohman, Sale & Lou 1987).⁴²⁷ Consequently, even when parents are warring with each other, if both retain a positive relationship with the child, the child should be afforded the adjustment opportunities of a good relationship with both parents. For these reasons, the issue of parental conflict should not be a rationale for arguing against a rebuttable presumption of joint residence.

This conclusion was supported by 74% of respondents to a 1985 survey of family therapy practitioners published in *Marriage and Divorce Today*⁴²⁸ who favoured joint residence as a rebuttable presumption of the court even if parents are antagonistic to one another. Williams (1987),⁴²⁹ Director, Child & Adolescent Psychiatry, Cedars-Sinai Hospital, Los Angeles studied parents in high conflict situations in both joint and sole residence arrangements, and documented that the type of court order seemed to effect the continuation or gradual resolution of conflict. Results showed that detailed joint residence agreements, which leave very little or nothing to negotiate actually reduced the stress, and both parents were more likely to learn to demonstrate higher levels of co-operation when highly detailed agreements were written (notated as Appendix E).

Clearly, one agenda of the courts should be to issue orders, which reduce the tension between the divorcing parents, since such a reduction in tension is plainly in the best interest of the child. Joint residence orders which are detailed and specific work much better in that regard than sole residence and contact arrangements, as the data on relitigation have consistently demonstrated.

In high conflict situations, if *shared decisions* are to be included in the agreement, the agreement should also stipulate how those decisions will be made if the parents attempt to make such a decision later on and cannot agree. The common example of this is the

sharing of major educational decisions. If parents wish to share those decisions, that decision should be expressly written into the agreement as a shared decision with the additionally provision that, if any point in the future the parents cannot agree on that or other specific decisions, the recommendation of the current school authority or the like will be followed. Judicial adjudication should be considered only as a last resort. The agreement should also encompass the specific details of how the children's time spent with each parent will be divided.

This *safety valve* mechanism while not totally effective will tend to reduce future litigation. It should be clear that obtaining a detailed joint residence agreement is necessary in high conflict situations, and courts should require the lawyers of the parents in high conflict situations in the absence of child abuse or family violence to prepare such an agreement. The research has demonstrated conclusively, that joint residence, utilizing well prepared, detailed agreements results in less relitigation than does sole residence.

In addition to the conclusion that joint residence provides a symbol of the expectation that both parents are to continue in their role as parents after the divorce, we should recognize that the presumption of joint residence has another equally powerful anticipatory effect. Mindful of the fact that equality of parenting privilege will be the cornerstone of court decisions, parents are likely to be far more cooperative in pre-trial negotiation, and may avoid litigation all together. If on the other hand, either of the potential litigants forecasts an advantageous position in court, their involvement in meaningful mediation may be severely compromised, or the efforts of even the most skilled mediators may be thwarted. Political extrapolations have sometimes resulted in the conclusion that where there is conflict at the time of divorce (when isn't there?) joint residence should be precluded. If this conclusion were allowed to stand, it would serve as incentive to promote conflict by those desiring sole residence.

Conflict is certainly present in most divorcing situations, but it usually subsides with time. Temporary anger is common in reaction to such a powerful psychosocial stressor. It is not ordinarily indicative of pathology and should not result in an abrogation of parenting privileges: *innocent* orientation is exercised by confused judges who have limited ability to distinguish between truly menacing verbal behaviour and harmless verbal expressions of anger (which flow both ways in marital discord). These distortions have fuelled the controversy over what might otherwise appear to be an obviously fair proposition – that neither parent should lose parenting privileges or responsibilities as a result of divorce.

Payments of Child Support

Some advocates for mothers' rights have claimed that the gender-neutral *best interests* standard disfavours mothers and operates to deprive women of a critically important bargaining chip with which to counter attempts to reduce child support and property distribution (Polikoff, 1982; Weitzman 1985).^{430,431} Singer & Reynolds (1988)⁴³² for example, boldly claim that:

Proponents (of joint custody) ignore what studies increasingly confirm: divorcing husbands routinely and successfully use the threat of a custody fight to reduce or eliminate alimony and child support obligations. Such custody blackmail has been identified as a major cause of the impoverishment of divorced women and their children.⁴³³

However, in fact, there are no empirical studies, which support such an argument (Maccoby & Mnookin 1992).⁴³⁴ The available data suggest that the opposite is true. There is solid evidence that parents in joint custody situations are much more likely to meet child support obligations. Studies of payment rates for joint custody parents, and those non-custodial parents who are able to remain a viable part of their children's lives, show much higher compliance (Hillary 1985; Montana Child Support Advisory Council 1986; Pearson & Thoennes 1986; Lester 1991).^{435,436,437,438}

The study by Pearson & Thoennes (1986)⁴³⁹ is typical of this research. These researchers compared the child support payments in various sole custody and joint custody situations. Fathers in joint custody arrangements who had been ordered to pay child support had the best of payment with a 95% compliance rate. Fathers in sole maternal custody situations had the lowest compliance rate, at 65%.

A study of child support compliance by non-custodial mothers in Austin, Texas, showed much smaller compliance rates for them (Diehl 1982).⁴⁴⁰ Of the 783 divorces surveyed, only 18.8% of fathers obtaining custody received an award of child support. No non-custodial mother was required to provide any other continuing service to her children analogous to her role function in an intact marriage. Almost 97% (96.8%) of mothers obtaining sole custody received child support. Only one father in five received assistance and help from a former spouse, and over five times as many mothers as fathers received post-divorce help. Three years after separation, over 80% of non-custodial fathers were in full compliance with the child support orders. After one year, only 11.7% of non-custodial mothers were paying anything at all.

Lester (1991)⁴⁴¹ authored a report for the US Department of Commerce, Bureau of The Census. The report indicated that fathers with parental responsibility pay 90.2% of money owed; fathers with contact pay 79.1% of the money owed, and fathers with neither parental responsibility nor contact pay 44.5% of the money owed. Unfortunately the census report used only self-report figures of the mothers who were due to receive the monies, and those figures may be self-serving overestimates of non-compliance.

The study by the federally funded U.S. researcher Stanford Braver (1993)⁴⁴² found that the degree of involvement in the child's life by a parent was the single most powerful indicator of the amount of child support that is paid. According to payer fathers when sole parental responsibility was the arrangement, despite the father's wishes, only 80 percent was paid; when joint responsibility was awarded, despite opposition by one of the parents, child support zoomed to almost perfect compliance (97 percent). According to recipient joint responsibility mothers' child support compliance was almost 94%; in contrast sole residence mothers reported that they received child support in about 78% of cases.

There is also considerable evidence that parents in joint parenting arrangements do more in terms of *extras* such as school payments and the like, which go beyond the court ordered financial responsibilities. While this result is more tentative than the conclusion on compliance, it would seem reasonable that by empowering someone, that person would be more likely to remain supportive financially, than if they are forced to become a mere *visitor* to their own children.

Data collected prior to the introduction of the Child Support scheme link contact between parents and children with levels of child maintenance payments. Funder (1989)⁴⁴³ found that absence of contact or conflict associated with contact was related to lower maintenance received. In its analysis of the pre-Scheme child support payments of over 3000 parents, the Australian Institute of Family Studies found that payments were less likely to be made where contact was infrequent or not taking place (Harrison, Snider, & Merlo 1990).⁴⁴⁴ Other investigators described the weakening of ties between non-resident parents and children as a cause of child maintenance default (Wade 1980).⁴⁴⁵

These data, taken together, indicate that sole residence determinations, as opposed to joint residence determinations, tend to work against the economic best interests of children. Sole residence preferences lead directly to less financial support for children of divorce. The economic evidence suggests that seeking ways to increase non-resident parental contact with their own child may be the most effective method of increasing compliance with child support orders.

Further, is it realistic to expect that non-resident parents, who are intentionally victimised as documented in the evidence on contact denial reviewed earlier (pp 95-96), will continue to joyfully pay up throughout five, or ten, or seventeen years of such victimisation? At the very least judges and policy makers should consider the evidence indicating that the problem of child support compliance may result from sole residence

Divorce Rates

Several studies have showed a significant correlation between joint residence and reduced divorce (Kuhn and Guidubaldi 1997; Brinig & Buckley 1998; Brinig & Allen 1998).^{446,447,448} In the U.S. for example, Kuhn and Guidubaldi (1997)⁴⁴⁹ compared divorce rate trends in states that encourage joint residence with those in states that favour sole residence. States with high levels of joint residence awards (over 30%) in 1989 and 1990 have shown significantly greater declines in divorce rates in following years through 1995, compared with other states.

Divorce rates declined nearly four times faster in high joint residence, compared with states where joint residence is rare. As a result, the states with high levels of joint residence now have significantly lower divorce rates on average than other states. States that favoured sole residence also had more divorces involving children. These findings indicate that public policies promoting sole residence may be contributing to the high divorce rate. Both social and economic factors are considered to explain these results. They concluded that a parent who expects to receive sole residence is more likely to file for divorce than one who may be awarded joint residence. This is because sole residence allows one parent to hurt the other by taking away the children.

As noted earlier, sole residence has been a key component of Family Law in Australia, with joint residence being awarded in fewer than 5% of contested cases since 1975 (Bordow 1994).⁴⁵⁰ There is compelling evidence that links sole residence with both the rapid growth in divorce and an increased risk of child abuse. Yet the family law system seems to be unable or unwilling to acknowledge the consequences of its unstated policy. To paraphrase family law this surely cannot be *in the best interests of our children*, parents, grandparents and the wider society.

Equity

Little is known how couples' perceptions about the equity or inequity of the divorce agreement affect their ongoing parental negotiations or their level of conflict. However, equity theory predicts that perceived inequity would increase the likelihood of conflict. That is, the greater the inequity the greater the need to restore equity (Walster, Walster & Bershield 1973).⁴⁵¹ Some legal authors argue that parents may have a constitutional right to a rebuttable presumption for joint residence (Note 1980; Canacakos 1981).^{452,453} While this argument addresses the U.S. Constitution it may have local legal relevance.

There's no doubt injustice has been done to men. The classic situation is the good father who sees his children every day and then bang. The couple separates and the court gives him every second weekend. To have a dear little child that you love, and suddenly your contact to him is so restricted. It's a basic cause for the anger so many men feel about the Family Court.

“Familiar words? The sense of loss of one’s child and sense of injustice experienced by fathers over their treatment in the Family Court is a constant theme in our society. Yet this time the complaint comes from the heart of the Family Court—in an exclusive interview with Geoffrey Walsh, recently retired after 18 years as a judge in the Victorian Family court” (Arndt 1996).⁴⁵⁴

The legal victimisation of non-resident fathers is widely acknowledged (Family Law Pathways Advisory Group 2001),⁴⁵⁵ though from a scholarly perspective, this problem has only occasionally been investigated (Gersick 1979; Goldstein 1983).^{456,457} However, anecdotal literature cite numerous specific examples of legal victimisation (Head 1991b; Lovorn 1991.^{458,459} Non-resident fathers repeatedly report that sexist statements are made against them by judges and quite frequently recorded on the court transcript.

When one seeks research support for these anecdotal claims, very little research is available. However, some available evidence does tend to support the hypothesis that non-resident parents are victimised by legal bias (Gersick 1979; Goldstein 1983; Burmeister 1991c; Bordow 1994).^{460,461,462,463} For example, Goldstein (1983)⁴⁶⁴ used 48 judges in an analogue decision-making task to examine the sex of a parent as a determinant of residence. Four equivalent parent descriptions were presented to each judge in two hypothetical cases, and judges were asked to *decide* each hypothetical case. Mothers were seen as more effective parents than were fathers in spite of the fact that the parenting descriptions were the same. Also, mothers were more likely to receive sole residence awards by a ratio of three to one.

Lawyers frequently discourage fathers from pursuing residence, even when the father has a valid reason for desiring residence (Gersick 1979).⁴⁶⁵ If a father is assertive and knowledgeable enough to ask his lawyer about sole residence or joint residence and his former wife is a *normal* person (with no gross parenting deficit) who wants to *keep* the children, he is usually assertively advised not to waste his money (Abernathy 1993).⁴⁶⁶ He may be (correctly) advised that good and decent mothers almost never lose sole residence and, do not have to share the residence of the child if they don't want to, no matter how good or loved or nurturing a father has been.

Often, the advice continues that Besides, if you petition for residence, you will cause her to be upset, and she will probably make it tough on you to see the children after you lose. Be cooperative, leave her and the kids in the house, and I'll try to get the most liberal contact for you.

Even in those unusual instances in which gross maternal deficits exist (e.g., florid drug or alcohol abuse, serious mental illness, previously demonstrated child abuse or neglect) and the father brings this to his lawyer's attention, he is often still advised as previously cited, even though his chances of being permitted to continue in a parental role (i.e., retain *residence*) are now much better.

Damaging and invalid preconceptions, so long erroneously held, cause and blend nicely and logically with the terrible legal and psychological positions taken to produce a father who, though he loves his children and parents them well, is persuaded and convinced that by *not taking the kids from their mother* he is taking the right and best course for his children's future (Levy 1987).⁴⁶⁷ The courageous and committed (and/or lucky) others who have remained committed, loved, and loving, sometimes, despite incredible odds, may still have a heady battle ahead:

You have never seen a bigger pain in the rear end than the father who wants to get involved; he can be repulsive. He wants to meet the kid after school at three o'clock, take the kid out to dinner during the week, have the kid on his own birthday, talk to the kid on the phone every evening, go to every open school night, take the kid away for a whole weekend so they can be alone together. This type of involved father is pathological.

(Verbatim statement from judge Richard Huttner, former Chief Judge of the New York Kings County (Brooklyn) Family Court).⁴⁶⁸

The idea that fathers should be significant caregivers in a post-divorce situation sits uneasily with received notions of men as primary breadwinners and women as carers. In

this context, fathers are assumed to be unable to look after their children and must prove their childcare abilities, whereas mothers' competence is taken as given. One judge from the Family Law Court in San Diego California spoke to a support group of fathers in that city about how they might gain sole residence or joint residence of their children. Unabashedly she told the fathers they must present the court with documented evidence of their parenting skills. Asked by the fathers in this support group if she would be more specific about the skills needed, she replied:

Skills like cooking, diapering a baby, giving the children baths, cleaning, doing the laundry...

Some of the fathers protested to her that mothers are not required to provide the same kind of documentation. The judge replied unhesitatingly:

All I can tell you is that if men want custody or joint custody, they will provide the documentation (Silver & Silver 1981).⁴⁶⁹

As distasteful as her advice was to the fathers, the judge did realistically represent the situation of fathers seeking sole residence or joint residence. There is a presumption that the mother will be awarded residence and the father will be given *reasonable contact* and will pay child support (Pearson & Ring 1983, Rassam 1994).^{470, 471}

Research in the U.S. suggests that many judges bring a sexist view of parenting to the bench and that when fathers are awarded residence it is not because they are the more appropriate parent for the children to reside with. Rather fathers obtain residence because mothers are found to be unable to conform to certain stereotypical views of motherhood. In 1991, the *Georgia Commission On Gender Bias In The Judicial System* released a report listing *culturally based gender-biased beliefs that influence some judges and disadvantage fathers*.⁴⁷² The Commission found that these beliefs included:

- The belief that a mother is a better parent than a father.⁴⁷³
- The belief that children, especially young children, need to be with their mothers.⁴⁷⁴
- The belief that a father cannot work outside the home and be a nurturing parent.⁴⁷⁵
- The belief that because a mother is presumed to be the better parent, fathers must prove the mother *unfit* in order to gain residence.⁴⁷⁶
- The belief that if a court grants residence to a father, it brands the mother as *unfit* and *unworthy*.⁴⁷⁷

The Commission noted that in addition to the actual application of these biases by judges, *perceptions of gender bias discourage fathers from seeking custody by creating a 'chilling effect,'* thus convincing fathers that it is not worth their effort to even seek residence.⁴⁷⁸

A brief review of a local appeals case illustrates the overseas findings. In *McMillan v Jackson* (1995)⁴⁷⁹ an unemployed father denied sole residence of his son because the trial court considered him a poor role model for his son was found to be the victim of gender bias. The child was originally handed over to his maternal great-grandmother whom the trial judge said *may well wear the pants in her family*.

It goes without saying that the child's respect for his father as a role model will be immeasurably heightened if he perceives his father as the parent who is supporting him from his own exertions' his decision also said.

The Full Court upholding the father's complaint of gender bias ruled that it was wrong for one of its judges to say the child in question was at risk of welfare dependency because his father chose to be a full-time parent rather than a wage earner. The judgment found *the trial judge's pre-conception that a father should be out working to support his son rather than staying at home to look after his day-to-day needs, played a significant part in the determination of the case.*⁴⁸⁰

In addition, the trial judge had failed to notify the father of his views during cross-examination. The appeals court noting that it had the obligations and responsibility to reflect community standards and opinions subject to the Family Law Act 1975 found that the judge was out of step with community values.⁴⁸¹

The Sunday Telegraph in 1996⁴⁸² reported on a residence case where the mother made a sexual abuse allegation about the father towards the child. Justice Joseph Kay found the mother to not be a believable witness and that she would try to deny any meaningful relationship to the children with their father. He further found that her behaviour was positively destructive to the emotional needs of the children and would psychologically harm them. He then awarded her sole residence because the husband *lacked instinctive insight into the needs of children.*

The continuing education of which many judges and magistrates already undertake needs to address issues such as these (Family Law Pathways Advisory Group 2001).⁴⁸³

Several N Z decisions further illustrate the problem of judicial gender-bias. "In *Logan v Robertson* (1995),⁴⁸⁴ late submission of a husband's affidavit was not permitted because *the directions of the Court were not to be treated as non-binding guidelines.* In *Nichols v Nichols* (1996),⁴⁸⁵ the same judge allowed late submission by a wife on the grounds that *an injustice could have been done to the wife if she had been unable to have the affidavits introduced.* Any underlying justification for these conflicting approaches is not presented. It is as if there is a *menu of principles*, which can be drawn from as necessary to support the desired result. Under such circumstances arbitrary or biased decisions could be made with the appropriate explanation added, and we would be none the wiser. In other words, even if a decision appears to be well reasoned and internally consistent, it may not give a complete and transparent explanation. This potential for decisions based on unstated assumptions gives further cause for concern about the information, which might be shaping judges' opinions" (Birks 1998).⁴⁸⁶

Family court judges have wide discretionary powers in disputed cases about children. They cannot but bring to their judgements their own overt and covert value systems (Fitzgerald 1994).⁴⁸⁷ Perhaps it is not surprising that some judgements echo to those beliefs. Ask any judge, lawyer, mediator, or therapist, and they will have their particular bias on this emotionally loaded subject and the mix of experts in an individual case may determine who gets residence. To some people that looks like a lottery, the ticket being which judge or therapist you draw.

Some social science writers have argued that welfare professionals may operate a covert form of discrimination against fathers (Marsh 1987; Kelly 1991).^{488,489} Marsh (1987)⁴⁹⁰ has made the point that British social work in the past has been ambivalent and uninterested in the role that fathers play within families. Research carried out on the Court Welfare Service based on practice in six probation areas has concluded that, *a persistent theme was... the degree to which the data illustrate the differential treatment that fathers receive leading to their marginalisation in a number of key spheres* (James & Hay 1992).⁴⁹¹

Other research by Fry & Addington (1984)⁴⁹² demonstrates how welfare professionals and teachers operate negative expectations of fathers. Abraham Sagi, & Rachel Dvir (1993)⁴⁹³ in a study of 216 Israeli social workers found that their subjects, when given hypothetical child residence cases to assess, were value-biased in their judgments. Even

in the cases where the best interests of the child, as well as the knowledge now available on the subject, would suggest that the father should assume residence, it was seldom awarded by the social workers to the father. The authors suggested that because the workers were value-biased, their professional socialisation should be reconsidered. In a review of social work journals over a 27-year period, Greif & Bailey (1990)⁴⁹⁴ found that the literature on fathers was sparse and that they were under-represented in the professional literature. Similarly, Jaffe (1983)⁴⁹⁵ argues that fathers are the forgotten clients of child welfare services.

A highly original explanation as to why joint residence has met with so much resistance has been provided by Kelly (1991)⁴⁹⁶ who argues that opposition is connected to unconscious attitudes amongst legal and welfare professionals. She states that women professionals may feel a threat to the security of their own parenting role when fathers seek joint residence, with the result that there might be hostility towards fathers. There could be a similar effect when male professionals are involved since they may be forced to contemplate the strengths and weaknesses in their own role as fathers and the quality of the relationship with their children (notated as Appendix D).

Some social work writing has, however, tried to deal with the issue of joint residence in a positive way. The growth of family mediation and a developing interest in post-divorce parenting plans has meant that the profession has re-examined some of its values. Of particular importance here is the contribution made by Kruk (1993).⁴⁹⁷ In an important article he argues the case for a post-divorce joint residence model supported by an interventionist family mediation approach and the development of parenting plans. He believes that mediation should promote the ideal of joint residence, and is critical of what he calls *the more short term, future focused neutralist mainstream model* of family mediation. In a later contribution (Kruk 1994)⁴⁹⁸ he outlines the position of the disengaged non-resident father and spells out some implications for social work practice.

The court counselling service provides social work assistance to the Family Court. Local court welfare officers have not been proactive in arguing the case for joint residence; the service generally has fallen into line with judicial conservatism and advocated the *sole residence* and *reasonable contact* model. An influential strand in this flux has undoubtedly come from the writings of Goldstein, Freud, & Solnit (1973).⁴⁹⁹ As noted above, the authors take the position that the child in divorce should be placed with one parent who should have control over all aspects of the child's life, including the extent of the contact, if any, that the child has with their non-resident parent.⁵⁰⁰ Although the influence of this thinking has diminished, it has permeated some local social work⁵⁰¹ and legal thought.⁵⁰²

Beyond this overt legal bias against fathers seeking residence, there are anecdotal reports (Lovorn 1991)⁵⁰³ and some research evidence (Vogtli 1989)⁵⁰⁴ of social and legal bias against non-resident mothers. When a woman chooses to give up residence, for whatever reason that woman may be negatively stigmatised for life (Vogtli 1989),⁵⁰⁵ and that stigmatisation may impact her chances for future modification of residence/contact orders.

By requiring mothers to be the primary caregivers of children, whether or not they desire to be, society continues to communicate to mothers that they must choose their children over all else or risk being labelled a failure as a mother, and as a woman (Greif & Pabst 1988).⁵⁰⁶ Thus, women who voluntarily relinquish residence are frequently seen by society as *misguided, selfish and unnatural* (Sanger 1996).⁵⁰⁷ This refrain continues, despite the fact that numerous opportunities, notably in education and employment, have opened up to women over the last thirty years (Chavez 1996).⁵⁰⁸ Clearly, the legal/social victimisation results in demonstrable injustice against non-resident parents of both sexes.

It is somewhat surprising that this evidence of bias and legal victimisation of non-resident parents has not been investigated more thoroughly. Further, it is interesting that this legal

victimisation has been allowed to continue as long as it has, given the sensitivity of lawyers, parliamentarians, and courts to other complaints of victimisation from other disenfranchised and powerless groups. It may be that the calls for ending this legal victimisation have been muted because of the sex of the majority of the victims happen to be male. While our society has become increasingly cognizant of instances in which women are victimised, victimisation of male members of our society is, almost, an unheard of issue, and researchers may have chosen not to investigate this mounting evidence because of this general societal perception (Wright 1992)⁵⁰⁹

Whatever the reason for the lack of information on legal victimisation of non-resident parents, future studies should begin to investigate these discriminations. Further, the relationship between this documented discrimination in the courts and post-divorce adjustment and conflict of non-resident and resident parents should be investigated, in order to determine potentially negative ecological relationships between this victimisation and the overall well being of the children.

Parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced disintegration of their parental role post-divorce, have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

The Primary Caretaker Doctrine and Gender Bias

A frequently heard rationale for sole mother residence concerns the issue of pre-divorce parenting role performance serving as a precedent for post-divorce parenting roles (the so-called primary caretaker rule utilized by the Family Court).⁵¹⁰ In response, it should be noted that during the marriage, traditional role complementarity provides for efficient childrearing, wherein one of the parents usually serves as the primary bread-winner, providing for the child's food shelter, clothing, etc. while the other parent's main focus is on utilizing these resources in providing direct services for the child.

While the current legal statutes instruct the courts to award *residence in the best interests of the child*, the dated maternal presumption doctrine continues to have an influence even though it is no longer explicitly mentioned in Family Court judgements (Rassam 1994; Bordow 1994).^{511,512} The more recent *primary caretaker* standard, adopted implicitly by the Family Court, is seen by many as a thinly veiled return to the sexist *maternal preference* doctrine (Bordow 1994).⁵¹³ The evidence reviewed above solidly indicates judges may make decisions as though such a presumption still exists, or may exhibit strong biases against awarding residence/joint residence to fathers.

The test to determine the primary parent is essentially a checklist of parental tasks ordinarily performed by the parent who has fulfilled the traditional role of homemaker. Duties indicative of a primary parent's status are: preparing and planning of meals, bathing and dressing; buying, cleaning and care of clothes; medical care including trips to physicians; arranging for after-school interaction with peers (i.e. transporting to friend's houses, or for example to girl or boy scouts meetings); arranging alternate care (i.e. baby-sitting, day-care, etc); putting a child to bed at night, attending to the child in the middle of the night; waking the child in the morning.

The origins and purpose of the *Primary Caretaker* theory so enthusiastically embraced by the Family Court can be traced back to the *tender years doctrine* firmly adhered to in several local⁵¹⁴ and U.S. decisions of past years.

"In *J.B. v. A.B* (1978)⁵¹⁵ Chief Justice Richard Neely of the Supreme Court of West Virginia freely acknowledged the maternal preference bias of his Court in the following terms:.

We reject this (father's) argument as it violates our rule that a mother is the natural custodian of children of tender years.

(The Court) rejects any rule which makes the award of custody dependent upon relative degrees of parental competence rather than the simple issue of whether the mother is unfit.

(B)ehavioural science is yet so inexact that we are clearly justified in resolving certain custody questions on the basis of the prevailing cultural attitudes which give preference to the mother as custodian of young children.⁵¹⁶

J.B. v A.B. was so openly biased that it helped to accelerate the end of its own era. In 1980, the West Virginia legislature statutorily abrogated Justice Neely's maternal preference.⁵¹⁷ As noted previously, investigators and Gender Bias Commissions across the United States have often found however, bias may simply change its form rather than disappear. Justice Neely's rejoinder, *Garska v McCoy* (1981),⁵¹⁸ was issued the following year:

(This case) squarely presents the issue of the proper interaction between the 1980 legislative amendment to W. Va. Code 48-2-15 which eliminates any gender based presumption in awarding custody, and our case of *J.B. v. A.B.*, W. Va., 242 S.E.2d 248 (1978) which established a strong maternal presumption with regard to children of tender years.

While in *J.B. v. A.B.*, supra, we expressed ourselves in terms of the traditional maternal preference, the Legislature has instructed us that such a gender based standard is unacceptable...

Consequently, all of the principles enunciated in *J.B. v. A.B.*, supra, are reaffirmed today except that wherever the words 'mother,' 'maternal,' or 'maternal preference' are used in that case, some variation of the term 'primary caretaker parent,' as defined by this case should be substituted.⁵¹⁹

Thus the *primary caretaker* doctrine was born. Let us be as plain, concise, and honest as was Justice Neely. The *primary caretaker* theory is first, foremost, and always a change-of-name device designed to maximize the number of cases in which the Court will be compelled to preserve the bias of maternal preference.

The phrase *primary caretaker* is a warm, fuzzy term with a superficial appeal. Like all legal terms, however, the substance is in the definition provided for the term. Every definition which has been put forward for this term has systematically and purposefully counted and recounted the types of tasks mothers most often perform while systematically and purposefully excluding the types of nurturing fathers most often perform. No effort is made to hide the bias.

In some definitions, the very first credit on the list of factors to be considered goes to that parent, regardless of gender, *who has devoted significantly greater time and effort than the other in . . . breastfeeding.*⁵²⁰ The definitions often do not limit how far forward in time credit is to be extended for having performed such services in infancy.

While the historic role of breast feeder certainly should have little relevance to the residence of an adolescent who is contemplating the merits of rival street gangs, the more fundamental problem is the exclusion of consideration for the father's efforts and involvement throughout the child's life. No one seriously disputes the role of father absence in street gang formation, teenage pregnancy, and other pathologies yet the *primary caretaker* theory remains fixated on *mothering* and ignores *fathering*.

Even on tasks where simple physical labour is involved, the *primary caretaker* theory aggressively asserts that what traditionalists called *women's work* is meritorious while *men's work* is irrelevant. The typical *primary caretaker* definition gives credit for shopping but denies credit for earning the money, which permits the shopping. Credit is given for laundering the little cricket or netball uniform but not for developing the interest in cricket or netball or providing a role model in settings outside the home; for vacuuming the bedroom floors but not for cutting the grass or repairing the leaking tap, and for chauffeuring the children but not for commuting to work or maintaining the car.

Generally, the items that are counted in accumulating primary caretaker points are not matters of supreme difficulty or matters where abilities are differentially distributed. For example, the usual definition gives points for *planning and preparing meals*.

To establish a custody preference on the basis of opened-can counts is an affront to all parents and hardly squares with our understanding that many women entered the paid workforce precisely because they were *stunted* by the repetitious tasks of daily childcare. Most unreasonable is the *primary caretaker* theory's contempt for paid work. Time spent shopping counts—paid work does not. Often, grocery shopping, clothes shopping, and other shopping are counted separately. A single afternoon of shopping can be counted several times over but paid work is the only thing that permits the shopping. Who is really providing the childcare?

The gender bias inherent in the *primary caretaker* theory lies in its insistence that the types of tasks most often performed by women, regardless of the presence of children, are worthy while those of men are not. The biased selection of factors deemed worthy of credit under the *primary caretaker* theory is not the only flaw in the theory. Even if it was possible to remove the gender bias from the selection of *primary caretaker* factors, the theory still suffers from the fact that its *freeze frame* analysis of who-did-what during the marriage ignores the reality that children's needs change.

The best breast feeder may be a lousy cricket coach, math tutor, or spaghetti can opener. What every child needs is the active, extended emotional and physical involvement of two parents, not a division of time based upon historical spaghetti can counts" (Henry 1999).⁵²¹

"The Primary Caretaker As A Prediction of The Best Interests of The Child"⁵²²

If the law supposes that, said Mr. Bumble, *the law is a ass, a idiot* (Charles Dickens, *Oliver Twist*).⁵²³

"The best defense of the 'primary caretaker' theory was presented by Professor David L. Chambers in his article, *Rethinking the Substantive Rules for Custody Disputes in Divorce*.⁵²⁴ "None of the articles since Chambers have matched his thorough analysis and many are bare claims for the mother's ownership and dominion over the child. Thus, Professor Mary Becker (1993)⁵²⁵ writes that:

I therefore suggest that more custody questions would be resolved correctly were we to defer to the decision of the mother with respect to the best custodial arrangement for her child as long as she is fit.⁵²⁶

Chambers, in contrast, laboured to analyse mountains of research and more mountains have appeared since the publication of his article. Nothing before or since his article, however, shows that mothers are better parents or that either parent cannot readily take on the tasks that had been allocated to the other parent during the marriage. What the research does show is that children suffer dire consequences when they are deprived of the active and continuous involvement of one of their parents. No one would suggest that our nation's gang members, drug addicts, pregnant teenagers and school dropouts are suffering from excessive fathering.

The interesting thing about the Chambers article is that, like a good mystery thriller, the suspense lasts until the end. As late as the 83rd page of the article, Chambers advises that *on the basis of the current empirical research alone, there is thus no solid foundation for concluding that children, even young children, will be typically better off if placed with their primary caretaker* " (Henry 1999).⁵²⁷ The lack of empirical evidence causes Chambers to take an uncertain position. He says:

In the end, there is a disturbing tenuousness about the recommendation I am able to make. Research points with only a quivering finger towards the rules that I recommend—indeed, the suggested rules rest in large part not on hard evidence but on theory, clinical observations and even hunch—an educated hunch but a hunch nevertheless.⁵²⁸

The claim by supporters that the primary caretaker preference will reduce litigation by introducing certainty in child residence outcomes⁵²⁹ is not supported by the experience of the American State of Minnesota. It is of more than passing interest to note that in 1985 the Minnesota Supreme Court assessed the suitability of legal standards to promote proper determination of child residence disputes. Consistent with case law development in Australia (*important factor*),⁵³⁰ the court in *Pikula v Pikula*⁵³¹ announced a firm preference for the child's primary caretaker as a measure of the best interests of the child.⁵³² Reasoning that the child's relationship to a primary caretaker provides *emotional and psychological stability*⁵³³ the court deferred to the work of Goldstein, Freud, & Solnit (1973)⁵³⁴ reviewed earlier (the authors *psychological parent* doctrine is a sophisticated variation on the legal presumption for primary caretakers and heralded the preference).

In almost every respect of its rationale, the primary caretaker presumption proved ineffective, and contrary to the expectations of its supporters, caused an explosion of litigation as parents fought to assert their claims over who was the child's chief caretaker. Freed & Walker (1989),⁵³⁵ two respected family law commentators observed that *Pikula spawned an incredible amount of litigation concerning who changed more diapers, the unfitness of parents, and the threshold age at which a child is old enough to express a preference.*⁵³⁶

The Minnesota legislature responding to political and legal pressure rejected the preference in 1989⁵³⁷ and again in 1990.⁵³⁸ The family law section of the Minnesota State Bar Association asserted in an *amicus brief* to the Minnesota Supreme Court in 1988, which referred to feeding and clothing factors that the court used as a determinant of the parent-child bonding, that:

While time spent on these tasks (the Garska-Pikula factors) may very likely contribute to bonding between a parent and his or her child, no empirical evidence has been presented to support the proposition that, in and of themselves, these factors alone produce the intimate bond between parent and child.⁵³⁹

The work by Robinson (1989)⁵⁴⁰ raises doubts about the very existence of a primary parent (in emotional terms) in the average divorcing family:

About half of the parents primary childcare is spent doing...dressing, feeding or otherwise tending to the physical needs of children. Another 15% is spent chauffeuring children to school, to lessons or to other places. The remaining one third is spent interacting with children—talking to them, helping them with homework, or playing with them...While mothers may spend more time caring for their children than fathers do [mothers spend 9 hours a week doing primary child care, fathers spend just as much time in primary interaction as do mothers...To the extent that this is the most

enjoyable and influential time parents spend with children (i.e. 'quality time'), fathers get proportionably more of it...⁵⁴¹

Moreover, in this age frequently both parents work (Delaney 1993).⁵⁴² By necessity, when both parents work, both parents usually share *childcare and household responsibilities* (Bookspan 1995).⁵⁴³ Thus, the determination of exactly who is the *primary caretaker* is even more difficult. With more two-career couples in today's population, the *primary caretaker* is likely to be the day care centre (McIsaac 1989).⁵⁴⁴ Does the *secondary caretaker* beat the *tertiary caretaker*? Unless disqualified from eligibility, the *primary caretaker* theory causes Mum and Dad both to lose residence to the nanny" (Henry 1999).⁵⁴⁵

Furthermore, when parents divorce, frequently the number of mothers who work increases (Dowd 1993).⁵⁴⁶ Therefore, when both parents work, the presumption that the mother is nearly always the primary caretaker is further weakened. Single parent overload also short-changes the children (Robinson 1989; Bianchi 1990).^{547, 548} Robinson (1989)⁵⁴⁹ writes:

Children (living in single-parent households) receive 2 to 3 fewer hours of care per week from the custodial parent than do children living in two-parent households. Children who live with their mothers, then lose 3 hours per week of care from their mothers, plus 3 hours a week of care by the absent father...As more mothers...become single parents, the amount of time children spend with (both) parents is likely to fall.⁵⁵⁰

Regarding the Family Court's application of the primary caretaker standard to determine child residence, Professor Warshak (1992)⁵⁵¹ states:

I do not believe it makes any sense to equate the amount of time a person spends with a child with that person's importance in the child's life. Research indicates that we cannot even assume that, the more time a parent interacts with a child, the better their relationship will be. In fact, we all know of parents who are too involved with their children, so-called smothering parents, who squelch any signs of their child's independence...

.... Is the primary caretaker the parent who does the most to foster the child's sense of security, the person to whom the child turns in time of stress – the role most often associated with mothers? Or is it the parent who does the most to promote the child's ability to meet the demands of the world outside the family and to make independent judgments – the role most often associated with fathers? We really have no basis for preferring one contribution over the other. Both are necessary for healthy psychological functioning.⁵⁵²

Clearly, neither parental contribution should be denigrated in determining post-divorce childrearing privileges or responsibilities. Since both roles were essential for child welfare, since both parents may be presumed to have had at least a tacit agreement to these role divisions, and since in many families the roles are not mutually exclusive and may involve a considerable amount of overlap, the pre-divorce parenting roles should not be the basis for post-divorce parenting time and should not place either parent at a disadvantage in residence disputes.

If many fathers are behaving according to their societally prescribed roles as primary familial breadwinners, then it is patently unfair to deprive them of a meaningful relationship with their children simply because they spend their day in the workplace to provide for their children, rather than in the home caring for their children in person. Both

forms of care taking are essential to raising children, and one should not be perceived as more worthy than the other.

It is blatantly clear that post-divorce lifestyles are markedly changed for all parties concerned, and a consequent redefinition of roles and privileges is essential. For example, to expect mothers to be dependent economically on their divorced spouses neglects their capabilities to become self sufficient, productive wage earners, and in fact may promote attitudes of learned helplessness. For many non-resident fathers, the orientation is that of a second-class citizen placed outside their child's mainstream, useful only as a source of continued financial support. For many resident mothers, this unequal post-divorce situation results in the feeling of continued economic dependency, a need to support the child on a reduced financial base since two households must now be maintained, and the inability to move forward into new employment opportunities because of the heavy childrearing burden essential in sole residence.

What is often not noticed however is that application of the primary caretaker principle rests upon a more important and general presumption – namely the presumption of sole residence. The presumption is that one parent alone, rather than both parents together should have day-to-responsibility of the children following divorce.

The Parental Agreement Debate

There is the myth in some mental health, legal and judicial thinking that joint custody can only be effectively undertaken by cooperative parents. To the contrary, joint custody provides one of the best methods of stimulating a degree of significant and meaningful cooperation in warring parents who would otherwise continue years of battling to the detriment of their children. The years of battling are particularly ferocious as one parent abuses the power of sole custody and the other parent fights the abuse in an attempt to gain back his or her lost parental identity (Williams 1988).⁵⁵³

A further important debate concerns whether courts should make orders for joint residence over the objections of one of the parties. Opponents maintain that for joint residence to work there should be maximum co-operation between the parents – a parent who is coerced into joint residence is unlikely to co-operate.⁵⁵⁴ Critics also say that if joint residence becomes a preferred court-ordered option the potential non-resident parent (usually the father), is given greater bargaining power and leverage in the separation process by raising non-serious claims to joint residence.⁵⁵⁵

All of these arguments have merit. However, as noted earlier, there are no empirical studies, which support the speculative concerns (Maccoby & Mnookin 1992).⁵⁵⁶ Furthermore, it is important also, to look at the other view. If joint residence is only ordered for couples who are agreed then the potential resident parent (usually the mother), has an effective veto on residence outcomes. Under laws which preclude joint residence unless both parents agree, it has been argued that the objecting parent is given inequitable power (Danzig 1980; Kelly 1983).^{557,558} It is submitted that the law should not insist on complete agreement between the parties about what is in their children's best interest. That would be an unrealistic standard and one that parents who live together do not have to meet.

Danzig (1980)⁵⁵⁹ argues that is intellectually dishonest to oppose the awarding of joint residence over the objections of a parent for reasons that are equally applicable to the awarding of sole residence. Court-ordered sole residence, the default residence award is always imposed over the objections of the resultant non-resident parent, and that the court-ordered contact component of such award is often imposed over the objection of the resident parent, all of which is functionally indistinguishable from court-ordered joint residence. Danzig concludes that a joint residence award will force parents to overlook

their personal animosities in order to achieve the stated goal of all residence decisions, namely, the innocent child's welfare.

Gender Bias and Results-Oriented Studies

As the twenty first century unfolds, family law seems no closer to resolving child residence issues free of gender bias than it did in the days of the 1800s when fathers automatically received residence. Despite more than 150 years of evidence that *residence* have been based largely on prevailing social and cultural roles and mandates for men and women, child residence in Australia today continues to be decided with only lip service to the holistic needs of children.

Unfortunately, a second layer of gender bias—gender-biased results-oriented studies, hampers the child residence debate. Rather than contributing to the debate about how best to provide for children of divorce or never-married parents, these studies seek to preserve the *status quo* by denying the existence of gender bias in the first place or finding that gender bias in Family Courts is a uniquely female dilemma. Those trained in the psychological sciences know that it is possible to devise research methodology to obtain desired results (Kelly 1983).⁵⁶⁰

The classic example of such a study is the now-discredited work of gender feminist sociologist Lenore Weitzman. Since its publication in 1985, Lenore Weitzman's *The Divorce Revolution*⁵⁶¹ has had a critical role in shaping the debate on divorce and its economic effects. "In particular, the book's claim that in the year after divorce women's standard of living decreased by a whopping 73 percent while men enjoyed an increase of 43 percent⁵⁶² caught the attention of pundits, policy makers, and judges" (Rapp 1996). Her findings were trumpeted in the news media and various publications as proof that divorce laws actually favoured men and that more economic protections had to be given to women of divorce (Abraham 1989; Faludi 1991).^{563, 564} It was the prop upon which much of the child-support legislation of the 1980s rests. The statistic has become one of the philosophical bases for deciding child residence and property division in divorce cases. It has also altered public perceptions of men, women, and divorce.

Amidst the accolades for Weitzman's findings that echoed in U.S. courtrooms, lecture halls, and legislative chambers, a few researchers expressed some doubts about the accuracy of the 73/42 statistic. Some critics charged that her sample—228 people (114 men and 114 women) who had been divorced in 1977-78—was too small to be representative of the national divorced population (the self-selected respondents drawn from divorce case dockets were all from Los Angeles, an area which has its own unique culture of divorce and divorce laws (Abraham 1989).⁵⁶⁵ In addition, *self-selected interviewees often have ulterior motives for agreeing to being interviewed* (Abraham 1989).⁵⁶⁶ These methodological concerns, however, received little play in the press, and Weitzman refused to let other researchers examine her data set, shielding her research from further scrutiny (Abraham 1989).⁵⁶⁷

The American Sociological Association awarded *The Divorce Revolution* its 1986 Book Award for *Distinguished Contribution to Scholarship* (Abraham 1989).⁵⁶⁸ Weitzman repeated the 73/42 statistics when she testified before the U.S. Congress, and legislatures across the U.S. revisited their divorce laws in response to her claims (Weitzman herself takes credit for influencing 14 laws in California alone). The attention culminated with the statistic's appearance in President Clinton's 1996 budget proposal as part of his attack on *Deadbeat Dads*" (Associated Press 1996).⁵⁶⁹

The problem was that Weitzman's numbers were woefully inaccurate, a conclusion shared by independent researchers, feminist researchers, and, eventually, even Weitzman herself. For example, as recounted by feminist author Susan Faludi (1991),⁵⁷⁰ Weitzman purported to base her study on a methodology advanced by Saul Hoffman, an economist at the University of Delaware, and Greg Duncan, a social scientist (Faludi

1991).⁵⁷¹ Upon learning of Weitzman's claims, Hoffman and Duncan attempted to contact her to discuss the discrepancies in their own findings that, using the same methodology, post-divorce women suffered a much smaller and temporary decline in their standard of living of 30% (Hoffman & Duncan 1988).⁵⁷² The two also found that divorced women's standards of living actually rose within five years to a figure higher than that obtained while married to their former husbands (Faludi 1991).⁵⁷³ After sidestepping Hoffman and Duncan for more than four years, Weitzman finally supplied her data to them, but the data were disorganised and unreviewable (Abraham 1989; Faludi 1991).^{574, 575}

Accordingly, Hoffman and Duncan ran the data supplied by Weitzman in her book, and they still received a figure closer to their much lower number (Faludi 1991).⁵⁷⁶ When they published their findings demonstrating that the Weitzman figures were *almost certainly in error, suspiciously large*, and inconsistent with her own information, this news was hardly reported by the news media at all (Faludi 1991).⁵⁷⁷ Similarly, the U.S. Census Bureau confirmed in a study that Weitzman's 73% number was wrong and inconsistent with her own information (Faludi 1991).⁵⁷⁸

"In June 1996, Richard Peterson of the Social Science Research Council published a study of Weitzman's 73/42 statistics, which was arrived at using an *income/needs ratio*. After precisely recreating Weitzman's study using the data sample and methods outlined in *The Divorce Revolution*, Peterson reported his findings (Peterson 1996a; 1996b).⁵⁷⁹ ⁵⁸⁰ Weitzman's figures were actually the result of a computer transcription error and dramatically overstated the case. After correcting her errors, Peterson arrived at a 27 percent decrease in the standard of living for women and a 10 percent increase for men in the first year after divorce (figures more in line with other studies dealing with this topic—earlier work by Hoffman reported a 6.7% decline for divorced women compared to Weitzman's 73% (Hoffman & Holmes 1976; Hoffman 1977).^{581,582}

As horror stories of a 115 percent disparity between men's and women's post-divorce standard of living made their way through editorial boards and the legislatures, Weitzman ensured the success of her 73/42 statistic by refusing to allow other researchers access to her data, claiming that she wanted to correct some errors in the master computer file before doing so. She had every right to do this, at least at first, explains Richard Peterson (*there are some norms that are generally accepted. If you collect data you have the right to keep it to yourself and not be required to share it with others until you publish from your data*).

But when Weitzman's data files arrived at the archives of the Murray Research Center at Radcliffe College she had still not made the corrections, and what started as the exercise of her rights as a researcher began to look suspiciously like ten years of stonewalling. She reserved to herself the right to veto anyone from looking at the material and turned down Peterson's requests. It was not until a year and a half had gone by and the National Science Foundation, the organization which had funded Weitzman's research, threatened to declare her ineligible for federal grants in the future that she finally allowed Peterson to examine the data. Once given access to the files, Peterson began to recreate Weitzman's study using exactly the same self-selected 228-person sample and the methods described in her book. He found that the information in Weitzman's computer file in many cases did not match up with the paper records of the original respondent interviews.

The computer file was supposed to be coded from the paper records, but the file in fact did not reflect the paper records. For example, suppose the computer file said a person's income for the preceding year was \$27,000, when Peterson examined the paper records it turned out that it was \$37,000. After correcting the data file, Peterson arrived at figures more in line with other studies, with women's standard of living decreasing by 27 percent in the first year after divorce and men's standard of living increasing by 10 percent. Because his corrected figures may actually still overstate the inequalities in the economics of divorce, Peterson's revision of Weitzman's numbers may ironically

continue the distortion of the truth. As the media slowly begins to use Peterson's calculations to correct its uncritical acceptance of Weitzman's 73/42 statistic, it may lose in the shuffle the growing body of scientific and anecdotal evidence indicating that both women and men suffer economically after a divorce."

Atlee Stroup, professor emeritus of sociology at the College of Wooster (Ohio), felt that Lenore Weitzman's numbers were too extreme to be accepted at face value. *A general feeling that this ought to be evaluated very carefully* led him to think about doing some kind of study. The National Opinion Research Center, a sociological organization affiliated with the University of Chicago, provided Stroup with the data sample he needed to ensure that the study he undertook would avoid Weitzman's parochialism.

Every year, the Center surveys roughly 1,500 adults, creating a national data sample representative of the major socio-economic segments of American society. Along with Gene Pollock, a professor of economics at the College and an expert statistician, Stroup combined the surveys from the years 1983-1987, creating a cumulative data set of close to 7,500 respondents (Stroup & Pollock 1994).⁵⁸³ Armed with this sizable, national data bank, Stroup & Pollock brought their considerable experience (a combined seven decades of research and teaching) to bear on the question of the economic repercussions of divorce.

They found that women and men, at every socio-economic level, experience a decline in income after divorce. According to their data, women in the first year after divorce experience on average a 22 percent decline in family income, with professional women's family incomes declining the least (12 percent) and unskilled labourers declining the most (30 percent). These figures were far less dramatic than Weitzman's 73 percent, and comparable to, although still lower than, other studies methodologically similar to Weitzman's, which suggested an average 30 percent decrease for women.

When they looked at the status of men, however, Stroup & Pollock uncovered surprising information. Keeping in mind the suggestion of Weitzman and others of economic gain by males with divorce, they wrote, the results are sharply contrary to expectations. Instead of the 42 percent increase reported by Weitzman or the more common 10 percent figure, the data indicated an average 10 percent decrease in income, with professional men experiencing a decline of 8 percent and less-educated workers a drop of 19 percent. Stroup & Pollock wrote that Weitzman's sharp generalization of a 42 percent rise in living standards for males certainly does not hold for our sample. More importantly, their findings presented an implicit challenge to the studies that reported lower figures than Weitzman but still agreed with the conventional wisdom that men benefit from divorce.

The findings of Stroup & Pollock, first presented at a conference of the National Council on Family Relations in 1992, initially attracted only a modicum of attention, Weitzman's claims having by that time achieved a hammerlock on U.S. public opinion. Unfortunately (and equally unsurprising given the current zeitgeist concerning these issues) observers in academia, government, and the media failed to acknowledge the implications of Stroup's & Pollock's research, and the promotion of Weitzman's 73/42 statistic proceeded apace" (Rapp 1996).⁵⁸⁴

In 1998 Stanford Braver a psychology Professor at Arizona State University together with colleague Diane O'Connell published the results of an eight-year study of 400 divorcing couples in Maricopa County, Arizona (Braver & O'Connell 1998).⁵⁸⁵ The survey funded by several federal grants, revealed several surprising findings that directly challenge current thinking about divorced fathers. Dr. Braver began his research intending only to refine the received wisdom, but his empirical data changed his own mind. The prevalence of the myths he has exploded raises serious questions about the entire structure of social science, on which our nation's public policies are based, and the susceptibility of

statistics to manipulation by gender-biased academics (Cooke 2001). For example, Dr. Braver refutes six key anti-father myths one-by-one. He writes:

- Divorced dads are not overwhelmingly deadbeats in terms of child support compliance. They actually pay far better than assumed, especially if they remain fully employed;
- Divorced dads are not overwhelmingly disappearing or runaway dads. Most continue a surprisingly high amount of contact with their children, and much of whatever disconnection does occur can be attributed directly to mothers impeding or interfering with visitation;
- Divorced fathers do not end up noticeably more economically advantaged by divorce than mothers... in the long run, many divorced mothers will surpass divorced fathers in economic well being. Divorced mothers and children do not disproportionately end up in poverty, and those few who do almost without exception would continue to be in that state whether or not their ex-husbands paid full child support;
- Divorced fathers are not far better satisfied or advantaged in the negotiations leading to their divorce settlements. In fact, fathers are significantly disadvantaged and dissatisfied compared to mothers, who feel more in control of the settlement process than fathers;
- Divorced fathers are not more content and better emotionally adjusted after divorce than mothers. In fact, overwhelming evidence suggests that they are far more emotionally devastated by divorce than mothers. Only with respect to calming their anger more quickly than their ex-spouse do fathers have an emotional advantage over mothers; and
- Fathers do not generally trigger the marriage's demise by abandoning their wives and families

Although he found some divorced fathers who fit the stereotype, most are responsible, loving parents, debunking the myths.

“Not only does Dr. Braver exonerate so called *Deadbeat Dads*, he also documents a number of ways in which sole residence mothers misbehave. The big thing mothers do is deprive children of their lawful contact to their non-resident fathers. The courts are set up to take very seriously the enforcement of child-support payments by fathers, but they assign little seriousness to the issue of children's contact rights. Despite statutory penalties sole residence mothers without reasonable cause can arbitrarily deny court-ordered contact without fear of sanction from the judicial system.

So where did these myths about divorced fathers come from, if untrue? Basically, our society developed a massive emotional desire to believe the worst of divorced fathers. Then social scientists, despite their pretensions to objectivity and hard statistics, lamely translated these biases into research findings. The negative stereotyping of divorced fathers that routinely appear would get people indicted if it were applied to minorities, women, or any other category of person.

Professor Braver suggests that our society is experiencing a great deal of stress over the ongoing decay of the traditional family and needed to find a scapegoat—*Deadbeat Dads* conveniently appealed as scoundrels, guaranteeing support and ideological cover on both sides of the political spectrum. There was also an appeal to a pseudo-scientific version of socio-biology, which claimed that it is the nature of males to seek polygamous or serial-monogamous relationships because of an evolutionary incentive to spread their DNA around. This has been called the *Darwin made me do it* defence and raises obvious questions on its own” (Locke 2001).⁵⁸⁶

Despite continuous efforts from equity advocates to modify these stereotypical images, they still persist today. In no greater sphere do these outdated fictions persist than in our nation's Family Court system. There, the state frequently not only denies the capability and desire of many men to participate actively and meaningfully in the care of their children, but also perpetuates the subjugation of women as mothers by deeming them weak and incapable of survival without the support of a man (Mitchell 1995).⁵⁸⁷ This state-instituted romantic paternalisation of mothers, combined with the narrowed view of the role of fathers, is largely responsible for the wholesale destruction of the post-divorce, father-child relationship (Stephens 1996).⁵⁸⁸ Consequently, as the research reviewed above clearly documents, the state creates increased psychological, educational, behavioural, and health disorders for children, and crime and violence for society.

Paradoxically, society maintains its insistence that it wants to promote women's independence by setting them free of the constraints of a bad marriage through state-sanctioned marital dissolution,⁵⁸⁹ while at the same time operating a system that expects, permits, and maintains the outdated role of women as the weaker and dependent sex, primarily responsible for care giving and incapable of economic self-sufficiency.⁵⁹⁰

"The other great intellectual rogue of divorce mythology is Lenore Weitzman's notorious divorce statistic. At first, Braver found himself thinking that if women experience a 73 percent decline in living standards while men's substantially increase after divorce, family law policies are needed that bring more balance. But then he began questioning Weitzman's calculations. He found almost certainly that she had mistakenly switched around two figures. It turns out that her finding was based on a simple misprogramming of the computer analysing the data, which reveal that mothers end up with 73% of their former standard of living (a 27% drop) not 73% less. When he telephoned Weitzman to explore this possibility, she admitted that such an error was possible. But it took seven years until she publicly admitted her findings were erroneous.

This was not an innocent *computer error*. The computer did what it was supposed to do – the investigator mangled the result. Professor Braver, who investigated this blunder and gave Dr Weitzman a chance to respond, documents her mendacity and evasive behaviour throughout this disturbing episode. The idea that vast policy changes can come from such incompetence is nothing less than mind-boggling. This incident needs to be treated as the *My Lai* of social science, which needs to be dethroned from its privileged position in policy formulation.

While attempting to duplicate Lenore Weitzman's findings, Braver and his colleagues discovered not only the reversing of the two figures, but that other important factors had never been included in any previous calculations. As noted above, several of her critics' alternative calculations still showed a drop for women and a rise for men. All those researchers, Braver shows, made one big mistake – they didn't factor in the tax code, which favours the sole custody mother. They also omitted such things as the non-custodial father's spending on children during contact. Professor Braver *expected these factors to narrow the gap, but was stunned that taking into consideration something as commonplace as taxes would virtually eliminate the gap*. After these adjustments, the economic effects of divorce are similar for both sexes – mothers may even have a slight advantage.

But the most disturbing thing Dr. Braver shows has nothing to do with divorced families *per se*, but pertains to the shabby standards of results-orientated social science research. Lawmakers and courts take this research, which forms the picture of society on which government policy is based, not to mention the general public, as being simply objective truth. He documents in devastating detail the degree to which sloppy research standards have opened the door to gender bias. Properly disciplined research has epistemological safeguards built in to protect it from the prejudices of the researchers.

Naturally, this makes one wonder what other received truths of our society are myths generated by biased research" (Locke 2001).⁵⁹¹

"For over a decade and a half, statistics like Weitzman's – which suggest that women suffer tragically from divorce while men blithely benefit – have been at the centre of the national discussion of divorce and its economic effects. They have served as what some call *aha!* statistics, appearing to confirm in dramatic fashion the worst expectations about the social system. In Weitzman's case, the 73/42 statistics suggests at bare minimum a jarring unfairness, perhaps even an outright misogyny. It is easy to see how for gender feminists it would become part of a wish-fulfilling fantasy" (Rapp 1996).⁵⁹²

Bettina Arndt (1996)⁵⁹³ referring to research by Dr Peter MacDonald at the Australian National University (Canberra) writes:

The dramatic shift in financial fortunes that occurs when the marital cake is cut in two was clearly demonstrated by statistical data. One of the more intriguing results concerned the difference between the assets of divorced men and women.

We found, for example, that in all age groups substantially more divorced women own or are paying off their own homes than divorced men. With 40-44 year olds, almost twice as many divorced or widowed females (46,100) own or are acquiring homes than the equivalent men (23,700). By their late 50s, almost two thirds of these women had home assets.

Looking at these figures, we might remember that Lenore Weitzman claimed, as absolute fact, that men were invariably better off and women invariably worse off after divorce... so as usual, we might notice a rather large disparity between gender feminist theory and physical fact... and it's males who bear the brunt.⁵⁹⁴

"The real power of statistics is cultural, their ability to shape the way society thinks, discusses, and acts. Peterson (1996a & 1996b)⁵⁹⁵ has corrected the errors in Weitzman's study, but has given a veneer of legitimacy to the conclusions, which for fifteen years decision-makers in the media, academia, and government have drawn from. While the 73/42 statistic may have reached the end of its shelf-life, the idea that divorce catapults non-resident fathers into some sort of financial *Elysian fields* will likely continue to influence public policy and discussion, at least until researchers like Stroup & Pollock (1994)⁵⁹⁶ and Braver & O'Connell (1998)⁵⁹⁷ get the attention they deserve" (Rapp 1996).⁵⁹⁸

Lenore Weitzman has admitted the charges against her for which she has never been disciplined (see Weitzman 1996).⁵⁹⁹ Yet the damage was done. Many policy makers and judges failed to recognize the clear error of Weitzman's work and conclusions – this failure, in retrospect, made sense – her study told them what they wanted to hear. She confirmed the prevailing cultural bias that women were the *weaker sex* and, accordingly, in need of paternalistic government intervention and protection. She also confirmed the prevailing cultural bias that men did not need such protection. This attitude, demonstrated here in economic considerations, likewise prevails in child residence considerations.

What is troublesome about the current family law debate is the extent to which immoderate and unscientific views have influenced the policy recommendations of bodies such as the Family Law Council. In 1992, the Council without the benefit of supporting empirical data explained its opposition to joint residence in the following terms:

Council's view is consistent with feminist criticism of the model, i.e. the model facilitates control over the child and the mother by the father, not a shared program of day-to-day care and residence.⁶⁰⁰

The serious problem of sloppy scholarship and results-oriented research bias bearing on the central issue of joint residence is demonstrated by the April 1992 Family Law Council report *Patterns of Parenting After Separation*.⁶⁰¹ (Hereinafter *Patterns of Parenting*). The paper produced for the Minister of Justice and Consumer Affairs was submitted by the Council to the 1992 Joint Select Committee examining the operation of the Family Law Act 1975 (Cth).

While concluding that children's access to both the financial and emotional resources of each parent is a desirable goal, the Family Law Council refused to endorse any guideline for a rebuttable presumption of joint residence after divorce.⁶⁰² Even with strong provisions for exceptions based on spousal violence, child abuse, substance abuse, or other impediments, the Council was unwilling to endorse a recommendation for a marginal 30%-70 % time-share standard.

The bias against a presumption of joint residence was observable in several Council actions. For example, bias was clear in the uncritical acceptance of feminist testimony opposing joint residence (e.g. the work by Lenore Weitzman critiqued above) and the ignoring of substantial supportive research. Second in its brief survey of family law in the United States, *Patterns of Parenting* reviewed several U.S. jurisdictions enacting the Council's preferred model of a change in family law terminology (e.g. Florida, Maine, & Washington state). However, no comparable analysis of the states enacting presumptive joint residence laws was made (e.g. Louisiana, Montana, New Mexico). To maintain consistency with other Florida statutes, the Florida Shared Parental Responsibilities Act allows some remnants of the custody and access language to remain in some circumstances).

It is of some interest to note that terms *custody* and *access* are absent from the 1987 Washington Parenting Act, which refers instead to *parenting functions* and *residential schedules*. The statute has proved to be so unappealing to the general community and many lawyers, that in 1989, two years after its enactment, joint residence supporters obtained 135,000 signatures opposing the law.⁶⁰³ Moreover in 1997, the Florida Legislature passed a bill⁶⁰⁴ stating that *rotating custody* is a viable option for judges to consider when determining custodial arrangements (Rotating custody means that parents who live within the same community can split residence of the child fifty-fifty, such as where the child lives one week with one parent, and a subsequent week with the other parent).

To further prop its wobbly opposition to joint residence, the Family Law Council after citing Lenore Weitzman, misrepresented California joint custody law as a preference statute and wrongly advised that the law was repealed in 1988.⁶⁰⁵ This advice was central to Council's recommendations against joint residence.⁶⁰⁶ In fact, the statute states a presumption in favour of joint custody only when parents agree to such an arrangement and lists joint custody and sole custody as co-equal options when parents cannot agree (Nygh 1985; Mclsaac 1989).^{607, 608} Section 4600.5 (a) of the California civil code creates a presumption for agreement and it was not repealed.

After stonewalling the writer for approximately 18 months, the Council acknowledged that its advice was wrong. However, it refused to accept responsibility for the misinformation or to correct it. The refusal was based on the flimsy argument that the 1996 Family Law Council as constituted did not make the misrepresentation, nor did it know how the inaccuracy occurred (letter from Jennifer Boland, Chairperson, Family Law Council 14th June 1996). In like fashion, the Family Court is unwilling to correct the identical misadvice contained in its submission to the 1992 Joint Select Committee.⁶⁰⁹ Despite the Family Law Council's acknowledgement that the advice on California child custody law

was false, the Court stands by its incorrect reporting (letter from Len Glare, Chief Executive Officer 7th August 1996).

The unwillingness to accept responsibility and the lack of attention to academic canons raises serious questions about objectivity and responsibility. The misleading of a Federal Minister and the 1992 Senate inquiry are other serious concerns. In this context, it is important to note the California pretext was also repeated in New Zealand by government policy-advisors to a recent parliamentary review of family law in that country (see, Hall & Lee 1994).⁶¹⁰

The catalyst for gender feminist opposition to joint residence was not the failure of joint residence, but the latest round in a political struggle that is painfully analogous to a courtroom battle between husband and wife. As recently as 1996, NOW, a gender feminist organization based in California issued *National Conference Resolutions* announcing that the group was preparing a counterassault against all father advocacy organizations in the United States, because their recent successes—primarily legislation that inched fathers minimally forward to permitting them to spend more time with their children—threatened *all women*.⁶¹¹

The gender feminist movement was strangely silent during the early debate when joint residence clauses were introduced in the 1980 California Civil Code. With the 1985 publication of *The Divorce Revolution*.⁶¹² silence ended with a roar. The joint custody opposition found an articulate advocate in Lenore Weitzman, who *based largely on a speculative interpretation of her interview data*, concludes that fathers are not really interested in obtaining custody (Abraham 1989).⁶¹³ Their real motive lies in threatening a custody battle to exhort reduced claims for support from their ex-wives (Abraham 1989).⁶¹⁴

Since by contrast, mothers normally assume primary responsibility for the care of the children during marriage and genuinely desire sole custody after divorce, the law should enshrine these tendencies in a primary parent presumption favouring sole custody to the mother and allow joint custody only if the parents (in effect the mother) agree to it (Abraham 1989).⁶¹⁵ Thereupon the parent with sole custody *can justly assert a greater need for the family's resources* (Weitzman 1985).⁶¹⁶

In his searching critique of *The Divorce Revolution*, Hugh Mclsaac (1986),⁶¹⁷ Director of Family Court Services for the Los Angeles Conciliation Court, adeptly unfolds the extent of Lenore Weitzman's malice towards joint custody. The reviewer-expressed concern that what began as research had become advocacy for a particular point of view.⁶¹⁸ He pointed out that Weitzman failed to cite a single study supportive of joint custody⁶¹⁹ and had incorrectly characterised California's joint custody law as a preference statute.⁶²⁰

Evidence which Weitzman claimed indicated that parents who were responsible for child support in joint custody had no better record of compliance than parents in sole custody was also misrepresented, making the opposite conclusion from the research itself. In fact, investigators found a statistically significant relationship between joint physical custody and support compliance. *When asked by a member of the research team about this error, prior to the publication of The Divorce Revolution, Weitzman's response was, 'It is too late to change'* (Mclsaac 1986).⁶²¹ Mclsaac went on to say:

These vignettes reveal a central reason for some of the problems with Weitzman's analysis: Does she tend to present her information in a way favourable to her point of view? Rather than reviewing relevant information dispassionately, has the researcher-turned-advocate shaped the data to buttress the outcome she wishes to achieve? Has myth become reality? Has the need to understand and explain become the end rather than the means (Mclsaac 1986).⁶²²

Misandry has been defined as *the attribution of negative qualities to the entire male gender* (Arnold 1991).⁶²³ Today, it is politically correct within our culture to belittle and berate men, although the very same treatment toward women could result in a civil lawsuit (Farrell 2001).⁶²⁴ This is selective discrimination. Rather than disseminating anti-father propaganda that devalues fathers. It is time to realistically and fairly define the post-divorce relationships between the child and both parents on the basis of what can be demonstrated by substantial scientific evidence to be in the best interests of the child.

In marked contrast to that espoused by prejudiced myopic ideology, the research reviewed earlier in this paper shows fathers in joint residence are less litigious, have greater compliance with child support orders and are more involved with their children. Researchers for the Family Law Council, the Family Court of Australia, the Institute of Family Studies, and Australian Law Reform Commission, have often referred to *The Divorce Revolution* as an authoritative source in submissions dealing with social policy, but they have never acknowledged the major criticisms levelled at this tainted work.

As McIsaac (1989)⁶²⁵ puts it, "We need thoughtful, careful research, not narrow advocacy that plays parents against each other like scorpions in a bottle."⁶²⁶

Summary

While there are studies which run contrary to some of the points made in this review, those studies are relatively few, and there is no single area in which the bulk of the studies runs counter to the conclusions drawn here. Acknowledging that all research evidence is probabilistic, it is nonetheless quite possible to arrive at conclusions to guide public policy based on the currently available research literature. The accumulated evidence suggests that children who are not forced to divorce a caring parent are more likely to be better adjusted after divorce.

The following synopsis of data on joint residence leads to the conclusion that a rebuttable presumption in favour of joint residence is preferable to the judicial *flip of the coin* currently being employed as a solution in the average case before the Family Court.

The American Psychological Association (1995)⁶²⁷ the world's largest organization of practising psychologists, in an objective analysis of this body of research. began with the following statement:

A search of the empirical research specific to joint custody was conducted. Major databased studies available at the time of this review have been individually summarised and evaluated relevant to findings and adequacy of the methodology as requested. While flawless studies on such a complex subject are extremely rare as indicated by the evaluations, the goal of this report is to provide a synthesis so that... policy recommendations may be predicated on the best available empirical base. To minimize some of the confusion in such a highly charged area of study, this review focused on the weight of evidence as determined by both replication of findings and consideration of methodological rigor.

The document then reviewed results from 23 studies, providing abstracts of each and summary findings according to criteria of:

- Best interests of the child standard,
- Father involvement,
- Relitigation and costs to the family,
- Financial child support, and;

- Parental conflict.

On each of these criteria, the report supported the conclusion *that joint custody is associated with favourable outcomes*. The report further noted that:

... the need for improved policy to reduce the present adversarial approach that has resulted in primarily sole maternal custody, limited father involvement and maladjustment of both children and parents is critical. Increased mediation, joint custody, and parent education are supported for this policy.

Conclusion

In the past decade, the welfare of children has become the most important social issue we have, given its relationship to enormous increases in violent crime, and to youth and father suicide. As a society we seem to be getting worse in bringing up children. This might suggest that changes to the way we bring up children—such as the increased divorce rate have been bad. It is now well established that divorce has harmful long-term effects for many children and that the rise in violent crime has followed increases in the number of never-married single parent and divorced families.

The purpose of the research is not to stigmatise parents and children in single and divorced households or to suggest that such children are doomed to a life of crime but to let everyone particularly government policy makers know that, for the well-being of children and the good of society certain sorts of family are worth encouraging. The argument is that families are by far the most important factor in the socialisation of children and that, on average intact and when divorce occurs, joint residence families do this much better than other sort of families.

The research to date points to the need to re-examine the ways in which couples divorce in our society and the role that the extended family, friends, mental health professionals, lawyers and the courts play in the process. Too often there is unconscious and conscious encouragement of hostile and destructive divorce actions that then have long term consequences for all family members. The surprisingly cavalier termination of parental and other important extended family relationships that had meaning to children prior to divorce should also be scrutinised.

Parental *absence* is one of our nation's most serious problems of youth. Everything we know about the needs of children teaches us that it is in the best interest of children to maximize the involvement of both parents for the benefit of the child. The amount of time a parent spends with a child directly affects the parent's competence in dealing with the child.

To see the importance of joint residence, consider how you, as an adult, would feel if you could see your children only four days a month. Like most parents, you would miss them terribly, even with your adult level of emotional maturity. Children, with their fragile, still-developing emotions, often suffer much more. Children naturally love and need both parents. Joint residence is the means of preserving the child's right to two parents and, where both parents seek to continue their role as parents, the court should reduce neither parent to a mere *visitor* unless the other parent comes forward with a valid reason to do so.

As the divorce rate continues to climb, non-resident fathers and their children are increasingly being separated not by choice. The question *Why are absent fathers absent?* is better replaced by the question *How do so many persevere, and hold on, despite reluctance by judicial officers to enforce parenting orders and other pressures to give up and disappear?* The evidence is overwhelming and demands that we re-examine the wisdom of conventional care taking of children following the terminating a marriage. Unless you believe that a father's value to his children diminishes after divorce, it is hard

to justify a family law policy that routinely and automatically disrupts the divorced father's relationship with his children.

The notion that only mothers are important to their children is certainly false; it is time to jettison it from family law policy. If the treatment fathers receive in the Family Court occurred in the workplace, an affirmative action plan would likely be implemented to rectify the pervasive discrimination and barriers fathers encounter as they seek meaningful contact to their children in Family Courts.

Emotional, legal, social, and financial pressures to drop out are usually overpowering and unrelenting. Paradoxically, this comes at a time when father-child relationships are being redefined as a result of fathers reintegration into family life. That is, more and more fathers are currently find themselves separated from their children at the same time they that they are being urged to take a more active role in their child's growth and development. One significance of divorce, therefore, lies in creating not only father absence for the child, but also one of child absence for the father.

In spite of all the data available, the legal profession has been slow to recognise that the present system must be changed in the best interests of all parties. This resistance to change is based on disbelief that competitive parents can share the nurturing of children. Part of the resistance rests on the underlying assumption that divorcing parents are unable to separate their marital differences from their parenting responsibilities, and that it is necessary for the legal system to intrude and award the children to one parent over the other. But human nature is flexible and the legal system has to recognise that warring ex-spouses can still be joint parents and the responsibility for encouraging joint residence is part of the legal system now.

As long as parents and the legal profession assumed that exclusive residence was inevitable, (*somebody had to lose*) as long as everyone believed that sole residence, no matter how painful, was really best for children, and as long as no one was examining the psychological effects of sole residence, then exclusive residence rulings went unchallenged. The worst that people saw was a messy courtroom battle and hard feelings between parents, which all the courtroom participants expected anyway. Suddenly however, we are seeing a very different situation as a result of the combination of factors already discussed. We are also admitting more openly the destructiveness and barbarity of the courtroom adversarial process when it is applied to child residence disputes.

As a society, we must move into the new century armed with realistic legal practices, which protects the interests of all members in the separated or divorced family. The continuation of the de-facto presumption for sole residence, simply, will not do. Even a cursory look at the research documents that children are victimised by sole residence decisions in at least three ways—emotional victimisation, economic victimisation, and increased risk for child abuse.

We now have had the advantage of approximately 25 years of research to inform our legislative decisions. It is time to act on this accumulated wisdom. If the choice is to continue as is, maybe in another 25 years we will be in the same position as we are today or perhaps our social condition will deteriorate even further. How then will we answer a new generation of lost children?

As long as residence is an either/or arrangement, the great pain of loss that children and their non-resident parents suffer and the equally great pressures that the resident parent must feel will continue to show up as the damaging aftermath of divorce. The terrible pity of it is that it need not be this way. However one looks at the future of divorced couples and their children (or for that matter, the future of successful intact families), logic and research is on the side of joint residence as the presumptive first choice.

With legislative support for joint residence, divorced parents can develop the kind of working relationship that children and the parents themselves deserve. As distinct from the damage now being wrought by sole residence, itself often thoughtlessly accepted even sanctioned by some legal and health professionals a more positive, richer life may well be the consequence for all concerned.

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⁸ *ibid*

⁹ In order that the child's fundamental right (i.e., human right) to receive maximum exposure to both parents and their associated kinship, child care should be split equally, or at the very least should resolve itself into a two-to-one split. However, this is obviously dependant on the individual circumstances of the post-divorce family. Such an arrangement will also ensure that the task of the physical and emotional care of the child is equitable shared between the parents.

¹⁰ Schulman J, & Pit V. Second Thoughts On Joint Custody: Analysis of Legislation and Its Implication For Women and Children. 12 (1) *Golden Gate Univ. Law Review* (1982) pp 539-579. These feminist commentators oppose the courts having legislative authority to award even limited joint guardianship (i.e., long-term parenting responsibility) over the objections of a parent and strongly advocate a legislative primary parent presumption. Under this doctrine a presumption exists in favour of awarding sole day-day custody (i.e. residence) to the parent who convinces the court that they were the child's chief caretaker during the marriage. The commentators write:

Forced legal custody only serves to interfere with the primary caretakers ability to make the decisions needed to carry out her responsibilities to the child...forced joint custody like forced sterilisation and forced pregnancy is a denial of women's right to control their lives.

But see, McIsaac H. *The Divorce Revolution: A Critique*. 10(5) *California Family Law Report* (May 1986) pp 3069-3072:

...Weitzman's policy recommendation of a primary parent standard ignores the child's epigenetic need for both parents. It also ignores the reality in today's world where 63% of all mothers work outside the home, that the primary caretaker may be the babysitter or day care centre. Whether we like it or not, our world has changed, a nostalgia for outmoded methods whose defects were most apparent in practice, would not serve as well in searching for realistic solutions in the new world. The adoption of Weitzman's new standard, and especially linking this standard to the family home...would change...the parties 'bargaining endowments.' Parents, will be fighting over who is the primary parent to assert their claims over both children and property, and we will return to the acrimony of the fault era. Enough hate and acrimony already exists in the divorce process. The laws of divorce should not promote more hate; rather, they should encourage and reward cooperation and mutual respect (*ibid* at 3071).

Also see testimony by Los Angeles County Court Judge R A Curtis to the Californian Senate Committee examining child custody laws (29 May 1993). Subsequently, the Committee rejected proposals for the enactment of a primary parent presumption. Judge Curtis said:

... the supposedly more modern (but actually archaic) notion that their living arrangements should be determined by trying to define which parent is (or has been) the child's primary caretaker and then presuming that the child's best interest will be furthered by maintaining that status... is a mean spirited attack on joint custody brought upon behalf of angry, embittered parents who are incapable of cooperation in their children's best interest and only wish to bend the court system... to their end of controlling their children and controlling the other parent through their children... Instead of clutching the so called primary caretaker role as the determination of their identity, as the proponents of these measures would have women carve out exclusively for themselves, they should be encouraging men to develop the nurturing aspects of their own characters so that children can have the benefit of two care taking parents in the best sense of the word, both during and after the breakup of a marriage... It is very important that the trial court continue to have the power to impose joint custody on divorcing couples who come to court at the outset of their cases tightly wrapped but in an uncooperative frame of mind. If they are forced to parent under a joint custody order and are given co-parenting instruction and educational materials by the mediator, by their attorney, or by the child's attorney, or by outside agencies, most such parents will learn to put aside their differences for the sake of giving their children a peaceful life and the benefit of having two involved parents... The state should promote healing, growth and balance in the lives of divorcing parents and their children.

¹¹ Roman M, & Haddad W. *The Disposable Parent: The Case For Joint Custody*. Holt, Reinhart & Winston, New York (1978) at 178. The authors write:

As the word implies presumption simply suggests the capacity for, and importance of, sharing parenthood and the very powerful social sanction for such an arrangement. This presumption differs from the current bias which coercively sanctions an arrangement that not only damages all those involved, but that people are nearly powerless to change. As things now stand it is very difficult – financially, socially, and emotionally for men and women to do anything but conform to the irrational bias in favour of sole custody. Under joint custody on the other hand, both parents are equal.

¹² Danzig H. *Presumptive Joint Custody*. 105 *New Jersey Law Review* (1980) p 289. See also, *infra* note 315 and accompanying text (p 142); Lehman G. *The Case For Joint Custody*. *Quadrant* (June 1983); and Lehman G. *Legal Craftsmanship In Custody Cases Or A Joint Custody Presumption*. 14 *Melbourne University Law Review* (June 1984). Lehman rejects the view that in the average residence disposition, the Family Court can determine what is in the best interests of the child, without the aid of a rebuttable joint residence presumption. In such cases, it is argued the search for the better resident parent is a meaningless exercise since both parents are important for the psychological development of the child:

Only recently courts believed that they could determine matrimonial fault. This was an article of professional mythology. The abandonment of fault divorce throughout the western world and its replacement by no fault divorce is an acknowledgment that courts are incapable of making this type of order in many cases. The continuing belief that in custody cases where both parents are fit the court can make a fine evaluation and apply 'legal craftsmanship' to determine the superior custodian is a similar article of professional mythology.

The inability of a judge to determine the best interests of the child in the typical child residence case is described by Chief Judge Hood of the District of Columbia Court of Appeals in *Coles v Coles*. *Coles verses Coles* (204 A. 2d (D C 1964) The trial in *Coles* was reported in over 2000 pages of transcript (*ibid* at 330), and *all phases of the backgrounds and lives of the parties were fully explored*.(*ibid*). Judge Hood states:

The best interests of the child principle is easily stated but its application in a particular case presents one of the heaviest burdens that can be placed on a trial judge. Out of a maze of conflicting testimony which one court called 'a tolerable amount of perjury' the judge must make a decision which will inevitably affect materially the future of an innocent child. In making his decision... the judge must endeavour to look into the future and

decide that the life of a child's best interests will be served if committed to the mother or the father...When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realises that another equally able and conscientious judge might have arrived at a different decision on the same evidence (ibid at 331-332)

The judge in a residence case generally is presented with much highly conflicting evidence. This often includes conflicting testimony of the two parents as to events that only they have witnessed, the parents' self serving statements as to their intentions, and the testimony of the child who may have been influenced by parental persuasion, bribery or coercion. The residence determination must be made at a time when reliable evaluation of the parents by the judge or mental health professionals is difficult, if not impossible. It is an abnormally stressful time for parents and children, and *the behaviour of children and adults toward each other may bear little resemblance to the them past or the future* (Chambers D. Rethinking The Substantive Rules For Custody Disputes In Divorce. 83 Michigan Law Review, 1984 pp 477, 484)

Even if a judge could determine the effects that each potential residence choice would have on a child, he or she must place some value on the effects of the possible living situations on the child (Mnookin R. Child Custody Adjudication: Judicial Function In The Face of Indeterminacy. 29 Law and Contemporary Problems. Summer 1975, p 282; Oakland T. Divorced Fathers: Reconstructing A Quality Life 1984, p 106). Professor Robert Mnookin (*ibid*) concludes:

Deciding what is best for the child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic productivity' of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for the child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that would inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values (ibid at 260-261).

Some have suggested the use of mental health professionals in child custody choices, but they can be of only limited help. They are confronted with the same difficulty that the judge faces regarding unreliable information at the time of divorce. There is little consensus among mental health professionals with respect to the child's psychological development that are basic to the custody decision (Mnookin, *supra*), and many of the factors that mental health professionals agree are needed for the child give little or no help in deciding the typical residence case (Okpaku S R. Psychological Impediment Or Aid In Child Custody Cases. 29 Rutgers Law Review 1976 at 117).

The costs of what professionals consider to be an adequate evaluation prevent courts and most parents from obtaining such evaluations (Chambers, *supra*), and evaluations prepared by experts hired by the parties are typically so biased as to be of little value to courts (Neely R. The Divorce Decision: The Legal and Human Consequences of Ending A Marriage. 1994 at 74). Robert Mnookin (*supra*) in his classic work has demonstrated the fallacy of the assumption that the judge can determine the best interests of the child in every case.

Though it is beyond the ability of judges to balance all of the probabilities concerning future living situations of the child, the judge will have the basis for making the residence decision in some cases. The problem with the case-by-case rule, is not the best interest of the child can never be determined, but that the case-by-case rule incorrectly assumes that the child's best interests can always be determined. The best interests of the child standard should not be abandoned because in some cases judges are able to determine that one residence placement is better for a child than another.

Decision makers however, should recognise that with the limited ability to predict the effect on the child of day-to-day responsibility being granted to either parent and the limited ability to agree on what future would be best for a child, there are many cases in which courts will not be able to determine the best interests of the child. It is argued what is needed is a rule that will establish joint residence as the care taking preference that generally will be in the best interests of children, but one that can be overcome when a parent is able to clearly establish that another arrangement

would be better for the child. Litigation would usually occur only in those cases in which the result of the hearing might benefit the child.

¹³ A survey conducted by the Australian Institute Of Family Studies after the enactment of the Family Law Reform Act but just prior to the 1996 commencement of the reforms indicates that there is strong community support for the notion that the duties and responsibilities for caring for children should be shared. For example, 78% of Australians think that both parents should care for children where they are married. Where parents are separated or divorced, 50% of Australians believe that both parents should always care for children, and a further 33% believe it should mostly be the case. Amongst divorced or separated parents, 54% believe that care should always be cared and 26% believe it should mostly be shared (Carberry F. Parents Sharing Care of Children—Family Law and Income Support. Paper, 6th Australian Institute of Family Studies Conference, Changing Families, Challenging Futures, Melbourne 25-27 November 1998)

¹⁴ See Family Court of Australia policy statement:

The Court's objective is to serve the interests of the Australian community by providing for the just and equitable administration of justice in all matters within the Court's jurisdiction, with emphasis in its family jurisdiction on the conciliation of disputes and the welfare of children

¹⁵ Kelly J B, & Wallerstein J S. The Effects of Parental Divorce: Experience of The Child In Early Latency. 46(1) American Journal of Orthopsychiatry (1976) Hereinafter *Early Latency*.

¹⁶ Nunan S A. Joint Custody Verses Single Custody Effects On Child Development. Doctoral dissertation, California School of Professional Psychology, Berkely. UMI Order number 81-10142 (1980)

¹⁷ Wallerstein & Kelly, *supra* note 5

¹⁸ Hetherington E M, Cox M, & Cox R. Effects of Divorce On Parents and Children. In M E Lamb (Editor), Non Traditional Families: Parenting and Child Relationships. Lawrence Erlbaum, Hillsdale New Jersey (1982) pp 223-288

¹⁹ Kelly J B. Longer-Term Adjustment In Children of Divorce: Converging Findings and Implications For Practice. 2 Journal of Family Psychology (1988a) pp 119-140

²⁰ *ibid*

²¹ *ibid*

²² McDermott J. Divorce and Its Psychiatric Sequelae In Children. 23 Archives Gen Psych (1970) p 421

²³ Block J *et al*. Parental Functioning and the Home Environment In Families of Divorce. 27 Journal of the American Academy of Child and Adolescent Psychiatry (1988)

²⁴ Thompson R. The Fathers Case In Child Custody Decisions: The Contributions of Psychological Research. In M E Lamb, & A Sargi (Editors), Fatherhood and Social Policy. Erlbaum, Hillsdale, New Jersey (1983). pp 50-100

²⁵ Wallerstein & Kelly, *supra* note 5.

²⁶ The work by Wallerstein & Kelly (*ibid*) is one of several published reports dealing with various aspects of the same study. The others are Wallerstein J S, & Kelly J B. The Effects of Parental Divorce: Experiences of The Preschool Child. 14 Journal of Child Psychiatry (1975) at 616; *Early Latency*, *supra* note 15; Wallerstein J S, & Kelly J B. The Effects of Parental Divorce: Experiences of The Child In Later Latency. 46(2) American Journal of Orthopsychiatry (1976) at 256 (Hereinafter *Later Latency*). See also, Wallerstein J S, & Kelly J B. The Effects of Parental Divorce: The Adolescent Experience. In E. Anthony & C. Koupernik (Editors), The Child In His Family: Children At Psychiatric Risk (1974) at 479.

²⁷ Lund M. Research On Divorce and Children. 14 Family Law (1984) pp 198-201. See also, Walczack Y, & Burns S. Divorce: The Child's Point of View. Harper & Row, London (1984)

²⁸ Mitchell A. Children In The Middle: Living Through Divorce. Tavistok Publications, London & New York (1985)

²⁹ *ibid*

³⁰ Amato P. Children In Australian Families: The Growth of Competence. Prentice-Hall, Sydney (1987)

³¹ *Early Latency*, *supra* note 15. See also, *Later Latency*, *supra* note 26. The study also indicated that among a group of 29 children aged eight and nine, *relatively few were able to maintain good relationships with both parents* (at 269).

³² Weiss R S. The Emotional Impact of Marital Separation. 32 *Journal of Social Issues* (1976) pp 135-146

³³ Hetherington E, Cox M, & Cox R. The Aftermath of Divorce. In Steven and Mathews (Editors), *Mother-Child, Father-Child Relations* Washington DC: National Association for the Education of Young Children (1978)

³⁴ Greif J B. Fathers, Children and Joint Custody. 49 *American Journal of Orthopsychiatry* (1979). pp 311-319 at 314

³⁵ Hetherington, Cox, & Cox, *supra* note 33

³⁶ Roman & Haddad, *supra* note 11. See also, Kalter N. Long-Term Effects of Divorce On Children: A Developmental Vulnerability Model. 57 *American Journal of Orthopsychiatry* (1987) pp 595-597. Hereinafter as *Long-Term Effects of Divorce* (*The continued involvement of the non-custodial parent in the child's life appears crucial in preventing an intense sense of loss in the child...The importance of the relationship with the non-custodial parent...indicate that arrangements where both parents are equally involved with the child are optimal. When this type of arrangement is not possible, the child's continued relationship with the non-custodial parent remains essential*).

³⁷ *ibid* at 119

³⁸ Hetherington, Cox, & Cox, *supra* note 18

³⁹ Hetherington E M, & Hagan M S. Divorced Fathers, Stress, Coping, and Adjustment. In M E Lamb (Editor), *The Fathers Role: Applied Perspectives*. John Wiley, New York (1986) pp 103-134

⁴⁰ Wallerstein & Kelly, *supra* note 5

⁴¹ Braver S L, & O'Connell D. *Divorced Dads: Shattering The Myths*. Tarcher/Putnam, New York (1998)

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⁴³ Warshak R A. *The Custody Revolution: The Father Factor and The Motherhood Mystique*. Simon & Schuster, New York (1992)

⁴⁴ Silburn S R, Zubrick S R, Garton A, Gurrin L, Burton P, Dalby R Carlton J, Shephard D, & Lawrence D. Western Australian Child Health Survey: Family and Community Health. Australian Bureau of Statistics and The TVW Telethon Institute For Child Health Research, Perth, Western Australia (1996)

⁴⁵ Garrison C Z, Waller J L, Cuffe S P, *et al*. Incidence of Major Depressive Disorder and Dysthymia In Young Adolescents. 36 *Journal of American Academy of Children and Adolescent Psychiatry* (1997) pp 458-465

⁴⁶ McCall P L, & Land K C. Trends In White Male Adolescent, Young-Adult, and Elderly Suicide: Are There Common Underlying Structural Factors? 23 *Social Science Research* (1994) pp 57-81

⁴⁷ Nelson F L, *et al*. Youth Suicide In California: A Comparative Study of Perceived Causes and Interventions. 24 *Community Mental Health* (Spring 1988) pp 31-42

⁴⁸ Noevi Velez C, & Cohen P. Suicidal Behaviour and Ideation. In A Community Sample of Children: Maternal and Youth Reports. 27(3) *Journal of The American Academy of Child and Adolescent Psychiatry* (1988) pp 349-356

⁴⁹ Larson D B, Swyers J P, & Larson S S. The Costly Consequences of Divorce. National Institute for Healthcare Research, Rockville, MD (1995) p 124

⁵⁰ Wodarski J S, & Harris P. Adolescent Suicide: A Review of Influences and The Means For Prevention. 32(6) *Social Work* (1987) pp 477-484

⁵¹ Kershet H F, & Rosenthal K M. Single Parent Fathers: A New Study. (May-June 1978) pp 13-14. See also, Kershet H F, & Rosenthal K M. Father Presence: 4 Types of Post-Marital Separation Fathering Arrangements. Paper presented at the N I M H Symposium On Mental Health Consequences of Divorce On Children. Washington DC (1978)

⁵² Wallerstein J S, & Blakeslee S. *Second Chances: Men, Women, and Children: A Decade After Divorce*. Houghton Mifflin Company, Boston (1989). Reprinted 1996

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- ⁵³ House of Representatives, Standing Committee On Legal and Constitutional Affairs. *To Have and To Hold*. Parliament of Australia, Canberra (1998). Hereinafter *To Have and To Hold*
- ⁵⁴ Hetherington, Cox, & Cox, *supra* note 33
- ⁵⁵ Biller H. *Father Absence, Divorce and Personality Development: The Role of The Father In Child Development*. Wiley & Son, New York (1981)
- ⁵⁶ Buckingham J. *Boy Troubles—Understanding Rising Suicide, Rising Crime and Educational Failure*. Centre For Independent Studies, St Leonards NSW (June 2000)
- ⁵⁷ See accompanying text to *infra* notes 131,132,133
- ⁵⁸ Sawyer *et al.* *The Mental Health of Young People In Australia*. Mental Health and Special Programs Branch, Department of Health and Aged Care, Canberra (2000)
- ⁵⁹ McDermott J F. *Parental Divorce In Early Childhood*. 124 *American Journal of Psychiatry* (1970) pp 1424-1425
- ⁶⁰ Greif, *supra* note 34
- ⁶¹ *ibid* at 315
- ⁶² Hetherington E M, Cox M, & Cox R. *Family Interaction and The Social Emotional and Cognitive Development of Children Following Divorce*. In Vaughn & Brazelton (Editors), *The Family Setting Priorities*. Science & Publishing Company, New York (1979)
- ⁶³ Amato P R, & Booth A. *Consequences of Parental Divorce and Marital Unhappiness For Adult Well-Being*. 69 *Social Forces* (1991) pp. 895-914. Such unhappy married families frequently have many of the effects of divorce.
- ⁶⁴ Amato P R, & Booth A *A Generation at Risk* Harvard University Press Cambridge MA (1997) p 73
- ⁶⁵ Wallerstein & Blakeslee, *supra* note 52
- ⁶⁶ Guidubaldi J. *The Status Report Extended: Further Elaboration's The American Family*. 9(4) *School Psychology Review* (1980) pp 374-379
- ⁶⁷ *ibid* at 378-379
- ⁶⁸ Bennett W J. *The Role of The Family In The Nurture and Protection of The Young*. 42 *American Psychologist* (1987) pp 246-250
- ⁶⁹ *ibid* at 247
- ⁷⁰ Ditson J & Shay S. *Use of A Home-Based Microcomputer To Analyse Community Data From Reported Cases On Child Abuse and Neglect*. 8 *Child Abuse and Neglect* (1984) pp 503-509
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- ⁷² Williams F S. *Child Custody and Parental Cooperation*. Paper presented at American Bar Association Family Law Section (1987)
- ⁷³ Kelly, *supra* note 19
- ⁷⁴ Fulton J A. *Parental Reports of Children's Post-Divorce Adjustment*. 35 *Journal of Social Issues* (1979) pp 126-139. See also, *supra* text pp 73-74
- ⁷⁵ Wallerstein & Kelly, *supra* note 5
- ⁷⁶ Lovorn R. *Why Women Join Fathers Rights Groups*. Athens Banner Herald. Athens Georgia (Thursday, 3 October 1991)
- ⁷⁷ Gibson J. *Non-Custodial Fathers and Access Patterns: Family Court of Australia*. Office of The Chief Executive. Summary of Key Findings. Research report No. 10. Australian Government Publishing. Service Canberra (1992).
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- ⁸¹ Ditson & Shay, *supra* note 70
- ⁸² Webb R. *Characteristics of Alleged Perpetrators of Child Abuse/Neglect*. R Webb, Acting Director, Department of Health and Social Services, Division Family and Youth Services, State of Alaska, Juneau, Alaska (1991)
- ⁸³ Ditson & Shay, *supra* note 70

⁸⁴ Webb, *supra* note 82

⁸⁵ Wright L. Are Men Necessary? 17(8) Texas Monthly (1992). pp 18-29

⁸⁶ Anderson E. Mothers More Violent Than Fathers. A News Release Based On A Review of Statistics From The Texas Department of Human Services (1987-1988). Texas Children's Rights Coalition, Austin Texas (1990)

⁸⁷ Burmeister H W. Destroying The Myths. 3(1) FAPT Briefings 1990. pp 3-4

⁸⁸ Anderson, *supra* note 86

⁸⁹ Ditson & Shay, *supra* note 70

⁹⁰ Rosenthal J A. Patterns of Reported Child Abuse and Neglect. 17 Child Abuse and Neglect (1988) pp 263-271

⁹¹ Angus G, & Hall G (1996). Child Abuse and Neglect Australia 1994-1995. Canberra: Australian Institute of Health and Welfare. (Australian Institute of Health and Welfare Series; no 16)

⁹² *ibid* at 1

⁹³ Australian Bureau of Statistics. Australian Social Trends 1995. Australian Bureau of Statistics, catalogue number 4102.0, Australian Publishing Service, Canberra (1995). Further, the Australian Bureau of Statistics reports that in 1992 approximately 81% of children under the age of fifteen resided with both natural parents, 4% resided in step-families (one natural parent and a married or defacto partner), 3% were in joint custody and less than 1% resided in some other type of household (e.g. with extended family members).

⁹⁴ Angus & Hall, *supra* note 91

⁹⁵ Broadbent A & Bentley R (1997). Child Abuse and Neglect Australia 1995-1996. Australian Institute of Health and Welfare Catalogue No CWS 1. Canberra: Australian Institute of Health and Welfare (Child Welfare Series No 17)

⁹⁶ Angus & Hall, *supra* note 91

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⁹⁸ Australian Bureau of Statistics, *supra* note 93

⁹⁹ *ibid*

¹⁰⁰ *ibid*

¹⁰¹ Angus & Hall, *supra* note 91

¹⁰² Australian Bureau of Statistics, *supra* note 93

¹⁰³ In 1997, around 72% of dependent children lived with both their natural parents—68.7% with married parents and 3.6% with cohabiting parents of the 978,000 children who lived apart from at least one of their natural parents, most lived in single parent households. A small number lived with neither natural parent (Australian Bureau of Statistics 1997. Children, Australia: A Social Report. Australian Bureau of Statistics. Catalogue 4119.0). In 1992 about 81% of children lived with both of their natural parents (Australian Bureau of Statistics, *supra* note 93)

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We speak of the 'broken family,' the 'disintegration' of the family, the 'crisis' in the family, the 'unstable' family, the 'decline' of the family, and, perhaps inevitably from some perspectives, the 'death' of the family. Underlying such labels is the spectre of single motherhood—statistically on the upswing—pathological and disease-like, contaminating society, contributing to its destruction and degeneration.

Single motherhood has been designated as the source of other social phenomena such as crime and poverty. Indeed, in the public's mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother...

While some may indeed blame single mothers for the wealth of social ills that plague our society, the view here is the focus should instead be on what is in the best interests of children. The purpose of the research is not to stigmatise parents and children in single or divorced families or to suggest that such children are doomed to a life of crime but to let everyone—particularly parents considering divorce and government policy makers—know that, for the good of society, certain sorts of families are worth encouraging.

The argument is that families are by far the most important factor in the socialisation of children and that on average intact families do this much better than other sorts of families. Moreover, following parental separation children need, want, and are entitled to all of the love and support that they can get, and fathers should be encouraged to fully participate and care for their children, whom they have an equal and human right to parent.

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¹⁹⁷ Hetherington, Cox, & Cox, *supra* note 33

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The Family Court must look at divorce in a realistic light for fathers.

While the government pokes at the ashes of family meltdowns by amending the Child Support act, a major conflagration threatens to engulf the Family Court.

The head of the Family Court, Chief Justice Alastair Nicholson, portrays critics of his court as nothing more than a noisy minority of disgruntled men who don't want to support their children. Yes, men do complain about unreasonable levels of child support, but the real issue is that for many men the end of a marriage means the end of a meaningful relationship with his children.

Sadly, this is not a rare occurrence. An Australian man getting married today faces a one in three risk that his marriage will end before his children are reared. He faces a one in ten risk that he will have no contact at all with his children by the time they are adult. This means his risk of losing contact with his children is not mere paranoia; it's twice the risk of contracting lung cancer, for example.

Every day of the year 77 fathers separate from their child's mother and 71 of these 77 fathers will not be living with their children five years later.

Every day of the year an additional 23 Australian fathers lose contact with their children, leaving another 36 fatherless children.

There are 558,000 separated fathers who are denied as much contact with their children as they would like, the flip-side being that there are 892,000 children who are denied the degree of care their father is willing to offer. In fact, there are 291,000 children who see their father less than once per year.

Unemployment rate amongst men registered with the Child Support Agency is 30% and on average, at least one non-custodial father suicides every day.

So here's the picture: half a million unhappy fathers with unemployment four times the national average and a suicide every day; not to mention over a million children being deprived of a relationship with both parents and so many mothers' lives being limited by single-parenthood.

Against this backdrop violence triggered by custody disputes should come as no surprise. Sadly, mothers too have been unable to take the stress of losing their children. In the past 4 months 3 Queensland mothers killed themselves and their children in almost identical circumstances to the much-publicised Perth murder/suicide. Obviously men have no monopoly on irrational violence and if pushed rather than helped in times of immense emotional turmoil anyone has the potential to choose death over their perceived living hell. Maybe fathers and mothers were being alienated from their children in equal numbers there would be 'gender equity' in murder/suicide perpetrators.

Rather than arguing about this perverse form of equity we should accept that the sustained criticism of the Family Court is a legitimate response to a significant social problem. The Family Court must reinforce the idea that when parents divorce they divorce each other, not their children. The number of alienated parents needs to be reduced, not equalised.

I do agree with Nicholson on one point: the Family Court should not be the sole target of complaint. We need to do far more than reform the Family Court.

We need to bring about a change of consciousness so that everyone accepts that children have a right to a meaningful relationship with both parents. This is no more than what the Family Law Act ostensibly states. Parliament even amended the Act in 1995 in recognition of the overwhelming evidence that it is much better for children if both parents stay closely involved after separation. The problem is that little has happened to put this goal into practice. The average person still assumes that when a marriage ends the children will live with the mother, and the father's role will become an 'uncle' at best. This attitude is also reflected throughout the counselling professions, the legal fraternity, the judiciary, and government institutions like Centrelink.

This is a big issue with no simple answers. Fathers, mothers and particularly children are not served well by hoping the problems will go away. Nicholson's noisy minority are merely the canaries down the mine and I for one am relieved that they're still chirping

²²² See, Mathew Bowman. *Daughter's Desperate Attempt To Save Mother, Sisters, Fails*. The Advertiser, Adelaide (Friday, 2nd November 2001) p 9. See also, News In Brief. *Mother Hangs Child*. The Advertiser (Wednesday 20th February 2002) p 24, reporting that a *depressed* single mother *tied three nooses to a stairway and hanged her two year old daughter before attempting to kill another child and then taking her own life in a murder suicide on the Gold Coast...the surviving child—a girl aged five or six—escaped from the mother after seeing what she was trying to do...*

²²³ Cantor & Slater, *supra* note 207 at 99 (Children could well contribute to the observed different suicide rates, as females are more commonly the principal parents during separation)

²²⁴ Bordow S. Defended Custody Cases In The Family Court: Factors Influencing The Outcome. 1(8) Australian Journal of Family Law (1994) pp 253-263

²²⁵ Arndt B. Private Lives. Penguin, Melbourne (1986). See also Price, *supra* note 216

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- ²³⁰ Price, *supra* note 215
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- ³⁰² Warshak, *supra* note 43
- ³⁰³ Snarey J. How Fathers Care For The Next Generation. Harvard University Press, Cambridge MA (1993) pp 163-164
- ³⁰⁴ Furstenburg *et al.* The Life Course of Children of Divorce; Marital Disruption and Parental Contact. 48 American Sociological Review (1983) pp 656-668
- ³⁰⁵ Lund M. The Non Custodial Father; Common Challenges In Parenting After Divorce. In C Lewis & M O'Brien (Editors), Reassessing Fatherhood. Sage (1987) at pp 212- 224
- ³⁰⁶ Australian Bureau of Statistics, *supra* note 103
- ³⁰⁷ Gibson, *supra* note 77
- ³⁰⁸ Loewan J. Visitation Fatherhood. In P Bronstein & C Pape Cowan (Editors), Fatherhood Today. John Wiley (1988) at pp195-213
- ³⁰⁹ Kruk E. Psychological and Structural Factors Contributing To The Disengagement of Non Custodial Fathers After Divorce. 30(1) Family and Conciliation Courts Review (January 1992) pp 81-101
- ³¹⁰ Greif, *supra* not 34
- ³¹¹ *ibid* at 315
- ³¹² Wallerstein & Kelly, *supra* note 5
- ³¹³ Hetherington, Cox, & Cox, *supra* note 33
- ³¹⁴ *ibid*
- ³¹⁵ Roman & Haddad, *supra* note 11
- ³¹⁶ *ibid* at 74-75
- ³¹⁷ McMurray, *supra* note 80
- ³¹⁸ Schaefer M P. Children's Adjustment In Contested Mother Custody, Father Custody Homes. Paper presented at the 66th annual meeting of the American Orthopsychiatric Association, 3 April 1989. Schaefer concluded:

Within the context of a custody evaluation the burden of proof should be on those who wish to preclude fathers or mothers from having custody of their sons or daughters on the basis of gender.

- ³¹⁹ Wallerstein & Kelly, *supra* note 5
- ³²⁰ *Early Latency*, *supra* note 15 at 21-22
- ³²¹ Greif, *supra* note 34
- ³²² Luepnitz, *supra* note 249
- ³²³ Wallerstein & Kelly, *supra* note 5
- ³²⁴ D'Andrea A. Joint Custody Fathers: Parental Involvement and Paternal Self- Esteem As Related To Custody Status. Dissertation Abstracts International, 42B 2048, Order Number, AAC8124385 (1981)
- ³²⁵ Greif, *supra* note 34
- ³²⁶ Luepnitz, *supra* note 248
- ³²⁷ Luepnitz, *supra* note 249
- ³²⁸ Kelly, *supra* note 19
- ³²⁹ Greif, *supra* note 34
- ³³⁰ Luepnitz, *supra* note 249
- ³³¹ Shiller, *supra* note 286
- ³³² Greif, *supra* note 34
- ³³³ *ibid* at 314
- ³³⁴ Kelly, *supra* note 19
- ³³⁵ *ibid*
- ³³⁶ Lovorn, *supra* note 76
- ³³⁷ Gibson, *supra* note 77
- ³³⁸ McMurray & Blackmore, *supra* note 78. Also see, McMurray, *supra* note 80
- ³³⁹ Jordan, *supra* note 218
- ³⁴⁰ Warshak, *supra* note 43
- ³⁴¹ Farrell W. Father and Child Reunion: How To Bring The Dads We Need To The Children We Love. Tarsher/Putman, New York (January 2001)
- ³⁴² Luepnitz, *supra* note 248
- ³⁴³ Hanson S M H. Healthy Single Parent Families. 35 Family Relations (1985) pp 125-132
- ³⁴⁴ Kelly, *supra* note 19
- ³⁴⁵ Maccoby E E, Depner C E, & Mnookin R H. Co-Parenting In The Second Year After Divorce. 52 Journal of Marriage and The Family (1990) pp 141-155
- ³⁴⁶ Hetherington, Cox, & Cox, *supra* note 33
- ³⁴⁷ Wallerstein & Kelly, *supra* note 5
- ³⁴⁸ Kelly, *supra* note 19
- ³⁴⁹ Hetherington, Cox, & Cox, *supra* note 33
- ³⁵⁰ *ibid*
- ³⁵¹ *ibid*
- ³⁵² *ibid*
- ³⁵³ Patterson G. Mothers: The Unacknowledged Victims. In J H Stevens & M Mathews (Editors), Mother-Child, Father-Child Relations. Washington D C. National Association for the Education of Young Children (1977)
- ³⁵⁴ Hetherington, Cox & Cox, *supra* note 33. See also, Roman & Haddad *supra* note 11. The authors list numerous problems faced by sole residence parents. These include, for mothers, the economic problems caused by being forced to take a low pay job, and for fathers and mothers, sole decision making responsibility, possible deterioration of the parent-child relationship as one parent tries to fill

all roles, discipline problems, lack of a social life with adults, lack of intimacy, presence of stress and feelings of being in an emotional vacuum due to incomplete relationships.

³⁵⁵ *ibid*

³⁵⁶ Maccoby, Depner, & Mnookin, *supra* note 345

³⁵⁷ Wallerstein & Kelly, *supra* note 5

³⁵⁸ Saxe J. Some Reflections On The Interface of Law and Psychiatry In Child Custody Cases. 3 Journal of Law and Psychiatry (1975) p 503

³⁵⁹ Folberg & Graham, *supra* note 4

³⁶⁰ Wallerstein & Kelly, *supra* note 5

³⁶¹ Kelly J B. Custody Agreements and Parental Interaction At Final Divorce. Paper presented at the annual meeting of the American Orthopsychiatry Association, San Francisco, California (1988b)

³⁶² Luepnitz, *supra* note 266

³⁶³ Hanson, *supra* note 343

³⁶⁴ *ibid*

³⁶⁵ Maccoby E E, Mnookin R H, & Depner C E. Post-Divorce Families: Custodial Arrangements Compared. Paper presented at the meeting of the American Association of Science, Philadelphia (1986)

³⁶⁶ Shiller, *supra* note 286

³⁶⁷ Goldstein M A (1983). Judges Decision making In Child Custody: An Analogue Study. Dissertation Abstracts International, 44 256B (UMI order number 8322540)

³⁶⁸ Bordow, *supra* note 224

³⁶⁹ Polikoff N D. Why Are Mothers Losing? A Brief Analysis of Criteria Used In Child Custody Determinations. 7(3) Women's Rights Law Reporter (1982) pp 235-243

³⁷⁰ Weitzman L. The Divorce Revolution: The Unexpected Social and Economic Consequences For Women and Children In America. The Free Press, New York (1985)

³⁷¹ Luepnitz, *supra* note 248

³⁷² See for example, H and H-K (1990) FLC 92-128. Order for joint custody over the objections of both parents (Four year old child to spend alternate weeks with each of her parents)

³⁷³ Kelly J B. Further Observations On Joint Custody. 16 University of California Davis Law Review (1983) pp 762-770

³⁷⁴ Mclsaac, *supra* note 10

³⁷⁵ Williams, *supra* note 72

³⁷⁶ Mclsaac, *supra* note 10

³⁷⁷ Williams, *supra* note 72

³⁷⁸ Kelly, *supra* note 267

³⁷⁹ The Family Law Reform Act 1995 defines family violence to include *conduct, whether actual or threatened, by a person towards or towards the property of, a member of the person's family that causes that person or other member of that person's family to fear for or be apprehensive about, his or her personal well-being or safety* (s 60D1)

Subsections 68F(2) *i, j, k, and l* represent the first time that *any family violence involving the child or a member of the child's family and any family violence order that applies to the child or a member of the child's family* have been given explicit statutory recognition as factor relating to the best interests of the child and reflect pronouncements by the Full Court of the Family Court (see eg. *In the marriage of J G and B G*, 1994. F L C 92-515).

³⁸⁰ Johnston J R, & Campbell E G. A Clinical Typology of Interparental Violence In Disputed Custody Divorces. 63 (2) American Journal of Orthopsychiatry, April 1992 pp 190-199

³⁸¹ Straus M A, & Gelles R J, & Steinmetz S. Societal Change In Family Violence From 1975-1985 As Revealed In Two National Surveys. 48 Journal of Marriage and The Family (1986) pp 465-479. Murray A Straus, Richard J Gelles and others, in 1975 and again in 1985, conducted the *National Family Violence Survey*, one of the largest and most respected studies in family violence ever done in the United States. The study, one of the few which have surveyed both men and women, confounded conventional views on the subject – not only are men just as likely to be the victims of

domestic violence, the study also showed that between 1975 and 1985 the overall rate of family violence by men against women decreased, whereas women's violence against men increased. Discussing the decrease in violence against women and the increase in violence against men, Straus & associates commented:

Violence by wives has not been an object of public concern. There has been no publicity, and no funds have been invested in ameliorating this problem because it has not been defined as a problem. In fact, our 1975 study was criticised for presenting statistics on violence by wives. Our 1985 finding of little change in the rate of assaults by women on their male partners is consistent with the absence of ameliorative programs.

Professors Richard J Gelles and Murray A Straus are social scientists (from the University of Rhode Island and the University of New Hampshire respectively) who have studied domestic violence for more than 25 years. Their research is among the most respected and frequently cited by other social scientists, by police, by the FBI, and by the personnel in family violence agencies. Gelles & Straus consider family violence to be a national problem in the United States and they have for years been advocates for social, medical and legal intervention for victimised women. All the same, according to their studies, more than 84% of families are not violent.

³⁸² Marriage and Divorce Today. *First Large-Scale Study Reveals Elder Abuse Is Primarily By Wives Against Husbands* (15 December 1986). 1986, *Marriage and Divorce Today*, an American newsletter for family therapy practitioners, reported on a study done by Pillemer & Finkelhor of the Family Violence Research Laboratory of the University of New Hampshire. The study based on interviews of over 2000 mature age persons in the Boston metropolitan area, found that 32% of the elderly had been abused. The majority of the abuse victims were men (52%) who had been attacked by their wives in unprovoked occurrences of family violence.

Perhaps more surprising are other U.S. reports suggesting that young husbands are not spared victimisation. Male soldiers in their military prime are not uncommonly stabbed or shot by their wives in unprovoked episodes of violence (Ansberry M. *Calling Sexes Equal In Domestic Violence, Article Stirs Clash Among Rights Group*. The Wall Street Journal. 5th May 1988. p 27)

³⁸³ Straus M A. Physical Assaults By Wives. In *Current Controversies On Family Violence*, Richard J Gelles, & Donileen R Loseke (Editors). Sage Publications, Newbury Park, California (1993). See also Sugarman D B, & Hotaling G T. Dating Violence: Prevalence, Context, and Risk Markers. In M A Pirog-Good, & J E Stets (Editors), *Violence In Dating Relationships, Emerging Social Issues*. Praeger, New York (1989). Sugarman & Hotaling summarised the results of 21 studies that reported gender differences in abusive intimate relationships. They found that the average rate of assault was 329 per 1000 for men and 393 per 1000 for women. The investigators commented that a surprising finding was the higher proportion of females than males who self-reported having expressed violence in a dating relationship (*ibid* at 8). Other research confirms also the high rate of assault by women in courting relationships (eg Stets J E, & Straus M A. Gender Differences In Reporting Marital Violence and Its Medical and Psychological Consequences. In M A Straus, & R J Gelles (Editors), *Physical Violence In 8,345 Families*. Transaction Books, New Brunswick, New Jersey 1990 pp 151-166).

³⁸⁴ Malone J, Tyree A, & O'Leary K D. Generalisation and Containment: Different Effects of Past Aggression For Wives and Husbands. 51 *Journal of Marriage and The Family* (1989) pp 687-697. See also, Mcleod M. Women Against Men: An Examination of Domestic Violence Based On An Analysis of Official Data & National Victimisation Data. 1 *Justice Quarterly* (1984) pp 171-193 at 19; McNeely R J, & Robinson-Simpson G. The Truth About Domestic Violence: A Falsely Framed Issue. 32 (6) *Social Work* (1987) pp 480-495; McNeely R L, & Mann C R. Domestic Violence Is A Human Issue. 5 *Journal of Interpersonal Violence* (March 1990) p 130.

On the often ignored topic of women's violence to men, see, Beverley Kemp. *Battered By The Women of Their Dreams*. The Independent, 22 July 1994 (*They are punished, kicked and attacked with bottles, glasses and pans. But burnt, bruised and bleeding these men still love their tormentors*).

When the issue of female against male violence is addressed, there is a response by the victims. For instance, when the subject of battered husbands was raised on British television and the London Times did an article on the subject, hundreds of calls came in from male victims to a special helpline set up by a Women's Aid group (Rooke M. *Violence In The Home*. Radio Times, 16-22th March 1991) p 8.

On the problem of the distortion of statistics on violence and how it damages women's interests, see the seminal *Media Beatups Conceal Truth on Female Violence* by Katherine Dunn, *The Australian* (June 1994). Also see, Nina J Easton. *Insult and Injury: The Law of The Schoolyard*. Los Angeles Times Magazine, (2 October 1994), reporting on a lawsuit in which a woman is suing a school for failing to protect her daughter from sexual teasing. Feminist lawyers presented the case as a means to force schools to change boy's behaviour before they become abusive men. No-one however, listened to the girl, who says that it was the incessantly cruel teasing by girls, not boys, that was the problem for her.

³⁸⁵ O'Leary K, Daniel J, Barling I, Arias A, Rosenbaum J, Malone J, & Tyree A. Prevalence and Stability of Physical Aggression Between Spouses. 57 *Journal of Consulting and Clinical Psychology* (1989). pp 263-268.

³⁸⁶ Stets J E, & Straus M A. The Marriage Licence As A Hugging Licence: Comparison of Assaults In Dating, Cohabiting, and Married Couples. 4 *Journal of Family Violence* (1989) pp 161-180

³⁸⁷ *ibid*

³⁸⁸ Sherrard J, Ozanne-Smith J, Brumen J, Routly V, & Williams F. Domestic Violence Patterns and Indicators. Monash University, Melbourne (1994). See also, Catherine Lambert. *Men Victims At Home Too, Study Finds*. Melbourne Herald-Sun (5th February 1995).

³⁸⁹ Stuart P A. Review of The Management of Domestic Violence In The Emergency Department. Emergency Department, Modbury Public Hospital (February 1996)

³⁹⁰ Headey B, Scott D, & de Vaus D. Domestic Violence In Australia: Are Women and Men Equally Violent? 2(3) *Australian Social Monitor* (July 1999) pp 57-62

³⁹¹ Becker M. Maternal Feelings; Myth, Taboo and Child Custody. (1) *Review of Law and Women's Studies* (1992) pp133-224.

³⁹² Fineman M. Dominant Discourse, Professional Language and Legal Change In Child Custody Decision Making. 101(4) *Harvard Law Review* (1988) pp 727-774

³⁹³ Brophy J. Custody Law, Child Care and Inequality In Britain. In C. Smart & S. Sevenhuijsen (Editors), *Child Custody and The Politics of Gender*. Routledge (1989)

³⁹⁴ Bartlett K T, & Stack C B. Joint Custody, Feminism and The Dependency Dilemma. In J Folberg (Editor) *Joint Custody and Shared Parenting*. Guilford Press (1991) p 63-87

³⁹⁵ Polikoff, *supra* note 369

³⁹⁶ Reece J. Joint Custody: A Cautious View. 16 *University of California Davis Law Review* (1983) at 77 (judges decide residence decisions on basis of personal bias or conviction)

³⁹⁷ Fineman, *supra* note 392

³⁹⁸ Brophy, *supra* note 393

³⁹⁹ Becker, *supra* note 391

⁴⁰⁰ Bartlett & Stack, *supra* note 394

⁴⁰¹ Hoggett B. Joint Parenting Systems; The English Experiment. 6(1) *Journal of Child Law* (1994). pp 8-12

⁴⁰² Bartlett & Stack, *supra* note 394

⁴⁰³ Salka F T. Remedying Post-Dissolution Financial Problems of Women: Who Shall Bear the Burden? 10 (2) *Family Law News and Review* (1989). The writer is co-chair of the Family Law Section of the Women Lawyers Association of Los Angeles, and an active member of the State Bar Standing Committee on spousal support.

⁴⁰⁴ *ibid*

⁴⁰⁵ Weitzman, *supra* note 370

⁴⁰⁶ For a definition of *gender feminism* see, Christine Hoff Sommers. *Who Stole Feminism? How Women Have Betrayed Women*. Simon & Schuster, New York 1994). Christina Hoff Sommers is an associate professor of Philosophy at Clark University Boston who specializes in contemporary moral theory. She has edited two ethics textbooks, published numerous professional papers and written articles for *The New Republic*, *The Wall Street Journal*, the *Chicago Tribune* and *The New England Journal of Medicine*, among other publications.

Professor Sommers makes a crucial distinction early in her book between *equity feminism* and *gender feminism*. As she explains it, *equity feminism* arises out of classical liberal beliefs that all people should enjoy simple equality under and before the law. Thus, an equity feminist makes only

one request on behalf of all women: *a fair field and no favours*. In contrast, Dr. Sommers characterizes *gender feminism* as self-preoccupied, elitist, divisive, gynocentric and misandric. A long-time proponent of *equity feminism* she has taught feminist theory and is intimately acquainted with the theories and practices of the gender feminists. She is also well qualified to offer a cogent, thoughtful and balanced critique of the extremist thought and practice of the gender feminist ideologues. Dr. Sommers' descriptions of the work of the gender feminists are almost mind-boggling, as she patiently walks the reader through a maze of obscure terminology and confused ideas associated with the gender feminists. She takes great pains to show that the theories of these feminists are more properly belief systems rather than verifiable scientific concepts, and notes that gender feminists try to secure *converts* to their view that liberal democratic societies are hopelessly patriarchal and *rigged* against women. She writes:

American feminism is currently dominated by a group of women who seek to persuade the public that American women are not the free creatures that we think we are. The leaders and theorists of the women's movement believe that our society is best described as a patriarchy, a 'male hegemony,' a 'sex/gender system' in which the dominant gender works to keep women cowering and submissive. The feminists who hold this divisive view of our social and political reality believe that we are in a gender war and they are eager to disseminate stories of atrocity that are designed to alert women to their plight. The 'gender feminists' (as I shall be calling them) believe that all our institutions, from the state to the family to the grade schools, perpetuate male dominance. Believing that women are virtually under siege, gender feminists naturally seek recruits to wage their side of the gender war. They seek support. They seek vindication. They seek ammunition (*ibid*).

⁴⁰⁷ Karen DeCrow. Syracuse News Times (5 January 1994)

⁴⁰⁸ *ibid*

⁴⁰⁹ Warshak, *supra* note 42

⁴¹⁰ Ditson & Shay, *supra* note 70

⁴¹¹ Kelly, *supra* note 19

⁴¹² Thompson, *supra* note 281

⁴¹³ Saposnek D. Mediating In Child Custody Disputes. Jossey-Bass, New York (1983)

⁴¹⁴ Williams, *supra* note 72

⁴¹⁵ Kelly, *supra* note 19

⁴¹⁶ Ilfeld F, Ilfeld H, & Alexander J. Does Joint Custody Work? A First Look At Outcome Data of Relitigation. 138 American Journal of Psychiatry (1982) pp 62-68

⁴¹⁷ *ibid*

⁴¹⁸ Luepnitz, *supra* note 249

⁴¹⁹ Australian Law Reform Commission. For The Sake of The Kids: Complex Contact Cases In The Family Court. Report No 73. Australian Law Commission, Canberra (1995)

⁴²⁰ *ibid* at 126

⁴²¹ *ibid*

⁴²² Kelly, *supra* note 19

⁴²³ Ilfeld, Ilfeld & Alexander, *supra* note 417

⁴²⁴ Luepnitz, *supra* note 249

⁴²⁵ Kelly, *supra* note 361

⁴²⁶ Kelly, *supra* note 19

⁴²⁷ Rohman, Sale & Lou, *supra* note 275

⁴²⁸ The results from a 1985 survey by Marriage and Divorce Today (a professional newsletter for family therapy practitioners in America) reveals that readers overwhelmingly support the concept of joint residence. Respondents who have helped to arrange joint residence agreements believe that it is possible to have successful joint residence even if parents are antagonistic to one another. To the question, *do you support joint legal and physical custody even when parents are antagonistic to one another provided the family receives counselling to help them understand how joint custody works?* 74% of respondents replied *yes*, while 25% replied *no* (Marriage and Divorce Today. Volume 10, Number 41, 13 May 1985)

⁴²⁹ Williams, *supra* note 71

⁴³⁰ Polikoff, *supra* note 369

⁴³¹ Weitzman, *supra* note 370

⁴³² Singer J B & Reynolds W L. A Dissent On Joint Custody 47 Maryland Law Review (1988) pp 497-523

⁴³³ *ibid*

⁴³⁴ Maccoby E E, & Mnookin R H. Dividing The Child: Social and Legal Dilemmas of Custody. Harvard University Press, Cambridge, Massachusetts (1992)

⁴³⁵ Hillary A G. The Case For Joint Custody. The Children's Rights Council, Washington D C (1985)

⁴³⁶ Child Support, Custody, and Visitation: A Report To State Child Support Commission. Montana Child Support Advisory Council (July 1986)

⁴³⁷ Pearson J & Thoennes N. Will This Divorced Woman Receive Child Support? Your Custody Decision May Determine The Answer. The Judges Journal. (Winter 1986)

⁴³⁸ Lester G H. Child Support and Alimony 1989. A Report of The US Bureau of The Department of Commerce, Bureau of The Census. Current Population Reports, Consumer Income-Series P-60, No. 173. US Government Printing Office, Washington D C (September 1991).

⁴³⁹ Pearson & Thoennes, *supra* note 437

⁴⁴⁰ Diehl M. A Texas Father Speaks Out For Equal Rights: A Survey of Discrimination. In Texas State Bar Section Report, Family Law Section, vol. 82 (1982). The author studied 783 Texas divorces and the findings published in approximately thirty Texas newspapers, and the Texas Bar Association Journal.

⁴⁴¹ Lester, *supra* note 438. The study conducted jointly by the Bureau of Census, and the Department of Health and Human Services was based on a population of 9,955,000 custodial mothers throughout the United States. Custodial fathers were not surveyed because the report explains *the survey sample size is insufficient to provide reliable statistics*.

⁴⁴² Braver S H *et al*. Frequency of Visitation By Divorced Fathers: Differences In Reports By Fathers and Mothers. 61(3) American Journal of Orthopsychiatry (1991) pp 448-454; See also, Braver S H *et al*. A Social Exchange Model of Non-Residential Parent Involvement, In Depner & Bray (Editors), Non-Residential Parenting: New Vistas In Family Living. Sage (1993) pp 87-108.

⁴⁴³ Funder K. Financial Support and Relationships With Children. Report No 6, Child Support Evaluation Study, Australian Institute of Family Studies (1989)

⁴⁴⁴ Harrison M, Snieder G, & Merlo A. Who Pays For The Children? A First Look At The Operation of Australia's New Child Support Scheme. Monograph No 9, Australian Institute of Family Studies (1990)

⁴⁴⁵ Wade J H. The Family Court of Australia Informality In Court Procedure. 27 International and Comparative Law Quarterly (1978) p 820

⁴⁴⁶ Kuhn R & Guidubaldi J. Child Custody Policies and Divorce Rates In The U.S. Paper presented at the 11th Annual Conference of the Children's Rights Council, Washington, D C (23-26 October 1997)

⁴⁴⁷ Brinig M F & Buckley F H. Joint Custody: Bonding and Monitoring Theories. 73 Indiana Law Journal (1998) p 393. Brinig & Allen found a correlation between joint residence awards and reduced divorce. They conjectured that fathers are more likely to form strong bonds with their children if they know that the relationship would be protected through joint residence in the event of a divorce. This would reduce the likelihood that fathers would initiate divorce.

⁴⁴⁸ Brinig M F & Allen D W. These Boots Are Made For Walking: Why Wives File For Divorce. Paper presented at the Canadian Law and Economics Association Meeting, (1998). Brinig & Allen's work found that the parent who receives residence is more likely to be the one who files for divorce. That is, among cases where the mother received residence, the mother usually filed for divorce, and where the father received, the father was more likely to be the one who filed. They concluded that filing behaviour is largely driven by attempts to *exploit the other partner through divorce*. Significantly they found that residence had a stronger relationship than financial factors, although these factors of course commingled through child support

⁴⁴⁹ Kuhn & Guidubaldi, *supra* note 446

⁴⁵⁰ Bordow, *supra* note 224

⁴⁵¹ Walster F, Walster G W, & Bersheid E. New Directions In Equity Research. 25 Journal of Personality and Social Psychology (1973) pp 151-176

⁴⁵² Note: Developments In The Law. 93 Harvard Law Review (1980) p 1136

⁴⁵³ Canacakos E. Joint Custody As A Fundamental Right. 23(20) Arizona Law Review (1981) p 787

⁴⁵⁴ Bettina Arndt. *I Want My Daddy*. Sydney Morning Herald (12 October 1996).

The response of the Chief Justice of the Family Court, Alistair Nicholson, to this devastating exposé was to *shoot the messenger*. He said the claims of *bias against men by a largely male bench was nonsensical* and accused Arndt of considerable ignorance as how the Family Court works and selectively citing a *tiny number of judgements* to support her claims. He dismissed the comments of ex-justice Geoffrey Walsh, quoted extensively by Arndt, as *the idiosyncratic view of one retired judge*.

⁴⁵⁵ *Out of The Maze*, *supra* note 216

⁴⁵⁶ Gersick K A. Fathers By Choice: Divorced Men Who Receive Custody of Their Children. In, G Levinger & O C Moles (Editors), *Divorce and Separation*. Basic Books, New York (1979)

⁴⁵⁷ Goldstein M A (1983). Judges Decision Making In Child Custody: An Analogue Study. Dissertation Abstracts International, 44, 256B (UMI order number 83-22540)

⁴⁵⁸ Head L. 1992 Legislative Agenda. 4(5) FAPT Briefings (August/September 1991b). p 7

⁴⁵⁹ Lovorn, *supra* note 75

⁴⁶⁰ Gersick, *supra* note 456

⁴⁶¹ Goldstein, *supra* note 457

⁴⁶² Burmeister H W. Georgia's Gender Bias Commission's Report: Lies, Myths, and Falsehoods. 1(4) *Voices For Children* (1991c) pp 4-6

⁴⁶³ Bordow, *supra* note 224 (Older judges biased towards mothers) citing the work of Bolocofsky D N. Use and Abuse of Mental Health Experts In Child Determinations. 7(2) *Behavioural Science and The Law* (1989).

⁴⁶⁴ Goldstein, *supra* note 457

⁴⁶⁵ Gersick, *supra* note 456

⁴⁶⁶ The Lone Fathers Association of Australia conducted a survey of 10,000 divorced fathers. The poll found that 80% of divorcing fathers are told by their lawyers not to apply for residence orders in the Family Court because they would be unsuccessful in what would be costly proceedings. However, this does not mean that lawyers are part of an anti-father conspiracy. The essence of a lawyer's job is to give honest advice, and that in the case of most fathers' parenting attempts, the honest advice was that the father was unlikely to succeed (Abernathy M. *Paternity Wars In Australia, Divorce Is A Battle Men Can't Win*. Australian Penthouse, April 1993 at 106-107)

⁴⁶⁷ Levy A. Father Custody. In, Schetky & Benedek (Editors), *Emergency Issues In Child Psychiatry* (1985)

⁴⁶⁸ Judge Richard Huttner (quotation marks added), In, *The Fathers Also Rise*. New York Magazine, (18 November 1985 pp 50-75

⁴⁶⁹ Silver G A, & Silver M. *Weekend Fathers*. Stratford Press (1981) at p 11

⁴⁷⁰ Pearson J, & Luchesi Ring M A. Judicial Decision-Making In Contested Custody Cases. 21 *Journal of Family Law* (1982-1983) at 719:

More detailed questioning revealed that most judges remain very attached to the tender year presumption. As one older judge put it: 'If both parties are seeking custody and there are children of tender years, biologically the mother should get custody. Men sometimes want custody but usually want something more, like not paying child support.' and in the words of a younger judge: 'I do not care what the statute may say about sex neutrality. If the mother has been there and the children are small, I give custody to the mother. The bond between young children and their mothers is important.'

⁴⁷¹ Rassam A Y. Note, 'Mother,' 'Parent,' and Bias, 69 *Indiana Law Journal* (1994) at 1165, 1170-1173

⁴⁷² Commission On Gender Bias In The Judicial System. *Gender & Justice In The Courts: A Report To The Supreme Court of Georgia By The Commission On Gender Bias In The Judicial System* (1991), reprinted in 8 *Georgia State University Law Review* (1992) pp 539-807 at 539, 657

⁴⁷³ *ibid* at 657-58 (noting that *American society has tended to assume that mothers, rather than fathers, should and do have primary responsibility for raising children*).

⁴⁷⁴ *ibid* at 659 (listing public commentary, including testimony from a father who noted that he had heard the judge ask an attorney in a residence matter, *How many times have you seen a judge award custody of a five-year-old to the father?* to confirm that the 'tender years' presumption is alive and well in Georgia courts (footnote omitted).

⁴⁷⁵ *ibid*

⁴⁷⁶ *ibid* (noting that: *an attorney from South Georgia testified that in her experience the test is not what is in the best interest of the child, but rather whether or not the mother is fit. If the mother is fit then the father will not be awarded custody, and this is gender bias against fathers*). Other attorneys testified that *a fit mother would not lose custody no matter how appropriate it might be to give custody to the father*, and one testified that he had been told by judges in pre-trial conference[s] that *he will not get anywhere in the custody battle unless he has some 'dirt' on the mother* (*ibid* at 659-660 footnote omitted).

⁴⁷⁷ *ibid* at 660 (noting that despite extensive evidence that a mother was psychologically unstable and that it would not be in the best interests of the children to remain with her, the judge nonetheless awarded residence to the mother because *it does something to a mother to lose her children*)

⁴⁷⁸ *ibid*. The report also lists *culturally based gender-biased beliefs that influence some judges against mothers* (*ibid* at 662). These beliefs include *the belief that an older boy needs to be with his father and the belief that a mother who works outside the home, whether because of ambition or economic necessity, is less fit to be awarded custody than a man . . . because these women are not good mothers* (*ibid*).

Such gender-biased beliefs likewise have no place in the Family Court system because they are not only patently unfair to the rights of mothers to equally parent their children, but they can result in residence awards that are not truly in the best interests of the children.

⁴⁷⁹ *McMillan v Jackson* (1995) FLC 92-610. See also, *Sheridan and Sheridan* (1994) FLC 92-517; *In the Marriage of Kennedy and Cahill* (1995) FLC 92-605 (judgement raised a reasonable apprehension of bias as trial judge did not disclose the existence of an intimate relation between herself and the solicitor acting for the wife).

⁴⁸⁰ *ibid* at 82,085

⁴⁸¹ *ibid*

⁴⁸² Sunday Telegraph (9th June 1996) p 82

⁴⁸³ *Out of The Maze*, *supra* note 216 at 32

⁴⁸⁴ *In Logan v Robertson* (1995) NZFLR 711

⁴⁸⁵ *In Nichols v Nichols* (1996) NZFLR 311

⁴⁸⁶ Birks S (1998). Gender Analysis And Women's Access To Justice Project, Issues Paper No 2. Centre for Public Policy Evaluation, Massey University, Palmerston North N Z. p 13. <http://econ.massey.ac.nz/cppe/papers/cceipo2.pdf>

⁴⁸⁷ Fitzgerald W A. Maturity, Difference, and Mystery: Children's Perspectives and The Law. 36 Arizona Law Review (1994) pp 11, 56 (*Absent some empirical basis for a 'best interests' determination, after all, the court's decision must manifest little more than idiosyncratic and subjective conclusions about what living arrangements are 'best' for children*).

⁴⁸⁸ Marsh P. Social Work and Fathers—An Exclusive Practice? In Lewis & O'Brien, (Editors) *Reassessing Fatherhood*. Sage (1987)

⁴⁸⁹ Kelly, *supra* note 267

⁴⁹⁰ Marsh, *supra* note 488

⁴⁹¹ James A, & Hay W. *Court Welfare Work: Research, Practice, and Development*. University of Hull (1992).

⁴⁹² Fry P S, & Addington J. Professionals' Negative Expectations of Boys From Father Headed Single-Parent Families: Implications For The Training of Child Care Professionals. 2 British Journal of Developmental Psychology (1984) pp 337-446. See also, Kammer J *Good Will Toward Men*. St Martin's Press (1994). The author describes anti-male bias shown by psychotherapists at a gathering in the U S. He quotes a woman social worker/director of a relationships centre saying that

many women therapists have anti-male prejudices, and that, *many men, especially social workers, are going to take the female's side* (p.51).

⁴⁹³ Sagi A, & Dvir R. Value Biases of Social Workers In Custody Disputes. 15 Children and Youth Services Review (1993) pp 27-42.

⁴⁹⁴ Greif G, & Bailey C. Where Are The Fathers In Social Work Literature. Families In Society (February 1990) pp 88-92

⁴⁹⁵ Jaffe E. Fathers and Child Welfare Services; The Forgotten Clients. In; Lamb M. E. (Editor), Fatherhood and Family Policy. Lawrence Earlbaum Associates (1983)

⁴⁹⁶ Kelly, *supra* note 267

⁴⁹⁷ Kruk E. Promoting Shared Parenting After Separation; A Therapeutic/Interventionist Model of Family Mediation. 15(3) Journal of Family Therapy (August 1993) pp 235-261

⁴⁹⁸ Kruk E. The Disengaged Non-Custodial Father; Implications For Social Work Practice With The Divorced Family. 39(1) Social Work (1994) pp 15-25

⁴⁹⁹ Goldstein, Freud, & Solnit, *supra* note 263

⁵⁰⁰ *ibid* at 37-38

⁵⁰¹ Preston G, & Madison M. Access Disputes In The Context of the Family Structure After Marital Separation. 5(1) Australian Journal of Sex, Marriage and Family (1984) pp 37-45. Geoffrey Preston and Mark Madison two Family Court counsellors from Brisbane have expressed reservation about the wisdom of *libera.contact*, recommending that certain constraints be imposed on contact by the non-resident parent in the interest of forming new boundaries around the family unit made up of the resident parent and children. Contact parenting time by the non-resident parent is seen as intrusions, particularly if it is imposed by the court against the wishes of the resident parent.

Demonstrating their familiarity with the draconian implications of *BBIC* (Goldstein, Freud & Solnit, *supra* note 262) that is cited in their article, Preston & Madison argue that contact arrangements should have rules that give the resident parent control over the conditions of the non-resident parent presence. They write:

Following separation, the family boundaries become disturbed. The departure of one spouse from the family makes this boundary diffuse; it becomes more permeable and less able to provide a sense of security and containment for the members of the family. This is because of disturbance in the spousal sub-system which is responsible for maintaining the family boundary. The important task in the initial period after separation is to re-establish the boundary around the family. Disputes over access can serve to prevent the formation of a clear family boundary (*ibid* at 39).

In short, Preston & Madison believe that contact by the non-resident parent should be limited and/or clearly regulated in the interest of strengthening the boundary around a new family structure that does not include him or her.

Advocates of *frequent and continuing contact* while acknowledging the risks of loyalty conflicts, argue that such risks are outweighed by the risks of not seeing a divorced parent. They point to the profound grief and sense of abandonment children experience over the loss of contact with a beloved parent, and the damage such reactions can do to normal development. Other investigators suggest that so long as a child is continuing to spend time with both parents, the child is a member of a single family structure that includes both parents (Isaacs M B, Montalvo B, & Abelsohn D. *The Difficult Divorce: Therapy For Children and Families*. Basic Books, New York 1986. Working from this point of view, Isaacs & colleagues say:

We place special emphasis on problem solving—parent with parent, and parent with child—that allows family members to struggle face to face with each other during the process of reorganising the unit. We view the immediate family [mother, father and their children] as the unit of direct intervention (*ibid* at 5-6).

⁵⁰² See for example, commentary by Justice Peter Nygh retired Full Court judge, Family Court of Australia. Judges Newsletter, (August/September 1993) p 8:

...there are no simple solutions, perhaps access should be left up to the custodial parent to decide.

⁵⁰³ Lovorn, *supra* note 76

⁵⁰⁴ Vogtli J M. Personality Attributions Ascribed To Divorced Mothers Living Apart From Their Children. Dissertation Abstracts International, 50B, Order Number AAC89113556 (1989)

⁵⁰⁵ *ibid*

⁵⁰⁶ Greif G L, & Pabst M S. Mothers Without Custody (1988) at 147-149

⁵⁰⁷ Sanger C. Separating From Children. 96 Columbia Law Review (1996) at 377:

Separating from one's child-even temporarily, even for sensible reasons-is now often viewed as the worst thing a mother can do. It is often taken as proof that she is not a good mother at all and should not be allowed to resume the status she has abandoned

⁵⁰⁸ Chavez L I Want You: Uncle Sam As Mr. Right? 19 Harvard Journal Law & Public Policy (1996) at 740

⁵⁰⁹ Wright, *supra* note 86

⁵¹⁰ Bordow, *supra* note 224

⁵¹¹ Rassam, *supra* note 471

⁵¹² Bordow, *supra* note 224 at 255

⁵¹³ *ibid*

⁵¹⁴ see eg The High Court of Australia in *Kades v Kades* (1961) 35 ALJR 251; Glass J A, in *Epperson v Dampney* (1976). 1 Fam Law Note No 29, 10 ALR 227; 41

⁵¹⁵ *J.B. v. A.B.*, 242 S.E.2d 248 (West Virginia 1978). Transcribed from Henry R. K (1999). The Primary Parent Theory: Backsliding To The Tender Years Doctrine.

Article: www.menshealthnetwork.org.library.mhndocs/PrimaryCaretakerRule.htm.

⁵¹⁶ *ibid* at 251-52, 255 (emphasis added).

⁵¹⁷ West Virginia Code 48-2-15 (1980).

⁵¹⁸ *Garska v McCoy*, 278 S.E.2d 357 (W. Va. 1981)

⁵¹⁹ *ibid* at 358, 361, and 363 (emphasis added).

⁵²⁰ See, Kelly J B. The Determination of Child Custody In The U.S. A. p 3 citing the proposal of feminist professor of law Carol Bruch. (<http://wwlia.org/us-cus5.htm>)

⁵²¹ Transcribed from Henry *supra* note 515

⁵²² *ibid*

⁵²³ *ibid*, citing Charles Dickens. *Oliver Twist*. Dodd, Mead & Co New York (1941) Chapter 10, p 51 (Originally published as *The Adventures of Oliver Twist*. Chapman & Hall London 1890)

⁵²⁴ Chambers, *supra* note 12 at 486

⁵²⁵ Becker M Judicial Discretion In Child Custody, The Wisdom of Solomon? 81 Illinois Bar Journal (December 1993) pp 650-667. Cited in Henry, *supra* note 515

⁵²⁶ *ibid*

⁵²⁷ Transcribed from from Henry, *supra* note 522

⁵²⁸ Chambers, *supra* note 12 at 480

⁵²⁹ see for example, Chambers, *supra* note 12

⁵³⁰ e.g. *In The Marriage of Sutton* (1976) 1 Fam. L R; *Raby v Raby* (1976) 2 Fam L R; *In The Marriage of Chandler* (1981) 2 Fam L R at 736

⁵³¹ *Pikula v Pikula* 374 N W 2d 705 (Minnesota 1985).

⁵³² *ibid* at 711-712

⁵³³ *ibid* at 711

⁵³⁴ Goldstein Freud, Solnit, *supra* note 263

⁵³⁵ Freed G & Walker T. Family Law In The Fifty States: An Overview. 22(4) Family Law Quarterly (Winter 1989)

⁵³⁶ *ibid* at 460

⁵³⁷ Act of May 22 1989 s2 1989 (*The court may not use one factor to the exclusion of all others*)

⁵³⁸ Act of May 2 1990 ch 1990. Restating its 1989 prohibition against exclusive use of any statutory factor, the legislature declared: *The primary caretaker factor may not be used as a presumption in determining the best interests of the child.*

⁵³⁹ Brief for *Amicus Curiae*, Minnesota State Bar Association Family Law Section (1988) at 10

⁵⁴⁰ Robinson, Caring For Kids (July 1989) 11 American Demographics.

⁵⁴¹ *ibid* at 52

⁵⁴² DeLaney K A. Note: A Response To 'Nannygate': Untangling U.S. Immigration Law To Enable American Parents to Hire Foreign Child Care Providers. 70 *Indiana Law Journal* (1993) at 305, 327 (*The typical family during the first half of the twentieth century included a father who was breadwinner and a mother who stayed home to care for the children and do the housework. Today both parents usually work outside the home*).

The increasing number of women participating in the labour force, the rise in part time and casual employment and higher levels and longer durations of unemployment are some of the key trends to have a dramatic impact on Australian families. The move away from the traditional *male breadwinner/female carer* model of family life means that parents are more likely than ever before to be balancing family responsibilities with paid work. In August 1995 among couple families with dependants, 95% (1,750,400 families) had one or both partners in the labour force, 62% (1,137,000 families) had both partners in the labour force, 93% had the male partner in the labour force and 64% had the female partner in the labour force (Australian Bureau of Statistics. Labour Force Australia, August 1995, ABS Catalogue No. 6203.0).

⁵⁴³ Bookspan P T. A Delicate Imbalance-Family and Work. 5 *Texas Journal Women & Law* (1995) at 37, 77 Thus, the determination of exactly who is the *primary caretaker* is even more difficult.

⁵⁴⁴ McIsaac, *supra* note 10

⁵⁴⁵ Henry, *supra* note 515

⁵⁴⁶ Dowd N E. Work and Family: Restructuring the Workplace, 32 *Arizona Law Review* (1990) 431, 444 (noting that the percentage of divorced mothers in the workplace ranges from 69% to 83% depending upon the ages of their children).

⁵⁴⁷ Robinson, *supra* note 541

⁵⁴⁸ Bianchi. America's Children: Mixed Prospects. 45 *Population Bulletin* (June 1990) pp 20-21 (primarily because of the absence of a second parent, children in single-parent families spend considerably less time in one-on-one activities with a parent than children in intact families).

⁵⁴⁹ Robinson, *supra* note 541

⁵⁵⁰ *ibid* at 52

⁵⁵¹ Warshak, *supra* note 42

⁵⁵² *ibid*. Moreover, *Numerous studies have established beyond a doubt that infants form close attachment bonds with their fathers and that this occurs at the same time that they form attachments to their mothers. Although father and mother usually play different roles in their child's life, 'different' does not mean more or less important.*

. . . a warm, involved, caring father does militate against antisocial behaviour, and an inadequate father does increase the probability of delinquency. As in the case of intellectual development and social development, a father can be a predominantly positive or negative influence with regard to his children's moral development. And this runs counter to our cultural prejudice, which consistently devalues the father's contribution to his children's psychological development. . . . for the better part of this century, our society and its institutions have overlooked all but the father's economic contribution to his children.

. . . stereotypes about the nature of men, women, and children have dictated custody decisions throughout history. In earlier times, it was assumed that men, by nature, are better suited to protect and provide for children. Since 1920, it has been assumed that women, by nature, are better suited to love and care for children. . . .As guidelines for custody dispositions, folklore, sentiment, and stereotypes are poor substitutes for factual information (ibid).

⁵⁵³ Williams, *supra* note 72

⁵⁵⁴ Opponents of joint residence argue that joint residence cannot work if the parents are in conflict. Certainly it is the case that conflict between the parents is troubling to children. The opponents of joint residence however, make the wrong comparison. The choice is between joint residence and sole residence, not between joint residence and Ozzie and Harriet of the idealised intact family. Sole residence does not reduce conflict and exacerbates it. The parents still must deal with one another in connection with all aspects of the child's life, but they do so in unstable and unhealthy relationship of victor and vanquished. Compared against sole residence, joint residence is a device for conflict reduction and facilitates cooperation by avoiding both the grasping by a parent fearful of loss and the devastation to a parent suffering loss. Research tells us also that children suffer the

fear of loss and the actual loss of parental involvement during divorce. Joint residence saves the child from the loss of a parent.

⁵⁵⁵ From a strictly negotiating perspective, it is difficult to understand how a father's insincere request for joint residence could advance his quest for lower child support payments. Knowing his insincerity, all a mother need do is to call his bluff. This tactic would confront him with the prospect of residence responsibilities which he does not want—plus undiminished financial responsibilities (Abraham, *infra* note 564 at 284)

⁵⁵⁶ Maccoby, & Mnookin, *supra* note 434

⁵⁵⁷ Danzig, *supra* note 12

⁵⁵⁸ Kelly, *supra* note 361

⁵⁵⁹ Danzig, *supra* note 12

⁵⁶⁰ Kelly, *supra* note 361

⁵⁶¹ Weitzman, *supra* note 370

⁵⁶² *ibid* at xii and 337-339

⁵⁶³ Abraham J H. The Divorce Revolution Revisited: A Counter-Revolutionary Critique. 9 Northern Illinois University Review (1989) pp 251-298 at 251

⁵⁶⁴ Faludi S Backlash: The Undeclared War Against American Women. Crown, New York (1991) at 19-20

⁵⁶⁵ Abraham, *supra* note 564

⁵⁶⁶ *ibid*

⁵⁶⁷ *ibid* at 251

⁵⁶⁸ *ibid*

⁵⁶⁹ See, Associated Press, *Huge Gap Reported In Post-Divorce Standard of Living A Mistake* (16th May 1996) noting references to the study in 175 news stories, 348 social science articles, 250 law review articles, 24 appeals courts and Supreme Court cases, and even in President Clinton's 1996 budget. See also, Detroit Free Press (Front Page, Friday, 7th May 1996)

⁵⁷⁰ Faludu, *supra* note 564

⁵⁷¹ *ibid* at 21

⁵⁷² Hoffman S & Duncan G. What Are The Economic Consequences of Divorce? 25 Demography (1988) at 644 n.3

⁵⁷³ Faludi, *supra* note 565 at 21

⁵⁷⁴ Abraham, *supra* note 564

⁵⁷⁵ Faludi, *supra* note 565 at 21

⁵⁷⁶ *ibid* at 22

⁵⁷⁷ *ibid*

⁵⁷⁸ *ibid*

⁵⁷⁹ Peterson R R A Re-Evaluation of The Economic Consequences of Divorce. 61 American Sociological Review (June 1996a) pp 528-536

⁵⁸⁰ Peterson R R Statistical Errors, Faulty Conclusions, Misguided Policy: Reply To Weitzman. 61 American Sociological Review (June 1996b) pp 539-570

⁵⁸¹ Hoffman S D, & Holmes J. Husbands, Wives and Divorce. In, G Duncan & J Morgan (Editors), 45 Thousand Families—Patterns of Economic Progress (1976)

⁵⁸² Hoffman S D. Marital Instability and The Economic Status of Women. 14 Demographics (1977) at 67

⁵⁸³ Stroup A, & Pollock G A. Economic Consequences of Marital Dissolution. Journal of Divorce and Remarriage (1994)

⁵⁸⁴ Rapp C (1996). Lies, Damned Lies And Lenore Weitzman. Article, <http://www.abc.com/biglie.htm>

⁵⁸⁵ Braver & O'Connell, *supra* note 41

⁵⁸⁶ Locke R (2001). Deadbeat Social Scientists. Article, <http://www.rense.com/>

⁵⁸⁷ See, Anne P. Mitchell, Address at the 1995 Convention of the U.S. National Congress of Fathers and Children (ncfcspeech.html). Hereinafter *Mitchell Speech*. Ms. Mitchell noted that:

the vocal feminist front, in its current incarnation, has no desire for there to be even a semblance of equality in this [family law] system, and is in fact coercing today's woman out of the workforce and back into the nursery. . . .

Of course, this can only mean that women must be primary caretakers, which in turn means that men must be their financial benefactors. Or, put more simply: women get the kids, men get to pay. One would think, given the countless contemporary women who have proven that women are in fact capable of sustaining a career as well as having children, that to define women back into dependency on the very actors who have for generations oppressed them, namely men and the state, would be nothing short of heresy.

Notably, Ms. Mitchell is a divorced, custodial mother. See also, Anne P. Mitchell, Testimony Before the California Focus on Fathers Summit (com/free/testimony/summit.html).

⁵⁸⁸ Stephens M. Joint Custody. *The Irish Times* (26th July 1996) at 13:

It is morally wrong that when . . . marriages end, the father's role in the lives of his children is reduced to such an extent that he becomes, at best, an avuncular figure on the periphery of his family. The destruction of the father/children relationship does not only apply in exceptional circumstances, but is standard practice when custody disputes are referred to courts for settlement.

Not only must divorced fathers frequently contend with state-induced parental alienation, but some are also confronted with parental alienation spurred by the child's mother. See Walsh M R, & Bone J M. Parental Alienation Syndrome: An Age Old Custody Problem, *Florida Bar Journal* (June 1997) at 93 describing parental alienation syndrome, first identified by Professor Richard A. Gardner (Gardner R. Recent Trends In Divorce and Custody Litigation. 29 *Academy Forum* 1985) as one parent *brainwashing* the child to reject the other parent.

⁵⁸⁹ e.g. through the use of liberal divorce law

⁵⁹⁰ See, *Mitchell Testimony*, *supra* note 588

⁵⁹¹ Locke, *supra* note 586

⁵⁹² Rapp, *supra* note 585

⁵⁹³ Bettina Arndt. *The Second Time Around*. *The Age* (24 June 1996)

⁵⁹⁴ *ibid* at A17

⁵⁹⁵ Peterson, *supra* notes 580 & 581

⁵⁹⁶ Stroup & Pollock, *supra* note 584

⁵⁹⁷ Braver & O'Connell, *supra* note 41

⁵⁹⁸ Rapp, *supra* note 585

⁵⁹⁹ Weitzman L J. The Economic Consequences of Divorce Are Still Unequal: Comment On Peterson. 61 *American Sociological Review* (June 1996) pp 537-538

⁶⁰⁰ Family Law Council. Note: Patterns of Parenting After Separation. 6(3) *Australian Journal of Family Law* (December 1992) pp 189-190 at 190. But for *contra*, see Mclsaac, *supra* note 10; Curtis, *supra* note 10; Salka, *supra* note 401; DeCrow, *supra* note 405. See also, Luepnitz, *supra* note 249; Kelly, *supra* note 19; Hanson, *supra* note 343; Maccoby, Depner & Mnookin, *supra* note 343; Shiller, *supra* note 285

⁶⁰¹ *Patterns of Parenting*, *supra* note 7. Conclusions para 4,51 (k) at 37 (*Cooperative Parenting is a desirable goal*)

⁶⁰² *ibid*. Recommendation 14 at 3 (*The introduction of a joint custody presumption is not recommended*)

⁶⁰³ *Eliminate Joint Custody Terminology?* Joint Custodian (March 1990) p4

⁶⁰⁴ See Act effective July 1, 1997, ch. 97-242, § 2, 1997 Fla. Laws 4436, 4437 (codified at FLA. STAT. § 61.121 (1997) (*The court may order rotating custody if the court finds that rotating custody will be in the best interest of the child.*)

⁶⁰⁵ *Patterns of Parenting*, *supra* note 7 at 36

California was the first state in the United States to introduce a statutory presumption of joint custody after separation (paragraph 4.46).

California repealed its joint custody presumption in 1988. Prior to its repeal, Weitzman (1985) criticised California's legislation... (paragraph 4.57).

⁶⁰⁶ *ibid.* Conclusions at 31(paragraph 4.51 o)

The joint custody presumption has been tried and abandoned in at least one major jurisdiction....

⁶⁰⁷ Nygh J. Sexual Discrimination and The Family Court. 8 University of New South Wales Law Journal (1986):

Section 4600.5(a) of the California Civil Code provides for a presumption that joint custody is in the best interests of the child where both parties agree to an award of joint custody, thereby, it would seem, relieving the court from the duty to make further inquiries. There is it would seem, no such presumption in the case of contest (*ibid* at 70).

⁶⁰⁸ Mclsaac, *supra* note 10 at 3071 (*In fact, the law states a presumption if parents agree, and then has joint custody and sole custody as equal options for the courts to decide upon if the parents cannot agree*)

⁶⁰⁹ Family Court of Australia, Submission 940 vol 30 (b), 26th May 1992 at s5837 p 9

In 1980, in California a presumption in favour of both joint legal and joint physical custody was enacted...The presumption was repealed in 1988...

⁶¹⁰ Hall G & Lee A. Family Court Custody and Access Research Report 8. Discussion Paper, Department of Justice, New Zealand (December 1994) at p 75. The authors incorrectly state:

In 1988... the State of California, which had earlier gone so far as to embrace in its statutes a presumption that joint custody was in the best interests of the child, recognised that this presumption was untenable and removed it.

⁶¹¹ See Now Action Alert. Father's Rights Bill Advances in the House. 20 October 1999. <http://www.now.org/issues/right/alerts/10-20-99.html>

⁶¹² Weitzman, *supra* note 370

⁶¹³ Abraham, *supra* note 564

⁶¹⁴ *ibid* at 282. However, as noted earlier there is no valid scientific evidence to support the feminist argument (Maccoby & Mnookin, *supra* note 436)

⁶¹⁵ *ibid*

⁶¹⁶ Weitzman, *supra* note 370

⁶¹⁷ Mclsaac, *supra* note 10

⁶¹⁸ *ibid* at 3070

⁶¹⁹ *ibid*

⁶²⁰ *ibid*

⁶²¹ *ibid* at 3071

⁶²² *ibid* at 3070

⁶²³ Arnold P M. Wildmen, Warriors and Kings (1991) at p 52

⁶²⁴ Farrell W. The Myth of Male Power: Why Men Are The Disposable Sex. Simon & Schuster, New York (1993)

⁶²⁵ Mclsaac, *supra* note 10

⁶²⁶ *ibid* at 3072

⁶²⁷ Doll B. American Psychological Association. Preliminary Summary: Empirical Research Describing Outcomes of Joint Custody. Washington DC (14 June 1995). For a more recent examination see Bauserman, *supra* note 259

APPENDIX A

Proposed Statutory Joint Residence Framework

(A) Statement Of Legislative Intent

This legislation is intended to and shall replace and supersede previous case and statutory law regarding child residence to the extent it conflicts with or is inconsistent with the rebuttable presumption of joint residence enacted in paragraph H below.

(B) Public Policy Statement

The parliament of Australia in recognizing the fundamental right of every child to experience the love, guidance and companionship of both parents after their separation or divorce, declares that it is the public policy of the Commonwealth to maximize the time and involvement each parent is willing and able to contribute in raising their children after the parents have separated or dissolved their marriage and to encourage parents to share the rights, duties and responsibilities of child rearing to affect this policy.

(C) Residence Disputes

In disputes involving the residence of a minor child, the court shall award residence orders according to the best interests of the child in the following order of preference:

1. To both parents jointly (pursuant to the rebuttable presumption of joint residence in paragraph H below).
2. To either parent. In making an award to either parent, the court must consider among other factors which parent is more likely to maximize the time and involvement of each parent and may not prefer a parent because of the parent's gender or race.
3. To any other person deemed by the court to be suitable and able to provide adequate and stable environment.

Before the Court makes a residence order to a person or persons other than a parent without the consent of the parents, it should make a finding that an award of residence to a parent would be detrimental to the child and that an award to a non-parent is required to serve the best interests of the child. Allegations, that a

residence order in favour of a parent would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings.

(D) Interim Orders

Unless it is shown to be detrimental to the best interests of the child, the child shall have, to the greatest degree practical, equal contact to both parents during the time that the court considers the award of residence

(E) Parenting Plan

The court shall require both parties to submit a parenting plan or plans for the court's approval.

The court may order mediation in order to assist the parties in formulating or modifying such a plan.

(F) Cooperation

A parent who asserts they cannot get along with the other parent is required to present a Cooperative Plan setting out the acts that parent will undertake to reduce conflict and increase cooperation to overcome any alleged difficulties

A parent who fails to present a Cooperative Plan, or fails to engage in the acts set forth in that plan, or who engages in any acts that directly or indirectly enhance hostility and constitute a failure to cooperate, is deemed to be acting in contravention of the best interests of the child.

A parent who is found to have committed one or more of the acts set out above without reasonable excuse is deemed to have acted in contempt of court and is subject to punishment.

(G) False Accusations

Evidence of a false report of child abuse or family violence is admissible in a suit between the involved parties regarding the residence of a child. A false report of child abuse or family violence made before or during a suit affecting the parent-child relationship shall be grounds for the court to modify the parent-child relationship to restrict further contact to the child by the false accuser.

(H) Presumption

There is a rebuttable presumption that joint residence orders are in the best interests of the child.

1. The presumption in favour of a joint residence order may be rebutted by a showing that it is not in the best interests of the child after consideration of clear and

convincing evidence with respect to all relevant factors in section 68F(2).

2. The burden of proof that a joint residence order would not be in a child's best interest shall be upon the parent requesting sole day-to-day responsibility.

(I) Definition

For the purposes of this part, a joint residence order means an order investing both day to day and long term parental responsibility in each parent, and providing that residence of the child is shared in such a way as to maximize the time and involvement each parent is willing and able to contribute in raising their children. Contact must be as equal as possible

Maximizing is achieved by ensuring that a parent is not denied the ability to spend as much time as that parent is willing and able to spend, and does not have his/her requested time reduced, when it would result in increasing the amount of time the other parent spends to exceed 50%.

A joint residence order obligates the parties to exchange information concerning the health, education and welfare of the minor child and unless allocated or apportioned, the parents shall confer with one another in the exercise of decision-making rights, responsibilities and authority.

(J) Reasons

If the court declines to award a joint residence order, the court shall state in its decision the specific findings of fact for denying the award.

An objection by a parent to a joint residence order is not a sufficient basis for a finding that a joint residence order is not in the best interests of a child, nor is a finding that the parents are hostile to each other. That there is conflict between parents is of itself not a sufficient basis for assuming that the child's best interest will not be served.

A statement that a joint residence order is not in the best interests of a child shall not be sufficient to meet the requirements of this part.

(K) Modification.

A joint residence order may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is

shown that the best interests of the child require modification or termination of the order.

In an application for modification, the court shall consider evidence of substantial or repeated failure of a parent to adhere to the plan for implementing the joint residence order. The court shall state in its decision the reason for modification or termination of the joint residence order if either parent opposes the modification or termination order.

(L) Records

Notwithstanding any other provision of law and unless the court orders otherwise, access to records and information pertaining to a minor child, including but not limited to medical, dental, law enforcement and school records shall not be denied to a parent even if that parent does not have day to day responsibilities for the child.

(M) Change of Address

In the absence of an order to the contrary, a parent in receipt of a residence order shall notify the other parent if he or she plans to change the residence of the child for more than thirty (30) days, unless there is written consent to the change.

To the extent possible, notice must be served personally or given by certified mail, not less than forty-five (45) days before the proposed change in residence. Proof of service must be filed with the Court that issued the residence order. The purpose of the notice is to allow the parents to seek modification of the residence order.

Failure to give notice without good cause may be a factor in determining whether relocation was done in good faith.

The Joint Residence Presumption

Implementing joint residence and non-adversarial conflict resolution successfully between divorcing parents will depend upon the existence of adequate legislative guidelines and support services. Given our long tradition for residence litigation and competition for exclusive residence awards, joint residence will not come about simply by telling parents to *do it*. If the law insists that the paramount consideration be the welfare of the child, parents should be at least reminded of their responsibilities towards their children. This reminder also serves to demonstrate the concerns of the whole community that the welfare of children must receive special consideration.¹

We too often forget that it is an important function of the law to provide a model of which is generally believed to be desirable. This gives people an indication of what is expected of them and a framework in which they can negotiate between themselves.² The opening policy statement which introduces our proposed joint residence statute establishes a guide for divorcing parents and articulates its legislative intent:

The parliament of Australia in recognizing the fundamental right of every child to experience the love, guidance and companionship of both parents after their separation or divorce, declares that it is the public policy of the Commonwealth to maximize the time and involvement each parent is willing and able to contribute in raising their children after the parents have separated or dissolved their marriage and to encourage parents to share the rights, duties and responsibilities

Our recommendation on a new family law in Australia changes the starting point or premise for determination of child residence, thus changing the nature and course of the process itself. Instead of win or lose, all or nothing presumption, there is a presumption of consensus, equality and the protection of parent-child bonding. The courts in effect must say to parents, *we do not care how you feel about each other—as long as there is no clear convincing evidence that either of you is abusive and unfit to be a parent, our assumption is that you are both qualified to continue as parents, albeit under different circumstances.*

Presuming joint residence as a first stage in resolving a custody dispute eliminates the necessity of proving which parent should *have* the children; there is no battle due to no contest and no prize to win. There is no loyalty conflict because children do not have to choose between parents and one parent does not need to convince the child that the other parent is less fit.

Thus, the kinds of problems that exist under the present system – court room litigation, friends and relatives taking sides, thousands of dollars spent on lawyers and expert witness fees, time off work in many cases and difficulty in enforcing the resulting *treaty* – all would be reduced substantially or avoided by this simple, clear legal presumption of equal protection of the parental status of both parties. This parallels our presumption in criminal cases that *one is innocent until proven guilty*. The present sole residence practice of divorce is saying in effect, *we must choose between you—one of you must be judged less fit than the other; somebody has to be guilty.*

However, this is more than the mere replacement of one presumption with another. The presumption for joint residence is supported by social science data that demonstrates that it is appropriate, whereas the older presumption for sole residence did not rest upon any valid foundations.³ Moreover, the presumption for joint residence is not rigid, but can be overcome in the appropriate case—when it can be shown that joint residence is not in the best interests of the child.⁴ This approach continues the proper focus on the child's interests, provides the courts with an appropriate starting point—joint residence—and

allocates burdens of proof⁵ the parent objecting to joint residence bears the burden, all of which are lacking in current practice.⁶ Ironically, while we criticise married parents for not sharing the care and responsibility for their children more equitably, we actually prevent divorced parents from doing so. Of course, a presumption in favour of joint residence will not mandate such an arrangement in cases where one parent relinquishes residence voluntarily or both parents agree that sole residence is preferable.

The act mandates that the only appropriate standard to be applied by the trial court in determining the residence of the child after separation or divorce is the best interests of the child. This principle is repeated throughout the law and is the sole criteria to be met in making any award

Paragraph (C), as amended, provides for the residence of children during litigation: First, and of paramount importance, residence shall be awarded according to the best interests of the child. Second, an order of preference as to whom residence shall be awarded is enacted:

- (1) To both parents jointly (plans of implementation may be submitted by the parties and may be required by the court either before or after issuance of the award);
- (2) To either parent (sole residence);
- (3) To any other suitable person;

Provided that any award to a non-parent can be made only when there has been a finding that continued parental residence would be harmful to the child. Whatever choice is made by the trial court, the determination must be made in the child's best interest.

Paragraph (E) contemplates that the court shall select from among the litigants' proposed parenting proposals that plan which most effectively promotes the best interest of the child. This requires the court to compare the advantages and disadvantages of each concrete plan in terms of its effect upon the child's welfare. If the court finds that the evidence weighs in favour of a particular parenting plan as being most effective in promoting the child's best interest the court must adopt that plan, regardless of whether the plan calls for joint or sole residence.

The presumption or preference in favour of a joint residence plan only comes into play and requires the court to adopt the joint residence plan when the evidence is in equipoise, that is, when the court is in doubt as to whether the joint plan is superior to a competing non-joint plan in terms of promoting the child's best interest.

Third, paragraph (H) establishes a rebuttable presumption that joint residence is in the best interest of the child which may be rebutted by a showing to the contrary, after considering evidence introduced with respect to provisions codified in section 68F(2) of the Family Law Act. The presumption only compels the court to award joint residence in those cases where:

- Other things are equal
- There is insufficient evidence to rebut the presumption
- Neither parent alone would be able to manage a sole residence arrangement
- It cannot be shown that parental residence would be harmful to the child

Effectively, the presumption only provides the court with a first choice, able to be rejected in the face of evidence disproving the conclusion. In such a case, it becomes necessary for the party seeking joint residence to re-establish the propriety of the presumption's conclusion. It provides further that *the burden of proof that joint residence would not be in the child's best interest shall be on the parent requesting sole residence.* (Paragraph H part 2).

This provision does not create any extraordinary burden on the party requesting sole residence. Here the parent must show that a consideration of provisions established in section 68F(2) would make sole residence the preferred arrangement. As in any matter in which there is a rebuttable presumption, the burden rests with the party challenging the presumption to convince the fact-finder that his or her other proposed conclusion is more correct than the presumed one

A presumption does not have any probative value, but merely provides the fact-finder with a conclusion in the absence of proof to the contrary:

Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear.⁷

If joint residence is not decreed by the provision of paragraph C(1), the court must consider along with the relevant factors set out in section 68F(2), which parent is more likely to maximize the time and involvement of each parent (paragraph C 2). There is but one element upon which the trial court cannot base its decision. Paragraph C(2) expressly forbids the judge from *prefer(ring) a parent because of that parent's gender or race*. Consequently if sole residence is being evaluated the court must determine which of the parents can serve better the best interest of the child. Without any regard to the gender or race of the parents.

Fourth, a joint residence order may be modified or terminated when it is shown that the best interest of the child so requires, and the court must state the reasons for the change if it is opposed by either parent (paragraph K).

Fifth, a sole residence order may be modified to a joint residence order in accordance with existing legal practice. To support an action for modification of a judgement of child residence, the applicant is required to show that a change in circumstances materially affecting the welfare of the child has occurred since the prior order regarding residence was made. Therefore, when the trial court has made a considered decree of permanent residence, a party seeking change bears the burden of proving that continuation of the present residence arrangement does not promote the welfare of the child.

Sixth, paragraph (L) contains provisions for access to school, health and other relevant records.

Seventh, the closing paragraph (M) contains provisions to notify a parent of any proposed change of address in excess of thirty days.

References

¹ Family Law, Revision of Child Law: Custody, English Law Commission Working Paper, number 96 (1986)

² *ibid*

³ Parley L. Joint Custody A Lawyer's Perspective. 23 Conn. Bar Journal (1979) pp 311-316 at 313

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*

⁷ *Lincoln v French*, 105 U.S. (15 Otto) 614, 26 L. Ed 1189 (1881)

Impact of The Proposed Law

The greatest impact of the proposed new family law is the effect it will have upon the expectations and conduct of parents prior to a court hearing. Moreover, it facilitates the preservation of the child's need for contact with both parents and reduces use of the courtroom by one parent to destroy the other, to the detriment of the child's best interests. Secondly, the new law modifies the options available to the court and the considerations which to be weighed in disposing of custody cases. The Act's emphasis on joint residence is intended to alleviate other problems generated under the present law.

1. Protecting A Child's Right To Experience The Love, Guidance, and Companionship of Both Parents After Divorce.

While the opportunity for fathers to compete for residence, tests the equality of the sexes insofar as sole residence decrees are concerned, the result is increasingly hostile residence battles due to a heightened expectation of unilateral victory by both parents. The new law will shift the view of equality—from a statistical determination of how frequently fathers rather than mothers achieve sole residence—to a decision based on protecting a child's right to contact with both parents and encouraging joint day-to-day and long-term responsibility for the child.

2. Discouraging The Use of Child Residence For Intimidation.

The most apparent feature of the new law is the message it sends in advance to divorcing parents. A power-play for exclusive child residence, either for purposes of intimidation or to force subservience in divorce negotiation, is unlikely to be tolerated by the court. In the same way as the 1975 no-fault divorce law eliminated *fault* as justification for divorce, the proposed new law will largely dissolve the recourse to *winner-take-all* litigation that has been substituted for the catharsis of airing *faults*. In the absence of abuse or neglect, preference is likely to favour joint residence. However where one parent is uncooperative without reasonable excuse and sole residence is being considered by the Court preference is likely to favour the parent who demonstrates the most co-operation and tolerance for a child's frequent and continuing contact with the other parent. Consequently, an antagonistic and covetous parent is likely to be denied sole residence and may jeopardise the opportunity to participate equally in joint residence.

3. Defusing Child Abduction and Support Avoidance.

The legislative recognition of joint residence and its implementation by the courts may defuse and reverse the menacing recourse by some excluded parents to child abduction and/or abandonment of financial support for lack of meaningful, frequent and extensive contact with their children. Joint residence provides an opportunity to demonstrate and increase respect for equality under the law while effecting a possible reduction of child abduction and support avoidance.

APPENDIX B

Amendments To Section 68F (2) - Factors Considered Best Interests Check List

In order to ensure so far as possible that courts exercising jurisdiction under the Family Law Act 1975 consider all factors that judicial and social experience have shown to be particularly relevant to the determination of where the best interests of a child lie in the average custody or guardianship case, a list of mandatory considerations are set out in sections 68F(1) and 68F(2) the Act. The relevant parts of sections 68F(1) and 68F(2) state:

68F (1) *Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).*

(2) *The court must consider:*

- (a) *any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;*
- (b) *the nature of the relationship of the child with each of the child's parents and with other persons;*
- (c) *the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*
- (d) *either of his or her parents; or*
- (e) *any other child, or other person, with whom he or she has been living;*
- (f) *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;*
- (g) *the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;*
- (h) *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;*
- (i) *the need to protect the child from physical or psychological harm caused, or that may be caused, by:*
 - (i) *being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or*
 - (ii) *being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;*
- (j) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
- (k) *any family violence involving the child or a member of the child's family;*
- (l) *any family violence order that applies to the child or a member of the child's family;*
- (m) *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;*
- (n) *any other fact or circumstance that the court thinks is relevant.*

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

To be the child of a mother and father who dislike one another is an unfortunate life experience and any parent who subjects their child to conflicting loyalties whether or not they remain married is less than adequate to their role. Thus, to protect the child's right to a continuing and equitable relationship with both parents the following amendments are proposed:

- (n) *The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;*
- (o) *Evidence that any party has knowingly provided false information to the court regarding a family violence or child abuse proceeding;*
- (p) *The court may not use one factor to the exclusion of all other factors. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child; and.*
- (~~q~~q) *Any other fact or circumstance (including the education and upbringing of the child) that, the court thinks is relevant. However consideration of persons according to gender or race is neither relevant nor permissible.* (new provisions are highlighted in italics)

Parallel to the current position that the child has a right to be consulted, usually in the context of a choice between parents, the child has also the fundamental right to be informed of all possible post-divorce parenting arrangements. None of the booklets for children provided by Family Court Counselling Registries explain the concept of joint residence. The only form of parenting depicted to the child is the sole mother residence model.

Grandparents

As a matter of general principle children develop better when they recognise that they have a place not only in the home in which they live but in the wider family.¹ Social science data has established that it is very important for children's proper upbringing and development that they have contact and relationships with their extended family. It is very important for a child to understand that he or she is part of the wider family, that he or she has grandparents on both sides, uncles, aunts and cousins so that the child grows up feeling part of an extended and supportive family. Although the Family Law Act allows parties other than parents of a relevant child to apply for contact and residence orders, there is no specific reference to grandparent contact. In order to recognise the cultural role of grandparents on the best interests of children, the following amendments are proposed:

(A) Grandparent/Grandchild

The Family Court may grant to a grandparent of a child reasonable rights to contact with the child.

The Court may order grandparent-grandchild contact only upon a finding that the contact would be in the best interests of the child.

A person may not petition the Court under this part more often than once every two years unless there has been a material change of circumstances of:

- (a) *The child*
- (b) *The child's parent*
- (c) *The child's grandparent*

The Court may appoint a separate representative to represent the interests of the child with respect to grandparent-grandchild contact when the interests are not adequately represented by the parties to the proceedings.

References

¹ See Objects and Principles, Section 60B(2)(b) of the Family Law Act 1975 (clth): *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.*

APPENDIX C

The Need for Mandatory Mediation

The Role of Divorce Lawyers

The duty of lawyers in an adversarial role is to protect their client's rights and to maximise their client's ascendancy within a dispute through various legal manoeuvres. This attitude is intrinsic to a lawyer's training and is reinforced ethically, by peer esteem and financially through attracting clients. In a residence dispute, if a lawyer does not advocate to the fullest extent possible for the client, because he or she understands the systemic nature of such conflict, the lawyer may be accused of failing the legal canon of ethics. These require the lawyer to represent only one party in a dispute, on the understanding that the other party is entitled to full representation by separate counsel.

A wide variety of professionals who work in the family relations disciplines advance severe criticisms of the adversarial process.¹ Among these are the perspectives of the prominent American divorce lawyer R.L. Fiedler,² which are transferable to the Australian situation:

I am in the business of winning... Once I have been hired my sole aim is gain victory; and in doing so, I will do anything and everything I think is necessary to serve the interests of my client... That is what I have been hired to do, and if in doing so I appear cold and calculating that's the way it has to be. I am tough because I assume the lawyer who opposes me will also be tough (and) when I take a case I am not concerned with whether any client is always right. As far as I am concerned, a client is always right.³

Thus the adversarial system trains some parents through modelling to fight more effectively, using slander, accusation and any other weapon available, yet such contests are seen as proper means of achieving the best interests of the child. By any standard of civilised behaviour, as well as the accumulated research data recording that children need joint residence and a low level of inter-parental conflict, the adversarial system must rank very low as a method of making satisfactory and lasting post-divorce parenting arrangements.

Research indicates that it is important to provide parents with the forum and the tools they need to separate their unsatisfactory marital relationship from their continuing role as parents after divorce (Saposonek 1983).⁴ Many parents intuitively understand that high levels of conflict can adversely affect on their children's emotional health. Others need the assistance of appropriate laws and trained professionals in order that sensible nurturing decisions are made in their children's best interests.

Redefining The Divorce Lawyer's Role

Within a no-fault divorce and child residence context, itself buttressed by extensive mandatory mediation and counselling services, it is inevitable that the divorce lawyers role would change. It would – and we believe, that it should – become that of advisor, not advocate, with the entire family as client. The lawyer's role would be to ensure that decisions, which the parents had themselves worked out were incorporated into a legal parenting contract. No longer an adversary figure, he or she might also (assuming more sophisticated training than lawyers now receive) lend knowledge of marital legal options and expertise about, for example, financial options to both husband and wife, helping them to work out the most mutually advantageous arrangements possible. Naturally, an arrangement that is mutually advantages (and that is arrived at through mediation)

lessens the psychic cost of divorce and increases the chances of cooperation between parents regarding their children. We would also applaud a decrease in lawyers fees, which may come about through the competition of advertised rates and various self-help programs.

Divorce Mediation Research

What Is Mediation?

Mediation is a process in which the parties with the assistance of a neutral person attempt to reach a consensual solution (Folberg & Taylor 1984).⁵ Divorce mediation is a process whereby a couple facing divorce meets with one or more impartial, neutral third parties who are skilled in problem solving and knowledgeable about divorce law. Through a series of meetings, the couple attempts to resolve their differences in a positive way with the help of the mediator or mediators. The mediator can be a lawyer, a therapist, or an lawyer-therapist team. In addition, third party experts are used when necessary to establish the accurate value of community assets, although these appraisers do not usually participate in mediation.

Non-adversary help from professionals whose interest is in the family (not a client) is essential for many who, at the most conflicted and confused time of their lives, are obliged to make some of the most critical life decisions, the care of children the foremost among them. We therefore must expand programs and services whose purpose is to help people come to terms with a divorce and its aftermath, both practically and emotionally.

In many United States jurisdictions, mandatory mediation laws have been enacted⁶ and impact positively on the resolution of child residence matters. Other states have given the courts legislative authority to require parents to mediate child residence matters.⁷

The Family Court's evaluation of its pilot study⁸ of voluntary mediation conducted in the Melbourne registry found it to be very beneficial for participants, but recommended against the introduction of mandatory mediation as part of family law reform. This was done without any detailed analysis of the experience of jurisdictions that which have enacted mandatory mediation laws in child residence matters.

The report examined 149 cases mediated between April 1992 and March 1993. It found that there was overall agreement in 82% of cases, with all matters in dispute settling in 71% of cases and at least one substantial matter settling in 11% of cases. 79% of participants were assessed as experiencing moderate to high relationship conflict, with 92% showing moderate to low levels of communication with their former partner. Having co-mediation by a man and women was seen as highly desirable. Some 88% of clients reported that having male and female mediators with both legal and social science training made a great deal of difference to the way things were handled.

Multiple issue disputes resulted in a higher rate of agreement than single-issue cases (88% and 73% respectively). In particular, combined property and child matters demonstrated a higher resolution rate than cases dealing with either of these matters alone. The report recommended further evaluation of the mediation service to examine whether there were any systemic problems. It suggested that an evaluation should include an attempt to understand why combined property and child matters tended to have a higher rate of resolution than matters raising only one of these matters.

Curiously, a study of mandatory mediation commissioned by the Californian Judicial Council was cited in the report's bibliography, but there was no discussion of its results. The study by Dr. Mary Duryee,⁹ Director Alameda Family Court Services, like most other studies of mandatory mediation, found that:

- Parents who participated in mandatory mediation of child residence disputes are twice as likely to be satisfied with both the process and the results as parents who go to court without mediation.¹⁰
- Mediated agreements are more likely to be complied with than are court orders.¹¹
- A vast majority of parents who participate in mandatory mediation of child residence disputes believe that mediation also helps them focus attention on the needs of their children and helps the parents feel better about themselves.¹²
- Mediation is twice as likely as court intervention to improve relationships between the parties.¹³
- Mandatory mediation saves money for both the parties and the state when compared with extended court action, while allowing the parties significantly more time to address their problems.¹⁴ (This finding confirms Mclsaac's 1981¹⁵ study which found that mediation administered through a conciliation court as part of California's mandatory process cost only one fourth as much as a trial. Mclsaac points out that this significant saving of public funds was the most persuasive argument presented in getting California's mandatory mediation law passed).

Why Mandatory?

If mediation is good goes the argument it should not be mandatory. All we need is to tell people about it, or show them videotape and those for whom it is helpful will choose it. To suggest that viewing a videotape on mediation might be sufficient to counter a lifetime exposure to the idea that controversies should be resolved by litigation ignores the realities of human nature. The unfortunate truth about human behaviour, however, is that, when left to our own devices, we often choose to act in ways that are not very prudent. Some people would ride in cars, alone or with their children, without seatbelts. Others ride motorbikes without helmets, or otherwise expose themselves and the children who rely on them to danger.

There are countless things that we do which are not the result of profound knowledge. We often act because we are used to acting in certain ways, or because we have fear or uncertainty about the unknown. Research indicates that groups of people who, given the option of mediation, tend to choose it over a court hearing, tend to mirror people who are generally more willing to try something new (tertiary educated and relatively high income).¹⁶ This data does not show that either group of those who are predisposed to try new things or the group of people who do not tend try new things are more wise. It tends to suggest, instead, that important socio-economic factors are at work.

To the extent that people's views about mediation are subject to influences outside of the judicial system, it is not the educational media, but the opinions of their lawyers that seems to impact most noticeably. Whether those represented by lawyers are likely to accept or reject mediation seems to depend on the attitudes of the local bar than on any insight of the parties in dispute (Kressel & Pruitt 1989).¹⁷ Where mediation is not mandatory, it is likely to be chosen by those whose lawyers recommend it and likely to be rejected by those advised by their legal practitioners to do so (Rosenburg, Folberg, & Barrett 1991).¹⁸

In addition, if mediation is not mandatory, it is not then voluntary, in any real sense of the word. Instead, a system of non-mandatory mediation either parent could force the case to trial by refusing mediation, regardless of the other party's preference. Most people learn about mediation most effectively by participating, and that the vast majority are pleased with what they learn. Evidence indicates that women would not be more likely to opt out of mediation than men. Rather, those most likely to reject mediation are those

who are unfamiliar with the process and generally reluctant to try something new (Kressel & Pruet 1989).¹⁹

Studies of mandatory mediation have shown that while approximately one third of divorcing parents would reject mediation if given the opportunity, when those parents are required to mediate, 75% to 80% of them are satisfied with the process (Kressel & Pruet 1991).²⁰

Some people find residence/contact mediation to be tense and unpleasant. These same people find court more strained and more distasteful, and of those who find the mediation process unappealing, over 75% nonetheless remain satisfied with the process (Kressel & Pruet 1989).²¹ While a small number of people might experience discomfort in the mediation session, the undeniable truth is that every law ever enacted changes some pre-existing relationship and makes some people unhappy. The evidence shows that mandatory mediation is a beneficial enactment and helps a far greater number of people of both genders than it hurts.

In any deliberation on mandatory mediation it is important to consider the worry of some critics who are concerned that abused spouses may be unable to hold their own during the process of mandatory mediation, and that requiring victims of abuse to negotiate head-to-head may be inappropriate. A brief examination of California mandatory mediation law sheds light on this issue. However, as the code permits courts to enact local rules requiring mediators to make recommendations regarding residence/contact in the event that mediation is not successful, it cannot be considered to be *pure* mediation law.²² In mandated mediation parties are only required to attend mediation. They need not reach agreement or actively take part, so even the process may be required it is only marginally compelling.

The statute requires that the parties *participate* in mediation.²³ California law imposes no penalties for participating badly, nor for participating only briefly. The party who is determined to use the court for their own personal vindication may simply refuse to reach agreement during mediation and court-room door will swing wide open. Nonetheless, the net result in this jurisdiction's use of mandatory mediation of child residence/contact disputes has been that parties who would not have attended the mediation absent the court order almost invariably do participate in a meaningful way and are satisfied with the outcome (Duryee 1991; Ricci 1992).^{24, 25}

In matters where a restraining order is in effect because of actual or threatened spousal abuse, the statute directs the mediator to see the parties separately in a kind of *shuttle diplomacy*.²⁶ Courts are instructed to develop local rules to respond to requests for a change of mediator, or to general problems relating to mediation.²⁷ Several counties also permit spouses who allege abuse to bring a support person with them.

But what if a parent abuses the children or threatens their physical safety or emotional health, should such behaviour escape comment and be treated with the same respect accorded the kind, nurturing parent's actions? While mediators do not hold themselves as arbiters of morality, they do not treat all behaviour similarly. When one or both parents engage in dangerous or illegal behaviour with children, a mediator will examine that behaviour. Furthermore, the mediator will explore whether the parties understand the consequences of the conduct and, if so, whether they are willing to change that behaviour. If the child is abused, the mediator has the legal obligation to notify the appropriate state agency.

The California evidence clearly indicates that parties to mandatory mediation, including those who would have opted out if given the opportunity, significantly prefer the process over court attendance because of the substantive results, and because the process was more supportive and helpful. As noted, mandatory mediation also saves money for both the parties and the state (Duryee 1991; Ricci 1992).^{28, 29}

In determining whether to mandate mediation, the pertinent question for policy makers to consider is not whether mandatory mediation will be as effective as voluntary mediation, but whether mandatory mediation will be more effective than no mediation. Requiring parents to mediate prior to allowing them to invoke the power of the court is consistent with the societal view that, to the extent possible, parents rather than the state should make parenting decisions.

Creating A Neutral But Mandatory Mediation Process

Having a law that allows voluntary mediation is hardly the strongest pressure the court can apply to parents to try to resolve differences on residence and contact. At present all a parent needs to do to prevent compromise is to refuse it. He or she then proceeds directly to the courtroom where present law and custom hold out the possibility of a total *victory* based on destroying the other parent's character to the detriment of a child's best interests.

Parents need not like each other or interact in order to share the rights, duties and responsibilities of parenthood. What parents do need during and after divorce is a neutral setting in which to work out existing hostilities and then develop the terms of their arrangement or at least express their difference to a neutral party who can then report to the court. One basic consideration which should guide both mediator and the court is which arrangement will have the effect of increasing the child(ren)'s chances to receive the most nurturing and involvement possible from both parents. If responsibility cannot be delegated equally, residence should be delegated in favour of the parent who is most likely to encourage and respect the child's relationship with the other parent. By contrast, under today's custom of choosing between parents, residence tends to go to the parent who is most adamant about excluding the other, mounts the strongest courtroom battle and is least open to the idea of joint residence.

Whatever the parents response to mediation – whether they reach an agreement or not – neither parent should be threatened with the loss of his or her child, just as children should not have to face the loss of a parent. As a last resort, the precise division of time and delegation of responsibilities may need to come under the court's jurisdiction. Even when parties are highly antagonistic, the court can still protect the child's right to both parents and each parent's right to be a parent and each parent's obligation not to interfere in the areas delegated to the other party. In fact, there is far less reason and motivation to interfere in each parent's status if their role is clearly protected and equitably delegated.

References

¹ See for instance, Brown D G. Divorce and Family Mediation: History Review, Future Direction. 20(2) Conciliation Courts Review (1982) pp 1-44; Saposnek D. Mediating In Child Custody Disputes. Jossey-Bass, New York 1983

² Fiedler R L. They Way Things Are; Not The Way Things Should Be. World, New York (1971)

³ *ibid* at 1-2

⁴ Saposnek, *supra* note 1

⁵ Folberg J, & Taylor A. Mediation; A Comprehensive Guide To Resolving Conflicts Without Litigation (1984) pp 7-9

⁶ e.g. California, Delaware, Maine, North Carolina, Oregon

⁷ e.g. Alaska, Illinois, Kansas, Louisiana, Montana, New Hampshire, New Mexico, Texas, Washington DC

⁸ Evaluation of The Family Court Mediation Service, Office of The Chief Executive, Research Report Number 12 (March 1994). See key findings and conclusions. pp 4-11

⁹ *ibid* at para 11.25

¹⁰ Duryee M. A Consumer Evaluation of A Court Mediation Service. Report To The Judicial Council of The State of California (1991), cited as Duryee M. Mandatory Court Mediation: Demographic Survey and Consumer Evaluation of One Court Service. Executive Summary 30(2) Conciliation Courts Review (1991) pp 261-267

¹¹ *ibid* at 10-27

¹² *ibid* at 16

¹³ *ibid*

¹⁴ *ibid*

¹⁵ McIsaac H. Mandatory Conciliation: Custody Visitation Matters, California's Bold Stroke. 19(2) Conciliation Courts Review (1981) pp 78-81

¹⁶ Kressel K, & Pruet D. Mediation Research: The Process and Effectiveness of Third Party Intervention. Jossey-Bass, San Francisco (1989) pp 19-2. See also, Ricci I. Implementing A Legislative Mandate For Service In California's Court Connected Family and Conciliation Courts. 20(2) Family and Conciliation Courts Review (April 1992)

¹⁷ *ibid*

¹⁸ Rosenberg J, Folberg J, & Barrett R. Use of ADR In California, Findings and Proposals, Report To The Judicial Council of California (November 1991) 55-60

¹⁹ Kressel & Pruet, *supra* note 12

²⁰ *ibid*

²¹ *ibid*

²² See, California Civil Code 4607. West Supp (1991)

²³ See, California Civil Code 4607(a). West Supp (1991)

²⁴ Duryee, *supra* note 6

²⁵ Ricci, *supra* note 12

²⁶ See, California Civil Code 4602.2

²⁷ See, California Civil Code 4607(g)

²⁸ Duryee, *supra* note 6

²⁹ Ricci, *supra* note 12

APPENDIX D

Proposed Statutory Mandatory Mediation Framework

- (a) Where it appears on the face of the petition or other application for an order or modification of an order for the residence, or contact to a child or children that either or all such issues are contested, as provided in Section 64.2, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony that may exist between the parties and to develop an agreement assuring the child or children's frequent and continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the residence or contact dispute.
- (b) Mediation proceedings shall be held in private and all communications verbal or written from the parties to the mediator made in a proceeding pursuant to this section shall be confidential.
- (c) The mediator shall have the authority to exclude a solicitor from participation in the mediation proceedings where in the discretion of the mediator, exclusion of the solicitor is deemed by the mediator to be appropriate or necessary. The mediator shall have the duty to assess the needs and interests of the child or children involved in the dispute and shall be entitled to interview the child or children when the mediator deems such an interview to be appropriate or necessary.
- (d) The mediator may, consistent with local court rules render a recommendation to the court as to the residence, or contact to the child or children. The mediator may, in case where the parties have not reached agreement as a result of the mediation proceeding, recommend to the court that an investigation be conducted, or that other action be taken to assist the parties to effect a resolution of the controversy prior to any hearing on the issues. The mediator may, in appropriate cases, recommend that mutual restraining orders be issued, pending determination of the issues, to protect the well-being of the children involved in the controversy. Any agreement reached by the parties as a result of mediation shall be reported to the court and to solicitors for the parties by the mediator on the day set for mediation or any time thereafter designated by the court.
- (e) Nothing in this section shall prohibit the mediator from recommending to the court that a children's representative be appointed to represent the minor child or children. In making any recommendation, the mediator shall inform the court of the reasons why it would be in the best interests of the minor child or children to have the children's representative appointed.

APPENDIX E

Professional Sketch

Joan Berlin Kelly PhD, Director, Northern California Mediation Centre, Corte Madera, California: 1971-1994. Co-Principal Investigator, Children of Divorce Project: Co-authored (with Judith S Wallerstein) *Surviving The Breakup, How Children and Parents Cope With Divorce*. Basic Books, New York (1980). Member, Northern California Committee on Custody and Visitation, Family Law Section, California Bar. Board Member, Academy of Family Mediators. Author, among other articles, of *The Visiting Relationship After Divorce: Research Findings and Clinical Implications*, in the book, *Children of Separation and Divorce*. Stewart & Abt Van Norsirand Reinhold, New York (1981).

The following paper is transcribed from remarks about attitudes by counsellors, therapists, attorneys and judges toward the concept of joint custody for the children of divorce during the conference Patterns and Perspectives: The 21st Century Family conducted by the Association of Family and Conciliation Courts, in San Francisco, California 20 May 1982 (Reprinted as Kelly J B. Examining Resistance To Joint Custody. In, J Folberg, editor, *Joint Custody and Shared Parenting*. The Guildford Press, 2nd edition, New York 1991 pp 55-62).

Examining Resistance To Joint Custody by Dr Joan B. Kelly

Introduction

In examining resistance to joint custody, we must look to the influence of mental health professionals, lawyers and judges in counselling parents and in decision making in matters of shared parenting.

Attitudes In Mental Health and Law

As you know, attitudes regarding joint custody within the fields of mental health and law range from outright opposition, to whole-hearted acceptance of joint custody for everyone.

Joint Custody Not Matched By Scrutiny of Sole Custody

It is ironic that we have subjected joint custody to a level and intensity of scrutiny that was never directed toward the traditional divorce arrangement of sole custody to the mother and 4 to 6 days per month of visiting to the father. And yet, there is a growing body of evidence that such post divorce relationships, that is 4 to 6 days per month with the father and the rest with the mother, were not healthy for many children or parents and were, in fact, psychologically destructive for other children.

Since 1962, when the spiral of divorce rate began, countless thousands of father/child relationships have deteriorated and thinned to a relationship of mere formality in the years after divorce. Mental health professionals did not challenge these arrangements that led to this situation until very recently.

Influences Contributing To Resistance

Why does the notion of joint custody arouse such passion? It is worthwhile to examine the various influences contributing to the resistance of many mental health and legal professionals to joint custody. These include:

- 1 Our larger cultural tradition of which we are all a part.
- 2 The psychological theories that determine our thinking and our decision making.
- 3 The more elusive unconscious attitudes which shape our reactions and thinking—the transference phenomenon.

Unexamined Cultural Influences

First, cultural traditions: We don't need to dwell long on this except to say that cultural tradition, as you know, is very strong and is an integral part of every one of us. What, basically, is it that we have assimilated? We have decades of precedence for mothers having primary responsibility for their children. Mother/child relationships became the focus of attention of psychoanalytic theory and practice and child development research. Concurrent with this focus on mother/child relationships was a resulting de-emphasis of the father/child relationship. Over time, mother/child relationships achieved sanctity. Today, we find mothers who feel that they essentially own their children.

As the divorce rate spiralled and women returned to the economic work place, little thought was given to changing the prevailing view. It is notable, for example, that 60% of the mothers of children from birth to 5 are now in the economic work place. I needn't dwell any further on cultural influence and its immense role in our lives, but a comment from one judge in a California jurisdiction summarised it all. He said, children belong to the mother. Another quote from a Missouri state senator is representative of the American mainstream. He said, I believe that a mother is more important than a father. He went on to say that fathers should not be granted rights equal to those of mothers. He supported his statement by saying he was divorced and had not had contact with his own son during the many years after divorce.

Re-Examined Psychological Theories

Second among influences is that of psychological theories. We need to examine the various psychological theories and concepts which govern our thinking and our decision-making with divorcing parents. Some of these theoretical constructs are indeed valuable and have been serviceable in our understanding of the traditional intact family. But, it is clear that some concepts lose coherence in their translation to the needs of children in the divorced family. Much has been said, for example, of the child's need for stability.

Just what is stability? Why has it been defined as one house, one toothbrush and one primary parent by mental health colleagues? Why has this geographic definition of stability taken precedence in our thinking and in our decision making over the kind of stability that is provided by an ongoing relationship with a loving parent who no longer lives in the family home? We know that young children successfully integrate the experiences of day-care, nursery school and overnight at grandparents' homes.

Why have we assumed that such youngsters could not successfully integrate the regular and frequent experience of visiting a father's home into their ongoing development? It is important for all of us to turn some of our cherished developmental and psychoanalytic clichés inside out and discover what it is that we are really saying.

Increased Father Overnights To Minimise Separation Anxiety

The concept of separation anxiety has also been important in post divorce decision making, particularly in discouraging overnights between infants and toddlers and their

fathers. Initially, as you know, infant research focused entirely on mother/child interactions and discovered in the process that infants and toddlers reacted to the absence of the primary caretaker, most often the mother. But when researchers discovered fathers in the past decade, and it has only been, I might add, since 1968 that the field of child development has begun to turn to fathers and father/child relationships for a field of study, they learned that fathers too were identified early in life by infants as special and that separation from fathers created anxiety and unhappiness. The infant and toddler with a bond to a nurturing father, in fact, requires more, not less, overnights with their fathers in order to remember just who their fathers are. The young child's immature sense of time, the absence of language and symbolisation, and the cognitive inability to know that a beloved parent will return during an absence requires creative arrangements that enhance the child's ability to build object permanence. In addition to mid-week and weekend overnights, for example, many infants and toddlers benefit from a father's or a mother's ability to visit their day-care during the day for lunch or their nursery school during the day for lunch or their nursery school during a time-out period. With such arrangements, we are attempting to preserve for the child his or her relationship with both parents post divorce.

Deprivation Rather Than 'Differences' Leading To Problems

With the introduction of the joint custody concept, there is now considerable preoccupation with the child's ability to cope with differences in the personality, style and attitudes of parents after divorce. The concern here is with confusion and problems of identity formation. We did not question the child's ability, strangely enough, to cope with these same differences within the intact marriage. Youngsters cope on a daily basis with stylistic, emotional and attitudinal differences of teachers, friends, Cub Scout leaders, soccer coaches, and others, with little if any assistance. For the most part, it is the parent's anger about the other parent's differences which create problems for the child, rather than the differences themselves.

There is some evidence that, in our well-meaning efforts to save children from anxiety and confusion, we have produced in the longer run more numerous symptoms of anger, depression and a deep sense of loss, by depriving the child of the opportunity to maintain a full and nourishing relationship.

Dangers of Policy-Making Predicated On The Most Angry

Another psychological concept used to bolster resistance to joint custody and has been the notion that parents who divorce, by definition, will be unable to co-operate around any of the aspects of parenting post divorce. This theory draws upon the erroneous notion that a failed marriage included amongst its debris failures in parenting, and that the conflict that permeated the marriage permeated decision-making around parenting as well. Lawyers seem to voice this concept the most often by saying that if parents could agree about their children they wouldn't be getting a divorce.

Indeed, it would be better for all concerned if parents were not angry at each other at the time of divorce. But, the fact remains that the vast majority of parents, during the initial separation period are indeed very much angry at each other. For the most part, over time, this anger diminishes between parents except in a small percentage, approximately 15%, of those parents who remain pathologically enraged. We need to be very careful that we do not make policy on the basis of this 15% who fight to the death and who are the most regular and frequent customers of the conciliation court. When the child is in the custody of an angry parent, needing to secretly and silently defend his or her affection for the other parent, one might well ask whether the child wouldn't be better served by a joint custody arrangement that involves large amounts of time with the non-angry parent who does not force the child to align or take sides.

Advantages To Contact With Least-Angry Parent

The current wisdom is that when there is bitter anger between parents, that joint custody will never work. Indeed, it seems difficult, but we must recognise that most often there is one bitter parent per family, not two, and that often this angry parent, particularly around the joint custody issue is the mother.

It is equally possible in such a case that the regular contact of the child with the healthier and less angry parent will bring such sufficient relief so as to outweigh the problems of negotiating the joint custody waters at least for the child. The alternative for the beleaguered and non-angry parent is to retreat from the child or fight for sole custody and neither of these solutions serve the child's developmental needs.

Child/Parent Contact More Relevant Than Status of 'Emotional Marriage'

From other quarters, we hear theories that parents who enter into joint custody arrangements are still emotionally married and that joint custody is a way of avoiding the issues of separation and the death of the marital relationship. While this may or may not be the case, it seems not to be a particularly relevant argument as far as the children are concerned and does not articulate the ways in which such a continuing emotional marriage might be detrimental to the children.

Spurious Conjecture About Child Support Obligations

Aside from the pervasive suspicion that fathers cannot master or are not interested in co-parenting on a sustained basis, other arguments prevail as well. A common argument heard from lawyers is an economic one in which the claim is that fathers want joint custody only in order to avoid their child support obligations. The argument continues, that once the final settlement agreement is signed, the father does not share in parenting responsibility and then no longer pays child support. Given the time and the money involved in working out the many details and provisions of a settlement agreement, this seems to be a spurious argument. Settlement agreements for joint custody parents can contain provisions for change in support, if the custody arrangement shifts or if parenting responsibilities are not upheld.

Masking Objections Behind Unexamined Phrases

Finally, we need to be aware that we sometimes cloak our resistance to joint custody in some well-worn phrases such as the psychological parent and the best interest of the child. There are two psychological parents per family rather than one. The child of divorce continues in the years after divorce to view himself or herself as a child of two parents. Therefore, it seems our obligation is to facilitate his or her relationship with each.

Vulnerability of Professional Self-Images

In addition to cultural tradition and theoretical bias or psychological theory, there are other complexities which contribute to professional resistance to joint custody. Perhaps the most difficult to identify and change are those unconscious attitudes and reactions in the lawyer or therapist or judge which shape our thinking regarding post-divorce custodial arrangements.

The Woman Professional

It is important to be aware of a few forms which these unconscious attitudes take and the potential hazards for professionals if they are not recognised. Professional women, for example, both women lawyers and therapists are particularly vulnerable if they have children of their own. When a father appears in their office and desires frequent access or joint custody, professional women may feel profoundly threatened by the threat that

this represents to their own work with families, I have become aware at times of a strong reaction when a man comes in with full brief case prepared to fight for full custody. I'm aware of a gut feeling which is who does this guy think he is that he wants his kids. It's the kind of feeling, the unconscious feeling, that all of us have in response to people who enter our offices of which we need to become aware. Further, if professional women are themselves divorced with sole custody of their children, they are even more likely to react with unconscious hostility to requests from fathers for shared parenting. For the same reason, women therapists and lawyers are more at risk in terms of over-reacting to a woman in their office who is hostilely rejecting the idea of a father sharing parenting arrangements after divorce and may therefore be more likely to side with the woman's position. Not being aware of their unconscious attitudes, mental health professionals may cloak their resistance in psychological clichés and analyses without the benefit of data.

Male Image Resistance

For men, there are comparable hazards. When a father seeks a rich and continuing relationship with his children after divorce, male lawyers, judges and psychotherapists sometimes react with suspicion, derision and hostility. The father's request for joint custody may create doubts or regrets about the quality of the fathering of the professional male. The potential for rejecting or treating lightly the father's attempts to seek a shared parenting arrangement is especially great where an attorney or therapist has failed to maintain a gratifying relationship with his own children after divorce.

The Male Professional

Similarly, when enraged women who wish to exclude the father from children's lives seek the guidance and support of lawyers and therapists, the male professional runs the hazard of not adequately challenging those views because they themselves have been excluded from their children's lives, either by choice or by default.

Impact of Unconscious Attitudes

The impact of unconscious attitudes in family law and divorce counselling work is insufficiently understood and seldom discussed. Yet it is clear that such attitudes and feelings amongst all of us assist in making decisions that play a key role in the various post divorce arrangements which are made regarding the children of divorce. It seems that we have not yet come to grips with the fact that power regarding children remains fully lodged in the hands of women as custodial parents in this country. Men continue to retain power in areas of support and financial arrangements but the consequences of the abuses of the respective powers of men and women in divorce seem not to be equal. With regard to children, men remain today the applicants and must always ask, negotiate or litigate for more of the child's time than is deemed normal by our society.

By having to go on the offensive to obtain a shared parenting arrangement men frequently become cast into the role of trouble maker when for many their intention is to continue a co-parenting role they established within the marriage family. When women oppose joint custody arrangements, they are less likely to be seen as trouble makers and their views less often challenged.

Changes In The Role of Men As Fathers

Too often we as professionals continue to counsel and make decisions which ignore the profound changes of the past decade in the role of men as nurturing fathers. Suspicions remain about deeply committed fathers and the belief prevails that the majority of men continue to have little interest in parenting post divorce. We seem to require that men prove their parenting skills whereas with women we assume that the skills are already there. There are men and women who have no interest in their children within the intact

marriage or the divorce. There are men and women who are inadequate parents. There are men and women whose own narcissistic needs take precedence over the needs of their children. And, there are men and women who love their children and genuinely want to be responsible loving parents.

Clarifying Our Attitudes, Feelings and Biases

Our responsibility as professionals is to clarify our own attitudes, feelings and biases; to become fully conscious of where we stand in this arena and to be able to assist parents in decision making with openness and integrity. Our primary task is to assist parents in developing post divorce arrangements which meet the needs of their children as well as the needs of each parent.

It behoves us to understand just how complex this task is. The needs of divorced children are no different than children in the intact family. Indeed, it is certainly apparent that the parents within the intact marriage often fail to provide the conditions for healthy development. But it may be harder to meet youngster's developmental needs after divorce because divorce, unlike marriage, does not exist for the purpose of nurturing children. Parents rarely seek divorce to enhance their children's development, but rather to enhance or improve the quality of their own lives.

Sometimes divorce automatically removes the barrier to good psychological development by, for example, removing or separating a child on a daily basis from the cruel or disturbed parent. But, for the most part, there is no assurance that divorce will benefit children unless specific attention is paid to their particular developmental and psychological needs and decisions are made based on the recognition of these needs.

Protecting The Child's Need For Parental Contact

The problem is that in divorce, more so than in marriage, children's developmental needs may be in competition with each other. For example, a preschool child needs a degree of structure and stability to maintain and enhance his psychological functioning and ongoing development. As mentioned earlier, this is often interpreted as indicating a need for one custodial home, not two. But the youngster also has a competing need to maintain a nourishing relationship with a loved parent that will sustain itself in a meaningful way. To accomplish this goal or fulfil this need, the preschool child needs frequent contacts with that parent; several per week, as I mentioned before, because of his or her immature sense of time and lack of object permanence. This need for stability and need for relationships compete with each other. Our dilemma is to arrange things to fill both important needs. Complicating our task is the knowledge that some situations or post divorce arrangements fulfil short-term needs while compromising longer term needs and vice versa.

Returning to the preschool child, the regular transition between homes may indeed create some confusion and anxiety, but this must be compared to the emptiness and longing that the child will experience in their later years, because their father is an essential stranger. It is important for us to adopt a frame of reference which includes assessing all the alternatives which might arise from the post divorce arrangements which we sanction and to look at short and long-term problems and short and long-term goals.

Two Worthy Parents To Protect A Child's 'Best Interests

Increasingly, we are seeing before us, in the courts and in our offices, two parents of reasonable psychological health, both of whom want to parent full-time. Such cases have the potential to push counsellors and clinicians beyond the limits of current psychological knowledge and predictive capacity. In these instances we are more likely to make judgements based primarily upon unconscious, irrational or irrelevant factors. Where

each parent is deemed to be a good enough parent and each supports and encourages the child's relationship with the other there is really no basis, in either psychology or law, for making a rational choice. In these families the lawyer, the judge, the mental health professional, can truly address the child's best interest by encouraging each parent to take an active role post divorce in the child's life by sharing parental responsibility on an ongoing basis at two separate locations.

Examining Professionals' Attitudes

In this short period of time there is not a lot that can be said about interventions with professionals, where there is unconscious resistance or theoretical resistance to the issue of joint custody. It's really an educational matter: a matter of getting together and exploring one's attitudes and feelings toward mothers and fathers, and parenting post divorce. It's a process which takes some honesty, and perhaps some personal introspection as well.

I remember, in about 1974, when the data was just beginning to become a reality in the divorce project, we started to see the children's dismay about the visitation situation and their rather plaintive request of us, can you help me see my daddy more? As a consequence, I turned to my own family situation and to my own son, who was at that time three years old, and said to myself, What would it take for this child, if there was a divorce, to maintain his good relationship with his father? The answer was so evident that every other weekend would be so painful for him, I was stunned and shocked because I don't think any of us had really begun to think about this in the early 1970's.

Overnights For Infants and Toddlers

There is a good deal of introspection which needs to go on as well. Somebody questioned on what basis do I say that infants and toddlers need to stay overnight with the non-custodial parent? They need to stay overnight so that they can maintain a relationship. They don't have a sense of time. If they have to wait 14 days or 7 days to see a parent they have no way of knowing when that is going to occur. They have no language, they don't go around like they will when they are 3 or 4 saying, daddy, daddy, like where is he? They don't have, at that age, a consolidated permanent image of the parent – what we would call object permanence or sense of object permanence. Overnights also create relate time as opposed to play time with their children that involves discipline, loving, routine, homework ...real life as opposed to not such real life.

Influence of The Hostile Parent

Somebody asked at what degree of hostility between parents does joint custody become inappropriate? Well, I don't know. I think it is important for us to acknowledge that we really don't know very much about this. We have to be sort of neutrally scientific and look to some data. It is obviously clear that in cases of great hostility it is very difficult and it may not work. But, on the other hand, I am very concerned about the post divorce situation in which just one parent is very angry and the other parent suffers as a result of that anger.

My experience is that the temptation is very great in counselling and mediation to cave in to the irrational demands of the angry or embittered or pathologically embittered parent. That worries me because in the long run if we leave the children with that pathologically embittered parent, we have not done any sense of service for the child.

Afterwards, The Fathers of Limited Previous Relationship

What about fathers who had no relationship or a poor relationship with their children during the marriage and who now, essentially, want to have more of the child's time at the point of separation and divorce? One of the things that was interesting in the children-of-divorce project was the change in relationships and particularly father/child

relationships, that the likelihood of changes were more predictable than non-change. That is, there is a great deal of unpredictability between the pre divorce and the post divorce relationship. Good relationships deteriorate over time. Poor relationships improved after divorce. We weren't necessarily prepared for those improved relationships between fathers and children.

APPENDIX F

Professional Sketch

Dr. Frank S. Williams is a Child Psychiatrist and Psychoanalyst for adults and children, licensed and practicing in the State of California. He is Board Certified by the American Board of Psychiatry and Neurology in both Adult and Child Psychiatry. Dr Williams is the Director of Family and Child Psychiatry at Cedars-Sinai Medical Centre in Los Angeles, where he and his colleagues have developed nationally recognised preschool and family psychiatry diagnostic and treatment programs. Dr Williams has been a pioneer in the assessment and treatment of pathogenic preschool family and child communication systems. He is a former President of the Southern California Society, past-President of the American Society for Adolescent Psychiatry and has served on the editorial board of the Journal of the American Academy of Child Psychiatry. Dr Williams has been a member of the California State Bar Association's Standing Committee on Child Custody and access, and has served on the Los Angeles Family Conciliation Court Task Force assembled in 1981 by the then presiding Judge of the Family Law Department of the Los Angeles County Superior Court, the Honourable Billy Mills. Dr. Williams is one of the co-authors of the cooperative parenting pamphlet, which is distributed by the Conciliation Court for the Los Angeles County Superior Court to all families seeking divorce in Los Angeles County.

During the course of the past twenty years, Dr. Williams has published and lectured nationally in the areas of family and marital evaluation; parent-child communications systems; preschool family dynamics; language development in early childhood; approaches to families and children of divorce; physical and sexual child abuse; adolescent psychiatry; and treatment approaches to pre-school children, infants, and toddlers. He has made recommendations and rendered opinions with respect to child custody and access matters in over five hundred different families, and additionally has closely supervised over five hundred cases counselling, carried out by staff, during the past fifteen years.

Dr. Williams is a qualified court expert and has testified in Family Law Courts in matters before the Los Angeles County Superior Court, the Orange County Superior Court, and outside of California. He and his staff carry out a very large number of Court and attorney referred custody evaluation and treatment cases. As Director of Family and Child Psychiatry, Dr. Williams trains and supervises a professional mental health staff of fifteen qualified family and child psychotherapy clinicians, as well as a large body of students – including twenty-five medical, psychology and social work students, and advanced psychiatric residents training to become Child Psychiatrists, in the areas of family and marital diagnosis, custody evaluation, divorce counselling, child abuse, preschool early intervention, adolescent psychiatry, and family therapy. He and his staff are considered leading experts in Family, Adolescent and Child Psychiatry.

Child Custody and Parental Co-Operation by Dr Frank S. Williams

Paper Presented at American Bar Association
Family Law Section, January 1988

Introduction

There is the myth in some mental health, legal and judicial thinking that joint custody can only be effectively undertaken by cooperative parents. To the contrary, joint custody provides one of the best methods of stimulating a degree of significant and meaningful

cooperation in warring parents who would otherwise continue years of battling to the detriment of their children. The years of battling are particularly ferocious as one parent abuses the power of sole custody and the other parent fights the abuse in an attempt to gain back his or her lost parental identity.

For 15 years, the Cedars-Sinai Family and Child Psychiatry staff has focussed on family health and family pathology. Until about 12 years ago, our main diagnostic and treatment attention was to intact families with severe dysfunction, most often related to severe deficits in parental cooperation. Preschool children in these intact but dysfunctional families made up a significant part of our clinical population. As preschool children are most developmentally vulnerable to the rage, chaos, and warring that goes on when there is marked non-cooperation between parents, we needed to develop family therapy and counselling techniques which would hopefully increase parental cooperation. Our objective was to at least partially decrease the mutual distrust, rage, power struggles and helplessness in the parents. Again, these parents were not interested in separating or divorcing.

During the past 13 years our family and child psychiatry clinical population has shifted, so that now approximately 60% of the children we see – including a large number of preschool children – are from families of divorce or separation. Additionally, we have developed a special program and expertise in the area of custody evaluation and custody counselling, thereby receiving a large number of evaluation and counselling referrals from the Court, attorneys, conciliation clinics, and mental health professionals. Most of our custody case referrals are cases of warring, non-cooperative parents. Usually the court, the conciliators and the attorneys involved in these cases have been stymied and have felt helpless and frustrated.

The Dynamics of Co-Operative Parenting

The particular parents involved are usually uncooperative and warring for any of the following reasons:

1. One—occasionally both—of the parents is severely psychologically disturbed or severely deficient in parenting skills, without recognising that deficiency.
2. Both parents are competent and emotionally attached to their children; one, or both, however, wants to maintain the primary parental identity by erasing the other parent. We have come to call such attempted physical and psychological erasure: 'parentectomy.'

Our experience leads to the conviction that parental identity—if strengthened in both parents—can increase cooperation and that cooperation should not be a criteria for joint custody vs. sole custody schedules for children. During the ensuing years, after custodial orders are in place, children of parents who remain highly uncooperative suffer greatly, and suffer just as much in unilateral sole custody as in joint custody arrangements.

The main hope for averting the later depression, conduct disorders, drug usage, school and peer problems in these children, is for their parents to learn how to cooperate. Even minimal development of a cooperative attitude in such parents can prevent and decrease the severity of emotional disorders in their children, again regardless of whether there is unilateral sole custody or joint custody.

Recognising that the chronicity of parental uncooperativeness is the principal villain in post-divorce child and adolescent psychological disturbance, we in our family counselling programs at Cedars-Sinai Medical Centre, have focused on ways of developing and enhancing cooperation. In our experience the essential minimal cooperation needed to best help children through their post-divorce problems develops more rapidly and is sustained more often when there is joint legal custody, and when there is a carefully structured, very clearly defined shared or joint physical custody. We find a greater failure

of development and growth of parental cooperation in unilateral sole legal and sole physical custody situations for the following reasons:

The parent feeling erased, as a victim of a psychological or legal parentectomy, as traditional, visiting non-custodial parents usually do feel, remains enraged over his or her loss of parental identity. In this state of rage, the psychologically erased parent feels powerless and depressed. Sometimes such mothers or fathers who feel this rage, depression and powerlessness adapt to and overcome these feelings by removing themselves from the struggle and giving up the battle. In so doing they may abandon their children financially, physically and psychologically. That is the most devastating consequence possible for children of divorce, and in our experience is highly correlated with the later development in children and adolescents of the most severe emotional disturbances, including suicidal depression.

More frequently the mother or father who feels such rage, depression and powerlessness over being erased as a result of unilateral sole custody being given to the other parent, does not abandon the battle, but instead continues to fight viciously with the other parent.

The vicious battle takes the form of both open war, as well as subtle more concealed warfare in which sabotage of the other's parental identity ensues. Cuing the children to not enjoy time with the other parent is one form of such sabotage. In either event the battle remains vicious and unrelenting, and precludes the development of even minimal parental cooperation. Parents in such a state of war-like tension are unable to focus upon or experience those elements necessary for the development of cooperation. Those elements include:

- (1) accurate perception of the other parent's parental competence;
- (2) a capacity to patiently assess the positive potential of the other parent's wishes or judgements about their activities, life-style, relationships or values for their children;
- (3) a capacity to hear and understand the other parent's communication with objective perceptions, rather than with paranoid mistrust.

When parents live in an atmosphere of constant expectation of war, the consequent preparing for self-defence or readying for an offensive attack, does not allow them to easily see the goodness in the enemy. In our experience, sole custody more often than joint custody continues to fan the flames of such war, thus blocking any potential for cooperation.

Parental Identity and Cooperation

There are those who would believe that one can maintain a good sense of parental identity by quality visitation contacts—even if those contacts are infrequent—compared with quantity of custody contacts. That is just not so. Each of our identities—be it our professional, or marital or our parental identity—is fulfilled by both the quality and quantity of our experiences.

If a cardiac surgeon does a masterful triple by-pass once a year when he has been used to doing them once a week he or she no longer truly feels like a practicing surgeon; if a trial attorney performs brilliantly once a year when he or she has been used to weekly courtroom work, he or she no longer truly feels like a practicing trial attorney; if I were to help only one child and that child's parents once a year, I would no longer truly feel like a practicing family and child psychiatrist. So too, when fathers and mothers are wonderfully interactive, responsible, and loving with their children, two to three times a month, when they have been used to being with their children most every day, they no longer truly feel like a parent.

Structured Detailed Custody Orders and Parental Cooperation

Clear structure and orders framed with detail leads to sufficient cooperation by minimising the need for contacts and negotiation, and clarifying decision making in advance. Studies done to date are deficient in that they have not reviewed different custodial outcomes when minimal structure is provided in Court orders, as compared with maximum detailed structure provided in Court orders.

As designing a structured custody order requires compulsive attention to details – judges are often mind boggled by such potential work and may unfortunately give in to providing orders which are loose, and require too much negotiation; or they may give in to a misbelief that if they order sole custody, and traditional visitation, such structure and detail is less necessary. Since parental judgement and leadership are weak following divorce, the court must step in and convey the message that parents of divorce are expected to cooperate.

We have seen a growing number of cases where in the initial hearing the Court has, with extremely raging uncooperative parents, ordered temporary joint custody with very structured time-sharing guidelines, pending the outcome of the full custody evaluation. By the time these warring parents get to us, the very experience of having had to accept the reality of the other parent's parental identity, and the very experience of seeing that their own parental identity need not be wiped out, have already lessened some of their anxiety and mistrust. There is often a sense of relief over having seen the first glimpse of a way out of their entrapped turmoil and family chaos. By the time they get to us, they have already developed some of the minimal cooperation which helps children in any type of custody arrangement.

Problems In Child Development Following Divorce

Those post-divorce factors which contribute to children's psychological, development and academic decompensation appear to be the same in joint and sole custody families. They are:

1. Appearance on the scene of harsh or overzealous step-parents or new siblings;
2. Having one or both profoundly emotionally disturbed parents with marked psychological disorganisation;
3. Having one or both parents with a severe deficit in empathy for, and commitment to children, often leading to indifference or neglectful care;
4. Having one or both parents with heavy drug or alcohol abuse problems;
5. Having a minimally structured, or over-flexible custody plan which allows potentially warring and violent parents too much contact and too much need for negotiation;
6. Having one or both parents with a pathological over-attachment to the child, or a need to use a child as a substitute for a lack of adult love relationships in the parent's life;
7. Having one or both parents unable to shield the child from overexposure to the parents' mutual hatred and mistrust;
8. Having one or both parents with a severe deficit in parenting skills, unable to provide basic dependency, need nurturance, or any authoritative guidance and structure.

In certain of these situations which portend emotional gloom for children, carefully framed detailed joint custody plans can help children more than sole custody plans. For example, if one parent has a pathological over-attachment to the child, and the child has

been primarily with the over-needy parent, joint custody can help neutralise the toxicity of that bond by decreasing the time of the child with the parent without completely erasing the bond to which the child has become accustomed. If a new harsh or overzealous step-parent or the arrival of a new step-sibling or half siblings creates neglect, depression to turmoil for a child who had been the only child in a particular family setting, the additional time with the other parent afforded by joint custody, can neutralise the neglect, depression, and turmoil.

Kidnapping and Violence In Relation To Custody

The potential for abduction of children or the violent physical abuse of children is often presented as a spurious argument against joint custody. Ninety percent of the violence and kidnapping we have seen are in sole custody situations in which the sole-custodial parent fears losing his or her cherished sole custody status, or the parentectomised parent kidnaps the child away from the sole custody parent who possessively blocks the visiting parent from access to the child. The cases of the most serious violence we have seen include child and parent murder, and suicide. In these cases, the violence did not occur because the parents were unable to handle joint custodial decisions. Rather, the violence occurred when one parent was threatened by the potential loss of his or her children by the unilateral attempt of the other. Parental custodial power is, again, more common in court-ordered or assumed sole custody situations, before Court intervention.

Geographic Distance and Custody

Geographic distance should not be a criterion for awarding of sole legal or physical custody. Some parents plan distant moves with their children far away from the other parent. Often such moves are not essential, and disrupt a child's school, peer and extended family relationships. Usually the parent who precipitously moves, without careful forethought and professional guidance, is the parent least open to providing the children with ongoing access to the other parent. Nonetheless the Court should not punish either parent or the child in face of such planned moves. First of all, such moves, unless essential, should be discouraged. Then, when there is no choice, we need to develop creative plans in which, during any given year, the child victim of such moves gets to spend significant time with each parent in each parent's community. Although such plans are costly and involve much parental and child travel time, the emotional costliness of the de facto loss of a parent is greater.

Financial Motivation In Relation To Custody Issues

There are mothers and fathers motivated by monetary concerns, in their custody battles. A father may be partly motivated to gain joint custody for monetary reasons – to hopefully pay less child support. Nonetheless, the evaluation of the child and family may show that in spite of his monetary motivation, it would still be best for that particular child to be in the joint custody of both parents; or perhaps in father's sole custody, or perhaps in mother's sole custody.

A mother may be motivated to gain sole custody for monetary reasons – to hopefully receive more child support. Nonetheless, the evaluation of the child and family may show that in spite of her monetary motivation, it would still be best for that particular child to be in sole custody of that particular mother, or perhaps in the joint custody of both parents; or perhaps in father's sole custody.

Parents rely heavily upon the judgment of their attorneys and psychotherapists, at a time when financial pressures are great and their own judgment is decreased. Certain attorneys and certain advocate psychotherapists of a parent often stimulate financial anxieties, by nature of the enormous expenses involved in custody litigation and expert psychiatric testimony.

Conclusion

A shared or joint custody schedule should always be considered by the Court along with sole custody. Our position is that joint custody should be considered first in the form of rebuttable presumption, and then ruled out only where appropriate in the child's best interests. Some mental health professionals believe joint custody is the best arrangement for children when parents are able to do it. I believe any custody works better when parents can learn to cooperate. The Court, attorneys, and mental health professionals have the duty, the challenge, and the obligation to help parents become able to do it. Our experience is that the minimal cooperation necessary for parents to become able to do it can be achieved if we structure joint custody plans to minimise negotiation and maximise clarity.

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APPENDIX G

Brainwashing In Custody Cases: The Parental Alienation Syndrome by Doctor Ken Byrne.

[Reproduced from an article in 4 (3) *The Australian Family Lawyer* (1989) pp 1-5]

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Introduction

Divorce is one of the most stressful experiences that most people in our culture will experience in a lifetime. It is often accompanied by strong feelings of bitterness, betrayal, anger and distrust of the former partner. Each party often feels that they are right in many of their views on issues about which the couple disagree. When they have children the picture becomes infinitely more complicated. Among many other reactions, there is often a tendency for each partner to want the support or agreement of the child (or children) on critical issues. The more difficulty and intensity of negative feeling between the two adults, the more likely is this to be the case.

In some cases, the desire to have the agreement of the child can become strong enough to verge into brainwashing. By brainwashing I mean an effort on one parent's part to get the child to give up his or her own positive perceptions of the other parent and change them to agree with negative views of the influencing parent. At this intensity the motivation of the parent goes beyond simply getting the agreement and support of the children. Commonly, brainwashing parents are motivated by an opportunity to wreak a powerful form of revenge on the other parent – diminishing the affections of the children. Typical examples include mentioning obvious weaknesses of the other parent and blaming those as the major source of difficulty between the parents. Nothing is said about the other parent's positive traits. The fact that both parents have contributed to the problem is also omitted. This kind of communication has at least two psychologically destructive effects.

First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is asked to choose who is the preferred parent. No matter what the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts.

Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent on parent's distortions of reality. It is as if the child walks outside on a sunny day in summer clothes, and feels quite comfortable. Then one parent says, Billy, it's raining right now, and it's cold. You have to wear a raincoat and jumper. To appease that parent, the child must act in accordance with that statement, and bend his own perceptions of reality. Some may argue that such behaviour is simply accommodating to the directions of a parent, something that children have to do all the time. However, in healthy interactions, the child is encouraged to accept a view of reality that is both accurate and adaptive (I know you don't want to study, but unless you do you might very well fail the test).

Adults in the midst of a divorce are not famous for their objectivity, especially regarding their spouse. Typically, over weeks, months and years, the child is exposed to a long series of such distortions. In many cases, directly opposite information is being presented by the other parent. Children caught in this cross-fire inevitably end up with a significant degree of psychological disturbance, not the least of which is a distortion in basic reality testing about the world around them. In divorces where the parents are unable to find any way to mediate the questions of custody and access, they typically turn to the legal system. In most cases, each seeks the advice of their own solicitor, setting in motion a legal duel. One of the effects of this duel is that each parent senses the need for a list of horror stories about the other. The intuitive feeling is that if it can be shown that the other parent is worse through a longer and more vivid list of horror stories, the victory in the form of physical custody (or greater access in some cases) will be won.

The Parental Alienation Syndrome

In cases of contested custody and access, mental health professionals have been seeing with increasing frequency an extreme form of brainwashing which has been called "The Parental Alienation Syndrome" (originally described by Dr Richard Gardner, Recent Development in Child Custody Litigation, 29(2) The Academy Forum: The American Academy of Psychoanalysis, (1985)).

Children who are suffering with this situation have been subjected to an intense and persistent form of brainwashing by one parent against the other. The overt goal is almost always – at a minimum – dramatically reduce contact by the child with that other parent. Commonly, the goal becomes to virtually eliminate the other parent from the child's life.

Example:

Mrs Litigious complained to her solicitor that her two children aged five and eight, kept refusing to see their father on access visits, and that with each passing week, they became more tearful and resistant as the visit approached. She wondered whether the mid-week visit couldn't be reduced to every second or third week, or eliminated altogether, in order to spare the kids all the pressure.

Mrs Litigious had been married to her first husband Mr Cross, for ten years. She divorced four years ago, and is now remarried to Mr Litigious. The solicitor asked for consultation from a forensic psychologist, Dr Neutral.

Mr Cross, father of both children, complained to his solicitor that his former wife was making it increasingly difficult to see his children. It started with him being kept waiting for increasingly longer periods of time when he would pick them up. Recently they had been pouting and saying he was mean, with the younger echoing the elder's complaints. On weekends visits this would last through Friday night and Saturday morning. By lunch time, both children began to seem happier, and the rest of the visit would go fine, until the drive back to mum's house. At this point the kids would again begin to disparage the father, saying for example, We don't really like you – we only pretended to have a good time.

During his first visit with Dr Neutral, Joe Cross, aged 8 said that he disliked his father very much, and did not want to see him as often. When questioned about his reasons for this, he said He hits me and doesn't let me watch television. The youngest could say nothing positive about his father, yet found a wide variety of praises for mum, with virtually no complaints about her.

Lisa Cross, aged 5, virtually echoed her brother's words. Her reasons for not wanting to see her father were that When I go there he just sits around and he makes me cook dinner! She too could find nothing positive about father, and had no complaints at all about mother.

In a joint visit with father and the two children, Joe's complaints were aired. Mr Cross readily acknowledged that what his son said was correct, but in further context. He limited television to two hours, and made Joe stop when that time was up. On a recent Saturday morning, Joe had balked at this limit, an argument developed, and father slapped him once on the bottom.

In individual visits it soon became clear that Mrs Litigious despised her former husband. Since the initial separation there had been a continuing feud, with better accusations on both sides. She argued strongly that whilst she encouraged and even forced her children to accept access visits, it was they who were now reluctant and unwilling. Her proposed solution was less access time. Her husband, when seen alone, echoed her bitterness. In his opinion it would be better for the children to never see their father, since he had no positive virtues whatever.

Psychological evaluation of Mr Cross indicated that he was an argumentative and rigid man, who many would see as being somewhat difficult to deal with. He was also seen as a quite adequate father, who offered his children a good deal of love and support, and who was deeply attached to them.

Evaluation of Mrs Cross found her to be a devoted and competent mother, but a rather immature woman, prone to let her emotions override her judgement.

In a report tendered to the court and to all parties, Dr Neutral made the diagnosis of Parental Alienation Syndrome, and made specific recommendation for resolution of the matter.

This case illustrates all of the diagnostic symptoms of the disorder in its fully developed form. These symptoms are:

1. The child shows a complete lack of ambivalence – one parent is described almost entirely negatively, the other almost entirely positively;
2. The reasons given for the dislike of one parent may appear to be justified, but investigation shows them to be flimsy and exaggerated; with younger children, the reasoning is even more transparent;
3. The child proffers the opinion of wanting less contact with one parent in a way which requires little or no prompting. The complaints have a quality of being rehearsed or practiced;
4. The child seems to show little or no concern for the feelings of the parent being complained about;
5. The alienating parent, while seemingly acting in the best interest of the children, is actually working to destroy the relationship between them and the other parent. It is not uncommon for this to be further fuelled by new spouses or defacto;
6. Most importantly, while the children will verbally denigrate one parent, they retain an unspoken closeness and affection for that parent. However, if the syndrome is allowed to develop unchecked, this can be all but erased by the alienating parent.

These symptoms are seen exclusively in children where parents are engaged in a legal battle for custody or access. The more protracted and bitter the dispute, the more this is likely to occur. The Parental Alienation Syndrome represents the intertwining of a complex series of factors. It certainly goes well beyond simply brainwashing. It is begun and propelled by a host of factors in the alienating parent, including both unconscious and subconscious elements. The child, independent of the brainwashing parent, can have a vested interest in maintaining an overt position against one parent for both conscious and unconscious reasons.

The case above describes the syndrome in a relatively pure form. More often, the case is complicated by a host of other factors. For example, allegations of child sexual abuse are being lodged with increasing frequency during custody battles. Often the child will report details of how the other parent (usually the father) has abused the child. Some of these claims are legitimate; many more are manifestations of this syndrome embedded in charges of abuse; Kidnapping of children, often across state or national borders, is being reported with increasing frequency; (speaking at The Bicentenary Family Law Conference at Melbourne in March, 1988, Lawrence Stotter provided the following figures. Between 1973 and 1979, 85 cases of international child abduction were reported to the United States Consular Affairs Office. For the years 1983 to 1988, this figure had jumped to 1,516). On top of the web legal challenges which these cases present there is the added element of this syndrome operative in most if not all cases.

Professional Misjudgement

I have encountered several cases in which mental health professionals have allowed themselves to become embroiled in these scenarios without appreciating what they were dealing with.

Case 1

At the request of the court, a psychiatrist, Dr Eager conducted a custody evaluation concerning Mary, aged 6. After one interview with each parent, he recommended that the father have custody and the mother be granted limited access. The court followed this recommendation. The mother lodged an appeal against this decision. After the court made its initial decision, the father asked the psychiatrist to accept his daughter for treatment. Dr Eager agreed, seeing the girl once weekly with occasional visits with father. However, he did not involve mother in treatment, and neither father nor Dr Eager even told her the daughter was being treated.

During the next hearing, the father produced a letter from Dr Eager which indicated that he was now treating Mary. His letter described how the child told him how frightened she was of her mother, and quoted the girl, then aged six, reporting *memories form when she was three about how her mother had hit her*. He concluded that, *In my opinion Mary's emotional state is still not stable enough to allow her to have access to her mother. I cannot estimate how long it will be before the child would be well enough to begin any sort of regular access*. He then commented that, *If access must commence, I believe it would be best done in supervised setting with an independent third party, such as a representative from the State social work department*.

Here Dr Eager treats a child without involving the mother, whom he has already met. He accepts unquestioningly the memory of a six year old of events she couldn't possibly recall, and overlooks any possibility of programming of the child by the father. Perhaps most importantly, based on only one interview with the mother, he concludes that the child is too unstable to visit her. Several questions could be posed. If the mother is so destructive and frightening, wouldn't a natural part of the treatment be the re-uniting of the mother and child in a safe, controlled environment, such as the therapist's office, where there would also be an opportunity to explore more carefully her parenting ability? If deficiencies were found, wouldn't it help the child to have the therapist teach the mother how to parent this girl more effectively? Finally, how can one treat a six year old without involving the mother?

Case 2

A mother brought her two children, aged 5 and 7, to the family GP and described how reluctant they were to see their father during access visits. The doctor provided a letter to the mother's solicitor which said I have interviewed Billy and Sally at 2:10 pm in my

surgery. I have a videotape of the interview if required. Both children have indicated they do not wish to see their father. It is my opinion that it is the individual and personal wish of Billy and Sally to decline their father's access. It is also my professional opinion that if such access were granted it would be detrimental to the welfare of the children.

The doctor accepted at face value the statements made by the mother and children. Without consulting the father, who was known to him, he offered this professional opinion to the solicitor for one side. His reasoning appears to be that these children of five and seven are able to determine a matter of magnitude of whether or not it is in their best interest to visit and thereby maintain a relationship with their father.

In each of these cases a medical professional, using the weight of the authority, offered a written opinion for one parent's cause without a careful assessment of the other parent or of the underlying situation between the couple. As closely as I can determine, both professionals seemed well motivated, though naive. In my opinion, their efforts only aggravated already difficult situation. Each seemed to be led into this error by being manoeuvred by one party into becoming an advocate for one side, instead of serving as an impartial examiner.

Guidelines For Solicitors

1. When faced with parents or children who want to reduce or eliminate access visits, maintain a healthy degree of scepticism. Remember that even children who have unquestionably been physically or sexually abused are usually extremely reluctant to discuss this with a stranger. When a child easily volunteers mostly negative criticisms to a solicitor, mental alarm bell should go off.
2. Do everything possible to hear both sides of the story. This requires remaining more flexible on occasion. Legal training is designed to install an adversarial spirit, and parents who use children in this way can quickly stir up one's mental juices to fight for this child. To hear both sides of a story doesn't mean that you can't be adversarial later. If need be, try to arrange a without-prejudice round table conference of the parties and their solicitors.
3. Choose experts who insist on being involved only as an impartial examiner from the outset. Such experts are less likely to be drawn into becoming advocates. Selecting these people means that you risk getting an opinion which doesn't favour your client, and perhaps losing the fight the client is paying you to win. However, it greatly enhances the possibility that you will obtain an opinion which is genuinely in the best interest of the child. Should the opinion favour you client, the evidence of such an expert is far more likely to be found credible by the judge.
4. Use courtroom litigation only as a very last resort. Litigation is psychologically damaging to children. The more times that the couple goes to court, the more damage is done to children. Aren't there times when court is the only answer? Yes, but they aren't nearly as frequent as the number of cases which actually end up in court.
5. Consider alternative solutions to the courtroom. When the couple will agree to counselling, this is obviously the preferred solution. However, by the time the couple reaches solicitors, the likelihood of their selecting such a recommendation is only modest. A thorough evaluation by a truly impartial examiner often helps to settle cases before getting to court. Another option is court-ordered counselling, to which all parties agree. To be successful, certain prerequisites are essential:

The plan must have the support of both solicitors. Certain changes to the usual rules of confidentiality need to be agreed upon in writing. The therapist must be able to see all parties in whatever combination is considered warranted. New spouses or de-facto partners must be available for involvement. The therapist must have sufficient time to

work with the family – these cases aren't worked out in just a couple of visits. It is not essential that the parties want counselling. It is only essential that they agree to a court order, and that they see this as being preferable to a courtroom battle.

Conclusion

The Parental Alienation Syndrome represents an extreme form of brainwashing of children by one parent. It is always seen in the context of disputed custody or access situation. The goal of the brainwashing parent is to get revenge. There is no greater revenge than blocking the other parent from playing a meaningful role in the child's life. The syndrome has clear signs and symptoms and, with appropriate procedures, can be diagnosed and treated. This syndrome is also seen in more complex forms, when it is embedded in situations of alleged child sexual abuse or child kidnapping. It can easily be misdiagnosed by professionals who have not educated themselves about these situations, and misguided efforts at helping can worsen an already bad situation.