LEGAL CRAFTSMANSHIP IN CUSTODY CASES OR A JOINT CUSTODY PRESUMPTION?

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[*The author rejects the view that in child custody disputes the Family Court of Australia is able to ascertain who the best custodian of the child is, without the aid of any rules of thumb or presumptions. In the first place, deciding whether a child's mother or father is the 'best' custodian is meaningless since both parents are important for the psychological development of the child. Moreover, in evaluating each parent's suitability as a custodian, the Family Court is bound up in a predictive trap which entails increasing reliance on the reports of psychiatrists and other similar professionals. Secondly, the failure to develop any 'automatics' preserves for the Family Court wide discretionary powers which encourage litigation between ex-spouses and damages their children.*

The author contends that the better approach in child custody disputes is to have a legislative presumption in favour of joint physical custody of children to both separated parents, and he presents a legislative provision to this effect suitable for Australian conditions.]

THE ARGUMENT

Two leading American family law specialists, Henry H. Foster and Doris Jonas Freed have claimed that in custody disputes the court can ascertain who is the best custodian for the child as factors are rarely equal if there is a meticulous investigation and evaluation of the facts . . .

> It may be more meaningful not to view custody as a battle of the sexes, but as an illustration of legal craftsmanship . . . able jurists sift the facts and eschew hyperbole and absolutes. The complexity and diversity of custody issues are such that there should be no 'automatics' or rules of thumb. Psychiatrists and psychoanalysts as well as lawyers should accept the inherent difficulties of custodial decisions and forget about panaceas as well as presumptions.[1]

The views of Foster and Freed are rejected in this paper as themselves a dangerous nostrum, a presumption against presumptions, a panacea against panaceas. The employment of vocabulary from the inventory of professional mystique by Foster and Freed is indicative. Phrases such as 'complexity and diversity' and 'inherent difficulties' allow the professional to congratulate himself on what he is doing for the client or patient and construct an area of specialist expertise which ordinary people cannot penetrate. Foster and Freed's argument is superficially tough-minded, but there is a soft presumption at its core. This is that jurists are 'able', that psychiatrists and psychoanalysts are able. A practising forensic psychiatrist has himself written of the 'fallacy of impartiality' of psychiatric evidence.[2] The evidence of psychiatric and psychological professionals is difficult to translate into legal concepts as their training and objectives will often be very different from that of the court.[3] This article denies that there is such a concept as the best or most suitable custodian except in those cases where one parent is patently unfit (for example, one parent is a batterer or alcoholic).

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[1] Foster H. H. and Freed D. J., 'Life with Father: 1978' (1978) 11 *Family Law Quarterly* 321, 341.

[2] Diamond B. Z. and Louisell D. W., 'The Psychiatrist as an Expert Witness: some ruminations and speculations' (1965) 63 *Michigan Law Review* 1335, 1344.

[3] See nn. 66-9 and the text relating to them.

In custody disputes there is, it will be argued, a more sympathetic and humane alternative to the 'legal craftsmanship' recommended by Foster and Freed. There should be a legislative presumption in favour of joint physical custody of children to both separated parents (ideally each parent should have care and control for 3½ days of each week). Joint physical custody is opposed by Foster and Freed in their 1978 article.[3a]

Since then there has been a softening in their attitude, perhaps as a concession to the groundswell in favour of joint custody, but they still remain exceptionally cautious:

> Ideally there should be no presumption for or against joint custody, and each case should be decided on the basis of its esoteric facts.[4]

The legislative presumption in favour of joint physical custody should not be unlimited. This article in the section headed 'Legislative Reform' presents what the writer feels is a suitable provision for this country and contains features which are perhaps novel.

In the last decade there has been increasing recognition of the psychological importance of the father-infant relationship and that it is 'unique and qualitatively differential'.[5] If fathers, as well as mothers, are important for the psychological development of children and the role of the father is different from the mother, the courts in preferring one parent are involved in a meaningless exercise. In choosing between a specific mother or father the court is asking itself whether it is more important for the child to breathe or eat. The abolition of maternal preference in *Gronow v. Gronow*[6] is judicial recognition of current psychological views, but it does not make the task of family courts easier.

Historically the role of courts has been to declare existing rights as distinct from creating new rights.[7] The determination of questions such as 'Did X murder Y?' or 'Is Z an obscene publication?' may involve difficult issues of fact or law. Such questions, however, involve merely an investigation of existing facts and community standards and the court is not called upon to make a prediction. When custody was allocated primarily on the basis of fault the court was again exercising a typical judicial function. It was adjudicating the past and not attempting to predict the future. Now that matrimonial fault is largely irrelevant in custody proceedings the role of the court is predictive, it is creating new rights. Commonsense should tell us that no court is capable of making such a prediction in the majority of cases. The number of variables is impossibly large. The courts in abandoning fault, have abandoned their own area of expertise, and called in psychologists, psychiatrists and social workers to make the decisions for them. Psychiatrists disclaim any long-term ability to predict the preferable custodian[8], but so long as the jurists and

[3a] See *supra*. n. 1.

[4] Foster H. H. and Freed D. J., 'Joint Custody: Legislative Reform' (1980) *Trial* 22, 27. See also Foster H. H. and Freed D. J., 'Joint Custody: a viable alternative?' (1979) *Trial* 26. One Australian commentator is also cautious about joint custody. See Bates F., 'Joint Custody in Australian Law: a broad perspective' (1983) 57 *Australian Law Journal* 343.

[5] Lamb M. E. and Lamb J. E., 'The Nature and Importance of the Father-Infant Relationship' (1976) *The Family Co-ordinator* 379, 383.

[6] (1979) F.L.C. 90-716.

[7] *Waterside Workers Federation of Australia v. J. W. Alexander* (1918) 25 C.L.R. 434. *(Alexander's Case).*

[8] *Infra*. n. 65.

the psychologists each speak different languages it is possible for each set of experts to believe that the decisions taken in family courts are primarily the responsibility of the other group.

The recommendation by Foster and Freed in their 1978 article that professionals should 'accept the inherent difficulties of custodial decisions' is dangerous. It is a call for professionals to anaesthetize themselves and ignore the broader social implications of their activities and the anguish they cause to non-custodial parents and many of their children.

The Family Court, as this article will attempt to show, has adopted policies similar to those advocated by Foster and Freed and has avoided 'automatics' and rules of thumb. In doing so, the court has diverged from the normal pathway of judicial development which is to build up a coherent body of rules which, firstly, allow ordinary people to know what the legal consequences of their conduct are, and secondly, prevent unnecessary litigation. It will be argued in this article that the 'best interests of the child' has become a shibboleth giving the Family Court wide discretionary powers over the lives of ordinary people (one in three divorce), which common law courts have never previously had. This novel situation should be viewed with extreme caution and suspicion.

The Joint Select Committee on the Family Law Act has adopted the view that a matrimonial property regime should be introduced, *i.e.* there should be rules of thumb in regard to property decisions. Two in three divorces involve children under 18, and property decisions must take into account custody placements. For the majority of divorces a matrimonial property regime still retains many variables until the basic problem, child custody, has been solved. In California the physical custody of children seems to be shared by separated parents more commonly than here. This is partly because of legislative initiatives which will be discussed later.

A recent survey by a judge dealt with 414 custody awards determined in his court from 1978 to the latter part of 1980 in a Los Angeles district. In one third of the cases parents shared custody on a joint custody basis, which in California normally entails joint *physical* custody. In two thirds of the cases sole custody was awarded to one parent. The judge found that 16% of the parents who were subject to joint custody orders came back to the court with further legal disputes regarding the children. However, 31% of the parents subject to a sole custody order were involved in subsequent legal disputes regarding the children.[9]

This statistic tells us two things. Firstly, it tells us that a large number of parents can take advantage of joint custody. It is only in the last four or five years that joint custody has received social and legal acceptance in some parts of the United States, yet already one third of a large statistical sample was taking advantage of the court's willingness to make joint custody orders. Secondly, this statistic tells us that a sole custody order in this judge's court was almost *twice* as likely to result in subsequent litigation. Some may argue that the result merely shows that the best parents were in his joint custody group and inferior parents were in his sole custody group, and the result does not demonstrate that joint custody is itself intrinsically

[9] Salfi D. J. and Cassady N., 'Who owns this Child? Shared Parenting Before and After Divorce' (1982) 20 *Conciliation Courts Review* 31, 38.

superior. Such a facile dismissal of the statistic is fallacious. It fails to take into account that many non-custodial parents in the sole custody group, perhaps half of them, would have stopped seeing their children. Parents who 'give up' in this way have little incentive for further litigation. By contrast parents subject to a joint custody arrangement are presented with many more situations where friction could occur leading to litigation. The fact that joint custodians have a subsequent litigation rate which is half that of sole custodians shows that joint custody does reduce friction between parents. In so doing, it also benefits children. Fighting between parents is more significant than the absence of one parent as a predictor for disturbance in children.[10]

HOW OUR FAMILY LAW SYSTEM IS FAILING

Don Edgar, Director of the Institute of Family Studies, has indicated that he is not satisfied with the psychological studies which indicate that children suffer no long-term damage from their parents' marital break-up because of what these children themselves report. He has stated that he is not altogether happy with the attitude of the Family Court in custody matters. He is also of the view that a number of the male judges (as distinct from female judges) of the court display an anti-father bias in making custody awards.[11]

The absence of presumptions in custody matters and the wide discretionary powers of the Family Court in financial awards encourages litigation between ex-spouses and damages their children. Patrick Tennison, a journalist, has estimated that family law in this country is a '$400 million a year industry for lawyers'.[12] Even if this estimate is not correct, and it is not backed by figures, family law has become a growth area for lawyers, and there are many more lawyers specializing in this area than before the Family Law Act 1975 (Cth.). The Australian Legal Aid Office in its submission to the Joint Select Committee on the Family Law Act estimated that in the three years after the Act came into operation 80% of its available funds and a similar proportion of its professional officers' time was devoted to family law matters.[13] In addition, the Australian Legal Aid Office has expressed concern that a disproportionate amount of its resources were being absorbed in this way. In the United States and Canada the proportion of legal aid going to these matters was respectively 34% and 28%.[14]

As well as failing to contain the proliferation of litigation between parents, the Family Court has not been able to prevent what has been described by John Wade as an 'apparent epidemic of default' amongst maintenance payers.[15] This is a chronic, world-wide problem which is not unique to the Family Court. Ailsa Burn's recently published study of divorce dealt with a sample which antedated the

[10] Luepnitz D., 'Children of Divorce' (1978) *Law and Human Behaviour* 167.

[11] 'City Extra' A.B.C. (2 B.L.) live radio interview conducted on 24 May 1983 by Margaret Throsby, involving Dr Don Edgar and Geoffrey Lehmann.

[12] Tennison P., *Family Court the Legal Jungle* (1983) 101.

[13] Joint Select Committee on the Family Law Act, *Official Hansard Report*, Volume 3, 2638.

[14] Australian Legal Aid Office, *A Review of Issues* (1980).

[15] Wade J. H., 'Maintenance Orders and Causes for Non-Payment' (1978) 13 *Australian Journal of Social Issues* 232, 232.

Family Law Act. Burns found that 52% of the husbands dealt with in her sample 'rarely or never' paid maintenance as ordered by the court, but where there was a private agreement between the parties only 39% of the husbands defaulted.[16] Her sample was self-selected and slightly above average status. Wade referred to higher rates of default appearing in other studies and listed 23 'causes or symptoms' associated with the 'apparent epidemic of default'. Many of these, such as illness and unemployment, irresponsibility, vindictive behaviour, difficulties of enforcement, and absence of legal aid, are factors over which the Family Court has little or no control. Some of the factors which Wade listed are factors directly associated with the Family Court's present policies in regard to custody. In particular, disassociation between the non-custodial parent and disputes over children were considered by Wade to be factors, and he adopted the view of the Canadian Law Reform Commission (1976) in this regard.

Burns in her study found that the non-custodial parent saw the children rarely or never in 52% of her sample, and that there was little difference in this regard betwen non-custodial fathers and mothers.[17] It is apparent from her statistics that parent-absence was more frequent than maintenance default so that there is a considerable number of fathers who continue paying but do not see their children. A more recent study carried out in association with the Brisbane Family Court has shown that only one-third of non-custodial parents were in regular contact with their children three years after separation.[18] This sample is likely to be more representative of the current position. The articles and book of Kelly and Wallerstein massively document the enormous grief which marital break-up causes children.[19] They concluded as the result of a large study over several years that:

> The continuation of contact between the child and the parent who has not retained custody is a crucial issue. Mounting evidence indicates that the maintenance of this relationship between parent and child is of central importance in the psychological adjustment of children within the post divorce family. Jacobson[20] found that children who spend little time with their fathers during the year after the marital breakup were more likely to develop psychiatric symptomatology than those youngsters who enjoyed more frequent contacts. The findings of the present authors' study point to a significant link between depression in younger children and adolescents and diminished visiting by the children's fathers. Conversely, high self-esteem in all children, especially in older boys, was tied to a good father-child relationship that had been sustained within the structure of visitation.[21]

The present sole custody regime under which the Family Court discourages joint custody (on a physical basis, as distinct from the legal joint custody which the

[16] Burns A., *Breaking Up* (1980) 132.

[17] *Ibid.* 150.

[18] Hirst S. R. and Smiley G. W., 'Access What is Really Happening?' Paper presented to Family Law Practitioners Conference, Brisbane, 1979 as quoted by Burns A., *op. cit.* 167.

[19] Wallerstein J. S., 'Children Who Cope in Spite of Divorce' (1978) *Family Advocate* 2; Wallerstein J. S. and Kelly J. B., 'Part-time Parent, Part-time Child: Visiting after Divorce' (1977) *Journal of Clinical Child Psychology* 51; 'Divorce Counselling' (1977) 47 *American Journal of Orthopsychiatry* 4; 'The Effects of Parental Divorce: Experiences of the Child in Early Latency' (1976) 46 *American Journal of Orthopsychiatry* 20; 'The Effects of Parental Divorce: Experiences of the Child in Later Latency' (1976) 46 *American Journal of Orthopsychiatry* 256; 'Children and Divorce: A Review' (1979) 24 *Social Work (N.Y.)* 468; *Surviving the Break-up: How Children and Parents Cope with Divorce* (1980).

[20] Jacobson D., 'The Impact of Marital Separation/Divorce on Children: Parent-Child Separation and Child Adjustment' (1978) 4 *Journal of Divorce*, 341.

[21] Wallerstein J. S. and Kelly J. B., 'Children and Divorce: A Review' (1979) 24 *Social Work (N.Y.)* 468, 471.

court awards in uncontested cases) must be to blame for much of this parent absence and the suffering it produces in children. The study carried out by Burns revealed that custodial fathers viewed visitation by the other parent much more positively than custodial mothers viewed it.[22] In fact 65% of the custodial mothers in her study whose ex-husbands rarely or never visited the children welcomed this situation. In many of these cases the absent father was violent or a heavy drinker, as Burns pointed out. But there are clearly many other cases where a non-custodial father's visits would be beneficial, but he is discouraged either by the mother or the inadequacy of the access order or both. Marital disruption is a stressor which may cause severe weight loss, increased drinking and psychiatric disturbance, particularly in men.[23] Consequently men are often assessed by courts regarding their suitability as custodians (or whether they should be entitled to access) at a time when they may be behaving uncharacteristically.

Many non-custodial parents regard access as a second class status, which is unnatural and lacking in authority or responsibility, the role of a visiting Father (or Mother) Christmas. The intermittent nature of the contact between parent and child may make it traumatic for the non-custodial parent, so that he distances himself psychologically from the child.[24] In one longitudinal study, eight out of 48 divorced fathers 'could not endure the pain of seeing their children only intermittently and by two years after divorce had coped with this stress by seeing their children infrequently although they continued to experience a great sense of loss and depression.'[25] In addition access, unlike joint custody, is a status with very little security and capable of considerable manipulation by the custodial parent.[26] The author of a study comparing fathers who merely had access with fathers who cared for their children under joint custody commented that 'children often seem ''used'' in sole custody arrangements because of the inherently unequal distribution of power between the parents.' She did not find this occurring to the same extent with joint custody parents as 'there is less motivation to use children in this way.'[27]

Staff of the Family Court of Australia participating in the 1978 Vancouver Conference of the Association of Family Conciliation Courts found U.S. and Canadian delegates 'often expressing amazement and envy of the unified progress made by the Australian Family Court.'[28] The counselling facilities of the Family Court are undoubtedly very successful in reducing litigation, but this does not necessarily mean that separating parents are happy with the outcome. A study

[22] Burns A., *op. cit.* 152.

[23] Bloom B. L., Asher S. J. and White S. W., 'Marital Disruption as a Stressor: A Review and Analysis' (1978) 85 *Psychological Bulletin* 867; Grief J. B., 'Fathers, Children, and Joint Custody' (1979) 49 *American Journal of Orthopsychiatry* 311.

[24] Seagull A. A. and Seagull E. A. W., 'The Non-Custodial Father's Relationship to his Child: Conflicts and Solutions' (1977) *Journal of Clinical Child Psychology* 11. See generally Roman M. and Haddad W., *The Disposable Parent* (1978).

[25] Hetherington M., Cox M. and Cox R., 'Divorced Fathers' (1976) *The Family Co-ordinator*, 427.

[26] See Tennison P., *op. cit.*, for many anecdotes principally from the male viewpoint. Many of the submissions on behalf of women to the Joint Select Committee list the disadvantages of access from the viewpoint of custodial mothers.

[27] Grief J. B., *op. cit.* 318.

[28] McKenzie D. J. and Marshall A., *Report on Conference of the Association of Family Conciliation Courts* (1978) 2.

carried out in California, before the new joint custody regime in that state, showed that 57% of the men divorced in 1977 stated that they wanted custody but only 13% of these men petitioned for custody.[29]

Where there is a contest in the Family Court, the reports by trained psychologists associated with the court certainly introduce a degree of sophistication into the judicial process which was lacking under the previous legislation. Fault under the old Act was mediaeval in its origin and operation. The removal of fault and formality from family courts was a step in the right direction. Notwithstanding all this progress, and no matter how meticulously crafted individual judgments are, this liberal and well-equipped court has presided over what has been for many children and their non-custodial parents a personal disaster, a disaster replicated hundreds of thousands of times by divorcing Australian parents who, without a contest, opt for the court's preferred model, sole custody to one parent.

Richard A. Gardiner, child psychiatrist and Associate Clinical Professor of Child Psychiatry at Columbia University and the author of three books about divorce, has written regarding custody orders of the American courts that parents' 'placing the decision in the hands of others (the courts) is not likely to result in an arrangement that is in their children's best interests.' He has also written:

> In the last few years the concept of joint custody has been enjoying an ever widening popularity. I believe that this trend is a good one because it attempts to utilize a visitation schedule that most approximates the natural marital state.[30]

JOINT CUSTODY IN THE FAMILY COURT

It is therefore a myth to believe that most divorcing men do not want custody of their children, and it is a myth that sole custody to one parent (usually the mother) is the 'natural' order. Joint custody more closely resembles the status quo before separation than sole custody, which is a disruption of the child's relationship with the non-custodial parent.

Before the decision in *Gronow v. Gronow* the Family Court had a history of moderate statistical discrimination against men in custody cases. In 1976 and 1977 appeals by men greatly outnumbered appeals by women in respect of both custody and property decisions. The Full Court of the Family Court was more reluctant to allow appeals in custody than in property matters. While there was little discrimination between men and women in their success rate in property appeals, women had a higher rate of success in custody appeals than men.[31] An analysis of custody applications at first instance by a Family Court officer has also shown statistical discrimination against men.[32]

[29] Weitzman L., 'Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce' (1979) 12 *University of California, Davis, Law Review* 473.

[30] Gardiner R. A., 'Children of Divorce — Some Legal and Psychological Considerations' (1977) *Journal of Clinical Child Psychology* 3, 3-6.

[31] In regard to property 44 male and 24 female appeals were dismissed, and 52 male and 29 female appeals were allowed. In custody matters 45 male and 26 female appeals were dismissed and 14 male and 12 female appeals were allowed. These statistics are extracted from *Official Hansard Report* Volume 5, 4245.

[32] Horwill F. M., 'The Outcome of Custody Cases in the Family Court of Australia' (1979) 17 *Conciliation Courts Review* 31.

If, as the result of *Gronow v. Gronow*, more men are encouraged to apply for custody and the number of custodial fathers increases, the outcome is hardly an improvement. To deprive more children of a relationship with their mothers is not a cause for congratulating the Family Court. In a number of earlier decisions the court recommended against joint legal custody (and, as a corollary, joint physical custody) where custody was contested, and held joint legal custody was 'exceptional' and required 'maturity' and 'co-operation' on the part of the parties.[33] Some recent cases indicate a more favourable attitude towards legal joint custody, however there are considerable differences among the judges. In *Chapman and Palmer*[34] a Full Court of the Family Court, consisting of Evatt C.J., Asche and Marshall S.J.J., upheld an award of joint custody by Opas J. with care and control to the mother. The court held:

> We think it inadvisable to attempt to lay down principles that could operate to fetter a judge's discretion. In other words, we think it wrong to approach the problem from the point of view that a joint custody order should be made 'only in the most exceptional circumstances'.
>
> The matters which have arisen in the decisions referred to should not be considered as binding principles. They are no more than guidelines, or factors which are or may be relevant to the Court's decision in a particular case. The welfare of the children must be the paramount consideration.[35]

Significantly the Full Court confirmed the joint custody award notwithstanding a degree of hostility between the parties'. This decision rejected the earlier authorities decisively, in particular the ratio of the earlier Full Court decision in *Foster and Foster*.[36] The refusal to limit discretionary powers of trial judges is a recurring theme in family law judgments in this country. The statutory requirement that the welfare of the child shall be paramount is an unanswerable impediment to any attempt to build up a coherent body of rules regarding custody. After *Chapman and Palmer* there were a number of decisions in contested cases where joint legal custody was awarded to both parents, with actual care and control to one parent.[37] Nygh J. has been particularly favourable to the concept of joint legal custody.

One of his decisions, *Chandler and Chandler*[38] is a particularly revealing example of the current methodology of the Family Court. The case involved an application by a wife of European stock for custody of two young children who had been in the care and control of their Fijian-Indian father for almost a year at the date of the judgment. She had left the father and was now living in a de facto relationship. His Honour accepted evidence that the father was a 'stern disciplinarian' and a report by a court counsellor that under the father's care the children had been 'well controlled and obedient but happy, and showing no signs of disturbance or fear'. His Honour expressed 'great admiration' for the way in which the father had cared for the children and 'struggled against very difficult odds'.

[33] Foster and Foster (1977) F.L.C. 90-281 *per* Watson S. J., Murray and Wood J.J.; *Dyason and Dyason* (1976) F.L.C. 90-026 *per* Emery J.; *Money and Money* (1977) F.L.C. 90-284 *per* Barblett J., *Newbery and Newbery* (1977) F.L.C. 90-205;; *Yann and Yann* (1976) F.L.C. 90-027.

[34] (1978) F.L.C. 90-510.

[35] *Ibid.* 77, 677.

[36] (1977) F.L.C. 90-281.

[37] *K. and K.* (1980) F.L.C. 90-903 *per* Hogan J.; see also *McEnearney and McEnearney* (1980) F.L.C. 90-866 and *Chandler and Chandler* (1981) F.L.C. 91-008. Note also favourable comments regarding joint legal custody by State Supreme Court Judges in *K. v. K.* (1979) F.L.C. 90-680 and *Chignola v. Chignola* (1979) F.L.C. 90-695.

[38] (1981) F.L.C. 91-008.

The outcome was an award of joint custody to both parents with care and control to the mother. In finding for the mother, his Honour commmented favourably on the fact that after leaving her husband she had promptly applied for custody and to exercise access. The decisive factor was the question of attachment and bonding and on the basis of a court counsellor's report he found there was 'a primary tie of affection with the mother'.

His Honour relied heavily on an article written by Mrs E. Goodman, one of the counsel appearing for the wife. He referred with particular approval to the following two quotations:

> The most important implication that the lawyer can draw from the above findings is the significance of the affectional tie that a child has with a particular custodian. The studies indicate that the crucial task for lawyers is to seek evidence relating to the child's daily activities, and to ascertain with whom an affectional tie has developed.[39]
>
> Since for most infants in our society the person with whom there is the greatest initial interaction is the mother, it is argued that this is the person with whom the first affectional tie is formed. Initiation of this process is by a series of proximity-seeking behaviours, for example, crying, clinging etc. on the part of the baby.[40]

His Honour found that there was evidence, which he held was 'significant', of clinging behaviour on the part of the children with various women, which indicated their primary tie was with the mother.

It is possible to argue that the interdisciplinary approach adopted by Nygh J. in this case was not interdisciplinary at all, but belonged merely to one discipline, namely psychology. Also the psychological views he adopted were of a simplistic nature and were already superseded at the time of his judgment.

The traditional role of the courts has been that of *custos morum*, and it is quite clear that in this case Nygh J. has rejected that role. To query the desirability of his policy is not to claim that old-fashioned fault with all its rigours and viciousness should be re-introduced into custody determinations. But it is relevant for a court to attempt some assessment of the relative stability of parents and obviously some knowledge of their past actions is necessary for a court to determine how they are likely to behave in the future. Nygh J. carefully avoided a comparison of the relative worth of the two parents, as he found a 'choice' between them 'invidious'. He also refused to speculate regarding the stability of the wife's new relationship on the basis that he could not 'speculate too far into the future'. He considered only two matters important: the affectional tie and what he referred to as the 'facilities available at each of the competing households in terms of both parenting and physical facilities'. It is clear from the use of the value-free, non-judgmental phrase 'parenting . . . facilities' that moral instruction and the imparting of social norms by parents were carefully excluded from his conception of parenthood. Parenting, it would appear from his judgment, is simply a process for transfusing emotional and physical nutrients from parent to child, and nothing more. Goodman's article rested on the same suppositions, particularly the views of William Bowlby, whose work she described as 'seminal'. The empirical basis for

[39] Goodman E., 'Child Custody Adjudication: The Possibility of an Interdisciplinary Approach' (1976) 50 *Australian Law Journal* 644, 647.

[40] *Ibid.* 645.

Bowlby's theory of maternal deprivation has been shown to be unsound and his theories are largely discredited.[41]

It is important to note that the theories of Bowlby which claimed that separations between a mother and infant may cause irreparable psychological damage to the infant have provided the theoretical framework for the well-known passage in *Beyond the Best Interests of the Child* by Goldstein, Freud and Solnit opposing shared parenting and access to the non-custodial parent because of the child's need for continuity.[42] Real continuity may incorporate regular scheduling and be between each parent's dwelling, say three days at a time, and be less discontinuous, after parental separation, than abandonment of the child to one parent. More recent authorities such as Gardiner have favoured this latter view. However, Goldstein, Freud and Solnit had such eminence that their book found its way into many legal libraries, while other specialist opinion did not. Nygh J. has been the main advocate of joint custody in Family Court decisions, and presumably favours joint physical as well as legal custody. His implied endorsement of Bowlby's theories is possibly in conflict with his support for joint custody.

For many years the parenting role of fathers was neglected by researchers (except to speculate on the effect of father absence). The main reason for this seems to have been that fathers were away at work during the hours when it was convenient to observe mothers interacting with children. More recently the role of fathers has been extensively studied. The masculinity of a father may not only enhance the sex-typing of his son, but also the femininity of his daughter.[43] In regard to older children it has been:

> usually concluded that fathers are primarily responsible for the transmission of societal mores and values — including the adoption of an appropriate sex-role, and the internalization of morality, particularly in sons. It seems, furthermore, that the influence of fathers in this regard begins in infancy. The vast father-absence literature, fraught though it is with methodological and substantive flaws lends substantial support to this hypothesis. One consistent finding has been a negative correlation between the seriousness of the effects, and the child's age at the time of the father's departure. The younger the child, the more seriously he or she appears to be affected. Boys are more likely than girls to be damaged by father absence at all ages.[44]

The effect of father-absence is highly contentious, just as Bowlby's theories on mother absence have distorted the true position. But it is apparent from the literature that psychologists with a specialist interest in the family themselves employ concepts such as the transmission of societal mores by parents which cannot be accommodated by the simplistic, non-judgmental methodology employed by Nygh J. in *Chandler and Chandler* and which concentrates solely on affectional ties. Furthermore, the decision seems to revive the 'tender years' doctrine which the High Court appears to have rejected in *Gronow v. Gronow*. The

[41] Morgan P., *Child Care: Sense and Fable* (1975). It has been pointed out that most studies of maternal deprivation' have been studies of *parental* deprivation (*i.e.* both parents were absent). See Okpaku S.R., 'Psychology: Impediment or Aid in Child Custody Cases?' (1976) 29 *Rutgers Law Review* 1117, 1141. The usefulness of 'maternal deprivation' theory as a basis for determining mother versus father custody disputes is therefore highly questionable.

[42] Goldstein J., Freud A. and Solnit A. J., *Beyond the Best Interests of the Child* (1973) 37-9.

[43] Lynn D. B., 'Fathers and Sex-Role Development' (1976) *The Family Co-ordinator* 403; Heilbrun A. B., 'Identification with the Father and Sex-Role Development of the Daughter' (1976) *The Family Co-ordinator* 411.

[44] *Supra*. n. 5, 381-2. For convenience the references Lamb and Lamb employ have been deleted. See also Lamb M. E., *The Role of the Father in Child Development* (1976).

'tender years' doctrine claimed that in regard to young children the mother should be the preferred custodian. Goodman in her article referred to the literature regarding father absence but stated:

> the value of these studies for the lawyer are limited as they relate almost entirely to the child's psychosexual development. Since this is only one aspect of personality development, albeit an important one, it is a factor to be considered but ought not be decisive.[45]

In downgrading the importance of those parental functions where fathers are primary, Goodman and Nygh J. in *Chandler and Chandler* create a set of rules with an inbuilt bias against fathers. There will, of course, be many cases where the primary affectional tie will be with the father, and there is a very considerable literature regarding the ability of fathers to be emotionally nurturant and to cope with single fatherhood.[46] However, with respect, the weighting of factors adopted by Nygh J. and Goodman creates a de facto presumption in favour of mothers and is in conflict with *Gronow v. Gronow* and the psychological literature. Nygh J. in *McEnearney and McEnearney* held:

> in the light of the decision of the High Court in *Gronow v. Gronow* we must start with the general proposition that presumptions in custodial matters should be generally discouraged, for the reason that the welfare of the child should be the paramount consideration.
>
> Presumptions, as I see it, are an easy way out for a lazy judge. It is not right to say that because a situation has lasted for a long time or because one of the parents is a mother, therefore our mind is made up unless you can show us that we should act to the contrary.[47]

His Honour's selection of a passage from Goodman's article suggesting that the first affectional tie is with the mother is hard to reconcile with this dictum from *McEnearney and McEnearney*. In addition the primary affectional tie (as distinct from the first affectional tie) will normally run with status quo. A recent study has been carried out by Alex Lutzyk of the Sydney Family Court Counselling Service of 104 children aged from just under four to just under 17 whose parents were disputing custody.[48] Seventy per cent of the children stated they wished to remain with the parent they were with, 24% stated no preference and 7% wanted to switch to the other parent. Children's preferences for living with mother or father, or switching were unaffected by age or sex. The time spent with the non-custodial parent was however a significant factor. Nygh J. in *Chandler and Chandler* counselled against self-help by parents, but confrontationist and grabbing tactics by one parent to obtain de facto custody early in the process of separating will help to establish a primary affectional tie.

The Victorian Women's Refuges Group has made the following interesting comment:

> Women have returned to the matrimonial home under police escort to pick up some clothes — and hopefully also a child. The police advise that if the child is in the cot she can pick it up — and she

[45] Goodman E., *loc. cit.*

[46] *E.g.* Saurin D. B. and Parke R. D., 'Fathers' Affectionate Stimulation and Caregiving Behaviours with Newborn Infants' (1979) *The Family Co-ordinator* 509; Keshet H. F. and Rosenthal K. M., 'Fathering After Marital Separation' (1978) 23 *Social Work (N.Y.)* 11; Orthner D. K., Brown T. and Ferguson D., 'Single Parent Fatherhood: An Emerging Family Life Style' (1976) *The Family Co-ordinator* 429, especially 436: Mendes H., 'Single Fathers' (1976) *The Family Co-ordinator* 439, especially 442. See also *supra*. n. 5, 43.

47 (1980) F.L.C. 90-866, 75, 499.

[48] Lutzyk A., 'Investigation of the Custodial Wishes Expressed by Children Who are Subjects of Custody Disputes' (1981) 1 *Court Counsellors Bulletin* 4.

> then has the custody. However, usually the father carries the child in his arms and the mother is not allowed to tear it away from him.[49]

A simple corollary flows from a sole custody regime: the parent who is prepared to wake up the child is more likely to get custody.

A further aspect of *Chandler and Chandler* deserves comment. The hearing occurred almost one year after the mother left. In terms of the child's sense of continuity, as expounded by Goldstein, Freud and Solnit, the mother could not by then have been the primary psychological parent. Nygh J. commented that the mother should not be disadvantaged by not having helped herself to the children and stressed the clinging behaviour adopted by the children with women other than the mother. In essence his Honour's finding was that the mother if she had continued as the children's primary caretaker, would have been the primary psychological parent *i.e.* she was a *constructive* primary psychological parent. The sophistication of such a judicial concept which is implicit in the judgment seems very remote from the instruction contained in s. 64 of the Act that the welfare of the child shall be paramount.

The concept of 'primary psychological parent' itself is a very dubious one and is under increasing attack as being unscientific.[50] It is intellectually vapid. 'Is Mummy more important than Daddy?' is about as profound as asking whether apples are better than oranges. It has persisted over many decades simply so that courts can justify their brutalized termination of the relationship between the child and adult whom the court decides is a 'secondary' psychological parent. As such it is a concept of convenience sanctioning the use of legal force. Under a joint custody regime it should be employed only with great reluctance and care.

In December 1981 two Full Courts of the Family Court delivered judgments following *Chapman and Palmer*. The first of these, *Lea and Lea*[51] involved an appeal by a husband against an order for joint custody with care and control to his wife, and a cross appeal by the wife asking for sole custody for herself. Simpson, Hogan and Strauss JJ. set aside the joint custody order and gave sole custody to the wife. The husband's action in instituting the appeal seems to have been the determinative factor as the court held:

> There are few greater evils than recurring litigation about custody or access. It is detrimental to the welfare of the children, it consumes the mental, emotional and financial resources of the parties and it is contrary to the best interests of the community.[52]

Counsel for the wife relied on *Foster and Foster*, but it may be significant that the joint judgment did not endorse the principle in that case, particularly bearing in mind the fact that Hogan J. was a member of the bench and in *K and K*[53] he made an award of joint legal custody. *Lea and Lea* may therefore be regarded as compatible with *Chapman and Palmer* and resting on its particular facts, namely the litigiousness of the husband who was ordered to pay a portion of the wife's costs. The same

[49] *Official Hansard Reports* Volume 2, 1675.

[50] Clawar S. S. 'One House, Two Cars, Three Kids' (1982) 5 *Family Advocate* 14, 16. Clawar, a clinical sociologist, commented that in '200 odd cases of custody conflict' he observed the children accepted the equalization of access to both parents where it was permitted and a majority experienced 'a reduction in their social, emotional, and physical problems after equalization of access'.

[51] (1981) F.L.C. 91-115.

[52] *Ibid.* 76, 878.

[53] (1980) F.L.C. 90-903.

cannot be said of the second case, *Cullen and Cullen*[54] which is distinctly cooler towards joint legal custody. Sole custody of a boy aged 3½ had been awarded to the wife. The father appealed and asked for an order of joint custody. Watson S.J. in dismissing the appeal held that there was 'a discernible shift in the authorities' towards awarding joint legal custody where the circumstances were favourable. As a member of the bench in *Foster and Foster* this is a particularly significant dictum and his Honour appears to have abandoned the views expressed in that case. However, both Strauss and Bell JJ. were of the view that sole custody was the 'normal' order where the parties have sought the intervention of the court and joint custody was 'very much the exception rather than the rule'.

Strauss J. endorsed *Chapman and Palmer* as binding authority, but his views appear very different from the views of that particular bench. In addition he was critical of the statement by Nygh J. in *Chandler and Chandler* that the concept of joint custody imposed an obligation on the parent with care and control not to move house without consultation. He regarded the dictum of Nygh J. as 'quite unacceptable' and commented:

> One of the main objects of the Act is to bring about a situation in which people are free to make a new life for themselves.[55]

With respect, the views of Nygh J. are much more acceptable. Divorcing parents cannot in a real sense enter into a new life at least until their children are no longer dependent. The view expressed by Strauss J. and the lack of concern for mutual obligation inherent in it is disturbing in its social implications. Many non-custodial parents have a very active relationship with their children, and this is increasingly the case. An example is the decision in *Newbery and Newbery*[56] where the non-custodial parent seems to have spent more daylight hours with the children than the custodial parent until access was adjusted slightly. The view expressed by Strauss J. is an invitation to custodial parents to remove the children from the vicinity of the non-custodial parent. The encouragement of a 'new life' mentality by the court in its custody decisions must affect behaviour both before and after separation. Cases such as *Chandler and Chandler* where the mother promptly applied for custody and access after leaving her husband and in due course obtained care and control must affect the behaviour of other parties.

Seweryn A. Ozdowski in his submission to the Joint Select Committee hypothesised that if the existence of the Family Law Act and the changes introduced by it are unknown then the Act could not be described as affecting attitudes and behaviour. In a survey of 313 residents of Armidale he found 54.6% had no knowledge of the Act and only 4.5% had substantial knowledge of it. However, from a sample of 16 Parents Without Partners whom he surveyed 11 had substantial knowledge and 5 had moderate knowledge. He concluded that the Family Law Act had not affected existing attitudes towards family and divorce.[57]

[54] (1981) F.L.C. 91-113.
[55] *Ibid.* 76, 848.
[56] (1977) F.L.C. 90-205.
[57] *Official Hansard Reports* Volume 1, 769, 780, 798, 801.

Ozdowski's findings have been welcomed by groups who support no fault divorce. His methodology is doubtful. It is significant that his separated parents did know a lot about the Act. Many spouses contemplating separation seek legal advice *before* they leave. Many who have left, promptly seek legal advice as to whether they can expect custody. The legal advice they receive may affect their decision as to whether they return to their spouse or remain separated and apply for custody. Ozdowski's study is only of value in showing general attitudes to the Act. As an analysis of the impact of the Act on individual behaviour its methodology is defective as people likely to be affected by the Act will make it their business to know about the Act.

A significant example of the dynamics of custody litigation is *N and N (No. 1)*[58] and *N and N (No. 2)*.[59] This was a contested custody application for two young boys. A number of facts are important to understand the case. The father was a legal academic and the mother was a secondary school teacher. Both were orthodox Jews, but the husband was much stricter in his orthodoxy than the wife. The husband wanted to keep the marriage on foot and the wife was the active sponsor of the divorce. The husband had initiated sharing arrangements for the children with equal blocks of time spent with each parent. This had been rejected by the wife who refused to co-operate. Up until the commencement of the hearing the husband had recommended shared parenting but the wife had remained adamant. Lusink J. in a detailed and sympathetic judgment gave sole custody to the husband. The hearing had occupied 5½ days and involved affidavit evidence from a large number of witnesses, perhaps 24 (or more). On appeal both parties employed senior counsel and the appeal was dismissed.

The case is important because the husband's religious strictness was alleged to be one of the causes of the separation. Notwithstanding, he was happy to share the children even though there was a considerable gulf between his wife and himself. This type of cultural difference between parents is one of the arguments employed against joint custody, yet here a lawyer obviously with some ability to make a mature assessment of his own situation was prepared to attempt to make a joint custody arrangement work. Her Honour formed the view that he was the more capable parent.

One factor that she found significant was that the boys were restless and argumentative after access to the father and difficult for the mother to control. They did not display this behaviour with their father. Her Honour attributed this difference to the different parenting capabilities of the parents. Equally, with respect, it was attributable to the fact that at this stage the boys were spending only one day each week with the father, as the mother had contravened the original shared parenting arrangement. The boys may not have been restless with their mother if they had spent more time with their father. The father himself believed that an equal sharing arrangement would have worked, and in a shared parenting arrangement may have been able to influence their behaviour for the better in their mother's household. Her Honour also commented on the wife's lack of knowledge

[58] (1981) Fam. L.R. 879.
[59] (1981) Fam. L.R. 889.

of 'the basic guidelines within which the determination is to be made'. It seems likely that the wife had an unrealistic assessment of her chances of success (this is shown by the vehemence of her appeal).

In an earlier decision Lusink J. had found against a father who was a Pentecostalist caravan salesman[60] and had commented unfavourably on the narrowness of his religious beliefs. But in *N and N* she found that the strict orthodox Judaism offered by the father was a 'special right' and heritage. The case of *N and N* illustrates the dangers for litigants of overconfidence in custody disputes and attempts to predict judicial behaviour on the basis of earlier decisions.

A Californian court has used joint custody as a 'circuit breaker'. In one case the husband had obtained permanent custody of a daughter and the wife sought a new hearing. In the meantime the new legislative provision creating a presumption in favour of joint custody came into operation. The court suggested to both parties that either or both should apply for joint custody.[61] Under the Californian legislation both parties must agree before joint physical custody can be awarded, and the court's willingness to entertain an application for joint custody by one party is revealing. Such an application would place the other party at a tactical disadvantage and act as an incentive for co-operation. A similar 'circuit breaker' tactic could be adopted by our own Family Court judges. But they would probably be reluctant to step outside their traditional role of umpire in an adversarial court without legislative approval, in particular without some presumption in favour of joint custody. *N and N* illustrates the unfortunate results of the present system. As the Family Court favours sole custody in contested cases, once counselling has failed there is little that individual judges can do to prevent a full contest running its course. Often parents want full custody, not because they are too angry to co-operate (as many Family Court judges allege is the case) but because they are over anxious. This seems to have been the case with Mrs N who prevented overnight access to her husband because she 'would have a very great need for the children in the initial stages'. A sole custody regime encourages contests and win-all, lose-all behaviour. In this case the father was given more than he had been asking for and the children lost half their complement of parents. It is difficult to believe the wife really preferred access to shared parenting, but the system did not allow this option to emerge.

THE CASE AGAINST SOLE CUSTODY

As a number of Family Court judges regard sole custody as the 'normal' order the jurisprudential nature of these orders deserves investigation. A thesis of this article is that with the removal of fault, the nature of such orders now entails such a heavy element of prediction that they are now no longer judicial in nature. The Family Court may even — to draw a long bow — be unconstitutional as it is presently constituted. It is to be hoped such a point is never litigated. There are strong arguments against such a proposition. The courts have long been wardens of

[60] *Dyer and Dyer* (1977) F.L.C. 90-229.
[61] *In Re Marriage of Levin* 102 Cal. App. 3d981, 162 Cal. Rptr. 757 (2d Dist. 1980).

infants and the mere removal of fault by legislation should not make the exercise of a traditional judicial function unjudicial in terms of the constitution.

The object of this article is not to demonstrate the Family Court's unconstitutionality, but simply to show how its present functioning through no fault of the judges themselves has become essentially non-judicial in the traditional sense. This non-judicial functioning on the part of the Family Court may partly explain why it has become such a target for abuse on the part of its clients (in a way that criminal courts are not). Some litigants seem to feel their custody or property rights have been confiscated by the court in a manner which they believe is unjudicial.[62]

An element of prediction is incorporated into a number of judicial determinations. Compensations for future wage loss and progressive physical disabilities is an example. It is notable that where the prediction has become too speculative even though the court may appear to be failing in its primary task of providing compensation the court has rejected consideration of certain factors. An example is the line of authority culminating in the decision of *Todorovic v. Waller* where Brennan J. held that:

> The quantification of future increases in net wages and costs, and of future rates of interest and inflation, is too complex an enquiry for the courts to undertake in personal injury litigation.[63]

Gibbs C.J., Wilson, Mason and Aickin JJ. held similarly. Stephen and Murphy JJ. held otherwise on this issue.

In *Alexander's* case Isaacs and Rich JJ. held the arbitral function of the Conciliation and Arbitration Court was non-judicial in the following passage:

> No one can foresee for any appreciable period the legislative requirements of industrial peace in any one industry, much less in all industries of the Commonwealth which are common to more than one State. Any attempt at detailed regulation, applicable to all industries even if suitable today — practically an impossible hypothesis — would certainly be less suitable a month hence. Nevertheless, it was thought necessary that such disputes should not go uncontrolled but that the control should be exercised only by means of conciliation and arbitration. That is essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.
>
> An industrial dispute is a claim by one of the disputants that existing relations should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights.[64]

The outcome of this famous dictum was that ultimately in 1956 the Conciliation and Arbitration Court was held to be unconstitutional and its functions divided between a court and a Commission.

It is instructive to compare a custody determination with industrial arbitration. Isaacs and Rich JJ. comment on the intrinsic difficulty of prediction for industrial

[62] See for instance the submission of Defence Against Women Marriage and Alimony *Official Hansard Reports* Volume 1, 611, where it is claimed of the court that ' [t] here has been a degree of tyranny unprecedented in the history of our courts'. See also the submission of the Divorce Law Reform Association of South Australia, *Official Hansard Reports* Volume 1, 633, which refers to the 'lucky dip' attitude of the courts. See generally Tennison P., *op. cit.*

[63] (1981) 56 A.L.J.R. 59, 84.

[64] (1918) 25 C.L.R. 434, 462-3.

matters. Also they state a judicial power concerns itself with declaring rights, not claims for new rights. Custody disputes resemble industrial disputes in that the variables make accurate prediction almost impossible. This inability for courts or professional witnesses to make accurate predictions in custody matters is frankly acknowledged by Goldstein, Freud and Solnit.[65] When fault was an important element, a custody determination could to some degree be regarded as the ascertainment of an existing right. The court conducted an essentially historical investigation to determine which parent was now entitled to custody. With the removal of fault the court is solely concerned with evaluating each parent's capacity in the future to provide a suitable environment for the child. This is almost purely predictive. The reliance by Nygh J. on the primary affectional tie may be seen as an attempt, perhaps unconscious, to escape the predictive trap in which the court now finds itself. The primary affectional tie is an historical fact which can perhaps be ascertained. However, this is not the court's obligation under the Act, which is that the welfare (*i.e.* the future well being) of the child shall be paramount. The solution proposed by Nygh J. is intelligent and sympathetic, but does not solve the problem.

Like an arbitrator in an industrial dispute, the judge has wide discretionary powers. Having heard the disputing custodians, the judge then terminates the existing joint custody and creates a new right, sole custody to one parent.

A joint custody regime could operate in an entirely different manner. Where both parents are fit and seem unable to co-operate in shared parenting the court's role would be to adjudicate which parent was refusing to co-operate. The most co-operative parent would be awarded the child and the court would not concern itself with determining who was the marginally preferable parent, which is a meaningless exercise in any event. The court's historical investigation of failure to co-operate would not always be an easy task, but it is the type of procedure which courts are equipped to handle. The court's role would be much more traditional. It would be historical and not predictive and it would simply declare a party had forfeited a right. New rights would not be created. Divorcing parties would regain their autonomy as it would be their own behaviour which determined the outcome, not psychological theories or the pre-emption of a sleeping child. The discretion of the court would be reduced and inevitably as in California, litigation would decrease.

As a result of the predictive trap in which the Family Court finds itself, it has come to rely heavily on reports of court welfare officers who are trained psychologists and the findings of modern psychiatric theory. This has a number of dangers for a court. Legal and medical definitions are often incompatible and the law may recognize concepts which are not recognized by psychiatrists.[66]

A legal concept such as the welfare of the child poses precisely these problems.

[65] Goldstein J., Freud A. and Solnit A. J., *op. cit.* 49-52. See also Freud A., 'Child Observation and Prediction of Development' in Goldstein J. and Katz J., *The Family and the Law* (1965) 953-4.

[66] *E.g.* 'dangerousness'; 'insanity'. see Needell J. E., 'Psychiatric Expert Witnesses: Proposals for Change' (1981) 6 *American Journal of Law and Medicine* 425, 430. Diamond B. Z. and Louisell D. W. *op. cit.* 1355.

It is instructive to study an extract from a submission to the Joint Select Committee by K. M. Lashchuck, Senior Psychiatrist of the Child Guidance Clinic, Hospitals Department, Adelaide:

> I am increasingly convinced that all couples who are showing any significant degree of litigation (sic) and hostility over litigation should have a thorough professional assessment by trained personnel such as psychiatrists and clinical psychologists *with given skills to evaluate what is best for a given child* . . . there is a need to somehow formalise a process whereby there is a review of the custody order. Very frequently circumstances for the custodial parent may change, or circumstances for the parent who has lost custody may change to his or her advantage, and finally there is the continuing developmental needs of the child to be considered.[67] (emphasis added)

It emerges from Mr Lashchuck's submission that he was an experienced witness in custody matters, but it is apparent that his perspective was very different from the court in *Lea and Lea* which spoke of the evils of recurring litigation. Courts seek to dispose of matters once and for all. The psychiatrist's given skills are not to make such a permanent evaluation, a psychiatric *res judicata*, rather to respond to current circumstances and emotional needs and recommend a course of action. In the emphasised passage Lashchuck seems to be saying that psychiatrists do have the ability to determine what is best for children. However, a careful reading indicates otherwise. His evaluation of what is best is in the context of a psychiatric intervention to help patients and of flexibility and responsiveness to changing needs which is beyond the capacity of courts.

Not only is there the problem of translating psychological concepts into legal concepts, but also there may be problems with the quality of the psychiatric or psychological evidence itself. A recent survey of the literature and case law on psychiatric evidence pointed out that psychiatric evidence is uniquely subjective, and conscious or unconscious bias is less likely to be uncovered than with evidence from expert witnesses in other areas. In addition there are no objective standards to demonstrate the thoroughness of an examination, and impeachment of evidence by fellow professionals is difficult because of the unique nature of the encounter between the psychiatrist and the examinee.[68] These views appy equally to psychological evidence. The Family Court avoids some of these difficulties by relying on reports from its own welfare officers rather than outside experts paid by the parties, but observer bias cannot be eliminated. A recent study of psychiatrists who reported on the dangerousness of incompetent felony defendants found that although the psychiatrists' recommendations were accepted by courts in 86.7% of the cases there was no significant difference in the behaviour over three years of those evaluated as dangerous and those evaluated as not dangerous by the psychiatrists. The authors concluded that psychiatrists' expertise was an illusion.[69] The implications of such a study are disturbing for a court such as the Family Court which relies on psychiatric and psychological evaluation.

[67] *Official Hansard Reports*, Volume 1, 663.
[68] Needell J. E., *op. cit.* 425-47.
[69] Cocozza J.J. and Steadman H. J., 'Prediction in Psychiatry: An Example of Misplaced Confidence in Experts' (1978) 25 *Social Problems* 265.

It has even been suggested by the Family Law Practitioners Association of N.S.W. that judges themselves should be psychologically screened as

> some judges by reason of their own personal background and their own feelings and their own relationships with their parents have such strong personal reactions in favour of mothers or aganist mothers as a group that a fair balanced review of the facts of the case is very hard to obtain.[70]

It is submitted that a large proportion of sole custody awards are arbitrary in nature although based on 'expert' evidence and conscientious consideration by the court. That a court can interpose itself between the child and parent in this capricious way is an invasion of the 'freedom of intimate association' which U.S. courts have begun to recognize.[71]

A sole custody regime is economically and psychologically bad for children for reasons stated earlier in this paper. Two additional points need to be made.

Sole custody awards often result in the custodial parent denigrating the absent parent to justify his or her pre-emption of the other parent's role. This may result in children believing one half of their biological heritage is 'bad'.

Secondly, sole custody is the judicial preferment of step-parents. Difficulties between children and step-parents are not confined to Grimm's Fairytales. A Melbourne study indicated considerable difficulties were experienced by adolescents on the re-marriage of the custodial parent (usually the mother). The majority appeared uncomfortable.[72] There is a vast biological literature regarding parental solicitude which shows that it is discriminative. Parents favour their own children. Many species as well as man make a considerable investment in paternity (for example, gibbons and bluebirds) and adopt strategies to ensure paternity confidence. Similar considerations apply to mothers. Biparental care is universal in our species and is a fundamental attribute.[73] A sole custody regime far from being 'normal', is a fundamental frustration of our sociobiological heritage.[74]

LEGISLATIVE REFORM

The case for joint custody has been argued elsewhere and the arguments for and against will not be repeated.[75] The few empirical studies of joint custody situations which there are fail to confirm the view of some judges here and overseas that it 'confuses' children or that parents cannot co-operate if there is a high level of hostility between them.[76] Some joint custodians are mutually hostile. Not all are high status or well educated.

[70] *Official Hansard Reports*, Volume 3, 2344.

[71] Karst K. L., 'The Freedom of Intimate Association' (1980) 89 *Yale Law Journal* 624.

[72] Hodges E., *Adolescents' Post-Divorce Relationships with Parents and Step-Parents: A Melbourne Study*. from Wilcott I., *Parenting After Separation* (1982) 161. There is evidence that joint custody is less stressful for step-parents and children than sole custody. The step-parent can spend more time alone with his or her partner. Joint custody children do not see the step-parent as usurping the biological parent. See Grief J. B. and Simuring S. K., 'Remarriage and Joint Custody' (1982) 20 *Conciliation Courts Review*, 9.

[73] Daly M. and Wilson M., 'Discriminate Parental Solicitude: A Biological Perspective' (1980) 42 *Journal of Marriage and the Family* 277.

[74] The violence which court decisions sometimes provoke confirm this. *E.g.* see Tennison P., *op. cit.* 26-8.

[75] Lehmann G., 'The Case for Joint Custody' (June 1983) *Quadrant* 60.

[76] Grief J. B., *op. cit.* 311-19; Abarbanel A., 'Shared Parenting After Separation and Divorce: A Study of Joint Custody' (1979) 49 *American Journal of Orthopsychiatry* 320.

At a National Conference conducted in Canberra in 1981 by the Centre for Continuing Education of the Australian National University and the Institute of Family Studies on 'Parenting After Separation: Alternative Patterns of Child Care', a large proportion of the delegates comprising social workers, psychologists and some lawyers seem to have been in support of joint custody. In the published papers there appear to be no opinions favourable to a sole custody regime.[77] The climate of opinion seems to be ready for reform so far as social workers and psychologists are concerned. If a presumption in favour of joint custody is introduced it will be the court welfare officers who will be chiefly responsible for making joint custody work. This paper has been critical of the ability of courts to translate psychological evidence into legal concepts. A joint custody regime would make considerable use of psychologists, but in their area of expertise — in psychological, not legal interventions. Under a joint custody regime counsellors would have the task of persuading and re-assuring reluctant parents and (in appropriate cases) calling the bluff of parents who are intransigent. Court counsellors are skilled in these strategies. Our Family Court has unique facilities to enable a joint custody regime to work and we have a publicly funded Institute of Family Studies which could monitor its effects. In both of these aspects Australia is privileged in comparison with most other jurisdictions.[78] Amongst our judges there is a 'discernible shift' away from sole custody and we already have a modern no-fault statute onto which a joint custody presumption could be grafted. A joint custody regime is incompatible with fault legislation.

A joint custody presumption should be introduced by legislative, not judicial initiative. There is the problem of disagreement among the judges and also restrospectivity, if the initiative is judicial. Clearly, such a regime should be largely prospective and not disrupt existing sole custody arrangements where children are accustomed to living with one parent.

The relevant provisions of the Californian Civil Code are as follows:

> s. 4600. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding, or at any time thereafter make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference: (a) to either parent, or to both parents jointly pursuant to s. 4600.5 according to the best interests of the child, provided, however, that in making an award to either parent, the court shall not prefer a parent as custodian because of that parent's sex.
> 4600.5(a). There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.[79]

The Californian provisions do not provide a suitable model for this country for a number of reasons. American statutory wordings do not transplant easily in this country because our judicial style differs.[80] Golembiewski in her commentary on

[77] Wolcott I., *Parenting After Separation* (1982).

[78] *E.g.*, in California, the Join Custody Study Project is co-sponsored by the Jewish Family and Children's Services, and California Woman Lawyers.

[79] Golembiewski P. A., 'California's Presumptions Favouring Joint Child Custody: California Civil Code Sections 4600 and 4600.5' (1981) 17 *California Western Law Review* 286.

[80] An *e.g.* is s. 45 of the Trade Practices Act 1974 (Cth). Its original wording employed terms from the Sherman Act which were not understood by the High Court in *Quadramain Pty. Ltd. v. Sevastopol Investments Pty. Ltd.* (1976) 50 A.L.J.R. 475.

the sections seems to treat it almost as a general presumption in favour of joint custody. On a strict reading, this is not the case. The parents must first agree. There are other subsections forming part of the Californian provisions which provide that it is public policy for minor children to have frequent and continuing contact with both parents and there is a discretion on the part of the court to award joint custody when only one parent applies. 'Joint custody' is itself defined in an unsatisfactory manner which James A. Cook, who was instrumental in the introduction and passage of the legislation has described as 'mischievous'. Section 4600.5(c) reads:

> For the purposes of this section, 'joint custody' means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

As Cook has explained, the proviso was inserted to assist parents who were geographically distant, but its effect is to introduce uncertainty which 'could intrigue the most litigious of counsellors and parents'[81].

The following is submitted as the draft of a provision suitable for Australian conditions which could be added to the existing provisions of the Family Law Act (perhaps with minor adjustments):

64A. On proceedings with respect to the custody of a child of a marriage where both parents are fit and willing custodians and caretakers for the child:

(a) there shall be a presumption that an award of joint custody to both parents will be for the welfare of the child;

(b) there shall be a presumption where the parents cannot agree on joint custody or are unable to make a joint custody agreement or order work that the parent whose behaviour has been more co-operative and less disruptive to the effecting of joint custody shall be given sole custody of the child;

(c) joint custody for the purposes of this section shall mean legal custody to both parents jointly with physical care and control alternating between the parents on a regular, frequent and equitable basis;

(d) the presumptions in this section shall not apply to a *status quo* where one parent has had sole care and control of the child after the parents have separated and joint custody would disrupt the child;

(e) joint custody shall not be ordered where the court is satisfied that it cannot be effective.

The effect of such a provision would be that unilateral attempts to change a child's religion or school would be 'disruptive' and the court would not involve itself in the non-judicial task of predicting the better religion or school. Similarly the parent leaving the *status quo* locality would normally disqualify himself from parenting. This would make the law simple to enforce and predictable for most

[81] Cook J. A., 'Joint Custody, Sole Custody: A New Statute Reflects a New Perspective' (1980) 18 *Conciliation Courts Review* 31-45. This article contains a full text of the Californian provisions and commentary. The full text is also reproduced in (1979) 17 *Conciliation Courts Review*.

parties. From time to time factually complex disputes would present themselves but less frequently than now.

Such a joint custody regime would be self-policing. Vindictive acts or proceedings would be 'disruptive' and self-defeating. Under the existing system where both parents want custody and cannot agree the system almost inevitably draws them into confrontation. It provides little support for the less aggressive parent. The draft proposal protects the parent who is less aggressive and more altruistic.

A joint custody regime might simplify matrimonial disputes to such an extent that a matrimonial property regime could be introduced. The major impediment to such a property regime is sole custody to one parent. It is instructive to compare the submissions to the Joint Select Committe of the Women's Electoral Lobby and the N.S.W. Women's Advisory Council to the Premier.[82] The Women's Advisory Council to the Premier supported a matrimonial property regime in terms almost identical to the W.E.L. proposal. The submission by the Women's Advisory Council was unqualified and would be simple for a court to administer. However the W.E.L. proposal for equal division of property acquired during the marriage (except windfalls) was subject to a large number of contingencies and would be only marginally easier to administer than the existing system. One of the chief contingencies provided for in the W.E.L. submission was the financial needs of a custodial parent. Under a joint custody regime this discrepancy of property needs would be eliminated for many parties and this would simplify the court's task (nevertheless under a joint custody regime many wives would initially require considerable maintenance from husbands until they attained financial independence). As two-thirds of divorcing couples have dependent children a simple solution to property disputes is not available until the problem of custody has been solved. A matrimonial property regime based on accrued entitlements would avoid the problems of predicting future needs.[83] But it might not do justice to women, whose bargaining power in the market place (as distinct from the courts) has remained inferior. In the long run, property may be more insoluble than custody.

American jurisprudential literature supports the view expressed earlier in this article that custody decisions under the 'best interests of the child' standard are administrative and non-judicial in nature. Referring to this literature in a recent article, Bernard S. Meyer and Stephen W. Schlissel in particular refer to the views of Robert Mnookin and quote Lon Fuller's statement that a judge applying the best interests rule is:

> not applying law or legal rules at all, but is exercising administrative discretion which by its nature cannot be rule-bound. The statutory admonition to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as an instruction to the manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state.[84]

[82] *Official Hansard Reports* Volume 1, 920-3, 761.

[83] Gray K. J., 'Matrimonial Property in Australia and New Zealand: Towards More Effective Bargaining on Divorce', *Official Hansard Reports*, Volume 8, 6712-41.

[84] Fuller L., *Interaction Between Law and its Social Context* quoted by Meyer B. S. and Schlissel S. W., 'Child Custody Following Divorce — How Grasp the Nettle? Part II' (January 1983) 55 *New York State Bar Journal* 32, 35.

Meyer and Schlissel believe that this legal *impasse* can be escaped by defining the best interests of the child in legislation. They refer to the Michigan statute which states that the best interests 'means the sum total of the following factors to be considered, evaluated and determined by the Court' and then lists ten factors such as emotional ties between the parties, continuity, moral fitness and eleventhly any other factor. They believe that a similar approach can be adopted to legislate for joint custody as well as sole custody, and oppose presumptions.[85]

In essence the Michigan statute provides a checklist which requires the court to allot a mark to the parties on each item. The court makes a calculation and awards custody on the result. This checklist may help judges, but the court's calculation and weighting of factors will still be extremely subjective. Some of the concepts in the Michigan statute are also very rubbery (for example, moral fitness).

The insertion of joint custody into the judicial calculation makes it even more uncertain. It is hard to see how such an approach would discourage the evil of custody litigation, although it might reassure judges and provide an illusion of legal craftsmanship. The view of long-standing advocates of joint custody such as Roman and Haddad, and also Cook, is that only a presumption in favour of joint custody will be effective.[86]

CONCLUSION

Foster and Freed have written that joint custody 'may be a judicial "cop out" in order to avoid complex and difficult fact-finding'[87]. Such a view assumes that 'difficult fact-finding' can enable courts to select the preferable custodian. There is no empirical evidence to suggest that courts have this ability in cases of any complexity (*i.e.* Foster and Freed's 'difficult' cases) and Robert Mnookin has suggested a state-administered coin-flip might be more just, as the 'best interests of the child' is a completely indeterminate standard.[88] In addition, psychological theories and psychologists are of little assistance to courts in cases of any complexity.[89]

The 'best interests of the child' doctrine has been embraced by courts as a cultural absolute. The social context in which the doctrine is meant to operate has been ignored and the result has been to promote competition and litigation between parents, and children themselves are damaged. Divorce has only become prevalent in the last couple of decades. A sole custody regime should be seen in its true focus: it is a radical and ill-conceived social experiment of the last two decades which has been a disaster notwithstanding the 'new life' philosophy of its advocates. Joint custody is not experimental or radical. It is simply a re-incarnation of the old fashioned moralistic view that parents should stay together for the sake of the children. Joint custody adjusts this view by maintaining that joint parenting should continue even though the parents live in different houses. A joint custody regime

[85] Meyer B. S. and Schlissel S. W., 'Child Custody Following Divorce — How Grasp the Nettle? Part III' (1983) *New York State Bar Journal* 36.

[86] Cook J. A., *loc. cit.*; Roman M. and Haddad W., *op. cit.*

[87] Foster H. H. and Freed D. J., 'Life with Father: 1978' (1978) 11 *Family Law Quarterly* 321, 340.

[88] Mnookin R. H., 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 290.

[89] Okpaku S. R., *loc. cit.*

has economic costs (to the parents rather than the community as it would reduce the entitlement of sole parents to social welfare payments) and in the long term it may reduce the incentive to divorce. Moralists have been mistakenly concerned with the effect on the family of no-fault divorce. Their research may have produced more significant results if it had been directed at the 'tender years' doctrine and other aspects of judicial behaviour which are substantive rather than formal. A divorce decree whether it is fault or no-fault simply formalizes an existing state-of-affairs, namely the breakdown of the marriage. Custody and property determinations of courts on the other hand are substantive.

Not only is the 'best interests of the child' doctrine indeterminate, it is culturally bankrupt. It provides guidance for courts only in very simple cases, and it provides no guidance at all for parents.

The distinction between courts creating rights and declaring rights is not a jurisprudential decoration. Although subtle, it is fundamental to our common law system. Where the court declares rights, it is the parties who create them and the court simply adjudicates the result. Where the court creates rights, the court becomes an actor and the parties lose their autonomy. In a custody adjudication under the present system one parent may be left by the other, lose custody not because of his (or her) actions but because the court intervenes and sees him as the less suitable parent. A deserted parent in such a situation has been deprived of autonomy. A provision such as the proposed s. 64A would restore autonomy to parties and the court to its traditional role.

A sole custody regime damages children and in the last five years, so far as published expert opinion is concerned, the supporters of joint custody greatly outnumber the sole custody supporters. Recent discussion on joint custody in the U.S. focuses on 'how' rather than 'whether'. One recent discussion of alternatives rejects presumptions and favours a judicial calculation of factors.[90]

This view is opposed here. Wide judicial discretions or judicial 'calculations' regarding custody promote litigation, damage children and their parents, and weaken the credibility of courts.

In Australia we have an advanced system for counselling which other jurisdictions lack. Our pathway to joint custody is not obliged to follow overseas trends.

The legislative draft submitted in this article is recommended for the following reasons:

(a) The existing provisions of the Act, viz. s. 64 would remain, so that the welfare of the child would still be paramount. Joint custody could not be awarded where there was a substantial case for not granting it. The draft provision would be read subject to its legislative context, including the provision relating to the wishes of children. In particular, older children, who are adolescent or coming into adolescence should not be coerced into joint custody.

(b) The presumption in favour of joint custody does not apply where one parent is unfit or unwilling. Parents who do not wish to be physical custodians cannot be ordered to be so by the court.

[90] *Supra*. n. 84.

(c) The provision that care and control alternate on a regular, frequent and equitable basis would prevent one parent pressing an 'outlandish' proposal such as one year in one state with one parent and another year in another state with the other. Some children and parents voluntarily enter into such arrangements, but there should be no implied presumption that can be claimed for them. Regularity implies a schedule so that children and parents know where they will be on which day. 'Equitable' implies fairness, both for parents and children, rather than mathematical equality.

(d) The provision does not reintroduce matrimonial fault but it obliges parents not to obstruct each other in their parenting roles. It injects a degree of morality into the system which many at present feel is lacking. At present deserted spouses often lose their children. The provision gives parents and children a degree of security lacking where joint custody is at the court's discretion. The ascertainment of which parent was 'co-operative' or 'disruptive' would be facilitated by our court counselling system. Proposed s. 64A(b) would act as a statutory 'circuit breaker'. It would induce parents into unselfish behaviour and is more effective than the Californian provisions which lack a 'circuit breaker'. No doubt determining which parent was more 'co-operative' and less 'disruptive' could cause difficult decisions of fact. Such determinations would require a historical investigation rather than an attempt at prediction. As such, the decision would be more traditionally judicial. Examples of the type of issue would be as follows: parent A wishes to move the child to a school closer to his home or to a midway position because the existing school causes logistic difficulties for him. Such a proposal would be *prima facie* 'disruptive' for the purposes of s. 64A(b). However, parent A may also offer to pay the child's taxi fares between the new school and parent B's house. Such an offer would be 'co-operative', and overall his behaviour may be viewed as co-operative rather than disruptive if the new school will not cause parent B inconvenience and the location of the existing school does make it difficult for parent A to continue joint parenting. Court counsellors are skilled at this type of intervention and their reports to the court could be of great assistance.

(e) The provision does not disturb existing sole custody arrangements. It would not create a stampede to the Family Court.

(f) The provision is simply worded and brief. Many ordinary people are affected by custody, so they should be able to read and understand the statutory provision. Legislators should be wary of complex wording in this basic area. The Californian provision provides for a series of complex but rather ineffective presumptions.

Joint custody should be adopted in a provision which a joint custodian can read and understand after putting the children to bed at night.

POST SCRIPT

The preceding article was written prior to the Family Law Amendment Act 1983 and I have been invited by the Editors to comment on the amendments, in particular s. 60A and amended s. 64.

New s. 60A defines a new category of guardianship under the Act which gives some status of dignity and long-term control to a non-custodial parent. As such it may encourage some non-custodial parents to retain an interested and active relationship with their children. It may suit some parents who wish to avoid the chores of custody or joint custody. Many parents will still remain unsatisfied by guardianship, although clearly it gives some security of access to parents afraid that their children may be removed from an accessible location. The flexibility introduced by the new concept is to be welcomed.

Section 64 (as amended) is not as open to constitutional challenge as the previous section. Whereas the previous section gave courts a completely open-ended administrative discretion based on the sole criterion of the welfare of the child, subject only to a limitation relating to the wishes of children over 14, the new section lists criteria to be taken into account in determining custody.

Many of these criteria remain predictive and therefore administrative in nature rather than judicial in the traditional sense. Clearly predictive criteria are s. 64(1)(bb)(ii) which refers to 'the effect on the child of a separation', (iii) which refers to 'the desirability of, and effect of, any change in the existing arrangements', (v) which refers to the 'capacity of each parent' and (vi) which refers to 'any other fact or circumstance . . . that . . . the welfare of the child requires to be taken into account'. The relevance of present facts to future welfare is determinable only by a prediction on the part of the court. In addition s. 64(1)(ba) enjoins the court to make an order that 'is least likely to lead to the institution of further proceedings with respect to the custody or guardianship of the child'. Such a provision self-evidently requires prediction on the part of the court.

Sections 60A and 64 (as amended) are clearly an advance on the previous provisions. In addition the relatively value-free and child-oriented nature of the new criteria makes them superior to the criteria of some U.S. codes which include specific criteria of a moralistic nature for the evaluation of child custody disputes. No criteria are, of course, value-free and courts should remain aware of the fact that no criteria are 'objective' in any scientific sense of the word.

The new provisions do provide considerable scope for a joint custody advocate. The recommendation of s. 64(1)(a)(ba) that the court make an order 'least likely' to lead to further litigation should provide considerable ammunition for Counsel arguing for joint custody in view of the findings of the Californian judge that joint custodians have a re-litigation rate almost half the rate of parents under sole custody orders.[91] In addition the requirement of s. 64(1)(bb) that the court take into account the effect on a child of any separation from 'either parent' also assists Counsel arguing for joint custody. The contention of my article is that sole custody orders give a judicial sanction to the separation of the child from one parent and are often damaging to the child. The court must now take into account the effect of this separation.

Specific provisions relating to joint custody are becoming common in U.S. codes, and in the absence of such a provision our Family Law Act is no longer in the vanguard of divorce reform.

[91] *Supra*, n. 9.