

Chapter Eight

PARENTING AND THE FAMILY COURT: AN ECONOMIST'S PERSPECTIVE

by
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1. INTRODUCTION

It is hardly a profound statement to say that there are many perspectives that can be taken when considering an issue. The essence of analysis is to simplify by focusing on what are considered to be the main elements and relationships. There are many such simplifications. Any single perspective can then be criticised by pointing out an alternative which gives other insights. The simplification chosen as a basis for a policy affects the approach taken and the resulting outcomes. It may therefore be prudent to base policy and interventions on the combined consideration of several perspectives, rather than a single "preferred" viewpoint.

This paper considers the Family Court approach which emphasises a "primary caregiver". It contrasts this with an approach based on an economics perspective considering parenting as a "service activity", a central component of the raising of children in a society. To provide other perspectives, some ways of looking at issues in economics are then applied to some of the processes and issues involved in the operation of family law. The aim in this paper is to show that a single perspective can lead to results which are vulnerable to criticism from other viewpoints.

2. THE CONCEPT OF THE PRIMARY CAREGIVER

In the context of a custodial mother wishing to relocate, Judge Boshier has stated that, *"the mother's enhancement as a primary care-giver is more important than the father's wish to have ready contact"* - Quoted by Judge Green in (Green, 1995, p.137).

The concept of primary caregiver has been interpreted in such a way that it is only a short step to move on to a concept of "sole caregiver". This is apparent in the thinking found in family law in New Zealand. There is a custodial parent and a non-custodial parent, sometimes referred to as the "absent" parent (see section 5.1 of Birks, 1998a). The non-custodial parent may be left with only "the shell of guardianship" in the words of Judge Inglis, and enforcement of access orders is problematic (see section 6.3 of Birks, 1998a). There is also little concern for the nature of the non-custodial parent's contact and whether this is in the nature of an effective parenting relationship. This is indicated in the consideration of most of the costs born by the non-custodial parent as being costs of "enjoyment of access", and therefore not to be considered in child support assessments. (As specified in the Child Support Act 1991, this applies even

when the children are with the non-custodial parent for nearly 40 percent of nights, and with the time being disproportionately at weekends and school holidays.) Amato, considering non-custodial fathers, uses the term "authoritative parenting" and suggests that the nature of the father-child relationship is extremely important (Amato, 1998). What does economics have to offer in considering these issues?

2.1. The Paradox of Value

It may be that the legal approach, taking an "all-or-nothing" view, focuses on the perceived total value of a parent rather than marginal value of a parent's time. In other words, it asks which parent the child should continue to have, the father or the mother, rather than how much time the child should spend with each. Economic optimisation commonly considers the effect of marginal changes in a search for a best outcome. The distinction is relevant when considering the amount of and enforcement of access, as compared to the decision of award of custody. The difference between the two approaches is highlighted by the "paradox of value". The paradox is that, when comparing diamonds and water, the latter which is essential for life commands a very low price, whereas the former, which are largely for ornamentation, can be very highly priced. The paradox is resolved when the issue is specified in terms of the value of a bit more water, rather than water as a whole. Water is in abundant supply in comparison to the amount wanted, whereas diamonds are in relatively short supply. To draw a parallel with parents where, for example, a custodial parent is very important and the other far less important, if the non-custodial parent has limited contact, then a day with that parent may be of more value than a day with the custodial parent. As another analogy based on similar reasoning and illustrating the problems of undue emphasis on a "primary caregiver", consider a cup of coffee. It is made principally of water, with a small amount of coffee added. Should we then conclude that it would make little difference if the coffee is left out?

This point and others are now considered in the context of an economist's approach to production.

2.2. "Production"

If we consider the raising of children to be an activity performed by parents, extended families, schools and other social institutions, and so on, then economic approaches to production show that the family law approach incorporates some very restrictive assumptions.

The standard theory of the firm assumes production of a single product using two factors of production, capital and labour. It is possible to substitute one factor for the other, hence for example production could be capital-intensive or labour-intensive. It would not normally be possible to produce anything with only one factor. In general, "diminishing marginal factor product" is assumed at least after a certain point. This means that, while it may be possible to substitute one factor for the other to some extent, this becomes more difficult as inputs become more unequal. The additional benefits of adding more of an abundant factor diminish. Conversely, units of a relatively less-used factor become more valuable. By convention, introductory

descriptions of production in economics select two factors, labour and capital. Others could be considered, and less aggregated approaches could also be taken, distinguishing between labour inputs, for example. Hence we could consider mothers and fathers as our two factor inputs. If this approach is appropriate in the parenting situation, then family law is giving inappropriate results. Reasoning would go as follows.

There may be many tasks that both parents could do equally well, but as one parent takes over more and more of the other parent's functions, tasks are taken on that are performed less well. There may be some things that simply cannot be done. One parent may not be able to swim, or play a musical instrument, for example. Rather than focussing on the well-being of the custodial parent, as the non-custodial parent's contact lessens, more emphasis should be placed on maintaining what remains. One day's contact with a custodial parent becomes less important in comparison to a day's contact with the non-custodial parent. Of course, the "production" relationship may be more complex than this, but it is a concern that the possibility appears to be overlooked in the current operation of family law. There is an additional consideration, namely that in any event the total amount of input that can be provided by two parents may be greater than that which one can offer.

We can extend this further to the possibility of many inputs, including the extended families of both parents, schools, community organisations, social groups, workplace networks and so on. These are where children learn more about socialisation, work, social structures, group activities, rules, and so on. Children grow up in an environment where many individuals, groups and organisations have an impact. Is it appropriate to focus on a sole caregiver?

As an additional dimension, industry data are gathered on both enterprise and establishment bases. An establishment is in a single location. An enterprise could consist of several establishments. Production is undertaken by enterprises. Children grow up spending time in homes, schools, sports clubs, churches, at their grandparents, at their friends' homes, and so on. There is a view in the Family Court that children need one home base (see section 2.5 of Birks 1998b). It is not clear why this assumption is made, particularly if the child's need is for continuation of significant relationships ("emotional stability"), which may not coincide with living in just one home ("physical stability"). In any event people do move homes regularly, so physical stability may be an unrealistic goal. Notably, the stability criterion is not applied in education, where children are taught by many teachers during their school lives.

2.3. Continuation of roles

Focus on the primary caregiver concept in the Family Court results in a continuation of pre-separation roles:

"... there are good reasons why custody cases at present are more likely to favour the women ... Most of the women awarded custody will have been the primary caregivers and they will, therefore, be seen by the court as best able to care for the children, especially when they are young."
(Julian, 1999, p.32)

Where both parents have been involved in caregiving, or where the children are relatively young, an established pattern might not have developed. The court's choice of one parent over the other would then be less clear-cut than some might like to believe.

One study, looking at families with pre-school children, found movements into and out of work, periods of study, taking parental leave, and children going through a range of pre-school activities with differing demands and schedules (Podmore and Sawicka, 1995). This demonstrates that it may be quite wrong to consider fixed roles even within intact families.

Even where specialisation is clearly observed, there are additional considerations. In economic terms, specialisation during marriage is taken by the court to indicate "absolute advantage". However economic analysis recognises that specialisation and exchange are based on "comparative advantage". These are not the same. The person doing a task is not necessarily the one who is best at that task, but rather the one for whom the relative cost of doing that task, in terms of other things not done as a result, is least.

There are many possible scenarios. For one, assume that both parents are equally competent caregivers, but one can command a salary of \$40,000 a year, whereas the other could only earn \$20,000. It would be in the best interests of the household for the former to earn and the latter to be the caregiver. There are possible scenarios where the better caregiver plays the role of primary income earner instead. It might be optimal for a poor caregiver to be in the caregiver role simply because that person has very low earning power. We could even speculate that some people might deliberately maintain low earning potential to justify being in the caregiving role, or conversely, achieve high earning potential to avoid that position. Some evidence suggests that men may modify their behaviour when placed, even unwillingly, in the sole caregiver role. Risman (1998) states:

"The results suggest that it is just as plausible that at least some men and women display feminine traits because the roles they play demand such characteristics. Social roles - even if not chosen - influence self-perceived femininity." (p.67)

The demands of the caregiving role depend in part on whether the family is together or apart. A person may be more effective in one situation than in the other. In particular, someone may be an effective caregiver when living with a partner who provides well financially, assists with children in evenings and at weekends, gives adult companionship, and performs various tasks about the home. The same person after separation can no longer enjoy the division of labour possible in a partnership and faces more uncertainties about the future. The caregiving environment and responsibilities are different. It would be quite inappropriate to think that parents could continue to operate in exactly the same way after separation as they did before. This extends to even relatively small issues, such as spending time with one child on an activity while the other parent is home to watch over the other children. This dimension of teamwork is lost.

In addition, there may be distortions and imperfections in the household labour market. The pattern of specialisation during a marriage may be due to many accepted social conventions, in which case these conventions may preclude potentially better arrangements. Doherty et al. (1997) describe barriers to involved fathering, including "gatekeeping" by mothers, perhaps a home environment parallel to the concept of a "glass ceiling" in the workplace (see also of Birks, 1999, p.129).

There is also the implicit assumption that the parent who meets a child's needs at one stage is therefore able to meet any needs at other stages of development. This does not necessarily follow.

2.4. Parenting and the Primary Caregiver

Hassall-Maxwell proposed a "simple rule" that custody would normally go to the primary caregiver. This was debated in the *Family Law Bulletin* in Hassall and Maxwell (1992a, 1992b, 1993), Henaghan and Ferguson (1992), Abrams (1992), Family Law Committee of the Wellington District Law Society (1992), and Family Law Committee of the Auckland District Law Society (1993).

Hassall and Maxwell describe the primary caregiver as follows:

*"... in most families one person usually attends personally to most of the following tasks most of the time; that person is the **primary caregiver** and is the person who:*

- *Breast or bottle fed the children as infants*
- *Changed the napkins and toilet trained the infants*
- *Nursed the infants through their illnesses*
- *Taught each child how to eat*
- *Taught each child how to speak*
- *Taught each child how to walk*
- *Helped each child to learn how to read*
- *Shopped for the children's food*
- *Shopped for the children's clothing*
- *Sewed and mended for the children*
- *Washed and ironed for the children*
- *Cleaned for the children*
- *Cooked for the children*
- *Assumed responsibility for sick children whether working outside the home or not*
- *Helped children with their social and emotional problems*
- *Chose schools and arranged special lessons for the children*
- *Met and maintained contact with teachers, parent groups and other parents*
- *Chose doctors and dentists and arranged for children to visit them*
- *Found, trained and supervised baby-sitters and housekeepers*
- *Planned and carried through family holidays and birthday parties*

- *Helped children with their homework*
 - *Arranged for children to go to birthday parties, sporting and cultural events"*
- (Hassall and Maxwell, 1992, p.75)

This is a very narrow definition with an emphasis on tasks commonly considered under "mothering", or the "nurturing" aspects of caring for young children. Some of the activities, such as shopping, do not even require contact with the child, although similar tasks such as earning money to purchase these items is not included. Some of the points refer to making decisions, whereas elsewhere men's influence is viewed negatively as "control".¹

It is interesting that the definition is task-focused. For a contrary view on mothers, consider Dally (1976): "What a mother is is much more important than what she does. This fact is usually omitted in books and articles on child care." (p.24)

Additional tasks could include: teaching ball skills, how to swim, how to ride a bike, how to fix a bike, wash a car, do woodwork, change a plug/fuse/washer; coaching sports teams; encouraging participation in the wider community; encouraging independence; discussing world events/news/current affairs; fostering hobbies, a love of music, literature, languages, gardening, the outdoors; taking tramping/camping/fishing; teaching money-sense; involving children in household tasks (doing with rather than doing for).

Looking beyond a task-based view of parenting, valuable qualities that a parent could offer, besides the ability to nurture, could include:

1. Commitment - a constancy of loving attention throughout the child's life even into adulthood.
2. Respect - for the child's individuality, independence, wishes, talents, sexuality.
3. Affirmation of experience - acknowledgement of the child's perceptions, achievements, feelings, modes of expression.
4. Compromise - the ability to negotiate with an awareness of competing physical and emotional needs.
5. Tenderness - a charitable understanding of, and making allowance for the child's unique weaknesses.
6. Discipline - definition of rules for personal behaviour.

If we consider parenting as preparation of the child for later life as an adult, we might be looking for such things as:

1. Development of motor skills (ball, drawing, running etc)
2. Development of problem solving skills (games, challenges)

¹ See, for example, Easting and Fleming (1994), p.23.

3. Teaching of expected community values (honesty, sacrifice, integrity, respect for others, patience, the value of hard work, a sense of fairness)
4. Teaching of general skills needed later (self defence, rope tying, cooking, body development/exercise, competitions - attitude and rules of, need for rest, fun, sports etc)

As yet another dimension, parents and members of a child's extended family play a part in giving a child a sense of its origin, its history, a spiritual home.

In other words, parenting is far broader than as described by Hassall and Maxwell².

The Family Law Committee of the Wellington District Law Society (1992) presents a broader view in response to the Hassall and Maxwell position. It presents the following list of "matters which need consideration by the Court, or by parents when making decisions about their children":

- (a) The physical and mental health of any person with whom the child may be required to reside;*
- (b) The nature and quality of the existing or potential emotional attachment between the child and any persons;*
- (c) The capacity of any person to provide continuity, order and structure in the life of the child;*
- (d) The ability of any person to respond to the developmental needs of the child;*
- (e) The capacity of any person to supervise the child's physical, psychological and other health care;*
- (f) The ability of any person to encourage the development of the child's cultural identity and understanding of the society in which the child lives;*
- (g) The degree to which any person is likely to foster the establishment and maintenance of the child's relationships with other significant persons;*
- (h) The quality of communication between any person and the child;*
- (i) The likelihood of future conflict between any persons who may have care of the child, having regard to any past or present conflict between those persons;*
- (j) The likelihood of any person providing the child with appropriate opportunities for education and other learning, and for the development of the child's abilities and capacity for independent thinking;*
- (k) Any other matter which, in the opinion of the Court, may relate to the welfare of the child.*

(p. 117)

² I am grateful to Richard Millicer, Michael Hart and Harald Breiding-Buss for suggestions on the role of parents.

Given this range of requirements, it is difficult to see why it might be routinely in a child's best interest to favour one parent, rather than supporting two.³

2.5 Parenting Stages and Changing Requirements

Not only are children's needs diverse, but they can change as children grow. The Family Law Committee of the Wellington District Law Society (1992) makes this point:

"The [Hassall-Maxwell] checklist of tasks for the primary caregiver would be very useful for parents to consider when they are trying to work out arrangements for children. Where however children are older the historical arrangements in place during the marriage may not be so important to such older children. Older children may place more emphasis on their school and continuing contact with their peers and other activities." (p.118)

The issue can be broadened to consider differing requirements from parents. Dally (1976) identifies three stages of parenting. While writing about mothers, she qualifies this:

"Sometimes the 'mothering' mother was not a mother in any true sense at all. 'She' may have been several people at once or a series, a father, or even an institution. So when I write of mothers I include not only physical mothers, but also adoptive mothers, foster mothers and all who act as parents or parent figures to children, sometimes including fathers, teachers and doctors." (p.25)

There can be many people having a significant influence on children's upbringing (including, through attitudes displayed, examples set, and decisions made, by those associated with the Family Court).

Dally describes her three stages, enclosure, extension and separation, as follows:

"Mothers feel about their children in three ways. First, they may see their children as part of themselves, enclosed within the same boundaries. Second, they experience their children as extensions of themselves. Third, they know them as separate people ... These types are related to the three psychological stages of mothering." (p.3)

"Most mothers are a mixture of the three types and as their children grow up they become aware of each stage as it rises and falls, is anticipated and lingers. Most mothers go through each psychological stage with

³ Henaghan and Ferguson made the following statement on the issue: *"The Hassall-Maxwell primary caregiver rule is promoted as a child's right. The main proponents of such a principle internationally have been writers who take a feminist perspective. The rule has been supported by such writers not on the basis of children's rights but women's rights in relation to their children."* (Henaghan and Ferguson, 1992, p.90). Maxwell, on the other hand, has stated of sole mothers, "... they know the reality that they can provide for their children without a man", and, "... information from research, which shows that children can grow up perfectly unharmed by being in a solo-parent family." (Listener/Haylen, 1994)

each child in turn. Most are better at one stage than at others. Many have considerable difficulty with one or more stages. Many end up as predominantly one of the three types.

Whether your mother was or is an enclosing mother, and extension mother or a separate mother and how far she is a mixture of these is one of the most significant influences in your life." (p.4)

If we accept her structure, we cannot consider that a good parent for one stage would necessarily be well suited to other stages. Dally identifies possible problems:

"... extreme dependence of a mother on her child or children prevents the normal development of the three stages and leads to an overemphasis on enclosure or extension or on both in a manner that precludes the development of freedom." (p.18)

"A difficult stage of enclosure can leave a permanent sense of gloom or loss, overwhelming sensations of emptiness, or feelings of perpetual struggle between love and hate, good and bad, the life-affirming and the life-denying." (p.28)

"A difficult stage of extension can leave behind such characteristics as lack of direction, motivation or spontaneity, or intense preoccupation with moral principles, body function or sexual activity, and all variety of opinions and feeling in matters concerning conscience, prejudice and affectation." (p.29)

We could speculate on parallel stages for children, first needing to be enclosed and protected, then needing to extend themselves and develop skills and abilities, and then needing to separate and "find their own feet". If it is suggested that fathers tend to be more distant and involve themselves more in play (Julian, 1999), it may be that they are helping children through later stages, rather than concentrating on enclosure.

Nord and Zill (1996) also question the connection between length and importance of contact:

"Fathers (and mothers) spend less time with their children as the children grow older, in part because children themselves desire to spend more time with their friends and peers. However, in spite of spending less time as children grow older, the importance of fathers to children's development increases as children grow older, especially for sons."

This reasoning could even suggest a switch of parents as children grow. The nature of "production" of parenting is complex, however. The contribution that a parent makes may depend on the relationship that has already developed with the child. For example, Aldous et al. (1998) found that active fathering with young children was related to more involvement later.

The complexity of the part played by parents is illustrated further by Dimitriades, talking specifically about daughters:

"A daughter's need for effective fathering does not diminish because her mother can manage without her father. A child's need for her father remains what ever her mother's situation, choice of lifestyle, or ability to parent her daughter. A daughter who is separated from her father experiences a loss that can deeply affect her perceptions of herself and the roles of men and women, and impressions of how parents relate to each other."

(Dimitriades, 1997, p.13)

And Dally suggests that not only the child grows as a result of parenting:

"Maturation in adult life, as at any other time, depends on the existence of an environment, including positive influences, suitable for the development of innate potentiality. Motherhood provides an environment not only for the child but also for the mother and it provides unique influences through which the mother can develop." (Dally, 1976, p.20)

If we acknowledge these possibilities, then we should also consider that performance of a parenting role by fathers might also be important, not only directly for the children, but also for the fathers and in the way it shapes the wider social development of future generations.

3. OVERSIMPLIFICATION BY THE COURT

The sections above suggest that the Family Court's view of parenting may be unduly narrow and out of step with many current family arrangements. There are further dimensions in terms of the processes and reasoning of the Court and its agents.

3.1. Fall-back Positions and Cooperation

A focus on the primary caregiver can lead to inadequate concern for the contribution of others, including the other parent. This is relevant not only in relation to decisions in court, but also for the overall influence that the Family Court has on outcomes. For example, it may impact on interim arrangements and on decisions whether or not to intervene when problems arise. This flows through to affect the circumstances under which more permanent decisions are made. For example, a parent who has had limited contact with a child for a period of months is unlikely to be awarded custody. It also affects the relative positions of the parties in dispute. This is clearly demonstrated in various publications that indicate the accepted approach of the Family Court. The following quote shows how this thinking permits the custodial parent, through generating conflict, to exercise a power of veto on the other parent's contact with the children⁴:

"But comparisons between children with both parents and children with one parent are not always simple in reality. A parent who is abusive, neglectful or irresponsible does not give a child much benefit and might be better absent. Even contact with a more responsible, caring non-

⁴ See p.37 of (Birks, 1998a) for similar quotes from a Department of Justice report and a publication from the Children's Issues Centre at Otago University. See also 3.4 below.

custodial parent may still not improve the child's emotional wellbeing or development if the parents continue a conflicted and hostile relationship with each other. The research suggests that the benefits a child may derive from continuing contact with both parents are outweighed by negative effects if the parents' fighting puts the child in the middle."
(Pritchard, 1998, p.84)

It is this sort of reasoning in the Family Court that leads people to consider that the Family Court is biased, especially when little attention is paid to the parenting abilities or alienating behaviour of custodial mothers. Julian (1999, p.32), states that, "*Almost half of the men and a third of the women in the sample thought that the Family Court discriminated against men*"⁵.

In economics, a body of literature on what is known as game theory considers behaviour and outcomes when parties can choose from several strategies with associated payoffs.

This may be relevant for an analysis of Family Court interventions in the form of mediation and counseling. Any out-of-court settlement, whether with the assistance of the court or otherwise, is reached in the context of the possible outcome of a decision in court. If one party knows that a strategy of non-cooperation will result in a decision of sole custody to that party, plus financial support and control over the involvement of the other party, then there is little reason to co-operate unless the input of the other party is valued. Similarly a party who knows that little can be expected from a court decision is in a very weak bargaining position and is pressured to make many compromises. In other words it may be that the approach of the court is such that there is a great imbalance between the situations of the parties. If this is the case, then even mediated outcomes are likely to be unbalanced. The court may be setting an inappropriate environment for the satisfactory resolution of disputes. This is important when considering the possible contribution of counsellors or mediators, although often their role is a narrow one within the overall process.⁶

The game theory approach also helps identify the available options to address the problem. If the issue is one of choice of strategy, then a change could occur as a result of a change in i) the preferences of a participant, or ii) the anticipated payoffs. Such changes could require action within the counselling/mediation process or in the broader handling of cases.

⁵ Julian wrote that it was understandable that people thought this, but in on the basis of the primary caregiver argument that this was basically justified: "*It is possible that many current fathers would be able to provide the same standards of care as the mothers of their children. However, since few of them have practically demonstrated their nurturing skills through providing fulltime care for their children, the judge will be bound to make a decision based on evidence rather than speculation.*" (Julian, 1999, p.32) Both parents could have been involved in parenting, with neither providing "full-time" care.

⁶ The connection between court action and the success of counselling has also been identified elsewhere. Gardner (1999) argues that the support of the court is a major factor in the success of therapists' treatment of parental alienation.

See also Birks (1998b, section 2.1) for discussion of problems with the adversarial approach found in the law in New Zealand.

3.2. The Nature of Custody/ Access Issues

At the Social Policy Forum in Wellington in April 1999, Judge Johnston referring to the few custody cases that reached a hearing, doubted that anyone, given the same evidence, would have decided differently. This highlights the central focus in law. It is on the decision reached.⁷ For this focus to be appropriate, two conditions must be met. First, the time taken to reach the decision must not be important and, in particular, events in the meantime must not have any influence on the decision that would be reached. Second, there should be a clear, one-off, manageable issue to be resolved, rather than a complex matter or an ongoing series of small issues, each with their own characteristics. With parenting issues, neither of these conditions is met. On the first point, the outcome of Family Court proceedings is process-dependent. Delays and out-of-court manoeuvring can have a big effect on a child's relationship with a parent, on the routine of his/her life, the activities undertaken, and the experiences shared. The second point leads on from the first. If the issue is too complex, then the Court has neither the expertise nor the resources required, and so will endeavour to simplify.⁸ If many minor events have a big cumulative impact, and if issues can be revisited as circumstances change, the small issues become important and a decision at one time does not preclude reconsideration later.

3.3. Enforcement

In my role as an economist I suggest that there are three conditions required for policymakers to choose to intervene. Firstly the non-intervention outcome must be unsatisfactory; secondly there must be interventions available that can improve on the non-intervention situation; and thirdly the interventions, if used, will be applied appropriately. The first condition may be met with cases that are taken to the Family Court, although it may be in some cases that the presence of the Family Court itself prevents the achievement of otherwise desirable non-intervention outcomes. The second and third conditions are also not entirely clear. In particular, while economists often assume, for example, that regulations in markets will be enforced, in practice regulatory regimes simply put in place mechanisms which may be inefficient or even fail to function at all. The Family Court is not too particular about supporting orders made in court, hence:

"... the conduct of disregarding a Court order [for joint or sole custody] is only to be taken into account in a custody dispute if it affects the welfare of the child." (Butterworths, 7th edn, page 412)

⁷ She also assumes that others see the issue as one of deciding which parent will have sole custody. Much of the opposition to the approach taken by the Family Court is because it commonly results in children having effective parenting from only one parent. It is interesting to note the general prevalence even among social policy researchers on the exclusive, parent focused terminology of "sole parent family", rather than the inclusive, child focused "two home child".

⁸ Perhaps even more worryingly, those working in the Family Court may not even be aware of their lack of expertise.

Similarly there are problems with the enforcement of access orders, as referred to above and described in Birks (1998a, section 6.3).

This suggests that the Court's ability to intervene is limited. As the options available are cumbersome, it is particularly important that situations do not arise which limit future options. An analogy could be drawn with an oil tanker. Oil tankers need a lot of space and time to stop or change direction. If orders are made "in the best interest of children", and if disregard of orders is permitted such that circumstances change, then a lot of damage can be done before the Court is able to address the matter. This is particularly worrying if we consider the role played by lawyers, their lack of training in matters of family relationships and parenting, and their possible motivation. A particularly unflattering description of this was made by the Honourable Justice Robertson at the 1999 Law Conference:

*"The hallmark of most litigation was **stealth and surprise**. You kept both hands in your pocket, every rabbit still in the hat, and you hoped, by avoiding any forewarning, to be able to steal a march and win your client's case. That is not the law as I observe it today... At least from the perspective of the outsider it is a situation where the prime driving force frequently appears to be a fees budget which has to be met to maintain a predetermined standard of living and lifestyle."* (Robertson, 1999)

As an additional consideration, the Court's failure to enforce its own orders not only impacts on the decisions themselves, but also sends a signal to others. Hence, for example, the failure to enforce orders with respect to a custodial parent teaches children that Court Orders can be disregarded. This may not be an appropriate lesson for them to take into later life. It also undermines the parental authority of the non-custodial parent, which can be harmful given the child's needs, according to Amato (1998).

3.4. Decision Criteria and Cost-Benefit Analysis

The essence of cost-benefit analysis is the determination and evaluation of the various costs and benefits of a course of action. Ideally, with no evaluation costs, all the costs and benefits would be considered. At the very least, there is an understanding that there can be several factors to consider on both sides.

Legal reasoning appears to be somewhat different. I refer elsewhere to drawing from a "menu of principles", and selecting information to present "plausible stories" (Birks, 1998a, section 4.2). There I use cases to show how the selective use of principles can result in a single criterion being used to justify an approach, with alternative principles giving opposite results. The implications of this approach are discussed further in section 2.8 of Birks (1998b). The approach is taken at a broader level in the Family Court's position on shared custody. The accepted view is that shared custody does not work because the children are being moved from one home to the other too much. This is one cost of shared custody, and to form a view based on this criterion alone is to value all other costs and benefits at zero.

It is notable that, without detailed supporting research being given, the view that children need for one home base is accepted ((Mahony P, *60 Minutes*, 5 January 1997), but, in relation to parental alienation, "... the basis and research is not accurate enough to make such general statements" (Green, 1995, p.140).

We see also in *Johns v CIR* dismissal of an appeal of a decision against "substantial equal sharing" of the care of children. A decision in favour of the appellant would have resulted in a determination of shared custody with a subsequent reduction in the appellant's child support obligation. While not disputing the contribution made by the appellant, it is argued that:

"...valuable though the father's parental role no doubt is, there are signs that the bitterness which accompanied the marriage break-up has still not dissipated. Until it does, and the attitude to care of the children becomes truly shared, I doubt that the father's parental contribution will be seen to satisfy the statutory trust."

In other words, even if a parent provides much of the ongoing care of the child, this would not count as shared custody if there is bitterness between the parents. An additional overriding criterion has been applied. Ironically, it was the father's grudging payment of additional money to the mother over and above the child support that formed much of the evidence of bitterness, although the child support paid was the same amount that would have been required had the father provided no care for the children.

Despite the scales of justice suggesting that issues are considered through a weighing up of the relevant factors, there are clearly cases where this does not occur. It may be that this is particularly apparent with underlying assumptions and beliefs of those in the Family Court, but, if so, that is even more dangerous because these may not be readily identified and cannot be easily challenged in Court or elsewhere.

4. CONCLUSION

Section 1 of Birks and Buurman (1999) addresses the way perspectives are selective in their choice of information, and how the attitudes of groups and society as a whole can be shaped in ways that are surprising, given the benefit of hindsight. This paper is intended to show that the Family Court has taken a narrow and conservative perspective on the issue of parenting and the raising of children in a society. While this may be readily explained by the nature of the law, it does suggest that a wider consideration of the issues and structures is appropriate. Some of the approaches taken in economics could be helpful in identifying the weaknesses of the current approach and in determining more constructive interventions.

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