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Committee Secretary
Standing Committee on Family and Community Affairs
House of Representatives
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Submission Re: Inquiry into child custody arrangements in the event of family separation, and the Operation of the Child Support Formula.

Dear Sir/Madam,

I seek to make a submission to this inquiry, based on my recent personal experiences.

In this submission, I will demonstrate that the rebuttal presumption of shared care satisfies the current intention of the Family Law Act 1975 to the maximum extent.

I will also demonstrate how the current Child Support formula can result in determinations whereby the non-resident parent may pay up to 250% the cost of raising a child, even if the child is in their care for 29% of the time, in clear violation of the intentions of the Child Support (Assessment) Act 1989 and Family Law Act 1975.

I have suggested an alternative formula that guarantees an equitable split of the cost of raising a child, in accordance with the current intentions of the Child Support (Assessment) Act 1989.

5/8/2003.

Paul Johnston

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1. Background

I am 31 years old. I consider myself well educated, having attained an honours degree and a Masters degree in Engineering, and a post graduate diploma in Computer Science. Since leaving school 13 years ago, I have been in continuous and relatively well paid employment. I am currently a software engineer with a small Canberra based company.

I have been separated from my wife of five years for eight months now. At the time of separation, we had a six month old son, who is our only child.

We lived in Canberra prior to separation, whereupon my wife relocated to the Sydney region.

2. Children and the Family Law Act of 1975

The Family Law Act of 1975 specifies the rights of the child and obligations of the parents of that child.

In particular, Section 60B is the primary section that underpins most of the remainder of the Act dealing with children's issues.

60B Object of Part and principles underlying it

(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children.

There is no doubt that the presumption of shared care in the event of separation, is entirely consistent with the principles of 60B(2).

2.1 Shared care in relation to section 60B(2)(a) of the Family Law Act 1975.

children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together.

By definition, shared care satisfies this principle to the maximum extent.

It has been recently argued by some in the community that a father who works while his wife is the homemaker is not in fact caring for the child, and somehow that lack of care should be interpolated into the care arrangements following union dissolution.

This argument is flawed for the following reasons:

- It is in the child's best interest to be breastfed, so it is most appropriate for the mother to stay at home.
- It is in the family's best interest to maximise income. It is a reality that in most cases, the father has the greater earning capacity than the mother.
- The high cost and unavailability of child care facilities mean that both parents working is not always a suitable alternative.
- The high cost of living, coupled with reduced social security benefits, mean that both parents not working is not a suitable solution.

For these reasons, the father is almost compelled to work. This is not necessarily through choice. By working, it should be recognised that the father is missing out on much of the joy of a young child's life. That is, the father is paying a personal cost to support his wife and children.

I could be considered fortunate that since separation I have cared for my one-year old son for up to 3 nights in a row, and to experience all facets of his day-to-day life is something I am really appreciate and am proud of.

The time that a father forsakes with his children so that he may provide as best he can for the family he is supporting is grossly undervalued by society at large.

Indeed, fathers find separation a particularly galling experience for the following reasons:

- The time a father spends with his children is reduced to being negligible, because of the roles he and his wife assumed during the marriage, as the courts, and legal profession in general, assume the mother will retain residency, and persuade the father that the idea of "fortnightly fathers" is a fair compromise,
- The father retains as little as 20% of the matrimonial property, because he has a demonstrated earning capacity that the courts expect to be met indefinitely,
- The father is compelled to work to continue support his child and his wife to within his demonstrated earning capacity.

I argue that by working, at the expense of time with children, particularly young children, the father is indeed caring for the child, and indeed for the mother of the child, in the most practical way, but at great personal and emotional cost.

Indeed, just as the mother forsakes career opportunities to become a homemaker, and that is recognised by society, and most particular the courts, the father has forsaken much in working, however this has yet to be recognised.

Post-separation, the sacrifices the mother has made in being the homemaker are considered and recognised by the courts, and an adjustment of the matrimonial property pool is made accordingly.

The sacrifices of the father has made in working at the expense of time with his family are not ignored by courts, but rather used against him to ensure that those sacrifices continue into the longer term.

The presumption of shared care will in address this inequity in the same way that a presumption of shared property is an attempt to address the inequity in the financial resources of the mother and father.

2.2 Shared care in relation to section 60B(2)(b) of the Family Law Act 1975.

children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development

By definition, shared care satisfies this principle to the maximum extent.

Indeed, the current state of the law is such that residence is granted to one parent, who then retains overwhelming control and responsibility of raising the child. A recent study [1] showed that more than one-third of children of

separated parents in Australia do not see their fathers, ever. A further 17% of children only have day-contact with their fathers.

If the mother re-partners, the statistics are even more alarming, with only 51% of re-partnered mothers reporting that the child had any contact with their father.

Clearly, the current system is not producing a result consistent with the principles of Section 60B(2)(b) of the Family Law Act 1975.

The same study indicated that 41% of mothers and 74% of fathers would like the child to see more of the father.

Indeed, the authors suggest that one of the reasons why contact fails over the longer term is that the emotional bond between the child and the father is not established in the absence of frequent overnight stays.

By establishing shared care as the default position, both parents are then able to establish the meaningful emotional bonds with the child that will last the lifetime of the child, and work to reduce the incidence of fatherless children.

2.3 Shared care in relation to section 60B(2)(c) and (d) of the Family Law Act 1975.

parents share duties and responsibilities concerning the care, welfare and development of their children; and

parents should agree about the future parenting of their children

By definition, shared care satisfies these principles to the maximum extent.

Because both parents will be bound by the one common set of life choices for their child, they will have no choice but to agree, or to have an agreement imposed upon them by a higher authority such as a court.

2.4 Shared Care Rebuttal

In no way am I suggesting that shared care should be the forced position where it is impractical, or clearly not in the child's best interest because of violence, on either of the parents parts, however I am saying that shared care is a reasonable starting position for each parent and their expectations as to the future relationship with their children.

A recent media release by the Law Society of NSW states[2]:

"Rather than consider each family's special circumstances and needs, the current proposal for a presumption of 50/50 residence will set up parental expectations. An outcome that doesn't result in this split may leave the parent who has 'lost out', feeling disappointed and angry, and the presumption may encourage more litigation"

I would argue that parents would be quite right to expect a meaningful relationship with their child, and the current system, as I have already demonstrated, is clearly not working to foster any sort of relationship between the child and both their parents in many cases.

Further, if you are one of the 33% of non-resident father who never see their child, surely you would feel as though "you had lost out". The obligation imposed on the father to support those missing children while at the same time trying to

rebuild his own financial and emotional resources, I imagine, would further build on this feeling.

Research[3] has found that 41% of fathers want to change the living arrangements of their child 5 years after separation. Currently, any changes to the living arrangements of a child involves repeated iterations through the Family Law industry, with each iteration through the industry involving an astonishing cost to both parents.

It is difficult to imagine a group of people with a greater vested interest in the perpetuation of the current system than the Law Society.

The reasons for modifying the amount of time a child spends with one parent compared to another are numerous, but it is important to note that once the reason why shared care was not practical ceases to exist, then the care arrangements for that child should again be based on the presumption of shared care.

Below are some examples of how might work.

Example 1: the parents are located too far away for shared care to be practical. If at a later stage one parent was to move so that shared care was a practical alternative, there should not a complicated and costly court procedure to justify the new arrangements.

With regard to relocation, if a parent chooses to relocate, then the parent that did not relocate should be the resident parent of the child, unless the circumstances were such that this was clearly not the child's best interest.

This would not limit the freedom of either parent, but would encourage them to weigh the consequences of their actions in terms of their parental responsibilities. Bringing a child into this world also brings responsibilities to that child, and to the other parent, that override personal wishes from time to time.

Example 2: one parent is unable to have overnight care because she works shift work. After a while, she starts working straight day shifts, so is able to care for the child. She should be able to do this without a complicated and costly court procedure to justify the new arrangements.

Example 3: the child is a breastfeeding infant, so it would be impractical for the father to have sole care for an extended period of time. However, one day the child will cease to be breastfed, and the father should be able to care for the child for extended periods of time. He should be able to do this without a complicated and costly court procedure to justify the new arrangements.

2.5 Shared Care and Cost of Care

Clearly, in the situation where care was equitably shared between the two parents, then each parent would presumably pay half the living expenses of the child.

However the costs of the child whilst in the parents care needs to be adjusted by the relative financial position of the parents to determine if the cost apportioned to each parent is indeed equitable.

For example, consider the case where the father earns twice as much as the mother. In this situation, an equitable split of the costs of raising that child would be 1:2. Using the Budget Standards Unit cost of raising a child, it is estimated that the cost of a child is $66 per week, or $132 per fortnight.

The father pays two-thirds of this amount, or $88, while the mother pays the remaining $44. The father than pays to the mother the difference between $66 and $44 a fortnight, or $22.

Both parents should be eligible for any government benefits in accordance with the rate of which care is distributed between the two parents.

It has been recognised that there is a positive relationship between the amount of contact a parent has with their child and their willingness to pay child support to the other parent [1].

3. The Operation of the Child Support Formula

3.1 Child Support (Assessment) Act 1989

The intentions of the Child Support Assessment Act, 1989, are clearly defined in Sections 3 and 4 of the Act.

3 Duty of parents to maintain their children

(1) The parents of a child have the primary duty to maintain the child.

(2) Without limiting subsection (1), the duty of a parent to maintain a child:

(a) is not of lower priority than the duty of the parent to maintain any other child or another person; and

(b) has priority over all commitments of the parent other than commitments necessary to enable the parent to support:

(i) himself or herself; and

(ii) any other child or another person that the parent has a duty to maintain; and

(c) is not affected by:

(i) the duty of any other person to maintain the child; or

(ii) *any entitlement of the child or another person to an income tested pension, allowance or benefit.*

4 Objects of Act

(1) The principal object of this Act is to ensure that children receive a proper level of financial support from their parents.

(2) Particular objects of this Act include ensuring:

(a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support; and

(b) that the level of financial support to be provided by parents for their children should be determined in accordance with the legislatively fixed standards; and

(c) that persons who provide ongoing daily care for children should be able to have the level of financial support to be provided for the children readily determined without the need to resort to court proceedings; and

(d) that children share in changes in the standard of living of both their parents, whether or not they are living with both or either of them.

(3) It is the intention of the Parliament that this Act should be construed, to the greatest extent consistent with the attainment of its objects:

(a) to permit parents to make private arrangements for the financial support of their children; and

(b) to limit interferences with the privacy of persons.

In particular, Section 3 of the Act establishes that each parent has a responsibility to maintain the child, but not at the cost of either maintaining themselves or other people for whom they have duty.

Section 4(2)(a) of the Child Support (Assessment) Act 1989 states:

"that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support"

This is a crucial section of the Act, as it directs the parents to share the cost of raising a child equitably, in accordance with their respective financial capacities.

I will establish, from my own circumstances, that the operation of the Child Support Formula results in an outcome that is in violation of the above Section of the Act.

3.2 The Result of the Formula

My income is approximately $72,000 per annum. Application of the Child Support Formula yields a weekly child support bill of $206 a week.

3.3 The Cost of Children

The results of some research into the cost of children is presented below.

Source	**Cost (pw)**
Lee[4]	$225
Percival and Harding[5]	$167
Budget Standards (BSU) Approach[6]	$136

Table 1. *Costs of Children, various sources.*

To date, the Family Court has preferred the Lee method for establishing the cost of children[4]. There have however been some recent decisions where the more comprehensive BSU approach has been used in applications for departure from the Child Support formula, and the figures produced using this approach have been accepted by the court [7].

Of interest is a recent decision in the High Court of Australia that accepted the anticipated cost in raising an unexpected child of $105,000[8] was a reasonable estimate. That cost, spread over 18 years, equates to $115 a week.

At most, I should only ever have to pay 100% the cost of raising a child, and that should occur only my wife is not earning anything, and has no capacity to earn anything. If I pay more than 100% the cost of raising a child, then I am in fact paying spousal maintenance. However, spousal maintenance is covered under the Family Law Act, and should not be collected using the authority of the Child Support Act.

The proportion of the child raising costs borne by me is shown as a function of my wife's income in Figure 1. The figure also shows the proportion of costs that *should* be borne by me, if there was true equality in the levels of support having regard to each parent's income.

Regardless of the method used to determine the cost of raising a child, it is clear that at I pay more than I should, having regard to each parents income. This disparity is most apparent just below the resident parents disregarded income

amount, $36213. At this income, even using the Lee estimate for the cost of a child, I am paying 92% of the total cost of care, however if the level of support was weighted according to each parent's income, I should only be paying about 70%

The disparity is most clear when both parents earn $72000. At this point, I am still paying 64% the total cost of raising the child, according to the Lee tables. This cannot be seen as anything other than inequitable.

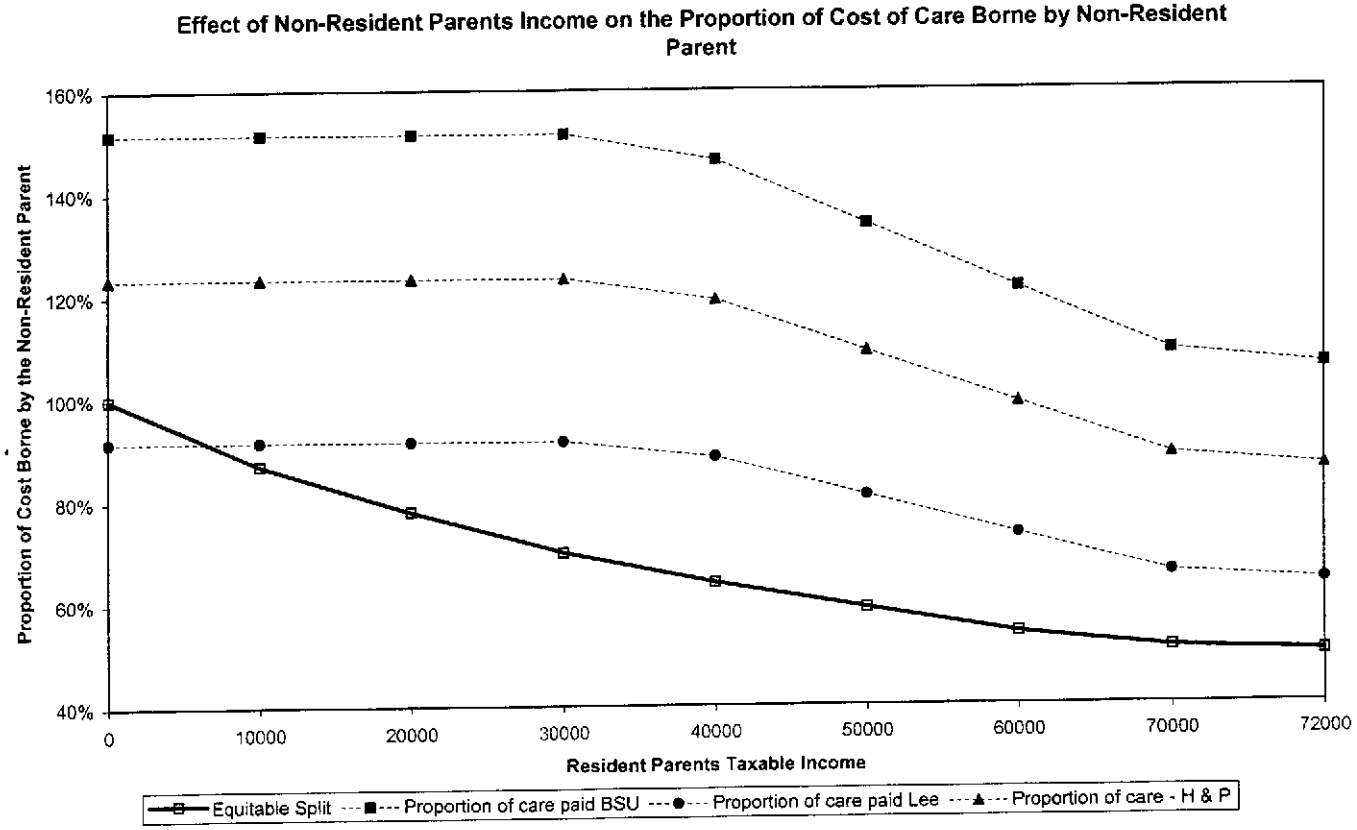

Figure 1. *Effect of resident parent's income on the proportion of costs borne by the non-resident parent earning $72000 per annum.*

The disparity is even greater when after tax income is considered, due to the impact of marginal tax rates. I cannot conceive how it is reasonable to determine the child support amount on taxable income, when much of that sum is surrendered in tax.

The British Child Support System has recently been changed so that the child support amount is calculated based on the after-tax income of the non-resident parent.

The Child Support formula does not take into account the time that my child is in my care. In fact, I may care for my child for 108 nights, or 29.5% of the entire year, but receive no relief or recognition for this contribution under the existing formula. This cliff effect ahs been noted by the Chief Justice of the Family Court[9].

Further, the formula does not take into account the effect of Family Tax Benefit, which is non-means tested for single parent families. Using the Lee tables, the cost a child is about $250 per fortnight. The value of the Family Tax Benefit is about $140 per fortnight. The nett cost to the resident parent of raising the child is $110 per fortnight. If the non-resident parent then gives $412 a fortnight to the resident parent, the child is now a source of tax-free income to the resident parent of $302 per fortnight.

Figure 2 shows the effect that the income of the non-resident parent has on the proportion of costs borne by them in raising a child. In this figure, it is assumed that the resident parent is earning $36000.

From this Figure, it can be seen that if the non-resident parent is earning below $30000 pa, then the cost of raising a child is unfairly distributed in respect of the resident parent.

However once the income of the non-resident exceeds $50000 pa the cost of raising the child is unfairly distributed in respect of the non-resident parent.

It is also clear from this Figure that once the non-residents income exceeds $80000 pa, they are paying 100% the cost of raising the child, and this inequity increases with increasing income.

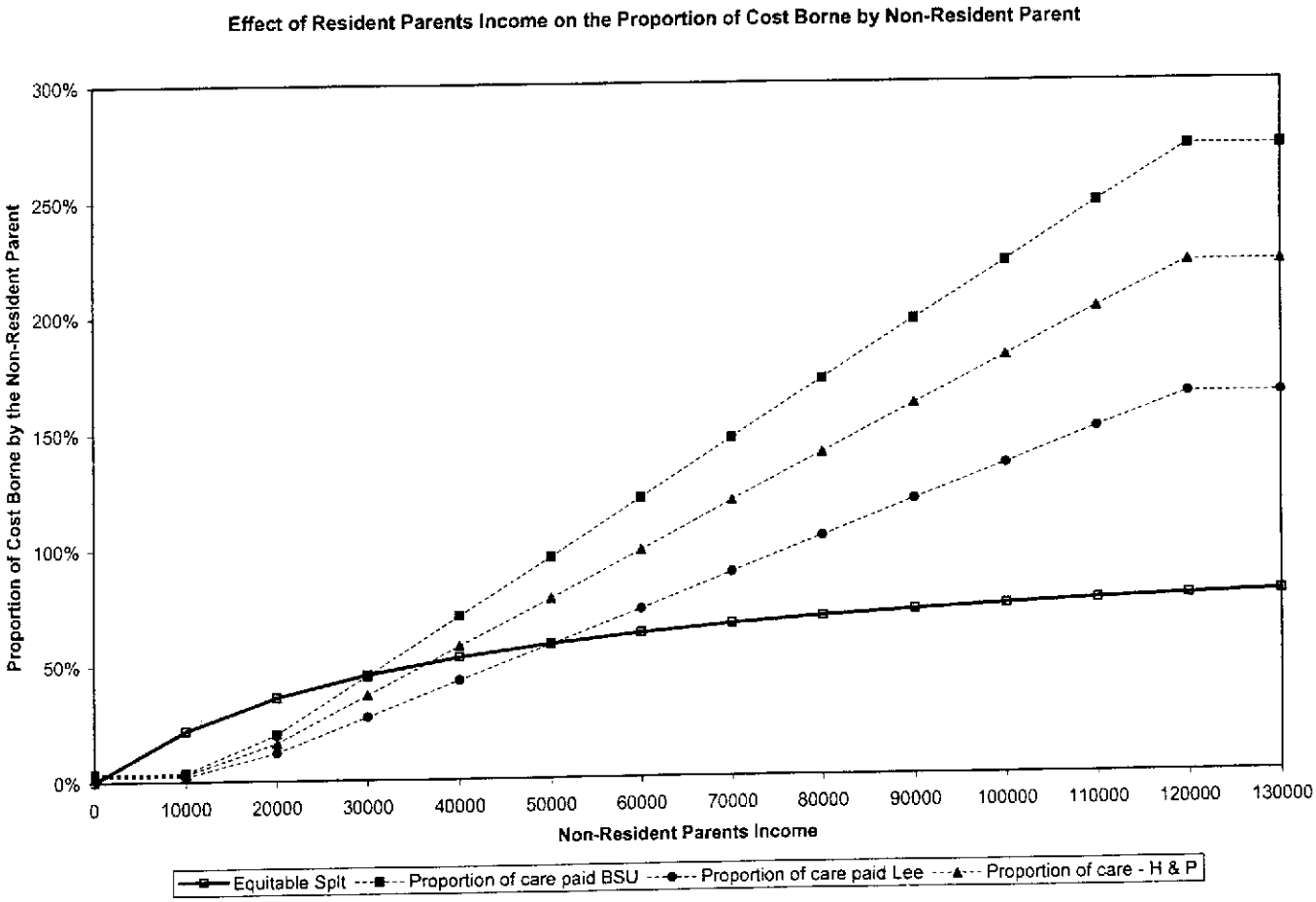

Figure 2. *Effect of non-resident parent's income on the proportion of costs borne by the non-resident parent. The resident parent is assumed to be earning $36000 per annum.*

The combined effect of the tax system and the child support formula can result in marginal tax rates for higher income earners of between 68% - 86%. This acts as a major disincentive for people in this position to increase the earning capacity through accepting additional responsibilities, training or working additional hours.

In fact, if I receive a 10% pay increase, or $7200 pay increase, I would, after taxes and Child Support, have an additional $2304 in my pocket, which represents an effective pay increase of 3.2%, which is less than inflation in many years. Of course a 10% pay increase is unrealistic year-in year-out, so in many years my real standard of living is actually dropping.

The resident parent receiving child support from a high earning non-resident parent also has a disincentive to increase their earning capacity. Child support paid to the resident is tax-free, and is far more attractive than the equivalent money earned in taxed employment.

3.5 The Child Support Scheme – A Fairer Formula

The current Child Support Formula is as follows:

$$CSP = \left(A - 12315 - \frac{(B - 36213)}{2} \right) \times R$$

Where:

CSP: *Is the Child Support Payable and,*

A: *Is the child support income of the payer, which is their gross income less any allowances for dependants.*

B: *Is the child support income of the payer, which is their gross income less any allowances for dependants.*

R: *Is the applicable rate, which varies from 18% for one child to 36% for five of more children.*

My previous discussion, and examination of the formula yields the following pertinent failings of this formula:

1. The true, actual cost of child is not referenced, thus it is possible for the amount paid to exceed the cost of child.
2. The excluded income for the non-resident and resident parent, of $12315 and $36213 respectively, are significantly different, resulting in a massive inequality in the contribution of the parents to the cost of raising a child.
3. The rate of contribution of the resident parents income to the income pool is half that of the non-resident parent, which results in a massive inequality in the contribution of the parents to the cost of raising a child.
4. The formula does not take into account the proportion of time the child is in the care of the non-resident parent.
5. The formula is based on taxable income, which includes a large proportion of money that is not actually available to be spent on the child.

6. It does not take into account non-means tested government benefits, which are directed to the resident parent for the benefit of the child.

The following Child Support Formula will result in a more equitable determination.

$$CSP = \frac{A}{A+B} \times C \times (1 - D)$$

Where:

CSP: *Is the Child Support Payable and,*

A: *Is the child support income of the payer, which is their income net of tax less any allowances for dependants.*

B: *Is the child support income of the payee, which is their income net of tax less any allowances for dependants.*

C: *Is the cost of a child, which may be calculated from published research and adjusted for inflation on a yearly basis. It may be that this value is dependant upon the sum of A and B, to reflect the increasing cost of care as it relates to increased family income.*

D: *Is the proportion of time the child is in the care of the non-resident parent. This proportion should be based starting from zero.*

Neither parent should have their income considered for the purposes of Child Support if that income, net of tax and the cost of dependants, falls below a reasonable amount. This amount should be the same for both the resident and non-resident parent.

Using this formula, it is not possible for the paying parent to pay more than 100% the cost of raising a child to the resident parent. This formula will also result in an equitable determination based on the amount of contact between the child and parent, and can be used for either parent, regardless of their residency status. The total cost of child is covered according to the above formula in the expression below:

$$\left(\frac{A}{A+B} \times C \times (1 - D)\right) + \left(\frac{B}{A+B} \times C \times (1 - (1 - D))\right) = C$$

Where the variables are defined above.

4. References

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6. Saunders, P **Using Budget Standards to Assess the Wellbeing of Families**, AIFS Conference November 1998.

7. **W & W & M** FMCAfam [2002] 466

8. **Cattanach v Melchior** [2003] HCA 38

9. **Gysleman** (1991) 15 Fam LR