

## News from the Family Court

As *Family Matters* readers will be well aware, the Institute has for many years provided information on the cost of children, based on separate calculations provided originally by Lovering, using a basket of goods approach, and Lee, using an expenditure patterns approach.

The scales, updated regularly by the Institute and published in each edition of *Family Matters* (for current update see elsewhere in this issue), have proved useful to parents and to family law practitioners in assessing child support liabilities. Their importance was strengthened in 1987 by the inclusion of a provision [section 66D(2)] in the Family Law Act which allowed the Court to have regard, where appropriate in the circumstances of the case, to any relevant findings of published research in relation to the maintenance of children.

As the Lovering and Lee approaches are different, include different items, and yield different amounts, questions are frequently raised about their methodologies and respective merits. Peter McDonald addressed some of these concerns in an article published in *Family Matters* in 1990.

# Cost of Children

The role of the Child Support Agency in assessing child support liabilities is well known, and courts have virtually no role to play in this area where parents separated after October 1989 and the custodian is in receipt of social security benefits. Undoubtedly for those outside the ambit of the Agency, most negotiations about child support still occur privately between parents or in discussions with lawyers; despite section 66D(2) the Family Court is rarely called upon to consider issues such as the costs of children. However, in two recent decisions involving parents who separated prior to October 1989 judicial attention has been drawn to the scales.

In *Coon and Cox* (1994) FLC 92-464, the parties had cohabited for six years and had separated in 1985. There was one child of the relationship who was aged nearly 12 years at the time of the hearing and for whom the father was paying \$46 per week. Both parents were in receipt of above average income. The mother earned \$45,000 per annum gross

*In this new, occasional column,*

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*keeps us up to date on recent decisions of the Family Court of Australia, and the implications these have for families.*

and the father \$51,000 gross, but the father's business expenses reduced his available net income to approximately \$25,000.

In finding that the amount paid by the father was too low, the Court made refer-

ence to the Lee scale under which the total cost of maintaining the child was \$215 per week. As the mother's available income exceeded that of the father it was accepted by her barrister that she would assume responsibility for approximately two-thirds of those total costs. The order made was that the father pay \$70 per week.

In the course of his judgement the Chief Justice noted the important and acknowledged omissions in the Lovering scale, including housing, medical and dental expenses, transport and school uniforms – expenses which families of all income ranges have to bear and which therefore cannot be ignored. He concluded that if the Lovering scale were to be relied on, these omissions would need to be taken into account and allowed for in calculations as to quantum. Justice Nicholson referred (at page 80,820) to the Lee approach as being more comprehensive, being one which 'realistically takes

into account the many and varied and often hidden and neglected costs of maintaining children by custodial parents.'

In October 1994, in the matter of *Streets and Streets*, the Full Court (Nicholson CJ, Ellis and Fogarty JJ) heard an appeal by a wife against orders which had seen the amount of child maintenance payable by her husband for their two children increased from \$5 per week for each to \$10 per week. The mother had sought increases of \$30 per week for each child. The parties had separated in 1984. The trial judge had determined that he was unable to assess the wife's income properly and therefore had varied the amounts payable in accordance with the proposals put forward by the husband.

Among several issues which formed the basis of the appeal was the appropriateness of the judge applying the Lovering scale of costs, on the basis that it was a proper guide where low income families were concerned. In so doing the trial judge had sought to distinguish the decision in *Coon and Cox* on the basis that the Lovering scale was preferable to the Lee scale where the income is less than the \$611 gross, referred to in the latter calculation.

The Full Court agreed with the approach in *Coon and Cox* and found that, regardless of the income levels involved, the Lee scale generally provides a more realistic approach to the actual cost of children. In so doing, the Full Court warned against 'slavish application of the scale', and stressed that in certain circumstances appropriate adjustments may need to be made to it.

In *Streets and Streets*, the Full Court also referred to the circumstances in which the Stage Two child support formula may be used as an indicator of the amount payable. In *Beck and Sliwka* (1992) FLC 92-296, the majority of the Full Court had held that the amount payable under the formula could reasonably be considered where the capacity of the non-custodian to contribute to the support of his or her children was relevant. In *Streets'* case, capacity was again the issue and reliance on the formula (and therefore on the husband's 1992-93 taxable income) would have resulted in him paying \$46 per week for each child. The Full Court commented that reference to the formula would have indicated to the trial judge that he should question the figure he had reached.

In allowing the appeal, the amount payable was ordered to be varied to that sought by the wife: \$35 per week for each child. N

Significant amendments to the Family Law Act relating to children and dispute resolution are, at the time of writing, due to be debated before Parliament rises for the Christmas break. Other amendments dealing with property issues will be debated in the first autumn session next year. It is hoped that both stages of the reforms will come into operation simultaneously in mid-1995.

The major impetus for the reforms came from the Joint Select Committee which was

recently, mediation; only about 5 per cent of couples ultimately have their matters resolved by a judge.

The most obvious changes introduced by the reform Bill include the removal of the terms 'custody' and 'access' and the replacement of the terminology and concept of parental *guardianship* with that of parental *responsibility*. Parents seeking Court orders will be required to apply for residence, contact or special purpose orders, which all come within the umbrella term of parenting

# Legislative Reforms for Children

established in March 1991 and reported in late 1992. The Government responded to the Committee's recommendations in late 1993. Although the final details of the property proposals are still unknown, the reforms to the area concerned with children follow very closely the recommendations of the Family Law Council following its 'Patterns of Parenting After Separation' discussion paper, and its March 1994 letter of advice to the Attorney General. The emphasis in the children's area on non-proprietary language and parental responsibility rather than rights is also consistent with the philosophy of the UK Children Act 1989.

Only the major amendments can be described here, and their possible impacts and the interpretation of some of the more contentious provisions obviously must await the passage of time. Predictions of the impacts vary with the perceived significance of the changes being introduced – they are variously described as being merely superficial and cosmetic, on the one hand, and on the other hand, as being the most significant changes since the passage of the Family Law Act in 1975. The major 'consumer' players – the Court, the profession and the Family Law Council – have had a number of concerns about various provisions and the process of reform can possibly be best described as an evolutionary one.

The changes strengthen the approach of resolving disputes by means other than litigation. Conciliation and mediation, which have until now been described as alternative dispute resolution procedures, are now referred to as primary procedures, thus emphasising their importance, and the consequent minimisation of litigation as a method of resolving family law disputes. In so doing it must be remembered that the Family Law Act has always stressed the importance of conciliation and, more

orders. However, these are not restricted to parents but may, in addition, be sought by the child or any person concerned with his or her care, welfare or development.

Despite predictions that the changes will in reality be minimal, the present custody order and the proposed residence order are intended to have different scope and effect.

Custody orders give custodial parents daily care and control of their children, whereas the proposed residence orders will only deal with the person(s) with whom the children will live. Anything which confers a duty, power, responsibility or authority in relation to a child will require a special purpose order (the cynics say that such an order will become an automatic component of proceedings).

The elimination of proprietary terms is reinforced by the change in emphasis from parental *rights* to parental *responsibility* – rather unhelpfully defined as 'all the duties, powers, responsibility and authority which by law parents have in relation to their children.'

Parents are encouraged to make consensual arrangements for their children after separation by the use of parenting plans. These plans can be registered with the Court, at which time they will be enforceable as an order unless the arrangements are found to be contrary to the best interests of the child and/or they seek to transfer important aspects of parental responsibility to someone other than a parent.

When making orders relating to children, the Family Law Act currently provides that the Court must regard the welfare of children as the paramount consideration. The amendments substitute 'best interests' for 'welfare', in accordance with the wording of the United Nations Convention on the Rights of the Child. The explanatory memorandum makes it clear that this is purely a terminology change and is not intended in any way to signal a lower test. Children's interests are matters relating to their care, welfare or development as mentioned above.

The Family Law Act requires the Court to consider a number of relevant matters when determining what is in the child's best interests. Many of these are reiterated in the amending Bill, but there are several additions and changes to the checklist. In particular, aspects of violence are referred to in the inclusion of provisions such as 'the need to protect the child from physical or psychological harm caused, or that may be caused by being subjected or exposed to, or being present while a third person is subjected or exposed to, abuse, ill treatment, violence or other behaviour', and specific references to any family violence or family violence order involving or applying to the child or a member of the child's family.

The Bill also deals with the location and recovery of children and attempts to resolve problems which arise when a Family Court order permits a parent to have contact with a child but an order is sought in a magistrates court which prohibits contact. In such situations the magistrates courts are given power to vary access orders of the Family Court where there is family violence.

The passage of the reforms, and particularly the final provisions of the property Bill, will be explained in a further issue of *Family Matters*.

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