

In its report *Access: Some Options for Reform* (FLC 1987), the Family Law Council gave some support to the view that the custody/access system created a mentality in which parents were encouraged to think of themselves as winners or losers in the custody battle. This led to the Council's study of cooperative approaches to parenting which resulted in the report *Patterns of Parenting After Separation* (FLC 1992). The proposals in this report were further developed in the Council's report *The Operation of the UK Children Act 1989* (FLC 1994). The Council's proposals were largely implemented in the Family Law Reform Act 1995.

Parenting plans were an important aspect of the Council's ultimate proposals. However, the Council's original intention, as set out in the *'Patterns of Parenting After Separation'* report (pp.38–44), was that parenting plans would be flexible arrangements which would vary widely in scope, detail and content. Such plans were considered to be workable where there was an appropriate degree of cooperation between the parents involved. The Council considered that they could be drawn up by the parents themselves, thus resulting in a mutual commitment to the arrangements they contain.

Parenting plans were seen as offering an alternative to the processes of the Family Court. It was not the intention of the Council that parenting plans become formal agreements, capable of registration in the Family Court.

### **Role of the family**

On a number of occasions the Family Law Council has stressed the primacy of the

# Parenting

## SHOULD THEY BE SET IN

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*BILL HUGHES presents the Family Law Council's argument that parenting plans were particularly aimed at helping such couples in making their own flexible arrangements and offering them an alternative to court action. They were not envisaged as formal agreements capable of registration in the Family Court.*

### **Bill Hughes reports**

role of the family in relation to the care of children. The Council has also pointed out that the preamble to the UN Convention on the Rights of the Child emphasises the importance of the family as the 'fundamental group of society' and states that the family should be 'afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community' (FLC 1996, p.2).

Section 43(b) of the *Family Law Act 1975* similarly refers to the need to give the widest possible protection and assistance to the family as 'the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children'.

Following separation and the consequent break-up of the family unit there remain many circumstances in which the parents retain a cooperative relationship which enables both to play a continuing role in the care of the children of their marriage. Parenting plans, considered by the Council to be consistent with the primacy of the family's role, were particularly aimed at helping such couples in making their own arrangements and offering them an alternative to court action.

### **Legislative recognition of parenting plans**

Parenting plans were given legislative recognition in the *Family Law Reform Act 1995*, which came into effect from 11 June 1996.

Contrary to the Family Law Council's original proposals, the

Act provides that such plans be capable of registration in the Family Court, after scrutiny by the court. To be registered, a plan must be accompanied by a certificate of independent legal advice or a statement that the plan was developed after consultation with a child and family counsellor (section 63E of the *Family Law Act 1975*).

Parenting plans are defined in section 63C of the Act. One requirement is that they be in writing. Section 63D of the Act provides that parenting plans may not be amended, but must be revoked and replaced with a new plan.

### **The Family Law Council and parenting plans**

The earlier mentioned *Patterns of Parenting After Separation* report (FLC 1992) states: 'Parenting plans form an ideal basis for discussion in a mediation or conciliation

# Plans

## CONCRETE?



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setting by focusing on the details of parenting rather than on legal concepts such as custody and access' (p.30).

The stated intentions of parenting plans in the report (FLC 1992) were to 'give each parent the opportunity to consider the nature of their parenting responsibilities' (p.39) and to 'increase the likelihood of shared parenting' (p.38). It was also suggested that 'parenting plans will be flexible and capable of easy alteration to meet the changing needs of the child' (p.42). Where there is a high degree of cooperation between separating parents it is possible that the most flexible form of parenting plan may not be in writing at all.

The report recognised that not all parents are capable of

(or willing to) cooperate or communicate to the degree necessary to enable them to draw up their own parenting plan. In those cases where cooperation between the separating parents was not possible, the report said that it would be necessary for the court to draw up a parenting order (p.41). This would especially be the case where, for instance, there is fear for the safety of the child or the former spouse. An order in such circumstances, the report said, 'will, in effect, be similar to current orders, where contact between parent and child is kept to a minimum, and may have restrictions placed on it' (p.41). However, the report drew a distinction between this latter group and those who were capable of handling their own affairs.

This was repeated in Council's letter of advice on *The Operation of the UK Children Act 1989* (FLC 1994). In that report (pp.13–14) it was stated that: 'Council considers that the role and potential of parenting plans need to be considered realistically ... separating parents can be viewed as coming within one of the following categories: separating parents who are able to make arrangements for the ongoing care of their

children; separating parents who will need the assistance of mediation, conciliation and other support services in making arrangements for the ongoing care of their children; and separating parents who are unable to cooperate to the extent where they can agree on arrangements for the ongoing care of their children.'

The Council went on to say that the first of these categories may draw up a parenting plan, but may prefer a more flexible and oral arrangement. Some of the second category, in the Council's view, might be assisted by the parenting plan approach. But a parenting plan was considered by the Council to be 'clearly irrelevant in relation to the third category of separating parents' (FLC 1994, p.14). Broadly speaking, parenting plans are aimed at the 95 per cent of persons who do not approach the Family Court to resolve their differences and *not* the 5 per cent who do approach the Family Court for a resolution to their differences of opinion.

### **Original intention of parenting plans**

In the Council's view, a parenting plan will only succeed when both parents are able to get together and discuss their parenting responsibilities rationally in a cooperative atmosphere where the ongoing responsibilities of both parents towards their children is mutually acknowledged. Given such an atmosphere of cooperation, the use of a parenting plan offers an alternative to court orders or agreements. In fact, parenting plans contrast with court orders and agreements in several respects, especially in relation to (a) the process by which the plans are drawn up, (b) flexibility of arrangements,

(c) the costs to the parties and (d) the resolution of disputes about what has been agreed to between the parties.

Parenting plans enable the parties, if they wish, to commit their arrangements to writing so that both parties understand their responsibilities and children can have a reasonable degree of certainty about arrangements affecting them. The aim is not inflexibility or finality, and parenting plans acknowledge the realities of changing needs over time. This is clear, for instance, when one considers the changes that occur in education, personal needs, health needs, living arrangements and financial support between birth and 18 years of age.

Court orders and agreements tend to take a fairly static view of situations; parenting plans are meant to allow for a more realistic, dynamic view.

This relatively static and inflexible feature of court orders and agreements is one reason why the custody/access model was overhauled – the system was not relevant to most parents (some would suggest as many as 95 per cent of divorcing couples) and may even have had the effect of drawing couples away from relatively inexpensive and mutually satisfying arrangements into a costly, adversarial position in which at least one, and often both, parties are far from satisfied.

A major advantage of parenting plans is that they allow the parties to decide how they will resolve their disputes over the detail of arrangements. They can thus avoid the winner/loser or loser/loser results of other options. Arrangements are capable of meaning different things to different people or of requiring ►

elaboration as specific situations arise. Disputes about such matters, particularly those relating to children, are an ongoing feature of the family law system. When such disagreements arise, a dispute resolution mechanism in a parenting plan will enable the parties to get together and try to find a solution that is acceptable to them both.

This contrasts with the dispute resolution options of a court order or agreement under which either the problem remains unresolved and adds to the gathering list of grievances between the parties, or an externally determined and enforceable solution is imposed on the couple. That solution may not be acceptable to either party or may be acceptable to one of them only.

**Treating the parenting plan as a court order**

Given the original intention of parenting plans, the question needs to be asked: Why should parenting plans be registered? Or, to put it another way: If parenting plans were introduced as an alternative to adjudication by the courts, why is it necessary to bring the court into the matter?

Registration enables either party to the plan to treat it as a court order, thereby circumventing the dispute resolution mechanisms of the plan and invoking the enforcement powers of the court. This immediately destroys the opportunity for cooperative parenting. Registration may bring lawyers into the picture. The effect of this may be a hardening of points of view and the emergence of an adversarial approach. It can also introduce costs issues.

**Parenting plans received/registered by the Family Court of Australia July to December 1996\***

Month	Applications	Registrations	% Registered
July 1996	9	7	78
August 1996	23	20	87
September 1996	42	33	79
October 1996	31	25	81
November 1996	46	30	65
December 1996	46	34	74
<b>Total</b>	<b>197</b>	<b>149</b>	<b>76</b>

\*Figures from six Registries were not available for parts of the period and, therefore, the data need to be treated with caution.

There will undoubtedly be cases where the parenting plan approach will fail and when this occurs the parties will need to turn to the courts for resolution of their disputes. This cannot be denied. But the registration of parenting plans will surely push many of the parties, who would otherwise be capable of avoiding the involvement of the court in their affairs, into the court unnecessarily.

On registration, a parenting plan will, in the event of disagreement, be legally enforceable. While enforceability may sound like it provides the parties with some guarantees, in practice it can often have little value, as many who have tried to enforce access orders in the past will attest.

The Australian Law Reform Commission (ALRC 1995) recently stated that: 'The Family Court's dilemma in enforcement cases is that its overriding duty is to give the interests of the children the paramount consideration. The merits of a case may suggest a severe penalty for non-compliance with court orders but concern for the children may suggest a lesser or no sanction. For example,

imprisoning a custodial parent is clearly likely to have serious consequences for the wellbeing of a child.' (p. 88)

Parenting plans were meant to overcome problems of enforcement – problems which are well recognised and which have often resulted in the 'non-custodial parent' losing contact altogether with his or her child. For example, it has been found in one Australian study that in half of the contact (access) cases determined by the Family Court contact ceased totally after a year (Hearst and Smiley 1984).

Preliminary statistics set out in the accompanying Table indicate that about one quarter of parenting plans received by the court are not accepted for registration. Also, on the available figures the number of registrations is not high. There appear to be at least two reasons for this: one relates to the scrutiny process; the other, based on anecdotal evidence, seems to be related to the complex and expensive process for amending a plan once it is made.

**Summary**

The provisions of the Family Law Act relating to registration

of parenting plans is contrary to the original intention of the Council when it first advocated use of parenting plans. If plans are registered with the court the effect is to negate the original intention.

The whole idea of parenting plans being seen as static rather than dynamic, and inflexible rather than flexible, also negates their intended role.

The Council recently wrote to the Attorney-General recommending that consideration be given to the removal of the registration provisions of the Act. The Council also noted that where the parties do not have the trust in one another to opt for a parenting plan, but do want to enter into a formal agreement about the ongoing upbringing of their children, they can use the provisions of section 65D of the Family Law Act to have consent orders made relating to their children. An alternative to parenting plans would seem to be desirable in those circumstances.

**References**

ALRC (1995), *For the Sake of the Kids*, Australian Law Reform Commission, Canberra.

FLC (1996), *Involving and Representing Children in Family Law*, Family Law Council, Canberra.

FLC (1994), *The Operation of the UK Children Act 1989*, Family Law Council, Canberra.

FLC (1992), *Patterns of Parenting After Separation*, Family Law Council, Canberra.

FLC (1987), *Access: Some Options for Reform*, Family Law Council, Canberra.

Hearst, S. & Smiley, G. (1984), 'The access dilemma: a study of access patterns following marriage breakdown', *Conciliation Court Review*, vol.22, no.41, p.49.