From:

07/08/2003 09:19 #002 P.001

House of Representatives Standing Committee on Family and Community Affairs

Submission No: 408

Date Received: 7-8-03

Secretary:

GCLC • GOLDFIELDS COMMUNITY LEGAL CENTRE
23 Maritana Street
PO Box 1560
Kalgoorlie WA 6430

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600, Australia
Fax: (02) 6277 4844, Email: FCA.REPS@aph.gov.au

Dear Committee Members,

The Goldfields Community Legal Centre encloses its submission on whether there should be a presumption that children will spend equal time with each parent. This submission focuses on Term of Reference (a) (i).

It is submitted that the presumption mentioned in Terms of Reference (a) (i) should not be introduced into the Family Law Act.

Yours faithfully,

Katrina Leonard
Articled Clerk
Goldfields Community Legal Centre

Authorised by Celia Williams
Principal Solicitor, Goldfields Community Legal Centre

(a)(i) The proposed presumption of equal time with each parent

The Goldfields Community Legal Centre does not support a presumption that children spend equal time with each parent post-separation, but it does support families being encouraged to adopt a joint residence arrangement wherever it is in the best interests of the children to do so. It also supports a legislative initiative to encourage parents to co-parent and one that will reduce parental conflict.

We believe that in the right circumstances, joint residence can indeed be beneficial to children. Evidence has shown that joint residence will work where the following factors exist[1]:

- Parental commitment to the arrangement, in good faith,
- Parental flexibility, including work hours, and where timing is based around children's activities not parent's schedules,
- Parenting support for example grandparents,
- The ability to agree on the major aspects of child raising, and
- Geographical proximity.

These factors are ones that will usually be in existence when parental conflict is low. Unfortunately this is in a low percentage of separating families. The circumstances in which joint residence will work cannot be enforced upon parents, without focusing first on lowering parental conflict. Once a system is in place to lower conflict between separating parents, then joint residence will be a more accessible option for separating families. Due to the requirements of joint residence, ie commitment and flexibility, it will be more beneficial to children if parents agree to the arrangement, and have some ownership of it, rather than have it enforced upon them. Therefore joint residence should be encouraged by the courts where it is likely to succeed, but not forced upon families.

[1] Smyth, Caruana and Ferro, "Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting." Australian Institute of Family Studies (2003)

Current arrangement

The Family Law Act currently focuses on children's rights and parental responsibility. All parents, by law, have responsibility for the care of their children[2]. The Court may make parenting orders, including residence orders and contact orders, but in most cases parenting orders never affect parental responsibility as defined by section 61B. We believe that this is where there is a misconception, as parents are equating residence orders with the older concept of custody. Many parents who are dissatisfied with their parenting arrangement are usually dissatisfied because they have less of an input into their children's lives. They want to be a major part of bringing up their children, and want joint responsibility for bringing up their children, which, by virtue of section 61C, they already have. Of course, a residence order will mean that the non-resident parent will have to forego some aspects of their child's day to day lives, but those parents are still required by law to determine a child's name, education, religion, medical treatment, diet, and how they are disciplined. It is important to educate parents that they both have parental responsibilities, and that a residence order merely determines whom the child lives with.

The Family Court has an extremely broad power to make parenting orders. It may "make such parenting order(s) as it thinks proper."[3] Indubitably this includes the power to make joint residence orders, taking into consideration whether this is in the best interests of the child.[4] A presumption of equal time with each parent is not necessary considering the existing power of the court that encompasses joint residence arrangements.

Problem with a presumption generally

The proposed presumption that children should spend equal time with each parent post separation will not be in the best interests of most children. It may be healthy for many Australian children to spend equal time with both parents, but a

[2] Subject to a Court order: section 61C of the Family Law Act
[3] Section 65D(1) of the Family Law Act
[4] Section 65E.

presumption that this is so will not necessarily benefit the majority of children whose parents are splitting up.

Similarly to the fact that one child's best interests cannot be determined by reference to other cases or other families, a presumption of what is in the best interests of children, will in many cases not be what is best for the individual child because it does not remain flexible enough to take individual circumstances into account.

This presumption would have no basis in social reality, as shared residence is a rare occurrence in Australia.[5] There has been no major research into shared residence in Australia, but the limited amount of research that has been done shows that only a small percentage of parents opt for shared residence[6]. A presumption where there is no basis in social reality is a dangerous fiction on which legal consequences, and the lives of Australian families, will be based. The presumption would have a foundation in policy and political outcomes, not in an assertion of social norms. It will be a social fiction to presume that it is in the best interests of the majority of children to spend equal time with each parent.

Other presumptions?

There are at the moment no presumptions in place when deciding what is in the best interests of the child. This is despite the fact that judges have advocated for presumptions in the past. For example in the case of *Kades v Kades* (1961) 35 ALJR 351, the Court referred to a presumption that a young girl should reside with her mother. This presumption was based on experience of human relationships of the time, but since the late 70's this presumption has clearly not been a part of Australian law. See *Gronow v Gronow* (1979) 144 CLR 513. In *Raby v Raby* (1976) FLC 90-104, the Family Court of Australia stated that "We are of the opinion that

[5] Smyth, Caruana and Ferro, "Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting." Australian Institute of Family Studies (2003)
[6] Ibid.

the suggested 'preferred' role of the mother is not a principle, a presumption, a preference, or even a norm. It is a factor to be taken into consideration where relevant." It has been referred to as the "mother factor".
There are also no presumptions that it will be in the best interests of children to not be separated from their siblings, or that a child should continue to live with the person who is currently looking after him or her so as to preserve the status quo, even though these situations may turn out to be in the best interests of many children whose parents have separated. They are seen merely as factors to be taken into account when deciding what is in the best interests of children.

The reason that there are no legal presumptions in deciding what will be in the child's best interests is the same reason that justifies why there should be no presumption of the kind referred to in the terms of reference. What will be the best interests of the child is a matter of discretion for each individual child. There should be no reference to other similar cases or general norms, because one child's circumstances will almost always differ from the norm and hence need to be treated specifically.
Justice Fogarty said in *In the Marriage of Mathieson* [1977] FLC 90-230 at 76, 222 – 76, 223

> "Unfortunately for the courts custody cases cannot be determined by applying preconceived formulae to the myriad facts which inevitably occur in the wide range of custody cases. No doubt such a course is convenient enabling one to pass the responsibility for the decision in an individual case from one's own shoulders to the shoulders of 'the law', but to do so is to ignore the direction which is clearly laid down in the legislation, namely the welfare of the individual child or children who are concerned in that particular case."

Clearly there are strong arguments in favour of a presumption of joint residence; a child's need to have both parents in its life, a parent's desire to play a greater role in its child's life. However, the flexible test of what is in a child's best interest should not be sacrificed for these ends, especially when there is not enough

research to show that shared residence *is* in the best interest of many Australian children.

Children's rights vs. parent's rights

A presumption that children should spend equal time with both parents would be an extremely significant reform to the Family Law Act and would disrupt the entire framework of the Act, which is to promote the interests of children.
As discussed above, a cover-all presumption will not be in the best interests of children where it disallows individual children's needs to be met in a dispute over where the children will live, despite it being a rebuttable presumption. This means that the consequence of the proposed change will be to benefit the rights of parents to have property in their children's time, and not to benefit children. Once it has become generally known that in most cases children will have to spent equal time with both parents, the focus will change from a parent having responsibility to care for their child, to a parental right to have exactly half of its child's time.

The family law movement since 1995 has been to advantage children's rights over parent's rights and in doing so decrease battles over children as if they were 'property'. This is due in part to the United Nations Convention on the Rights of the Child, which Australia is a party to. We feel that a presumption that each parent will have equal time as the other parent will only produce battles over children's time, as if it were a piece of intangible property, and lessen the focus on what is more important for each particular child.

Increasing or decreasing litigation?

Attached to the concept of a parental "right" to have half of their children's time, will be an increase in parents wanting to go to court to assert this perceived right. The consequence may be a tendency to increase parental conflict hence making separation more, and not less traumatic for the child. On the other hand, a presumption that children will share time with both parents may also result in more parents going to court to avoid this situation.

If more are involved in court ordered joint residency because of the presumption, then the justice system will necessarily need to get involved in the process of decreasing parental conflict to increase the success rate of joint residence. It cannot be expected that Australian families would make a smooth transition, even if supporting resources were available.

A huge quantity of family law cases never actually go to court, but settle because people cannot afford to litigate. In these instances parents usually settle after having been advised by a lawyer as to the consequences of going to court. Advice from lawyers with this presumption will inevitably be that there may be a strong chance that the judge will order joint residency. Parents may be forced to settle for joint residency, even where it is not in the best interests of their child, where there is no co-operation, merely because they cannot afford to, and do not want to go to court.

Equality of status?

According to the terms of reference the presumption would apply to children whose parent's have separated. The danger in this is that a distinction would be drawn between children whose parents resided together before separating, and children whose parents had never been in a residential relationship. This system may result in a difference in orders for children based on the relationship of their parents, and an inequality of status. This would defeat the purpose of the various State Acts concerning the status of children. It is submitted that this could be dealt with by changing the wording from "parents who have separated" to "parents who intend to reside separately."

Suggestions

The Goldfields Community Legal Centre can see the benefit of putting the emphasis on agreement between parents and ongoing joint parenting. It would support another legislative initiative that was flexible in its approach, but remained focused on the interests of the child. As the Family Court is at present able to order joint residency where it is in the best interest of the child, it is submitted that it would be more effective to require the Court to consider whether joint residency will be appropriate in each case. Section 65E could readily be amended to stipulate that the Court must consider whether joint residency would be in the best interests of children considering the individual circumstances. This would result in a flexible system with a purpose of encouraging joint parenting, while remaining focused on children's rights.

In the, "Government Response to the Family Law Pathways Report", it is suggested that in separations where parental conflict is high, a father's parenting role will often diminish because he will not have been the primary care giver prior to separation. In many cases a competent and caring father will be at a disadvantage when applying for a residence order, because social traditions have determined that the mother be a child's primary care giver. To enable fathers to have an equal chance of success in applications for residence orders, the Family Law Act should be modified to recognise the contributions of fathers made in their traditional "bread winning" role. Similarly to the law governing division of property following a marriage breakdown, where a home maker's contributions are recognised[7], proceedings involving children should take into account financial and other contributions made by parents for the welfare of the child.

This could be done by including in section 68F(2) a provision that the court must consider, when determining what is in the best interests of the child, financial contributions made by parents in bringing up their children.

These kind of parental responsibilities need to be recognised in the Family Law act as being significant to the wellbeing of children.

[7] Family Law Act section 79(4).