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To: Committee, FCA (REPS)
Subject: PARLIAMENTARY INQUIRY INTO POST SEPARATION PARENTING ARRANGEMENTS

6th August 2003

Committee Secretary
Standing Committee on Family and
Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600

Dear Committee Members,

PARLIAMENTARY INQUIRY INTO POST SEPARATION PARENTING ARRANGEMENTS

We provide the following submission in response to the Terms of Reference on these matters.

This response will not include statistical references instead taking a more discursive approach, however such references are available, if requested. We understand the references are included in other submissions to the Committee.

*Reference (a)
Given that the best interests of the child are the paramount consideration:
(1) What other factors should be taken into account in deciding the respective time each parent should spend with their children post separation and in particular, whether there should be a presumption that children will spend equal time with each parent and if so, in what circumstances such a presumption could be rebutted*.

With respect, the whole premise of this term of reference is misguided, focussing as it does on the amount of time and equal time rather than on the nature and quality of the relationship between children and their parents. In our view, introducing a presumption of equal time, rebuttable or otherwise, is a retrograde step and should not be taken.

In considering parenting and care arrangements post separation, the Family Law Act has as its primary consideration the best interests of the child. The legislation spells out the rights of children - and the responsibilities of parents (see sections 60B). It sets out in detail the factors that the Court must take into account in determining the children's best interests (see sections 65E, 68F(2)).

The Court (in this regard we include the Family Court of Australia and the Federal Magistrates Service) is given a broad discretion to make orders with respect to each family based on an assessment of those factors as they relate to that family. The legislation in its present form is appropriately child focussed, whereas we are concerned that a presumption of equal time shifts the focus of disputes to equal outcomes between parents as opposed to best outcomes for children.

It is our view that the present legislation provides a comprehensive and appropriate framework for resolving parenting disputes that come before the Family Court. Some parties or groups may have concerns as to the interpretation and application of that framework by the Court, but that does not necessarily mean the legislation is flawed or

lacking. It is our view that the Federal government should be cautious in amending the legislation in the absence of clear and compelling reasons to do so.

Why presume equal time ?

It is worth noting that most families sort out their post separation arrangements without recourse to Courts. The great majority of separating couples resolve questions of parenting responsibilities, division of property and so on by negotiation, taking into account their particular knowledge of their particular family.

Statistically, women are more likely to take on the role of primary parent during a relationship. There may be any number of reasons for this - income earning capacity, personal inclination, social convention/expectation, willingness/capacity to work part time etc. The "whys" are to some extent irrelevant. No-one is suggesting it is appropriate to introduce legislation to alter this situation; to impose an equal division of parenting time pre-separation.

Whatever the reasons why, where one parent takes on that primary parenting role - usually the mother - there are consequences that follow for children in terms of their primary emotional attachments and developmental needs.

Most families acknowledge this, implicitly or explicitly, and choose to maintain the primary parent role post separation, without need for court intervention. Significantly, only 5% of separating families choose to establish a shared residence arrangement post separation.

The introduction of a legal presumption of equal time has far reaching implications. It assumes that all families are alike and should have the same care and parenting arrangements. The reality is that all families are not alike; all children are not alike; all parents are not alike. Introducing such a presumption runs a grave risk of undermining the legislative focus of the best interests of the children and of reducing the s68F(2) factors to a list of arguments why not to order "equal time" rather than a positive focus on the best interests of the children.

Given the limited number of families that choose an equal joint residence arrangement post separation, it is not surprising there is limited research in Australia about how well such arrangements work for children. The evidence that is available suggests that joint residence will only be in the best interests of children where there is a high degree of co-operation and communication between the parents and where they are genuinely able to put the children's interests first.

A presumption of equal parenting assumes that the parents will:
- be able to communicate regularly and easily
- have consistent views and attitudes regarding the children's upbringing
- be able to afford to maintain two completely "set up" households
- be able to live close to each other to facilitate the children's attendance at school, maintain social networks etc
- be able to arrange flexible work hours, and survive any reduction in income that might then follow.

These expectations may well be unrealistic for many separating couples. To impose such an expectation could well increase the trauma and distress around separation, rather than reduce it.

Contra-indications for positive shared parenting outcomes are:
- parental conflict
- parental violence
- poor communication between parents
- conflicting values/attitudes of parents

These same factors are more likely to be present in those families that find themselves in litigation before the Family Court. That the parents have been unable to negotiate a co-operative parenting regime for their children post separation clearly casts a substantial doubt over their capacity to co-operate and communicate about the myriad day to day issues involved in a shared parenting regime.

Anecdotally, our members report a steady flow of Family Court applications seeking to set aside informal shared care arrangements. In such cases the applicants claim that the arrangement, which they agreed to, is not proving to be in the children's best interests. They usually cite poor communication, conflicting approaches to parenting and in some cases ongoing violent and aggressive behaviour as the basis for their application. Of particular concern are those cases where the applicant parent claims to have been threatened or intimidated into agreeing to a shared parenting arrangement.

A further area of concern relates to the financial impact of shared care outcomes. Research indicates that many women suffer a significant decline in their income and standard of living post separation. Many sole parent households, whether with male or female primary parent, rely on Centrelink benefits. A shared residence regime will effectively mean splitting the Family Payments Benefit, potentially leaving 2 households with inadequate income. Child Support payments will also be reduced, with a further impact on the available income to support the children in at least one of their homes. Realistically this will probably be the mother, who will still have the many of the same outlays, particularly in relation to housing, household effects and children's clothing, uniforms etc.

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Rebutting A Presumption of Joint Residence*

It is argued that the potential problems caused by a presumption of joint residence can be dealt with by a clear process of rebuttal identified in the legislation. Such a process would presumably take place by reference to the s68F(2) factors set out in the Act. We have already commented on our concerns at a changed emphasis on the s68F(2) factors.

The parent seeking to rebut the presumption would bear an onus to establish that the evidence on those relevant factors warranted not following the presumption of joint residence. Obviously this would make a difference to the outcome of final contested hearings as the evidence that is currently put before the Court may not be considered sufficient to rebut a legal presumption.

The impact of such an onus at interim hearings is even more concerning. It might well mean that parents would be pressured into agreeing to joint residence on an interim basis as they would not have sufficient opportunity at interim hearings to produce the necessary evidence to rebut the presumption.

Rather than improve the situation for separating couples and families, such a change may lead to an increase in litigation (with the attendant increase in demand on the Courts and Legal Aid). The risk of parents being forced into joint residence arrangements because they cannot afford to litigate cannot be ignored. In this regard, the evidence is clear that women are more likely to experience financial hardship after divorce than men so this will have a disproportionate effect on women.

Of even greater concern is the risk of children being exposed to abuse and neglect in those situations where an abusive parent demands shared care because of the legislative presumption. The other parent may be unable to effectively resist the application, whether through emotional manipulation, fear, financial hardship or lack of legal aid. A significant proportion of cases in the Family Court involve allegations of violence or child abuse. These are the cases most likely to be litigated and least likely to settle. It is in these cases that a presumption of equal residence could have the most disturbing and potentially abusive outcomes of children.

Clearly, the presence of family violence or child abuse could be grounds for rebuttal of the presumption - we would hope such a view is unarguable. This might reduce the risk of children being placed permanently in potentially abusive joint residence arrangements following a defended final hearing. However, it fails to deal with the difficulties surrounding interim arrangements either negotiated or ordered by the Court pending trial.

The Court has very little information available to it at interim hearings because generally they are very limited by time. The Court does not hear oral evidence, and family reports and other experts' reports are often not yet available. The Court relies to a large extent on affidavit material filed by the parties that, particularly in the case of self-represented litigants (of which there are now many in the Family Court), may be considered inadequate to prove violence or abuse.

Research into the reforms made to the Family Law Act in 1996 concludes that the legislative statement of a "child's right to contact" has led to an implicit presumption that contact must be maintained. In cases where there are allegations of domestic violence there has been a move away from suspending contact to ensure the child's safety. Rather, the Court maintains contact at such interim hearings and imposes conditions such as handovers through Contact Services, as a means to deal with these problems. Our concern is that the child's "right to contact" seems to have overtaken the child's right to safety and security.

Given this development regarding interim contact, based on an implicit, unstated presumption, the risks with the present proposal are even greater. An explicit legislative presumption of equal time with each parent clearly has the potential to lead to interim orders being made for joint residence and not just contact, even when violence is alleged, because of the difficulties in "proving" such allegations within the limits of an interim hearing. Thus, women and children are exposed to even greater risk.

Nothing in this submission should be seen as a criticism of joint residence per se. For those families who have negotiated such arrangements post separation and who are able to maintain high levels of communication, respect and co-operation, such arrangements may well work smoothly and in the best interests of the children.

Our concerns relate to the proposal of a legislative presumption, that would potentially be relied upon by one parent or another in proceedings before the Court, in precisely those circumstances that indicate the parents are unable to maintain a relationship based on mutual respect and co-operation. We reiterate that most families, whether before or after separation, arrange their affairs such that one parent takes on the primary parenting role. Given this reality, where is the basis for legislative intervention to impose a presumption of equal time?

The present legislation in no way prohibits or undermines the potential for separated couples to negotiate shared parenting outcomes. In our view, the introduction of a presumption of equal time is inappropriate and unnecessary. Shared parenting should not be imposed, presumed or mandated by legislative intervention. Rather, as presently occurs: "those who can, and wish to - do; those who cannot - should not."

(a) (ii) In what circumstances should a Court order that children of separated parents have contact with other persons, including their grand parents.

The Family Law Act already deals with the rights of children to have contact with other significant persons. Anyone with an interest in the care, welfare and development of a child, including grandparents, can bring such an application and the Court regularly deals with such matters. We are not convinced the legislation requires further amendment in this regard.

Anecdotally, members express concern that in some cases such applications have been filed as a form of harassment rather than for any genuine purpose. One such case involved a situation where the parents were both seeking final orders for residence. Pending final hearing, the children enjoyed regular overnight contact with the father.

Applications for contact were filed by the paternal grandmother and a paternal aunt, notwithstanding they clearly enjoyed a good relationship with the father and could see the children whilst in the father's care. The mother was forced to file responding documents to each subsequent application, which used up a significant portion of her limited legal aid funding prior to the final hearing.

The reality is that some intact family units may not enjoy good relationships with their extended family. Any Court proceedings will be stressful for the family unit as a whole and this impacts on the children's welfare as well. Rather than considering when a Court should order contact with other persons, we invite the Committee to encourage other forms of dispute resolution for such disputes.
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(b) Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.*

Since its inception, the Family Court has been clear that the level of child support or maintenance is a separate issue to contact. A resident parent should not refuse contact because the other parent is not paying, or is unable to pay child support. This term of reference seems determined to relate the two issues. The Child Support legislation already provides a "sliding scale" with respect to Child Support percentages, dependent upon the amount of time the child/children are in the care of each parent.

Some critics argue that since this change to the Child Support legislation, there has been an increasing number of Court disputes over relatively minor adjustments to contact - ie one parent seeks to increase or reduce contact, because of the financial impact in terms of child support received or paid. To explicitly link these issues is unhelpful and in no way focuses on the welfare of the children involved. Children's right to a relationship with their parents should be based on the best interests of the child, not on the financial implications of any such arrangements. The suggestion conveyed in the media, that non residential parents should be encouraged to have contact with their children by offering them a reduction in child support is abhorrent.

Before any change is proposed in relation to child support legislation, the government should take steps to ensure the existing regime is working and that residential parents are receiving the child support to which they are entitled. This is a much more pressing issue, in our view.

We trust this submission is of assistance to the Committee.

Yours faithfully,

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