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Secretary:

From: Libby Goss [Libby_Goss@fcl.fl.asn.au]
Sent: Monday, 11 August 2003 7:28 PM
To: Committee, FCA (REPS)
Cc: Michael_Crozier@fcl.fl.asn.au
Subject: INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION



Blue Mountains CLC
FL Inquiry ...

Committee Secretary

House of Representatives Standing Committee on Family and Community Affairs Parliament House
House
Canberra.

Dear Sir/Madam

RE: INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

Please find attached the submission from the Blue Mountains Community Legal Centre in relation to the above inquiry.

We would be glad of the opportunity to assist you further in relation to this inquiry and may be contacted on 0247 824 155 or on Libby_Goss@fcl.fl.asn.au should you have any queries or should you wish us to speak to the Committee in person.

We thank you for the opportunity to express these views and fully represent the constituents in our service catchment area.

We also thank you for permitting this late submission.
Yours faithfully

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Domestic Violence and Family Law Solicitor
BLUE MOUNTAINS COMMUNITY LEGAL CENTRE

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INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The **Blue Mountains Community Legal Centre** has a catchment area that covers the Blue Mountains City Council area, and spreads west to Orange, north to Bell's Line of Road, east to Penrith and south to Forbes. We provide regular outreach advice services to Lithgow, Springwood and telephone advice to Bathurst. We appear in the Katoomba and Lithgow Courts on a weekly basis assisting women seeking apprehended violence orders and Family Law orders. We also place a priority on prevention with our Community Legal Education workers presenting at least one legal education to our constituents each month. Our service has 1.4 solicitor positions, .6 of a community legal education position and 1.75 administrative workers. We also auspice the Women's Domestic Violence Court Assistance Scheme for Katoomba and Lithgow Local Courts. Assisting us to do our work we have a small number of dedicated volunteer workers.

Firstly, we advise that this service does not oppose the concept of shared parenting. It is clear that it is the ideal situation for children to be assisted to maintain their relationships with both their parents to the extent that this is possible after the breakdown of their parent's relationship.

Secondly, it is important to acknowledge the context within which this inquiry has arisen. We are aware that, as the result of a long and determined campaign by a number of groups eg Lone Fathers Association, Dads Against Discrimination, some members of the Family Law Pathways Advisory Group and a number of parliamentary backbenchers this Inquiry has been initiated. In this way issues that have been identified as problems for a minority are being raised as the yardstick by which to judge the overall health of the Family Law Act and its implementation in the courts.

Thirdly, as a service that auspices a Court Support Scheme, assisting women and their children experiencing domestic violence we have particular concerns regarding any

presumption of shared parenting. Our service also provides family law legal to clients, both residential and non-residential parents and we are very concerned that any changes to the Family Law Act may increase the number of clients seeking our assistance. This is of particular concern in rural, regional and remote areas where residents have many less resources to call upon for assistance.

Lastly, we have a strong interest in the maintenance of the role of a parliament that is responsive to the needs of citizens but which is strong in the face of pressure, brought to bear by vested interest groups, to subvert the independence of the parliamentary legislative process.

INTRODUCTION

It has only been a short time since the Family Law Act was under scrutiny for much the same reasons as have initiated this inquiry. In 1995 the Act was amended in an attempt to engineer changes in parental attitudes. The stated reasons were again identified by single interest groups, who had a view that the Family Court blocked the ability of parents to engage in joint decision-making in relation to their children. The subsequent 'joint parental responsibility' changes made in 1995 have not borne the promised fruit of shared parenting and, in fact have caused a great deal of hardship and have lead to unsafe interim decision making in the lower courts exercising Family Law jurisdiction.¹

At the same time, other amendments to the Act were designed to proclaim the serious nature of family violence by specifying it as a relevant factor in relation to what was 'in the bests interests' of children.² Ironically, what emerged from the 'joint parental responsibility' amendments was a pro-contact culture that lead to an increase in the number of Family Law applications.³ This was confirmed by a comparative analysis of interim contact hearings involving allegations of domestic violence from the periods

1995/96 and 1998/99. The study showed, while the number of supervised contact orders remained comparable, the numbers of unsupervised contact orders increased by 32% and the number of no contact orders decreased by 30% during the relevant periods.

One of the goals of the 1995 Amendments was to promote the use of mediation in order to divert family law disputes from the courts. Unfortunately, Family Court statistics for the period following the enactment of the Family Law Amendment Act showed a significant increase (256%) in the number of applications for contact and residence orders, and a steady increase in Form 49 Applications to 1997/98.⁴

It is clear from the research⁵ undertaken in both the Sydney and Brisbane registries of the Family Court of Australia that the 1995 Family Law Amendment did not achieve its stated goals:

- ***It did not prevent children or resident parents from violent ex-partners;***
- ***It did not lead to a reduction in Family Court litigation, in fact the opposite.***

The statistics for litigation commenced under the jurisdiction of the Family Law Act, clearly show that the majority of separating parents arrange their parenting amicably without needing to seek legal intervention. In spite of this we are constantly informed by the media⁶ that relationship breakdown is a huge problem which, when combined with having to pay child support, is leading to 'a massive rise in the number of male suicides' and 30,000 calls each day to the Lone Fathers Association. These statements are not based in reality. In the past ten years while marriage breakdown rate has increased, the suicide rate has declined NOT increased. These statistics are contrary to that which the lobby groups are widely disseminating and it would be impossible for the Lone Fathers Association in its present form to field 300 calls each day let alone 30,000.

³ ibid at 1

⁴ Family Court of Australia Annual Reports 1997-98

⁵ Parenting planning and partnership: The impact of the new Part VII of the Family Law Act 1975. John Dewer, Stephen Parker, Barbara Tynan and Donna Cooper; (a) The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?; (b) The Family Law Reform Act 1995: The First Three years. University of Sydney and the Family Court of Australia.

The Federal Government Children's Services Minister, the Honourable Larry Anthony uses the same information largely provided by these groups to support the necessity for this inquiry, however when confronted with allegations that the Child Support Agency has mishandled or ignored death and assault threats said:

"I think any potential threat or suicide is one too many. But to put it into perspective, these were figures gathered over four years. We have a total population around 1.4 million parents and over 900,000 children. So the actual reported numbers compared with the sample size is quite small."⁷

Further, when asked if he thought that the Family Court has done badly by males the Minister answered:

"I think one of the issues - ...is that, in a lot of cases, people feel as though they have been perhaps betrayed by the system. Indeed, all the cases that get into the Family Court are pretty difficult cases anyway, and I think you have to put it into perspective. You have those where there might be domestic violence issues and those where there are very good reasons why court orders are giving sole custody."⁸

Later in the interview the Minister expressed a view that if non-residential parents had more contact with their children there was a higher likelihood that they would pay 'maintenance'. This is partly what he is giving as a reason for promoting shared parenting.

" But I believe that if we can encourage a bit more contact, particularly with the father, as long as there is no mitigating [sic] circumstances, then it is a much better outcome for the children, and particularly in the case of boys who need that male role model figure, because many children are growing up in families where they don't have that male role figure."⁹

It appears from this and other statements made by the Prime Minister that there is an expressed view, which does not seem to be evidence based that:

- There is a bias against fathers in the Family Court;
- Fathers are being denied contact in a systematic way;

⁶ eg: ARNDT Bettina ' Fathers may get justice at last' The Age June 20 2003; DUNLEVY Sue quoting Barry Williams Lone Fathers Association Daily Telegraph 2 July 2003;; 'Giving support to men' Penrith Press 7 July 2003.

⁷ Larry Anthony: Interview sundaysunrise 10 August 2003

⁸ ibid

- Fathers need contact so they will pay child support;
- Fathers are being forced to pay huge amounts of their income in child support;
- Grandparents have no rights under the present legislation;
- Fatherless child rearing is leading to social ills.

(a)(i)

DETERMINING TIME TO BE SPENT WITH CHILDREN - A PRESUMPTION OF EQUAL TIME

Currently shared parenting is being undertaken in 2-3%¹⁰ of all families registered for child support. This is recorded where at least 30% of the child's time is with the other parent. There is currently no clear evidence to support shared parenting. Paul Amato, while noting that children's outcomes are improved by the participation of both parents in their lives, noted the following:

"Joint custody is not a panacea and the presumption that joint custody is always in the best interests of the child is incorrect."¹¹

It is clear that children benefit greatly from the love, support and guidance from both their parents. However, what is also clear is that in some cases, and not just those where domestic violence features, all parents do not have the capacity to focus on the needs of their children. Some parents are unable to exclude their own needs and place their child's needs first and, in many cases, they do not have the capacity for collaboration or cooperation with the other parent, their relationships having already broken down.

Further, while children may reap benefits from shared parenting arrangements research shows¹² they are affected by having to, not only move from one to another physical place but also, by having to manoeuvre themselves through different emotional and psychological spaces. This was shown to be oppressive for some children and, there was a feeling among some children that shared care was more likely to be organized to suit the needs of the parents rather than the children.¹³

⁹ ibid

¹⁰ Attorney Generals Department Child Support Scheme Facts and Figures 200-01 Canberra 2003

¹¹ AMATO Paul: "Children and Divorce: What Hurts What Helps?" Department of Sociology University of Nebraska, paper delivered at Family Separation Addressing the Needs and Interests of Children Conference 1998 Canberra.

¹² SMART Carol! "Children's Voices Family Court of Australia 25th Anniversary Conference July 2001:

<http://familycourt.gov.au/papers/html/smart.html>.

¹³ ibid

The Bauserman study ¹⁴ noted that where successful shared residence existed it contributed toward the psychological health of children where it:

- was undertaken voluntarily and
- showed evidence of high levels of cooperation and
- showed low levels of conflict between the parties.

CASE HISTORY

Jennifer is the 39 year old mother of five children. Her first husband was killed in a motor vehicle accident. She became pregnant accidentally and found herself ethically unable to terminate the pregnancy. Her relationship with the father was unsatisfactory to the point that she had never cohabited with him in spite of their longstanding relationship and their twin daughters. On learning of the pregnancy the father declared that she wouldn't get a cent from him. Shortly after the birth of the twins the father resigned from his job.

The father applied for joint residence of the twins when they were 2 years old. He was successful and he was to care for his daughters at least 33% of the time available. The mother was pleased that the girls would be seeing their father very regularly. The father's child support obligation was reduced and he was allowed income support and a share of the family allowance.

Unfortunately, the father has not exercised contact with his daughters even 50% of the time allocated to him. Any time the mother attempts to enforce the shared parenting the father becomes abusive and on several occasions has physically threatened her. The father made constant demands on the mother (pick me up from the station, let me stay overnight etc) and often arranged to collect his daughters but didn't show or called at the last minute to cancel.

Most recently the father moved out of the country town the family resides in without advising or consulting the mother. After moving the father made a proposal that contact be changed as due to his new residence he could not exercise contact mid-week and that he wanted to change the orders to allow him all of the school holidays to maintain on paper his hours of contact. The mother and the children do not want to lose their school holidays with their three siblings. The mother has no choice but to take the matter to the Family Court if it cannot be settled beforehand.

The father is not committed to sharing the care of his daughters merely avoiding higher levels of child support and continuing his entitlement to Centrelink benefits. In spite of her difficulties the

¹⁴ Bauserman R. Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review Journal of

mother has never reported the father to Centrelink regarding his not achieving the appropriate amount of shared care to qualify for benefits nor has she made any application to the Child Support Agency for a review of his Child Support obligation

Sadly this case is not unusual and on paper it may appear to be serious but with shared care this mother is forced to have contact with the father of her children each week for varying amounts of time. The contact is invariably abusive and offensive. She also gets phone calls at any hour of the day and night. In spite of the shared parenting this client does all the cooking, cleaning washing and homework assistance like the majority of mothers.

Shared parenting rarely means shared care of the children. It is difficult to speak generally about real shared parenting as it exists only in the smallest number of cases. However more often it is the case that parenting is shared to a lesser degree and in our experience where this is done it is done voluntarily and informally. Clearly we do not hear about the thousands of informal arrangements that have been reached in the interests of children without resort to the courts.

It must be noted though that women continue to do the majority of domestic work including child care and in many cases people organise their lives in this way as it is their choice to do so. If there is a presumption in favour of shared parenting this choice will be removed ignoring the wishes of families and the needs of children. It will place some/many children in a position where they will be reliant upon a primary carer who, in the majority of cases, will have little or no experience in the care of children. We take great pains to accredit child care agencies, vetting the staff for both skill and appropriate demeanour. It is probable that by placing children with inadequate and inexperienced carers that many children will be at risk of either deliberate or inadvertent harm.

In the study **"Some whens, hows and whys of shared care"** the authors¹⁵ found that, while the fathers who participated in the study were all very dedicated parents, they were seen as motivated toward shared parenting by a 'rights to fatherhood focus. However, the mothers in the study group were seen as motivated by their focus on their children's wellbeing. This study noted

¹⁵ Smythe B., Canuana C. & Ferro A. Australian Institute of Family Studies 2003

that all participants were in paid employment and were all able to place any antagonism toward their ex-partner aside in the interests of their children's well being. Further, for shared parenting to be successful they suggests the following as the minimum requirements:

- **geographical proximity;**
- **high degree of parental cooperation;**
- **child focussed arrangements;**
- **financial independence;**
- **paternal competence.**

In our experience it is clear that these conditions would be beyond many of our clients. In particular where there is family violence we would strongly endorse and support the submission by the New South Wales Domestic Violence Advocacy Service and note only that any presumption of shared parenting clearly would create a dangerous and unsafe situation for many of our clients and their children.

Indeed it is the case that there should be a presumption against contact where there are current family violence orders in place. This is the case in the New Zealand family law legislation and this presumption, rather than placing the best interests of the child in a secondary position, supports the child's right to live in a safe environment.

Other issues that must be considered in relation to shared parenting include:

- ***the income support consequences for parents on parenting payment – this may force even more children into living in poverty;***
- ***increased litigation;***
- ***the pressure on the Family Court and other courts exercising the jurisdiction will experience higher levels of litigation;***
- ***the demand for legal aid to fund increased litigation.***

(a)(ii)

CONTACT WITH OTHER PEOPLE INCLUDING GRANDPARENTS

The Family Law Act at Part VII at s.60B(2) states:

- 1. 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...”***

This section includes grandparents as ‘other people significant to their care’. They have standing to apply to have contact and, if contact is considered to be in the child’s best interests having regard to the s68F(2) the Court will uphold the child’s right to continue their relationship. It is important though to ensure that any decisions made about who will have contact with children is based on what is in the best interests of the child rather than any presumption or right of another to see the child.