Tasmania

PREMIER

21 AUG 2003

Mrs Kay Hull
Chair
Standing Committee on Family and Community Affairs
Parliament House
CANBERRA ACT-2600

Dear Mrs Hull

I am writing to forward the Tasmanian Government submission to the *Inquiry into child custody arrangements in the event of family separation,* which was announced by the Prime Minister in the House of Representatives on 24 June 2003.

The attached submission focuses primarily on Term of Reference (a)(i), relating to the factors that should be taken into account when deciding the respective time each parent should spend with their children post separation. Brief comments have been made on the remaining Terms of Reference.

Thank you for the opportunity to contribute to this Inquiry.

Yours sincerely

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Tasmanian Government

Response to

Inquiry into child custody arrangements in the event of family separation

August 2003

(a)(i) Factors to be taken into account in deciding the respective time each parent should spend with their children post separation, 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?

Amendments to the Family Law Act in 1996 were based on a recognition that children have a right to contact on a regular basis with both their parents and other people significant to their care, welfare and development, subject to the contact being in their best interests (Section 60B (2)(b)3).

However, there are many factors that should be taken into account in determining where a child of separated parents should live and how much time should be spent with each parent. These factors are complex and interrelated. As a result, the Tasmanian Government is of the view that decisions relating to the proportion of time a child spends with each parent must be based on an individual assessment of the risks and benefits for each child.

While the principle that children should spend equal time with both parents is commendable, it is not always practical or desirable. It also creates potential risks if a child is placed in the custody of a parent without a thorough assessment and the child is subsequently abused or neglected. An individual assessment of the risk to the child is necessary to reduce the likelihood of harm or maltreatment and would need to consider a range of factors. This assessment would apply in particular to cases where litigation occurs and to people who are vulnerable during separation.

Recommendation 8.1 of the *Out of the Maze Report* by the Family Law Pathways Advisory Group (FLPAG) is that the integrated family law system should ensure the fair and equitable treatment of all, and pay attention particularly to the emerging need of men and fathers[1]. The report identifies that:

> Some men (and some of their mother and current partners) were angry with the system, particularly with the law, lawyers, courts and the Child Support Agency. Frustration and hopelessness arose from lack of recognition of their ability to nurture their children, and the difficulty of influencing or changing decisions. There was also concern about the rate of suicide amongst separated men. In relation to residence, some suggested that the presumption in law should be that children live with each parent on an equal-time basis.

However, it is important to note that 'equal rights to contact with children' is not a proprietary rights issue, (nor should it become that). The decision should always remain one based on the unique circumstances of each child and what is in that child's paramount interest. What is equal is not always equitable, and may in fact be damaging unless the unique and special needs of each child are fully taken into account.

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[1] Family Law Pathways Advisory Group, *Out of the Maze Report: Pathways to the future for families experiencing separation,* Commonwealth of Australia, Canberra, August 2001.

Child abuse

Decisions about the respective time a parent should spend with their child must take into account any incidents of abuse or neglect of the child. Where it has been established that a parent has abused or neglected a child, the Family Court would need to establish that it was in the best interests of the child to spend time with the parent and then make specific arrangements to ensure the safety of the child. However, many practitioners would argue that it is not in the best interests of a child to have any contact with an abusive parent whether or not arrangements were made to ensure the safety of the child. Their views are supported by numerous studies on child abuse and its impact on the health and well-being of a child.

It is the State Government's view that any parent who is deemed to be at risk of physically, emotionally or sexually assaulting a child should be refused access to that child (and in certain cases the siblings of that child) or provided with conditional access to that child (and the siblings) under terms which maintain the safety and well-being of the child as an absolute priority.

Family violence

The negative impact of family violence on health and well-being of children is well-documented and any decision about the respective time a parent should spend with their child must take into account the risk of family violence and its impact on the child.

In the case of child custody arrangements, the Family Court would need to establish that it was in the best interests of the child to spend time with an abusive parent and where this was established, make specific arrangements to ensure the safety of the child. However, again many practitioners would argue that in such cases it is not in the best interests of a child to have any contact with an abusive parent, whether or not arrangements were made to ensure the safety of the child. Their views are also supported by numerous studies on family violence and its impact on the health and well-being of a child.

If family violence has occurred between partners it should be recognised that such violence constitutes a grave threat to the well-being of their children, and the offender and the impact of their behaviour should be dealt with under the principle outlined in relation to the commentary on child abuse above.

When the violence of one partner is deemed to constitute a continuing or ongoing risk for the other partner, the Court should be required to give due consideration to the safety of that person when determining custody and access arrangements between the parties.

The following is an excerpt from the Paper *Safe at Home – A Criminal Justice Framework for Responding to Family Violence in Tasmania*[2] which will be publicly released by the Tasmanian Premier and Attorney-General in mid August. This excerpt provides useful background information on this issue.

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[2] Tasmanian Government Department of Justice and Industrial Relations, *Safe at Home – A Criminal Justice Framework for Responding to Family Violence in Tasmania*, August 2003.

Family violence issues are a very relevant issue in the context of family law proceedings. Domestic violence is often about control within relationships, and this control factor is often at its worst at the end of a relationship. In the early years of the Family Law Act (FLA) 1975 (Cth), in keeping with a focus on 'no fault' divorce, the Family Court minimised the relevance of domestic violence as a factor in affecting the welfare of children. This approach had changed significantly by the mid 1990s and the Family Law Reform Act 1995 (Cth) constructed a framework for dealing with issues of family violence. Section 68F(2) now recognises the "need to protect the child from physical or psychological harm caused, or that may be caused" by factors including family violence.

However the Act also introduced other principles aimed at shared parenting, with the emergence of a distinct pro-contact policy with both parents enshrined in the legislation under s 60B(2). This has been noted as an almost contradictory response, as on the one hand it is recognised that family violence is a serious matter which must be considered before the Court, yet simultaneously a presumption in favour of contact seems to have developed. Studies conducted into this issue have found that it is now more difficult to obtain orders of no contact at interim hearings, even where there are allegations of violence against the contact parent and that the Court is more likely to try to preserve contact between the child and the non-resident parent. A further research study found that the previously held view which recognised the impact of domestic violence upon children appears to have been superseded by concerns about maintaining contact between a parent and a child.

Although there is a procedure for obtaining restraint orders under the FLA it would appear that orders under the Justices Act are more commonly used by people seeking protection. Given that contact between children and non-resident parents is given great emphasis, it is important that contact orders need to focus on the safety of the children and the accompanying parent at the time of hand over as well as generally.

Both the local Courts and the Family Court need to be aware of the presence of restraint orders or contact orders. Under s 68R of the Family Law Act the Family Court has the discretion to make a contact order which is inconsistent with a restraint order, but must explain the rationale of the order. Under s 68T of the Family Law Act the local Court has the power to make, revive, vary, discharge or suspend a Division 11 contact order if the Court considers that a person has been, or is likely to be, exposed to family violence as a result of the operation of the contact order.

Furthermore, the findings from the Partnerships Against Domestic Violence research, and the FLPAG Report both note that the division between Commonwealth and State jurisdiction currently complicates the resolution of family law matters where violence is an issue. This has been identified as one of the current system's major failings, and there is an urgent need to put in place an integrated legal system which can quickly deal with allegations of violence. One potential remedy for this could be the establishment of a specific Commonwealth/State Task Force involving the Department of Justice and Industrial Relations, Tasmanian Police, and the Family Court to improve co-ordination so that family law, violence and child abuse matters can be dealt with in the same place at the same time.

Capacity to care for the child
There are a significant number of parents whose capacity to care for their children is affected by the use of alcohol and drugs, mental health problems and disabilities. Such factors would need to be considered in determining the time a parent should spend with their children after separation.

Logistical issues
The employment status of the parents is another factor to consider in determining the time a parent should spend with their children after separation. For example, it is likely to be in the best interest of the child to spend more time with a parent who is not in paid employment or works part time than to spend equal time with a parent who works full-time particularly where a child is not at school full-time.

While the reasons behind the presumption of equal time are understood in terms of increasing contact time for the non-resident parent, the presumption itself is problematic and may well run counter to the paramount consideration of the best interests of the child. The presumption that children will spend equal time with each parent also assumes that the households of separated parents are reasonably close to each other. Where this is not the case, the presumption that a child will spend equal time with each parent every week or fortnight could mean that he or she would have to attend two schools, develop two groups of friends and could not participate in team sports or recreational activities on a regular basis. Alternatively, the child could spend six months with one parent and six months with another. However, neither arrangement is practical nor is it likely to be in the best interests of the child.

In fact, research on a child's well-being might well suggest that that a child is more settled within a single family unit, with regular and supportive access arrangements. To constantly move children between households may be quite unsettling as children need as much stability as possible, especially during the transitional process. This is really a question to be informed by research findings on residency arrangements and their impact on children.

(a)(ii) In what circumstances a court should order that children of separated parents have contact with other persons including their grandparents?

Pathways to earlier assistance are urgently required in order to minimise conflict over parental contact with children. Early interventions aimed at developing agreed parenting plans involving contact with grandparents and significant others would be a

most welcome initiative, and reduce stress on parents, children and other family members.

A court should order that children of separated parents have contact with other people including grandparents provided it is established that it is in the best interests of the child. In determining the question of access by grandparents or significant others, the court should look to existing patterns of contact with the child prior to separation. These arrangements would need to be considered as part of the individual assessment as to the child's living arrangements for people who are vulnerable during separation and those undergoing litigation. Research indicates that a large network of friends and family can have a positive impact on the health and well-being of a child and is to be encouraged as long as it does not create conflict between parents and grandparents and provides a positive experience for the child.

(b) Does the existing child support formula work fairly for both parents in relation to their care of and contact with their children?

Both media reports and anecdotal evidence suggest that the child support formula may not work fairly for both parents. Anecdotal evidence suggests, for example, that child support arrangements may not operate fairly and may impact on the capacity of people to enter new relationships and adequately fund costs of children in those relationships.

Therefore, a system that is based on the cost of children rather than the income of the non-custodial parent may be preferable. For example, the "budget standards" approach that is used by the Social Policy Research Centre at the University of New South Wales to determine the cost of children may provide a more rational basis for the calculation of child support than the current system. This approach identifies the cost of the energy, food, clothing, transport, health care, leisure activities and personal care products needed by children in various age groups if they are to have either a low cost or modest but adequate standard of living.