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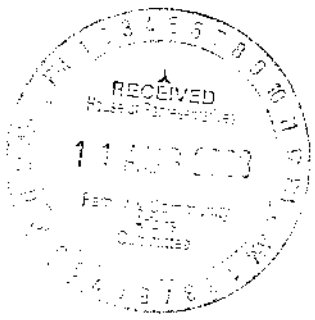
7 August 2003

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,

Inquiry into joint residence arrangements in the event of family separation

Please find enclosed Marrickville Legal Centre's submission to the Parliamentary Inquiry into Joint Residence Arrangements in the Event of Family Separation.

Please direct any enquiries about this submission to Ms Philippa Davis at Marrickville Legal Centre on (02) 9559 2899.

Yours faithfully,
Marrickville Legal Centre

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SUBMISSIONS ON THE PARLIAMENTARY INQUIRY INTO JOINT RESIDENCE IN THE EVENT OF FAMILY SEPARATION. (AUGUST 2003)

Marrickville Legal Centre has been providing free legal advice, information, representation and legal education for more than twenty years. We have a general legal service, a children's legal service, a tenant's advice service and a domestic violence court assistance scheme which assists women applying for domestic violence orders at Newtown Local Court.

Much of our work in each of the services, but most particularly in the General Legal Service and the Domestic Violence Court Assistance Scheme, involves advising people experiencing a relationship breakdown. A significant proportion of those clients are women who have the role of primary caregiver of the children of the relationship (whether that be by way of formal orders or informal arrangements) and a large number have been victims of family violence. Many women report to us that the father does not participate in the ongoing care and support of his children and often, despite orders for contact, does not exercise those rights of contact. Further, we hear reports of non-resident parents who are self-employed or work for cash and misrepresent their income so as to avoid their child support obligations.

We feel that the accounts of our clients and our experience in the provision of family law advice places us in a position to assert that a presumption of joint residency, even if that presumption is rebuttable, will be detrimental to children in the vast majority of cases of relationship breakdown. Further, our assertion is supported by research into this issue.[1]

The terms of reference for the inquiry state at the outset that the best interests of the child are paramount. The Standing Committee is however seeking submissions on other factors which should be taken into account when deciding the residence and contract arrangements for children following family separation, including whether there should be a presumption of joint residence.

It is our view that the best interests of the child are more likely to be achieved under the current legislative framework of the Family Law Act and that any changes to the Act will detract from the 'best interests' principle. The Family Law Act already encourages parents to share in the

[1] See below

duties and responsibilities of their children's care. While we believe it is in the best interests of children that parents share these duties and responsibilities, we do not believe that joint or shared duties and responsibilities for children should be equated with joint residence based on equal periods of time spent by each parent with the child in every case.

We believe that the proposition of joint residency promotes the perspective that children are the property of their parents, to be divided such as would an asset in the event of a breakdown. It also promotes the idea that the right of parents to equal time is more important than the right of the child to have their individual situation considered and finally, assumes that the quantity of time spent with children is more important than the quality of the interaction between parent and child.

The Family Law Act sets out four clear principles about the parenting of children, namely that except where it is or would be contrary to a child's best interests:

- children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- 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; and
- parents share duties and responsibilities concerning the care, welfare and development of their children; and
- parents should agree about the future parenting of their children.[2]

For those parents who are unable to agree on residence /contact arrangements, the Family Court is *required* by law to make decisions based on the needs, wishes and rights of children, not parents. The decision is made on an individual child focussed basis and one which does not favour a parent of either gender. In doing so, the Court must take into account a number of factors[3] such as:

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[2] see section 60B(2) of the FLA
[3] see section 68F of the FLA

- any expressed wishes of the children
- the nature of the relationship of the child with each parent
- the likely effect of any changes in the child's circumstances
- the practical difficulty and expense of a child having contact with a parent
- the capacity of each parent to provide for the needs of the child
- the child's maturity, sex and background, including issues of race, culture and religion
- the need to protect the child from physical or psychological harm
- the attitude to the child and to the responsibilities of parenthood
- any family violence which has occurred.

In making arrangements for parenting post separation, the most common arrangement is for mothers to have residence of their children and for fathers to have contact. Over 85% of resident parents are mothers[4] and it is estimated that fathers exercise contact with their children in around 60% of these arrangements.[5] Joint residence currently occurs in less than 5% of separated families.[6]

There is very little information at all about joint residence arrangements in Australia and how well they work for children, even in the short to medium term, let alone the long term[7]. As indicated above, less than 5% of separated parents in Australia have arrangements for shared residence and no comprehensive study has yet been completed as to the success or failure of this small percentage of joint residence arrangements. The evidence that is available, principally from overseas, tends to suggest that joint residence only promotes the best interests of children when compared to other arrangements if the relevant parents are able to cooperate with each other *and* genuinely put their children's interests first.[8] High levels of parental conflict clearly have a negative impact on children's well being. Where such conflict exists, frequent movement between parents, means that children are more likely to be exposed to a

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[4] Australian Bureau of Statistics, 1999

[5] Australian Bureau of Statistics, 1998 – this is an estimate only as the available statistic in relation to patterns of contact generally (62% of non-resident parents exercising contact) is not divided along gender lines.

[6] Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra 1997, Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

[7] Smyth, Caruana & Ferro, 'Some whens, hows and whys of shared care', Australian Institute of Family Studies (2003).

[8] see Smyth, Caruana & Ferro above. See also Smart, C. 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July 2001, available on the internet: http://familycourt.gov.au/papers/html/smart.html

greater extent than were they to move less frequently between parents. A high level of conflict between parents should therefore be viewed as a counter-indicator to joint residence. Unfortunately, a high level of conflict between parents is a hallmark of parents who have to resort to litigation in relation to their children.

To introduce a presumption in favour of shared residence in the absence of significant evidence that establishes without a doubt that such an arrangement is in the best interests of the child is both foolhardy and dangerous. Such a presumption represents a dramatic policy shift that is being lead by political factors and emotive anecdotes, rather than by evidence.

It is our submission that a presumption of joint residency (even if it is rebuttable) :

- privileges the rights of parents over the rights of children by over-riding the paramountcy of the 'child's best interests' principle which is entrenched in the Family Law Act and entrenching instead, a position that is parent focussed rather than child focussed.

- ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and family violence.

- ignores the current provisions of the Family Law Act which already include mechanisms for shared residence as a child's right where it is in the child's best interests.

- reduces the ability of families to make their own decisions about parenting arrangements which will be dependent on the particular child's needs, parental capacities, geographical distance between the parents, parent's work patterns, finances and housing.

- does not reflect current caring practices in intact families where mothers are still predominantly the primary carers of children and undertake most of the domestic work. Shared residence would mean arrangements for some families post-separation would be significantly different from pre-separation arrangements. Further, where prior to separation fathers have had only limited involvement in actually providing for the needs of their children, they are less likely to be equipped than their female partners to look after

children after separation. In some such circumstances, children may also be less bonded to their fathers which will cause further stress to children.

- assumes that the parties are able to effectively and appropriately communicate regularly to negotiate arrangements for the children.

- will exacerbate conflict rather than assist in resolving it. A blanket approach such as a presumption of joint residence will focus on the rights and obligations of each parent and their respective commitments rather than encourage the cooperation of each parent to develop long term and appropriate solutions for the care of children which are in the best interests of their children rather than the parents.

- will give controlling and angry non-resident parents further avenues through which to attempt to control and exact revenge upon their ex-partner. Our experience has shown us that the families whose relationships and interactions are the least suitable for workable joint residence arrangements are the same families in which the non-resident parent (predominantly fathers) will relentlessly pursue legal action in the Family Court to secure joint residence and in which the resident parent (predominantly mothers) will be unable to secure appropriate legal representation to respond to continual proceedings.

- will present practical difficulties for many separated parents and children and the burden of running two households will be too great for many families.

- will force children to constantly move between two households. Research has shown that this places enormous stress on children and such an arrangement therefore is to their great detriment. Studies in the US have shown that a significant number of children suffer as a result of constantly being shuttled between households particularly when this involves leaving their neighbourhood[9]. Further, parents will be forced to either live in close

[9] Janet R. Johnston et al., Ongoing Postdivorce Conflict: Effects On Children of Joint Custody and Frequent Access, 59 Am. J. Orthopsychiatry 576, 588 (1989) (a study of parents who were entrenched in disputes over custody and visitation, concluding that children who have more frequent access are more emotionally troubled and behaviorally disturbed). see also Susan Steinman, The Experience of Children in a Joint Custody Arrangement: A Report of a Study, 51 Am. J. of Orthopsychiatry 403 (1981). Dr. Steinman reports, in a 1978-80 study of twenty-four families who pioneered joint custody on their own prior to express authorization of joint custody under

proximity to each other so as to provide consistency in schooling and peer relationships and limit travelling time or force children to maintain not only a space in two residences, but also travel great distances to school.

- will place women and children who are victims of violence at increased risk of further violence. The presumption will force some children to live with violent fathers and will force mothers to regularly negotiate with and be in the presence of violent ex-partners. A large number of women experience significant violence post-separation and for many this occurs in the form of harassment under the guise of organising contact and during contact changeovers themselves. Therefore, any increase in contact exposes women and children to increased levels and incidents of violence and provides a dangerous tool to abusive men.

- will increase litigation as parents who do not want 50:50 shared residence may feel the need to go to court. Given the lack of legal aid funding, many people will self-represent, increasing delays and further stretching the resources of the Family Court and Federal Magistrates Service. Women who are not in a position to litigate either because they are not able to get legal aid, can not afford a private solicitor or are not confident or able to self-represent, may be forced into a position of accepting a 50:50 arrangement that is not in the best interests of their children. Evidence has shown that women are more likely to experience financial hardship after divorce than men so a tendency toward an increased level of litigation to rebut a presumption of shared residency will have a disproportionate effect on women.[10]

- will lead some non-resident parents to re-open finalised cases in the belief that a presumption of joint residence will bring them a different outcome. Community agencies are already reporting contact from women whose former partners are threatening to take them to court, or back to court, to get new arrangements for the children.

- is the agenda of a number of fathers' rights groups who assert that the Family Court has a bias against men and makes decisions on residence and contact based on gender rather

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California law, that while most children adjusted, twenty- five percent of the children were confused and unhappy because of the demands of living in two households.

[10] Weston, R, Smyth B, 'Financial Living Standards after Divorce,' Australian Institute of Family Studies, family Matters No. 55 Autumn 2000.

than the best interests of the child. There is little factual evidence to support this contention. On the contrary, research points to a high incidence of fathers (approximately 60%) having contact with their children[11] and almost three quarters of these men have children staying with them overnight.[12] In general it is only where the court finds that the circumstances dictate that the well-being of the child may be jeopardised that restrictive measures are applied.

For these reasons, we argue that it is unrealistic and in some cases dangerous to introduce a blanket presumption of joint residency, even where that presumption is rebuttable. As stated previously, there is little research into the effects on children of such arrangements and in fact that research which has been done, indicates that shared residence is more often to the detriment of children rather than to their advantage. Further, joint residency is not an option currently taken up by the vast majority of people entering into consent arrangements regarding residency and contact.[13] The fact that so few families find this arrangement workable strongly indicates that it will impose a situation that is not appropriate in the majority of cases.[14] Accordingly, to impose a presumption that flies in the face of common practice is unwise and ill-conceived.

Before turning to the two other terms of reference of this inquiry, we wish to stress that we do not oppose the principle of joint residency itself, but rather, a *presumption* in favour of joint residence. Families where both parents have shared responsibilities for children prior to separation, can cooperate with each other and can establish the sort of arrangements required for a successful joint residence arrangement, including making sure that the arrangements work in the best interests of their children, are likely to be positive for all concerned.

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[11] Australian Bureau of Statistics, *Family Characteristics Survey 1997*, Cat No 4442.0, AGPS, Canberra.

[12] see Parkinson and Smyth above note 23 at page 9

[13] US studies indicate that couples who enter into shared residence arrangements by consent, they do so often without legal assistance and regardless of legislative provisions. Commonly, such arrangements are entered between couples with little history of conflict during and after separation – Bauserman, R; 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, vol.16, no.1, 91-102 at p.99. See also Rhoades, h., Graycar, R. and Harrison, M.; 'The first years of the Family Law Reform Act 1995', *Family Matters* No.58, Autumn 2001 p.80 http://www.aifs.org.au/institute/pubs/fm2001/fm58/hr.pdf

[14] 3% of children from separated families were recorded as being in shared care arrangements in 1997 – ABS Statistics: *Family Characteristics Survey*, Dt 4442.0, AGPS, Canberra, 1997. Less than 4% of parents registered with the Child Support Agency in 2002 had equal (or near equal) care of their children – A-G's Department; *Child Support Scheme Facts and Figures, 2001-2002*, Canberra, 2003.

It is the potential for joint residence to be *imposed* on parents as a result of a presumption that concerns us. Given that it is already open to cooperative parents to make arrangements for joint residence by consent, introducing a legal presumption will have the greatest effect on families where the parents are in significant conflict with each other.

In closing, we will briefly address the other two terms of reference.

The Inquiry calls for submissions on the circumstances in which a court should order that children of separated parents have contact with other persons, including their grandparents. It is our submission that the Family Law Act, in it's current form, already provides for persons who have an interest in the care, welfare and development of a certain child, to make an application to the Court for contact. Grandparents clearly fall into the category of such persons and if contact is considered to be in the best interests of the child, having regard to section 68F(2) of the Act, the Court will order contact. As with our submissions regarding a presumption of joint residency, we believe that any change to the Family Law Act will mean a shift away from the principles of the best interests of the child to favour instead, the interests of other persons in the life of the child.

The final term of reference asks for submissions on whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children. While we do not believe that this term of reference has a place in an inquiry into residence of children, we wish to state that it is our belief that the existing child support formula works fairly for both parents. However experience has shown us that the Child Support Agency does not take adequate measures to collect child support from non-paying parents,[15] which in many cases leaves children without adequate support.

Our assertion that this term of reference does not belong in an inquiry which purports to address the issue of joint residency, is based on our concern that the agenda behind this inquiry is in reality, one which is ultimately aimed at reducing the child support liabilities of non-resident parents rather than pursuing an agenda of actual shared residence. Any inquiry into child support should be treated separately and not in the misguided shadow of an inquiry

[15] The amount of uncollected child support in 2000-2001 was $M669.7 – Child Support Scheme Facts and Figures 2000-01.

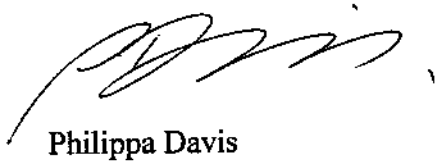
into shared residency. Once again, it is apparent that the interests of non-resident parents, have been placed well ahead of the best interests of the children involved.

Further, linking the levels of child support payable to the amount of time spent by children with each of their parents does not promote the fundamental principles of the child support system, nor does it encourage resolution of family law disputes with less conflict. Instead, it creates a dangerous proposition that non-resident parents are paying for the contact they have with their children and connotes an ownership of children who are to be treated as assets of a relationship.

In closing, we have read and wish to endorse the submissions to this inquiry provided by the National Network of Women's Legal Services, Macarthur Legal Centre, Women's Legal Service Victoria, Welfare Rights Network, Welfare Rights Service NSW, Peninsula Community Legal Centre, Murray Mallee Community Legal Service and Illawarra Legal Centre.

Yours faithfully,

Marrickville Legal Centre



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