Submission to the House of Representatives Standing Committee on Family and Community Affairs Enquiry into Joint Custody Arrangements in the Event of Family Separation

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Context of the submission

I present this submission in the capacity of a social worker with 30 year's experience in counselling, policy development, education and research, with a primary focus on issues of child protection and violence against women. From January 2000 to July 2003, I was foundation Director of the Australian Domestic and Family Violence Clearinghouse, University of New South Wales. This submission will therefore focus primarily on the implications of the proposed changes to the Family Law Act for families in which child abuse and/or domestic violence are present.

With respect to term of reference a:

The core statement in this term of reference, as in the current approach to Family Law in Australia, is that "*the best interests of the child are the paramount consideration*":

It is submitted that it is not possible for a "one size fits all" approach, as proposed in the rebuttable presumption of shared residence, to meet the *best interests* of all children and young people affected by family dissolution. Among the many reasons why more flexible options for post-separation arrangements for maintaining parent/child relationships are the following:

- The difference in children's ages, social, cognitive and emotional developmental levels, gender, cultural background and pre-separation relationship with each parent etc., shape their different needs. Young children and infants, for example, require a stable environment in which to develop trust and confidence before being ready to venture, with the support of a secure base, into more complex and changing areas of social interaction. At the other end of the developmental spectrum, adolescents

may find that shifting residences disrupts and limits the time available for peer relationships (Smart 2002).

- Managing post-separation relationships and arrangements for contact/residence is a complex task, even in the best of situations where there is commitment and lack of conflict between parents (Trinder, Beek & Connolly 2002). In the less ideal situations of many children and young people, where there is conflict about contact, this is a source of stress for children. These are highly complex, emotionally charged situations, for which the forced solution of shared residence would be no solution, despite its superficial appeal. In some instances, shared residence works very successfully, but such arrangements are usually implemented by parents without recourse to the legal system or to legislative requirements. Such arrangements are better promoted by community education than by legislation.
- Research indicates that there is no single model of post separation contact which will suit all children and families. Based on their study, Trinder, Beek and Connolly (2002, p. vi) point out that parent/child relationships are about more then "time spent" together, in concluding that: "It is the quality of the relationships rather than the precise amount of contact that is important."
- The proposal for shared residence is not based on a body of research that supports its contribution to the well-being of children and young people. In fact, there is a dearth of research that explores the perceptions of children and young people, about post separation arrangements. A notable exception is the work of Carol Smart (2002), who reports on three studies in the UK in the article: *From Children's Shoes to Children's Voices.* She describes the burden that children can carry from their awareness of the need for each parent to receive "equal time". Yet she found, with respect to time and sharing:

  For children who had plenty of time with both parents and where parents were on good terms, sharing time could be seen as a way of continuing

family life...This dimension of sharing was, for the children, less to do with the apportionment of time than the quality of relationships. Thus, it was quality of relationships that gave rise to the sharing, and the key element in the success of these arrangement was not the equal time but the equal caring. Expressed slightly differently, it was the way in which parents "did' the relationship" that created the sense of well-being, love and security for children. It was not the formal structure of residence and contact, counted in hours or days, that produced happy and contented children. What was more important to children was the way their relationships were sustained and managed. (Smart 2002, p. 317)

With respect to term of reference a(i), regarding the circumstances in which such a presumption (of shared residence) could be rebutted, it is submitted that:

Where there are allegations of child abuse and/or neglect, a presumption of shared residence is inappropriate, and may place the child/ren at risk of continued abuse and/or neglect.

Similarly, where there are allegations that a child or young person has been exposed to domestic violence, a presumption of shared residence is inappropriate, and may place the child/ren at risk of continued abuse and/or neglect through exposure to the abuse of their parent during contact/change of residence.

It is submitted that allegations of child abuse/neglect and/or exposure to domestic violence should be a "red flag" within the Family Law system that a separate, specialist "pathway" to deciding matters of residence/contact, is required. A rebuttable presumption of shared residence would rob the system of the flexibility to offer a prompt, specialist response to these complex cases.

A separate, specialist pathway – such as that trialled in Project Magellan (Victoria) and the Columbus Project (WA) - would:

- ensure that such allegations are investigated promptly so that decisions about contact and residence can be made on an informed basis and with safety as the central concern
- provide swift resolution of accusations which otherwise may "hang over" an accused person.
- be consistent with the recommendations of the Government's Family Law Pathways Report (2001a).
- be consistent with the recent recommendation, by the Child and Family Services Committee of the Government's Family Law Council (2002), for the establishment of a federal child protection service, to investigate child protection concerns arising from Family Court matters. This is a recognition that, while better coordination with state child protection services, as achieved in the Magellan and Columbus Projects, is essential, state child protection departments cannot respond to many allegations of child abuse which arise during family dissolution because of the limitations of their statutory role (eg the child may be safe due to the separation, yet the allegations of abuse are still relevant to matters decided in the Family Court.)

The evaluation of project Magellan was extremely positive, and is evidence that providing a specialist "pathway" for cases involving allegations of abuse and neglect can benefit children and their families. It reduced the number of hearings by almost 50 per cent, reduced the time taken by almost 50 per cent, reduced cases proceeding to a judicial determination from 30 per cent to 13 per cent and, most importantly, it reduced the incidence of highly distressed children from 28 to 4 per cent. There was also a reduction in the cost of cases, attributed to the investment of resources in the very early stages of the disputes rather than towards the end (Brown et al. 2001). It is important to note that, although

domestic violence was not a criterion for inclusion in the pilot, in 75 per cent of cases in the study, it was identified during the course of the research.

Why should cases involving allegations of abuse and/or exposure to domestic violence be expeditiously directed to a separate pathway?

- Domestic violence is a serious and widespread social problem in Australia (ABS 1996) and is a common issue in marital separation. For example, Brown et al. (2001, p. 2) cite research by the Australian Institute for Family Studies which found that: '66 per cent of separating couples point to partnership violence as a cause of marital breakdown, with 33 per cent of the couples describing the violence as serious.'
- Exposure to domestic violence has well documented deleterious effects on children's social and emotional development and is associated with a range of behavioural and emotional problems (Edleson 1999a). Exposure to domestic violence can have serious mental health impacts, such as posttraumatic stress disorder (Levendosky et al. 2002; Mertin. & Mohr 2002)
- Domestic violence and abuse of children coexist in 30-60 per cent of cases (Edleson 1999b), hence identification of either should lead to an assessment for all forms of family violence.
- Concern about the impact of violence on their children is an important factor in the decision of many women to end a relationship in which they are being abused (Hilton 1992; Keys Young 1998). However, the domestic violence literature reveals that, for many women, ending the relationship does not necessarily end the domestic violence (Fleury, Sullivan & Bybee 2000). This post-separation violence can be serious and life-threatening: approximately thirty per cent of the Australian women killed by male partners are killed after separation (Easteal 1993; Carcach & James 1998). Hence, the Family Law system is in contact with many women who are at risk of violence.
- The period following separation presents the period of greatest risk to women of death or serious injury (McMahon & Pence 1995), yet at this time of

heightened danger, the victimised woman is expected to negotiate arrangements of contact and residence. This is a context in which abusive spouses can use issues of contact and residence to continue to exercise coercive control over their partners (Rendell, Rathus & Lynch 2000). There is a growing body of Australian research which documents that contact is a context in which many women are subject to ongoing violence and their children to exposure to this violence (Rendell, Rathus & Lynch 2000; Katzen 2000; Kaye, Stubbs & Tolmie 2003). These issues require a specialist, skilled response.

- Australian research shows that child abuse allegations in the context of family breakdown are not the fabrications of vengeful litigants. Based on a review of the Australian and international literature, leading researcher Thea Brown states that:

  The recent research, to which Australia has been the major contributor, shows the new reality. It shows that child abuse allegations in this context should not be classed as a red herring, or a diversion stemming from the dispute, but as a red light, an indicator of serious family problems. Child abuse in this context is real and it is serious. Child abuse is a critical event on the way to parental separation and parental separation is a critical event on the pathway to child abuse (Brown 2001, p. 1).

  She argues that child protection has become a core part of the Family Court's business, something that was not anticipated at the time of its establishment.

What might a separate pathway look like?

Writing for Health Canada, Sudermann and Jaffe (1999) provide a clear model of the different pathways that need to be followed in cases where there are, and where there are not, allegations of violence and abuse at separation. This is provided in a clear table (reproduced as an appendix to this submission). In essence, their model takes each core issue that needs to be addressed, and looks at the different focus which is needed in cases where there are, or are not,

allegations of child abuse and/or domestic violence. For example, in a "normal visitation dispute", the central issue is described as "promoting children's relationships with the visiting parent". However, in a situation involving allegations of violence, the central issue is identified as "safety for mother and children".

In summary:

A push for universal shared residence ignores the reality that much of the Family Court's work involves complex situations involving domestic violence and/or child abuse and positions an appropriately protective parent as obstructive of contact and residence.

A "one size fits all" solution, such as that proposed, can never meet the "best interests" of all children and young people.

Any rebuttable presumption robs the Family Law system of the flexibility to offer a pathway that ensures that allegations of abuse and exposure to violence do not become bogged down in litigation, but are subject to prompt, expert assessment.

Appendix: Different Pathways Model

Issues	**Normal Visitation Dispute**	**Visitation Dispute with Allegations of Violence**
Central issue	Promoting children's relationship with visiting parent	Safety for mother and children
Focus of court hearing	Reducing hostilities	Assessing lethal nature of violence
Planning for future	Visitation schedule that meets needs of children	Consider no (suspended) visitation or supervised visitation.
Assessment issues	Children's stage of development, needs, preferences Parents' abilities	Impact of violence on mother and children Father's level of responsibility Mother's safety plan
Resources required	Mediation services Divorce counselling for parents and children Independent assessment/evaluation	Specialized services with knowledge about domestic violence Supervised visitation centre Coordination of court and community services Well-informed lawyers

Reference: Sudermann, M. and Jaffe, P. 1999, 'Child Custody and Access Issues', in *A Handbook for Health and Social Service Providers and Educators on Children Exposed to Women Abuse/Family Violence*, Family Violence Prevention Unit, Health Canada. Available: www.hcsc.gc.ca/hppb/familyviolence/html/children_exposed/english/index.htm [2003, 8 July].

This table online at: http://www.hc-sc.gc.ca/hppb/familyviolence/html/children_exposed/english/child_custody.htm [last accessed 8/8/03]

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