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12 August 2003

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

Please find attached a submission to be considered by your Inquiry.

Yours Faithfully

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Inquiry into Child Custody Arrangements in the Event of Family Separation

An Inquiry Commissioned by the House of Representatives Committee on Family and Community Affairs

Submission from: **Robyn Fitzgerald, Richard Harris and Dr Anne Graham**
Southern Cross University
August 8, 2003

Introduction

This submission focuses on the need to maintain *children* as a central focus for decision-making in the *Inquiry into Child Custody Arrangements in the Event of Family Separation*. The submission draws upon the findings of a pilot study conducted by researchers from Southern Cross University (Fitzgerald, Graham & Harris, 2003) which found that children convey a strong need to be acknowledged as participants in both the legal and emotional processes occurring around them.

Our submission can be summarised as follows:

(i) A presumption of shared "custody" is inconsistent with the paramountcy principle in so far as it focuses on parent's rights and not those of the child.

(ii) A presumption of shared "custody" marginalises children's voices and their participation in decision-making processes that fundamentally shape their lives and futures.

(iii) Children's perspectives are one of a number of factors that should be heard and taken into account in determining the retrospective time he or she will spend with each parent, and with other persons, including their grandparents, post separation, in *all* decision-making processes.

The idea of such 'child inclusive' practices is not new and is strongly reflected in policy discussions in Australia. The recent emphasis on the voice of the child as being integral in the decisions that shape their lives is implicit in the *Family Law Pathways Advisory Group Report* (2001, p xiv) which states:

> The stress and conflict around separation frequently puts children and family members at risk, and the family's capacity to care for children with their best interests in mind is often lost. It follows from this that all service providers in the family law system should focus on the potential for their client families to maintain positive relationships that support each parent's and other family members' ongoing capacity to nurture their children.

The Advisory Group believes that family decision making is the **key** to this process. Sustainable arrangements are more likely when there is involvement between adult family members, and **children are involved in reaching that agreement.** (Emphasis added)

The recent decision of *ZN v YH* [2002] Fam CA 453 provides one of many examples where the Family Court has acknowledged the importance of the wishes and views of children. In that decision, Nicholson CJ cites research referring to the need to obtain the views of children, including those of quite young children, an emphasis he states is not inconsistent with the dual requirements of Article 12 of the *United Nations Convention on the Rights of the Child* which provides:

(1) State Parties shall assure to the child who is capable of forming his or her own views **the right to express those views freely** in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity of the child.

(2) For this purpose, the child shall in particular be provided **with the opportunity to be heard** in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. (Emphasis added)

The intention of amendments to Part VII of the *Family Law Act* in 1995 was to encourage parental responsibility and to exhort parents to focus on their children's well-being (Nicholson, 2003). This being the case, the current *Inquiry into Child Custody Arrangements in the Event of Family Separation* must ensure that considerations of 'equal time with each parent' do not inadvertently marginalise or silence concerns about what is best for the child.

Considering the 'Terms of Reference' for the Inquiry

(a) given that the best interests of the child are the paramount consideration:

(i) what other factors should be taken into account in deciding the retrospective 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; and

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

We submit that the *Terms of Reference* are confusing and misleading in the following ways:

1. The inclusion of the presumption as a factor to consider in the *Terms of Reference* misrepresents the status that would attach to such a presumption. A presumption of "shared residence" would be the initial starting point of any inquiry, not a factor to be considered amongst others. The consequent elevation of "shared residence" as a legal presumption is significant in that it is adult focused, signalling a reluctance to allow for children's voices to be introduced into family decision-making.

2. The reference to 'custody' is confusing. We must assume that the inquiry is into the shared 'residence' of children, in light of the fact that, unless the Family Court make an order varying that shared responsibility, parents already share responsibilities that attach to parenting (Nicholson, 2003). Reverting back to the pre-reform terminology of 'custody', a term replaced in an effort to remove connotations of proprietorship of children in the inquiry, signals a shift back to understandings of children as the property of their parents. The use of the term shared 'custody' is also significant in that it hides the reality of 'shared residence', that is, children living in two homes. In this submission we refer to shared 'custody' as 'shared residence'.

   The introduction of a 'shared residence' presumption in the *Terms of Reference* suggests conceptual and ideological shifts in approaching the question of what is in a child's best interests. The implications of such changes for children are profound and reveal how the child's best interests can become conflated with the options, choices and wishes of the parents and the State (Thery, 1985) rather than focusing on the rights, well-being and perspectives of the child.

   The principles *underlying* the object of the *Family Law Act* 1975 enumerate children's rights within a framework of duties imposed upon parents and adults to promote their welfare and well-being (Dewar, 1998). Section 60B(2) states:

   - except when it is or would be contrary to a child's best interests:

(a) children have the 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
(b) 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
(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
(d) parents should agree about the future parenting of their children.

The notion of children as rights holders, in particular, the right to be cared for by, and to have regular contact with, both parents has been widely misunderstood and reinterpreted as a parental right since the introduction of the 1995 reforms. Shared responsibilities too have been reinterpreted as a right to shared residence (or 'custody'). The extent of such misunderstanding is summarised in the *Pathways Report*:

> 'Parenting responsibilities' and 'shared parenting' are frequently turned into arguments about parental rights and confused with children's rights. Education (of the Australian community, young people and professionals) would help to clarify these errors. (p.xviii)

We submit that the articulation of a presumption of 'shared residence' in the *Terms of Reference* reinterprets and confuses a child's right to contact with both parents and implies instead a right of each parent to equal contact.

The introduction of a legal presumption is also significant in that 'shared residence' is allocated the status of a 'conclusion or inference as to truth of some fact in question, drawn from other facts proved or admitted to be true' (Rutherford and Bone, 1993). In other words, it is assumed that it is in the child's best interests to reside and spend equal time with each parent. We question what evidence supports such a presumption.

We suggest that if we are unable to hear children's views, children will continue to be marginalised in both legal research and policy making and our understandings of children in families will be diminished (Smart et al, 2001). The following submissions illuminate our concerns around this issue in more detail.

Submission one: **A presumption of shared "custody" is inconsistent with the paramountcy principle in so far as it focuses on parent's rights and not those of the child.**

A presumption of 'shared residence', as the starting point for the determination of the best interests of the child, reflects an ideological shift away from the legislative rights of the child stated in the *Family Law Act* section 60(B)(2). Such a shift will result in a child's best interests being determined by an inquiry that is parent-focused not child-focused; in other words, the capacity of each parent will be the initial focus of inquiry and not what is in the best interests of the child.

Central to a presumption of 'shared residence' is an assumption that it is in the best interests of the child to spend equal time with both parents. Underpinning such an assumption is an ideology of family autonomy that submerges children in their family identity (Smart, et al., 2001). Children are considered as one homogenous group in the allocation of the child's time to each parent (Rhoades, 2002). A presumption of shared 'residence' fails to take into account:

(i) The diverse identities and interests of each child.
(ii) Children who live with violence.
(iii) No one parenting arrangement after separation and divorce will be ideal for all children.

Children are not one homogenous group, but rather individual citizens in our community whose particular needs and wishes must be respected both at the time of their parents' separation and divorce and in the future.

Submission two: **A presumption of shared "custody" marginalises children's voices and their participation in decision-making processes that fundamentally shape their lives and futures.**

We have previously argued that children's voices are rarely heard in family law decision-making processes or heard only in ways that render them vulnerable rather than capable (Fitzgerald, Graham & Harris, 2003). Although the *Family Law Act* provides for children's wishes to be heard, no 'right' exists to be heard in *any* proceedings. In distinguishing between private and contested proceedings, the provisions are relevant in a small number of matters where separating parents do seek orders from the Family Court. When a matter is resolved privately and the adults are in agreement, there is no obligation to consider the wishes of the child. In contested proceedings, the legal capacity of children to participate in legal processes is limited to situations where either a separate representative is appointed on a child's behalf in circumstances set out in section 68L(3) or when a child initiates proceedings on their own behalf (section 65C(b)).

How then does a presumption of 'shared residence' of children *further* contribute to the marginalisation of children's voices? The term 'equal' sharing is often referred to as 50:50 parenting. By its very nature such an equation is exclusive and begs the question of whether children are mere variables in their parents divorce. A presumption of equal time equates to a presumption that the child's perspective is irrelevant to a decision-making forum that potentially divides his or her life in half. Such a presumption silences the voices and perspectives of children who *are* involved in their parents separation and divorce, despite their capacity to participate in decisions that potentially impact significantly on their lives (Smith et al., 2000; Smart, et al., 2001).

The consequences for children of 'shared residence' are significant. Issues such as how children's schooling, activities and friendships can retain cohesiveness are of fundamental concern. Smyth et al (2003) and Nicholson (2003) refer to factors such as geographical proximity and its role in maintaining cohesive schooling, activities and friendships, financial independence of both parents, competence of both parents, family-friendly work practices and co-operation between parents.

More importantly, we do not have any evidence to know and understand children's perspectives of shared care. In the most recent Australian research on parents who spend equal time together, Smyth et al (2003 referring to Smart et al, 2001, p22) state that:

> Little is known about children's views on shared care arrangements. Moreover scant data are available on the long-term outcomes for children and parents with such arrangements. The collection of such data represents a crucial plank of knowledge required to fully answer the question: How well does 50:50 care work?

This is despite the fact that they are the family members most profoundly affected by such an arrangement.

A presumption of shared 'custody' as the starting point for the determination of the best interests of the child, assumes that parents are considered to be, in general terms, best able to determine and promote the child's best interests (Bailey-Harris, 1996). Parents are presumed to be able to speak for their children, and consequently children are rarely asked to speak for themselves about family life (Smart, 2001). If the child's best interests really are paramount, we agree with Taylor (2001) that at the very least the child deserves to be heard and treated with respect as an individual. The notion that parents "share" their children implies they somehow own them (Smart et al, 2001).

We do not submit that children's perspectives should be determinative of decisions relating to residence and contact, nor for children's perspectives of their parent's separation and divorce to become privileged above their parent's experiences, however we do argue that children's voices, rather than being excluded from family and legal decision making, should be included and weighed equally with other voices in the process (Gollop, Smith et al. 2000).

Submission three: **Children's perspectives are one of a number of factors that should be heard and taken into account in determining the retrospective time he or she will spend with each parent, and with other persons, including their grandparents, post separation, in *all* decision-making processes.**

Children's perspectives are too easily overlooked as a criterion for decision-making generally, but particularly when determining the retrospective time the child will spend with each parent, with other persons (including grandparents), and after separation. While there is little research on children's views of shared care, there is a growing body of research supporting the view that children have the capacity to contribute to decisions being made about where they are to live and with whom they will spend their time. Smith & Taylor (2003, p1) argue that:

> Children's resilience to the stress of parental separation is furthered when they are treated as competent actors and can communicate with the other people making decisions in their lives. Competence, we suggest, develops within supportive, familial educational and legal context.

In a pilot project conducted in November 2002, eight young people between the ages of 6 and 19 were interviewed seeking their perspectives on their participation in their parents' separation and divorce (Fitzgerald, Graham & Harris, 2003). From the outset, the children interviewed provided thoughtful and articulate views on their understanding of the legal processes and of their role in those processes. When the children were asked what advice they would give to parents and lawmakers, they overwhelmingly called for adults to listen to them and to allow some involvement in the family processes that surrounded both their parents' separation and divorce, and also the ongoing contact arrangements. Although a small number of children were interviewed, it was evident that each child had the capacity to participate and, significantly, may well draw on their participation to adjust to the decisions that inevitably affect them. We suggest that marginalising the participation of children may well limit the coping resources of the child, particularly their 'capacity to appraise' (Rutter, 1987 cited in Gorrell Barnes, 1999, p.436).

We submit that children's perspectives are one of a number of factors that should be heard and taken into account in determining the time he or she will spend with each parent, and with other persons, including their grandparents, post separation, in *all* decision-making processes. We submit that children have the ability to articulate, from a young age, their perspectives not only on where they want to live, but also in regard to continuing arrangements and relationships with others such as their grandparents and extended family. It would seem that any future developments should not resile from the progress already made in amplifying the voices of children in matters that concern them most.

Conclusion

The history of legislative and caselaw in Australia, New Zealand and the UK in dealing with children has been to focus on the best interests of children and to gradually recognise the importance of children's perspectives and wishes. Why then would a recommendation be made firstly to go against this trend and secondly, place a legal obstacle in the way of children by the introduction of a legal presumption which children would have to rebut if it were not in their best interests to have "shared residence"?

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