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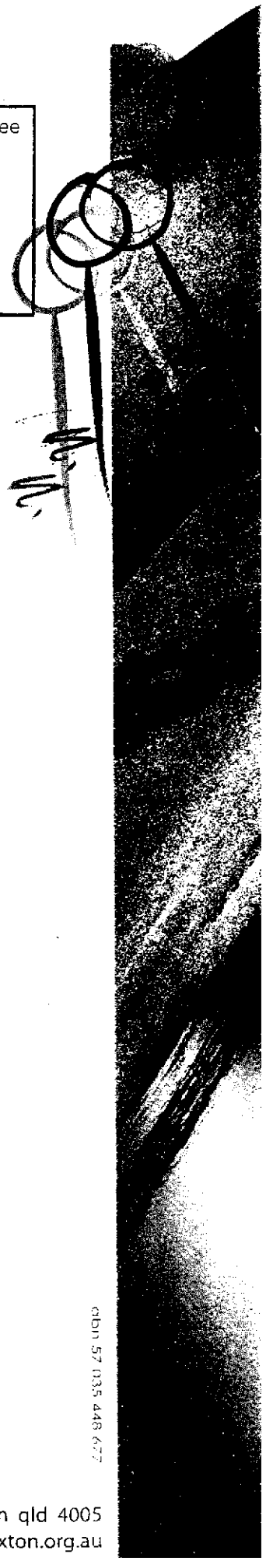

House of Representatives Standing Committee on Family and Community Affairs

Submission No: 902

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Secretary:

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The Secretary
Standing Committee on Family & Community Affairs
Children Custody Arrangements Inquiry
The Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Colleagues

RE: INQUIRY INTO JOINT RESIDENCE ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

We are a community legal service and have been operating for over 25 years. We operate separate programs, providing legal assistance to Carer parents, the majority of whom are females, and Liable parents, the majority of whom are males. We deal with a broad range of family law issues confronting both client groups and are aware of the conflicting interests of the two groups.

The practitioners at the Centre, all of whom are experienced family lawyers, have attempted to reach consensus in relation to the content of this submission.

(i)What other Factors should be taken into Account

It is our submission that the current provisions of the Family Law Act (the "Act"), specifically s.68F already provide the Court with an appropriate perspective from which to approach the determination of issues affecting children.

However, it is our submission that the Family Law Act should highlight re-parenting as an issue requiring consideration on the part of the parents. The turmoil of separation is made more confusing and painful for some children by the rapid introduction to a new partner and potential parent-figure by one or both of the parties. Our submission is not that newly separated parents should not re-partner. However, it is our observation that some parents do not handle re-parenting

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sensitively. Many people may not be aware of the damage created by a premature introduction of another partner into the children's lives.

Again, there are issues that often flow from the re-partnering, such as the blending of two families. Although, the Court is able to consider re-partnering under the existing provisions of s.68F, it is our submission that an amendment high-lighting the importance of re-parenting issues should be considered.

We are of the view that a specific amendment highlighting re-partnering as an issue would, in part, act as an educative tool emphasising to the community and individuals that re-partnering is a matter of grave significance to the children of separated parents.

Should there be a presumption of equal time

In the absence of risk of harm to the children, the interest of the children is best served by reinforcing the need to remain in contact with both parents and the maintenance of as much stability as possible at a time of upheaval. In the period immediately following separation both parents are often anxious to secure residency of the children for reasons that:

1. they believe it is in the interest of the children;

2. it may weaken their future opportunity to seek residency of the children if there is a status quo of residency in favour of the other party;

3. lack of care of the children may impact in a later property settlement.

The period immediately following separation is often a time in which the parties have to operate without court orders and without immediate access to the courts. There are often tug-of-wars between the parties, for instance one party may collect the children from school without the knowledge or consent of the other party and the other party may then attempt to recover them. In some instances there is a complete denial of contact by parents concerned that if the children are sent on contact, the other party will not return them. The parties often make major decisions that are not necessarily in the children's interests, such as moving to new homes, or places.

It would be in the interest of children for certain safeguards or legal presumptions to operate in this period. In our submission, there should be a presumption in place for a defined period, for example ten weeks, that promotes as little disruption as possible to the children.

We see the provisions of the Act, as a means of reinforcing the significance of the "home" for the children. It is our submission that the Act should place an emphasis upon the security of the "home". We would like a presumption to operate along the following lines:-

1. children will reside at the former matrimonial home or within a distance of less than a thirty minute drive, or comparable journey, from the children's last home;

2. the children, if relevant, are to continue at the school, or other care/educational facility attended by them prior to the separation;

3. that the children should reside with the parent who personally attended to the children for the majority of their care prior to separation;

4. that where both parents have cared for the children on an equal basis, a presumption of shared care should operate;

5. that the parent with whom the children are not residing shall be presumed to have contact for at least 35 hours (being one day and a weekend including overnight) per fortnight.

In what circumstances can such a presumption be rebutted

1. the children would be at risk of sexual, emotional and physical harm;

2. that the practicalities of the situation make it inappropriate for the presumptions to apply;

3. if separation has taken place after a physical separation of the parents for more than 6 months, the presumptions may not apply and the Court will have to consider the circumstances in which the separation occurred and the best interest of the children.

4. where Domestic Violence Orders are in place prohibiting physical contact between the children and the respondent.

We consider that it would be useful for these presumptions to apply for a period of ten weeks but that after this time, it would be open to the parties to seek to alter the Orders. In the event that neither party applied for further Orders, the presumptions would continue to apply unless otherwise agreed by the parties in writing.

Should there be a presumption of shared residency

We are not in agreement with the presumption of shared care. We have had the benefit of reading submissions formulated by other community legal centres and are aware that strong submissions against the presumption will be before the Committee.

Although we fully support the concept of parents putting into place their own arrangements for shared residency, we do not believe that it would be in the interests of the children for this to be imposed by the Court.

The main reasons that we do not support the presumption are:

- children are likely to be exposed to high levels of conflict between the parties;
- given inflexible working arrangements, children of working parents are more likely to spend time in non-family care such as child care facilities or after-school care;
- children are likely to suffer from the impracticalities of changing households and may not develop a sense of "home".

ii. In what circumstances should a Court order children to have contact with other persons, including grandparents

We are of the view that the current provisions of the Act provide for this and enable such contact to occur. We would suggest a general presumption that unless otherwise determined, it be assumed that contact with grandparents is in the interest of children.

(b) Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children

Given the conflicting interests of our client groups, it has been difficult to reach consensus in relation to this point.

However we would raise the following points.

From the perspective of the Liable parent, post-separation often sees a geographical separation from their children. Although anecdotal only, it is our observation that it is this client group who are most likely to lose contact with their children post-separation. It is our submission that the current difficulties with the enforcement of inter-state court orders or in intra-state orders where the parties reside more than approximately 250 km apart, are the situations in which the Liable parent will 'give up' on maintaining contact. These situations would be assisted by changes to the enforcement of Court Orders. Our suggestions for improvements are as follows:

- the ability to bring weekend / holiday applications for the breach of Court Orders where a party has flown interstate or driven in excess of 250kilometres and there is a denial of contact;

- the ability of Federal police to liaise with State law enforcement officers to enable Orders to be enforced where the party has flown inter-state or driven more than 250 kilometres to have contact.

In relation to the issue of child support, we are of the view that there needs to be greater flexibility for variation of assessments where there are clearly special costs associated with the exercise of contact which are not caught by the current reason. For instance, one of our clients was the father of an eighteen-month-old child. The mother resided at Bundaberg and the father resided at Toowoomba. The father would have to pay for overnight accommodation at Bundaberg and would have contact for a few hours on both days. The costs, including petrol and accommodation did not amount to 5% of the child support and

therefore, although the costs were considerable, he was unable to obtain a change of assessment.

In another instance, our client had a family of four children and his car was only large enough to take four people safely. In this instance, two trips were involved in contact and again, although the costs were substantial, there was no provision for seeking a change of assessment under the current provisions. In another instance, the liable parent had to borrow a car from a family member and for this reason was not seen to incur the cost of contact himself.

Some recognition should be given to these types of costs. Although the costs may not amount to 5% of the child support as envisaged by the current provisions, the costs are still very significant and can prohibit contact from occurring. We are aware of many other examples of geographical and financial realities being such that contact cannot be maintained.

We are also of the view that a liable parent should be able to raise the cost of housing appropriate to the care of the children on periods of contact. It is frequently the concern of the carer parent that the liable parent is living in shared accommodation with no separate rooms for the children. In some instances, liable parents have left the matrimonial home without beds or bedding for the children and find it hard to afford the necessary household items required to properly house the children. Again, there needs to be greater flexibility in the change of assessment process to allow these costs to be recognized.

There are many areas of dissatisfaction with the formula raised by liable parents. Without addressing those issues, we would make the following suggestions in relation to the change of assessment process:

- that there be provision for urgent change of assessment applications to be brought by either parent in the period immediately following separation, say for a period of two months. This would enable the parties to by-pass the usual delay in awaiting a change of assessment. For parties who have to re-house, and who may still be paying pre-separation debts, the delay in having the application dealt with creates greater hardship. The ability of these parties to bring Stay applications or to seek relief in the Court is very limited;

- that the current tests (special circumstances, just and equitable, otherwise proper), set out under the legislation that have to be satisfied for purposes of a change of assessment application or Departure Application are too harsh and should be relaxed. For instance, in our experience, the Senior Case Officers apply the "earning capacity principles " formulated in DJM. v. JML (1998) FLC 92-816, far too strictly, such that there are findings that it is not just and equitable to reduce assessments where there are clear indications that there is no ability to maintain a previous level of income. There is no recognition of the genuine changes that can occur in relation to earning capacity arising from a multitude of circumstances. The earning capacity of many separated parents alter simply as a result of marital separation either for the reason of mental / emotional difficulties or a need to have greater flexibility in employment with a view to having more contact with the children. The casualisation of the labour force and the emphasis on younger employees are factors that should be considered more readily also;

- it is our experience that there is a lack of consistency in the decisions reached by Senior Case Officers and it would, no doubt, be useful for there to be greater policy guidance as to when it is appropriate to alter assessments;

- greater latitude in reducing assessments should be shown on the part of the Senior Case Officers. We have been informed that Senior Case Officers are under great pressure **not** to reduce assessments and to thereby reduce the burden on the community. This leads to a great deal of hardship for liable parents and a test should be introduced ensuring that an outcome does not mean a liable parent is at risk of living under the poverty line;

- the requirement for the parties to go through an Objection process be removed or made optional so that parties can go direct to Court. An ability to proceed quickly to Court is most helpful where a party is failing to make proper disclosure and the use of subpoena may uncover important information;

- the inability of the liable parent to raise the support of a partner's children at any point of the process is leading to a great deal of hardship and many second families are living in poverty. It is our view that where the liable parent is clearly

supporting the second family for reason that support is not available from the natural father of the stepchildren, that Centrelink provide increased benefits to the mother of those children. We are aware of the legal and social difficulties involved in the recognition of step-children as 'legal' dependants;

- many parties fail to adequately prepare their cases for a change of assessment and are not aware that it is necessary to do so. There should be a preliminary contact sometime before the actual assessment at which the issues for the parties are canvassed with an experienced officer and the parties given clear guidance as to the evidence that they should produce;

- that Senior Case Officers with experience and training in business and accounting deal with those cases involving self-employed parties operating businesses so that the financial documentation of the parties is clearly understood.

Summary

In summary, we suggest that other factors highlighted by the legislation include **re-partnering** by separated parents of children. We support the concept of **a set of presumptions operating in the period immediately following separation** with a view to minimising the upheaval that occurs at this time. We do not accept that a presumption of shared care is in the interest of children. In relation to the issue of child support and care and contact, we feel there are **general changes** that could be made to the **change of assessment** process that would be of benefit to both Carer and Liable parents.

Should you wish to discuss this submission, please contact the writer.

Yours faithfully,

Scott McDougall
Director