

Legal Aid Queensland

Response to the Inquiry into child custody arrangements in the
event of family separation

Terms of Reference

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

(i) what other factors should 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

Matters coming before courts exercising family law jurisdiction in relation to children cover a wide spectrum of families with varying issues and dynamics. Some matters are relatively straightforward, the parties are reasonable and the relationships functional. These are matters in which an agreement is likely to be reached early, where parties seek consent orders to formalize arrangements. In other cases parents do not feel the need to formalize arrangements as they are able to negotiate arrangements for the care of their children with the other parent with a degree of ease. In some of these cases there may be a significant degree of shared care of the children, if that is what the parents determine best suits the needs of their children.

Some of these parties may seek the assistance of Legal Aid Commissions for information and advice about proposed parenting arrangements for children. Many people seeking assistance from Legal Aid Commissions have potential parenting disputes that are problematical and some have situations that have difficult and complex issues to be addressed.

It is submitted that whether the parties readily reach agreement as to the parenting arrangements for their children, or whether they require a degree of intervention by third parties to achieve this, or need a determination of the courts as to the parenting arrangements for their children, each case must be considered individually, which necessarily will need to focus on the unique circumstances and dynamics of the family.

The competing demands on all members of separated families mean that parents, courts and others need to seek creative solutions that focus on the needs of all family members, in particular the child or children in the family. Each family is unique and arrangements for children should reflect the knowledge, skills, other capabilities and risks posed by each parent and their availability.

Shared care arrangements, in the sense of an equal division of time in caring for the children, are seldom in place prior to the separation of parents. Most families do not operate in that fashion. Australian society, including employment, educational and social systems are not generally conducive to equal time shared parenting arrangements. Parents who are able to negotiate parenting arrangements for their children on separation usually make arrangements that reflect parental involvement prior to separation, taking account of all of their responsibilities.

Under the present legislative regime set out in the Family Law Act 1975 (as amended) the fundamental importance of the relationships between children and their parents are recognized. The overarching principles are set out in:

- Section 60B which states

'60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

60B(2) The principles underlying these objects are that, 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 of 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.'*

- Section 61C which states

'61C(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

61C(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

61C(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

- Section 61D(2) which states

'61D(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

- (a) expressly provided for in the order; or
- (b) necessary to give effect to the order.

- Section 65E which states
'65E In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.'

These provisions provide a framework and significant guidance to parents, courts and others in determining appropriate parenting orders for children. They favour regular contact with both parents and other people significant to the child. They also prescribe the responsibilities of parenthood and encourage the sharing of parental responsibilities between parents.

The right of children to know and be cared for by both parents and to have regular contact with both parents (and significant other people) can be accommodated by a range of parenting orders including orders relating to parental responsibility, residence and contact.

The issues raised in the legislation as it presently stands that must be canvassed by a court when orders are made in relation to parenting issues covers, in our submission, relevant factors that should be considered by a court in determining parenting arrangements for children. There is an obligation on the court to make a full investigation of all circumstances relevant to the child or children.

In many situations parents are unable to care for children on an equally shared basis. Reasons for this include:

- a parent undertaking shift work
- a parent working away from home on a regular basis
- geographical location of the parties – in particular a great distance between the homes of the parents, and in particular from one parental home to the child's school
- the accommodation of one parent being inappropriate for the child to live for half of the time- in many low income families there is simply not enough money to set up two households to adequately cater for the needs of the child or children on an ongoing daily basis. Under the current regime practicalities and flexibility can be taken into account. For example, one parent may see the children after school until after dinner on some week days and stay overnight only at weekends and during holidays.

Other factors that might militate against equally shared parenting include:

- the history of the relationships between each parent and the child
- the amount of time that each parent has been able to spend with the child whilst the parental relationship was intact

- the attitude to the responsibilities of parenthood by one or both of the parents
- a parent who has left a relationship in order to avoid the responsibilities of parenthood
- violence or abuse by a party or associated person which would place the child at risk of being subjected to or exposed to such behaviour
- physical, sexual, emotional or psychological abuse by a parent of the child
- the wishes of the child or children, particularly given the United Nations Convention on the Rights of the Child of which Australia is a signatory - it may be that a child, particularly a mature child, has a clear preference to live with one parent rather than another. The Court should take such wishes into account, placing appropriate weight on the wishes depending on the maturity of the child and the child's capacity to understand the long term consequences of their stated wishes, when determining appropriate parenting arrangements for the child
- the ability of the child's parents to communicate and co-parent the child
- the level of conflict between the parents and the impact of such conflict on the child
- the characteristics of a particular child such as
 - special medical, educational or other needs, or
 - a child who demonstrates great anxiety when separated from one parent, or
 - a child who is closely bonded to a step parent or stepsiblings or half siblings in the household of one or both of their parents.
- the capacity of a parent to appropriately care for a child or children may be affected by
 - mental health issues,
 - substance abuse
 - lack of understanding about the needs of children
 particularly if the lack of capacity of the parent places the child or children at risk of harm

The factors set out above are currently taken into account in determining the best interests of the child when making a parenting order under section 68F(2) of the Family Law Act 1975 (as amended).

Shared care arrangements to greater or lesser degrees occur in many separated families. Generally, the parents require the capacity to communicate, cooperate and negotiate with each other. In situations where this is the case matters seldom present to the court. Consequently the fact that a judicial decision is required normally indicates that the prognosis for co-parenting is limited, and shared care in the sense of shared time, is likely to be contraindicated.

Relationships between parents, or between a parent and a child or between other parties and a parent or other parties and a child that

feature either family violence or other abuse pose particular risks for the child. There can be delays in, or complete absence of, approaching third parties and courts for assistance because a parent is overborne by a partner, or fearful of the consequences of making such an approach.

Where family violence has been a part of a family's circumstances, the ability of the victim of such behaviour to negotiate safe and positive parenting arrangements can be compromised, leading to difficult and unsafe arrangements being put in place for the child and parent. The research report *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (Kaye Stubbs and Tolmie, Research Report 1, June 2003, Socio-Legal Research Centre) found that "...the end of the relationship had not meant an end to violence towards them. Much of this violence was linked in some way to the negotiation and exercise of child contact." This study also stated that "witnessing domestic violence perpetrated on one of their parents generally influences children's behaviour detrimentally."

The Family Court is considered to be one of the front line child protection agencies. In *Violence in Families. The management of child abuse allegations in custody and access disputes before the Family Court* (1998) Professor Thea Brown opined: "Generally the families engaged in Family Court litigation were not the families already known to the state child protection services." The situation for families and children involved in such cases can be exacerbated by "the propensity of state child protection authorities to withdraw when family law proceedings are underway or likely to proceed. Furthermore, this can be aggravated by the increased numbers of unrepresented parties who are unable to prepare and present their cases, creating an evidence vacuum in the court" – *An unacceptable risk: a report on child contact arrangements where there is violence in the family*. Rendell (2000).

Recent research also raises the issue of lack of legal aid funding in family law matters. It highlights the fact that "Professionals agreed that the lack of legal aid, and/or caps on legal aid, had negative consequences for the court and clients, including: women dropping actions, women conceding to unworkable contact arrangements that put them at further risk, agreements by default, and a failure to vary orders despite good grounds for doing so. The problems raised by both women clients and professionals concerning the inadequacy of legal aid find support in the research literature." Kaye et al 2003 (supra).

Generally, the approach adopted by the courts, particularly when considering interim parenting arrangements for a child, is to try and achieve the greatest level of stability for the child that is possible in the circumstances of the case.

In situations in which both parents have been significantly involved in the care of their children whilst an intact family, the Court is more likely

to order some form of shared arrangement at the interim stage. If there is a dispute about the level of involvement of each parent, or there are allegations of risk to a child if existing arrangements continue, the matter will be determined on an interim basis by a court relying on the evidence presented by the parties at that stage.

The concept of shared parenting does not necessarily equate to a precise equal division of time. Shared care arrangements are possible and occur in appropriate cases under the current legislative framework.

Many children in Australian society are cared for or have important relationships with people other than their biological parents, such as grandparents, stepparents, aunts, uncles, or other people. The concept of a presumption of "shared custody" between biological parents does not fit with such familial circumstances.

The age and developmental stage of the child is important in terms of the level of shared care.

Newborn children and children who are being breastfed have particular parenting needs. Presently, the courts tend to put in place parenting arrangements that provide for shorter, more frequent periods of contact for very young children, increasing the length and duration of contact as the child ages.

It is submitted that research into the consequences on the physical, psychological and emotional development of all children, in particular very young children, of different types of parenting arrangements should be conducted before consideration is given to any changes to the current legislative regime.

The courts generally try to ensure that siblings are not separated. This is based on psychological evidence about the importance of sibling relationships as support for children in separating families. However, in many families children within the family unit have different needs. A very young child will have different needs to their older siblings. The current regime allows for flexibility in determining the unique needs of each child within the family unit.

Children of parents who have never lived together as a family and never in any way shared the parenting responsibilities for their child, also have particular needs that can be met by the present regime.

It is accepted and acknowledged that some parents feel frustrated and distressed by inadequate involvement in their child's life and are motivated by a desire to maintain or develop appropriate relationships with their children following the breakdown of the parental relationship. There are also parents who are frustrated and distressed by continuing breaches of existing orders. However, it is submitted that this is more likely a consequence of the complex personalities and family dynamics

involved in particular cases, rather than any deficiencies or inadequacies in the current legislation. Matters which come before a judicial officer often have particular features which militate against children spending equal time with both parents.

A number of issues compound parties frustrations such as:

- the difficulties surrounding the efficacy of proceedings to enforce parenting orders
- delays in the courts.

It is submitted that the focus on the best interests of the child needs to be maintained. The individual needs of children and the circumstances of their families need to be assessed in each case. The current provisions of the Family Law Act, in which there is legislative support for the right of children to know and be cared for by both parents and to have regular contact with their parents and significant others (unless contrary to their best interests), provides a good framework in which to formulate individual arrangements for children.

If there were a presumption enshrined in the legislation it is submitted that this would be likely to increase the levels of litigation between parents. If this were so then the levels of conflict in separated families would increase. There would be increased emotional and financial costs to the parents, and additional stresses placed on children. It would be potentially very damaging to future ongoing family relationships.

It would appear that orders which provide for some type of shared care tend to be made (by consent or otherwise) for families in which there has been a significant degree of shared care prior to the separation of the parents. So that such arrangements can be put in place in appropriate cases changes in the structure of employment would be needed to encourage part time and flexible hours so that parents are more readily available to their children. Also, there may need to be an increase in Government funded child care centres which offer appropriate care for children of working parents.

If a parent has been out of the workforce for years for the purpose of raising children, they will often be dependent on Centrelink benefits and child support following separation. If a type of shared regime of parenting is put in place both the government income support and the child support will be reduced. However, the costs of the parent may not be significantly reduced. Some costs, such as food, will be reduced, but the cost of rent and power, for instance, will not be reduced by virtue of the child not being present for a significant period of time.

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

It is submitted that the existing legislation adequately deals with children having contact with grandparents and other persons. They are able to negotiate appropriate contact arrangements or seek assistance from the courts to obtain appropriate orders under the legislation as it currently stands.

Again the focus on the rights of the children to know and have relationships with grandparents and/or other significant people in their lives is the appropriate focus, rather than the "rights" of grandparents/other persons.

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

It is submitted that the objects provided in the Child Support legislation are still a useful enunciation of the principles to apply. Whilst the child support formula has some shortcomings overall it works well given the diversity of situations and family needs and circumstances it must address. One area of possible review is that of blended families where it is considered that the current formula does not adequately take into account the diverse needs and obligations of the blended family unit.

A duty to provide financial support for children exists regardless of the parenting arrangements. On the one hand, contact and residence are determined under the paramountcy principle in the Family Law Act. On the other hand, child support is calculated based on a capacity to pay having regard to the parenting arrangements that are in place. Arrangements and decisions should be made in the child's best interests.

The court should be required to satisfy itself that there are appropriate arrangements in place for financial support of children when making orders in relation to parenting arrangements.

There is a need for legislative reform to reconcile some of the contradictions in the child support legislation, social security legislation and tax legislation. For example, when a couple cohabit Centrelink determines that a person has a legal duty to support the person with whom they live and social security benefits are withdrawn. Under the child support legislation, a person is not seen to have a legal duty to support their new partner and the new partner's children, and the formula operates as if the payer was a single person with no dependents. This can cause hardship and resentment. If a parent has a dependent child living under their roof they are eligible for an income tax deduction in consideration of their support of that child. The other parent often makes a substantial financial contribution to the care of the child but receives no tax deduction.

If a parent has an order that provides for them to have care of a child for more than a certain period of time they are entitled to a percentage of the social security benefits relative to the child. If the paying parent was unable to or did not continue with the care arrangement Centrelink and the Child Support Agency can require the other parent to vary the parenting orders to re-instate the social security benefits relative to the child. Again this increases the level of litigation between the parents.

There are other issues in relation to a legal duty to support another person that in our submission need to be considered in any proposed legislative reform they include

- support of a child over 18 years of age who is completing their education or
- support of a child over 18 years of age who has special needs, or
- support of a de facto spouse who is unable to support themselves.

In shared care arrangements if one parent earns a higher income than the other and so has to pay the other parent some child support there can be disputes about contributions to the child's other financial needs such as

- medical costs
- dental work
- school books
- school excursions
- extra curricular activity fees.

If the parents have agreed on a shared care arrangement without the necessity of involving the court, they will probably have worked out these issues for themselves. However, if shared care orders are imposed these types of payments can be a constant source of disagreement and conflict between the parents in which the children become embroiled.

The courts would have to consider whether they needed to make orders as to which expenses each parent is to be responsible for, as the fixed formula as set by the Child Support (Assessment) Act cannot account for the variables that arise in individual cases. The courts will have to look at the financial costs and needs of the child and the capacity of each parent to contribute to those needs. The courts will need to be aware of the social security implications of shared care on the income of each parent especially where other dependents are involved, for example children of other relationships.

This is likely to be a fertile area of litigation, and thus conflict for the parents, with a flow on effect to the children, as the orders may need to

be revisited whenever there is a change in the circumstances of a party.

For parents on low income, these issues are particularly significant and they can profoundly affect the day to day lives of the parents and their children.

There are many cases where a child's parents have agreed whilst they are together that one parent, usually the mother, should gear their life to look after the children. They have stayed at home for a number of years and/or worked part time. For these carers when they separate payments from social security and child support are their main, and often only, source of income. Reducing that income by ordering an equal time shared care arrangement will cause great financial hardship. It may give the parent more opportunity to enter the workforce as they will have less direct care of the children, but only if there is suitable work available at the relevant time.

Legal Aid Queensland
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