

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: **333**

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Secretary:



4 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

Attention: Ms Margaret Atkins

Dear Ms Atkins,

Re: Submission to the Child Custody Arrangements Inquiry

Please find attached a submission for the above inquiry.

I believe that my case is unusual in that in the eyes of the Family Law Court I am considered to be the "father" as, due to circumstances beyond my control, I am the breadwinner for our family.

Please consider my submission.

Yours faithfully,

SUMMARY

The issue of shared care has been promoted as improving the position of fathers when a family breakdown occurs. However, it also affects working mothers like myself, who may lose residency of their child because they are not considered to be the "principal carer" by the Family Law Court.

A shared care approach provides the OPPORTUNITY for both parents to be parents. This does not occur under the current legislation.

In considering the shared care approach:

- 1 The first consideration must be the safety of the children and the relevant parent. If there is no violence or threats to safety, then the following should occur.
- 2 The "shared care" approach should be the starting point for any negotiation of child care arrangements. This creates an environment where shared care is considered the norm rather than the exception.
- 3 The Family Court mediation facilities should encourage families to set up a positive parenting approach that in turn creates a positive environment for the children. Support should be provided for families to allow them to make good decisions for their children, at a time when they are probably least able to make informed decisions.
- 4 The process of preparing a Family Report, the basis on which the Family Court makes its decision, should be reviewed as it is unnecessarily adversarial.
- 5 Employers should be encouraged and rewarded (not necessarily monetarily) to allow their employees to work flexible hours to assist with parenting responsibilities.
- 6 The Australian Government, in cooperation with the Family Law Court, has the responsibility to create an environment where parents are allowed to be parents and that includes parents who work to support their children.
- 7 Issues that are parent related and child related should be carefully separated. The child should not suffer because of their parent's mistakes or shortcomings. It is up to the Court to encourage the parent/s to sort out their problems BEFORE they become the child's problem.
- 8 The Family Law Act should be amended to remove the ability for the Magistrates Courts to hear Family Law Act Matters. With all due respect to Magistrates, they do not have the resources or experience to hear Family Court matters.

AIM:

The aim of this submission is to maintain that:

- (a) it is in the interests of the child to ensure that maximum access to BOTH parents is available after separation; and
- (b) the proposed shared care arrangements are the most sensible means whereby a child can achieve a balanced relationship with both parents.

BACKGROUND

I am a working mother of a 3 year-old boy and am currently fighting for residency of him in the Family Law Court. My former husband refuses to work, and indeed has not worked for the past 2 ½ years. He appears to have no intention of obtaining work. Nevertheless he is presenting himself to the Family Court as the "principal carer", and expects me to support him financially. I believe this may have been his intention for a considerable period of time.

Under a strict application of the Family Law Act, the binding precedent (i.e. the "Cilento Principle") says that I will lose my child and only get to see him every second weekend.

Fortunately my family has provided me with some financial support. This has helped me fight this matter in the Magistrates court, and then subsequently in the Family Law Court. I have also managed to gain an interim order to shared residency. However, the battle continues and will almost certainly proceed to trial. My husband will only accept full residency of our child without negotiation and is therefore prepared to go to any length to achieve his aims. He has no concerns is this includes bankrupting our family. The next Court action will cost me at least \$20,000.

When my son was 15 months old, I was forced back to work when my husband was dismissed from his job. I need to work because I have no other way of supporting my son and myself. It must be clearly understood that the welfare of my son is, and always will be paramount. Although the Family Court claims to act primarily in the child's interests, the reality of the matter is far removed. This is clearly indicated by the fact that the Family Court is prepared to consider vexatious, ill motivated claims such as those of my former husband.

I implore the Committee to recommend changing this law and encourage the "shared care" approach. My little boy is three years old and needs a mother more than just every second weekend. How can I be a mother to my son with such minimal residency access? Furthermore, a "shared care" approach will eliminate costly and emotional court battles, and ease the burden on the Family Court.

Children need both parents and this should be the starting point for any negotiation. Many employers now offer more flexible working hours that allow both parents to spend more time with their children. This can only be a positive outcome following the failure of a marriage. A child should not suffer because of their parent's mistakes or disputes.

I acknowledge that shared care may not be appropriate or workable in every circumstance, but in many cases it is. Surely it is worth a try first. It would represent a quantum leap in basic "fairness" over the current system.

In my case when the Court handed down the decision for shared care, I was devastated as I felt that the Court was taking my child away from me. However, the reality is that shared care approach is working well for my son and he has settled down into our routine. Granted it is not easy, but where there is no violence involved, it is the best outcome for children.

SUBMISSION

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.

1. The first consideration must be is there any domestic violence involved? If there is, then the Court should put appropriate measures in place to protect the children and the relevant parent. The Court should then enforce counselling for the family. Shared care is not appropriate in this instance.

If there is no violence or threats involved, then these conditions need to be put into place to allow a shared care situation to work:

1. Young children, prior to school age, need short bursts of time with each parent. Older children could spend one week at each parent's house.
2. Each parent should be given the opportunity to arrange their domestic and work situation to facilitate shared care. Unless there is an extremely good reason why not, parents should be required to live close together to allow shared care to work.
3. Each parent should reassure their child that they are loved by both parents and that the other parent is available to the child, even by phone, should the child wish to talk to them.
4. Where the acrimony between parents is such that joint decisionmaking concerning the children is impossible, the Court may need to adjudicate. Negotiation and counselling sessions should be used here to assist the parents to handle the situation.
5. When, after counselling, parents cannot reach agreement over decisions relating to their child, the Court may need to allow one parent to make decisions within certain guidelines. For example, the decision making parent cannot decide to restrict access of the other parent to the child's school or to sporting activities either directly or by deciding to send the child to a school that is unavailable to the other parent.

Benefits of this Approach

1. The child has the opportunity of developing a balanced relationship with both parents.
2. Reduces the likelihood of one parent "poisoning" the mind of the child against the other parent.
3. Allows both parents to participate in their child's life.

Role of the Family Report

Given that the Family Court bases its decision on the Family Report, then:

1. The Family Report should consider what relationships are important to the child, i.e. those with relatives.
2. The Family Report should not just be the opinion of one person.
3. Family Report Writers should be counselled to ensure that reports are prepared in a fair and unbiased way e.g. the way questions are phrased and taking an "interrogation" like approach during the interview process creates an adversarial environment.
4. Family Report Writers or other social workers should follow up with families after the orders have been implemented to ensure that children are being cared for and that the parents are providing a positive environment for their children. If it is not then the Report Writer should counsel the parents, reinforce boundaries and also the kind of behaviour the Court requires from both parents. The Report Writer can require parents to undertake training to assist them to become better parents.

Role of the Family Court Mediators

1. Should provide support to both parents at a time when they are least likely to be able to make effective decisions regarding their families. Sometimes the need to survive post

- separation overwhelms the custodial parent's ability to cope and to share their child with the other parent.
2. Should NOT assume that the outcome of a custody battle will be two weekends and half the school holidays for the working parent (usually the father). They should promote the advantages of shared care.
 3. Should work with parents to negotiate the most effective way of implementing shared care in each particular circumstance.
 4. Should reinforce with parents the requirement to create a positive environment for the child to allow shared care to work.
 5. Should encourage parents to deal with their own issues or problems separately and not make them or confuse them with child issues.

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

- 1 Families are not just mothers and fathers.
- 2 Where a child/ren has a relationship with grandparents, uncles and aunts, cousins these relationships should be allowed to continue post separation.
- 3 If possible, the relevant parent should be allowed to make provision for their child/ren to see their relatives.
- 4 Where this is not possible provision to phone and spend time with relatives like grandparents should be included in the court order. This recognises that the child has a RIGHT to see their relatives.
- 5 The Family Report should be the vehicle to assess what relationships are important to the child. Family members should be contacted by the Family Court Report Writer to ascertain their wishes. Indeed they may be able to suggest some workable contact arrangements.

Whether the existing child support formula works fairly for both parents in relation to their care or, and contact with, their children.

- 1 The parent paying child support should have the same access to the Child Support Agency as the parent receiving child support. In circumstances where child support payments were negotiated as part of the divorce order, the payer of the child support payments cannot lodge an application with the Child Support Agency for a reassessment. Only the parent receiving the child support payments may do that. This blatantly discriminates against parents paying child support, statistically usually the father.
- 2 There should be some mechanism whereby child support payments are spent on the children, rather than supporting the lifestyle of the carer parent. The Carer parent should be expected to account for how the money is spent.

OTHER CONSIDERATIONS

Detractors from the shared care approach have raised a lot of spurious claims undermining this initiative including:

1. A shared care approach puts some children and perhaps a parent in danger.

Where danger to a parent or a child occurs, shared care should never be considered. Detractors using this approach are deliberately trying to derail the shared care approach and this should be treated with distain.

2. Only in 5% of cases is the issue the subject of defended hearing in which the court determines the dispute.

This is not supported by Members of Parliament themselves who have noted that some 25% of their electorate enquiries relate to Family Court issues. Also the amount of public interest in this matter since the Prime Minister, Mr John Howard, raised this matter in Parliament indicates a significant level of discontent within the community.

When a separation occurs, the parties involved seek legal advice. As the law currently stands the parent who is not considered to be the "primary carer" in the eyes of the Court has very little chance of achieving more than two weekends per month access with their children. This is the standard approach taken by the Court and indeed is supported by the Family Court Mediators.

Their solicitor will also advise them of the length of time it takes to get a hearing date and the cost of the hearing (quite likely to be in the range of \$20,000). In most cases parents in these circumstances cannot afford to pay child support and fund an expensive court process that is unlikely to achieve a better result, given the law. So they accept the status quo, access to their child/ren for two weekends per month.

This creates "distressed" fathers and this has certainly been reflected in suicide rates.

3. Parents do not have the flexibility to ensure work patterns and living arrangements can accommodate the demands of children.

This is an archaic approach that does not reflect current 21st Century thought and working environments.

Parents should be given the OPPORTUNITY to arrange their personal circumstances to be child friendly. Currently the non-carer parent does not have this option.

4. Accommodation and other facilities to meet the needs of children in two households are not financially within the reach of both parents, given that separation frequently results in fewer resources being available.

While it is recognised that separation creates financial stress, it is recognised that in Australia generally living standards are fairly high compared to many other countries. Children need a bedroom with adequate sleeping arrangements and food and clothing. This is regardless of whether they are staying for two weekends per month or two weeks per month. Providing this is not beyond the bounds of most families and in cases where there is extreme financial distress charity organisations might need to provide assistance in setting up a home.

This claim does not provide any consolation to the father, or the non custodial parent, who is paying quite large amounts of child support and who cannot get reasonable access to sustain a relationship with their child/ren.

A shared care approach will also reduce the possibility of long winded expensive Court processes, sometimes taking years. This money would be better spent providing resources to be used for the child/ren.

5. Before separation, one parent has carried out most of the child care and the other lacks sufficient parenting skills.

This supposition also does not reflect current social standards and should be considered nonsense.

Where the Family Report Writer considers that a parent (or both) needs to improve their parenting skills then a plethora of parenting courses are available, for example, the PPP Parenting Course at the University of Queensland. The Family Law Court frequently advises or requires parents to undertake these sorts of courses.

Just because a parent is providing full time child care does not mean they have adequate parenting skills. In fact, just the opposite situation often occurs. This issue should be resolved separately and is a parent issue rather than a child issue.

CONCLUSION

Introducing a shared cared approach would assist Australian children to grow up into healthy and well-adjusted adults. Having reasonable access to both parents should be a right available to every child. The Australian Government should provide the mechanism, through the Family Law Court, whereby parents are allowed to be parents, and they should be supported in their endeavours.

Research indicates that divorce in itself is not a traumatic experience for a child. The child only becomes traumatised when the divorce experience is constantly reinforced. Losing daddy or mummy makes a child either blame themselves, think that they are somehow unworthy or are somehow being punished. This definitely reinforces the divorced state and is not healthy for children.

Changing the law will also change the mindset of Family Court representatives and the expectations of the Australian public. It will also empower children and it recognises that they have a right to a mother and father and other family members.

Adopting a shared care approach would also remove the feelings of hopelessness that many fathers and indeed parents in my situation who work to support their family. Working parents should not be punished for supporting their families as they are under the current system. This would also move towards removing the "social welfare mentality" that permeates through certain sections of our community.