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

House of Representatives Standing Committee on Family and Community Affairs
Submission No: 847
Date Received: 8-8-03
Secretary:

Dear Committee Members,

The Western NSW Community Legal Centre provides free legal advice, referral, casework, some advocacy and community legal education to people living in the Orana and Western region of NSW. The centre has a particular focus on family law, domestic violence, child support, Consumer law – Credit and Debt, discrimination and Criminal law. We provide this submission with assistance from the Dubbo Women's Housing Programme ('DWHP') and the Regional Violence Prevention Specialist ('RVPS'). The DWHP runs a low cost housing program for women and children leaving situations of family violence. The RVPS works to promote integrated responses to domestic violence, works with Aboriginal communities to prevent family violence, develop community awareness campaigns.

Our submission deals in detail with Term of Reference (a)(i) in relation to determining the amount of time parents should spend with their children after separation.

(a)(i) Determining time to be spent with children - a presumption of equal time?

We are opposed to a presumption of joint residence for separating families.

We argue that the legislative framework already encourages parents to share duties and responsibilities of their children's care. Where parents cannot agree, the Family court is required by law to make decisions based on the needs, wishes and rights of **children**, not parents. The presumption privileges the rights of parents over the rights of children by over-riding the paramountcy of the 'child's best interests' principle which is entrenched in the Family Law Act.

A presumption of joint residence ignores the factors listed in the Family Law Act which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and whether there is family violence.

A presumption of shared residence reduces families abilities to make their own decisions about parenting arrangements depending on children's needs, parent capacities, geographical distance between them, parent's work patterns, finances and housing.

It ignores the evidence from research that shared residence works for some families where there has been a history of cooperation, a history of shared care pre-separation and where parents voluntarily enter these arrangements irrespective of the law. US studies have shown that where shared residence couples make these arrangements they do so voluntarily, irrespective of legislative provisions. These studies have also shown that the relationship between shared residence parents are commonly characterised by cooperation between the parties and low conflict prior to and during separation. Many men already participate actively in their children's lives after separation. In these families neither fathers nor mothers need the law to tell them to do this. Further, most mothers wish to share parenting duties and responsibilities cooperatively with fathers who were significantly involved with their children prior to separation.

A presumption does not reflect current caring practices in intact families where mothers are still predominantly the primary carers of children and undertake most of the domestic work. We argue that families make arrangements for shared residence voluntarily, and that a presumption of shared residence would mean arrangements for some families post-separation would be significantly different from pre-separation arrangements.

There will be consequences for fathers who agree to contact rights as a preference to joint custody. These men will have to show why they are not willing to accept shared residence, rather than the court determining what is in the child's best interests. Current provisions of the Family Law Act already include mechanisms for shared residence being a child's right where it is in the child's best interests.

ECONOMIC COST TO FAMILIES

The child support consequences, brought about by shared residence, will force single mothers, already amongst the most impoverished group in the community, to plummet further into poverty and consequently increase the number of children also living in poverty.

Research, conducted by the Australian Bureau of Statistics notes that of single parent families, 75%-85% are headed by single mothers. Being the resident mother of children is still the most likely predictor of poverty in Australia. Research over the past two decades has consistently shown that women are more likely to experience financial hardship following marital dissolution. In a 1993 study, husbands surveyed three years following their marital breakdown had returned to income levels equivalent to pre-separation while wives' income levels had dropped by 26%.

It will present practical difficulties for many separated parents and children and the burden of running two households will be too great for many families. These difficulties will be exacerbated in regional, rural and remote areas where separated families are often living hundreds of kilometres apart, with very limited access to public transport. In such circumstances shared residence would place enormous financial burdens on parents and children.

FAMILY VIOLENCE

A presumption of shared residence will place women and children who are victims of violence at increased risk of further violence.

Data from a 1996 Australian Bureau of Statistics national benchmark study showed that 23% of women who have ever been married or in a de facto relationship had experienced violence in that relationship. This means that one in five Australian women have experienced violence by their current or former partner representing a total of 1.4 million women.

It is already difficult to get children included on Apprehended Domestic Violence Orders ("ADVO"). A legislative presumption of joint residence will undoubtedly ensure that local courts will be even more reluctant to give children ADVO protection or include them on their mothers application if the Family Court is going to be compelled to look at shared residency. Therein exposing women and children to inappropriate orders that place them at risk of continuing family violence.

There is a significant body of research that demonstrates that there is a high incidence of domestic violence in cases going to the family court and that domestic violence against women continues after separation.

The presumption will force some children to live with violent fathers and will force mothers to have to regularly negotiate with and be in the presence of violent ex-partners. Analyses of cases in the Melbourne and Canberra Registries of the Family Court between 1994 and 1995 found that one half of all cases going to Pre Hearing conferences involved allegations of child abuse. It is not surprising that violence and abuse is more prevalent in families, who separate, than families who remain together.

Earlier this year ATSIC released its family violence action plan, addressing issues of family violence endemic in a number of aboriginal communities. ATSIC acknowledged that family violence was one of the most serious problems affecting indigenous communities and has recognised that the safety and wellbeing of those subjected to family violence must have priority. Further, ATSIC stipulated that there must be a focus on children and young people and the provision of protection for them. A presumption of shared residence will do little to support the policies, initiatives and programs provided to address family violence in aboriginal communities or individual separating families.

We argue that there is a substantial risk that a legislative presumption of joint residence may well become a government endorsed mechanism benefiting abusive men who wish to control their women partners and children after separation.

BURDEN TO THE LEGAL SYSTEM

A presumption of shared residence will see an increase in litigation as parents who do not want 50:50 shared residence may feel the need to go to court. Given the lack of legal aid funding, many people will self-represent, increasing delays and stretching the resources of the Family Court and Federal Magistrates service. Such a situation has the potential to ensure inequality before the law for any family without the funds to rebut a presumption.

Additionally, it may lead parties to re-open finalised cases in the belief that a joint residence presumption law will bring them a different outcome. Community agencies are already reporting contact from women whose former partners are threatening to take them to court, or back to court, to get new arrangements for the children.

CONCLUSION

Finally, we are not opposed to joint residence; rather we are opposed to a *presumption* of joint residence. We believe that a presumption of shared residence is a dangerous departure in the governments family law policy and privileges the rights of parents over the rights of children by over-riding the paramountcy of the 'child's best interests' principle. We argue that in making decisions in relation to children the best interests of the children should be the paramount concern – the interests of the mother or the father should not be more important that that of the children.

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