FOOTSCRAY
COMMUNITY
LEGAL
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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

Dear Committee Members,

INQUIRY INTO CHILD "CUSTODY" ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

Footscray Community Legal Centre is a community based, non profit 'generalist' community legal centre providing free legal advice, referral and on going assistance in the Inner Western suburbs of Melbourne. The Centre has operated for more than 20 years in Footscray's diverse community comprising 44% of people who speak a language other than English and experience overall high socio-economic disadvantage. The Centre provides on going casework of which more than 30% is family law related. The Centre also co-ordinates an Intervention Order Support Project at the Sunshine Magistrates' Court providing advice and assistance to women experiencing family violence who are seeking the protection of Court orders. The Centre also employs a full time financial counsellor.

Footscray Community Legal Centre Inc. endorses the well written submissions of Womens' Legal Service Victoria and the National Network of Women's Legal Services. Those submissions provide comprehensive reference to relevant data and research in support of a position which is opposed to the introduction of a presumption of shared residence. We do not intend specifically referring again to that research or duplicating reference details. We commend those submissions to the Committee. We wish to reiterate the matters raised in those submissions and add to them.

We intend commenting on (a)(i) of the Terms of Reference and will only briefly touch on Terms (a)(ii) and (b)

(a)(i) Determining time to be spent with children – a presumption of equal time.

A shift in emphasis away from the "rights of the child" to the "rights of the parent" ?

We are concerned that the Terms of Reference imply consideration of a shift in the current emphasis in dealing with children's issues away from that of the "rights of the child". In our view, it is counter - productive to shift the focus from outcomes which are based with the welfare of the child being paramount to an almost 'possessory' parental right regarding residence (as we understand it this was one of the major reasons for the changing of the nomenclature of 'custody' and 'access' to 'residence' and 'contact'). In the small percentage of cases where residence and contact issues become the subject of bitter acrimony (often as a result of unresolved emotional/relationship issues pertaining to the relationships of the parents) and therefore the subject of dispute in the Family Court, the shift toward a 'parents rights' approach will ultimately be an impediment to settlement and detract from the paramount consideration – being the best interests of the child. There is also a significant likelihood that litigation levels will increase as a result of parents wanting to 'enforce their rights' rather than focussing attention on the child/ren.

Family Violence and the Shared residence presumption

The introduction of a presumption will by its nature set a 'standard' or 'norm' in the consideration of post separation negotiations for child residence. We are gravely concerned that this would impact most significantly in matters where there is a history of family violence in the relationship. We are concerned that the presumption would force children into residence arrangements where they are further subjected to the risk of violence. This is particularly so for those that cannot litigate to rebut the presumption due to lack of resources and at the 'interim' stage of Court proceedings.

It is our experience that often one party (overwhelmingly the mother) is overborne or disempowered in child residence 'negotiations', particularly where family violence is an issue. A presumption of shared residence will force those parties to accept inappropriate residence arrangements for children in a similar way to which some parents currently accept fortnightly weekend contact as the norm. It is our experience that women escaping family violence situations feel considerable pressure to negotiate arrangements for contact which are inappropriate rather than submit to the lengthy and emotionally debilitating Court process.

In matters where litigation is commenced, a presumption would most heavily impact on cases at the interim stage. Interim orders can have significant weight in the final determination as they can endure for up to 12 months while the matter proceeds to full trial and lead to 'status quo' arrangements. Sadly the Court does not have the resources at the interim stage to call on the expertise of professions such as occurs with the preparation of a 'Family Report' and as such, cannot hope to fully explore the issues at hand. Similarly the Court is restricted in the time it can devote to interim hearings.

Further it is common that all the facts upon which a party may wish to rely cannot be presented to the Court at the Interim hearing given the short preparation time prior to hearing. This would be a significant issue in providing a full and complete argument in support of a rebuttal of a shared residence presumption.

An alternative Presumption where Family Violence has occurred

We agree with submissions of the National Council of Single Mothers and their Children (NCSMC) and others who argue for an adoption of principles applied in New Zealand regarding a rebuttable presumption against residence or unsupervised contact where the child or other party to the proceedings has been subject to violence by the party seeking same. In their submission to the Senate Standing Committee in relation to the *Family Law Amendment Bill (2003)* NCSMC stated as follows;

" NCSMC recommends amendments to section 68F of the Family Law Act to require that 'safety' is the threshold determinant of a child's best interests when violence or abuse has been raised as an issue in the case and its use has been established on the balance of probabilities. When violence is established as an issue, judges should be required to pursue a structured risk assessment similar to that used in the Guardianship Act in New Zealand.

Section 16B(4) of the NZ Guardianship Act creates a rebuttable presumption against custody or unsupervised access being given to a perpetrator of violence unless the Family Court can be satisfied that the child will be safe during such arrangements. The section states that if allegations are made that one of the parties has used violence against the child who is the subject of the proceedings, or a child of the family, or against the other party to the proceedings, the Family Court must "as soon as practicable" determine whether such allegations have been proved. The burden of proof is the civil balance of probability standard (50.01%). If the Court is satisfied that "violence" (defined in the statute as physical and/ or sexual violence but extended by case law to include psychological violence as well) has occurred, the section creates a rebuttable presumption, mandating that the Court shall not make any order giving custody or unsupervised access to a violent party unless the Court is satisfied that the child will be safe. As with all rebuttable presumptions, once the Court is satisfied that "violence" has occurred, the onus shifts to the violent party who must then demonstrate that the child will be safe during visitation arrangements. Reflecting the provisions of the New Zealand Domestic Violence Act, court decisions have held that a single act of abuse may trigger the rebuttable presumption. As well, acts which in isolation may appear minor or trivial but which form a pattern of behaviour also may trigger the presumption.

Section 16B(5) provides a list of statutory criteria which must be used by the Judge in deciding whether the child will be "safe". These mandated factors make risk assessment the central feature of residence/contact disputes where domestic violence has been present. They include the nature and seriousness of the violence; how recently and frequently such violence has occurred; the likelihood of further violence; the physical or emotional harm caused to the child by the violence; the opinions of the other party and the child as to safety; and any steps the violent party has taken to prevent further violence occurring. The occurrence of such violence is the central issue of the court's initial inquiry and the assessment of the risk of further violence occurring determines the shape of the residence/contact order."

In the best interests of the child

We are concerned that the Terms of Reference for the enquiry appear to be inconsistent in that they could be seen to be equating 'in the best interests of the child' with 'equal time'(shared residence). We fail to see how a presumption of shared parenting/joint residence can of and in itself be 'in the best interests of the child'. We question whether

there is sufficient empirical data to claim that as a general tenet, joint residence is prima facie 'in the best interests of the child'.

There is very little data available on the relative benefits or otherwise of shared parenting and more needs to be done before consideration of a presumption which would make 'equal time' the norm.

There is ample opportunity for the Court to determine now, given the individual circumstances of a case before it, that joint residence is appropriate if required given the discretion available to the Court in determining weight to s68E and F factors . There does not need to be a presumption underlying the current paramount consideration for the Court to make such Orders and it would be inappropriate to impose one.

An increased likelihood of Court intervention and parental bitterness toward the system

There is a risk in the introduction of a presumption of shared residence that there are likely to be more parents seeking Court intervention to rebut the presumption than is the case currently. The more frequent current arrangement (usually arrived at amicably between the parties) is not shared parenting. If there is a shift in emphasis toward shared residence without reference to individual circumstances as provided for by a presumption, then it would appear on current experience, that there would be more parties who consider the presumption to be inappropriate and hence would seek judicial intervention.

A presumption would stand as a guiding principle for those who currently negotiate their own arrangements without the intervention of the Court and hence the expectation of shared residence would be heightened notwithstanding that shared residence occurs in only approx. 5% of post separation families currently. Research indicates that in the vast majority of pre-separation families one parent generally has the role of the primary carer and this would not be reflected in the introduction of a shared residence presumption.

In order to ensure viable and workable contact/residence arrangements, relationships between the parties need to remain as amicable as is possible well after litigation is concluded. If parents identify themselves as being singled out in that process because the Court considers that shared parenting is not appropriate (under a regime where shared parenting is the presumption), there is likely to be greater animosity toward the Court and the system as parents will be openly identified as being outside the norm. This in turn may lead to a less workable relationship between the parties at the conclusion of Court proceedings than is currently the case.

Animosity toward the Court and a deteriorating relationship between the parties, makes ongoing arrangements more problematic - that is the current experience in the limited number of cases where the Court has refused one party contact or greatly restricted it. The non resident parent often feels 'branded' by the Court as the presumption for allowing contact between the non resident parent and the child is openly overridden. The non resident parent is clearly 'singled out' as being outside the 'norm' and they often perceive this to be unjustified. In the case where it may become more likely than not that most children's issues matters proceeding to Court will provide for determinations which are outside the presumption (of joint residency) there is potential for more non resident parents who feel aggrieved as not falling within the 'norm' of the presumption.

Disruption to the child's normal routine

We are not opposed to shared residence and actively support the notion in appropriate circumstances. Joint residence works well, in our experience, between parents who are in tune with the needs of the child and can continue to have a rational and amicable relationship with their ex-partner on the basis of maintaining a focus on the child as the primary concern. There is no doubt that in some cases shared residence is the most appropriate option. Even in these instances where the parents live within close proximity and the child can continue to attend the same school and have the same interests and friends outside school, it is our experience that joint residence can be disruptive.

In circumstances where parents live significant distances from each other we fail to see how joint residence is either practical or feasible without significant impact on the parents (and therefore the children). We therefore consider the consideration of a presumption to be at odds with the practical circumstances of the majority of post separation families.

It would appear that there is considerable scope for further research to be undertaken in relation to joint residence prior to further consideration of the issue.

Family Law Act 1975

The *Family Law Act 1975* was a land mark legislative shift in philosophy in relation to family dispute resolution. The Family Court upon its inception in 1976 has shown that impartial decision making in the application and interpretation of the *Act* can make for fair and equitable decisions in an area of law which is arguably the most challenging and difficult area in which to resolve disputes. Family law disputes are generally resolved amicably by parties that recognise the need to compromise individual parental need in order to do the best thing for the child/ren – these are the matters where no Court intervention is required.

In matters that become intractable however, the Court must ensure that the most vulnerable party (the child) is its paramount concern. The *Family Law Act* 1975 provides a strong legislative framework and balances the sometimes competing interests of the parents (and occasionally third parties) with the interests of the child in determining appropriate outcomes. Often neither parent is happy about the outcome however the Court must walk this line to ensure fairness and equity 'in the best interests of the child'. The current 'paramount consideration' of the Court must not change and must not be in any way hamstrung by a presumption of joint residence.

There are presumptions and myths which abound in the community in relation to the workings of the *Act* which ought to be addressed. An increased emphasis on education of the Court's philosophy and heightened community discussion and information provision in relation to the issues will lead to far more productive outcomes than the introduction of a presumption of shared residence.

There should be promotion and fostering of conceptual acceptance of philosophies such as;

- equal responsibility for parenting in pre and post separation relationships
- greater recognition of the importance and value of the work of parents who provide the primary care of children in the home,
- financial support of children not being solely a function of the amount of time spent with the child
- that it is the best interests of the child which must be paramount and not a possessory right of either parent to contact/residence
- children should not be used as 'pawns' where unresolved relationship issues persist in post separation communications between parties
- promotion of the potential benefits of early intervention/ relationship counselling for parties considering separation

These philosophical tenets should be promoted through greater community education and awareness. The introduction of a shared residence presumption will not lead to such acceptance.

Adequate Legal Aid funding

Many parties in Family Law matters are frustrated by what can be a long and confusing Court process. Often parties in disputes are required to complete many documents and attend 'the Court of many returns' without the support of lawyers. It is our experience that many unrepresented litigants feel that they did not have a full opportunity to put their case to the Court and many are too emotionally caught up in the dispute to make clear and rational decisions or negotiate on their own behalf in a constructive way. Some are overborne or intimidated by ex-partners. Many consider that outcomes may have been different if they had had legal representation (particularly where one party is represented and the other is not), and may feel disempowered by the Court process.

The availability of Legal Aid funding for those attending the Family Court is extremely limited and even for those who qualify, may be withdrawn or expended before cases are determined. The system and the Family Court cannot hope to provide access to justice for families in dispute in relation to children's issues without a significant injection of Legal Aid resources.

Many of the loudest voices calling for the introduction of a presumption of joint residence may be unrepresented litigants who have been perplexed, confused and possibility harshly done by, in a system where adequate Legal Aid funding may have made a difference to their perceptions of the 'fairness' of the Court. The system must be looked at from a broad perspective not just that of individual cases which have fostered disgruntlement.

The level of disgruntlement would, in our view, be significantly reduced if litigants felt they had received a fair hearing, whether or not their perception is a correct one. Some litigants will never be happy with the Court outcome as they are unable to accept the issues of relationship breakdown.

Adequate Legal Aid funding for the Court's processes is a fundamental element in the provision of access to justice in the Family Court.

(a)(ii) Contact with third parties including Grandparents

We contend that the legislative framework of the *Family Law Act 1975* adequately allows for children's contact with third parties. Grandparents clearly have standing before the Court and the paramount consideration of the best interests of the child is adequate criteria for determining a child's contact with third parties.

We consider that there could be consideration of a 'stream lining' of the process for grandparents who seek residence of children with the consent of all parties as the current process requires the obtaining of a Family Report (cf. Consent Orders generally). In our experience, that report can take many months to prepare, during which time the grandparents may be left in 'limbo' in relation to parenting payments for the children through Centrelink or in dealings with schools and the like who require formal proof of 'long term care and control'/residence.

Reference (b) – Whether the existing child support formula is fair.

In our view the incorporation in the Terms of Reference of the issue of the fairness of the Child Support formula is concerning in itself as again this shifts the focus from the issue of what is best in the interests of the child. The best interests of the child should not be in anyway determined by discussion regarding the financial liability of parents in supporting children and it is inappropriate to link any discussion of joint residence with the discussion of the financial responsibilities of non resident parents.

There is an acknowledged link between the issues given the current formula in calculating Child Support is in part based on the time the child spends with each parent. There may well be a need to revisit the formula. We do not intend to comment on the appropriateness or otherwise of the current formula. We do however note that where the primary focus of the inquiry is on joint residence, the incorporation of Child Support issues has potential to cloud the fundamental issue. The issue of what is in the best interests of the child is the initial question which should not be influenced or determined by the second question of what financial responsibilities flow from any arrangement or decision made regarding parenting arrangements.

It is our view that whilst the non resident lobbyists have been vocal regarding their perceptions of the unfairness of the Child Support system, there are an equal if not greater number of resident parents (who are largely unheard) for whom the system is similarly 'unfair'. It is our experience that for every non resident parent who complains about the 'hardship' imposed by the assessment formula there is a resident parent that complains that they are not receiving adequate financial support from the non resident parent - that self employed non resident parents 'dodge' the assessment through 'creative accounting' or by working 'cash in hand' is a common complaint.

There are also issues regarding contact with the child where Child Support is being withheld or the resident parent considers the amount to be inappropriate and this leads to disputation about continuity of child contact. This is a further issue which needs to be addressed by community education to ensure acceptance of the underlying philosophy that there is a parental responsibility to financially support children post separation and that child contact is an independent issue from that of the receipt of Child Support payments; an issue of what is in *the best interests of the child.*

Yours Faithfully
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