



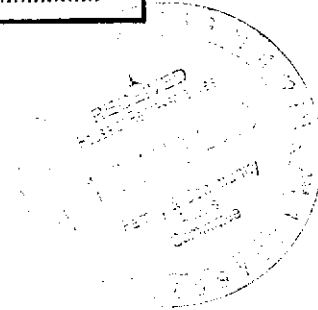
# THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

Your ref  
Our ref: DF/DS  
8 August 2003

House of Representatives Standing Committee on Family and Community Affairs
Submission No: <b>409</b>
Date Received: <b>8-8-03</b>
Secretary: .....

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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



## Re: Child Custody Arrangements Inquiry

We **enclose** for the consideration of the Standing Committee a Response prepared by the Family Law Committee of the Law Society of the Australian Capital Territory.

Any queries which the Committee may have in relation to the response maybe directed to the convenor of that Committee, namely Ms Kate Hughes.

Yours faithfully

Denis Farrar  
President



## Response to the Inquiry into Child Custody Arrangements in the event of Separation

- (a) *Given that the best interests of the child are the paramount consideration 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.*

### **Summary of Recommendations**

1. The Law Society of the Australian Capital Territory does not support the introduction of a presumption such that children spend equal time with each of their parents post separation.
2. The success of any arrangement for children is not dependant upon the length of time that each child spends with each parent but rather in the way that the arrangement is implemented by the child's parents.
3. A presumption favouring one regime over another will lead to an inadequate consideration of the factors facing each particular child in determining his or her living arrangements in circumstances where his or her parents are living separately.
4. The current provisions of the *Family Law Act (1975)* provide the necessary flexibility for the Court to determine the most appropriate arrangements applicable to each case in that the Court must consider factors which are referred to section 68F(2) of the *Family Law Act*.
5. The resolution of the practical difficulties associated with an equal time arrangement will be outside the financial reach of many families who are adjusting to the increased cost of running two households instead of one.



## Reasons for Recommendations

1. The decision to make a shared residence Order (including an equal time Order) has always been available to the Court. It, however, is not a usual Order. Research with children in the UK indicates that "shared residence" is more likely to be organised to suit parents rather than children and that it is in children's interests for them to have a home base<sup>1</sup>. Shared residence is the least common post-separation arrangement. Only 3% of children from separated families lived in "shared care" arrangements in 1997<sup>2</sup>.
  
2. It is in a child's interest to have a meaningful relationship with both parents following his or her parents' separation. The upheaval that separation brings to a child's life should be minimised and as far as possible stability promoted in the child's life. Whilst in some cases a child's best interests may be promoted by he or she spending equal time with each parent many practical difficulties need to be overcome. These difficulties include the following factors:
  - 2.1 both parents being able to provide adequate accommodation to enable the children to stay for relatively lengthy periods of time;
  
  - 2.2 both parents being able to care for children taking into account that many parent's work hours do not coincide with a child's school hours;
  
  - 2.3 the undesirability for children to travel lengthy distances to school in order to spend equal time at each parent's home;
  
  - 2.4 the desirability to provide facilities for children at each home such as bedrooms, toys and computers in economic circumstances where parents are adjusting to the expense of running two households instead of one;

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<sup>1</sup> Smart, C., 'Children's Voices' Paper presented at the 25<sup>th</sup> Anniversary Conference of the Family Court of Australia, July, 2001, available at <http://familycourt.gov.au/papers/html/smart.html>.

<sup>2</sup> Australian Bureau of Statistics, *Family Characteristic Survey*, Australia, Ct 4442.0, AGPS, Canberra, 1997.



2.5 the desirability for care arrangements for children to be continued following separation. Many families of young children organise their paid work and family responsibilities to enable one parent to be available to care for young children at home and during before and after school hours. A shared care presumption may result in children spending more time in paid child care following separation.

3. The Court has previously rejected presumptions in children's cases

Since the early history of the *Family Law Act (1975)* the Court has rejected presumptions in determining the outcome of applications for children. The presumptions rejected include the so called "mother principle" (children are best cared for by their mothers) maintenance of the "status quo" of care and separation of siblings. The Law Society agrees with the sentiments expressed by Justice Fogarty in the decision of *In the Marriage of Mathieson* [1977] FLC 90-230.

Justice Fogarty stated "*Unfortunately for the Courts custody cases cannot be determined by applying preconceived formulae to the myriad facts which inevitably occur in a wide range of custody cases. No doubt such a course is convenient enabling one to pass responsibility for the decision in an individual case from one's own shoulders to the shoulders of "the law" but to do so is to ignore the direction which is clearly laid down in the legislation, namely the welfare of the individual child or children who are concerned in that particular case.*"

The general principle stated by Fogarty J *In the Marriage of Mathieson* was approved by members of the High Court in *Gronow and Gronow* (1979) FLC 90-716, a case in which the High Court rejected the presumption of the so-called mother principle.

4. Most applications to the Court resolve by consent. In some circumstances, for example where there is a history of domestic violence



or insufficient Legal Aid funding, there is reason to question whether consent is genuine in all cases. A presumption for a particular regime of custody will increase pressure on parties who are victims of violence and those with limited funds to resolve the matter in accordance with the presumption.

5. Following separation a significant number of adults will form new relationships. A presumption of equal time may create further difficulties for a child required to spend equal periods in a household or households with step-parents and step-siblings. Step-family relationships have complex dynamics and require a great deal of sensitivity and patience for all concerned. A presumption of equal time in these circumstances may cause unnecessary hardship to children.
6. A presumption favouring equal time is likely to lead to increased applications to the Courts for "specific issues" orders in circumstances where parents are unable to reach agreement about matters such as where the children attend school. Currently, the choice of school for a child is largely determined by agreement taking into account the school's proximity to the child's home.
7. It is not clear what ill the Inquiry is designed to cure in circumstances where the current legislation provides a flexible framework to make arrangements for children on a case by case basis. If it was thought appropriate an additional provision could be inserted in section 68F(2) requiring the Court to consider whether it was appropriate or not for a shared residence arrangement to apply in the circumstances of the case.
8. More research is needed into the position of children post separation and the effect on children including the relevance of accommodation arrangements for children to develop and maintain meaningful relationships with each of their parents.



9. In some circumstances a child will have a significant relationship with a person or persons who are other than his or her parents. The presumption will accord those relationships a lower status to that of the biological parents.

#### **Circumstances of rebutting the presumption**

10. If the presumption was introduced the following are included in matters which would need to be addressed:
- 10.1 Should the presumption for equal time operate in all circumstances or only in circumstances where one party seeks 50% care?
  - 10.2 Should the presumption operate to prevent both parents from relocating to a different locations?
  - 10.3 Should the presumption be restricted to those circumstances where parents have lived together with the child and should it take into account the child's developmental and cognitive age at the time of separation?
  - 10.4 Should a breast fed child be subject to an equal time presumption?
  - 10.5 Should it apply to interim Orders or only Final Orders?

- (ii) ***in what circumstances a Court should order that children of separated parents have contact with other persons, including their grandparents***

The current legislation deals adequately with the position of applications for contact by persons other than a child's parents, including grandparents. Such persons have standing to make applications to the Court and the Court does make Orders in favour of such parties taking into account factors referred to in section 68F(2) - the best interests factors.

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



11. It is concerning that the terms of reference include a reconsideration of the Child Support formula. Most single parent families are headed by single mothers<sup>3</sup>. Research over the past two decades shows that women are more likely to experience financial hardship following marriage breakdown<sup>4</sup>.
12. The Court should be required to satisfy itself that there are appropriate arrangements in place for financial support of children in making contact and residence Orders.
13. Any changes to Child Support legislation should only be made after a careful examination of all of the relevant facts and consultation with all stakeholders including payees.
14. There should be a greater attention given to enforcement powers particularly against self-employed payers who are in a position to minimise the Child Support income.

Family Law Committee of the Law Society of the Australian Capital Territory  
Dated: 7<sup>th</sup> August 2003

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<sup>3</sup> Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families*, Australia, Cat No 6224.0, AGPS, Canberra, 2000.

<sup>4</sup> See R Weston, 'Changes in Household Income Circumstances', in P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies (1986) 100; R Weston, 'Income Circumstances of Parent and Children: A Longitudinal View', in K Funder, M Harrison and R Weston (eds), *Settling Down: Pathways of Parents After Divorce*, Australian Institute of Family Studies (1993) 135.