Northern Rivers Community Legal Centre
10 Club Lane
PO Box 212
Lismore NSW 2480

ABN: 98 071 395 652

Administration & Legal Service:
02 6621 1000
02 6621 1011 (Fax)

Tenants Service:
02 6621 1022
1800 649 135
02 6621 1033 (Fax)

Domestic Violence Service:
1300 720 606
02 6621 1055 (Fax)

18 August 2003

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

Dear Committee Members,

Please find attached the Northern Rivers Community Legal Centre's submission to the Inquiry into Joint Residence Arrangements in the Event of Family Separation.

Please direct any enquiries about this submission to Ms Tatiana Lozano Women's Outreach Solicitor, or Mr Steve Bolt, Principal Solicitor.

Yours sincerely,

Tatiana Lozano
Women's Outreach Solicitor

Inquiry into Joint Residence Arrangements in the Event of Family Separation

The Northern Rivers Community Legal Centre is located in Lismore, in northern NSW, servicing an area from Grafton to the Queensland border, and from Tabulam to the coast. Services provided by the Centre include free legal advice (and sometimes representation) and a women's domestic violence court support scheme.

The Northern Rivers is one of the fastest growing areas in Australia (4.1% growth- ABS 2000) and has a large population of families with young children (23.1% ABS 2000). Eighteen point six percent of our families are single parent families, well above the NSW figure of 15.5%. Many of our families live in small villages and isolated communities that are poorly serviced by schools, health services and public transport.

Our submission will focus on Term of Reference (a)(1):

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

The submission will also comment on the consequences of joint residency from a rural, regional and remote perspective.

How much time should a parent spend with their child post separation?

The existing provisions

In order to answer this question faced daily by Courts with family law jurisdiction, the Courts rely on existing provisions in the *Family Law Act 1975*, which focus on the child's best interest, the rights of children and joint responsibility of parents.

The best interests of the child are paramount[1] and, as such, the main consideration when the Courts are making any decisions about parenting orders

[1] *Section 65E Family Law Act 1975*

In order determine the best interests of a child in any given matter, the Courts are then guided by various other provisions which set out fundamental principles and factors, rather than refutable presumptions.

Section 60B of the *Family Law Act 1975* outlines the object of Part VII of the Act which deals with children, that 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".

Section 60B goes on to list the principles which underlie these objects and states that "children have the right to be cared for by both parents" and that children "have a right to regular contact with both their parents". It also states that "parents share duties and responsibilities concerning the care welfare and development of their children".

Further, in section 68F, the Act lists a set of factors to be considered by the Courts when determining the child's best interests, in each individual case. These include the wishes of the child, the nature of the relationship between the child and each of the child's parents, the effect of any changes to the child's circumstances, the practical difficulty and expense of a child having contact with a parent, the capacity of each parent to provide for the needs of the child, the child's maturity, the need to protect the child from violence and abusive behaviour, the attitudes of parents, the likelihood of further proceedings in relation to the child and any other factor or circumstance that the Court thinks is relevant. (see Appendix A).

We submit that the objectives and factors mentioned above are sufficiently adequate to assist the Courts make decision about how much time each parent should spend with their child, post separation. The objectives in section 60B and factors in section 68F are comprehensive, giving consideration to both the child and their parent, as well as giving the Court the discretion to consider other factors it deems relevant in any particular case.

We submit that there is no need to amend the current *Family Law Act* to include any further factors which would assist the Courts in making decisions about time spent by children with each parent post separation.

Rebuttable Presumption of joint residency

We consider that the introduction of a *rebuttable presumption* in favour of joint residency would be detrimental to all family members who are dealing with separation. We believe that the existing legislative provisions of the *Family Law*

Act are sufficiently adequate to allow the Court to make a range of post-separation arrangements, including joint residency, in the best interest of the child.

It is notable, though, that the existing provisions requiring sharing of responsibility do not require *equal* sharing. We believe this quite validly reflects the difficulty of attempting to somehow promote quality parenting by measures of quantity, including equality of the time spent with each parent.

The existing provisions in the *Family Law Act* requires the Courts to make an assessment of every individual case, based on its facts, and make decisions in accordance with the principles set out in the Act. The Act acknowledges the specific needs of families and allows the Courts to make appropriate decisions in each case where parents cannot agree on arrangements in relation to the care of their children.

To introduce a rebuttable presumption of joint residency would mean that the Courts would have to start with joint residency as a starting point rather than the individual facts of each case. The Courts will have to consider evidence and submissions from the parties involved on why and how the Court should deviate from the one-size-fits-all presumption. The presumption would usurp the Courts ability to consider a matter according to the best interests of the child.

The existing practice

The majority of families who separate reach an agreement about how much time each parent will spend with their child (residence and contact arrangements) without having to access the Courts. The most common arrangement reached out of Court is for mothers to have residence and for fathers to have contact. This reflects the reality that prior to separation it is women that provide the majority of care for their children, leaving men less equipped to look after their children post-separation.

Joint residence is a relatively recent social phenomenon, and the number of separated parents who choose this option is very small. According to ABS figures, only 3% of post separation residence and contact arrangements involve joint residence[2], with a similar proportion (less than 4%) of parents registered with the Child Support Agency last year having equal (or near equal) care of their children.[3] The numbers choosing this option will probably increase in future years, regardless of legislative change.

---

[2] Australian Bureau of Statistics; Family Characteristics Survey, Ct 4442.0, AGPS Canberra, 2003.

[3] Attorney General's Department; Child Support Scheme Facts and Figures, 2001-02, Canberra, 2003.

In our experience, joint residence arrangements are made after agreement between the parents, and are rarely (if ever) imposed by Court order. We consider that joint residence can provide viable, healthy and constructive family structures for the children of separated parents. But we consider that joint residence works best when (and perhaps only when) both parents are committed to making it work. It is most common where both parents have had an active and positive role in the care of their children *before* separation.

The low numbers of parents choosing joint residence reflect not just the social novelty of the concept, but also that the majority of separating parents feel unable or unwilling to make it work. To a greater extent than the more traditional sole residence/contact patterns, joint residence requires ongoing communication and co-operation between the parents.

The problem is in attempting to impose this model as a standard on all separating families. The fact that few families currently choose this option should indicate that it is not (yet anyway) socially popular. We submit that it is unwise social policy to impose as a norm a family arrangement which has only been chosen willingly by a very small minority.

Displacement of "best interests" test

Although the presumption of joint residence is usually put in terms of being subject to the best interests of the child (as indeed the Committee's terms of reference are expressed), any such presumption must undermine the operation of the bets interests principles and must undermine the Court's ability to exercise discretion to find an outcome best suited to the circumstances of the children and parents involved.

The "best interests" test has been a hallmark of Australian family law since the introduction of the *Family Law Act*. It is widely supported as representing the most appropriate way to approach the always difficult conflict over children between separating parents, because it properly puts the focus squarely on the rights of the children (ahead of the adults involved) and because it allows – even demands – the exercise of a case-by-case discretion.

A legislative presumption – even if rebuttable - puts joint residence in a privileged position compared to other possible options. Joint residence is **not obviously** in the best interests of all children. It is certainly not in the best interests of children whose current non-custodial parent is violent, abusive, neglectful, selfish, uninterested, unreliable, or uncommunicative.

Yet requiring a parent to prove joint residence is not in their child's best interests can be difficult. Inevitably such a presumption would result in many poor decisions (ranging from inappropriate to tragic), and would be more likely to do so than the existing law and legal practice.

Violence and abuse

A significant proportion of child residence matters that go to Court involve cases where there are allegations of domestic violence and/or child abuse. It is not surprising that, in relationships involving violence, the parents will be less likely to be able to agree about post-separation arrangements for their children.

A concern that has been raised by many of our clients and the staff of the Domestic Violence Court Support Scheme is that a presumption of joint residency ignores the provision in the Act which aim to protect children from violence and abuse.

In practical terms, an abusive parent could claim to have the right to joint residence of their child under a presumption of joint residency, which would expose that child to further violence and abuse until the non-abusive parent took the matter to Court. It is well known that this period of time could be significant due to the number of matters currently before the Courts.

Once in Court the non-abusive parent would have to rebut the presumption of joint residency in order to secure the safety of their child. It is speculated that the standard of proof to rebut the presumption of joint custody will be higher than the existing one of the best interest of the child

Increased business for the Courts

Introducing a presumption of joint residence would have the effect of increasing the number of matters that need to be dealt with by the Courts.

It must be assumed that introducing such a legislative presumption would have a practical impact on how people see their rights and their ability to enforce their rights. The 1996 amendments to provide for greater rights concerning contact have resulted in a larger number of non-custodial parents applying for and gaining contact orders.

It can only be expected that a presumption of joint residence would cause an increase in the number of non-custodial parents seeking joint residence, including by applications to Courts. Already we are seeing clients who are seeking advice about their position and possible changes to residence arrangements, just on the basis of media and community discussion of the proposed changes.

There would need to be an increase in the resources allocated to the Family Court, counselling and mediation services, and legal aid. We are fearful that (especially in the current climate) those increases in resources would not be provided.

The consequence is that there would be pressure to divert resources away from other cases, so that more people would miss out on legal aid, more people would engage private solicitors to contest residence cases, and more people would be unrepresented litigants in the Family Court.

One particular concern is in "recovery" cases. Where a non-custodial parent fails to return a child after contact, or takes the child in other circumstances, the custodial parent can apply to a Court for urgent orders for the child's return. Where there are no existing orders, the Court can make an interim order, based on evidence about the custodial parent being the child's primary carer. The typical order in these cases is for the custodial parent to be awarded interim residence, plus an order (enforceable by Federal Police warrant if necessary) for the immediate return of the child.

If there is a presumption of joint residence, would a Court faced with this situation be able (or as likely) to make an interim order in favour of one parent alone? Would the change have the effect of encouraging non-custodial parents to just take their children away from their normal home? Is that in the child's best interests?

Other concerns about a rebuttable presumption of joint residency

- How is "equal time" to be interpreted? Per week, per month or per year? Will parents have the discretion to decide?
- Children will be cared by strangers more frequently as parent continue with existing work commitments
- In order for joint residency arrangements to work, both homes will need to be in close proximity of each other, schools and other services used by children
- An increase in expense to adequately provide two home environments to the children
- Children will take on responsibility for success of shared parenting which will have a detrimental affect on children

Rural remote and regional perspective

The rebuttable presumption of joint residence will have particular consequences for families dealing with separation in regional, rural and remote regions.

For families that reside outside cities, separation often represents the need for one parent to relocate to another area. In situations where the family home is part of a farm or other primary industry, it is often women that leave the family home.

Under the proposed changes the parent leaving the family home will have to deal with extra concerns, for example:

- Establishing a second home for the children which is close to existing schools and other services used by the children. This will often be problematic in rural and remote regions where rural rental properties are scarce. As such the leaving parent will more than likely have to settle in a regional centre where they will face increased spent travelling to and from their home to the old family home to pick-up and drop-off children

- The significant geographical distances in rural and remote areas and the lack of public transport would affect the practicability of a joint residency arrangement. There would be increased financial pressure on the leaving parent to purchase a vehicle to meet the requirements of joint residency.

- The availability of services such as legal aid, primary dispute resolution and counselling are significantly reduced in rural and remote regions, as well as the availability of Family Court or Federal Magistrate Court Sessions. As such, parents in rural and remote regions that would require these services to rebut the presumption of joint residency, would face increased disadvantage.

- There are limited numbers of contact centres in rural and remote regions. Under a presumption of joint residency parents may face more frequent change-overs so that in situations where there has been violence the lack of a suitable safe place for change-overs will place parents and children at further risk.

Conclusion

We submit that the provisions in the current *Family Law Act 1975* provide adequate guidance to the Courts when making decisions about how much each parent should spend with their child, post separation. The principle of the best interest of the child and the factors which underpin it, allow the Courts to consider each matter individually and arrive at the most appropriate post separation arrangement for the children.

The Courts are currently able to make orders for joint residency or any other arrangement which defines the amount of time to be spent by each parent with their child, according to the best interest of the child. As such, we do not support any amendments to the *Family Law Act* which would impose a fixed distribution of time that children should spend with their parents. Such would be the case with a rebuttable presumption of joint residency.