ALSWA

Aboriginal Legal Service
of Western Australia, Inc

Perth Head Office
Nash Street
East Perth WA 6004
ABN 61 532 930 441

PO Box 8194
Perth Bus Ctr WA 6849
DX 274

T 08 9265 6666
F 08 9221 1767

Toll Free
1800 019 900

Your Ref:

Our Ref TB:

07 August 2003

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

BY EMAIL (FCA.REPS@aph.gov.au) AND POST

Dear Sir/Madam,

RE: SUBMISSION

I am the Director Legal Services at the Aboriginal Legal Service of Western Australia (Inc).

I am pleased to enclose our submissions in respect of the current Inquiry into child custody arrangements in the event of family separation, and thank you for the opportunity to have our views considered.

Yours faithfully,

Mark Cuomo

MARK CUOMO
Director Legal Services
enc

SUBMISSIONS OF THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) IN RELATION TO INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

Introduction

On 25 June 2003 the Minister for Children and Youth Affairs, the Hon Larry Anthony MP and the Attorney-General, the Hon Daryl Williams AM QC MP, asked the House of Representatives' Standing Committee on Family and Community Affairs to inquire into child custody arrangements in the event of family separation.

The specific terms of reference are:

a given that the best interests of the child are the paramount consideration:

i 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; and

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

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

c with the committee to report to the Parliament by 31 December 2003.

It is noted that Swedish academic Eva Ryrstedt has recently published an article about the issue of joint parental decision-making, in which she considers the laws of England, Australia, Scandinavian countries and Germany ("Joint decisions – A prerequisite or drawback in joint parental responsibility?" published in (2003) 17 Australian Journal of Family Law). The Committee is invited to consider the contents of that article.

The Aboriginal Legal Service of Western Australia (Inc)

The Aboriginal Legal Service of Western Australia (Inc), referred to hereinafter as ALSWA, was established in 1973. It provides legal advice and representation to Aboriginal clients and organisations in a wide range of areas including

criminal law, civil law and family law. Its service extends throughout Western Australia via 16 regional offices and one metropolitan office.

ALSWA has a dedicated family law unit at its metropolitan office, consisting of 3 lawyers all highly experienced in family law, and 1 ½ secretaries. That unit's primary area of practice is matters relating to children, including residence/contact (formerly called custody/access) cases in the main, and child support to a lesser extent.

Response to the first term of reference ie 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

ALSWA strongly opposes any presumption that children spend equal time with each parent. ALSWA however supports an amendment to section 68F(2) of the Family Law Act 1975 (Cth) as follows:

Section 68F(2)(ka) be inserted to read:

"(ka) whether it would be preferable to make an order providing for the child to spend equal time with each parent;"

ALSWA submits that it is appropriate for the court to specifically consider, along with all other factors listed in section 68F(2), whether equal time with each parent is appropriate, given the significance to children of the parental relationship.

However given that section 68F(2) lists other matters all of which are also highly significant to children's welfare, ALSWA considers that none of these should be weighted in the legislation more than the others so as to skew the outcome. Each case is individual and ALSWA submits that "one size fits all" legislative presumptions imposed on a variety of individual circumstances are far less appropriate for families and the Australian community than tailor-made orders for individual circumstances.

ALSWA submits that the court should retain unfettered discretion to balance up all relevant factors so as to ensure it has the best chance of making the orders best suited to address the welfare of any particular child, whatever his or her individual circumstances.

ALSWA's specific concerns about a presumption are:

d Aboriginal families have a disproportionately high experience of family violence compared with other Australian families.

This has been known for some time by Aboriginal people and by those who work with them. It has recently come into the spotlight following the 23 July 2003 meeting between Prime Minister John Howard and several recognised indigenous leaders, where this issue was formally acknowledged and commitment expressed to address it.

The effects of family violence are severe and far reaching for children, parents, extended family and the Australian community including police, employers, medical officers, and taxpayers who pay for services for victims and perpetrators and also for criminal injuries compensation. In particular, it should not be forgotten that each year, some people die and some others are horrifically injured as a direct result of family violence.

ALSWA submits that if children automatically spend equal time with each parent, the risk of family violence for children and for the parent who is the victim of the violence is greatly increased through increased frequency of contact between them and the perpetrator.

ALSWA further submits that a rebuttable presumption does not adequately address this risk. First, the victim must be aware that the presumption is in fact rebuttable. There are many barriers to this including lack of access by some people to competent legal advice, language barriers and cultural barriers. If the victim is not aware of the possibility of rebuttal, evidence relevant to rebuttal is unlikely to be presented to the court. Secondly, the victim must be capable of presenting evidence in admissible form that is sufficient to rebut the presumption. Nowadays, due to the inability of community legal aid centres to meet demand, a great many people self-represent in the court, and while some do so competently, many do not due to lack of understanding of the process. For Aboriginal people in particular, there are additional cultural and language difficulties prejudicing their chances of successfully presenting evidence necessary to rebut the presumption. Thirdly, by requiring the victim of violence to bear the onus of establishing grounds for rebuttal, the victim is placed at a disadvantage as regards the court process compared with the perpetrator. ALSWA submits that this is unconscionable. The victim, often struggling to cope as a result of the trauma of the family violence, should not have to suffer this extra burden. Finally, the risk of further violence to the victim is likely to be heightened, due to the perpetrator seeing the victim's attempts to rebut the presumption as a source of provocation.

ALSWA notes that the main victims of family violence are women and children, and the main perpetrators of family violence are men. ALSWA also notes that the existence of family violence/a family violence order does not bring about any legal presumption that contact should be denied between the child and the perpetrator, and

each case is considered on its merits. ALSWA submits that a presumption for children to spend equal time with each parent is gender-biased as well as culturally-biased.

e Such a presumption ignores cultural factors and the role of extended family in caregiving to children.

First, in many Australian families, and Aboriginal families in particular, parents are not the sole, or even the major, people with responsibility for caring for children. Any or all of grandparents, older siblings, aunts and uncles may have a highly significant role in caring for children. For many Aboriginal families, it is a cultural responsibility for extended family to care for children, or alternatively to assist parents in doing so.

Secondly, many Aboriginal people are culturally obliged to go away for sometimes prolonged periods to meet relatives, attend funerals, or attend to other kinds of obligation. Some of these, such as funerals, occur on an unscheduled basis. A pay-back of hour for hour, day for day, is not necessarily practicable for parents or children.

Thirdly, time is regarded differently according to culture. Many Aboriginal people have considerable difficulty for cultural reasons in keeping childcare arrangements by the clock or calendar. An "equal time" principle is likely to be inaccessible to those members of the population who do not keep track of time in this way, especially if the particular equal time arrangement was to be one involving frequent handovers.

f Such a presumption ignores geographical and financial factors. Many parents live too distant from each other for a child to be able to conveniently remain at the same school, in reasonable distance of friends, and have time after travel for homework and recreation. This is aggravated if one or both parents lack ready and speedy transport or are poor or homeless or dependent on State/refuge housing so as to be unable to secure stable accommodation near to the other parent. Aboriginal people are disproportionately affected compared with other Australians in relation to each of these.

g Such a presumption assumes that parents are willing and able to promote an "equal time" routine. Many Australian children already have in place court orders that equally divide their time on school holidays, birthdays, Christmas and Easter between their parents. ALSWA's experience, believed to be common to experienced family law practitioners and to the court, is that at those times there are more than usual disagreements between parents about contact, more breaches of contact orders, and hence more litigation. Similarly, ALSWA's experience is that a high degree of disagreement between

parents often occurs when the child, while living in the home of one parent, receives a birthday party invitation/medical appointment/sports event notice that is scheduled to fall during the child's time with the other parent. ALSWA submits therefore that for unco-operative parents, equal time is likely to increase disagreement between parents.

In light of all of the above, ALSWA submits that such a presumption, even if rebuttable, would not address the welfare of the child in all cases, and would in many cases act to the child's serious detriment by exposing the child to a higher degree of parental acrimony and disruption to routine.

However, ALSWA submits that there are some cases where the interests of the child would be promoted by spending considerable or equal time with both parents, and hence supports change to the legislation as written in these submissions.

ALSWA's specific reasons in support of adding this consideration to the factors the court is required to consider under section 68F of the legislation are these:

h There is a significant pool of matters where such an order might promote the best interests of a child. Such cases would most likely involve children too young for school and parents who live close to each other and who are capable of and highly motivated towards joint parenting and problem solving.

i It is submitted that the change would promote the child's welfare in cases where, despite the emphasis of the family law process on shared parenting and on solutions via alternative dispute resolution rather than litigation, the parent/other person with whom the child spends most time not only tries to prevent any increase in contact, but also attempts to dictate how the other person parents the child during contact periods, for reasons unrelated to the child's welfare.

Obviously broadly similar arrangements as to routine and discipline are desirable from the child's point of view, but these cases go far beyond that. In these cases one parent dictates numerous minor parenting rules and creates a fuss if they are not obeyed, aiming to parent by proxy, rather than sharing parenting. Such parents are often well versed in child development theory, and they cloak their actions by describing them as addressing the child's best interests. However their actions are destructive, interfering with the other parent's ability and authority to parent the child, and damaging of the child's relationship with that parent, and adding considerably to the acrimony between the parties and the child's exposure to this.

The change ALSWA proposes will address this by reinforcing that the child is not a possession of that party and the significance of the other parent's role. In addition, by requiring evidence as to whether or not literally shared parenting is the best option for the child, the "dictator" party will have to consider the value of reciting numerous petty concerns in affidavit material versus focussing on issues truly significant to the child's welfare. To raise petty concerns, ie to mudsling, could well make him or her seem unreasonable to the court, to the detriment of his or her case.

j Unless included as a factor, neither parents nor the Family Court are required to specifically consider the possibility of an order that the child spend equal time with each parent. Although the legislation does currently allow parties to seek such an order, and the court to pronounce it, ALSWA's experience is that notwithstanding the reforms of the Family Law Act 1995 aimed at encouraging parents and other significant people to share child care, this has not occurred. A change along the lines proposed by ALSWA will ensure that this possibility is specifically addressed in evidence brought before the court, and by the court when pronouncing orders. It is submitted that this is the next logical step to the 1995 reforms.

Response to the second term of reference ie in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents

ALSWA strongly supports the court considering this factor as a matter of course whenever it is asked to make orders in respect of children. People who are significant to a child by definition are relevant to the child's welfare and ALSWA submits that therefore contact with them ought to be considered by any court charged with deciding on orders designed to promote the child's best interests.

In many cases, and ideally, children get to spend time with grandparents and other significant people within the time they spend in the care of one or other parent, making specific orders unnecessary. However in many cases this does not happen, and so ALSWA regularly represents grandparents and other family members in obtaining orders in respect of children.

This is because, even more so than for the Australian community generally, many Aboriginal people have a cultural responsibility to raise, or assist in raising, children who are not their own.

ALSWA's view is that the court already has power in any parenting order proceedings to make such an order, as follows:

k Under section 65D of the Family Law Act 1975 (Cth) the court has full discretion when considering an application for a parenting order to make <u>whatever</u> order it thinks proper.

l Section 65E compels the court in so doing to regard the child's best interests as the paramount consideration, and section 68F(2) refers the court to a list of specific factors to consider in making this assessment.

m Section 68F(2) for the most part does not limit consideration of its factors to parents only, and even were it considered to do so, section 68F(2)(b) specifically requires the court to consider the child's relationships with people apart from his or her parents, and section 68F(2)(l) gives the court discretion to consider any and all facts or circumstances it considers relevant, whether or not specifically named in the section 68F(2) list.

However, ALSWA's experience is that despite the 1995 reforms to the Act recognising the significance of grandparent and other relationships to children, such orders are generally not made by the court unless specifically sought by the grandparent/other family member.

One probable reason is that the court cannot bind the third party with a contact order unless s/he consents to submit to the court's jurisdiction. Consent needs to occur if the order is to be enforceable. The court has inherent power to make administrative decisions such as regarding the means for establishing such consent.

Another probable reason is that evidence about the pros and cons of making such an order is simply not being presented to the court, and because it is not a specified section 68F(2) factor, the court is not proactive in seeking it. Generally this evidence is only supplied if the relevant grandparent/other person is specifically seeking orders in the proceedings.

ALSWA submits that there is considerable merit in ensuring that the court does consider the necessity of making specific orders whenever deciding what orders would best serve the interests of a particular child. ALSWA therefore proposes amendment to section 68F(2) of the Family Law Act 1975 as follows:

Section 68F(2)(kb) be inserted to read:

"(kb) whether it would be preferable to make an order providing for the child to spend time with a person who is not a parent, including but not limited to a grandparent or other member of the child's extended family;"

ALSWA also proposes that the dissolution of marriage application form (Form 4) for parties who have children aged under 18 be amended to require information in respect of contact between the child and all significant people, not only parents/siblings.

ALSWA's view is that this change furthers the intention of the 1995 reforms that recognised the role of people apart from parents in raising children. By listing this consideration as one of the various factors the court is required to consider in its decision-making, (not as a presumption), the court's ability to make orders tailor made to the child's welfare is improved by ensuring that all relevant factors are considered and each can be accorded weight commensurate with the individual circumstances of the child.

Response to the third term of reference ie whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children

ALSWA submits that the child support system is particularly complex and it is therefore frequently difficult and time-consuming to ensure that the correct formula is in fact being applied to a particular family. However assuming for the purposes of response that the correct formula has been identified and is being applied to a particular case:

n ALSWA submits that the child support formula does not work fairly because it is not calculated according to the actual time people spend with their children. Children are a constant cost, and therefore some parents who spend considerable time with their children but do not meet the requisite number of child support nights to qualify for a reduction in child support are disadvantaged compared with those who spend less time at less cost with their children.

o ALSWA also submits that most non-parent child carers are apparently not in receipt of child support from parents, notwithstanding their ability to apply. To ensure that the formula is fairly applied, the availability of this source of financial support to non-parent carers (eg grandparents and other relatives or informal foster carers) should be better promoted by the Agency. Such promotion should take into account cultural factors to ensure the message is received by all Australians.

ALSWA submits that change to the formula is necessary, so that child support is calculated according to the exact number of days a person (parent or otherwise) spends caring for a child.

ALSWA draws to the Committee's attention that there is currently considerable litigation happening in Western Australia in respect of child maintenance/support, for example:

p It was reported in "The West Australian" newspaper on 6 August 2003 that the court at Perth is currently considering whether a man whose daughter, an 18 year old university student who refuses contact with him, should have to pay maintenance for her and give

her $10,000 for a car. The matter is due to be determined in October this year.

q On 14 February 2003 His Worship Mr Wilson SM sitting in the Court of Petty Sessions at Paraburdoo, Western Australia, determined that a man who has no contact with his 13 year old daughter and who has 2 step-children living with him, had a qualified legal duty to financially support the step-children and that his child support assessed liability for his daughter should be reduced because of this. This decision has broken new ground, and has attracted much interest among Western Australian family law practitioners given the vast number of blended Australian families, which includes many Aboriginal families. Many Aboriginal people form defacto relationships rather than marrying. The decision potentially expands the number of adults with a duty to financially support a child from 2 to 3 (4 under an equal time regime) if the child's parents repartner. However if one parent of a child repartners and becomes a step-parent, and the child lives with the other parent who does not repartner, the level of financial support available to that child may diminish, as happened in the case before the court. It remains to be seen whether other courts will decide to follow this decision, and if so, what the financial effects for children will be.

r It is understood that the court in Western Australia may currently be considering an application to reduce to nil the child support assessment liability of a teenage boy sexually assaulted by a woman; the assault led to the woman falling pregnant, a child was born, and the woman obtained a child support assessment against the teenager. This is an interesting issue. If the assessment is to be reduced to nil, the flip side is the question of how to deliver equal justice and equity where the victim of incest/sexual assault is a female, who gives birth to and raises a child born of the abuse. One way is for the father's child support assessment liability to be increased to cover the whole of the costs of the child, but this will often be impracticable. Another way is via additional social security payments or criminal injuries compensation, to cover the costs of the child.

At this time ALSWA does not express a view as to whether or not child support legislation should be amended in light of any of these cases, but invites the Committee to investigate those issues further in the course of its inquiry.