Centre Against Sexual Assault

Loddon Campaspe Region

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25th July 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

Dear Committee Members,

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

The Centre Against Sexual Assault – Loddon Campaspe region provides counselling and advocacy services to children, young people and adults who are past and recent victims of sexual assault. A significant number of these women and children are victims of family violence. In addition, CASA also provides an after hours response to women and children experiencing domestic and family violence.

Our letter deals 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?

In our view the Family Law Act should *not* be amended to introduce a presumption of joint residence.

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THE CURRENT POSITION

A focus on Children's Rights & Parent's Responsibilities

The *Family Law* Act currently emphasizes *children's rights* by focusing the Court's attention on making decisions that are in the *best interests of the child* and by providing that children have rights to be cared for by both parents and to have regular contact with them (unless this would be contrary to a child's best interests). The Court is given discretion to make orders for the residence and contact of children looking at the individual situation of each family with reference to a number of *factors* (the s68F(2) factors[1]). The Act clearly already accommodates joint residence arrangements where they are in the best interests of children.

What occurs currently with this focus

The overwhelming majority of parents agree on arrangements for the care of their children and currently the most common arrangement is for mothers to have residence of their children and for fathers to have contact. Over 85% of resident parents are mothers and it is estimated that fathers exercise contact with their children in around 60% of these arrangements. Many of these parents probably agree on arrangements for their children without any reference to the *Family Law* Act at all. Joint residence currently occurs in less than 5% of separated families.

INTRODUCING A LEGAL PRESUMPTION OF JOINT RESIDENCE

The significance of a Legal Presumption

A legal presumption *may* be useful in some contexts *if* it reflects a solution that is appropriate in the overwhelming majority of cases – *provided* that this solution can be rebutted where evidence shows that, in an individual case, it is not the appropriate solution. However, the significance of introducing any presumption into the *Family Law* Act needs to be acknowledged. Any presumption should be founded on compelling evidence based on recognised research that joint residence *really is* in the best interests of the overwhelming majority of children.

Evidence about Joint Residence Arrangements

There is very minimal evidence that joint residence arrangements are in the best interests even of a minority of children. Indeed, there is very little information at all about joint residence arrangements in Australia and how well they work for children, even in the short to medium term, let alone the long term

A focus on Parents' Rights

[1] Note that s68K also directs the Family Court to ensure that any order is consistent with a family violence order and does not expose a person to an unacceptable risk of family violence – to the extent that this is consistent with the child's best interests.

Given the available evidence, introducing a presumption of joint residence cannot be promoting the best interests of children but only the supposed "rights" of parents to have a "fair" (for which read "equal") amount of time with their children.

Pre-Separation and Post-Separation Realities

That a presumption of joint residence focuses on parents' rights is underlined by its failure to account for pre-separation or post-separation realities in families.

The reality of arrangements for the care of children *prior* to separation is that women still provide the overwhelming share of care for children[2] and have often structured their lives around caring for children by not engaging in paid work or by finding part time or flexible work arrangements. Where, prior to separation, men have had only limited involvement in actually providing for the needs of their children, they are likely to be less well equipped than their female partners to look after children after separation. The children may also be less bonded to them.

A presumption that parents should spend equal time with their children assumes that all parents will be able to:

- live close to each other (in order that the children can readily attend the same school and health professionals, participate in sport and maintain friendships)
- negotiate flexible working arrangements (in order to care for younger children not at school and to take older children to and from school, health professionals, sport and social events)
- communicate regularly and easily (to negotiate logistics of activities that cross over residence periods or are agreed in one period to occur in another)
- afford to maintain two separate households that are completely "set up" for their children (ie complete sets of clothes, toys and daily necessities).

This is simply not a reality for many parents and pushing parents into joint residence arrangements where they cannot establish this kind of set up eg for financial reasons, because they are hostile to each other, or because one party is at risk of violence from the other, clearly has the potential to be damaging to children.

Joint Residence can work

We wish to emphasise that the criticisms we have made in relation to a presumption of joint residence apply only to there being a *presumption.* We are not opposed to joint residence. Quite the contrary - for families where both parents have shared responsibilities for children prior to separation, can cooperate with each other and can establish the sort of arrangements discussed under Pre-Separation and Post-Separation realities above, such arrangements are likely to be positive for all concerned.

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[2] Australian Bureau of Statistics, Time Use Surveys, 1992 and 1997, tabularized in ABS *Social Trends Report: Family – Family Functioning: Looking after the children*, 1999 available on the internet at http://www.abs.gov.au/Ausstats.

It is the potential for joint residence to be *imposed* on parents as a result of a presumption that concerns us. In our view, parents who are unable to resolve disputes between themselves and need to issue court proceedings are the most unsuited to providing a supportive environment for children to move between parents in a joint residence arrangement. Given that it is already open to cooperative parents to make arrangements for joint residence between themselves, introducing a legal presumption will have the greatest effect on families where the parents are in significant conflict with each other.

Family Violence and Child Abuse Cases - the most intractable disputes

A significant proportion of the Family Court's work involves cases where there are allegations of violence or child abuse and research shows that these are the cases most likely to be litigated and least likely to settle.[3] It is in these cases that a presumption of joint residence could have the most significant and potentially disastrous effect.

Proponents of a presumption of joint residence will no doubt suggest that the presence of family violence or child abuse could be grounds on which the presumption of joint residence could be rebutted. This *might* reduce the risk of children being placed permanently in potentially abusive joint residence arrangements. However, it fails to deal with the significant problem of "temporary" arrangements either negotiated or made by the Court at interim hearings.

The Court has very little information available to it at interim hearings because generally they are very limited by time, the Court does not hear oral evidence, and family reports and other experts' reports are often not yet available. The Court relies to a large extent on affidavit material filed by the parties which, particularly in the case of self-represented litigants (of which there are now many in the Family Court), may be considered inadequate to prove violence or abuse.

Researchers studying the effect of the reforms made to the *Family Law* Act in 1996 expressed serious concerns that the then newly introduced "child's right" (which sadly is frequently misinterpreted as "parent's right") to contact had led to an *effective* presumption that contact should be maintained. Thus, in cases where there are allegations of domestic violence there has been a trend away from suspending contact at an interim hearing to ensure the child's safety, towards using neutral hand-over arrangements. A legal presumption of joint residence clearly has the potential to lead to interim orders being made for joint *residence* and not just contact, even when violence is alleged, thus exposing women and children to even greater risk. Research clearly shows that only a small proportion of allegations of violence fail to be established at the final hearing when all of the evidence is available to the Court.[4] Given this and the fact that

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[3] T Brown, M Frederico, L Hewitt and R Sheehan, *Violence in Families – Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, Monash University, Clayton, 1998, Chapter 5.

[4] M Hume, 'Study of child sexual abuse allegations within the Family Court of Australia' in Family Court of Australia, Enhancing Access to Justice: Second National Conference Papers (Sydney, 1996). See also Brown et al above.

interim arrangements can last for as long as 12 months, a presumption of joint residence could place women and children at significant risk.

Increasing Protection for Women & Children

In our view, it is quite ironic, but also rather disturbing, that the government is considering changing the *Family Law* Act in a way that will increase the risk of violence to women and children at the same time as governments around the country (including the Commonwealth itself through its Partnerships Against Domestic Violence jointly with the states and territories) are taking significant steps in other contexts to address and reduce violence. This would clearly be a retrograde step.

Rather than reducing the already poor protection women and children have under the *Family Law* Act[5] (especially while matters are progressing through the Court system), protection should be increased. The *Family Law* Act already directs consideration of the presence of family violence in determining what arrangements should be made for children.[6] However, in practice the "child's right" to contact takes precedence over the need to protect either the mother or child from violence and lawyers continually have to advise clients that they should allow contact or they may appear to the Court to be hostile and risk losing residence of their child altogether.

We have recent experience of this in clients' Family Court matters where children who have disclosed sexual abuse by their fathers have been further exposed to risk by unsupervised contact being allowed. In addition children have been not allowed to continue attending CASA.

A presumption against contact where violence is proven?

Unlike the evidence examined above in relation to a presumption of joint residence, there is ample evidence that:

- family violence is a huge problem in our community
- family violence continues and may even increase after separation
- there is a link between spouse abuse and child abuse – that is a person who abuses their spouse is likely to abuse their child
- "merely" being exposed to or witnessing violence is highly damaging to children – causing a host of behavioural and emotional problems

The *Family Law* Act should be tightened to give greater weight to the presence of family violence and sexual assault allegations in determining residence and contact arrangements for children. If consideration is to be given to introducing presumptions of any kind into the *Family Law* Act then the evidence points to a quite different presumption. Rather than introducing a presumption of joint residence and forcing victims of violence to rebut that presumption, Australia should follow the lead of New Zealand which has adopted a presumption that, where violence to a child or the other

[5] We have attempted to summarise the findings of Rhoades, Graycar & Harrison. However, we urge the committee to look in detail at this study.
[6] S68F(2) and s68K.

party is proven, contact with the violent parent should not occur unless the Court is satisfied that the child will be safe. In the current Australian system such a presumption may have to be cast in the language of the best interests of the child but these "best interests" need to clearly recognize the importance of safety both for the child and the abused parent.

We are concerned that the focus of questions posed by the inquiry appears to be on the "rights" of people other than children.

Yours faithfully,

Judy Flanagan

Judy Flanagan
Manager