Peninsula Community Legal Centre Inc.

Registered No. A8T
ABN: 23591244622

HEAD OFFICE
Chatsworth House
Suite 2-4,
431 Nepean Highway,
Frankston Vic 3199
Telephone: (03) 9783-3600
Facsimile: (03) 9770-5200
Free Call: 1800 064 784
DX 19953 Frankston
Email: penclc@vicnet.net.au

BENTLEIGH BRANCH
82 Brady Road,
Bentleigh East Vic 3165
Telephone: (03) 9570-8455
Facsimile: (03) 9570-8466
DX 37509 Bentleigh
Email: sthn@vicnet.net.au

PINES BRANCH
2A Candlebark Crescent
Frankston North Vic 3200
Telephone: (03) 9786-6980
Facsimile: (03) 9785-3582

Regular Visits to:
- Hastings
- Rosebud
- Mornington
- Cranbourne
- Chelsea
- Monash University (Caulfield & Peninsula Campuses)

Consumer Affairs Program also visits:
- Emerald
- Mordialloc
- Narre Warren

Covering:
- Frankston City
- City of Casey
- City of Kingston
- City of Glen Eira
- Mornington Peninsula Shire
- Shire of Cardinia (Consumer Affairs Program only)

Donations over $2.00 are tax deductible

Celebrating 25 years of service to the community 1977 - 2002

6 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

Via Email: FCA.REPS@aph.gov.au

Dear Committee,

RE: Inquiry into Child Custody Arrangements in the Event of Family Separation

Please find attached submission regarding the above inquiry, a hard copy of which is being forwarded by mail.

If you would like to discuss our submission, please do not hesitate to contact me.

Yours faithfully,

HELEN CONSTAS
EXECUTIVE OFFICER
PENINSULA COMMUNITY LEGAL CENTRE INC.

Inquiry into Child Custody Arrangements in the Event of Family Separation
Submission by Peninsula Community Legal Centre

Position:

Peninsula Community Legal Centre (PCLC) is concerned about the recent proposal by the Minister for Children and Youth Affairs and the Attorney-General to give consideration to a presumption of 'joint custody' in cases of marital breakdown. We are one of the largest Community Legal Centres in Victoria and see many parents prior to and after separation. Over 50% of our advice is family law related and consequently we are well placed to foresee the practical implications if such a proposal were to become law.

The terms of reference for the inquiry into child custody arrangements set out by the Government state that 'the best interests of the child are the paramount consideration'. It is our view that this is more likely to be achieved under the present system than an imposed presumption of joint custody.

There are a number of reasons for this.

1. **Presumption encourages conflict and unrealistic expectations.** In our experience, conditions for reaching agreement on satisfactory and sustainable custodial arrangements in a post separation environment rely heavily on the commitment and cooperation of both parents. This is supported by studies that show that without such collaboration joint custody arrangements are destined to fail[1]. Yet, the imposition of joint residency as a starting point is more likely to exacerbate conflict than help to resolve it. By imposing a general rule the focus would be directed towards the rights and obligations of each parent and their respective commitments rather than encourage cooperation in the search for lasting solutions in the interests of the child. For example, in terms of commitments, the assumption that parents will share equal care of their children may put undue pressure on parties who are already dealing with significant changes in their lives (e.g. changes in location, financial situation, employment and relationships) and result in unrealistic and unfulfilled expectations.

2. **The motive behind the proposed change is controversial.** The joint residency campaign and the move to review the Child Support Act have been driven by a number of fathers' rights groups particularly the recently formed lobby group the Shared Parenting Council of Australia. Such groups have asserted that the current Family Court administration is anti-male and point to evidence that the father is just as well equipped to bring up a child as the mother. They look for certainty in the blunt instrument of statutory regulation to bring about change rather than the discretion of the family courts. However, in advocating a statutory approach they are subscribing to a restriction in the capacity of families to resolve parental care problems according to their unique circumstances and the flexibility of the courts to take this into consideration.

---

[1] See Prof. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced and Simplistic Solutions*, Catholic University Review Spring 1997.
www.law.edu/faculty/barry/Articles/westlaw/SEPT5/BARRY5.htm at 783

3. **General rule detracts from specific 'self-help' solutions for the majority and encourages unworkable arrangements for the minority.** Whatever the reasons behind the proposed changes in the current law, a starting point of shared residence will have an indiscriminate influence on all post separation negotiations. The imposition of the rule will be as applicable to the 95% of couples who resolve matters voluntarily under current family law without recourse to the courts as it will for the 5% where conflict between parents has reached a level that prevents them reaching an accommodation in the best interests of the child. However, its greatest impact will be on latter group - those parents who are unable or unwilling to negotiate acceptable joint custodial arrangements or where shared residence is found by one of the parties to be undesirable. If the new law favours an outcome that in practice becomes unworkable and leads to recrimination and dispute this can only have an adverse effect on the children caught up in the conflict and place a further burden on dispute resolution services.

4. **New starting point: an adverse influence on legal process.** Under the proposed change to the law the courts are likely to see an increased incidence of litigation as parents take action to secure their rights under legislation. Legal advice will be tailored to take advantage of the standard and the courts to the presumption of a new norm. This is likely to have a substantial influence on both interim and final orders of the court and to create an artificially high number of inequitable arrangements. Many of these will require conciliation of one kind or another at a later stage again putting pressure on the social support and legal services.

5. **Current law balances interests.** Family law under current legislation already gives priority to the best interests of the child[2]. It also clearly identifies principles for the shared parenting of children and factors that the court must take into consideration[3]. These do not discriminate between paternal or maternal interests. Father's groups that lobby for proposed changes are thus targeting a perceived discrimination in the interpretation of the law as this impacts on the rights of the father. This presupposes that the greater incidence of awarding custody to mothers is a function of bias rather than in the best interests of the parties particularly the children. There is little factual evidence to support this contention. On the contrary research points to a high incidence of fathers (64%) having contact with their children[4] and almost three quarters of these men have children staying with them overnight.[5] In general it is only where the court finds that the circumstances dictate that the well-being of the child may be jeopardised that restrictive measures are applied.

6. **Post-separation arrangements should minimise further disruption to the child.** In terms of stability it is not surprising that the courts have awarded residency to one parent. Historically this has been in favour of the mother. In recent years, however, there has been an increase of awards in favour of the father[6]. Sole residency has proved to be the safer

---

[2] *Family Law Act 1975* (Cth) s 65 E
[3] Ibid Part V11
[4] Australian Bureau of Statistics, *Family Characteristics Survey 1997*, Cat No 4442.0, AGPS, Canberra.
[5] see Parkinson and Smyth above note 23 at page 9
[6] Data tracking residence orders made in the Family Court for 2000-2001 show that 70% of residence orders are made in favour of the mother and 20% in favour of the father. This can be compared with data from the mid 1990s that shows only 15% of residence orders favoured the father. These statistics include orders made by consent as well

option for children who have already been subjected to the insecurity of marital breakdown. Constancy of friendships, schooling, sports and home environment as well as geographical proximity to parents all play an important role in the healing process. By contrast joint residency has been found to be inherently problematic in this regard and is the least common post separation arrangement in Australia[7]. Studies in the US have shown that a significant number of children suffer as a result of constantly being shuttled between households particularly when this involves leaving their neighbourhood[8].

7. **Primary parent considerations should take priority.** Since the middle of the 19th century when the concept of 'paternal preference'[9] was superseded by legislation that favoured the primary caretaker as being responsible for the child, the courts have almost exclusively recognised the mother as the preferred custodian. This is not surprising, in practice in pre-separation families women almost exclusively take on the day-to-day care of children and their lives are organised accordingly. In many cases this role involves the sacrifice of financial independence and employment opportunities[10]. By contrast the father's function in the practical side of child rearing is peripheral. It is only after separation when issues such as parental rights to access and residency are raised that a determination on the ability and suitability of fathers to take on a more involved parental function is raised. The records show that in post separation families where a voluntary choice is made there is a clear preference for sole residency in favour of the mother.
   Under a presumption of joint residence however, the proposed law would question the wisdom of this choice. It would assume the equal status of the non-primary caretaker parent's responsibility for the day to day upbringing of the child and in consequence would carry significant risk if the father had previously had minimal involvement in the child rearing function.

---

as orders made as a result of contested hearings. Residence Order Outcomes 1994/1995 – 2000-2001: Family Court. www.familycourt.gov.au/court/html/statistics.html

[7] Shared residence is the least common post-separation arrangement with only 3% of children from separated families in 'shared care' arrangements in 1997.[7] Less than 4% of parents registered with the Child Support Agency last year had equal (or near equal) care of their children. Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003

[8] Janet R. Johnston et al., Ongoing Postdivorce Conflict: Effects On Children of Joint Custody and Frequent Access, 59 Am. J. Orthopsychiatry 576, 588 (1989) (a study of parents who were entrenched in disputes over custody and visitation, concluding that children who have more frequent access are more emotionally troubled and behaviorally disturbed). see also Susan Steinman, The Experience of Children in a Joint Custody Arrangement: A Report of a Study, 51 Am. J. of Orthopsychiatry 403 (1981). Dr. Steinman reports, in a 1978-80 study of twenty-four families who pioneered joint custody on their own prior to express authorization of joint custody under California law, that while most children adjusted, twenty- five percent of the children were confused and unhappy because of the demands of living in two households.

[9] See Prof. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced and Simplistic Solutions*, Catholic University Review Spring 1997. Custody based on the father's right to his children's services as 'the fruits of his labours' at 769

[10] Australian Bureau of Statistics, Time Use Surveys, 1992 and 1997, *Social Trends Report: Family – Family Functioning: Looking after the children.* See Women's Legal Service Submission p4

8. **A potential for the exercise of authority without responsibility.** The introduction of a new law that realigns parental jurisdiction would encourage the pursuit of joint custody without the commensurate responsibility to ensure that the child receives the necessary care and attention that would have been the case had the child remained with the primary caretaker. A presumption of shared residency would almost certainly dilute the authority of the primary caretaker to ensure that the interests of the child are maintained in the post-separation environment and subject those interests to the whim of an uncooperative parent. Once the issue of parental rights had been resolved it would be difficult to enforce acceptable standards of responsibility particularly where problems arose through inexperience, lack of commitment or change of circumstance. Here again the resultant disputes would inevitably increase the workload of the social services and in due course flow back to the courts.

9. **Child support should be treated as a separate issue.** The terms of reference for the inquiry also include the question of whether the existing 'child support formula' is fair to both parents. Surely if the priority is to resolve the issue of shared parenting in the 'best interests of the child' then it is better to resolve this issue first and to see how any changes, if implemented, work out in practice before tackling the critical matter of child support. To do otherwise might be construed as using shared parenting as the Trojan horse to bring about a reduction of the financial liability of non-resident parents.