

House of Representatives Standing Committee  
on Family and Community Affairs

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**Standing Committee on Family and Community Affairs**

***Submission to the inquiry into child custody arrangements in the event of family separation***

**ATT; Committee Secretary**

Standing Committee on Family and Community Affairs

Child Custody Arrangements Inquiry

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Total number of pages 12

<b>Index</b>	<b>Page</b>
<i>Introduction</i>	3
<i>Joint residence; an introduction to common sense</i>	3
<i>Separation and the act of selfishness</i>	4
<i>The Family Court. A Perception of Bias</i>	4
<i>Lawyers, Solicitors and Acquiring Tactics</i>	5
<i>Mediation and Counselling without Incentive</i>	7
<i>Determining the Child's Best Interests</i>	8
<i>A Rubutable Presumption of Joint Residence</i>	9
<i>Opposition to a Rubutable Presumption of Joint Residence</i>	9
<i>Conclusion</i>	12

## **Introduction**

John Howard has taken the positive step of ordering an inquiry into Family Law. I make this submission to this committee on behalf of myself, my family and most importantly my son and all the children that deserve to be heard. I also request that my personal details be kept confidential, however I am happy to discuss any of the points raised within my submission. I request that you take the time to read what has been written carefully, in full and with open minds.

I have also mailed a hardcopy version with accompanying attachments for your records.

I thank you for your time.

## **Joint residence; an introduction to common sense**

A child is born, and is raised by two loving caring parents, generally with both of them significantly contributing to the development, well being and state of mind of the child. In the vast majority of cases, this parenting is not a matter of necessity, but simply a matter of choice. Both parents want to contribute in every way possible to ensure a happy well-adjusted child. While the roles of each parent may vary from household to household, every role played is vitally important, the bond the child develops with each parent is also something very special, and something that must be protected at all costs as this directly contributes to the child's emotional stability.

The days of the traditional mother/father scenario, where the father works long hours and has little influence on the child's development, are rapidly becoming a thing of the past. At any school or kindergarten, you will always see a strong male presence. In the case of my own son's kindergarten, in many instances the number of fathers waiting to collect their children exceeds the number of mothers. This is now becoming an obvious way of life.

Equality between men and women in the workforce has also become equality at home. The child is well cared for, forms a close bond with both parents, and in most cases loves them equally. Few people would attempt to argue that any other family structure is superior to the one described. Many experts have written this exact point time and time again. Children from intact families have a clear advantage and are far better adjusted.

Regardless of the expert consensus, common sense suggests that the above must be the case. In the eyes of the children, this is Joint Residence. It isn't Joint Residence as legally defined, it is however a matter of the child being able to live with both parents and bond and develop accordingly.

## Separation and the act of selfishness

For a wide variety of reasons parents choose to separate. In most cases this is instigated by only one parent, this is not to say both parents aren't responsible. The decisions that these parents now make, will most likely be the single biggest contributing factor to their children, even though most may not be aware of it. The children in most cases have no preference; they love both parents equally. In most cases the parents are more than capable of being responsible and competent in the care of their children. **Now I would like you to stop and think about the above family!** This family is a typical family and covers the majority of family separations in Australia. There is no issue of domestic violence, no issue of child abuse or neglect, and no issue of drug or alcohol abuse. This family is a typical happy family structure; the only thing that has happened is that the parents for their own reasons have decided to separate. Now I would like you to read the following sentence very carefully. **The majority of families that fit this profile do not go through the court system!** While lawyers become involved in most cases, most of these cases do not go to court. They are settled prior to the hearing date, or prior to applications being lodged. Please remember this, as it will become very relevant at a later stage of this submission.

From this point parents enter into discussions as to arrangements for the care of their children. What happens at this time will depend greatly upon the intentions of each parent. At this point we need to remember basic human nature; many of us are selfish. We teach our children values such as sharing and politeness and try and instill a characteristic of fairness. At some point in our lives, this leaves us and yes, we become selfish. This is basic human characteristic. This trait in some may be stronger than in others, yet to a degree it exists in all of us.

So from here the parents are required to make some extremely important decisions. Where do the parents live? Where will the children live? What share of care will both parents have of the children? When parents are answering these questions, unfortunately in many cases the most important question of "what is best for the children" is often not even asked. The reason for this is purely selfish behavior. To a degree this is understandable, the love a parent feels for their children is arguably the most powerful thing on our planet. It is this basic human characteristic that causes so much pain and distress to parents and in many cases to children. The question then becomes a matter of whether our system discourages negative behavior or encourages it. It is my unfortunate conclusion that the system encourages negative behavior.

## The Family Court. A Perception of Bias

I am hesitant in writing this section as I am currently subject to our legal system. One very clear issue however is the question of whether the court is biased. My viewpoint to this is that it simply isn't a valid question. The question should be; *is the court system perceived to be biased?* The answer to this is a resounding yes. For the question of bias to even be asked, the perception must be there initially.

The issue now becomes at what point does a perception of bias become valid. Is it after all court proceedings have taken place? Is it after legal action has been instigated? Or is it simply a common perception that most of us have, even prior to us becoming parents? I have little doubt that if we were to conduct a poll in any street in any city and ask the question "Do you think the court favors the mother or the father in child custody dispute?" The overwhelming response would be that it favors the mother. The reasons for the answer are irrelevant, the fact that an answer could be given at all, suggests a perception of bias. To help confirm this perception, on my very first meeting with my solicitor, with no prompting from myself, he went to great lengths to exclaim he felt the court wasn't biased. He new I would have this perception without any suggestion from myself. It is this perception that greatly directs our children's future after separation, regardless of whether the Family Court becomes involved or not.

The reason this perception becomes so important is that it greatly dictates our future steps at the time of separation. Those few that agree to Joint residence have clearly been strong enough to put their children first. They have been able to overcome their natural basic desire to be selfish. The end result is children continue to be raised by two loving caring parents with as little disruption to their emotions as possible.

Those that don't take this step go through a different thought process. The following doesn't apply to all, however it certainly applies to most. The questions parents now ask themselves become;

- **What do I want?**
- **What can I get?**
- **What do I have to give?**
- **What if we don't agree?**

You will notice that the most important question has been left absent. **What is best for my children?** While not all parents fail to ask this question, it should be said that most do. Of those that do feel they ask the question, it is questionable as to whether they attempt to answer the question without prejudice. Now the big issue becomes the two questions of **What can I get? And What if we don't agree?** We know there is a perception of bias amongst the general public. From this it's safe to assume that if you're the mother, your thought process will most likely be "I would probably win in court", if you're the father then your thought process is most likely "I have no chance in court". From my own situation I can confirm the previous statement, I was primary carer of my son until separation, for all intents & purposes I took on both roles of parenting and contributed the majority of parenting to our son. Even with this the thought of "I have no chance in court" was the primary driver for me when it came to negotiations. I had little doubt that my sons best interests were best served remaining with me, for reasons I won't enter into, yet with that I knew that I was much better being quiet and hoping I could get as much time for my son as possible. From the many parents I have spoken to, this is by far the most common thought process. From the mothers perspective the thought process is generally that of control. If I don't get what I want, the court will support me.

Once again, this is not an issue of how the court functions; it is an issue of how the public perceives the court to function. In many cases, this perception has dictated the outcome of residence without the court ever becoming involved. These cases rarely show on any publicized statistic.

## **Lawyers, Solicitors and Acquiring Tactics**

When discussions between parents break down the legal system inevitably becomes involved. The primary role of solicitors is to act in their client's best interests. They will listen to what their client wants, advise accordingly and then act accordingly to their own interpretation. Their own ethics now play a large role as to future events. This process unfortunately takes no legal consideration of the children into account. The children have been placed at their parents' mercy, who in turn have been placed at their legal representative's mercy. The solicitors are now the driving force behind determining the parents' interpretation of the child's best interests. Most of these people have had no contact with the children, nor direct contact with the other parent. The process now becomes very clinical and tactful. The current system allows and encourages many tactics to reach the primary objective – winning. The best interests of our children have now become a competition, one winner, and one loser.

We all know many questionable tactics are adopted, we also know that the court frowns on many of them. We also know that at the end of the day.... They work!

They work simply because they are allowed to work. There is no legislation to prevent them, nor is there a code of ethics on child protection that solicitors must adhere to.

Some of the more common tactics are;

**Withholding** – Withholding is a simple tactic to create a status quo of residence. The process is one of denying any contact or physical contact to the other parent. The objective is to extend this time as much as possible, the lengthy court waiting times greatly assist with this tactic. It's a fairly easy task to deny contact for months on end. My own situation could have easily resulted in a period of 5 months before my son and I were to have any physical contact had it not been for the fact I was able to spend many thousands of dollars to speed up the process. Many do not have that ability. This tactic has been proven to have possible long-term negative affects on our children. My own son even six months later, still has a genuine fear that at any time he may not be allowed to come home to dad.

We know the tactic of withholding is damaging, the internet site of the family court even states that it is important that children of separation have frequent contact with both parents. Why then is this allowed to happen?

The extended definition of kidnap falls with the word Ransom. *3a; To keep in confinement until payment is received, b; To attempt to force (a person) to comply with ones demands.* The act of holding a person to ransom in our country is a Federal offence and carries severe mandatory sentencing. The legal tactic of withholding a child from another parent, until such time as an offer is accepted, meets the exact definition of Ransom. One is illegal, the other is encouraged. I have asked many people why this is the case, to this day no one has been able to provide a satisfactory legal argument as to why this should be allowed. Indeed no one has been able to provide any moral argument at all.

**Promotion of conflict** Promotion of conflict is simply that, to encourage parents to fight. I have confirmed with several solicitors that this is a common strategy, especially where Joint Residence is asked for. This has also been confirmed with many more parents of both sexes. The reason for this is simple, the Family Court tells us time and time again, that where conflict is an issue, Joint Residence simply cannot be ruled. The justification for this is that if parents are unable to agree, the children will eventually be harmed emotionally. What the current system fails to do is investigate thoroughly the cause of conflict. Nor does it address or encourage solutions. The creation of conflict from my understanding is both a common and highly effective tactic.

**Legal promotion of adverse reaction** Many solicitors work very hard at writing extremely intimidating letters, many of which display clear double standards. This is done in a way where the intention is to cause a reaction, which may be used as evidence in court. A perfect example of this was provided to me today. I can confirm this to be true as the source is extremely close, she has recently been having issues with her ex husband. The issue has arisen where both parties have engaged in argument, although I don't agree with the actions of BOTH parents, the solicitor's response to the ex husband was truly amazing. The solicitor has ordered that at changeover he is to remain in his car and is unable to open his door, he is to beep the horn on arrival and the mother will collect the child from the car. The intention of this letter was to purely antagonize. Should he fail to comply with the order it is the intention of the solicitor that this be used against the father in court. The father has now been ordered that he can't open his door on a public road. I know both parents quite well, from my knowledge of both of them the action of the solicitor is extremely savage, and will most likely achieve its desired result. It is also important to note that solicitors have no power to make orders, yet they constantly do.

My own situation has an extremely long paper trail of double standards and automatic assumptions of compliance. Many of which were no doubt written with the intention of antagonizing.

**Distance** This is another successful tactic, especially when used in conjunction with withholding. The children are established in a new location. This needs to be done before any orders are in place so the move may legally happen without serious recourse. There are many reasons why parents choose to move. It needs to be remembered though that by doing this, one parent is effectively removing the other parent from the equation of a two-parent child. Many of these moves are interstate, yet with the size of Australian states, the move can quite easily be within the same state and maintain a distance of hundreds, or in some cases thousands of kilometers. Law needs to be written to prevent the automatic relocation of a child without joint parental approval.

There are many more examples of questionable tactics used by solicitors. The ultimate objective of these is to reach the best interests of the parents. In many cases little consideration is given to the best interests of the children. The solicitors aren't entirely to blame, they are simply doing the best their ability allows, using the many tools the current system provides them.

## Mediation and Counselling without Incentive

The family court offers many incentives to encourage parents to reach resolution. Unfortunately these processes can only be effective should both parents wish to reach a resolution. While I feel there should be as much encouragement to reach resolution as possible, both of these approaches offer little to no incentive. This directly returns to the state of mind of both parents, their perception of where they stand and what THEY want. While I agree that these should remain private, it is unfortunate that things said at mediation or counselling are unable to be used in a hearing. It is clear that while many parents lie in court, they tend to be more honest when there is confidentiality. Steps need to be taken to ensure honesty, mediators should be able to submit notes to the court of situations they know to be false and suspect an offence of perjury may take place. These are points which may often determine the outcome of a hearing and determine the best interests of the child, yet the hearing Judge will never be made aware of them.

A hypothetical situation could be two parents, who reach an agreement of Joint Residence. There is no conflict and both parents have focused on the child. At this point the solicitors become involved and the claim becomes that Joint Residence was never agreed to, what was agreed to in fact was less than half of that. We now have one parent asking the court for three-quarters of time with the child, and the other parent wondering what has happened. These parents go through the normal process, with one parent continually claiming the offer made is the offer that was agreed to. They eventually attend mediation, at mediation it is revealed that the agreement was Joint, yet due to court rules this information can not be admitted as evidence to court, even though both parents and the mediator are fully aware that the claim being made is clearly a lie. This parent is about to commit perjury, and evidence exists to prove this, the evidence is unable to be used and the crime is allowed to be committed.

The second issue with the mediation and counselling process is the lack of incentive. If either parent is confident of their position at court, there is little incentive for them to reach a compromise at mediation, unless that compromise agrees with their own wants. The mediation to be fully effective should be used in conjunction with mandatory education. Parents need to learn

and understand that their actions do affect their children, they also need to understand that what the parent/s desire, isn't always the same as the wants and needs of the children. Even when the children don't say what they truly desire. The experts tell us that a child will often say what he or she feels the parents want to hear. This is the unfortunate situation we have all created.

### **Determining the Child's Best Interests**

Our current system offers a complicated, emotional and expensive solution in determining our children's best interests. The system relies heavily on mediation and counselling services, family reports, solicitors' approaches and the final determination being made by a Judge of our court system. While the level of qualification varies from stage to stage, it is safe to assume that the only people that know truly about the ability of the parents to function as parents, are the parents and children themselves. The system takes an invasive approach to collect as much information as possible, the end result is determined by how this information is presented to the court. Unfortunately whether the information is accurate or not appears to have little consideration.

I understand that a great weight is placed on the information placed within family reports. These reports are conducted within a day and within this time frame the psychologist is determined to be able to provide expert evidence. I don't wish to question the level of expertise of these people as I am sure they are all highly qualified. Yet the apparent authority this one person has in determining after just one day, the best interests of our children, to me is frightening. These people have little to no accountability and are expected to be able to inform the court of the child's wishes along with the attitude and approach of the parents. We all know that how people often behave in the privacy and protection of their own homes, is not how they behave in public. Whether a psychologist is able to effectively evaluate this in just one day is highly questionable. Either parent may be able to present themselves in which ever light they choose fit, it then becomes the responsibility of the psychologist to determine whether the impression being given is accurate or false, it is after all, simply an impression. What would be more appropriate is a series of mediation sessions of parents and children both individually, and jointly, in a relaxed, non-confrontational environment. This should also be able to include the interviewing of outside persons with good knowledge of the family history. The mediator would then be able to provide information to the courts based on a closer appreciation of the people themselves.

Parents should be encouraged to determine the best interests of their children, the simple state of the matter is that the current system does not achieve this, regardless of how much it claims it does. Parents are encouraged to distance themselves from one another and focus inwardly. By doing this it makes the job of determining the childrens best interests far greater, with a much higher probability of getting it so very wrong.



## **A Rubutable Presumption of Joint Residence**

We know that the best upbringing any child can hope to have is that of a loving, caring, intact family. Really we don't even need to ask the question, the statement is that of an obvious nature. When this family structure fails, we need to focus on what we can do to achieve the closest thing resembling the intact family. Again, this is common sense. The question then becomes one of whether the structure of a resident parent and a non resident parent, where children spend less than 30 percent of their time with either parent, remotely resembles the structure of the intact family. The clear answer is no, it doesn't. So we then need to look for a scenario that does achieve this. Ladies and gentleman of the commission, we already have the answer, deep in our hearts we know what is best for our children, we simply choose not to look for it. Why? Because to some degree, we are all selfish.

Remember back to your childhood, if you were approached with a hypothetical question of "We're going to make you spend less time with one of your parents, which one would you like it to be?" Your first natural response would be neither. You would become confused and angry, just like so many children do. I can state without any doubt whatsoever, that if my son were to have less contact with either myself or my ex wife, he would be absolutely devastated. You see even though my wife and I have what is "perceived" to be a high level of conflict, my son is currently in the fortunate position where he is able to enjoy joint residence. We share the care of our son 50/50 and my son would not have it any other way. Unfortunately later in the year, my ex wife and I are to attend court for final orders, one of us will leave a winner, and one of us will leave a loser. Due to the situation my ex wife and the system have created, there simply is no other option. Regardless of the outcome, the one fact that remains clear, is the fact that my son will be devastated. The potential damage this will do to him is something no one is looking forward to. The current system is about to hurt my son, this is a matter of fact and it is an unavoidable fact. The system has guaranteed that.

At this point I could overwhelm you with literally thousands of pages as to the expert opinion, as to why Joint Residence is the best outcome for our children. I won't do this as I suspect many others have already done so. We know it to be the best solution, yet some of us, for reasons of their own, choose not to acknowledge this.

## **Opposition to a Rubutable Presumption of Joint Residence**

Since John Howard's release into an inquiry regarding Joint residence, the media frenzy and commentary from various groups has been amazing. At the very least it proves beyond any doubt that this topic is one that affects all Australians deeply, as a result it needs to be given your very best intentions. Many polls have been conducted, petitions created and letters written, all showing that the majority of Australians clearly support a Rubutable Presumption of Joint Residence. However there has also been a number of concerning public statements from officials, false claims by specific media and individuals.

I would like to address these individually if I may.

Some claims have been made

*Joint residence should not be a presumption to protect children from abuse.*

We all know the risks of doing nothing when it comes to child abuse. This is something that should never be tolerated under any circumstance. A rebuttable presumption is just that! It allows an argument against why Joint Residence should not be adopted for each case. The important thing however, is that the argument against Joint Residence must

provide evidence that the child is at risk. We know the high number of legal tricks used, legislation must be written in a way that minimizes the potential for false accusations. Unfortunately it must also be written in a way that does protect those legitimately at risk. This is where legislation alone isn't enough. Thorough investigation to the claims being made needs to be conducted. Those investigating the claims also need to be accountable for their findings, for if they are to get it wrong, the consequences can be devastating regardless of whether abuse was found to be proven or not. No one wants to do anything that would expose children to risk, nor does anyone want to be falsely accused.

*Children need to be shuffled from home to home*

I found this argument ridiculous, children are already shuffled from home to home. This is an unfortunate fact that comes with separation. I will repeat what I have earlier stated, stability comes from a state of mind. Those children that are privileged to enjoy joint residence generally adapt quite well. Really it is no different to the weekend role. Studies have shown that children raised in joint residence have found it sometimes difficult having two homes, the same results have been found from children with a resident/weekend parent arrangement. It is no different. People bond to people, not to property. For some people to think that a bond between toys, furniture or linen is more important than a bond between parents is ludicrous. Stability does not come from property. Of the many studies conducted throughout the world, children from joint residence have at some point been asked the question "would they change their contact arrangements?" to which the answer is an overwhelming no. Unfortunately the same can't be said about those which do not enjoy Joint Residence. We know that many of these children shift from parent to parent, we also know that many grow up with hatred towards the resident parent and the system that helped create and shape their lives.

*It has been claimed that Joint Residence is not regarded to be in the best interests of the children for those parents that require court intervention.*

This claim came from a highly influential person. The statement was made in the context that those parents that require a court hearing obviously can't agree on the decision making process, therefore how can Joint Residence be expected to work? I feel that this comment, although it may have an element of truth, fails to look at the reasons why the parents have been brought to court. For them to be there in a position where they are both prepared to fight for the privilege of being with their children, clearly shows a high level of love and attachment to their children. They are simply there because one, or both, in many cases feels he or she has more right than the other does. The reply to that, no parent has a right to be with his or her children, the rights to be focused on are the rights of our children and the responsibilities we owe to them. I read a summary of a US hearing where both parents continually dragged each other through the court in order to get more time. There was a high level of conflict and a great deal of distress. So much so that eventually the Judge, becoming fed up, blasted both parents and ordered Joint Residence. He also added that the first parent to create conflict or cause distress would lose residence. This had everybody in the courtroom stunned, the end result? Joint residence that worked. This occurred several years ago and to the best of my knowledge is continually working well. These parents were basically told to grow up or else, they did exactly that. I am yet to hear of any similar Australian ruling, perhaps it's about time the courts took some responsibility and ordered that separated parents grow up.

*One journalist wrote that separation could be good for children where fathers have shown aggression. It was titled Divorce and Defective Parenting*

To quote the document "There is a school of thought that adheres to the line that divorce is a defining moment for children. In other words, children are badly affected by the separation of their parents. Poor and unacceptable behavior, drug addiction, mental health problems and relationship breakdowns can all be attributed to the divorce of an individual's parents.

*Consequently, the glib conclusion is that parents should stay together for the good of the children. The logic is that children will not be badly affected and all of these problems faced by so many individuals in the community will be resolved.*

*The author of the article gave an example of wandering through a supermarket prior to Christmas. The supermarket was crowded. There was a young couple with a child in a pram. The child wasn't crying but was whining (we've all been in this situation). The father smashed his fist down on to the handle of the pram and shouted into the child's face "Shut up".*

*The violence of the father's explosion prompted everybody in the immediate surrounds to stop and look."*

The instant I read this article I related very well to it. In fact I related so well that it makes me wonder if the journalist that wrote this is a neighbor of mine. You see this exact episode happened in my supermarket. It wasn't prior to Christmas, it was the week after, and it wasn't the father, it was the mother. Another instance at the same supermarket saw me look in horror as I saw a child pushed aggressively in the back with far more force that would have ever been acceptable, again this was the mother. My point is that some have attempted to create an impression where the father is typically the aggressor. In reality we know this not to be true. We know that statistically the mother is 4 times more likely to commit murder of their children than the father is. We also know that both sexes are capable of abuse.

Ultimately, abuse of any kind is not a gender issue; it is an education issue. Both Mothers and Fathers are capable of aggression towards their children. They are so, simply because they don't know any better, no one has taught them self-management. No one has taught them how to be an effective parent.

*If fathers want more responsibility with their children, they should take the responsibility before divorce*

Another influential person made the statement that Fathers don't take an effective parenting role at home, therefore it was suggested that this being the case, then why should fathers have any privilege after separation? My suggestion is that this opinion is well out of touch with reality. Infact I'm sure that all those families where the fathers collect their children from school or kindergarten, cook for, clothe, clean, educate and play with their children would all agree with me. Our society is rapidly changing, conservative views need to change accordingly.

There have been numerous comments, both negative and positive towards a rebuttable presumption. Many from both sides have been poorly thought out and lack a certain level of common sense. One thing this does achieve, is debate. This is something that has been needed for many years.

## Conclusion

A rebuttable presumption of Joint Residence offers children the stability of two loving parents where those parents are able to provide for them. Situations change, both after separation and indeed after court. Yet our system makes any change to orders extremely difficult and costly. The act of having our children's best interests determined has become a clinical and costly exercise, one that does often get things wrong. It gets things wrong simply because the entire approach to any sort of determination is inadequate. In the vast majority of cases children love both parents equally. In the vast majority of cases parents return this love, they also display this love with signs of affection by wanting to care for them and wanting to provide for them. This is our children's right, and it is our responsibility, a responsibility that most of us find a privilege. Situations arise under the current system, which assist parents to become customers of the legal system, a system that has become an extremely lucrative one.

Parents choose not to adopt Joint Residence because of inward thinking. My own wife made the statement that she should automatically receive residence because she is the mother. This was her claim over our son. While I respect she is indeed his mother, as I was there for the birth, what she fails to do is respect the fact that I am also the father. She is being led by perceptions from the legal community rather than putting the interests of our son ahead of convention. How many other parents have done the same? Our courts suggest most have. Joint residence isn't the answer to responsible parenting; it is however an extremely positive step forward, in promoting responsible and mature actions.

Actions which do place our children first.

Let's build a system that is fair to all. A system that forces both parents to avoid court rather than embrace it. A system that listens to everyone, not just those that yell the loudest. A system that my son can one day say thank you for.