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The HOUSE of REPRESENTATIVES
STANDING COMMITTEE on FAMILY and COMMUNITY AFFAIRS

In response to
The PARLIAMENTARY INQUIRY into
JOINT RESIDENCE ARRANGEMENTS

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Prepared by:
Shoko Takahashi
Social Work Student,
University of Queensland
on placement at
the Women's Legal Service,
Brisbane
(07) 3210 0457
syoko4@hotmail.com

Introduction

This paper aims to express our serious concern on the injurious legal presumption of joint residence, in response to the Parliamentary Inquiry into Joint Residence Arrangements. We strongly claim that:

- The presumption limits the ability of the court to have regard to the diversity and uniqueness of families and to make decisions which best suit the needs of those families.
- Its emphasis is on the rights of parents rather than the best interests of the child, pressing rigid perceptions of fairness and imposing unreasonable burdens to children.
- The presumption exposes not only the separating families with domestic violence, but also a number of families that have already been troubled with abusive non-residential parents after separation to greater risks.

Although it cannot be said that the current legal system is functioning ideally, the current Family Law Act sufficiently sets out the factors to be taken into account about parenting of children, such as: wishes of the children, the nature of the relationship of the child and each parent, the possible effect of changes in the child's circumstances, parents' capacity, and the child's maturity, sex and background, etc. For the separating families which seek joint residence by their own choice, actually it provides clear guidelines on the issue. However, for those families that appear before the Family Court, it is essential that their circumstances are considered on an individual basis.

Background

The emergence of the pro-contact culture since the Family Law Reform Act 1995 has been recognized widely by many legal practitioners and workers in the relevant areas in

relation to a rise of men's rights groups.¹ The Family Law Amendment (Joint Residency) Bill 2002, introduced by Senator Len Harris, One Nation Senator for Queensland, reflects the viewpoints of those groups which emphasizes the parents' rights to contact with children. In his second reading speech, the Senator argued that the current winner-loser court system had encouraged divorced fathers to abandon true fatherhood, and that as family violence was the worst behaviour of the most extreme individual, the law should serve the vast bulk of fit and loving parents.² However, family violence and its victims are the major business of the Family Court, and those families are the ones who would negatively affected by the legal presumption of joint residence.

Impact of joint residence on children

Although children's right to be cared for by both parents and parents' shared responsibilities are secured in the Family Law Act, the way in which those are operationalised is considerably different in each family. In the UK, C. Smart conducted research about co-parenting (a parenting arrangement where children spend virtually equally amounts of time with both parents and basically had two homes) and analysed its influence on children from various angles.³ Those effects include:

- Physical space

Practical issues of getting one place to another, organizing clothes, toys, school work, the way of contact with friends, etc.

- Emotional space

Difficulties of transfer from one emotional sphere to another, being influenced with their parents' feelings and dealing with their own feelings.

- Psychological spaces

Necessity of adjustment to another world where rules, routines, expectations are all different.

- Pressure for fairness

Necessity of balancing the equal shares to parents and finding time for themselves. Smart defined the process of exploring the most appropriate form of fairness in the families as a 'journey' from 'fairness-as-equality' for parents to 'fairness-through-recognition' of children's perspectives.⁴

Although Smart found that there were some children who appreciated co-parenting, adjusted themselves quickly, and developed new relationships with their parents successfully, it often caused a recurring sense of loss, ontological insecurity, a feeling of lack of control over their lives, continuity and security. Smart concluded that the key element in the success was not the time but the caring, the quality of relationships.

Myth of 'the best parent is both parents'

Philosophically, parents should be equal in their responsibilities for rearing their children. Nevertheless, a range of statistics show that in reality there is a huge gap in parenting responsibilities between mothers and fathers. For example, in 1999 in families where both parents were employed, 70% of mothers used flexible working arrangements to care for children, while only 33% of fathers used those arrangements.⁵ After decades of debates and actions against the division of labor by gender, women are still predominantly primary carers of children.

When the parenting arrangement is considered, this fact should not be devalued. After separation, the vast majority of the children (88%) live with their mother.⁶ However, how fathers commit to care for children is extensively different and they do not always seem to be 'fit and eager' as Senator Len Harris mentioned. For instance, the survey of families with at least one child aged 0-17 who has a natural parent living elsewhere shows that 40.9% of those families has received no child support and when we look at only the families with private child support arrangement (i.e., no involvement of

the court or the CSA), the proportion increases to 49.0%.⁷

In addition, the same survey indicates that 29.8% of the children has been visited by non-residential parents 'less than once a year/never', followed by 21.7% of 'once a week' and 15.2% of 'once a fortnight'.⁸ In regard to how visiting arrangements are decided, only 17.1% was made by 'mediation, counselling, consultation with lawyers and/or court proceedings', while 52.1% was by 'private arrangement' and 30.8% was 'not asked/not stated' (the question was not asked if the visiting arrangement was less frequent than once per year).⁹ In short, the majority of non-residential parents agreed to the contact arrangement without having any intervention by the legal system or chose to see their children less than once a year, and at least about 40% of them did not pay any for child support.

Those statistics suggest that it is reasonable for residential parents and community workers to have concerns that joint residence might be sought as a means of reducing the obligation for child support.

Possible risk of increasing victims of violence after separation

The Women's Legal Service has been assisting victims of domestic violence and has conducted research on the issue in association with other community organisations. The report includes some issues that will be significantly affected by the legal presumption of joint residence. One of the major concerns is the violence after separation in various forms such as:

- use of contact arrangements to harass and control the residential parent by the abusive non-residential parent.
- use of children as conduits of abuse.
- litigation abuse through continual court applications by the non-residential parent that would result in running out of legal aid funding and enormous stress

to the residential parent.

- use of processes ancillary to the litigation as opportunities for abuse.¹⁰

Moreover, the following points need to be taken into account.

- interrelation between child abuse and domestic violence against the mother of the child.
- direct and indirect effects of domestic violence on children.
- the difficulty in proving violence, especially sexual abuse of children.¹¹

Through the research and day-to-day services to the clients, it has been found that under the current pro-contact culture it is difficult to limit the amount of contact even if the domestic violence has been substantiated. In this situation, it is totally unacceptable to put more obstacles in the way of ensuring security and welfare of mothers and their children by introducing joint residence as a norm of parenting arrangements.

Recommendations

- I would not support the adoption of the legal presumption of joint residence. It should remain a form of parenting arrangements which might be voluntarily chosen by families.
- Rather than spending time and resources around this presumption, the Government, the Parliament, the legal society and workers in the relevant areas should focus on a range of unresolved issues on families experiencing separation, especially the obstacles surrounding residential parents and their children under the risk of violence, as presented in the report 'An Unacceptable Risk'.¹²

Endnotes

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- ¹ Rendell, K., Rathus, Z. & Lynch, A. (2002) *Un Acceptable Risk: a report on child contact arrangements where there is violence in the family*, Women's Legal Service Inc., Brisbane, p. 32.
- ² 'Family Law Amendment (Joint Residency) Bill 2002, Senator Len Harris, One Nation Senator for Queensland, Second reading speech', available at:
<http://parlinfoweb.aph.gov.au/piweb/Repository/Chamber/Hansards/Linked/1776-3.PDF>
- ³ Smart, C. 'Children's voices', Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July, 2001, available at:
<http://www.familycourt.gov.au/papers/html/smart.html>
- ⁴ Wade, A. & Smart, C. (2002) 'As Fair as it can be? Childhood after Divorce', Centre for Research on Family, Kinship & Childhood, University of Leeds, U.K.
- ⁵ Australian Bureau of Statistics, 'Families with at least one parent employed: Working arrangements used to care for children – 1999' in 'Australia Now 2. Australian Social Trends Family & Community -Family functioning: Balancing family and work', available at:
<http://www.abs.gov.au/ausstats/abs@.nsf/0/745DE481644DDB93CA256D39001BC33E?Open>
- ⁶ *ibid.*, 'Children with a natural parent living elsewhere, April 1997'.
- ⁷ Australian Bureau of Statistics, 'Child Support, Selected Characteristics' in *Family Characteristics*, Cat No. 4442.0, Canberra, 1998.
- ⁸ *ibid.*, 'Parental Care Arrangements, Frequency of Visits'.
- ⁹ *ibid.*, 'Parental Care Arrangements, Selected Characteristics'.
- ¹⁰ Rendell, K., Rathus, Z. & Lynch, A. (2002) *Un Acceptable Risk: a report on child contact arrangements where there is violence in the family*, Women's Legal Service Inc., Brisbane, pp. 46-50.
- ¹¹ *ibid.*, pp. 33-40.
- ¹² *ibid.*, pp.129-138.