Women's Law Centre of WA (Inc) – Submission to the Standing Committee on Family and Community Affairs inquiry into child 'custody' arrangements in the event of family separation.

Introduction

The Women's Law Centre of WA is a community legal centre for women. We provide a state-wide legal service to women, and target our services to women who face disadvantage. We deal primarily with family law cases involving children's issues. As a result we have significant experience with the current Family Law and considerable insight into the likely practical result of introducing a presumption of joint residence.

Summary of our position

We are opposed to the introduction of a presumption of joint residence.

We are concerned that the introduction of a presumption of joint residence will be at best unworkable and at worst dangerous for women and children. We support the practice of joint residence, where parents can agree to continue to co-parent beyond their own separation. However, this is not the case in the majority of cases where parents resort to the Family Court. We are concerned that a presumption in favour of joint residence would need to be rebutted in so many circumstances, that in fact the presumption would only apply in a minority of cases. The need to rebut the presumption would create greater litigation, heightening the problems people already face accessing justice.

We are concerned that the issue of separated parent's involvement with their children is being considered from a 'parent's rights' perspective, rather than maintaining the Family Law's current focus on 'the best interests of the child'. We support the intention to foster positive relations between children and each of their parents, but we believe that joint residence is not necessarily an effective way of achieving this outcome. A *presumption* of joint residence is a most impractical way of furthering this outcome and would have many detrimental effects.

We are concerned that this inquiry into residence and contact is also considering child support arrangements. Linking child support payments with contact arrangements fundamentally undermines the workability of child support – because child support is necessary to pay for children's needs regardless of contact arrangements.

In this submission we have focused on the question of a presumption of joint residence. In the subsequent sections we have addressed the issues surrounding children's contact with grandparents and the current child support framework.

Detailed concerns about a presumption of joint residence

1. Consequences of a presumption

(a) Increased litigation and re-litigation

In creating a presumption of joint residence the government would be creating a presumption that most families will need to rebut. This will create further demand for

Court time, Legal Aid resources and Community Legal Centre time. All of these organisations are ill equipped to service this greater demand.

We are concerned that rebutting such a presumption will create an unfair evidentiary burden. Introducing a presumption diminishes the relevance of the status quo and diminishes the importance of the primary care giving role – this means that the presumption will require other evidence for rebuttal, which may be harder to substantiate and more likely to create further conflict.

Californian experience of a legal preference for joint residence has shown that there are heightened instances of re-litigation in cases of joint residence[1]. In fact joint residence was the least stable of all parenting arrangements common in California. Californian research has shown that the families most likely to return to the courts after a joint custody order were those families where neither parent initially sought joint residence – it was either a compromise agreement or a Court ordered outcome. This indicates that a legislative presumption is not sufficient to ensure that families will be able to withstand the practical difficulties and pressures of joint residence. In fact Californian research shows that only one quarter of joint residence families developed cooperative parenting arrangements – in the rest of the families parents continued to have conflict over the children or disengaged from parenting[2].

In recognition of the changing dynamics of families, Family Court orders relating to children are never 'final'; they can be reconsidered at any point if a party can show that there has been a change in circumstances. This is a necessary and beneficial element of family law, however we are concerned that a change in the law will prompt many people to re-litigate their family law cases, creating further disruption and uncertainty in the family.

(b) Increased problems of access to justice

Many people simply do not have access to the legal assistance, court services or financial resources required to participate in Family court proceedings. Creating a presumption that will need to be rebutted by the majority of separating families will heighten this systematic problem of access to justice.

Most women who seek our assistance have either reached the limit of their Legal Aid funding or have been denied a grant of aid. Many people face extreme difficulties in participating in court proceedings. A presumption of joint residence would create an additional and unnecessary hurdle for many people. The following case study demonstrates one woman's experience – which is not uncommon.

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[1] Eleanor E Maccoby & Robert H Mnookin, "Dividing the Child: Social and legal dilemmas of custody" (Cambridge: Harvard University Press 1992) considered in Teitlebaum, L, "Book Review" *Michigan Law Review* 92 (6) p1800 – 1839 pp 10.

[2] As above note 1, p12.

A woman was referred to our service from a community agency assisting women from non-English speaking backgrounds. She was trying to create enforceable contact orders, because her ex partner was consistently failing to comply with their informal agreement. While she could speak English quite well she was unable to write in English, and could not read the court forms. Because she did not have family or friends in the Perth, she had to pay over $100 for the services of a process server just to serve the documents on her ex-partner. Our service could not represent her in court because of limited funding, and she was denied a grant of legal aid. She represented herself at the court hearing. The other party was represented by a private solicitor, and had paid for the services of expert witnesses. Our client breached the interim orders made at the hearing because she did not understand the oral orders made on the day.

Many people outside the metropolitan areas of WA experience considerable difficulty accessing the Family Court, which travel on a limited circuit through the state. This will create particular difficulties for people living in remote, rural and regional areas who need to rebut a presumption o joint residence. The following case study demonstrates some of the difficulty involved in accessing the court.

A woman contacted our service seeking assistance with an urgent application for interim orders. The nearest Court house was 4 hours drive from our client, and the Family Court was not sitting there for another 6 weeks. We assisted this woman to have a hearing listed in the Perth family Law Court, and for her to have access to a video link service for the duration of the hearing. This required overcoming considerable logistical difficulties in organising access to scarce resources over vast distances.

If many more families need urgent access to the courts to rebut a presumption of joint residence, organising access to these services will become increasingly difficult, and creating a considerable burden on the court both in terms of time and cost.

(c) Increased poverty and child support issues

Most research in Australia and comparable jurisdictions concludes that families are in worse financial circumstances after separation then during the relationship – primarily because of the need for two homes after separation. It is also widely acknowledged that single parent households headed by women are the most impoverished households.

We are concerned that the presumption of joint residence will mean that more children will live in poverty.

Californian experience shows that in cases where women are awarded residence, rather than joint residence, often they forgo their property entitlements to placate their ex partner. This means that not only are children living in the household with a typically lower earning capacity, but with a lower proportion of the marital property to support the family.

Many women complain of similar experience under the current Family Law – even where there is not a presumption of joint residence.

A woman rang the Women's Law Centre of WA to obtain legal advice after receiving correspondence from her ex husband's lawyer.

Our client had the residency of the couple's two primary school age children. The father had regular access, which he didn't always exercise and had always maintained that he did not want to be the 'resident' parent. Together the parties had reached an agreement to sell the family house and for our client to receive the 8 year old family car and 60% of the remaining equity from the proceeds of the sale of the home.

The father's lawyer's letter explained that he had changed his mind about their previous agreement. The letter went on to say that even though the house sale was nearly complete, the previous agreement was over. Further, that if our client did not agree to a reduction in the proceeds (from 60% to 40% of the remaining equity) then he would file for joint residency to reduce his child support obligations.

The Women's Law Centre advised the woman on her family law children's issues but could not offer property advice because of lack of resources. It is unlikely that she will receive advice from a private solicitor because she does not have paid employment and the proceeds from the sale of the family home are modest, and would barely cover legal costs.

A clear example of the children's residency being used as leverage for property and child support matters. We are concerned that this will become more prevalent is parents are encourage to think of residence as their 'right'.

Research from the United States shows that in more than half of the cases where joint residence is awarded, in actual fact the children continue to live with their mother[3]. The major outcome of this arrangement is that father's child support liabilities are reduced, and the mother has less capacity to enter the workforce because she is caring for the children full-time. This means that the legal preference for joint residence creates further childhood poverty.

Despite the complaints of many men who feel it is unfair to pay child support when they do not have very much contact with their children, US experience has shown that even where joint residence was awarded and exercised, fathers still didn't comply with their child support payments. US research has shown that fathers were required to pay child support in two thirds of cases where joint residence was orders – yet only 52% of these men paid their full child support[4].

The increased litigation costs incurred through rebutting a presumption of joint residence, or undergoing the re-litigation common in the event of joint residence order is an expense that few families can afford particularly immediately after separation.

[3] As above note 1, p8.
[4] As above note 1, p11.

2. Practical problems with a presumption of joint residence

Requirements for joint residence to be positive

Many parents who are separating agree to joint residence arrangements, without reference to the family court or in consent orders. However it is currently quite unlikely for the Family Court to *order* joint residence in contested case. In the small proportion of cases which go to trial in the Family Court (less than 5%[5]) the parties tend to be deeply distrustful of one another, uncooperative and unable to find agreement despite court mandated counselling and conciliation conferences.

Problems with the presumption – with so many exceptions, who will this law be for?

There are many circumstances where we believe that a presumption of joint residence may increase risk for women and children in dangerous situations, or be unworkable. We have illustrated the following reasons with case studies from our clients.

(a) Domestic violence and child abuse circumstances

In circumstances of domestic violence or child abuse a presumption of joint residence will create a legal presumption that the children spend half of their time with the person who perpetrated their abuse, or who was violent in the home. Such a presumption is clearly not in the children's best interests and should not be contemplated by government.

Creating domestic violence or child abuse as one of a series of circumstances which would rebut a presumption of joint residence, even if this rebuttal operated automatically, would be insufficient to safeguard the wellbeing of children and women. This is because the great majority of families determine their post separation residency arrangements in the 'shadow of the law' and not at a Family Court trial. The 'shadow of the law' is likely to be dominated by knowledge of a 'presumption of joint residence' and not by the knowledge of the exceptions. We are deeply concerned that the introduction of such a presumption would further disempower women in vulnerable circumstances. We are concerned that a presumption would create circumstances where rather than having an equally enforceable right to residence (as is the case under the current law) women in these circumstances would only have an equally enforceable right to residence of their children half of the time.

23% of women who have ever been married or in a defacto relationship experienced violence by a partner at sometime during the relationship[6]. Several research studies have shown that in homes where the female partner is being physically abused, there is a 40-55% chance that there is physical or sexual child abuse occurring[7]. This violence often continues after separation and many women report experiencing violence at changeover for contact – which would necessarily be a more common event with joint residence.

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[5] Nicholson, A (CJ) " The child's rights come first" Issue 448 *Australian Family Law – family law news* (North Ryde: CCH 2003)
[6] ABS Women's Safety Survey (1996)
[7] Legal Aid WA Domestic Violence Legal Unit training presentation, June 2003.

(b) Long distances between parents

Joint residence will be particularly difficult to carry out for parents who live long distances from one another. This is a real issue in Western Australia for many families. It is quite common for one parent to relocate from a small town or regional area at the point of separation. While this creates difficulties for contact to continue it would be extremely difficult to facilitate joint residence over long distances – travel may be prohibitively expensive, travel may also take up vast amounts of the children's time, and schooling would be interrupted.

Still, some people are able to manage shared care arrangements across vast distances. This case study demonstrates how this was achieved.

A woman in the Pilbara sought some initial advice for her situation. She and her partner had recently separated, and he had moved to another town about 10 hours drive away. Both parents wanted to have caring relationships with the children – but recognised the difficulty of sharing residence while living so far away. They came to the conclusion that the children would live with one parent and then the other parent for extended periods, usually from 4 to 7 months with one parent before seeing the other parent. The three children were aged 7, 9 and 10 at the beginning of this arrangement, and as they grew older their wishes increasingly determined how long they stayed with each parent. The 'handover' in this case cost about $1000 each time, either as a two day drive, or a chartered flight.

This arrangement required a great deal of flexibility on all sides given that employment arrangements altered depending on where the children lived, and the children's schooling was often disrupted. This arrangement was supported by both parents' extended families who were able to share the care of the children. This family also required the financial resource to provide for travel and to equip two houses with the children's needs.

More frequent changeovers between parents would be prohibitively expensive for most families in the north of WA – the distances and time required to travel mean that flights are the most practical way to travel between regional centres, with passage costing from $400 to $800.

Arrangements like these are made today without a presumption in favour of joint residence – and would be totally unworkable if both parents were not committed to the arrangement.

(c) Full time work / shift work / fly in – fly out work / working away from home.

A presumption of joint residence would be impractical for many families and not in the children's best interest for many families. Where one parents works full time, or has shift work, or fly in fly out work or works away from home, the children may in effect be cared for by childcare or one parent's new partner rather than being cared for by their own parent. While children still have a right to know these working parents – their relationships can be established through parenting contributions made without the children having joint residence orders.

The following case highlights the difficulties of rigid residence arrangements which did not consider the parent's employment:

A mother rang our service very distressed. Her 11-year-old son was staying with his father for the first week of the school holidays. However his father was still working full time during this period and had made no arrangements for the child to be cared for during the day. The 11-year-old boy was left home alone all day for the entire week of the school holidays. When our client raised her concerns with the father in this instance he replied that he was complying with the Court orders.

Without being accompanied by extensive industrial relations reform which:

- promoted shorter working weeks,
- ensured that professional and blue collar workers alike were able to arrange part time work when caring for their children, and
- provided higher wages for professions dominated by women

a presumption if favour of joint residence will create more circumstances where children are in childcare, or being cared for by their parent's new partner. This does not achieve the outcome of children developing close strong relationships with both of their parents. It actually creates the inverse situation where children may see less of each of their parents. It is irresponsible to introduce a presumption of joint residence without the labour market reform to make it possible for all parents to care for their children half of the time.

(d) Breastfeeding and very young children

Very young children who are being breastfed are not well suited to joint residence, because of their obvious reliance on their mothers. Some fathers assert their interest in having overnight (and even more extensive) contact orders in respect of breastfeeding children under the current law. However it would seem completely unworkable for a presumption of joint residence to apply in these cases.

A new mother called our service wanting assistance to negotiate contact arrangements for her children. Her three children were aged 6 years, 4 years and 8 months. While the oldest child was not the biological child of the other party, our client was happy for contact orders to be in place in respect of this child because the child and her ex-partner had formed a very close bond which she thought was positive for the child. Our client was happy for the two oldest children to have alternate weekend and half of school holiday contact with the other party. However our client was not happy for the other party to have overnight contact (for up to a week during the school holidays) with the baby while she was still weaning the baby.

Would the presumption of joint residence impact upon families to prevent children being breastfed? If this were to occur it would clearly not be in the children's best interests.

(e) Older children

Just as a presumption of joint residence could not be easily applied to young children, it will be difficult to apply to older children. Under current family law, children's wishes about where they live are given greater weight as they age and gain maturity. Often, a teenager's views about where they want to live would be persuasive in the Court's mind. If a presumption of joint residency were to override the child's wishes, then the presumption may act to exacerbate conflict within the family, undermining the child's best interests and developing independence. We submit that such a presumption would be unworkable with respect to older children.

(f) Minimal caring experience

A presumption of joint residence would be unreasonable where one of the parents has very little skill or experience caring for children. In many families prior to separation the mother plays the primary care giving role. This gives rise to the concern that some fathers may have very little experience of providing for their children's needs – and it doesn't seem to be conducive of the children's best interest to create a presumption that they spend half of their time with someone poorly equipped to provide for them.

One woman contacted our service seeking assistance in formalising the contact arrangement that she had with her ex-partner. She was happy for the children's father to have contact with the three children, however she wanted this to be phased in so that the children could get used to their father caring for them, and so that their father could learn the skills necessary to care for the children. She was concerned because the father had never cooked a meal for the children before, bathed the children or had to be patient with the children. He was short tempered with the children during the relationship, and our client had often facilitated the children's engagement with their father so that he did not become annoyed by the children. The father sought immediate overnight weekend contact and half of the school holidays.

In another case:

A woman sought assistance to change the contact orders so that the father no longer had overnight contact. During the relationship our client was the primary care giver and the father paid little interest to raising the child. After separation the court ordered overnight weekend contact with the father. The six year old child would return home from contact several kilos lighter as he had not been fed properly, sunburnt to the point of blistering because the father had taken him to the beach without sunscreen, and with eczema exacerbated because the father had not applied the prescription medication.

In this instance the mother was surprised to hear that she may be able to get the orders changed, as she thought that the law required fathers to have overnight contact on alternate weekends. This is an impression many of our clients express – given that this is not even a presumption of the family law, only a common outcome, it seems highly likely that women would be unaware of their rights and the rebuttal mechanisms they may use to protect their children under a presumption of joint residence.

We are concerned that a presumption of joint residence would create an impression that parents who had previously played a small role in caring for the children – and consequently had not developed the skills to care for the children – had a 'right' to have

the children live with them half of the time. If this is the case, then unfortunately parents' 'rights' will have been placed above the best interest of the children.

(g) Some parents will not want joint residence

Creating the presumption of joint residence seems unreasonable in those cases where one parent has no interest in having contact with the children, or where the children do not know one of the parents.

> A woman contacted our service wanting information about putting the father's name on the birth certificate and whether she would be required to do so. She was pregnant at the time when she separated from her partner, and he moved to the United States of America. The father knows that he has a son in Australia. To our client's knowledge he has not retuned to Australia, and has had not contact with the now three-year-old child.

If this father returned to Australia in five years time or even one years time would the presumption operate to presume that he look after the child half of the time despite never having met the child? This is yet another circumstance where a presumption of joint residence would be completely unreasonable.

The following case study is a more common example of this same issue:

> A woman contacted our service seeking advice about whether there was any way she could force her ex-partner to have more contact with the children. She complained that she was exhausted by the constant care of her two young children – and she was concerned that her children would grow up without knowing their father. The father had contact with the children one day a month, and refused to see the children any more frequently.

While this woman was very keen for the children to spend more time with their father – it would be completely inappropriate for the law to presume that the children should spend half of their time with this father who did not want to care for them.

(h) Other significant carers

We are concerned that a presumption of joint residency between the biological parents is not sufficiently flexible to allow recognition and protection of the relationships that children may have with other significant carers. This is particularly so in culturally and linguistically diverse communities, including Indigenous communities, where extended family groups may take responsibility for raising children. The responsibility and relationships that these people hold would not be adequately recognised by a presumption of joint residence, and this would be to these children's detriment.

(i) Step / Blended families

We believe that the presumption of joint residence will create unworkable scenarios in step or blended families, where all the children of a household will not be able to live together as step-siblings, because each child has rotating residence with their other parent.

(j) Recovery orders and Interim orders

Under the current Family Law recovery orders and interim orders can be sought ex parte, and on the basis of the status quo. We are particularly concerned that a presumption of joint residence may mean that parents wishing to retrieve their children who have been taken away by the other parent will be faced with further hurdles in producing evidence to rebut the presumption of joint residence, in order to obtain a recovery order.

Interim orders are currently granted primarily on the basis of status quo. Given that in most families prior to separation one parent is the primary care giver (usually the mother) the introduction of a presumption of joint residence undermines the weight of the status quo argument – because the law would presume that the children be cared for in a manner quite differently to how most families care for children. The status quo practice currently provides a degree of certainty, stability and protection of children's interests, because they maintain their connection with their main carer and are able to maintain some of their other routines. Given that interim orders are made before the Court has the opportunity to fully review the evidence, and may last for months to years before a final order is made, what will safeguard the children's best interests from the application of a presumption joint residence?

5. Contact with grandparents

In response to the inquiry term of reference (a) (ii) we believe that the current Family Law Act[8] already contains practical and accessible measures which enable the Courts to order contact and residence with people who are not the biological parents where it is in the child's best interests. The current family law also has direct recognition of the possibly different needs and practices of Indigenous communities. We see no particular need for the family law to be altered in relation to contact for other significant carers including grandparents.

6. Endorsements

We have founded this submission in the experiences of women who utilise our service. We recognise that there are many other issues which should be considered in this inquiry – and we endorse and support the following submissions which have addressed different perspectives of this debate:

- Welfare Rights Network submission (specifically relating to potential impacts on social security),
- Illawarra Community Legal Centre submission (detailing the potential issues relating to child support),
- National Association of Community Legal Centres,
- National Network of Women's Legal Services,
- Women's Legal Services of : Victoria, New South Wales and Queensland.

We also acknowledge the numerous considered and well research papers submitted by Legal Aid Commissions and Community Legal Centres.

This submission was prepared by Kate Davis for the Women's Law Centre of WA (Inc).

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[8] Section 65