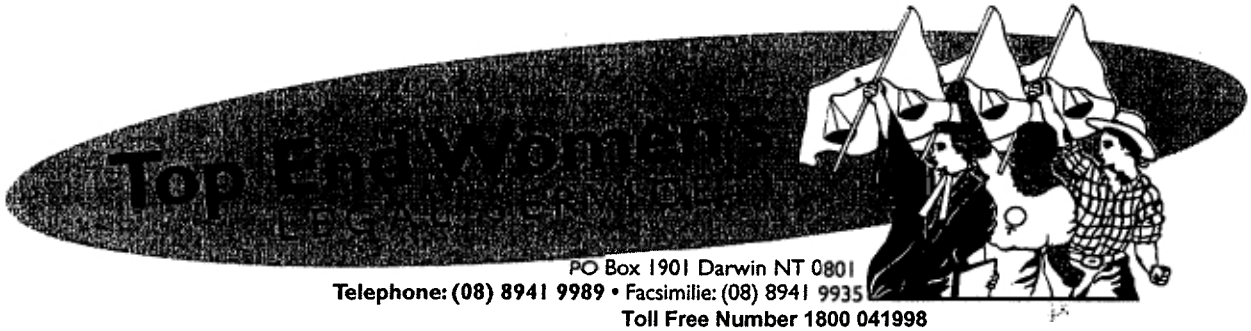

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Inquiry into Child Custody Arrangements in the Event of Family Separation

Submission from Top End Women's Legal Service

Top End Women's Legal Service (TEWLS) is a community legal service funded by the Commonwealth Attorney General and ATSIS. We provide legal advice, assistance and representation to all women living in the Top End of the Northern Territory (north of Katherine). We are also funded to provide intensive legal assistance in relation to family violence to women living in the remote communities of Wadeye, Oenpelli and on Groote Eylandt.

Summary

TEWLS opposes the proposal for a rebuttable presumption that a child should spend equal time with each parent after separation ("joint residency"). This is an arrangement that will suit only a small percentage of families. A presumption in favour of joint residency will tend to undermine the flexibility families and the Family Court currently have to determine arrangements for children, and put women and children at greater risk of violence post separation.

(a) Given that the best interests of the child are the paramount consideration:

(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted

The current factors set out in the *Family Law Act 1975* provide sufficient guidance for courts, which have to decide how much time children should spend with each parent if there is a dispute. There is no need for other factors to be considered.

Presumption of Joint Residency

In particular, TEWLS opposes the proposal for a rebuttable presumption that a child should spend equal time with each parent after separation (which we have termed "joint residency").

We think it is important to remember that there is currently no legal barrier that prevents parents from opting for joint residency. Furthermore there is nothing to prevent the Family Court making orders for joint residency where it is in the best interests of the children.

However, for a whole range of reasons, it is an arrangement that suits a very small percentage of families:

- the separated parents generally have to live close to each other or else the children's school, extra curricula and social activities will be unduly disrupted,
- joint residency requires a high degree of parental cooperation and good communication for the arrangement to work well for children,
- joint residency will not often mesh well with both parents work arrangements,
- joint residency will not always be the children's preferred option. Children often want/need the stability of one primary residence.

A presumption in favour of joint residency does not make sense where joint residency is the preferred option for only a small percentage of families.

Australian families are incredibly diverse and each family is unique. Most families make their own decisions post-separation about arrangements for the children. Under current law there is flexibility for families to decide on arrangements that suit their particular family. A presumption in favour of one arrangement undermines that flexibility.

A presumption in favour of joint residency also reduces the flexibility of the Family Court to make arrangements in the best interests of children.

A presumption in favour of joint residency will tend to make parents think they have a right to half of their children's time. In this way the presumption will put an unfortunate emphasis on parents' rights rather than the best interests of children. In our view this will tend to increase litigation as parents who feel they have a "right" to half time with their children will go to court if they perceive their "right" being infringed.

The presumption will put women and children, who are most often the victims of family violence, at greater risk of violence post separation. Having to rebut a presumption of joint residency will put a further legal hurdle in front of these most vulnerable citizens. This is especially significant as legal aid funding is not easily available. Victims of family violence will often have to self represent or privately litigate to protect themselves and their children.

We need to look at the kind of cases that end up in the Family Court. As we know, most families make their own arrangements without recourse to lawyers or the courts. Of the cases that do end up in court, a high proportion involve violence or abuse. These are the kind of cases where a presumption in favour of equal time will not be useful.

There is an additional reason to oppose the presumption in the Northern Territory. In the event of family separation in the NT very often one or both parents will re-locate "south" (elsewhere in Australia) to return to family/friends/support networks. Evaluating the best interests of the children in this situation is already complex. For example, weighing the effects of parents being geographically distant, versus the undoubtedly disastrous situation of a child living in a family with little or no emotional/extended family/financial support. Throwing in a presumption of joint residency will not assist the difficult choices families have to make and will tend to suit even less Territory families than elsewhere. This "re-location" factor would apply to a greater or lesser degree throughout RRR (rural/regional/remote) Australia.

ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents

Courts already make orders that children have contact with other persons, who have been significant in their lives, including grandparents. In doing so, they consider the best interests of the children as determined by the wide ranging factors set out in the *Family Law Act 1975*. These factors are sufficient to cover the circumstances in which children should have contact with other persons.

(b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children

TEWLS shares the concerns raised by the National Association of Community Legal Centres about the existing child support formula and system working fairly, particularly for payee parents:

1. The formula has already been reviewed several times and has been made very complicated to account for various circumstances. It was initially based on the relative costs of raising children and that basis should not be watered down.
2. The Child Support Agency failed to collect $669.7M in child support in 2000/01, an increase of $35M on the previous year. Payees are forced into private collection either by not being properly informed that the Agency can collect or through Registrar Initiated Private Collection. The Agency is responsible for collecting only 52% of all liabilities and that rate is falling.
3. The Child Support Agency frequently chooses to write off debts and ceases pursuing the payer, particularly after 12 months.

4. Even if the Agency does not write off a debt, it often enters into arrangements for the liable parent to pay at a lower rate per month, without informing the payee of these negotiations. The debt continues to mount and then it is easier for the payer parent to have it written off.

TOP END WOMEN'S LEGAL CENTRE

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