KWILS
Katherine Womens Information & Legal Service Inc.

5 August 2003

Committee Secretary
Standing Committee on Family and Community affairs
Child Custody Arrangements Enquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600

By fax: 02 6277 4844

Dear Committee Members,

INQUIRY INTO CHILD "CUSTODY" ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The Katherine Women's Information and Legal Service (KWILS) has been providing free legal advice, information, representation and legal education to women in the Katherine Region of the Northern Territory since its inception in 1997. The majority of our clients seek assistance in relation to family law and domestic violence issues.

Determining the amount of time to be spent with children – a presumption of equal time?

In our view the Family Law Act should *not* be amended to introduce a presumption that children will spend equal time with each parent post separation (a presumption of joint residence).

Any presumption operates as a legal starting point, both for the Family Court, and for lawyers in advising clients who will, in the vast majority of cases, reach agreement concerning the arrangements for their children outside of the court process. Arguably then, *a presumption* or starting point *needs to be a position or arrangement that would be in the best interests of the children in the overwhelming majority of cases.* And this needs to be backed up by significant and reliable evidence.

Yet is that so in this case? Even in the case of the vast majority of separated couples who agree to arrangements concerning care for their children by themselves, only a very small

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percentage of these agree to joint residence. Joint residence can really only work where both parents have shared care of the children prior to separation, where separation has been amicable and parents can communicate and cooperate well, and where it will be practically possible for both 'families' to live close to the children's schools etc. so as to minimize disruption to their routines. The fact that very few couples who sort out their own arrangements agree to joint residence, would seem to indicate that even where relations are amicable enough, couples either do not view joint residence as being in the best interests of their children, or it is simply not practically possible.

It has certainly been the experience of this service that families who end up in the Family Court, on the other hand, are those where there is intractable dispute between the parents, or where serious allegations of domestic violence or child abuse have been made, or where children are expressing very strong wishes to live with one parent or the other, such that arrangements either cannot be agreed upon between the parents or it would not be appropriate for Consent Orders to be considered. These are the very sorts of cases where the application of a presumption of joint residence could have potentially disastrous effects. Of particular concern is the very limited opportunity to present sufficient evidence of say, domestic violence, *at an interim hearing*, in order to rebut the presumption. Given the limit on evidence received at interim hearings, it is of serious concern that children could be placed in a joint residence arrangement for up to 12 months until Trial, when that situation is in fact exposing them to significant domestic violence or abuse.

Of importance here too is the growing evidence of the impact of domestic violence on children even though it may not be directed at them. Children witnessing abuse of their mother by their father every week at the time of changeover of residence would be deeply damaged by this.

A presumption of joint residence would also reduce families' abilities to make their own decisions about parenting arrangements depending on children's needs, parent's capacities, geographical distance between them, parent's work patterns, finances and housing. People seeking legal advice would need to be advised that joint residence is the starting point, or what the law says should be the 'usual arrangement'. Yet for many families, this would simply not be practically possible. For example, how many separated couples could afford to maintain two households completely set up to meet their children's needs? Of particular concern in the Northern Territory is also the impact that such a presumption would have on parents wishing to relocate (usually back to the southern states) in order to be closer to extended family support and work opportunities.

Finally, practitioners in family law as well as the Court know well that every family is different, hence *the importance of the court's discretion in each case* in weighing the factors listed in section 68F against the backdrop of the paramouncy of the 'child's best interests' principle. **The Family Law Act as it stands already enables the court to make an order for joint residence *where it is in the child's best interests*,** and of course couples outside of the court process can already agree to joint residence.

There is simply no need for a presumption of joint residence.

What is more, it is clear that introducing a legal presumption will have most effect on families where the parents are in significant conflict with each other – the very parents whom are most unsuited to providing a supportive environment for children to move between them in a joint residence arrangement.

Whether the existing child support formula is fair

KWILS does not have expertise in the operation or application of the Child Support Assessment Act 1989. However, it is of concern to us that this issue is even being considered by the government in the same enquiry as a reference inquiring into the spending of equal time with parents. Undoubtedly child support is a very difficult area in practice, and it often appears from client scenarios that there is simply not enough money to go around, particularly where the father who is a non-residence parent has now re-partnered and is, in practical terms, supporting his new defacto partner and her children. Yet the Act makes it clear that a parent's primary obligation is to support their biological children, irrespective of how much contact those children are having with the paying parent. If the amount of contact or residence and the amount or paying of child support are allowed to be traded off against each other, then the risk is that children will become simply bargaining pawns between their parents.

The apparent linking of child support and residence in this inquiry strongly suggests a focus, not on the best interests of children, but on the financial interests of non-residence parents.

Yours faithfully

Emma Yates
Solicitor