

House of Representatives Standing Committee
on Family and Community Affairs

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The Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

Inquiry into child custody arrangements in the event of family separation

The National Children's and Youth Law Centre ("**NCYLC**") was established in 1993 and is the only national community legal centre working exclusively for, and with, Australia's children and young people. The touchstone of the NCYLC is the United Nations Convention on the Rights of the Child and we aim to promote understanding and adherence to children's rights as fundamental human rights.

As such, we welcome the opportunity to make a submission to the inquiry into child custody arrangements in the event of family separations.

A. Presumption of joint residency arrangements – should there be a presumption that children will spend equal time with each parent?

Preamble

One of the principles governing the objects of Part VII of the Family Law Act 1975 (Cth) – the "Children" division – which posits that children have the right to know and be cared for by both their parents. This is also enshrined in the United Nations Convention on the Rights of the Child, of which Australia is a signatory. While the NCYLC whole-

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heartedly acknowledges and endorses the spirit and philosophy of that principle, we do not believe that a presumption of joint residency is the most appropriate starting point in determining parenting orders, post-separation.

More importantly, we believe that a child's best interests should remain the paramount consideration in making a parenting order. This is in accordance with the approach adopted by the Family Law Act currently, and is also embodied in Article 3(1) of the Convention on the Rights of the Child. Any proposal, which deviates from preserving the paramountcy of the child's best interests, has the potential to be detrimental to the child.

In short, the NCYLC believes that a proposal which imposes, in law, a presumption that children should spend equal time with each parent in the event of a family separation is not beneficial to a child's best interests, and as a consequence, we are opposed to any such changes to child custody arrangements.

Children cannot be divided in two like a cake. The notion that the child's time should be divided equally between separated parents is untenable and unworkable. One feels for the child who told a researcher that her greatest wish was that there were eight days in a week so Mum and Dad could not fight over how much time they had with her. The idea of equal sharing of children is based on notions of property and ownership. To argue that parents should have precisely equal rights in relation to their children ignores the reality that:

- In intact families, children rarely spend equal time with each parent.
- It is the quality of the time spent with each parent that is important to the child rather than an arithmetical measurement of the amount of time.
- School-aged children may spend more time interacting with their teachers and peers than they do with either parent.
- Most children spend time away from both parents. Provision should be made for discretionary time when they can make their own decisions how and where to spend their time. Time spent with siblings, grandparents and other relatives, neighbours, friends and pets are all important to the child. A regimented arrangement with fixed days and times overlooks the importance to children of flexibility so that they can take up

opportunities that arise such as a friend's birthday party, going on an outing with friends or relatives or taking part in a school trip or weekend school activities.

- As children grow older their needs change and a rigid regime, which may be appropriate for a very young child, may be quite inappropriate for a teenager with a broad range of interests outside the home.
- Parents would be likely to resent any court order that required them to spend so many hours a week with a certain person in a certain. It is anomalous that parents would want to have their children's waking time strictly circumscribed.

Reasons why the presumption is detrimental

The effect of a joint residency presumption would be detrimental to a child's best interests in cases where there is considerable geographical distance between the residences of each parent. Arrangements will be especially difficult to implement where, for example, each parent proposes to reside in different states, or even different countries. Apart from the potential inconvenience, time, and economic costs required to be expended in having to commute between the two residences, there would be added confusion and instability in the child's life from being continuously shuffled back-and-forth between homes, and having to maintain two sets of clothes, friends, schools, doctors, communities, lifestyles etc. While joint custody arrangements could no doubt be very satisfactory for parents, the rights, interests and opinions of the child are no longer given priority. As expressed by Chief Justice Alastair Nicholson of the Family Court of Australia, such arrangements are "impractical" and not "child-focused".

1. A joint residency presumption could further exacerbate problems and strain relationships in cases where there has already been an acrimonious breakdown of a marriage. Joint custody arrangements are generally unworkable where parents are constantly at odds with each other in making decisions concerning their child's welfare, care and development. As remarked by Schepis and Formica in *Australian Family Lawyer*, vol 6 no 2 at 13 and quoted and approved by Nicholson CJ in *In the Marriage of Forck and Thomas* (1993) 16 Fam LR 516, "if parenting values are not compatible, it may result in mounting tensions and mistrust to the point where the arrangement becomes detrimental and unworkable. Views with respect to medical preference, the emphasis on homework, selection of

television programs, treats and discipline, need to be reasonably compatible.”

2. It is detrimental for the child to be exposed to their parents' conflicts and tensions, and it is detrimental for the child if decisions concerning their life and lifestyle are made with the parents' emotional interests at heart, and not the child's best interests. Worse, still, the child could potentially be used and exploited as an object of emotional blackmail against the other parent by the parent aggrieved by the forced joint residency arrangements.
3. Joint residency arrangements are inappropriate where one parent's employment situation and lifestyle arrangements are not flexible enough to accommodate the demands of their children. Parents might be forced to shorten the hours they spend at work, or make alternative provisions for external childcare. The difficulties are compounded where there are very young children involved, and during school holidays, for schooling children. As a consequence, children could find themselves in a situation where they are spending the majority of their time with an external carer, or by themselves, when they could easily be spending that time with the parent who has a working arrangement, which is sufficiently adaptable to also accommodate the needs of their children. Also, for children who undertake extracurricular activities outside of school hours, parents who have inflexible working situations have to be doubly diligent in making alternate transport arrangements to ensure their child is safely conveyed to their destination, and back home.
4. A presumption of joint residency is clearly unacceptable where the child is at risk of being exposed to or having physical violence, psychological harm, and/or sexual abuse inflicted upon them by one of the resident parents. In such situations, it is obviously unsuitable that the abusive parent be spending any time with the child, unsupervised. The parent having equal and shared parental responsibilities for the child in that instance could not only be placing the child's care, welfare and development at risk, but also the child's life.
5. A presumption of joint residency is unsuitable and detrimental to a child's best interests where one parent lacks sufficient parenting skills. This will occur predominantly in cases where prior to separation, one parent has had primary responsibility for the care of the child. Where there are very young children involved,

it is of even more importance that the resident parent possesses the requisite knowledge and skills to be sufficiently able to care for the child. A child who is not cared for properly by their parents, or who receives inadequate or improper parental supervision could be exposed to neglect, harm, and danger, and even be at risk of committing criminal offences in the future. Thus a joint residency presumption would evidently not be in the child's best interest in this sort of situation.

6. A joint residency presumption will be wholly inappropriate where one parent has no intention, or is unwilling to undertake the level of responsibility required of shared parenting. This could also be in combination with an emotionally distant relationship between the reluctant parent and the child. In such instances, the attitude of indifference or even resentment towards the child by the parent would undoubtedly have far-reaching and negative effects on the child's psychological development. Worse still, the parent's lack of interest and commitment in their child's care, welfare and development could place the child in a situation of neglect, harm and danger, and this is clearly not in the best interests of the child.

B. What are the factors that should be taken into account in deciding the respective time each parent should spend with their children post separation?

1. It is the view of National Children's and Youth Law Centre (NCYLC) that the wishes of individual children (where the child is willing and able to express a wish) should be the starting point in deciding how much time the child should spend with each parent post-separation. If contact with a parent is the child's right, the views of the child should carry considerable weight. Contact should reflect the quality of the time spend with the parent concerned. The best indicator of quality is the child's experience of time spent with that parent both while the child was living in an intact family and after parental separation.
2. NCYLC favours changes to the Family Law Act which will ensure that the views of the child are ascertained by an independent professional at the earliest possible time in the court process and that the views of the child be the dominant consideration in resolving issues as to the day to day care of children post-separation and contact with the parent who does not have day to day care. At the same time as the child's wishes and views are being ascertained by an independent professional, the parents

should be required to attend an information session and to receive counselling to assist them in best meeting the child's needs and wishes and to help them minimise the opportunities for misunderstanding and conflict.

3. NCYLC believes that court adjudication will usually be an unsatisfactory means of resolving differences between parents over arrangements for the care of, and contact with, their children. The delays inherent in court processes, the financial and emotional costs of litigation, the polarisation of attitudes which is inevitable with any adversarial system of dispute resolution and the unsatisfactory nature of having a decision imposed on the parents by a person who does not have any close personal knowledge of them or their child – these are all factors which make the Courts an unsatisfactory forum for deciding issues which, at their heart, are issues of interpersonal relationships between parent and parent and parent and child.
4. NCYLC is critical of the current system in that the views of the child are ascertained only at a late stage in the process – often at a time when the attitudes of the parents have hardened and a consensual arrangement is more difficult to achieve. One option that should be considered is that, if the parents cannot agree on a shared parenting arrangement, after being informed of the child's wishes, there should be a standard parenting arrangement which takes effect pending agreement or court determination of the dispute. The delays inherent in the court system often result in the child's relationship with the parent who does not have day-to-day care deteriorating through lack of contact (and sometimes the negative attitudes of the parent with day to day care). It can be difficult after months have passed for the relationship with that parent to be re-established after there has been no contact for months.
5. With very young children who are unable to express a view, or older children who do not wish to express a view, the starting point of the inquiry should be the amount of time spent by the child in the company of each parent prior to separation.
6. Parental hostility and separation cause significant anxiety and distress to most children who experience family breakdown and the transition from living as part of an intact family to living in a situation where parents live apart can be eased by the retention of as much as possible of the child's familiar routines and patterns of life.

7. Despite the emphasis in family legislation on the welfare of the child, the reality is that most disputes over day-to-day care of, or contact with, children are driven by the demands and needs of the adults involved. Parents often relocate after separation for their own convenience creating a situation where it is difficult for the child to have regular and easily arranged contact with both parents. Parents who have had little contact with their children prior to separation demand much more time after separation. Parents who moved some distance from the home of their children expect the children to travel long distances so that they can maintain contact.
8. It is not suggested that children should have complete control over what time is spent with each parent but that the child's wishes should be the primary consideration. Clearly, if one parent poses a threat to the child's safety or if the child's wishes are being controlled or manipulated by one or both parents then it may not be in the child's interests to give full effect to his or her wishes.
9. There is considerable research literature that shows that the best post-separation arrangements are those where the child retains a large degree of autonomy. If the child can visit the non-custodial parent by walking, cycling or catching a bus to that parent's home, the child has the freedom to spend time with the other parent when the child wishes. The child has two homes and can move easily between one and the other. Such arrangements avoid the tensions that arise with strict schedules and formal handovers. It allows the child to maximise the opportunities that arise and to negotiate with both parents in a flexible way.

C. In what circumstances should a court order that children of separated parents have with other person including grandparents?

1. The NCYLC favours the idea of requesting that children draw up a schedule of how they spent their time prior to parental separation. If they enjoyed time with friends, grandparents, pets, school or sporting or cultural activities they should be able to continue with these activities post-separation. In some cultures grandparents and other relatives play an important role in a child's day-to-day care. Children may feel a closer bond with a grandparent, auntie or older brother or sister than with either parent. Particularly when relations between separating or separated parents are characterised by hostility and conflict the

neutral ground provided by other loving relatives can be a haven for the child.

2. Children form new relationships post-separation that will colour their feeling towards spending time with one or the other parent. They may like, or intensely dislike, a parent's new partner. They may form a close or conflicted relationship with half-siblings, stepsiblings or other members of a parent's new household. It can be beneficial for a child to have a range of adults within his or her world – these adults may come to have a greater importance in the child's life than the biological parent.

Concluding remarks

To conclude, the use of a joint residency presumption as a starting point in all child custody arrangements could be detrimental to a child's best interests. We agree with Regina Graycar's sentiments (Graycar is a professor of law at Sydney University) when she says that, "[replacing] the best interests of the child with some kind of fixed rule that doesn't take into account the individual circumstances would be a retrograde step." In addition, to quote Chief Justice Nicholson, "the shared parenting concept is a one-size fits all – it doesn't take into account the interests of the child and the need to protect the child from the people who are not good role models – of either sex."

In a Canadian report on child custody arrangements in Canada (*"Putting Children's Interests First: Custody, Access and Child Support in Canada"*, IER Planning, Research and Management Services, November 2002), which drew from extensive research and consultations with family law professionals, parents, advocacy groups, ministers and officials in Canada, it was recommended that: "... there should be no presumptions in law that one parenting arrangement is better than another. Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child. It is also a term that seems to focus on parents' rights rather than the child. Its meaning and application is ambiguous and this may itself promote litigation."

Children should have the right to know and be cared for by both parents. While from a parent's point of view a child spending equal time with each parent seems invariably to be the more equitable solution in child custody arrangements, it is not always in the best interests of the child. Children are unique, and as such, each case should be assessed by its individual circumstances, and not by a blanket presumption of joint residency for all situations. What is more important is not the amount of time the child spends with the parent;

rather, it is the quality of the relationship between the parent and the child.

We thank you for considering our submissions.

Yours faithfully,

NATIONAL CHILDREN'S AND YOUTH LAW CENTRE



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