

Submission No: 749

Date Received: 8-8-03

Secretary:

**House of Representatives Standing Committee on Family and Community Affairs  
Inquiry into child custody arrangements in the event of family separation**

**Submission of the Victorian Bar and Family Law Bar Association of Victoria**

8 August 2003

---

**Summary**

- There should be no presumption that children will spend equal time with each parent post separation.
- There may be a need for further community education about the effect of the existing presumption in s61C of the *Family Law Act* that parents retain joint parental responsibility for their children post separation.
- There may be a need for further community education about the options separating parents currently have for the residence of and contact with their children post separation, including the option of equal time residence.
- There may be a need for further Australian research into the effect on children of the different options separating parents currently have for the residence of and contact with their children post separation, including the equal time shared residence option.
- There is no need to add to the existing factors set out in s68F of the *Family Law Act* in order to decide the respective time each parent should spend with their children post separation.
- Children's contact with other persons, such as their grandparents, can be ordered where it will be in the best interests of the child in accordance with the existing guidelines in s68F of the *Family Law Act*.
- There may be a need for research into the question of whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

**A presumption of equal time residence?**

It is critical that the legislative framework should encourage parents to work cooperatively in the best interests of their children in order to minimise the harmful effects of separation on children. A legal presumption that children spend equal time with each parent is likely to have the opposite effect. It would very likely increase the amount of litigation over children's issues in the Family Court rather than encourage a cooperative approach. Such a presumption brings with it the danger that children will be seen as property to be divided. A presumption may focus a parent's attention on the parent's "right" to the child rather than the parent's responsibility to make decisions in the best interests of the child.

The Australian experience differs from that of many US states where shared physical custody has been introduced as a presumption in that the legislation already includes a presumption that parents will retain shared parental responsibility in s61C of the *Family Law Act*. This equates to shared legal custody in some US states, which studies have shown to be very important for children's adjustment post separation.<sup>1</sup> Joint custody appears to have been introduced in the US in response to a presumption, the 'tender

years doctrine', in favour of a mother with no custody rights to the father. This is not the situation in Australia.

Australian studies show a benefit for the children in regular overnight contact with each parent but have not shown that there is necessarily an additional benefit for children in equal time residence.<sup>2</sup> Shared care arrangements have been in place for some time in some Australian families. Some of the children are now adults and would be able to provide valuable insight. The existing research and anecdotal evidence suggests that shared time parenting requires a high level of cooperation between parents, two fit and competent parents free from issues of child abuse or domestic violence and the financial capacity to maintain duplicate households. There is a clear need for further research, firstly to inform parents and the courts about the option and certainly before considering such a major change as the introduction of a presumption.

Equal time residence should remain an option for separating parents but there should be no presumption that children will spend equal time with each parent post separation.

### **A need for community education**

To the extent that there are calls for the introduction of equal time residence arrangements for children, they would seem to be based in a lack of knowledge of the current options available. For example, the option of equal time with each parent is available under the current legislation and there is no presumption of any other arrangement that needs to be set aside in order to achieve equal time residence orders.

Separating parents are currently encouraged to agree on parenting plans for their children. The material provided by the court includes the option of equal time residence. Parents who apply to court for orders have the option of applying for orders on a broad spectrum from sole residence with the father or mother, with contact with the other parent through to equal time with each parent.

Perhaps there is a need for further community education about the options separating parents currently have for the residence of and contact with their children post separation, including the option of equal time residence.

Advocates of joint custody suggest that it improves the parent's feeling of responsibility for children thereby achieving a better long-term outcome for children. Under s61C of the *Family Law Act*, there is already a presumption that parents have the equivalent of legal joint custody of children, which is not displaced by separation.

There may be a need for further community education about the effect of the existing presumption in s61C of the *Family Law Act* that parents retain joint parental responsibility for their children post separation.

### **Additional factors?**

The factors set out in s68F of the *Family Law Act* in order to decide the respective time each parent should spend with their children post separation are comprehensive. There is no need to add to the existing factors to be considered.

### **Contact with other persons**

Children's contact with other persons, such as their grandparents, can be ordered where it will be in the best interests of the child in accordance with the existing guidelines in s68F of the *Family Law Act*. To the extent there may be concerns that

children are, on separation, losing contact with significant people, this may indicate a need to raise community awareness of the options available in court. The existing legislative framework provides for contact with other persons such as grandparents. For example, Section 60B(2)(9) provides that "Children have a right of contact on a regular basis with both their parents *and with other people significant to their care and welfare*" (emphasis added).

Admittedly contact orders in favour of grandparents are rare, and with good reason, because it is only in a situation of conflict that there is any need for an order by the court compelling contact.

#### **Adjusting the child support formula**

Barristers practising in family law have expressed concern about the operation of the child support formula. On the one hand, there are liable parents on low incomes who are unable to spend more contact time with their children because they cannot afford to look after and entertain them. On the other hand, there are fixed costs of raising children, which do not reduce even if the children are spending a few more days a fortnight with the other parent. Counsel have noted with concern that financial pressures on parents are a factor parents must take into account in determining how much time children spend with each parent rather than being free to consider the children's emotional best interests.

There may be a need for research into the question of whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

#### **Public Hearings of the Committee**

The issues being investigated in this inquiry are important, and are ones on which members of the Family Law Bar Association are uniquely well qualified to assist the Committee. The time for submissions was limited and the Committee Chair particularly asked that submissions be concise. We understand that the Melbourne hearings are likely to be towards the end of August, and accordingly that it is desirable for us to lodge a submission, albeit a rather brief one, by the 8 August due date. We request the opportunity to appear at such hearings in order to give oral evidence and answer the Committee's questions.

---

<sup>1</sup> See for example Margaret Brinig and F.H. Buckley "Joint Custody: Bonding and Monitoring Theories", *Indiana Law Journal*, 73 No. 2 Spring 1998

<sup>2</sup> See for example, Patrick Parkinson and Bruce Smyth, "When the difference is night and day: Some empirical insights into patterns of parent-child contact after separation" 8<sup>th</sup> *Australian Institute of Family Studies Conference*, Melbourne 12-14 February 2003 and Bruce Smyth, Catherine Caruana and Anna Ferro "Some whens, hows and whys of shared care," *Australian Social Policy Conference 2003*, University of NSW, 9-11 July 2003