

FAMILY LAW FOUNDATION
POSITION PAPER ON THE INQUIRY INTO
'CHILD CUSTODY ARRANGEMENTS IN THE EVENT
OF SEPARATION'

House of Representatives Standing Committee
on Family and Community Affairs

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Secretary:

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

6th August 2003,

Dear Committee members,

The Family Law Foundation was established in late 2002. It is an organisation comprising representatives from a wide range of agencies and organisations involved in the Family Law system. The Foundation's overarching philosophy focuses on the need for balance in the community discussion about family law issues and the wellbeing and rights of the child.

There has been significant interest in the inquiry into '*Child Custody Arrangements in the Event of Family Separation*', and the concept of a rebuttable presumption of joint residence. The Family Law Foundation is concerned that some of the reporting and comments around this issue contain inaccurate information, which may promote misunderstanding, and reinforce myths about aspects of the family law system. The imposition of a presumption of joint residence of children has also prompted concerns about the impact of such a presumption on the interests and wellbeing of children and families. In response to this inquiry, the Foundation has prepared this briefing paper. This paper:

- summarises the current legislative provisions;
- outlines what recent research, informs us about;
 - parenting patterns prior to separation;
 - current arrangements for children in the aftermath of separation;
 - joint residency arrangements,
- discusses the likely impact on children and families if a rebuttable presumption of joint residence is introduced; and
- presents; a summary of findings; and recommendations.

Current Legislative Provisions

The law encourages families to reach agreement about arrangements for their children prior to and during court proceedings. In appropriate circumstances parties appearing before the court in relation to children's issues, must attend counselling.ⁱ

When families cannot agree about the future parenting of their children, the Family Court must make a determination that places the best interests of the child as the paramount consideration.ⁱⁱ The law in Australia provides that parents have joint

responsibility for major decisions about their children, regardless of who they live with. ⁱⁱⁱ As it stands, the law already provides for joint residence arrangements, providing that they are in the best interest of the child.

The law also states that children have the right to know and be cared for by both their parents, and a right of contact on a regular basis with both their parents. The child's right of contact extends not only to their parents, but to other people who are significant to their care, welfare and development, unless it is contrary to the child's best interests. ^{iv}

In the process of determining what is in the child's best interest, the courts are required to make an assessment of the child and the family's circumstances. The court must take into account a list of factors when deciding what orders are most likely to promote the child's best interest. ^v These factors include;

- any wishes of the child;
- the nature of the relationship of the child with each of the parents and other persons;
- the practical difficulty and financial costs of contact;
- the capacity of each parent to provide for the needs of each child, including emotional and intellectual needs;
- the child's maturity, sex and background, including issues of race, culture and religion;
- the need to protect the child from physical or psychological harm;
- the attitude to the child and to the responsibilities of parenthood;
- any family violence which has occurred;
- the likely effect of any changes in the child's circumstances
- an order that would be least likely to lead to the institution of further proceedings in relation to the child.

Consideration of these factors by the court, encourage an individualised assessment and examination of the circumstances of the child and family, with the court basing its judgement on the best interests of the child.

What Research Tells us about:

Parenting Patterns and Domestic Arrangements Prior to Separation

Most of the child care prior to family separation is undertaken by women. ^{vi} Chief Justice of the Family Court Alastair Nicholson recently wrote,

"The fact is that we do live in a society where the mother is the primary care giver in most intact marriages. It is therefore not surprising that parents are most likely to decide that mothers should retain that primary responsibility... it is also not surprising that judges will choose an environment that provides the greatest continuity and least disruption for children". ^{vii}

Family Arrangements for Children – Post Separation

In the aftermath of separation, the vast majority of parents are able to make their own decisions concerning their family arrangements, without recourse to the Family Court.

Of the matters that do proceed to the Family Court, about 5% will result in a court determination, the remainder are settled by agreement.^{viii} (there appears to be an absence of qualitative data relating to the circumstances upon which these agreements are reached.) The kind of matters that fall into the 5% that proceed to a final hearing relating to children, will substantially involve matters concerning domestic violence, allegations of child abuse and social issues such as substance abuse.^{ix}

HILDA Survey

A recent study conducted in Australia, which explored the rates of parent-child contact including the prevalence of overnight stays^x drew from data obtained from *The Household, Income and Labour Dynamics in Australia* (HILDA) survey. This data provides the most recent national estimates available of separated parents' parenting arrangements and personal circumstances.^{xi} This data reflects that:

- around 64% of men have contact with their children;
- 17% of children have day only contact;
- 40% of resident mothers reported that they would like to see more contact; and
- 75% of non-resident fathers would like to see more contact.

The data does not provide any insight into why less contact is occurring than what both resident and non-resident parents would like. The study suggests that factors such as distance between the two homes, re-partnering, and the financial burden on the non-resident parent to provide an alternative home for children impact on parent's capacity to exercise contact.^{xii}

Joint Residence Arrangements

Joint residence arrangements are not common in Australia with only around 3% of children from separated families in shared care arrangements.^{xiii} This figure compares with statistics from the Child Support Agency that show only around 4% of families are recorded as having shared care arrangements for children.^{xiv}

In Australia, there is not a lot of information available about how arrangements for joint residence are structured and how successful they are. Little is known about children's view on shared care arrangements, or the long-term outcomes for children and parents with such arrangements.

What research tells us about Joint Residence

A recent paper from the Australian Institute of Family Studies which examined the '*...motives and reflections of separated parents who share equally in the care of the children*',^{xv} summarised the key empirical studies conducted in the United States, that relate directly to joint physical custody. A summary of these studies, as taken from this paper, is outlined below:

- One of the earliest studies conducted on joint residence arrangements, ^{xvi} found that arrangements for joint residence could work well under certain conditions, these included (a) commitment; (b) flexibility; (c) mutual co-parental support; and (d) the ability to reach agreement on implicit rules. Other factors that were relevant to workability of these arrangements, and outcomes for children and families, included geographical proximity between the parents, the age, number and temperament of the children. And the presence of step- parents and siblings.
- Brotsky (1991) ^{xvii} also examined the factors that help make a joint residence arrangement work for children and families. Her studies involved 48 recently separated parents. Brotsky found a strong association between levels of parental conflict and child outcomes. Children of the 'successful parent group were doing well, whereas children of the failed parent group were doing 'very poorly'. Brotsky also pointed to the utility of mediation and professional support for helping some families who were struggling with co-parenting issues. ^{xviii}
- The evidence for a rebuttable presumption of joint residence was explored recently in the US. The study concluded that "there is simply not enough evidence available at present to substantiate routinely imposing joint residential custody" ^{xix} "The limited analyses other researchers have performed don't strongly recommend it be imposed either". This study also raised questions about the necessity of splitting exactly down the middle, parent's time with the child.
- In a recent comprehensive meta-analytic review of joint residence, Bauserman ^{xx} found that children in joint custody were "better adjusted than children in sole-custody settings, but no different from those in intact families ...joint custody can be advantageous for children in some cases, possibility by facilitating ongoing positive involvement with both parents" ^{xxi}.

The analysis is not clear about the role of parental conflict in joint residence arrangements (possibly because most of the studies in the review did not control for conflict, and most parents that opted for shared residence in the samples were more likely to be self selected for low conflict. ^{xxii}) Bauserman's review points out that parental conflict was a variable in the equation and exposure to parental conflict may be potentially, a greater risk in a joint residence arrangement. ^{xxiii} However, Bauserman concludes that "joint residence arrangements... do not appear, on average, to be harmful to any aspect of children's wellbeing, and may in fact be beneficial". Bauserman follows this by saying that

' it is important to recognize that the results clearly do not support joint custody as preferable to, or even equal to, sole custody in all situations. For instance, when one parent is clearly abusive or neglectful, a sole custody arrangement may be the best solution. Similarly if one parent suffers from serious mental health or adjustment difficulties, a child may be harmed by continued exposure to such an environment. ' ^{xxiv}

Bauserman summarises his finding by saying that the available research is consistent with the hypothesis that joint residence may be beneficial to children, and fails to show any clear disadvantage relative to sole residence.^{xxv}

- According to Ricci(1997)^{xxvi} the way that parents relate to each other as parents is crucial to how well children adjust to family transitions and change “...if a pattern is destructive, neither equal time nor a traditional every-other weekend visitation arrangement can protect a child. But when a parenting pattern is constructive, many arrangements can work... ‘the prize is not a prescribed timeshare arrangement but a healthy pattern of parenting.’^{xxvii}

Other research

Research undertaken in the United Kingdom showed that shared care was more likely to be organised to suit parents than to suit children.^{xxviii} The research showed that children in shared residence arrangements were aware of how important equal allocation of time was for their parents, and felt responsible for ensuring ‘fairness’ in allocating their time between parents. Smart concluded that this often meant that the children would put their own needs behind the interests of their parents. The research argued that being shared on a fifty-fifty basis ‘can become uniquely oppressive’ for some children.^{xxix}

The potential ramifications of introducing a rebuttable presumption of joint residence.

Increase in litigation

Introduction of a rebuttable presumption of joint parenting is likely to lead to increased litigation as parents will be obliged to begin legal proceedings in order to rebut the presumption where the arrangement is not appropriate. It is also likely that there will be an increase in matters that the court has to determine concerning specific issues such as where the child(ren) will attend school etc. This is particularly likely in families where there are problems in communication and conflict.

The *Family Law Reform Act 1995* which commenced on 11 June 1996 served to increase litigation rather than reduce it. The thrust behind the reforms were to promote greater involvement of non-resident fathers in the care of children and the making of decisions about them, based on the premise that it would promote the interests of the child.^{xxx} Research shows that the *Reform Act* did not increase shared care giving but increased uncertainty and confusion.^{xxxi}

The presumption may lead parties to attempt to re open finalised cases based on an assumption that they will get a different outcome.

Litigation is likely to increase levels of conflict between the parents. Research consistently points to increased levels of conflict having detrimental effects on children.

Child support/Child Poverty Implications

A joint residence arrangement does not necessarily mean that parents will spend equal time with their children. In cases where child support reduction does not correspond to an increase in child contact, it will leave one parent with the responsibility of caring for a child or children on a reduced income.

Difficulties for victims of abuse and violence to achieve safety

The presumption will force some children who are the victims of abuse and or violence, to live with violent parents, until appropriate court orders are made. It will also force victims of violence to come into contact and negotiate with violent ex partners.

Effect on the workforce capacity

Not all employment situations are amenable to flexible working arrangements to accommodate the needs of parents with children. Parents may have to reduce their work hours to be available for their children. Alternatively children may have to spend time in alternative care arrangements, which may mean children have to adjust to further changes and disruptions in their care.

Logistical difficulties

A joint residence arrangement is likely to be difficult or unworkable for families who do not live in the same geographical area. Children will be forced to travel distances from one home to another, or to attend school.

There are also financial restraints on separating families. It will place a burden on parents to run two fully equipped households.

Summary

The 'terms of reference' into the inquiry canvassing a presumption of shared residence, preface the best interests of the child as the paramount consideration. However, there is no evidence that any one particular residence arrangement is the best option for all children and families. The concept of an presumption of shared residence of children in the event of family separation does not reflect the parenting patterns in the majority of families, that exist prior to separation; or reflect type of arrangement that most parents *choose*, following separation. That is, the presumption advocates an arrangement that only a small percentage of parents would normally agree to.

Joint residence arrangement that are workable and point to positive outcomes for children and families, are dependent on factors such as where:

- there has been a history of cooperation;
- a history of parenting patterns that reflect pre separation shared care;
- there are low levels of parental conflict;
- parents reside in the same area, allowing children to attend one school;
- parents are able to reduce their working hours and/or have flexible work arrangements;

- where parents voluntarily enter these arrangements irrespective of the law.

It is reasonable to proffer an opinion that these factors are not going to be apparent in the majority of families that separate, particularly given that separation is typically a time of conflict and high stress. A presumption is useful if it reflects a position that is appropriate in most cases. There appears to be very little data available that provides any insight into the environment of families, post-separation. Accordingly, there is no evidence that shows that most family circumstances would be amenable to the operation of a joint residence arrangement that would promote the best interests of the child.

Furthermore, this research shows that imposing a blanket joint-parenting arrangement can be potentially detrimental to children, particularly where there are high levels of conflict between the parents. A foreseeable consequence of this blanket presumption may mean that children in families where there are high levels of conflict and/or where there are indicators of abuse may be placed in situations of unacceptable risk. The presumption may operate until such time as a court can hear the evidence and make appropriate orders.

Recommendations

1. The starting position for any arrangements for children post separation, should place the best interests of the children as the paramount consideration. Parenting should be a shared responsibility. Under the current system, parenting can be a shared responsibility and joint residence can be an option where it is consistent with the child's best interest.
2. A radical change to the legislation such as a rebuttable presumption of joint residence should not be introduced without sufficient evidence/research to suggest it would be appropriate and in the best interests of children.
3. Parents should be encouraged to share the responsibilities of parenting not only after separation, but while families are intact. " If shared parenting is desirable after separation, surely it is also desirable and in the best interests of children before separation".^{xxxii}
4. Government policy should promote communication and co-operation and should carefully consider the impact and cost arising from increased litigation.
5. There are a significant number of contact and non-contact parents who would like to see more contact than what is currently happening. With reference to the data suggesting this, we suggest that it appropriate that any review should focus on identifying and addressing the issues and obstacles that impact on the contact parent's ability to exercise contact with their children.

i *Family Law Act 1975 (Cth) s 65 F(1)*

ii *Family Law Act 1975 (Cth) s 65E*

iii *Family Law Act 1975 (Cth) s 61 C (2)*

iv *Family Law Act 1975 (Cth) s 60 (B) 2 (b)*

v *Family Law Act 1975 (Cth) ss 68F (1), (2)*

- vi Australian Bureau of Statistics, Time Use Surveys, 1992 and 1997, tabularised in *ABS Social Trends Report: Family Functioning : Looking after the children*, 1999 (available on the internet at <http://www.abs.gov.au?ausstats>)
- vii as quoted from an article by Kingston, Margo, by, Bush, Polly, "Are Your Shoes Mucky", available from <http://www.smh.com.au/articles/2003/07/16/105803334068906.html>
- viii Horin, Adele, 'One Size Does Not Fit all, Especially Kids, June 21 2003, available from <http://www.smh.com.au/articles/2003/06/20/1055828491428.html>
- ix Hunter R, "Family Law Case Profiles" *Justice Research Centre*, June 1999, p 186.
- x Smyth, B., Parkinson, P, '*When the Difference is Night and Day: Insights from HILDA into Patterns of Parent-Child Contact after Separation.*', Hilda Conference 2003, University of Melbourne, Australia, 13th March 2003.
- xi Id, 3.
- xii Id 16,17
- xiii Australian Bureau of Statistics: *Family Characteristics Survey*, Cat no. 4442.0 (Canberra : AGPS, (1997)
- xiv Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra 1997
- xv Smyth, B., Parkinson, P, '*When the Difference is Night and Day: Insights from HILDA into Patterns of Parent-Child Contact after Separation.*', Hilda Conference 2003, University of Melbourne, Australia, 13th March 2003.
- xvi Abaranel, A, 'Shared Parenting after Separation and Divorce: A study of Joint Custody', (1979) 49 (2) *American Journal of Orthopsychiatry*, 320.329
- xvii Brotsky, M., Steinmen, S, & Zimmelman, S (1991) ' Joint Custody through Mediation : A Longitudinal Assessment of the children. In Folberg, J., Ed.' *Joint Custody and Shared Parenting* (New York : Guilford Press) 167- 176
- xviii Id, 176
- xix Braver, S. & O'Connell, D, 'Divorced Dads: Shattering the Myths', (New York : Tarcher/Putnam, (1998), p223
- xx Bauseman, R, 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta - Analytic Review', (2002) 16 (1) *Journal of family Psychology*, 91
- xxi Id, 91,
- xxii Id, 98
- xxiii Id, 91, 92, 99
- xxiv Id, 99
- xxv Id, 99
- xxvi Ricci, I, 'Mom's House, Dad's House: Making Shared Custody Work', (2nd ed, 1997), (New York : MacMillan)
- xxvii Id, 118
- xxviii Smart, C, 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July, 2001, available at <http://familycourt.gov.au/papers/html/smart.html>.
- xxix Smart C, 'From Children's Shoes to Children's Voices' *Family Court Review*, volume 40, No 3 July 2002, 307, 314.
- xxx Campbell, J, "*Who's the Boss? Parental Responsibility and the Welfare of the Child: Peeling Off the Paint - Parental Responsibility or Parental Rights?*", The 10th National Family Law Conference , Melbourne , March 2002, p299.
- xxxi Id, 299
- xxxii Id, 306

Signed

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PHILOSOPHY

The need for balance in community discussion of family law issues and a focus on the rights of the child.

AIMS

- ❖ To ensure community access to accurate information about the wide range of solutions available to resolve difficulties arising from the breakdown of family relationships.
- ❖ To assist in the development of a long-term community education campaign regarding the family law system and, promote discussion about the principles that underpin the family law system.
- ❖ To ensure that the protection and wellbeing of children informs all discussions.
- ❖ To ensure that the impact of family and domestic violence is recognised and considered in discussions.
- ❖ To promote a safe environment for individuals and institutions involved in the family law system.
- ❖ To promote informed debate about family law issues.

STRATEGIES

- Collect and disseminate to parliamentarians, media and others, such research data, articles and judgements as will;
 - ensure an appreciation of the extent to which most relationship issues are now resolved by mediation/conciliation/counselling/lawyer facilitated negotiation, and the extent to which the court system is reserved for the most complex and difficult cases;
 - address misunderstandings prevalent in the community about family law issues.
- Encourage media to publish material that promotes the peaceful and co-operative resolution of relationship issues;
- Encourage media to avoid publication of material that condones violence, whether against members of the family or those who seek to protect their interests;
- Stimulate discussion about the impact of the family law system and the behaviour of parents and guardians in the context of the system and the consequences of such behaviour;
- Lobby to give effect to the aims of the Foundation.