

Submission No: 1146

Date Received: 18-8-03

Secretary: .....

15<sup>th</sup> August, 2003

Committee Secretary  
Standing Committee on Family and Community Affairs  
Child Custody Arrangements Inquiry  
Department of the House of Representative  
Parliament House  
Canberra ACT 2600  
Australia  
FCA.REPS@aph.gov.au

Dear Committee Members,

**RE: INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE  
EVENT OF FAMILY SEPARATION**

I write to you on behalf of the Broadmeadows Community Legal Service in response to the request for submissions regarding child custody arrangements in the event of family separation.

The Broadmeadows Community Legal Service (BCLS) has been providing free legal advice and casework in the local community for over 30 years. BCLS also provides an outreach service to two outer metropolitan areas and operates an Intervention Order Court Support Service from the Broadmeadows Magistrates' Court every Friday. Our Service assists low income earners who are unable to afford a private solicitor and may not be able to access legal aid.

In the past year 75% of BCLS casework related to family law with the majority of that work consisting of issues relating to child contact and residence. Domestic violence rates as the highest single issue dealt with at BCLS.

Our submission will deal with Terms of Reference:

- (a) Given that the best interest of the child are the paramount consideration:**
- (i) What other factors should be taken into account in deciding the respective time that each parent should spend with their children post separation?  
Whether there should be a presumption that children will spend equal time with each parent?**

The current practice of the Family Court in dealing with issues relating to children is that 'the best interest of the child' is paramount. Most parents try to cooperate after separation in relation to the children's living arrangements. Only 5% of matters in the Family Court result in contested hearings and these are matters where the parents are so hostile that their case can only be resolved by the Family Court.<sup>1</sup> The majority of people

<sup>1</sup> Family Court Annual Report & Australian Law Reform Commission 1999

are able to reach agreement through mediation, parenting plans or consent orders with consideration given to the best interest of the child. These agreements can be flexible and vary as they are tailored to suit the individual families. They incorporate a variety of arrangements which could also include shared parenting.

A large part of BCLS casework deals with matters relating to domestic violence with 98% of clients being women. Our weekly Intervention Order Court Support Program which runs at the Broadmeadows Magistrates' Court frequently deals with incidents where women have need to apply for an intervention orders as a result of violence and abuse which has occurred during contact change over. With few options and a lack of child contact centres women are continually placed in a difficult position in which they have no choice but to have ongoing contact with a violent or abusive ex-partner. Joint residence would mean that there would be an increase in the amount of contact that parents would need to have with each other. This would lead to increasing the risk of violence and abuse for women and children.

### **CHILDREN'S RIGHTS vs PARENT'S RIGHTS**

A recent phone inquiry raised a number of concerns and highlighted the reason as to why we need to be careful in moving towards the presumption of joint residence. This example is a common complaint expressed by men and likewise one of the main reasons that women raise for wanting contact to be stopped or altered.

*The caller was a man inquiring about his rights after being told by his ex-partner that she was going back to the Family Court to stop contact. He was notably angry and felt strongly that the Family Court was there for women and didn't listen to fathers. He was not convinced that the Court does not favour either parent but looks at 'best interest of the child' and that the legislation states that the child has the right to see both parents. His primary issue was 'what about my rights'. This person complained that the mother was too soft on his son and that the boy is allowed to watch too much television. He therefore felt that during his fortnightly contact visits it was his responsibility to make up for the mother's inability to properly discipline the child. The father expected his son to read more, do more school work and watch minimal television. He admitted his son was not happy and would ring up his mum complaining that he wanted to go home. A heated discussion occurred and he stated that he told her she was not to come to pick up the boy because it was his turn to have him. He mentioned that there was a current intervention order in place against him and now she's threatening to take him to court to stop contact.*

The reason that this matter is so alarming, is that the child is only 5 years old.

The example raises the concerns many women have for their children and having to deal with a child's reluctance to be with their father and the perception many men have that paying child support and having contact with the child is a father's right.

A presumption of joint residence would put the priority on the rights on the parent to have an equal amount of time with their children and place unreasonable demands and

pressures on children in certain cases. This notion moves away from the child having a 'right' of contact with both parents providing it is in the 'best interest of the child'<sup>2</sup> and that those best interests remain the paramount concern when determining contact orders.<sup>3</sup>

Traditionally women have been the primary carers of children, generally responsible for the household duties, juggling casual or part time work to fit in with their family life. It is therefore reasonable that following separation the mother is the most suitable person to continue to care for the child on a daily basis. The Family Court considers the status quo as a significant factor in determining the child's residence post separation although should there be circumstances which are not considered to be in the best interest of the child, then the status quo is likely to be changed.

The time following a contact visit is difficult in re-settling a child back into a routine. This is the reality for that percentage of parents who are not able to agree on the upbringing of their child. Parenting is a difficult task at the best of times. The assumption should not be made that all parents have the skills to ensure a nurturing environment for their child. For many children joint residence could not be an option and would be a detrimental to the growth and development of the child. Regardless of arrangements, resources need to be put into establishing parenting programs to assist both mothers and fathers with the challenges they have to face in dealing with a child during post separation.

#### **REALITY OF JOINT RESIDENCE**

Joint residence requires positive communication, cooperation and similar parenting skills. The parents would need to live close by to enable the child to have easy access to school, social and recreational activities. Children need stability and a sense of belonging. Moving from one house to another, dealing with different sets of rules and different weekly routines would be stressful for even the most well adjusted child. No doubt that where parents have been able to reach such agreements the result for children would be positive. But it needs to be remembered that the financial situation and the impact of new relationships and blended families can have a major impact on the ongoing success of a joint residence arrangement.

#### **ACKNOWLEDGING DOMESTIC VIOLENCE**

The concerns raised by the presumption that children will spend equal time with each parent does not take into account issues of domestic violence in all its forms and the reality of what joint residence would mean to a child whose parents do not hold similar views in parenting.

The definition of domestic violence is much broader than physical abuse. It includes psychological, sexual, verbal and financial abuse. Whilst physical abuse is the most recognised form of domestic violence, it is overwhelmingly much more difficult for women to articulate the impact of psychological, verbal or financial abuse and to provide the evidence required to seek legal support. It is these other forms of abuse that are rarely

---

<sup>2</sup> Family Law Act 1975 s 60B(2)

<sup>3</sup> Family Law Act 1995 s 65E

acknowledged by the Court and which contribute to many incidents being under reported. For many women these are major factors in making the decision to leave their partners and why many women want to protect their children from such ongoing abuse.

Victorian Family Violence database show that in the period of 2000-2001 there were 21,618 incidents of family violence recorded by Victoria Police, this is a 10% increase on the previous year. Even more concerning is that 19,933 children under 16 years were present at the incidents.<sup>4</sup> These figures are frightening. With 25% of police time taken up the Family Violence issues, it is an issue that can't be ignored in looking at matters relating to children. Victoria Police is reviewing current practice in dealing with family violence incidents. The data has shown that 80% of women do not report family violence or seek assistance.<sup>5</sup> These alarming figures highlight the systems' inability to recognise the violence and to adequately protect women and children. What impact would the presumption of joint residence have on this silent percentage of our society?

#### CONCLUSION

We have seen in recent times the well organised and methodical campaigns of some men's groups to voice their anger at women and the system that they consider works against men and which denies them the right to their children. This small percentage of men has a loud voice and has been able to gain a sympathetic ear in certain political circles. But they are not part of the 95% of people who are able to reach agreement in relation to their children. I do not see how using the Court and non-payment of child support as a means of retaliation against the mother of their child can be construed as being a good father. Clearly in these cases the best interest of their children is not the priority.

BCLS is not against the concept of joint residence. The Family Court deals with these issues adequately and parents have been able to reach agreement, which have encompassed a variety of arrangements using 'the best interest of the child' as the basis. Our **opposition** is with the *presumption* of joint residence and that this presumption moves away from 'the best interest of the child'. The system needs to deal with each matter on an individual basis taking into consideration all the factors that will impact on a child or we run the risk of imposing untold damage on our young people. The hidden side of domestic violence cannot and must not be ignored in these matters.

Yours faithfully,

Flora Culpan  
Community legal education Worker  
On behalf of  
Broadmeadows Community Legal Service

---

<sup>4</sup> Victorian Community Council Against Violence: Victoria Family Violence Database-First Report August 2002

<sup>5</sup> Report to Statewide Steering Committee to Reduce Family Violence 2003