PRESENTATION TO THE ENQUIRY INTO JOINT CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

DETAILED NOTES FOR REFERENCE

WITNESS: [redacted]

Context

In making my submission and appearing before the committee, my area of concern is limited to what happens from the date of separation until an agreement or decision (about children's residence) is reached, either through the court process or otherwise. (ie I am not concerned about the merits or otherwise of the agreements and decisions that are reached.) This is because firstly, I am working on the assumption – perhaps naively – that when a matter is eventually heard by the court (or settled by some other process) the children's needs will be adequately assessed and fair decision made and secondly, because I am not yet at that stage.

I believe that, where there has been shared parenting prior to separation, there should be a presumption of shared residence after separation where this is the preference of both parties and there is no evidence or claim that the children would be at risk by such an arrangement.

I also wish to comment briefly on the child support assessment process.

Background – My Experience

I left a violent and abusive relationship in August 2002. I had been married 17 years. I did not take my 4 children with me. I believe my children are at risk while they remain living with their father. I have applied to the Family Court for orders that the children live with me and have contact with their father. This matter is still before the Court. I am led to believe it is likely to be mid-2004 before this matter is heard. In the meantime, I am allowed to have my children stay with me every second weekend and half the school holidays. I live very near to my children. Prior to separation, I was the primary carer and worked fulltime. My husband did not work.

Key Issues

Why Women leave without their Children

People are surprised and disbelieving when they hear a woman has left an abusive relationship, but has not taken her children with her. They puzzle about why she has not had the husband forced out of the home. I describe these reasons in my original submission:

- Magistrates are – I was informed – reluctant to grant an AVO that would force a man out of a home which he jointly owns. Magistrates – I was informed- will take the view that an AVO provides adequate protection to enable both parties to remain in the home while longer term arrangements are made. In some ways this may be true. In my experience, an AVO is very effective at restraining most abusive behaviours, except "harassment". Although separated under the one roof with the protection of an AVO, it was harassment that, in the end drove me out of my home. The AVO states he is not to harass, but this is such a subtle and grey area that I think it would be a rare woman who would notify police that the AVO has been breached because of harassment. And how do you try to persuade children to leave with you when everything seems resolved and safe, that you have to leave because you can no longer tolerate being constantly being followed around the house, talked at, denied all private spaces.
- The children's home is their home. In an unpredictably conflict-laden family, their bedroom and other parts of the house can, ironically, symbolise safety and security. It's difficult enough for a frightened abused mother to decide to end the relationship without causing – in her mind - more suffering to the children by uprooting them. Especially when she is likely to believe she has been responsible for his violence.
- The children don't understand that their father's behaviour is violent and unacceptable. They don't believe he will really physically hurt them badly and they cannot understand the damage his emotional abuse is causing them. It's all they have ever known. They know he loves them. And their father has always told them that his violence is their mother's fault.
- The children believe their father needs them more than their more apparently resilient mother. After all, he's the one that's been deserted.

Women will tolerate the abuse and violence for many years because he threatens her that – if she leaves - he will make sure she doesn't get the children. In my case, that is proving correct.

Rights vested in the Parent who Stays

Present practice provides that whoever remains in the family home with the children shall have exclusive right to decide what is in the best interests of the children, with the exception of allowing the non-resident parent to see the children on alternate weekends and half the school holidays (where did this arbitary recipe originate?). I have been told that this is how it should be as the parent "deserting" the children has abrogated their responsibility. The reasons for leaving – eg, violence and abuse perpetrated by the remaining parent – are disregarded – women should have put the needs of their children first and put up with the abuse.

While the right of the remaining parent (to decide what is in the best interests of the children) may be intended to only last in time until the matter is heard before the Family Court, in practice I fear the status quo may prevail, because by the time the 18 months, 2 years or whatever have passed:

- The Court may be reluctant to impose change or perceived instability on the children;
- The non-resident parent has lost the intimacy of their previous relationship with the children together with much of their confidence as a parent;
- Knowledge of the horrors of what is going on in that family home are more distant memories – and the children don't often volunteer this knowledge – they are so loyal to both parents and know that telling mum what dad does would be used against him.

Presumption about the Primary Carer

There is a presumption that where one parent is employed in the paid workforce and the other is not, the parent at home is the primary carer. This may often be the case but not always. In the three years prior to my separation I was employed fulltime in the paid workforce while my husband was unemployed. However, when I calculate the hours I spent on parenting tasks and the hours he spent, 73% of the parenting was done by me. I estimate that this percentage would be an accurate, perhaps conservative average for the 16 years we lived in the same home with children.

When I left, the system suddenly prescribed that I would only be permitted to do 15% of the parenting (if such a thing can be crudely measured quantitatively), except during school holidays when I would be permitted 50%.

This is wrong. Especially when apparently maintaining the status quo or stability for the children is used by the Court as a reason for continuing the post-separation arrangements.

Lack of Authority of the Court Counsellor

If a court counsellor recommends a Family Report be prepared, neither party should have the right to refuse. Maintaining the status quo, delaying an eventual court date are all tactics that favour the resident parent. And tactics I'm at a loss to counter.

Priority of the Family Court – Children before Property

I have had two appearances before a (Deputy?) Registrar. In the first, my children were not mentioned nor alluded to in any way. No enquiry was made as to their state of wellbeing, their wishes, their needs. We were instructed to obtain valuations of property. And that was it. In the second, the children were only mentioned in the context of ascertaining whether they were residing in the jointly owned property. And still no enquiry as to their wellbeing. This is despite there being a court counsellor's recommendation for a family report.

Reluctance to Notify Family Court of Children being at Risk

The process of notifying the relevant State authority (ie, NSW Dept Community Services) that a child is at risk is simple. A phone call and a telephone interview. T's easy to pick up the phone whenever an incident occurs that causes concern. There are – hypothetically – two processes for notifying the Family Court. The first is to tell the Family Court Counsellor who then consults the other party, who inevitably denies the allegation and makes a counter-allegation. The Family Court counsellor – in that absence of convincing evidence about who is correct - recommends an assessment (eg, a Family Report) but there seems to be no authority in this recommendation. It's almost 12 months since a Family Report was recommended in my case, and I'm still waiting. The second process is to complete a Form 66 – notice of child abuse or risk of child abuse, then pass it to your solicitor, then talk with your solicitor, think about the possible consequences of what you're doing (ie, the children learning what you've done; and, will it make any difference? – the state authorities have already been notified), then have the form lodged. Just filling in the form takes an enormous emotional effort. To follow-through to lodgement takes more resolve than some of us have. Especially when the children keep telling you that he's not violent, that he hardly ever gets angry now, that "he's better now". I suspect many women become even more convinced that they were the cause of their husbands violence.

Shared Parenting when Parents are in Conflict

Can a shared parenting arrangement work when parents are in conflict?

Yes, if both parties are bound to abide by some basic rules and have recourse to mediation if the rules are breached or prove inadequate.

What's worse is to leave one manipulative dominating party in total control of everything to do with the children – they can only learn that might is right.

Recommendations (re Shared Residence)

1. There should be a presumption of shared residence from the date of separation in circumstances where:
   a) there was shared parenting prior to separation;
   b) this is the preference of both parties; and
   c) there is no claim that the children would be at risk by such an arrangement.
2. Where one party claims the children may be at risk by such an arrangement, an investigation of this claim must be immediately made, without opportunity for delaying tactics, and immediate action taken to protect the children's interest.
3. Counselling/ mediation must be a mandatory and immediate first step when one party wishes to dispute the proposal for shared residence arrangements. Delaying tactics cannot be permitted.
4. Where a court mediator or counsellor recommends a family report (or other further professional assessment), this recommendation should be immediately acted on.
5. Pre-trial Family Court events should examine the aspects in dispute that concern the children first, not property matters.
6. Some people may need "training" in order to develop the skills necessary to constructively use mediation and counselling processes, and to negotiate shared parenting arrangements. In some cases, it may be necessary for such training to be mandatory.

ISSUES RE CHILD SUPPORT

For me there are 3 issues

i. the basis for constructing a formula to calculate a fair and reasonable amount of child support;
ii. the influence a paying parent can have over how available funds are spent; and
iii. the assessment of individual's capacity to pay the assessed amount.

I will leave the first issue – whatever formula is constructed the latter two issues will emerge.

Influence of Paying Parent over Spending Choices

The resident parent has total and absolute control over how the child support payments are used. The paying parent has no say, no influence. In my case, this means I pay both child support and pay for items, expenses for my children that their father says are not necessary: extracurricular activities, school excursions, materials for school projects, clothing, new toothbrush... While there is provision for "non-agency payments" to be accepted, a payment is only accepted as a NAP if he agrees it was necessary. When he says doctor and dental expenses I've incurred for the children were not necessary expenses, and CSA agrees, then I'm not optimistic about my chances for having any other payments accepted as NAPs.

I value sport, music, dance, drama, outdoor recreation. He values computers, electronic games, DVDs and videos. He spends his money on the latter. Prior to leaving the family home my children participated in sport, music, drama etc. They also played electronic games and watched DVDs etc. While I accept that, following a separation there is rarely as much money to go around, I don't see why I no longer have any say at all. The provisions to change a child support assessment in special circumstances allow for a reduction in the amount payable if "it costs you extra to care for, educate or train the children in the way that you and the other parent intended". This doesn't work in my case because, firstly, he says he did not share my intention that the children enjoy these extracurricular activities and secondly, the assessment can only be changed when the circumstances are "exceptional". Weekend sport is not exceptional. Nor are routine music, dance or drama lessons.

If I want the children to enjoy any of the former, I have to pay for it (or my family helps out), on top of my child support payments.

This brings me to the next issue – I am not allowed by the Child Support Agency to retain any funds that might allow me to pay for these things.

Capacity to Pay – Discretion to make Financial Sacrifices

The provisions to change a child support assessment in special circumstances allow for a reduction in the amount payable if the paying parent has necessary expenses that significantly reduce their capacity to pay. When I left the marriage there were large jointly incurred debts for which I was liable to make payments. I had my assessment reduced on these grounds. The heartbreaking aspect of this process was that I wanted to keep a little money aside to spend on the children. I was happy to go without other items usually considered "necessary" eg, dental work, new glasses, new clothes and shoes, in order to buy modest birthday and xmas presents for the children, and to pay for some of the children's extracurricular expenses. But – of course – these expenses are not "necessary for my support" and were not allowed. I'm happy to make financial sacrifices for my children – most parents are – but I would like to be able to retain some discretion about the purpose for which those sacrifices are used.

One final matter – I don't see why he doesn't have seek employment. The children are school-aged, there is plenty of casual work around for which he is skilled and suitable, the children don't understand why he doesn't have to work. I have to work. And it's an unpleasant irony that he claims the fact that I work as the reason why the children should not reside with me.

Recommendation re Child Support

- Paying parents should be able to influence some child-related spending decisions of the resident parent. This could be by the paying parent being able to retain some of their child support assessment for direct use on the children, or by negotiating agreements with the resident parent, probably with the assistance of a mediator.
- And resident parents of school-aged children who are in receipt of child support payments should be required to seek employment.

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[redacted] PRESENTATION NOTES

I believe that, where there has been shared parenting prior to separation, there should be a presumption of shared residence after separation where this is the preference of both parties and there is no evidence or claim that the children would be at risk by such an arrangement.

Since this enquiry was announced, the coverage I've seen has been divided into mothers/ women's vs mens/fathers perspectives. I was worried that non-stereotypical individuals and families might not be heard, for example women in my circumstances.

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Key Issues

- Why Women leave without their Children
- Rights vested in the Parent who Stays
- Presumption about the Primary Carer
- Lack of Authority of the Court Counsellor
- Present Priority of the Family Court – Property comes before Children
- Reluctance to Notify Family Court of Children being at Risk
- Shared Parenting when Parents are in Conflict

Recommendations (re Shared Residence)

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