



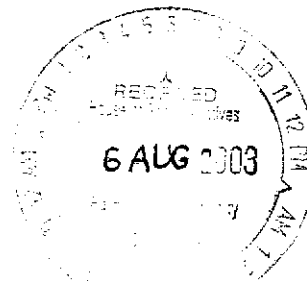
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House of Representatives Standing Committee on Family and Community Affairs	
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Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of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

Dear Secretary

Re: Inquiry into child custody arrangements in the event of family separation

Introduction to our centre

South West Brisbane Community Legal Centre Inc. is a generalist centre providing free legal information, advice and referral to all members of the public who may seek to use our service.

While we deal in many areas of law our principal area of inquiry has always been and continues to be family related.

We work "at the coalface", assisting people through the family law system. Our submission is therefore not based on any formal research that we have conducted because we don't have the time or resources to conduct it. Our submission is based on anecdotal evidence – what we have been told by clients going through the system – and the research of other organisations (what there is of it).

Child "custody" arrangements

We have a problem with the committee being asked to inquire into "custody".

There has been no child "custody" in the Family Law Act following the 1995 amendments to the Act.

The term did, and still does, denote a form of ownership of children. The Act now, as it should, speaks of children's rights and best interests and parents duties and responsibilities.

We are concerned that "equal time" may head us back to the old ways where children become a commodity to divide up.

Research

The lack of research is a major issue.

We have found no satisfactory study on "equal time" with parents nor could we find any reported decisions of the Family Court relating to the point.

We give advice to men and women but note that we have more women seeking advice than men. We note that Legal Aid Queensland's Gender Equity Report 2003 provides statistics that show that the organisation also saw many more women than men for advice relating to family law issues.

Relatively few men come to us seeking residence orders or shared residence arrangements. The vast majority want information regarding contact and most say that they are comfortable with their children living with the mother.

The Family Law Pathways Advisory Group (FLPAG) specifically suggested ongoing research and we note that the Government response acknowledges this need.

The studies that have been conducted in Australia suggest that equal time is happening in less than 5% of separation arrangements. We don't know why this is but would suggest that the practical difficulties inherent in such an arrangement have been recognised by the parties concerned.

Before any changes are made to the current principles contained in section 60B of the Family Law Act we urge that proper research be conducted to establish whether changes are warranted. Change should be based on need established by appropriate research, not on some "gut feeling".

Definition of equal time

We have a problem with the term "equal time".

What precisely is it? For it to work in practice a workable definition must be established. Does it mean dividing the 168 hours of every week neatly into 2 and that's what each parent gets?

Children won't necessarily be in any parent's care during parts of the average week. Do we then deduct time at school, sport and other activities, time asleep and sick and then divide up the rest of the hours?

The practical implications of implementing "equal time" seem daunting. We can foresee a situation where parents who are prone to disagreement will have a

further issue to argue about - how many hours they should be entitled to each week.

Legal presumption

A legal presumption has been defined in dictionaries as an assumption of the truth of a thing until the contrary is proved or an inference established by law as universally applicable to certain circumstances.

There must be a logical basis for a presumption. There should be such common ground and similar outcomes evidenced in an overwhelming number of cases before we should be entitled to say that something is a "given".

An example is the presumption of parentage. If a male and female live together as a couple in an intimate relationship there is some logic (and biological sense) in presuming a child born within that relationship is a child of them both.

The staff members in our centre have spent many years in discussions with clients about their family situations. We can say that each family situation is unique. There is no universality to the caring arrangements within families, no common starting point that can be presumed. Even within a single family unit care arrangements constantly change.

Available statistics from the Family Court suggest that 70% of residence orders provide for children to live with their mothers. Given that current indications are that less than 5% of children live "equally" with both parents, it could be argued that if we must have a presumption then the mother is the better option. However, for the reasons we have suggested above, we certainly do not advocate this.

Family Law Act

Available statistics tell us that the majority of families manage to reach agreement on the care of children. They also tell us that many of the families do so without reference to outside organisations or Acts of Parliament. We only see people who need some form of assistance to achieve a proper care arrangement. Of those, many only need minimal assistance through counselling or mediation. A small number of people couldn't agree if their lives depended on it and don't or won't realise that their children's welfare does depend on it. These people (and, by necessity, their former spouses and children) are the people who will need the full facilities of the Family Court.

We consider that the principles set out in sections 60B, 65E and 68F of the Family Law Act adequately set out the rights and responsibilities of children and parents respectively and the means by which these can be achieved if parties cannot reach those decisions by themselves.

It is not the Act that needs changing. It is the practical application of those principles that needs to be addressed.

To get into the court system people have 3 options – a private lawyer to guide them, a Legal Aid lawyer to guide them or self-representation.

The majority of our clients can't afford private lawyers. A fair percentage won't get legal aid and of those that do, a significant number of them won't get legal aid beyond an initial conference stage. Self-representation is therefore the only real option for many people.

Throwing people into court where they are not informed and not capable of representing themselves seems counter-productive. For example, parties will be unlikely to obtain a satisfactory outcome when their documents are hopelessly inadequate, do not clearly state the orders being sought and are full of irrelevant and inadmissible material.

Of the people who have self-represented and have reported back to us about their experiences there seems to be a disturbing level of dissatisfaction. We receive reports from our clients of judicial officers failing to listen to them, pressuring them into hasty decisions and of verbal abuse to the point where the client is in tears.

We don't see the court cases so we can't reach conclusions on the reasons for such treatment of the clients. We note, however, that there is anecdotal evidence of under-staffing of the courts and subsequent overworking of available staff.

What is significant is that both men and women report unsatisfactory experiences in court.

Basis for this inquiry

It has been suggested that the prompting for this inquiry has come from men who are unhappy with the outcome of their cases in the Family Courts. We are regularly consulted by men who fall into this category. Usually they haven't had proper information, little or no help from legal aid or feel they have been ignored in court. But we also see women in the same situation.

Perhaps men have felt that they have had no outlet for their frustrations – hence the formation of men's groups – whereas women are perceived to have better access to facilities to help them deal with their problems.

Our experience is that men are often in denial and that women generally seek assistance at a much earlier stage in the breakdown of the relationship.

That is not to say that if proper information, assistance and representation had been provided the outcomes of all court cases would have been any different. No matter what a court decides certain people will never be happy with the outcome.

Getting the system right

We suggest that imposing arbitrary presumptions won't help people who are experiencing unsatisfactory results in court.

What is needed is the proper provision of information and services to families to assist them to make decisions or, if they cannot make them, then to assist them to navigate the court system.

Men and women need to know that if finances don't permit then legal aid will be available to them. We see too many cases where

- a) neither or only one party only is approved for aid;
- b) if a child representative is appointed then aid is either not provided for either parent or may be ceased for the parents;
- c) aid is cut off at a monetary level which is usually just before final hearing;
- d) aid is cut off at a point where people need clarification / follow up with solicitors after a funded event such as a conciliation conference.

The courts need to become much more accessible. Current time constraints in interim applications need to be addressed. The lengthy delays in the provision of final hearings need to be eliminated.

Do these things and you will go a long way to providing better outcomes for children.

Practical considerations for equal time

We have considered numerous factors that would need to be in place for equal time to be a practical option. We list just a few here:

- Excellent communication between the parents – a factor that is often missing immediately after a separation.
- Both residences suitable for the children – cost is a factor that immediately becomes an issue. (1 household divided in 2 does not equal 2 households of the same quality)
- Residences close together - to facilitate travel by children, so children can stay at the same school (ridiculous to suggest they attend different schools on different days), same extra curricular activities, see same friends
- Both parents available to care for children for equal time – does this mean both work part-time (good luck trying to find an understanding employer!) or neither works (with severe financial consequences on parents / children / public purse)?
- Both parents have the same emotional, domestic and physical capacity to care for children.
- Children to adapt to the "2 home" scenario – we note UK studies have suggested this may be stressful for the children.

On a day-to-day basis at our centre we see few people whose situations would meet these criteria. If we are seeing them it usually means they can't get past the first item on our list.

Consent orders

We understand that current statistics suggest that the majority of court orders concerning children's care are arrived at by consent.

If a presumption of equal time is implemented and is rebuttable we wonder what information will be required by legislation where parents are proposing something other than equal time. Will it be necessary to rebut the presumption? Should there be a cooling off period in these circumstances?

Where "equal time" is agreed will it be necessary to provide calculations to prove it has been achieved?

We can foresee greatly increased complexity, cost and increased court time associated with a procedure that is presently characterised by low stress, low cost and time saving.

Government response to the FLPAG report

We note the response has 3 themes, namely early help by connecting people to information and services, better outcomes for children and an integrated family law system.

We don't see where imposing a presumption of equal time fits into these themes.

Such a presumption appears intrusive and inflexible, contrary to the recommendations of the FLPAG report.

It may appeal to a minority of people frustrated by their experience in the court system but it is not responding in an holistic way to the needs of the community for an integrated family law system.

Contact with other persons

With respect to a) ii of the terms of reference we consider part VII of the Family Law Act to be appropriate.

Each person's relationship to others is unique to that person. Whether a child needs to have contact with certain persons should be entirely dependant on that child's circumstances.

Presumptions are inappropriate. Whereas one child may have had a close and loving relationship with a grandparent and that relationship should be fostered, another child may not have had any relationship at all. Why should contact be foisted upon a child in the latter circumstance?

If any change is to be made, perhaps it should be geared towards making it easier for others such as grandparents to be made part of court proceedings and having their views considered.

Child support and child care

Regarding b) of the terms of reference we have to report that hardly any of our clients are happy with the child support system.

Carers report levels of support as too low based on the actual costs of caring for their children. (See the Lee and Lovering Tables) They report their former partners as resenting the support they have to pay and how they can't get them to understand it is not some payment to the carers personally who then go out on great shopping sprees. Many don't receive any payment at all and of those who do there are complaints of continually late payment. A number have reported that their former partners have deliberately quit their jobs as "why should they work their guts out to have it all go in child support" and "they are better off on the dole".

The carers are generally saddened by this attitude. Why do these people cease wanting to provide the best possible life for their children by working hard and earning good money and suddenly become obsessed with themselves and how they should live the life they want to live without considering anyone else.

Carers also report dissatisfaction with the enforcement procedures regarding payment and failure of the Child Support Agency to follow up payment.

Non-resident parents complain of payment levels beyond their financial capacity. Some complain of having to pay when they have unsatisfactory levels of time with the children or their other contributions to the care of children are disregarded by the statutory formula.

Certainly the issues of child support and contact seem intertwined so far as level of satisfaction with the child support system is concerned. Given people's inherent self-interest it probably always will be.

We don't see the legislation as necessarily needing alteration. Better education about the basis of the child support system is required. What people need to understand is that where a single family unit could exist at a certain financial level, 2 separate households cannot and therefore desired lifestyles may not be possible. Children's physical needs go on regardless of the level of contact that exists between the paying parent and the children. Child support payments are not something that 1 parent is deliberately inflicting on the other as some sort of punishment.

Summary

1. A lack of research needs to be overcome before any decision is made to alter Part VII of the Family Law Act.
 2. We fail to see how a presumption of "equal time" can sit with the "given" of the best interests of the child being the paramount consideration. A presumption that children will spend equal time with each parent logically entails a presumption that the best interests of the child coincide with this state of affairs. This is at odds with the overriding principle of section 65E of the Family Law Act.
 3. We foresee enormous problems with the practical implementation of "equal time".
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4. The existing principles of Part VII of the Family Law Act are appropriate. It is the practical application of the Act and parties access to the family law system that needs improvement.
5. We foresee a huge increase in litigation if an "equal time" presumption is enshrined in legislation.

Thank you for taking the time to consider our submission.

Yours faithfully

SOUTH WEST BRISBANE COMMUNITY LEGAL CENTRE INC.



Per: Athol Kennedy
Co-ordinator and Principal Solicitor