The New South Wales Bar Association

Bret Walker S.C., President

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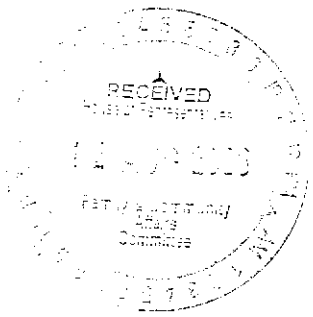
7 August 2003

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



Dear Sirs

Inquiry into child custody arrangements in the event of family separation

I refer to your recent invitation for submissions to the Inquiry into child custody arrangements in the event of family separation.

The New South Wales Bar Association has recently considered the matter and resolved to make a submission for your consideration in terms of the attached paper.

Should you or your officers have any queries concerning the attached submission, please do not hesitate to contact the Association's Executive Director, Mr Philip Selth on 02 9229 1735.

Yours faithfully

Bret Walker
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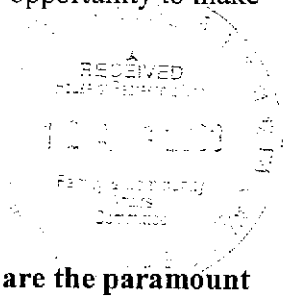
FAMILY LAW COMMITTEE

THE NEW SOUTH WALES BAR ASSOCIATION

SUBMISSIONS RELATING TO THE INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The New South Wales Bar Association is grateful for the opportunity to make submissions in respect of this issue.



The terms of reference:

(a) given that the best interests of the child are the paramount consideration:

(i) what other factors should be taken into account in deciding respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and

(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

(b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children;

(c) with the committee (Standing Committee on Family and Community Affairs) to report to the Parliament by 31 December 2003.

Submissions:

The New South Wales Bar Association opposes the introduction of any amendment to the Family Law Act, 1975 which would provide for a presumption that children will spend equal time with each parent post separation.

The Association's position is based on the experience gained by its members from preparing and conducting parenting cases at trial.

1. There is no doubt that many separated families have shared parenting arrangements in place which work in the best interests of children. These arrangements come about when parents, although separated, have their childrens' best interests the forefront and have:
    a. A very high level of commitment to shared parenting;
    b. A very high level of effective communication;
    c. A very high level of co-operation between households (including other occupants, e.g., new partners and their children);
    d. A very high level of mutual respect.
2. It is irritating to parents in intact families when a child leaves shoes, bags and clothing at someone's home after a sleepover. It can be a source of enormous

tension and disharmony in contact or shared parenting cases when these things occur and there is an absence of the elements of commitment, communication, co-operation and respect in the respective households.

3. In considering the introduction of the presumption of equal time, it must be borne in mind that no two households are the same. Irreconcilable differences have caused one household to become two.
4. There are obvious cases where shared parenting arrangements will never work. They include cases of emotional, psychological, physical or sexual abuse by a parent or partner against children. There are cases where a parent abandons a child to the sole care of the other. There are relocation cases where vast distances separate children and parents.
5. Litigants only progress to a final defended hearing after going through the Court's process. This process includes counselling and conciliation and even mediation. If parties are unable to resolve parenting issues after these processes this usually demonstrates very low or non-existent levels of commitment, communication, co-operation and respect between the parents and their respective households.
6. Shared parenting is impossible, (even where all elements of commitment, communication, co-operation and respect are present) due to the fact that one parent wishes to relocate the residence of the children interstate, intrastate or overseas in circumstances where the other parent remains in the pre-separation area. No amount of commitment, communication, co-operation and respect can achieve joint parenting in such circumstances.

7. There are also cases where the separation makes it financially impossible for the parents to remain in the same area as each other. In such a circumstance, equal time with each parent may result in term, week or month about. Such a result could not be in the best interests of children if it meant attending different schools in different terms, weeks or months.
8. In the experience of members of the Association, many more fathers seek advice in relation to shared parenting than do mothers. Quite often, the obstacle is not one of ability to care for children as shared parenting makes the assumption of ability to care for children. Rather, the issue often is that unless the parents have been sharing the parenting of their children fairly equally pre-separation, of necessity one of them has been fulfilling the greater parental role. The other parent may have been absent from the home and fulfilling the breadwinner role. There is no criticism if parents are to share parenting in the future then either or both may have to find part-time employment or they rely on other carers for their children. It is submitted that it is not in the best interests of children be cared for by different carers, after separation when they have had one parent primarily caring for them prior to separation. Stability in care arrangements is a cornerstone of ensuring best interests of children. There is no presumption of equal time with parents in intact families. It is difficult to see the rationale by this presumption when parents separate if the child's best interests is the paramount consideration.
9. One result of this proposal may be an increase in social security payments. In the event that part time employment is not available to one parent particularly in

cases where people have been out of the workforce for significant periods of time, or their job does not so permit they may cease work to share care.

10. Shared parenting arrangements do not merely involve "equal time" spent with each parent. It is not an accounting exercise and involves care to ensure each child's day to day needs are met by each parent has washed, bathed, fed, made dental checks, attended to supervising homework, washed, ironed, clothed etc.
11. It is foreseeable that in an acrimonious separation one parent could assert his or her "right" to take the child/ren for equal periods of time without proper regard to their welfare merely to spite the other parent. It would be a folly to suggest that the law can assume that all parents are responsible people or will act responsibly after separation. The overwhelming experience of our members is to the contrary in defended residence cases. Secondly the Act now focuses on the child's right to time with each parent (section 60B). Changing the Act to reflect a parent's right of equal time is fundamentally changing the basis of our present body of case law and social science.
12. Experience also shows that constant moving between households for children can cause both physical and emotional difficulties for them. This is particularly so in circumstances where one parent has retained the family home and the other has established a new residence, or there are significantly different parenting styles and routines as between the two households. Usually children are most comfortable in the family home where all of their belongings are. They have their sacred places in their bedrooms, their computers and special spaces. In new homes they do not have these things and circumstances may be radically different

in the new home. The new home may be an apartment and not a home, they may have to share a bedroom with a sibling for the first time or with a new partner's child etc. Meals may become very different and there will be a need for significant amounts of clothing for them in each household. They may be entering into a household which includes a new partner and his or her children. Differing routines often involves difficulties in a child fulfilling homework obligations and the like. Living between two homes, often even if in nearby suburbs will involve different difficulties for one household as opposed to the other in arranging or pursuing after school sports or other activities.

13. In respect of infants, particular problems arise such as maintaining appropriate routines for sleeping, feeding, hygiene and the like.
14. Children with special needs of diet, health and medication create even greater difficulties in having their needs met in an environment constantly changing.
15. More generally, the proposed presumption would have to include the presumption that the parties are in agreement on a wide range of issues including:
    a. Schooling;
    b. Homework;
    c. television time;
    d. discipline;
    e. pocket money;
    f. health and dental care;
    g. diet;
    h. sleep times;

i. religion;

j. cultural identity;

k. extra-curricular activities.

16. Does it also presume that the children desire to spend time equally growing up in two households? The short answer is that it must or that the needs of children are secondary to the presumed right of a parent.

17. The only perceived advantage to the presumption of equality in the view of our members, is that it may be seen to encourage the possibility of less litigation. The Federal Government's budget cuts have meant that there is less judicial time in the Family Court to deal with urgent parenting matters. The Association's view is to the contrary. As with the introduction of the concepts of "residence, contact and specific issues" in the 1996 Reform Act, parties will now have even greater ability to litigate. The introduction of the presumption may well result in a flood of urgent applications to rebut the presumption where separated partners insist on their right to have equal time with children when parents separate. It is the fact that if a proposal of presumption is adopted it will carry with it an opportunity for rebuttal and it will inevitably be the case that judges of the court will have to consider and give significant weight to the practical issues discussed above in ultimately determining the best interests of a child.

In what circumstances such a presumption could be rebutted.

18. The present formulation of section 68F(2) covers a very broad range of matters when considering what is in the best interests of children. For example, the forthright independent wishes of a mature child to spend the most time with one

parent or not to see the other at all, where one parent lacks the ability to care for his or her children, cases of abuse, health of children or parent, relocation cases and cases of domestic violence to select a few. The section offers considerations under the umbrella of determining the best interests of a child which ought ultimately rebut the presumption

19. It is submitted that the Court should retain its mandate to consider all relevant matters contained in section 68F(2) when considering an application to rebut a presumption of equality of time.

Conclusion

20. There are no advantages for children in a presumption of equal time with each parent. The paramountcy principal must remain for the protection of all children. The rights of parents must remain secondary to the best interests of children. It is our opinion that many potential litigants who would presently accept, with reluctance and sadness, that their circumstances and those of their children, lead to an inevitable conclusion as to where the children's interests are best served, will be encouraged to litigation by the inevitable perception that such a presumption will invite. The outcome of the cases however, for the vast majority, will be no different. This will come at an enormous potential cost. The cost to the community of running courts and attendant counselling and support services which are already taxed by demand beyond efficient running ability. A huge disappointment to the litigant. Most importantly, the often underestimated burden to children who inevitably suffer and lead their lives under a cloud waiting for the outcome of unresolved litigation between parents who often feel compelled to

then live their lives as a tactical exercise in the litigation. Ultimately we believ that the consequences would be very sad for the Australian community and children of separated families in particular.

Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

This is not a matter upon which the Bar Association wishes to make submissions. We see it as a matter for other disciplines.