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House of Representatives Standing Committee on Family and Community Affairs

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Secretary:

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

7 August 2003

Dear Committee Members,

Please find attached the Murray Mallee Community Legal Service's submission to the current Inquiry into Child Custody Arrangements in the event of Family Separation.

Please direct any enquiries about this submission to Ms Rebecca Boreham, Community Education Worker.

Yours Faithfully,

Vernon Knight
CEO Mallee Family Care
(auspicing agency of Murray Mallee Community Legal Service)

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Reg. A1982

towards a more caring community

STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

INQUIRY INTO CHILD CUSTODY ARRAGEMENTS IN THE EVENT OF FAMILY SEPARATION

SUBMISSION BY MURRAY MALLEE COMMUNITY LEGAL SERVICE

The Murray Mallee Community Legal Service (MMCLS) is a regional and remote community legal service funded by the Commonwealth Attorney General's Department. We provide free legal information and advice, and community legal education to disadvantaged members of the community who live in the Northern and Southern Mallee in Victoria and South Western NSW. Our Service provides a freecall telephone advice line for our catchment area, appointments in our office in Mildura and conducts regular outreach appointments in Swan Hill, Balranald and Robinvale. The Service comprises a generalist legal advice program, a Women's Outreach Service, a court based support service for people applying for Intervention Orders in the Mildura Magistrates' Court and a catchment wide community legal education program.

The Murray Mallee Community Legal Service strongly opposes any move towards introducing a presumption in favour of joint custody of children into the Family Law Act. The Family Law Act currently provides for a paramount consideration of the children's best interest in deciding residence and contact matters where parents cannot agree, and the Family Court is required to take into account factors including the child's right to know and be cared for by both parents. In our view the current formulation of factors are calculated to promote an assessment of individual family relationships and circumstances to ensure that the best interests of the child are the primary consideration in making residence and contact decisions. To shift the focus away from an individual assessment of the family situation to an across the board presumption that it is in the best interests of the child to spend half their time living with their mother and half living with their father represents a dangerous and fundamental shift in the focus of family law – it treats children as the property of their parents, to be split like an asset on separation; it promotes the idea that the right of the parents to equal time is more important than the right of the child to have their individual situation considered; and it assumes that quantity of time spent with children is more important than the quality of interaction between parent and child.

We also believe that further linking the levels of child support payable to the amount of time spent by children with each of their parents does not promote the fundamental principles of the child support system, nor does it encourage resolution of family law disputes with less conflict. Linking contact with paying child support creates an undesirable way of thinking that (predominantly) fathers are paying for contact with their children. This has the flow on effect of mothers feeling that they have an entitlement to refuse to allow contact if the father is not paying child support, and fathers feeling a corresponding entitlement that they will not pay child support unless they have a specific level of contact with their children regardless of Family Court orders specifying and regulating contact. There is little evidence that higher levels of child contact result in an actual shift in the financial responsibilities for children. Additionally, the current system of Child Support collection is not delivering crucial financial support to children of separated families : research conducted with Child Support Service customers have revealed that currently 40% of payee parents (mostly women) were not receiving any payment in accordance with their assessment[1].

In our experience there are a number of factors that make these changes not only undesirable from the perspective of promoting decisions in the child's best interests but also due to its capacity to increase the level of social and financial disadvantage amongst the most vulnerable families in our community.

The limited availability of Legal Aid Funding for family law matters, the low level of Family Court ancillary service provision in our region (eg. Primary Dispute Resolution, Federal Magistrates Service and Family Court Counsellors) and the remoteness of our physical location compound the social and financial barriers faced by low income families when attempting to access the Family Court.

There is no Legal Aid office in our catchment area to provide advice-only assistance, therefore we field an enormous number of enquiries about parental rights in relation to child contact and residence – these few areas of law made up a massive 37% of all advice provided by the Service for the 2002/3 financial year. The cap on, and limited availability of, Legal Aid for Family Law matters means that men and women who are relying on Legal Aid to

[1] Tammy Wolffs and Leife Shallcross, 'Low Income Parents Paying Child Support : Evaluation of the Introduction of a $260 Minimum Child Support Assessment' (2000) *57 Family Matters 26*.

resolve their family law dispute are often left to complete their case by representing themselves.

Our women's outreach service is frequently contacted by women who have already been through the Family Court, and obtained orders often by consent in which they have primary residence and the father has contact with the children. These women are then faced with another round of litigation in the Family Court by fathers who choose to continue to pursue resolution of frustration about the end of the relationship by continued litigation in the family court. These clients have usually exhausted their Legal Aid funding for the family law matter, and are often relying on a combination of social security, child support and/or limited part time work. The fathers of their children are usually working full time and they continue to retain a private solicitor. This kind of continuation of the relationship of control and abuse by continual litigation will only be compounded by a presumption that both parents have joint custody.

Research conducted by the Murray Mallee Community Legal Service in 2002 at the Mildura Magistrates' Court with people applying for intervention orders found that 80% had at least one child, usually with the person against whom they were seeking an order. A similarly high level of clients assisted by our Intervention Order Support Program in the Mildura Magistrates' Court report that significant incidents of violence occur at times when the defendant is exercising their right to child contact and that harassment by the defendant is able to continue under the guise of making arrangements for contacting the children.

40% of all cases opened by the Legal Service between 2001 and 2003 have been in relation to disputes over residence and contact. The following case studies serve to illustrate the inter-relationship of the issues of violent and controlling behaviour by fathers, the limited capacity of Legal Aid to ensure that clients are able to secure representation to finalise contact and residence matters and the existing problem of an association between payment of child support and rights to contact. A presumption of joint custody would not improve outcomes for children in any of these case studies, even where such a presumption is rebuttable. Our clients are currently unable to secure appropriate legal representation, this situation would only worsen if court action was needed to rebut a legal presumption of any entitlement to equal time for both parents.

Case Studies

1. Female client who has 2 children. Client has intervention order against father of children to protect her from his violent behaviour. Contact orders were made by consent in March 2002. Father brought new proceedings to change the orders in November 2002 at which point a Family Report was ordered. This report recommended no change in the level of contact and a cessation of overnight contact with the father. The report also found that during periods of contact the father spent little time with the children, focusing instead on his own leisure activities and refusing to allow the children to take part in their sporting commitments. Our clients' Legal Aid funding ran out before final hearing of the application. She was employed part time and in receipt of child support from the father. He was employed full time. Our client, with minimal assistance from our service, prepared affidavits and response documents for the proceedings. The father retained a barrister for the hearing and our client at the last minute hired a solicitor to represent her in court. The father got all orders sought.

2. Male client with 3 children. Contact orders were made (by consent) giving him frequent contact one month before he contacted MMCLS. Client wanted to contest these orders due to his dissatisfaction about mother having a new boyfriend. Client had been represented by private solicitor but could not return there as he had a $10000 debt from contact order proceedings. He refused to pay on the basis that he was not satisfied with the orders granted (in that they did not prohibit the mother from having a new partner.) Mother had intervention order against our client protecting her from his intrusive and threatening behaviour.

3. Female client with one child. Our client lives in Mildura, the father lives in Bendigo. The child is living with client and attending school in Mildura. Our client is on social security, father full time employed & privately represented. The parties were negotiating consent orders. The father withholding child support payments – only paying them to our client to reimburse her for petrol when she drove child to Bendigo (4 hrs) for contact on an ad hoc basis. Our client was seeking to have changeover occur in Robinvale – a town partway between Mildura and Bendigo, but the father refused this proposal. The matter was listed by the fathers' solicitor for contested hearing in Bendigo, but our client could not afford to drive there (4 hours) so agreed to

consent orders on the fathers' terms. Client had no opportunity to present her proposal for contact & residence.

4. Female client who has 3 children. Family Court order giving residence to mother and weekend and holiday contact to the father. Father had demonstrated history of breaching the contact orders including often not coming to collect the children for contact, taking them after school without agreement or notice to client and not bringing the children back after periods of contact. Father instituted Family Court proceedings to increase contact in 2002 as a self represented litigant. Client was able to adjourn matter to get legal advice but was unable to get Legal Aid as had reached the cap during initial process of applying for residence orders. Our clients' only income was child support and social security. This matter is still ongoing 12 months later, our client is representing herself.

5. Female, Aboriginal, client with 3 children. Children live with father under consent orders made in Local Court (NSW) 2000 which also give client reasonable contact. Our client had no legal advice at the time, father has private solicitor. Our client alleges that the father held her captive in her house until she agreed to sign the Consent Orders. The Legal Service assists client to obtain an Apprehended Violence Order. Client wants to secure residence of her children, but Legal Aid refused on the basis that there is little hope of success. In early 2001 client contacted us as Father had ceased allowing contact for the previous 6 months and also pursuing breach proceedings against our client for one incident of returning children late. The Legal Service arranged a private solicitor for client and contact resumed. In late 2001 Father again refused to facilitate contact – he hung up on our client every time she rang to arrange contact or speak to her children. Again Service arranged private solicitor for client.

6. Female client with 3 children. The children live in Adelaide with father, our client has a right to contact under FCA orders made in 1993. The father has consistently refused to allow contact and our client has consistently ignored contact order conditions like giving notice, not approaching the house. Our client was not represented at the original hearing, never read a copy of the order and doesn't have a copy of them. The father refuses to allow contact unless our client ceases to pursue legal advice about her rights to change the contact orders in the FCA. The client leaves the Service.

7. Female client who has 2 children, aged 10 and 11. She has an intervention order against the father to protect herself from his violent behaviour and fortnightly daytime contact takes place following a changeover at the Murray Mallee Child Contact Centre. The father is withholding child support payments as he is dissatisfied with his level of contact with the children, though children are left unsupervised in front of TV while father sleeps off hangover most weekends.

Two cases in which we have had clients with joint custody arrangements, have proved that these arrangements are no less problematic :

1. Female client who has one child. Joint custody pursuant to Family Court orders since 1997. In 2002 the father became unhappy with the level of child support he was paying and refused to return the child to the mother after his period of residence unless she refused to accept the Child Support payments. Our client is on social security and her only asset is the marital home from property settlement. VLA grant was refused and the client forced to retain private solicitor at own cost, paying by installments, to institute contravention proceedings against the father to secure the return of her son.

2. Female client who has one child. Family Court orders, by consent, specifying shared residence since 1998. Client was referred to us by the local Domestic Violence Service. Client had applied for an Intervention Order against the father in 1998 but was pressured by him to drop the proceedings, as he was then a serving Police officer who would have been unable to work as would not have been able to carry a gun. The child has primarily resided with our client, initially spending every second weekend with the father. In 1999 the father moved to Broken Hill (4 hours away). Family Court orders specified that the child remain living with the mother if this happened, contact continued monthly and in the school holidays supervised by the maternal grandmother. The father spent 9 months overseas in 1999 and on his return began insisting that our client allow him to have primary residence of their son, suggesting that the maternal grandmother move to Broken Hill to care for the child as the father works night shifts. The father continues to have contact with the child, in school holidays, but sends regular detailed and derogatory emails to our client criticizing her, their son and her parenting, and suggesting that she let him have residence of their son.

CONCLUSION

The Legal Service does not claim to represent the experiences of all families who make contact and residence agreements nor do we claim that joint residence is never a suitable option for separating families. What we do claim is that families who are able to resolve child contact and residence disputes to suit their own individual situations are doing so, and doing so with the best interests of the children in mind. Sometimes this will mean a joint residence arrangement and sometimes it won't. Presumptions in the Family Law Act do not solve problems for families who already prioritize the best interests of their children, have had relationships free from violence and controlling behaviour and have the resources to be able to facilitate flexible residence and contact arrangements.

Of all our casework in the past two years the Service has only had two cases which illustrate these kinds of arrangements, it is important to note that in neither case had the families gained orders in the Family Court :

1. Female client with 4 children. Children living with father, client had fortnightly overnight contact. No FCA orders. Client wanted to increase contact to include alternate weekends. Father agreed, and both parties decided to be guided by feedback from the children on the workability of their arrangement.

2. Female client of the outreach community education program with 2 children. Client and father continuing to cohabit after separation and divorce, in an upstairs/downstairs arrangement. Both parents involved in day to day care of children, and share caring responsibilities.

We argue, based on the experiences of the Legal Service in our various programs, that the families whose relationships and interactions are the least suitable for workable joint 'custody' arrangements are the same families in which the non-custodial parent will relentlessly pursue legal action in the Family Court to secure joint custody and in which the 'custodial' parent will be unable to secure appropriate legal representation to respond to continual proceedings. A rebuttable presumption of joint 'custody' only gives controlling and angry spouses further avenues through which to attempt to control and exact revenge upon their ex-partner. This is not in the best interest of the children in these relationships.