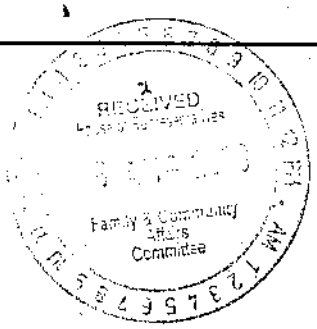
SCALES Community Legal Centre

Southern Communities Advocacy Legal and Education Service Inc.

ABN: 57 402 785 794 **Founded April 1997**



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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

House of Representatives Standing Committee on Family and Community Affairs
Submission No. 568
Date Received:
Secretary:

Submission to the Inquiry into child custody arrangements in the event of family separation

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

- *(i) what other factors should be taken into account in deciding the 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 to report to the Parliament by 31 December 2003.

Introduction

This is a submission to the Inquiry on behalf of the Southern Communities Advocacy Legal Education Service. SCALES is a community legal centre with dual functions of teaching law students through clinical legal education units, and providing a legal service to members of the surrounding communities in Rockingham, Kwinana and Mandurah in Western Australia. We teach and practice in many areas of law including family law involving children. One service we provide is the Family Abuse Advocacy Support Team, FAAST, which directly addresses domestic violence in our region and offers coordinated assistance in the form of legal help provided by SCALES and psychological counselling provided by a nearby community

more involved with earning and providing for the family, while the woman will be the primary carer for the children. One change is that in many cases the mother works outside the home as well. Many men are not experienced in parenting duties since they were not available to assist with the children prior to separation. For them to take on the degree of responsibilities that is implied by joint residence, many would require training in skills they have not developed.

In responding to Family Law Pathways Advisory Group report of May 2003 the Federal Government acknowledged research that confirms the destructive effects of parental conflict on children. Specifically, parental conflict is the strongest predictor of violent delinquency and is a better predictor of poor child adjustment than is divorce itself.

The Government's response also accepts the value of research by the Australian Institute of Family Studies (AIFS). The most recent and relevant research published by AIFS is *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting,* by Smyth, Caruana and Ferro, presented at the Australian Social Policy Conference 2003, 9 - 11 July 2003. There were three clear findings in this research in relation to joint residence:

1. Shared care arrangements are often complex
2. A number of conditions appear necessary to make shared care work
3. Research is needed on what children themselves think about joint residence

Among the conditions that appear necessary for shared care to work is the ability of parents to get along in terms of a business-like working relationship as parents. This conclusion is consistent with findings of several other studies mentioned in the paper: Ricci 1997 and Johnston 2003. Ricci found that many arrangements for parenting can work if parents relate to each other in constructive ways, but if the pattern is destructive the arrangements for parenting are likely to be problematic regardless of whether it is joint residence or alternate weekend contact. Johnston found the emphasis should not be on how to apportion time, but how to promote better ways to handle conflict such as primary dispute resolutions.

A final concern addresses the reasons for conflict between the parents. In many cases the reason for separation actually involves the children, such as incompatible differences on lifestyle or religion, or views on how children should be raised or educated. The dispute often remains unsettled and is 'unfinished business' between the parents but diminishes in importance following separation. Any forcing of close collaboration between disaffected parents through a presumption of joint residence could aggravate their differences and be a potential source of conflict that directly involves the children.

Consequently, we would answer question a(i) as follows. The factors that should be considered aside from the paramount principle in deciding the respective time each parent should spend with the children after separation **depends on the needs of the children in each case**. Any variation from that basic point would compromise the paramount principle that has been central to the law for decades and is not to be reconsidered by this inquiry. However, in deciding what are the best interests of the children in each case, other factors may be considered and these include the relationship with the children to each parent as well as to other people who may be important to the children such as grandparents, stepparents and siblings. These and other considerations are already included in the s.68F of the Family Law Act, notably s.68F (2)(i) 'any other fact or circumstance that the court thinks is relevant'. As

women's health service. FAAST also works closely with local and regional domestic violence committees.

Question a (i): a rebuttable presumption of joint residence?

It is our experience that joint residence can work only in a small number of cases. The breakdown of a de facto relationship or marriage usually involves a degree of bitterness and conflict is often present between the parties. The conflict often increases in the process of working out an arrangement for the children and trying to resolve matters of property settlement and child support. In very few cases is there no or little conflict and those clients typically have worked out a parenting arrangement that suits the children and simply need assistance in formalising the agreement.

It is likely that creating a rebuttable presumption of joint residence would lead in many cases to one party initiating proceedings in the Family Court to return the situation to one that is in the best interests of the children. Such proceedings would increase the levels of conflict between the parents, and require an increase in legal assistance to the community, which this service would not be able to meet with current levels of Commonwealth funding.

While joint parenting is a worthy ideal, joint residence is not workable post separation. It is chosen by only 3% of separating parents, and it is our experience that such parents are rare in that their separation would be relatively amicable. They are likely to have always shared care of their children, to be able to discuss the interests of their children dispassionately and if the children are old enough they would often involve the children in their decisions. It is not likely that forcing the assumed outcome of good parenting onto all parents post separation will improve their attitudes to each other, abilities to communicate and respective capacities to parent.

There are many cases when joint residence could be destructive for the children. These include where there is high conflict between parents, indicated by a history of domestic violence, or serious power imbalances between the parents, where there could not be sufficient communication to facilitate a successful joint residence arrangement. In other cases there are problems of addiction to substances or gambling, mental health and other dysfunction issues. Some cases involve emotionally volatile children who suffer severe separation anxiety when separated from the primary carer. In many of these cases, the parents can be assisted towards an consenting arrangement that works in the best interests of the children without the need for court hearings. Imposing a joint residence presumption would send the wrong message to the contact parent, leading to increased conflict where agreement was possible.

In many other cases there is not sufficient proximity between the parents' homes to enable convenient transfers for a joint residence arrangement. If the children are to have 'two homes' then both need to be close to the school, and the transfer of the children and of items important to them needs to be convenient and affordable on a regular basis.

There is often a significant difference in the abilities of the mother and father to parent their children. Our experience shows despite minor changes, it is still most likely that the man is

the needs of children in a multicultural society are diverse, the court needs maximum discretion and there is no apparent need for a change in this part of the legislation.

The second part of question a(i), whether there should be a presumption of joint residence and, if so, in what circumstances such a presumption could be rebutted, we answer in the negative. **There should not be any presumptions, rebuttable or otherwise,** as this would compromise the integrity of the paramount principle. Even if there were a substantial range of circumstances under which the presumption could be rebutted, there is unlikely to be sufficient legal aid resources provided to parties in the form of legal advice and access to the courts when disputes arise. The presumption itself is likely to increase conflict and be contrary to the best interests of the children.

Question a(ii): contact with other persons.

We would answer this question, in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents, by reference again to **the existing law reflected in s.68F.** Grandparents are specifically included in the law at s.68C, as people entitled to apply for parenting orders. The law is already comprehensive in this area; it needs to be broad to give the courts maximum discretion to address the needs of all children that come before it, without the fetter of restrictive conditions.

In relation to question (b), whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children. In our experience the main difficulty experienced by clients is **the delays and inconsistent manner of enforcement of arrears of child support**. Otherwise, the principle of child support is warranted and demonstrated by the needs of many families in the community. Most child support difficulties seem to be caused by the presumptions of liable parents that their obligations to their current relationships should take priority over their obligations to children from former relationships. The effect of this view would be to increase the number of children living in poverty and increase the burden for the taxpayer.

Yours sincerely,

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