

House of Representatives Standing Committee
on Family and Community Affairs

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Secretary:

3/18 Kellett St.
Auchenflower Q 4066

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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

Introduction

I welcome the opportunity to provide a submission on the issue of default arrangements for child custody following parental separation.

I strongly support default arrangements. The value of default arrangements is not to redress any perceived biases in Court or pre-Court processes for resolution of child care disputes, but to assist speedy and cheap resolution of disputes. Default care arrangements can assist in minimising parental conflict and court time in child care disputes.

Present situation

At present, there is no clarity about the custody arrangements for the children post-separation. In practice:

- each of the parents has parental responsibility;
- until resolution of the child care arrangements, each of the parents has a right to the residence of the child. This means that each of the parents can take the child to his or her place of residence, even over the objections of the second parent.

These circumstances seem to be almost designed to promote conflict. A parent may insist on taking residence of a child without the second parent being able to contest that situation. However, if the second parent is able to gain access to the child, the second parent can take residence of the child. In practice, this encourages the parent with current residence of a child to block contact by the second parent with the child, as there is a risk that the second parent may then take residence of the child. If the second parent takes residence of the child, the second parent likewise is in a position of not wanting to provide the child with contact with the first parent, for similar reasons.

In these circumstances the most responsible course of action to a non-resident parent is to institute legal proceedings. The only alternative is to seek to take residence of the child, which is likely to be highly disruptive to the child. Default arrangements would hopefully reduce the circumstances where a non-resident

parent would need to resort to legal proceedings to resolve a dispute about care arrangements.

Default arrangements could do this by providing both parents with some right of periodic residence until such time as the matter can be finally resolved by parenting order or Court determination. This would hopefully reduce costs and conflict between the parents. More importantly, they could promote the welfare of the child by making specific arrangements with respect to the care of the child until resolution of the care arrangements, for example by providing default provisions around matters typically covered in parenting plans or Court orders such as:

- principles for the hand-over and pick-up of a child after a period of residency; and
- arrangements in the case of illness of the child.

At present, there are few if any arrangements covering the situation between the time of separation and resolution of an ensuing dispute about care arrangements. This can be a considerable period of time in the case of disputes that reach trial (easily 18 months). It is unsatisfactory that the law does not provide any default arrangements in these circumstances.

Principles for resolution of child care arrangements

The principles guiding the resolution of child care arrangements following separation should include:

- ensuring the care of the child at all times (the primary guiding principle); and
- minimising delays and costs in resolution of care arrangements.

At present, the legal arrangements for resolving disputes about child care largely ignore the second of these principles, and also tend to ignore the first.

Deficiencies in the current provisions for resolution of care arrangements

At present, the Family Law Act contains a wide range of provisions to encourage parents to resolve disputes about child care arrangements without recourse to the law. Parents are encouraged by their lawyers to resolve matters before instituting legal proceedings, there are a range of compulsory counselling and mediation sessions after legal proceedings are instituted, and the cost and long lead time until trial is considered to encourage resolution between the parents.

There are two problems with these provisions:

- the arrangements that apply until resolution are unclear and unsatisfactory; and
- there are few realistic sanctions for abuse of legal process.

The theory behind counselling and mediation arrangements and of parenting plans, is to provide the maximum opportunity for parents to resolve care arrangements cheaply and without having arrangements imposed on them.

Prior to instituting legal arrangements, family lawyers encourage their clients to resolve disputes by non-legal means. In practice, the court frowns on the institution of legal proceedings without significant efforts being made by the non-resident parent

to resolve the matter through non-legal means. Effectively this can involve significant delays before the non-resident parent can institute legal proceedings.

After the institution of legal proceedings, there is a heavy emphasis on counselling and mediation prior to hearing of a custody case. A number of mediation sessions are compulsory before the initial hearing and before the final resolution of the case. However, these arrangements, which are designed to encourage resolution by the parents, can simply serve to delay the resolution of the dispute, increase the cost to the parents, and increase frustration. Moreover, parents often have little or no choice over the pathway to Court, forcing them to attend mediation sessions whether or not they would choose to do so of their free will. In these circumstances, it is open to a delinquent resident parent to abuse the mediation and arbitration sessions to delay resolution of the dispute. There are no realistic sanctions for these types of abuse of court processes. A sanction such as court order to pay the costs of the other party are unlikely to be particularly effective.

Following the failure of Court ordered counselling, there is an interim hearing to determine temporary arrangements pending a trial of the matter. Between the interim and trial, there are typically many months (most likely close to a year). These delays are partly to provide every opportunity for non-court ordered resolution of the dispute. These delays can provide further opportunity for abuse of the court process by a delinquent resident parent.

The reality is that most parents do not have the funds to fight a case to trial stage. This means that a delinquent resident parent can engineer a situation of residence without contact simply by denying all efforts at resolution, and by denying contact to the non-resident parent. There is also great pressure for the non-resident parent to agree to unsatisfactory arrangements either in a parenting plan or in a interim determination in order to avoid the delay and costs that would come from continuing to fight the case to trial. The delinquent resident parent would also gain the advantage at trial that the non-resident parent had not had contact with the child for a significant period of time and thus would have a weaker case to present to disturb the current arrangements.

Default arrangements would provide for a much more speedy resolution of disputes, with the ability for mediation and court processes to put in place alternative arrangements where appropriate.

It is critical to realise that whether or not the Family Law Act puts in place default arrangements, in practice the 'default' arrangements outlined above exist. At present, the default provisions are that both parents have parental responsibility and both have a right of residence. In practice, the parent with current residence of the child has a ability to block the right of residence of the second parent. In essence, this confirms the cynical view that 'possession is nine-tenths of the law', and does not address the needs of the child.

The default arrangements can be devised to take account of concerns that they could violate the primary guiding principle of ensuring the care of the child at all times. For example, provisions could be inserted make a range of default arrangements depending on situations of family violence such that:

- one set of default arrangements could apply in general circumstances; and
- other default arrangements could exist where there was pre-existing evidence of family violence or other clearly defined circumstances that would lead to a

reasonable view that the general default arrangements could pose a risk the adequate care of the child.

It is worth noting that at present there is nothing to prevent a parent with a history of violence towards a second parent asserting their right of residence following separation.

Concerns that default arrangements could displace parental agreement

There may be concerns that default arrangements could displace parental agreement via non-legal means such as parenting plans or mediation. These concerns are misplaced. Default arrangements, by definition, would only apply in situations where the parents could not otherwise agree between themselves about care arrangements. Parents would be free to agree to other arrangements at any time.

Concerns that default arrangements are too difficult to devise in practice

There may be a concern that generally appropriate default arrangements are, in practice, too difficult to devise. For example, default arrangements may provide for equal residence of children. In reality, it is rare that parents have the capacity due to work or other commitments to make an exactly equal contribution to residence for the child. Alternatively, default arrangements could provide for one parent to have residence and the other to have contact every second week-end and half of school holidays. These arrangements might not suit the situation where parents are living far apart, work unpredictable hours, or otherwise do not have the flexibility to conform to the default provisions.

This concern misses the point that the default arrangements should be designed to fill the gap between parental separation and agreement by the parents (or Court order) on appropriate child care arrangements. They should not be designed to displace the role of parental agreement, but to clarify the arrangements that will apply until resolution is reached between the parents. Where the default provisions are inappropriate, they provide additional incentives for the parents to resolve the dispute as speedily as possible.

It is true that no default arrangements will provide adequately for all parental situations. The real question is whether they will provide a better set of arrangements than the current situation. In effect, the appropriate counterfactual for judging the adequacy of default provisions is the current situation where arrangements are left unclear, parents may gain a strategic advantage by taking residence, refusing contact, forcing legal action and significant cost by the non-resident parent, and delaying court resolution as far as possible. Appropriate default arrangements would clearly be better than the current situation.

Scope of default arrangements

I believe it is important to ensure default arrangements are put in place to cover a broad range of parental situations, including the case of the separation of de facto and married couples, and in the case of couples who have never lived together or have separated prior to the birth of the child. This is because in each of these situations there is a requirement to determine care arrangements irrespective of any moral judgments about the choices made by the parents in deciding not to be together.

I do not comment about default arrangements concerning non-parents, but clearly this deserves attention.

Conclusion

I believe the default child care arrangements would considerably reduce parental conflict following separation. It would be important to ensure that these default arrangements do not displace the primary objective of ensuring the adequate care of the child at all times. I consider it is possible to devise default arrangements which would not compromise this primary objective. In fact, by specifying the arrangements that would apply until resolution between the parents, default arrangements could introduce significantly greater certainty and clarity in the arrangements that apply during the time leading up to resolution of care arrangements between the parents.

I would like to appear before the Child Custody Arrangements Inquiry to elaborate on my arguments in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to be 'LB' with a flourish.

Luke Berry