28 August 2003

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 Committee Members,

INQUIRY INTO CHILD "CUSTODY" ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The Mental Health Legal Centre Inc provides free legal advice, information, representation legal education and law reform to people with a psychiatric disability. For over 17 years we have been acting for our clients in all areas of the law. A significant number of our clients have matters before the Family Court and often experience discrimination against them as parents merely upon the label of psychiatric illness. Many of our clients are victims of family violence many of whom as parents suffer unfair and ungrounded scrutiny by Child Protective services.

We fully endorse the submissions made on behalf of our colleagues at the Women's Legal Service and the Federation of Community Centre, Victoria Family Law Working Group of which we are a member.

We are opposed to a presumption of joint 'custody' in the Act - such a presumption before the testing of any evidence will certainly place children at risk. We are deeply concerned that such discussion is on the agenda in reaction to political lobbying by recalcitrant child support payees. It is appalling that the debate has momentum when the focus has shifted from the best interests of the child to those of the parents.

Media coverage of this debate is equally concerning, politicians of both sides of government are quoted and exposed as biased and ignorant of the family law and the Family Court which struggles in the face of enormous conflict between parties, to protect children and secure for them the best quality of life - emotionally and financially.

Background

In 1996 the Act abandoned the terminology 'custody' and 'visitation' and adopted terms that aim to reflect the view that both parents have an important ongoing role in the life of every child - that the child has a right to know and be cared for by both parents. Current terminology 'residence' and 'contact' reflect the intention to encourage parents to work co-operatively. The Act now clearly accommodates joint residence arrangements where they are in the *best interests* of children. It is our view that the proposed changes are retrospective and contrary to the spirit of the act. We endorse the philosophy of the *Family Law* Act with its current emphasis on *children's rights* by focusing the Court's attention on making decisions that are in the *best interests of the child* and by providing that children have the right to be cared for by both parents and to have regular contact with them - unless this would be contrary to a child's best interests.

This proposed presumption change has no grounds -

- there is no compelling evidence that joint residence is in the best interests of the child, however we do not oppose joint custody
- joint residence occurs in less than 5% of families
- over 85% of resident parents are mothers
- discussion around joint custody is not about the best interests of the child but rather parent rights, it is in our view, a grave error to fuel an already conflictual jurisdiction with inequity and stymie decision makers from their task which is the best interests of the child.
- in cases where there are allegations of violence or child abuse and research shows that these are the cases most likely to be litigated and least likely to settle.[1] A presumption of joint residence in these matters could have the most significant and potentially disastrous effect.
- we support the New Zealand model that has a presumption that if there is violence to a child or the other party, contact with the violent parent should not occur unless the Court is satisfied that the child will be safe. We support research that concludes this includes protection against being in the vicinity violence even if not a victim
- the Court already has jurisdiction to decide on contact with other people. Grandparents are within the category of people with an interest in the care, welfare and development of children and if contact is considered to be in the child's best interests, having regard to the s68F(2) factors, the Court will order contact. Additional criteria is not required.
- the Court has very little information available to it at interim hearings. Interim hearings are heard urgently, time is of the essence, the Court does not hear oral evidence, family reports and other experts' reports are often not yet available. The Court relies to a large extent on affidavit material filed by the parties which, particularly in the case of self-represented litigants (of which there are now many in the Family Court), may be

[1] T Brown, M Frederico, L Hewitt and R Sheehan, *Violence in Families – Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, Monash University, Clayton, 1998, Chapter 5.

considered inadequate. The role of the Court is to ensure that prejudicial statements are tested. This is an issue for parents with a disability when a diagnoses of mental impairment, without exploration of the functional effects of the diagnosis on parenting, may lead to limiting the parents contact with the child.

The Court must deal with each case before it on its individual merits, considering factors that are comprehensive and appropriate. If there are any allegations of domestic violence then the Court must take a role in protecting the children until these allegations are tested. We support the position that the Family Law Act should not be amended to introduce a presumption of joint residence but instead ought contemplated a presumption that if there is a risk of the child being vulnerable to, including witness to, domestic violence then there should be no contact until otherwise ordered.

We are concerned that Child Support is considered in discussion on joint 'custody'. The apparent connection of child support and joint residence exposes the focus of this debate, not on the best interests of children, but on the financial interests of non-resident parents.

Parents with disabilities

Clients of our service, people with a psychiatric disability, suffer discrimination and early intervention in Family Court proceedings on the basis of their illness. The illness is more often than not, used by an opposing party as a lever to challenge contact and visitation. It is our experience that as a consequence alternative residence arrangements are quickly instituted and as a result a new status quo is established. It is then up to the parent with a disability to rebut this position.

We are concerned that parents with disability are disadvantaged by a process where evidence is not tested. This is for two reasons - firstly, because the transitional nature of a psychiatric disability is not considered; secondly, as the Court responds with caution towards a parent with any evidence or even a mere suggestion of a psychiatric illness. For this reason opposing parties wildly allege mental illness or instability. The evidence is not proven interim application but it is powerful enough to discredit the party about who is so labelled. Only at final hearing can this evidence be fully tested.

A joint custody presumption creates a further hurdle to clients with psychiatric illness. Already they suffer discrimination as parents, they will be immediately jeopardised if having to initially rebut the presumption of joint residence.

We are concerned that for our clients accommodation must be made during the period of time when they are unwell and may be unable to parent or unable to adequately ensure that the Court consider their views.

Parents with a psychiatric disability are vulnerable to being misunderstood and labeled as inadequate parents. With the mudslinging that is the hallmark of disputes in the Family Court parties too often throw a psychiatric label at the other party to discredit their parenting to the Court. Unfortunately in a jurisdiction so concerned about the safety of children the label of disability is used successfully. Furthermore when one party has a mental illness at the time of filing they may have not been able to prepare their case adequately or secure proper advocacy. A mental illness can impact upon a person in many different ways and make it difficult for them to properly organize a matter before the Court.

The Court must acknowledge that any intervention whilst a person is unwell may constitute indirect discrimination, defined in section 6 of the Disability Discrimination Act 1992 as follows:

For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability if the discriminator requires the aggrieved person to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and

(b) which is not unreasonable having regard to the circumstances of the case; and

(c) *with which the aggrieved person does not or is not able to comply.*

Furthermore the principles of the Disability Discrimination Act must be considered by the Family Court that it is unlawful to discriminate against a person because of his or her disability. There is no defense. This principle is reflected in the.1995(Vic) and in all state instrumentalities.

The Court **must** accomodate and encourage proper advocacy for, and behalf of, parents with disabilities.

Parents with disabilities share the same sense of pride in their children and are able to parent as well as people without disabilities. Unfortunately they often do this in the face of enormous prejudice and discrimination that remains unchallenged.

Conclusion

In our view the Family Law Act should *not* be amended to introduce a presumption of joint residence. This discussion must be steered back on track and move towards how to protect children against all harms, including conflict between parents, to enhance their lives and provide for them emotionally and materially.

We recommend that the government take a responsible role in the debate on parenting take stock of their ignorance of the issues and take a role repairing

community alarm. It is the role and duty of government to assist the community and parents focus on the needs of the children and offer support in the difficult role as parents

Yours faithfully,

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