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11 November 2003

Ms Bev Forbes
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 Ms Forbes

Re: Illawarra Legal Centre answers to questions on notice

The writer gave evidence on behalf of the Illawarra Legal Centre at the public hearing in Wollongong on 1 September 2003, and was invited to take two questions on notice. The transcript of evidence arrived while I was on leave, hence a delay in providing the following answers.

1. When do you feel that children's voices should be heard and at what age? Do you also feel that they should have separate legal representation? (Mrs Irwin FCA 38)

The Illawarra Legal Centre can foresee instances where it would be appropriate for children to have separate representation prior to legal proceedings being instituted. As children grow older and are better able to make their own decisions and express their own opinions, then those children should be able to speak for themselves, however there would always be a serious concern about how much weight should be given to a child's own representations.

Children do not always understand the implications of what they may say. They may not understand what is in fact in their best interests. They are very impressionable, and it is to be expected that parents fighting over residency will try to influence them. It is also to be expected that children will experience considerable dilemma if they are asked to choose between parents. They should not be exposed to this additional trauma. Also, the question arises of how to review the expressed views of the children as they grow and change their minds about what they want.

Clearly, children should be given a voice in circumstances where their interests are being debated. We see significant problems in instituting a "separate representative" role where there is a rebuttable presumption, but where legal proceedings have not been initiated.

A significant impediment is the cost of initiating the scheme. Where will funding come from? The separate representative will need appropriate professional qualifications eg. as a psychologist or social worker, and so will need to be paid appropriately. It would be most inappropriate to involve unqualified workers as real damage could be caused.

In the present system, Family Reports are prepared following conciliation for consideration when final orders are being made in the Family Court. These reports take account of the childrens' voice. On average it takes one day of a professional's time to prepare a report. Budgetary constraints have seen the use of Family Reports cut back, so that they are now only prepared where there are more serious issues to be considered.

With respect to the question of at what age should a child be heard, we submit that you cannot proscribe a minimum age because all children are different, and all cases are different. Some children are better able to express themselves at a young age, while others, especially where they have been exposed to trauma, or are being forced to choose between parents, may never be able to properly express themselves. The Family Law Act currently states simply that the views of the child should be taken into account, and we submit that the present provisions are sufficient to allow flexibility in each particular case.

In conclusion, we agree that children should be given a voice prior to the institution of legal proceedings, especially where there is good reason to rebut the presumption of joint residency. However, we see significant impediments to providing for those voices to be heard, the major one of which is the cost of establishing a "separate representative" scheme. It is therefore unlikely that a satisfactory system to support the children could ever be established. In this event, the best interests of the children will, again, be overlooked.

Given that it will not be possible to "hear the children", the proposal to introduce a rebuttable presumption of joint residency should be rejected.

2. **There is some confusion in my mind about how much flexibility the concept allows ... Statistically, the Family Court rarely makes fifty-fifty arrangements and, in lots of cases where there is an argument for a greater share it will be denied by the court. (Mr Price FCA 39)**

I was invited to expand on my answer after Mr Price made comments critical of the Family Court's failure to make many orders for 50/50 residency. He also referred to a perception that the Family Court often rejects arguments which favour awarding a greater share of residency to the non-custodial parent.

Firstly, the Family Court, and the Family Law Act, in no way favours mothers over fathers in making contact and residence orders. This is a misconception which has been repeated by various members of the Committee at various times, and reflects a disturbing lack of understanding of how the present system presently works.

The only way to understand the statistics which show few orders for 50/50 being made by the Family Court is to look at relevant cases and the actual evidence considered by the court, and to understand the legal decision-making process in each relevant case. It is simplistic to make any conclusions based on statistics alone. To do so also results in unjustified criticism of the present system.

For any analysis of the Court's decisions to be fair and well-reasoned, the Committee must understand a broad range of issues, including, for example:

- Why the matter could not be resolved out of court
- The personalities involved
- The age of the children

- Whether the relationship between the parties allowed for reasonable communication
- The living arrangements of the parties after separation
- Whether the parties had formed new relationships
- Whether any new relationships were accepted by the children, which may in turn influence a willingness by the children to visit or reside with either parent
- The financial situation of each party
- Any special needs of the children
- Parenting arrangements prior to separation
- What orders were in fact sought
- The existence of any detrimental factors eg. alcohol, violence, abuse, gambling
- What evidence was put before the court
- Whether the orders were made by consent.

Mr Price's comments suggested that the Family Court has a fundamental bias against the concept of shared parenting. I do not accept that any such bias exists. Matters come before the court only after exhaustive preparations, including case conferences, compulsory mediation, preparation of Family Reports, negotiations and exchange of documents. Separate representatives are appointed to represent the children and make appropriate submissions on their behalf. Orders are never made lightly or without proper consideration.

The fact that the parents are before the court for an order demonstrates that they simply cannot communicate, with the result that they have not been able to resolve their differences to a sufficient degree for them to come to some agreement. This clearly demonstrates that 50/50 wouldn't work for these families, as good communication is fundamental to the proposition being workable.

Most matters are resolved without the need for court orders. Many families which separate never resort to the Family Court at all, but just get on with it. The Committee must be aware that the Family Court only sees a minority of all families which separate, and so it is not justified to make sweeping reforms based only on the experiences in extreme cases.

If the Inquiry looks behind the statistics and understands the detail behind Family Court decisions then it can only conclude that the present system does operate to uphold the best interests of the children.

I take this opportunity to repeat the Illawarra Legal Centre's strong opposition to the introduction of a rebuttable presumption of shared residency.

Yours faithfully,

Karyn Bartholomew
Acting Principal Solicitor