ILLAWARRA LEGAL CENTRE INC

7 Greene Street Warrawong NSW 2502
PO Box 139 Warrawong NSW 2502
Phone: (02) 4276 1939 Fax: (02) 4276 1978 TTY: 13 36 77
ABN 37 488 400 52

29 July 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 Sir or Madam

Re: Inquiry into child custody arrangements in the event of family separation

The Illawarra Legal Centre has provided free legal and related welfare services since 1985. We are funded by local, state and federal government grants, and work with those in our region who are both socially and economically disadvantaged[1].

Over the years we had advised hundreds of "custodial parents". Almost without exception those clients have been women, although we have acted for fathers who are carer parents. . We hear the same story repeated, which is that the fathers do not wish to participate in the ongoing care and support of their children. In an alarming number of cases we hear of fathers who do not exercise their rights of contact despite the existence of court orders in their favour. Many of those fathers also simply do not pay child support. We also hear of an alarming number of fathers who are self-employed and misrepresent their income and earning capacity to avoid their child support obligations.

Our own experience tells us that a presumption in favour of joint residency will be detrimental in a majority of cases. Our experience is supported by research[2].

We are aware that submissions have been prepared and submitted by many other community legal centres, addressing the general question of a presumption of joint residency.

We have read and endorse the submissions made by:

---

[1] We provide general telephone advice in legal, tenancy, welfare and financial matters. We also undertake casework and advocacy in specific areas, including child support (we receive Commonwealth funding to provide advice only to 'custodial parents'), domestic violence (on behalf of the complainant), welfare rights, credit and debt matters, victims compensation, anti-discrimination and tenancy matters. We have until very recently provided Family Law advice.

[2] See below.

The National Network of Women's Legal Services
Macarthur Legal Centre
Women's Legal Service Victoria
Sole Parents' Union
Welfare Rights Network

Rather than repeat what has already been said by our colleagues, we will concentrate on the child support implications of a presumption in favour of shared residency. We would, however, like to stress the following compelling arguments against a presumption in favour of shared residency.

- It is dangerous and unrealistic to introduce a blanket presumption which is not an option currently adopted by a majority of couples entering into consent arrangements regarding residency and contact[3].

- The fact that so few families find this situation workable stongly indicates that it will impose a situation which is not appropriate in a majority of cases[4].

- At present, when parents separate the presumption is that the status quo remain ie. the children stay with the parent who has assumed the custodial role following separation. This may be for any of an infinite number of reasons, each specific to the particular circumstances of that family. If in the long-term it appears that that arrangement is not in the best interests of the children, then alternative court orders can be obtained. It is noted that an increasing number of fathers are seeking and obtaining residence orders[5].

  This situation provides for stability in childrens' lives at a time which is often intense and painful and of itself extremely unsettling.

  Under a new regime, the children will be forced to constantly move between two households and stay with parents who can reasonably be expected to be experiencing considerable stress, anger, pain and grief. The parents will be forced to maintain houses which can reasonably accommodate the children within close proximity to schools, sport, etc.

  It is foreseeable that such arrangements will be very detrimental to children. Not only will children be unsettled, it is foreseeable they will be caught in the "war games" which commonly occur between parents in the period after separation.

---

[3] US studies indicate that couples who enter into shared residence arrangements by consent, they do so often without legal assistance and regardless of legislative provisions. Commonly, such arrangements are entered between couples with little history of conflict during and after separation – Bauserman, R; 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, vol.16, no.1, 91-102 at p.99. See also Rhoades, h., Graycar, R. and Harrison, M.; 'The first years of the Family Law Reform Act 1995', *Family Matters* No.58, Autumn 2001 p.80 http://www.aifs.org.au/institute/pubs/fm2001/fm58/hr.pdf

[4] 3% of children from separated families were recorded as being in shared care arrangements in 1997 – ABS Statistics: *Family Characteristics Survey*, Dt 4442.0, AGPS, Canberra, 1997. Less than 4% of parents registered with the Child Support Agency in 2002 had equal (or near equal) care of their children – A-G's Department; *Child Support Scheme Facts and Figures, 2001-2002*, Canberra, 2003.

[5] Bordow, S: "Defended cases in the Family Court of Australia: Factors influencing the outcome', *Australian Journal of Family Law*, vol.8 No.3, pp252-263, and Moloney, L; 'Do fathers 'win' or do mothers 'lose''? A preliminary analysis of a random samply of parenting judgements in the Family Court of Australia' Presentation to Australian Institute of Family Studies, September 2000.

While in a small number of cases such a situation may be sustainable, we argue that it would occur anyway regardless of a legal presumption[6]. On the other hand, to impose that situation on all separating families cannot be in the best interests of the children involved.

- We have a real concern for what happens to the children in families where there is good cause for the presumption to be rebutted in the period following separation until court orders are made. The obvious examples are families where there has been domestic violence, child sexual abuse, gambling, alcoholism etc.

- We have a real concern as to what will occur in cases where there is good cause for the presumption to be rebutted, but where the parent seeking residence cannot afford legal assistance or is lacking in resources to obtain court orders. In such cases children will be forced into residence arrangements which are not in their best interests.

- The existence of a rebuttable presumption into the law will inevitably force more matters into court to either rebut the presumption entirely, or make other orders appropriate to each case. This will have many negative impacts, including increasing Family Court case loads and expenses. It will complicate many matters which would not presently require court intervention. It will prolong resolution of those matters, which in turn will be stressful and ultimately detrimental to the children involved.

- The Family Law Act already provides adequately for cases to be dealt with on their own facts and for joint residence orders to be made if they are in the best interests of the children involved[7].

- The Family Law Act already provides adequately for other significant people, including grandparents, to seek orders regarding contact and residency if that would be in the best interests of the children involved[8].

We will now address the Terms of Reference:

(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 opinion the existing child support formula does work fairly for both parents. What does not work fairly is that the Child Support Agency does not take adequate action to collect child support from non-paying parents[9], which in many cases leaves children without adequate support. This is, of course, a separate issue.

From a policy point of view, we are extremely cynical of any proposal to make child support contingent on the amount of contact awarded to or exercised by a non-custodial parent.

---

[6] See note 3 above.
[7] FLA s.65E
[8] FLA s.60B(2)
[9] The amount of uncollected child support in 2000-2001 was $M669.7 – Child Support Scheme Facts and Figures 2000-01.

The Family Law Act and the Child Support (Assessment) Act are both clear in ensuring that "the best interests of the child are the paramount consideration" in making orders regarding children, which includes payment of child support[10].

We firmly support the principle, which is enshrined in the legislation, that parents share equitably in the care and support of their children.

The notion that the amount of child support paid be contingent on the amount of contact between a non-custodial parent and child is abhorrent. Children are not the property of their parents. Parents do not have any rights which are paramount over the rights of a child to be properly supported by his or her parents.

We have seen hundreds of cases where non-custodial parents minimise their child support obligations. Our observation of these parents is that many simply do not "get" that their obligation to support their children is separate to any ongoing relationship or grievance with the custodial parent.

A common adjunct to this scenario is that as the child support arrears mount, the degree of contact exercised decreases[11].

Any change to the child support regime will have a monumental flow-on effect, requiring a complete re-drafting of the child support legislation and restructuring of the Child Support Agency. Not only will this process be extremely expensive, it will be very slow to implement.

Based on our extensive observations of the lengths non-custodial parents take to avoid their child support liabilities, it is foreseeable that shared parenting will become yet another means of child support avoidance.

In our opinion, any change to the existing child support regime, beyond improving enforcement, should not be contemplated because to do so will not be in the best interests of the children involved.

Yours faithfully,

Karyn Bartholomew
Acting Principal Solicitor.

[Case studies annexed.]

---

[10] FLA s.65E
CS(A)A ss.3, 4(1),

[11] Laura Wish Morgan with Chuck Shively; "*Contact and Child Support Compliance*", Department of Social and Health Services, Washington State University, 4 July 2003.

Case Study:

Sue and Ahmed have a 5 year old daughter, Clare, who has cerebral palsy and is profoundly disabled. Ahmed is approximately 10 years older than Sue. He is a company director with assets in the range of $1,000,000.00. The couple are currently going through extremely acrimonious Family Court property settlement proceedings.

Sue is sole carer of Clare.

Numerous modifications were made to the family home to accommodate Clare and assist with her physiotherapy requirements. Notwithstanding this, Ahmed insisted that she and Sue leave the family home when the marriage broke down. They are now living in rented accommodation, and Sue is experiencing significant stress and difficulty in caring for Clare.

Ahmed does not wish to have anything to do with either of them. He has failed to properly disclose his income to the Child Support Agency, and has been assessed to pay $10.83 per month.

It is apparent that shared residency would not work in a situation such as this. The child has special needs, and her father has rejected her.

We are concerned that a case such as this, where the mother has already been forced into lengthy, expensive and exhausting property settlement proceedings, would require further legal intervention to rebut a presumption of shared residency. Clearly this additional legal requirement would be extremely detrimental to the child involved, not least because it will place additional stress on a mother who is already close to breaking point.

(Names have been changed, however the facts of the case are genuine.)

Case Study:

Belinda and Steve were in a de facto relationship for 5 years. They have 2 children, presently aged 7 and 5. They purchased a home together, but it was sold following the separation in 1998.

Steve was employed as an electrician in one of the coal mines outside Wollongong until early in 2003. His income was in the range of $72,000.00 p.a. He supported Belinda and the children during the period of the relationship. Prior to having children Belinda had worked as a legal secretary.

Following the separation Belinda applied for child support, and an assessment of $910.50 per month was made by the Child Support Agency.

The children live with Belinda. Orders for contact were made in the Family Court however Steve did not exercise his rights to see the children until very recently. This greatly upset Belinda, who dearly wished for her children to have a positive relationship with their father.

In February 2003 Belinda received notification from the Child Support Agency that the child support assessment had been reduced to **NIL**, following telephone advice from Steve that his income had changed. It transpired that Steve had taken a voluntary redundancy from his job, obtaining a large lump sum payout. He did not notify Belinda of his change in employment. This change in financial circumstance has had a dramatic impact on Belinda's capacity to support the children.

Proceedings were commenced in the Family Court in May 2003 for a departure from the child support assessment. This action prompted Steve to contact Belinda for the first time in many months to discuss child support. He has gradually begun to see the children again and says he has put some money aside for them. Belinda does not wish to continue legal proceedings, fearing they will antagonise Steve which will in turn affect his attitude to the children. She is prepared to sacrifice her child support entitlements for the sake of preserving whatever relationship she can between the children and their father.

Steve has recently told the children he has had several holidays in Thailand where he has met a woman whom he intends to bring to Australia to marry.

Steve is a father who does not wish to accept the responsibility of caring or supporting his children, despite having above average earning capacity. He has not exercised his rights of contact and he has seen his children living in poverty. It is apparent that Steve's focus since the separation has been on self-gratification, evidenced by overseas holidays and his stated intention to marry. To impose shared residency in a case such as this would not be in the best interests of the children as the father has no inclination to fulfil his parental responsibilities.

(Names have been changed, however all facts are genuine.)

Case Study:

Kim and John had been married for 10 years when their marriage broke down. They had two children aged 7 and 4. Kim had been the primary carer and worked 2 days a week.

After they separated John lived 15kms away and initially saw the kids every second weekend and one night during the week while Kim played tennis. Kim had applied for and been accepted into a Bachelor of Laws degree.

Shortly after separation John repartnered and changed jobs. This lasted a few months and then he commenced to work for himself. He no longer could see the kids on Saturday mornings due to work commitments and he did not want to maintain the contact during the week night. Kim and John attended Family Court mediation however this was unsuccessful as John walked out of the session. Child support payments became erratic and Kim applied to the CSA for collection.

John did not want to sign a parenting agreement and came to see less and less of the kids. Property settlement occurred within 6 months of separation and John and his new partner bought a house and child support payments became even less frequent. As he was self employed and all bank accounts were in joint names, the CSA were unable to collect.

Kim completed 18 months of her degree part time but found the lack of child support meant she needed to increase her hours at work. Her youngest child had started school. Finally, the combination of part time study (and the cost associated with this), lack of time to study, full time parenting, working three days a week and lack of child support meant Kim gave up her degree and went back to work full time.

John will not agree to set arrangement to see his kids. Instead he prefers to go to watch them play sport and have them the occasional night if he hasn't got any plans. He sees this as doing Kim a favour rather than parenting his children and will sometimes pull out of arrangements he has made at short notice and without explanation. He had agreed to attend a mediation session with the family court but cancelled on the morning of the appointment. In three years he has not assisted with care for them during school holidays. There is no family court order and no parenting plan.

John had been a very active father prior to the marriage breakdown. His lifestyle then changed dramatically and his priorities altered. Over time he has become more and more distant despite still living 15 kms away from his children. He states he is unable, rather than unwilling to see more of his kids.

A presumption of joint residency in this case would have had disastrous consequences. It would have reduced the property settlement Kim received, and Kim would have had to go to court to rebut the presumption with all of the associated stress. Despite wanting her children to maintain a good relationship with their father, she knows that he does not want joint residency.

(Names have been changed, however the facts of the case are genuine)