

North and North West Community Legal Service Inc.

A.B.N. 35931 742 739

INQUIRY INTO CHILD CUSTODY ARRANGEMENT IN THE EVENT OF A FAMILY SEPARATION SUBMISSION

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 563

Date Received: 8-8-03

Secretary:

FRAMEWORK OF SUBMISSION

The purpose of this submission is to present to the Standing Committee on Family and Community Affairs, Child Custody Arrangements Inquiry, the views of the New England and North-West regions of New South Wales, which represents the service region of the North and North West Community Legal Service.

The community was invited to write to the North and North West Community Legal Service to express their views on the first term of reference of your enquiry:

- (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.

Only one term of reference was chosen because of the tight reporting time for the enquiry. Given that our community is a rural and regional community, it was hoped that opinions and experiences from the general public would highlight the need for the Committee to consider any special considerations that may be of relevance to separated parents in a country community.

The Service contacted all clients who had used the services of the North and North West Community Legal Service to obtain family law advice in the past 12 months. Thirty-four(34) clients agreed to participate though not all followed up their agreed participation. An article outlining our submission inviting participation from the community featured in a number of newspapers in our region and as a result we conducted a number of telephone interviews. As it happened the number of respondents was roughly divided equally between mothers and fathers, with mothers slightly more in number.

After agreement to participate was received by the North and North West Community Legal Service, a letter was sent out asking participants to outline whether they believed it would be in the best interests of the children to spend equal time with each parent as a matter of course and in what circumstances this should not happen. If participants wished they could tell us about their own experiences of the Family Law system to support their point of view. While the letter explained the

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present family law principles under the *Family Law Act*, and outlined the terms of reference (a)(i) of the Standing Committee on Family and Community Affairs enquiry, it deliberately did not seek to bias the outcome of the participation by directing questions that could be viewed as favouring one view or other related to the terms of reference of the Inquiry. As a result the letters received by the North and North West Community Legal Service were individual and expressed only the views of the writers of these letters or the views given in telephone calls.

The views of the people of our region are conveyed in the following submission. They are grouped under general headings which are indexed on the first page. For confidentiality reasons the participants have not been named.

SUBMISSION CONTENT

The contents of our submission are the words of those who wrote to the North and North West Community Legal Service and their views speak for themselves.

It would appear that there are equally strong views in the community as to whether there should be a presumption that children will spend equal time with each parent. Generally, many participants believed that the concept was a good concept but were concerned with the impact of geographical factors on the practicality of equal parenting. The difficulty of arranging schooling when the parents lived in two locations of some distance to each other was frequently raised. There was a common concern that each situation needed to be considered on its own merits.

We would respectfully ask that your Committee gives serious regard to the views of the participants of this submission.

Yours faithfully



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PART A: PERCEPTIONS OF THE LEGAL PROCESS

1. A perception that there is a 'system that gives one parent sole custody'

This is perceived in terms of a 'system' which may not accurately reflect the objectives of the Family Law Act. There is also a belief within this perception that the 'present system is wrong' and that if one parent wants to be involved with the upbringing of their children, 'he/she should be given the opportunity'.

- *"Most children from divorce stay with mom more than dad, I am personally not much know or not understand why??"*
- *One father sees it as a matter of Australian culture: "Australian culture has often meant that it is normal to expect the mother will undertake primary carer duties in the event of separation. As blended family numbers increase, the child should be given more opportunity to live with both families. This allows the child from a young age to develop the skills to have a meaningful relationship with all siblings."*

2. Looking at the process after parents separate

- *There was a suggestion that mediation be compulsory after divorce so that residence arrangements for the children can be made: "for the parents to sort out how the children can be best cared for, all the cards should be put on the table and the mediator help the couples resolve the problems."*
- *"Solicitors advise that 'if you go to court to contest it more than ninety percent of the time the mother gets custody... so advise you not to waste your money unless there is exceptional circumstances' (male divorcee)."*
- *A mother writes that although she has always adhered to court orders, "it would appear that the contact parent can do exactly as they please, in most instances because the resident parent cannot afford to go to court...the stress on the family unit is just too much".*
- *One father is supposed to have phone contact but the mother relocated and he now has no contact as he can't find her. His summary is that the "law is useless and benefits the woman. I was told by the police to go back to the courts but that's too expensive."*
- *In the middle of a Family Court application for residency, one father wrote about the legal process: "Originally I wrote in my Final Orders that the mother and I have 50/50 residency, but the solicitor that I had changed this to I have residency and the mother have access. A legal aid solicitor told me, seeing that the mother has had the child with her 5 days a week that I had no*

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hope for residency, and kept stating that because I'm the father, that also was a reason for me having very little to no hope, he kept referring to a previous case of Colin and Colin, which he kept telling me has set the precedent for residency matters. I feel that Colin and Colin are themselves, and my ex wife and myself are an entirely different case."

3. A perception that child support may not be spent on the child

- *"the money she receives from child support, single parent pension family allowance and all the fringe benefits allows her to dress smartly (don't worry about the children) has a mobile phone, pay TV, internet connected, pays to have her lawn mowed attends the club several times a week to play the poker machines I am told, while I do struggle to pay my child support \$877 a month which she is not accountable for one little bit."*

PART B: VIEWS ON SHARED PARENTING

4. A shared parenting relationship before separation

- One mother wrote that the ability of shared custody to operate effectively after separation is determined by the ability of both parents to have had a relationship with their children prior to separation: *"the father who was willing to change nappies, cook tea, attend doctors/therapists sessions, supervise homework, talk with their kids, tie hair ribbons, make school lunches, wash clothes, kiss bumps and scratches better, give doses of cough mixture, get out of bed at night to attend to monsters and nightmares and wet beds AND actually did these things, would be well able to co-parent in a shared custody arrangement when the relationship broke down."*

5. Shared parenting is not a good thing

- One female writer stresses that parents should not share custody of children equally. She believes that if this happened *"the legal aid system would be come dysfunctional and unable to keep up...Australia would have a higher suicide rate now and in the future and possibly wives would go bush causing more stress on the family unit....Personally if I were put in this situation I would liquidate all my assets and move as far away as possible."*

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6. Shared parenting is a good thing

- Male writes that he would love to spend more time with the children rather than every second weekend and half the holidays "*which is the norm*" but not enough to have an influence on the children.
- Another father says that: *'The children should have equal access to each parent at all times and the word custody removed from the Family Court dictionary.'* And *'it should not be a win lose competition for custody but divorcing parents have got to be told both parents must be more responsible for their children.'*
- Single mother writes that up to the age of 10 children should be with both parents, but after children reach 12 then they should be able to decide who they want to spend their time with. Another writer, a father, believes that children should spend equal time with each parent upon separation *"especially important to the child if less than 5 years of age. At this period the child is not restricted by schooling, and will benefit from living with both parents. This may set a precedent whereby parents can be more open to discuss more equal times when schooling begins. It may also prove that fathers are able to undertake the duties of primary carer as well as mothers."*
- Father who does share the parenting believes that *'it is in the best interest of the children to spend equal time with each parent'* and lists his factors where this can occur: when the children are not at risk; where there is a geographical closeness; where parents are able to provide suitable bedrooms, clothing, toys etc *"so that they experience a high level of continuity in the two homes"; "that each parent maintains a sense of decorum and respect for the other parents endeavours and aspirations with regard to the children; that changing life circumstances for the parents allow for alterations in the living arrangements both in the short and long terms ;that the wishes and expressed desires of the children be heeded as they advance in age".*
- In one case study both parents moved to a neutral location to take up shared parenting, the father relocating from interstate. The shared parenting arrangement is *"working for us...there are some communication problems but you need to acknowledge the lifelong connection....the essence of the solution is a commitment to reciprocal respect."* The parents in this case worked on a 10 day cycle flowing continually such that all aspects of the week are covered by both parents as the cycle continues.

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- A father believes that if they had been able to have had shared parenting there would not be such a "power play. If this came in it would be wonderful. Maintenance wouldn't be an issue, children would have had less problems and it would have stopped all the infighting and carrying on.
- The mother of triplets who has equal parenting with the father week about says the children (12) are happy to live between residences. They ring the mother/father constantly when they are at either residence and the mother and the father work together to go sporting events. The mother said it gives her a break week apart. Both grandparents and friends have been supportive –both herself and the father "work hard at it...it has helped our respect for each other."

7. New partner

- A father says that while shared parenting may be possible at the time of separation, it is difficult to commit on behalf of a future partner and when there is a new partner, these changes could be more distressing for the children.
- What had been an ad hoc arrangement for contact visits became regular when ex husband re-married and began having boys every second weekend.
- One mother interviewed had shared parenting with the father of their triplets(the parents lived 20 kilometres apart) "It was actually the girls who suggested it. We said 'ok' we'll give it a try. It would not have been as easy when we first separated 6 years ago(when the girls were 6) but since we have both got new partners, the new partners have been supportive and it is easier. My ex mother-in-law originally found it difficult, perhaps a generational issues, but she is OK with it now as she sees the girls are happy."

C. RURAL AND REGIONAL FACTORS

8. Geography – location of parents

- There is a need to consider if both parents live in the same town – issue of schooling, no changing of school and the moving of possession "no big deal". If children are teenagers and parents live close to each other – free to live where they choose if the parents live reasonably close to each other.

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- *"Although I believe that shared care is a fine concept in principle, I believe that it would become very difficult in practice. Both parents would have to agree to live in close proximity to each other so that schooling and friendships for the children could be easily maintained."* (male)
- One father who has contact with his daughter 6 weeks per year believes this is *'insufficient for my family and child'* and stresses that his experience is limited by geographical factors in that the mother lives 600 kilometres from where he lives. He suggests the setting of distance parameters, then *"both parents are able to have equal time with the child more equitably"*.

9. Schooling (and geography)

- Schooling and geographical factors are linked in regional and rural areas. There was a consensus that schooling and distance were the limiting factors in the support of equal time. As one father writes: *"separate schooling to achieve equal time may not be in the best interests of the child's education. Primary schooling still gives the opportunity for the child to attend more than one school, but whether it is in the best interests is an arguable point."*
- One father attempted to negotiate shared parenting with the mother but *"she would not co-operate. For example, getting a split bus pass is a nightmare. If the child already has a bus pass then you need to write an affidavit for another pass and both parents have to sign – she wouldn't sign."* Similarly the father pointed out that the child cannot go on a Countrylink bus under 12 without an adult and this had presented problems for him.

10. Special situation of small towns

- One mother proposed that parents move apart and away from the same town, especially in small town situations because *"they can't cope with seeing the new partner in the same town and you cannot escape the gossip and talk unless you move out."*

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11. Having to leave area to look for work

- Mother with responsibility for children having difficulty finding employment in region where she lives – husband has said that if she leaves region that he will 'take out a court order'. so "in my case, having joint custody means that I would be locked into [the town where she lives] forever! I do not seek a long-term future for myself here, certainly in terms of career and social opportunities. I have stayed living inso that the boys could maintain contact with their father

D. MOTHER HAS MAIN CARE : VIEWS ON SHARED PARENTING

12. Mother has main care (and supports idea of shared parenting)

- A single mother with 2 children 11 and 8 and the older child has a disability. Mother says: "Children growing up fast and concern why father hardly visit, only answer I can give is 'he busy or he live long way' that only way I could say for my kids so that they not feel left out, but I have no power to order him to visit or take children even for school holiday.
- "I wish the law should order with both party to be able to look after the children in school holiday so other party could have a break or spend more time with they children.
- There is agreement amongst participants that generally children need more than one responsible adult: "on a day to day basis they need to see problem solving and burden carrying and even spleen venting modelled in a socially appropriate and effective way and to see that different people do these things differently but mostly as effectively as each other."

13. Mother has main care and proposes fine

- Same mother as the one with two boys –the older with a disability, proposes that if parents do not make time to visit their children they should give fines as if they were breaking the law 'so no one can get away from it.' ...and it should be in writing "so no one cheat".

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14. Mother has main care and considers disadvantages

- The mother has main care and considers that she regrets that she relinquished her career "*a decision that would not have mattered to me if my marriage had not foundered.*". She considers that she is financially disadvantaged and has placed increasing strain on her health, as well as limited opportunities to meet a new partner and start a new life.

E. FATHER HAS MAIN CARE OR CONTACT

15. Father has main care

- In this example father has care of the children for all the time excepting ALL of the school holidays because his wife lives interstate – when he made this arrangement "*I did not fully think through the implications for the children and me in the future.*" The implications (by his admission) are that he never has a holiday with the children and also a lot of the Child Support is spent on travel for contact.

16. Losing contact with children

- One man had parenting orders which is "*ex wife chose to ignore..when it suited her*", and because he did not have the resources to take her to court, he lost contact with his daughter for two years. "*I am her father for God sake, I had done nothing wrong*". In this case resumed contact through the school counsellor after his wife gave permission for this to happen.
- In another situation, mother looks after children and father does not always ring between fortnightly contact visits. She says, "*I find myself encouraging the boys to ring their father, so that they maintain a relationship.*"

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17. Contact visits ad hoc

- *'Often he would arrange an access visit at very short notice (despite an arrangement to see the boys every second weekend) ...he would sometimes arrange to have the boys for the weekend and then cancel the plans at the last minute. I did not dispute this arrangement, because I felt that it was less unsettling for the boys, but in hindsight I should have insisted that their father abided his fortnightly access arrangement. It meant that I was physically and financially exhausted, we had no reliable custody routine, and I had very little time on my own to start a new life.'*
- Another mother writes that the children live with her and see their father everyday and at times they stay over on the weekend and she is happy with this arrangement because *'the children do need to see their father on a regular basis...my situation is rather simple as we both live in one town. So we can arrange different visits at different times.*

F: CIRCUMSTANCES THAT MAY AFFECT THE PRESUMPTION

18. Breastfeeding

- One letter wrote that equal care should not occur if the child is breastfeeding as the writer believed this would be emotionally and physically traumatising *"as most babies that are breastfed(in my experience)feed on demand not just for nutrition and the necessary antibodies but for comfort and reassurance in stressful situations....at this stage need more time with the mother.."* although the idea of introducing an occasional bottle and the ability of the other parent to comfort a baby in distress is also raised. The writer suggests that the father could still see the child for a few hours at a time each day and could take on an active role in the extra washing needs as well as financial support. The mother would continue in her current life and the father would do the travelling.
- Another parent who shares the parenting with the father on a continuous 10 day cycle believed that *"it is essential for fathers to have contact at early infancy and to have equal care of the baby."*

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19. When one parent has an addiction or is not emotionally stable

- *"I think equal care as a matter of course should not occur when one parent is dealing with drug or alcohol addictions." The writer suggests that the parent with the addiction should show they are able to take on some responsibilities and progress to more time when they can show that the children will be safe with them. This would also apply to emotional disorders or depression which "can be equally damaging to children".*
- *In another situation, one mother said that the father is not a 'happy person and this affects the children. I have to worry that every second weekend he sees my daughter that he will not be vigilant...he does not always enforce her wearing a seatbelt...You feel you do the job better yourself, the quality is not there."*

20. Employer needs to be accommodating in shared parenting

- *One father who shares the parenting with his former partner of their two children has needed to re-order his work schedule to accommodate the two out of four weeks the boys spend with him and he considers that "I am lucky in having an employer who has been accommodating in this regard. Whether it is possible for this to be the situation for all who are in full time employment is one of the points that would need to be taken into consideration when placing a 'presumption' upon separation".*

21. Abused parent and supervision

- *There should be supervision if one parent has been abused so child and other parent feel safe and children do not have concerns re abuse.*
- *We were told by one father that when he was before the Court in one matter, the Magistrate ordered that "for the interim that the child remain with the mother and that I have weekly supervised access (still the same unfounded allegations)until final orders...this has left me with only a window into my sons life. My concerns for the mothers ability to look after our son, which I stated to DOCS and the Court have unfortunately proved to be justified. ..." and he is concerned that "seeing my son for two days a week hinders my case for Residency in the long term."*

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**G. CONSIDERING THE INDIVIDUAL SITUATION OF
EACH SEPARATION AND MISCELLANEOUS
REMARKS**

22. Need to consider each situation individually

- A number of people interviewed believed that one needed to take each individual circumstances, that it was situation dependant.\
- A father, awaiting the hearing of his Family Court matter in several months time says that "I do realise that each case is individual and should certainly be judged on its own merits..I feel that this "presumption" is a genuine starting point, and that the case should be worked out from there

23. Not all parents are able to deal with single parenting

- A father who shared the parenting believes that not all parents are equipped "either emotionally, physically or financially to deal with single parenting in a manner which does not negatively impact upon the children."

24. A change in law midstream (with orders already in place)

- This was a concern to one writer who claimed that if there was a change to the law such that "a new child custody law dictates that my children suddenly have to start living with my ex-husband every second week. would be very unjust".

25. Seen as a moral issue

- The same mother who was concerned with a change of law midstream and who has the main care and responsibility of two boys says that she believes that a parent who leaves a marriage and family "because the grass is looking greener elsewhere, relinquishes some rights to the control they have over the children." - this is in terms of the rights of a parent.
- Another mother writes that "if children are to grow up stable in this ever-changing world then they must have love, stability, and continuity of care without being entangled in a legal battle and passed between two parents".

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26. All parents have something to contribute

- *"I think all parents certainly have something to offer their children, but the amount would vary with the parents current situation and the child's age. Very rarely it's a perfect world where each parent adequately participates equally, initially. We would be so lucky."*

27. Male and female 'values'

- *One sole mother writes: "The values instilled in males is still leaning away from nurturing, listening, etc., the values more likely to be instilled in females. To be prepared to drop things to be with sick children, to listen to troubled children, to soothe troubled children, to be patient, to stay up all night with sick children, all the things that women still do the most of in relationships. Males still have trouble dealing with their own emotions, should they receive training, counselling to give them more of an idea of what a nurturing parent should be? Not to say women are the perfect parents we aren't but are most men willing to do the 'women's work' required by a full time sole parent?"*

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