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House of Representatives Standing Committee on Family and Community Affairs

Submission No: 597

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Our ref.

Your ref.

4th 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

RECEIVED

Dear Committee Members,

RE: INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

I write to you on behalf of St. Kilda Legal Service in response to the request for submissions regarding child custody arrangements in the event of family separation. Through out this submission the term 'child residence' will be used rather than 'child custody' to reflect the language used in the Family Law Act (FLA) following reforms to the Act introduced in 1995 [1].

St. Kilda Legal Service is a community legal centre (CLC) that has been providing free legal advice and casework to members of its community over the past 30 years. CLCs are often the first place that family members, after separation, will seek legal advice and assistance. Generally, CLCs provide casework services to people within their community who are unable to afford a private solicitor and are ineligible for legal aid assistance.

In the last year, child contact was the second most prevalent problem type for which clients sought legal advice and assistance from our Service. A quarter of all advice given and casework undertaken over the past two years at St. Kilda Legal Service has been in the area of family law.

[1] See also S64B FLA for meaning of 'residence order', 'contact order' and 'parenting order'.

The type of casework assistance that St. Kilda Legal Service is able to provide to clients with family law matters includes a range of activities such as giving legal advice, advocacy, assisting clients to take their own action, drafting letters and documents, initiating and defending court action, and briefing out matters to barristers for representation at court. The majority of family law casework undertaken by the Service involves negotiating child contact arrangements between parents.

St. Kilda Legal Service has recruited and maintains a number of experienced family lawyers, (including accredited specialists) who volunteer on a weekly basis, to enable the Service to meet the constant demand for client appointments for family law advice and ongoing casework services.

St. Kilda Legal Service is a generalist CLC that provides legal advice and assistance to all members of its local community, with almost equal numbers of male (49%) and female (47%) clients in the last year [2]. Therefore, the Service provides legal advice and assistance to mothers, fathers and grandparents in disputes regarding child residence and contact arrangements[3].

Given the nature of legal casework that St. Kilda Legal Service undertakes in assisting members of its community experiencing family breakdown, our Service is well placed to contribute to this inquiry.

This submission demonstrates, with the use of case examples, that the status quo should be maintained and legislative reform is unnecessary.

I refer specifically to the House of Representatives Standing Committee on Family and Community Affairs Terms of Reference:

(a)(i) Factors that should be taken into account in deciding time parents should spend with their children post separation.

Child residence and contact arrangements made by consent

Parents seeking legal advice after separation, if appropriate, are sometimes referred to family mediation for assistance with the process of reaching agreement over child residence and contact arrangements. A recognised benefit of mediation is that parties are more likely to abide by agreements they have reached between themselves, than an order imposed by a Court.

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[2] Based on Centre statistics collected, 4% of clients' gender was unknown or not supplied.

[3] Note - only one party in each dispute can be advised to avoid a conflict of interest.

Many parents continue to actively participate in their child/ren's lives after separation, with regular contact if not shared care. If agreement is reached over child residence and contact arrangements then clients may seek legal assistance with drafting consent orders reflecting the arrangements they have agreed upon. Parents with informal agreements may wish to formalise these arrangements through parenting plans or consent orders, which are then enforceable if required at a later stage. This provides some parents with a feeling of security that their children cannot be taken out of their care at times other than previously agreed to. However, where child residence and contact arrangements are agreed to informally following separation and are working well, there is no imperative for either parent to seek legal advice or enter consent orders, let alone come before a court.

Interviews conducted with separated parents using a flexible shared residence arrangement indicated that these arrangements were not attributable to the family law, and these parents would have chosen the arrangements regardless of the law[4].

There have been a number of cases at the St. Kilda Legal Service whereby child residence and contact arrangements are agreed upon by both parents, yet the non-resident parent fails to enjoy the contact time with their child/ren as agreed to. This results in disappointment for the child/ren who are waiting in anticipation of a contact visit with their parent who fails to show up to collect them. In a national ABS survey in 1997 it was found that 36% of children living with one parent saw their other parent rarely (once a year or less) or never (ABS, 1999).

St. Kilda Legal Service is currently assisting a resident mother that wishes to arrange regular contact times with the father to see their 2 year old son. The parents had previously agreed that the father would have weekly overnight contact visits with their son. The father has consistently failed to comply with the contact arrangements agreed to. The resident mother in this case is very concerned about the irregularity and unreliability of contact and the effect it has on both their son and herself, being disruptive and not conducive to a regular routine which a child needs. It is also hurtful for their son when the father postpones contact visits with him.

Factors currently taken into account under the Family Law Act (FLA)

The FLA encourages each parent to continue to share the responsibilities of caring for their child/ren despite separation (Ss60 &

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[4] 'The first three years of the Family Law Reform Act 1995, by Helen Rhoades, Reg Graycar and Margaret Harrison, published by the University of Sydney and the Family Court of Australia, 2000. The report is based on research undertaken into the operation of the Family Law Reform Act 1995 from the time it came into effect in June 1996 to the end of 1999.

61C). The notion of parental responsibility found in Division 2 of the Act was introduced with the legislative reforms in 1995 (Family Law Reform Act 1995). The underlying principles in relation to the parenting of children are contained in S60B(2) of the FLA.

The FLA gives the Court discretion to make parenting orders with respect to child residence and contact, but in exercising this discretion the Court must consider the child's best interests as being paramount (S65E). The range of factors that should be taken into account in determining what is in a child's best interests are listed in S68F(2) FLA. This range of factors allows consideration to be given to the unique circumstances of each family on a case-by-case basis, in determining what are the most appropriate parenting orders to be made.

Family violence

In determining what is in a child's best interests consideration must be given to any family violence or family violence order involving the child or a member of the child's family [S68F(2)(i)&(j) FLA]. The Court is also required to ensure that a parenting order made is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence (s68K FLA).

Contact changeovers can provide opportunities for arguments between parents, harassment and in some cases further violence (for example threats being made, physical or sexual assault of resident mother), which can be an emotionally and psychologically traumatic event for the mother and the child/ren. The research by Rhoades, Graycar and Harrison (2000) suggests that the introduction of the notion of parental responsibility referred to above "created greater scope for an abusive non-resident parent to harass or interfere in the life of the child's primary care-giver". St. Kilda Legal Service has assisted clients where contact visits have been used by the non-resident parent to harass or denigrate the other parent when speaking to the children.

Despite legislative attempts to protect women and children from family violence, in practice they can still be at risk of further violence where interim orders allowing contact are made, rather than suspending contact until a final hearing. This was found to be the case by Rhoades, Graycar & Harrison (2000), who found "a trend away from suspending contact at interim hearings ... towards the use of neutral hand-over arrangements". This may involve contact change-overs occurring in a public place or supervised contact, such as at a Contact Centre or in the presence of a third party.

Presumption of equal time spent with each parent

Equally shared care is most likely to succeed where parents have a good working relationship post-separation, based on co-operation, trust, flexibility, good communication skills, with as little conflict as possible during separation. This kind of post-separation relationship between parents is most likely to result from having this kind of relationship prior to separation. This is supported by the research that "shows that parenting after separation is more likely to be co-operative where that has been the practice during the subsisting relationship" (Rhoades, Graycar & Harrison, 2000).

To encourage parents to enter child residence and contact arrangements where children spend equal time with each parent, the government needs to have policies and resources supporting equally shared time spent in parenting roles in families before separation, so that those roles may continue after separation. This involves much broader social and economic policy considerations than just legislative change to the family law. This would involve policy (and possibly legislative) reform in the area of employment, including:
- conditions of employment;
- maternity and paternity leave entitlements;
- the effect of pregnancy & motherhood on career prospects;
- availability of child care for working families;
- real support within workplaces from employers for true shared care arrangements between parents;
- tackling the reasons for women still having a lower earning capacity than men, particularly in female dominated areas of work;
- changes to taxation law and superannuation schemes.

There also needs to be a dramatic shift in social values in Australia and greater support for and acceptance that parenting is in fact a shared responsibility, rather than a gender-specific expectation of mothers to take on the role of being the primary carers of children.

Parenting orders made are based on the factors to be taken into account under the Family Law Act (see above) and a need to ensure stability in a child's life, by maintaining the existing arrangements for care of the child/ren. So although the majority of residence orders made by the Family Court and Federal Magistrates' Service, are in favour of mothers (69.6% in 2000- 2001)[5], this should be no surprise as it is a reflection of the fact that mothers are still performing the role of primary carer within families prior to separation. This is further supported by the fact that children remain residing with their mothers in 88% of

[5] Residence Order Outcomes – 1994-95 to 2000-1, Family Court Statistics available online at www.familycourt.gov.au/court/html/statistics/html

separations, most commonly by agreement between parents without legal advice (ABS 1997, 1999).

For example in Californian family law a statutory presumption in favour of joint custody was introduced in 1980 but repealed in 1989 because the actual physical care and financial responsibility for children inevitably fell on the mother, who received less child maintenance and property because of the presumption.

Presumptions made by the presumption of equal time with each parent

The presumption presumes that equal time being spent with each parent is in the child's best interests. The time being spent with each parent should take into account a child's needs, based on their physical, emotional and social development. This means taking into account the importance of peer support and the influence of role models outside of the family in their local community, for example a sports coach. Parents need to provide some stability in living arrangements so that their child has the time to develop and maintain these relationships and links to their local community.

The presumption also presumes that parents are capable of overcoming practical hurdles of maintaining two separate residences for the child/ren in close proximity, can provide transportation, negotiate flexible arrangements to meet the needs of their child/ren (not just to suit themselves), without conflict and have good communication skills.

St. Kilda Legal Service assists many clients where these practical considerations in maintaining ongoing contact arrangements through out childhood are issues in dispute. For example disputes as to who is responsible for collecting or dropping off the child/ren and transporting the child/ren for change-overs, particularly where one or neither parent has a motor vehicle and parents live some distance from one another. Problems often arise with contact arrangements being disruptive to recreational or sporting activities a child is involved in. Other cases relate to contact arrangements being used as a weapon in negotiating child support payments or division of property.

Problems with the presumption:

- places the rights of parents as a consideration aboue the best interests of the child/ren;

- fails to acknowledge that equal shared parenting already exists as an option for parents who are able to agree to this and make it a workable reality;

- places women and children who have been victims of family violence at increased risk of further violence by abusive fathers;

- potential for increased litigation, resulting in greater delays in the Family Court and Federal Magistrates' Service, particularly with an increased number of self-represented litigants (almost 40%) due to the lack of legal aid funding;

- potential for using care of children as a pawn or weapon in negotiating child support or property settlement.

Whilst the FLA encourages the sharing of parental responsibilities after separation, the Act does not explicitly express any preference for children to spend equal time with each parent. For a more detailed analysis and consideration of this presumption, I refer the Committee to the relevant sections of a PhD thesis by Dr Renata Alexander (attached)[6]. In conclusion Dr Alexander argues that the "disadvantages of court-ordered shared residence clearly outweigh any claimed benefits ... and so it is crucial that this discernable trend (of the Family Court making more formal residence/residence orders) does not evolve into a legal presumption"[7].

(a)(ii) Contact with other persons, including their grandparents

Currently the FLA (S65C) enables anyone concerned with the care, welfare and development of a child (expressly including grandparents) the right to apply to the Family Court for a parenting order, to have contact with the grandchild/ren when they can't reach agreement with the parents. Therefore, the Court already has the power to order that children of separated parents have contact with other persons and legislative change is unnecessary.

In a recent case the Legal Service has been instructed by the resident mother to write a letter initiating contact between the father and paternal grandparents, with their 13 year old daughter. In this case the resident mother is supportive of her daughter re-establishing contact and developing a relationship with her father and extended family.

b) Child Support

Child support and maintenance aims to ensure that parents share equitably in the financial support of their child/ren following separation.

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[6] 'Reflections on Gender in Family Law Decision Making in Australia, by Dr Renata Alexander, PhD awarded 2001, Monash University.

[7] Ibid, p 295-296

A non-resident parent has a parental responsibility to continue to contribute to the financial support of their child after separation regardless of whether their relationships change, such as entering a new relationship with another partner, having other children etc.

The Child Support (Assessment) Act 1989 introduced a standard formula to calculate the amount of child support payable to overcome the problems associated with recovering child maintenance prior to this. Problems included no consistency in the amount of child support paid, not considered fair, a more difficult process for resident parents having to seek child maintenance through the court system, which resulted in many parents not seeking child maintenance, resulting in tax payers supporting child/ren through the welfare system. The Child Support (Assessment) Act 1989 provides for a variation of the standard formula reducing the amount of child support payable where the liable parent has substantial contact with the child/ren based on the amount of time each year spent with the liable parent. "The desire to reduce child support liabilities is frequently a motivating factor for seeking shared residence arrangements ... placing pressure (on carer parents) to agree" according to the Rhodes, Graycar and Harrison research (2000).

There are still means of avoiding paying child support under the existing child support formula. For example where a non-resident parent is receiving a low income, such as a pension or benefit, which is below the exempted income amount, they are only liable to pay the mandatory minimum child support in the sum of $21.47 per month. Also, the formula is based on taxable income, so where the non-resident parent is self-employed there may be ways in which to misrepresent their true income, by declaring a low taxable income. In addition, the ceiling on taxable income is currently $113,000 so non-resident parents in high income-earning brackets (usually men) do not pay equitably. The burden of seeking to vary child support falls on the resident parent to challenge any child support assessment made with the Child Support Agency. Most non-resident fathers pay low or no child support, with only 42% (ABS 1999) of single mothers receiving any cash child support. St. Kilda Legal Service has seen cases where even the mandatory minimum amounts of child support (ie. $5 per week) are not paid by the non-resident parent.

Therefore, the existing child support formula could be said, in some cases, not to be working fairly for resident parents who may still face difficulties in recovering child support from parents who attempt to avoid paying.

Conclusion

Legislative reform to the Family Law Act is unnecessary, since parents are currently able to agree on child residence arrangements that provide for their child/ren to spend equal time with each parent. Where separated parents are able to reach this agreement parenting plans or consent orders may be entered to formalise the arrangement. This represents a major proportion of families following separation, given that so few cases, only 5%[8] result in contested final hearings being determined by a judge.

The disputed cases that do reach Court usually involve circumstances in which it would not be appropriate for the child/ren to spend equal time with each parent. The cases most likely to be litigated in the Family Court are those cases involving violence or child abuse, and "the shared parenting concept is totally at odds with the types of parents who litigate" [9].

If any amendments are to be made to the Family Law Act, they should be as recommended by Rhodes, Graycar and Harrison (2000), to clarify that shared parental responsibility does not mean there is a presumption of shared residence.

Rather than legislative changes to the family law the Commonwealth Government needs to develop much broader social and economic policies that encourage and support equally shared time spent in parenting roles in families before separation. This should lead to shared parenting roles naturally continuing after separation, where it is appropriate and workable, without needing a presumption for this to occur.

The Service would welcome the opportunity to contribute to any future consultations on these issues. Should you have any queries regarding this submission you can contact Dr Alexander or myself on 9534 0779.

Yours faithfully,

J. Maloney.

Jacinta Maloney,
Community Lawyer
ST. KILDA LEGAL SERVICE CO-OP. LTD.

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[8] Family Court Annual Report, 1999; Australian Law Reform Commission, Review of the Federal Civil Justice System (1999)

[9] A Family Court Registrar quoted in Rhoades, Graycar & Harrison, 2000