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Sent: Monday, 18 August 2003 11:57 AM
To: Committee, FCA (REPS)
Cc: g.sheehan@griffith.edu.au
Subject: Submission

Please find attached a submission from the Families, Law and Social Policy Research Unit to the Child Custody Arrangements Inquiry. A second copy of this submission has been posted.

Regards,

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Standing Committee on Family and Community Affairs

Child Custody Arrangements Inquiry

Department of the House of Representatives

Parliament House

Canberra ACT 2600

Australia

August 15, 2003

Dear Committee Secretary,

Re: Submission from the Families, Law and Social Policy Research Unit, Socio-Legal Research Centre, Griffith University.

The Families, Law and Social Policy Research Unit of the Socio-Legal Research Centre was established by the Griffith Law School in 1996, and commenced operation in early 1997. The primary aim of the Unit is to engage in research, mainly of an empirical nature, into the practical operation of family law in Australia with a view to identifying ways to best assist families post-separation and divorce. The Unit is the first university-based body with this focus in Australia, although there are counterparts in the UK, Canada and the USA.

This submission draws together the expertise of members of the Unit to address the question of whether there should be a presumption that children spend equal time with each parent (from here on referred to as 'joint residence' or 'shared care') and, if so, in what circumstances such a presumption could be rebutted (Term of reference (a) (i)).

We recommend against the introduction of such a presumption for the following reasons:

1. Many separated and divorced families do not have the capacity to establish and maintain equal time shared care.

Shared care is a model of post-separation parenting that necessitates particular parent characteristics and financial resources. This means it cannot easily be extrapolated to the broader separating and divorced population. The introduction of a rebuttable presumption of joint residence would make shared-care the default parenting arrangement post-separation and divorce – causing considerable hardship for parents and children who lack the capacity to sustain it.

In Australia, post-separation shared-care is rare.[1] Research suggests that parents who adopt shared care have particular characteristics. We refer the committee to the

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1 Australian Bureau of Statistics (ABS), Family Characteristics Survey 1997 Cat No. 4442.0 (1998). Less than 3 per cent of children living with a natural parent had shared care arrangements in 1997.

recent research of the Australian Institute of Family Studies (AIFS) on this issue for a detailed review of the national and international research findings on shared care. In summary, the core characteristics of parents who share care that emerge from this research base are:

Relational: Parents have a cooperative and businesslike relationship.[2] They are careful to support and not undermine each other, regardless of their own feelings. They are focused on the children's needs, and children are kept out of any relationship issues that parents might have.[3] Such a post-separation parental relationship may be beyond many parents, at least in the short-term, because of high levels of conflict and violence. Research by the Australian Institute of Family Studies (AIFS) suggests that violence between men and women is not the exception for those who separate and divorce but the norm. Based on data from a national random sample, around 30 per cent of divorced women and 5 per cent of divorced men report having been the victim of severe and ongoing violence during the marriage and/or post-separation.[4] When experiences of less severe family violence are taken into account these rates increase to include the majority of divorced women and men surveyed.[5] These findings suggest that conflict and violence is the context in which many parents negotiate (legally and otherwise) the parenting aspects of separation and divorce.

Financial: Shared care is not only dependent on the parents' ability to cooperate for the benefit of the children; it is dependent on the financial capacity of both parents to establish two households that can function as a residence for children; and a reasonable proximity between the two households and between them and the children's school to facilitate the children's access to school, extra curricular activities and peer group interaction. [6]

Separation often leads to a financial crisis because the available resources are insufficient to meet the costs of two newly formed households.[7] Research by the AIFS suggests that on separation a large minority of families have most of their assets tied up in the family home and superannuation. They have high levels of debt, and little accessible cash.[8] At the point of separation shared care is a costly arrangement and

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Patrick Parkinson and Bruce Smyth, 'When the Difference is Night and Day: Some Empirical Insights into Patterns of Parent-Child Contact After Separation' (Paper presented at the 8th Australian Institute of Family Studies Conference, Melbourne 12-14 February 2003). Parkinson and Smyth estimate that shared care occurs in about 10 per cent of all separated households, and in about 16 per cent of households where contact is occurring. While these respective estimates rely on a different definition of 'shared – care', they are both based on national random samples, and the conclusion is the same – shared care is adopted by a small minority of separating and divorcing families.

2 A. Abaranel, 'Shared Parenting after Separation and Divorce: A Study of Joint Custody' (1979) 49(2) *American Journal of Orthopsychiatry*, 320; M Brotsky S Steinmen and S Zemmelman, 'Joint Custody Through Mediation: A Longitudinal Assessment of the Children' in Jay Folberg (ed) *Joint Custody and Shared Parenting* (1991); I Ricci, *Mom's and Dad's House: Making Shared Custody Work* (2nd ed, 1997); Bruce Smyth, Catherine Caruana and Anna Ferro, 'Some Whens, Hows and Whys of Shared Care: What Separated Parents Who Spend Equal Time with Their Children Say About Shared Parenting' (Paper presented at the Australian Social Policy Conference, Sydney 9-11 July 2003) 21-22.

3 Ricci, above n 2; Smyth, Caruana and Ferro, above n 2, 21-22.

4 Grania Sheehan and Bruce Smyth 'Spousal Violence and Post-separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law*, 102, 109.

5 Ibid, 109. When broadly defined, a majority of women (65 per cent) and a majority of men (55 per cent) reported experiencing some form of physically abusive or threatening behaviour during the marriage and/or post-separation.

6 Smyth, Caruana and Ferro above n 2, 21.

7 Bruce Smyth and Ruth Weston 'Financial Living Standards After Divorce: A Recent Snapshot' (Research Paper No 23, Australian Institute of Family Studies, 2000) 1.

8 Grania Sheehan, 'Financial Aspects of the Divorce Transition on Australia: Recent Empirical Findings' (2002) 16 *International Journal of Law, Policy and the Family*, 95, 103.

out of reach for many families. Reducing child support payments may not free up sufficient resources to establish and maintain a second household without compromising the financial welfare of the other parent and the children. To our knowledge, no Australian research has tested the assertion that shared care reduces the cost of care for the former resident parent.

It is not surprising therefore that successful shared care arrangements typically involve relatively affluent families in which both parents are employed with above average incomes in family friendly workplaces, enabling them to stagger working hours and minimise child care costs.[9] This degree of financial security post-separation and divorce is not the reality for large numbers of separated and divorced families in Australia.[10]

In summary, understanding the relational and financial characteristics of parents who establish and sustain shared care makes it easy to see why these families are a small and distinctive group.[11] Rather than imposing shared care on families who will struggle to establish and maintain it, government resources would be better spent on programs that build parents' capacity in these two areas prior to marital breakdown and post-separation.

2. A presumption of joint residence may not be in the best interests of children.

The appropriateness of shared care depends on the needs of the children, the parents' capacity to prioritise these needs, and their skills in responding to them. A child focused parenting model must be sensitive and flexible, rather than rigid and imposed by law. For some families this may mean changing the arrangements from shared care to alternative arrangements that better suit the children's needs at particular ages or in particular circumstances. A presumption of joint residence will compromise this flexibility by introducing a new proposition into family law - that shared care is *the* parenting model that is in the best interests of children.

Parents and children for whom this model does not fit may be left with no real option but to litigate to rebut the presumption and adopt an alternative arrangement. The scope to negotiate an alternative agreement that better suits the needs of the children would be restricted. This would be counter to a fundamental principle laid out in the existing legislation, which also underpins the Family Law Pathways Advisory Group's recommended family law system – that the use of non-adversarial dispute resolution processes to resolve children's matters in family law be a priority.[12]

There is limited empirical evidence to suggest that shared care is the optimal model for children. Despite claims by interest groups that equal time shared parenting has been shown to be beneficial for children in those jurisdictions that have implemented it, there is scant evidence to support these claims. While 18 US jurisdictions provide for joint legal custody either by way of presumption (16) or preference (2) these arrangements are not materially different from current Australian law. Only 11 of the 16 American states have enacted legislation providing for a

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9 J Pearson and N Thoennes, 'Custody After Divorce: Demographic and Attitudinal Patterns' (1990) 60 *American Journal of Orthopsychiatry*; Smyth, Caruana and Ferro above n 2, 21-22 .

10 Smyth and Weston, above n 7, 11-12.

11 Smyth, Caruana and Ferro above n 2, 21. J Pearson and N Thoennes, 'Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments' (1988) 22(3) *Family Law Quarterly* 319.

12 Family Law Pathways Advisory Group, Commonwealth of Australia, *Out of the Maze – Pathways to the Future for Families Experiencing Separation*, (July 2001), xv.

presumption of joint legal and physical custody and, of those, only 2 have given the presumption universal application. In the other 9, the presumption applies only where both parents agree and directs the court to award joint legal and physical custody in these circumstances.[13] Only in New York (1999) and Pennsylvania (1998) has anything approaching a universal presumption in favour of equal shared care been enacted, and there is as yet no empirical research available on the impact of these arrangements on children's wellbeing.

More generally, research on shared care and outcomes for children is based on small samples of parents who voluntarily agreed to joint physical custody despite the absence of explicit legislative directives.[14] Most of these parents were equally engaged in hands-on parenting before separation and remained so after divorce. Even enthusiastic American supporters of shared care such as fathers' rights advocate Sanford Braver have conceded that the present evidence does not support its legal imposition and that equal time shared care may not be in the interests of the children – a view shared by Wallerstein who suggests that children whose "lives are ruled by rigid time-share arrangements ultimately feel like prisoners deprived of the freedom their peers take for granted".[15]

In the absence of strong empirical evidence that legally imposed shared care produces beneficial outcomes for children, imposing such a model of post-separation parenting would be out of step with the United Nations' Convention for the Rights of the Child. This is because a statutory presumption of shared care would replace a broad based inquiry into the best interests of the child with a model of parenting that some suggest could be detrimental to the child, unless otherwise proven.

3. A presumption of joint residence will lead to an increase in litigation to rebut the presumption, and consequently have significant resource implications for the government

Given that shared care is a difficult arrangement for many parents to adopt, and that a presumption of joint residence will make this the default arrangement, reform of this nature will inevitably increase litigation of children's matters in the Family and Federal Magistrates' Courts. This increase in litigation will have resource implications for the government and the Courts. For the Courts it will increase backlogs and waiting times, and reduce the Courts' capacity to resolve matters in a timely and effective manner. In turn, this will create pressure on the government to increase court resources.

Any increase in family law litigation will also affect demand for legal aid. Legal aid for family proceedings is already scarce and many applicants are unable to obtain legal aid.[16] An increase in litigation could result in a return to the funding crisis of the late 1990s,[17] creating pressure on the government to inject more funds into legal aid.

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13 American Divorce Network, *Child Custody Legislation in the United States*, <http://www.americandivorce.net/divorce-statistics/joint-custody-legislation.htm> at 7 August 2003.

14 E. E Maccoby and R.H Mnookin, *Dividing The Child: Social And Legal Dilemmas Of Custody* (1992).

15 Sanford Braver (with D O'Connell), *Divorced Dads: Shattering the Myths* (1998) 223, 224; Judith Wallerstein, *Unexpected Legacy: A Twenty-Five Year Landmark Study* (2000) 181-2.

16 Rosemary Hunter, Jeff Giddings and April Chrzanowski 'Legal Aid and Self-Representation in the Family Court of Australia' (Research Report, Socio-Legal Research Centre, Griffith University, May 2003). Recent research shows a particular family law funding shortfall in Queensland.

17 R Hunter, A Genovese, A Melville and A Chrzanowski, 'Legal Services in Family Law' (Justice Research Centre, December 2000).

If parents are unable to access legal representation privately or through legal aid, they can represent themselves in court. However, this also presents problems for the courts and for the litigants. Research indicates that a substantial proportion of self-represented litigants in family law proceedings have applied unsuccessfully for legal aid.[18] Between 1995 and 1999 approximately 31 per cent of Family Court litigants at first instance were unrepresented at some stage during their case and 18 per cent of litigants on appeal were unrepresented. There has also been a steady increase in the proportion of fully unrepresented litigants at first instance in the Family Court.[19] In short, increased litigation will lead to an increase in demand for legal aid in an environment where these resources are already restricted. In turn, these research findings suggest that restrictions on the provision of legal aid does not decrease litigation but produces more self-represented litigants.[20]

Self-representation affects the ability of litigants to pursue their cases effectively. Family law clients who have low to average incomes[21] and who are refused legal aid will have limited, if any, funds to outlay for services such as expert witnesses, subpoenas, barristers and discovery, yet they have high needs for information (eg. information on court procedures, advice on how to file forms, court etiquette, preparation of documents, and the formulation of legal arguments) and for emotional and practical support.[22] While the Family and Federal Magistrates' Courts have taken a pro-active role in assisting self-representing litigants,[23] judicial officers and judges struggle with a duty to remain impartial while ensuring a fair and just outcome for all parties, including the self represented party. This inability of self represented litigants to run their own case was demonstrated graphically in *T v S* (2001) 28 Fam LR 342 where the self-representing litigant had been the target of violence by her former partner. Chief Justice Nicholson highlighted the fact that women who have suffered serious domestic violence may be unable to present their cases unaided in family law proceedings and this may result in an unfair trial. His Honour said "The present legal aid system does not appear to be able to cope with these problems."[24]

In summary, any increase in litigation will exacerbate these problems and compromise the integrity of the legal process. The introduction of a presumption of joint residence would precipitate just such an increase in litigation.

4. A presumption of joint residence will place victims of family violence and child abuse at further risk of harm.

If the safety of adult victims of family violence and child victims of abuse is not made the primary concern for legislators and the Courts, the introduction of a presumption of joint residence will put victims at risk of further harm.

We are particularly concerned about the effect the presumption will have on the court's deliberation on the s 68F(2) factors – the factors that are used to determine

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18 Hunter, Giddings and Chrzanowski, above n 16.

19 R Hunter, A Genovese, A Chrzanowski, and C Morris, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Law and Justice Foundation of NSW, August 2002.

20 J Dewar, B Smith, and C Banks, 'Litigants in Person in the Family Court' (Research Paper 20, Family Court of Australia, 2000); Hunter, Genovese, Chrzanowski, and Morris, above n 19.

21 Hunter, Genovese, Chrzanowski, and Morris, above n 19.

22 Dewar, Smith and Banks, above n 20.

23 J Faulks, 'Self Represented Litigants A Challenge' (Project Report, Family Court of Australia, 2003).

24 *T v S* (2001) 28 Fam LR 342, para 202-203.

what is in the best interests of the child. Although the Inquiry is not seeking submissions specifically in relation to the Family Law Amendment (Joint Residency) Bill 2002 (Cth), a presumption of joint residence as drafted[25] would appear to take precedence over consideration of the s 68F(2) factors. This would constrain the Courts' consideration of the effect of family violence and abuse on children, and the need to keep children and their family members safe, by giving secondary weighting to s 68F(2)(g), (i) and (j) of the *Family Law Act.*

The Courts' handling of family violence and child abuse in the context of orders for children's arrangement has long been an issue of concern for the Courts, academics and government. For a recent analysis of these concerns we refer the committee to the submission from the Women's Legal Service (Brisbane) for a detailed discussion of the problems associated with court and consent ordered contact arrangements in the context of family violence and child abuse.

The importance of developing a more effective response to these safety concerns is highlighted in *Out of the Maze: Pathways to the Future for Families Experiencing Separation* – the report of the Family Law Pathways Advisory Group. Recommendation 18 specifies that the safety of children and adults is paramount. Violence and abuse should be screened for at the earliest point of contact with the legal system. Once assessed the family would be guided to the most appropriate pathway so that their immediate needs for safety can be addressed.[26] Deliberations about contact and residence arrangements would be secondary to these safety considerations.

If shared care is to be legislated as a preferred arrangement for children, it could take the form of a staged process. The best interests of the child would be the primary consideration followed by the imposition of restrictions on the types of orders that can be made if after assessment there are judged to be safety concerns. Only then would making orders for shared care be considered. For further details on a staged process of making orders for children's arrangements we refer the committee to the submission by the Women's Legal Service (Brisbane) and their discussion of the Revised Code of Washington State.

A presumption of joint residence will be particularly difficult for Aboriginal and Torres Strait Islander communities, given the high rates of family violence in many such communities, and the incompatibility of the presumption with culturally appropriate patterns of care. Where a former partner is not Indigenous, the presumption may disrupt the child's cultural and social integration, leading to alienation and jeopardising the child's access to his or her cultural heritage and relationship with the Indigenous community. Other ethnic communities will also experience substantial difficulties where shared care conflicts with entrenched cultural traditions.

In conclusion, whilst the desire to increase the role of fathers in caring for children following separation and divorce is an important and praiseworthy policy direction, the following factors leads us to recommend against the incorporation of a rebuttable presumption of shared care in the *Family Law Act*:

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[25] Family Law Amendment (Joint Residency) Bill 2002 (Cth), s 68ME.
[26] Recommendations 18 and 19, Family Law Pathways Advisory Group, above n 11, 63 – 68.

- the large number of families who lack the capacity to establish and maintain shared care;
- the absence of clear empirical evidence supporting the assertion that shared care is in the best interests of children;
- the risks that such a presumption as drafted poses for victims of family violence and child abuse;
- and the resource implications for government and the courts.

We would like to thank the committee for its consideration of our submission and we would welcome the opportunity to elaborate further on this submission if it would assist the committee in its deliberations.

Yours sincerely,

Members of the Families, Law and Social Policy Research Unit.

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