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House of Representatives Standing Committee
on Family and Community Affairs

Submission No: **1524**Date Received: **10-9-03**

Secretary:

Telephone: [REDACTED]

10 September 2003

The Hon Alan Cadman MP
Federal Member for Mitchell
Suite 6 29 Terminus Street
CASTLE HILL NSW 2154

Via fax no: (02) 9899 7990

Dear Mr Cadman,

**Re: Standing Committee on Family and Community Affairs
Inquiry into Child Custody Arrangements
Hearing - Brisbane, Thursday, 4 September 2003.**

Thank you so much for taking the time to speak to me on Thursday after the hearing. I understand that your time was very limited as you had to catch a plane. However, I have taken up your invitation to forward some information to you.

As this case is to come before the Family Court again sometime next year, I would ask that you keep my personal details confidential, but I would be more than happy to discuss issues surrounding my case with you privately.

Just to refresh your memory I am a working mother with an almost four year old son born after five years on the IVF program. Currently we have a shared care situation where my son spends 50% of his time with me and 50% with his father. In my view a share care arrangement is the best outcome for my son. He is doing very well despite our family breakdown.

1. Cilentio Principle

Residency (or custody) of children is determined in the Family Law Court based on the binding precedent, the Cilentio Principle. Basically whoever is the primary carer for the past 12 to 16 weeks gets residency of the children. There is no negotiation. The Court will accept 12 weeks but prefers 16 weeks as primary carer.

We were able to challenge the primary carer argument as my son attended day care for three days per week and we were able to demonstrate to the Court that I cared for my son when I was not at work. So the fact that my son attended day care and being able to afford excellent legal counsel (funded by my family) were the two factors that turned the decision towards shared care.

2. Family Support

As I went back to work to support our family this works AGAINST me as far as residency is concerned. As a matter of fact the Magistrate at the Petrie Magistrates Court said that he

could find no fault with me as a mother but that I did not have the time to care for my child because I work.

The Family Court does not take into account WHY I went back to work, the fact is that I did. Had I had any idea about the legal implications of my actions I would have tried to find another way. Certainly the outcome of my case would have been entirely different if I had resorted to relying on the social welfare network.

The Family Court takes the view that I have the ability "to pay" so that role is more important than my role as a mother. Like most other fathers I pay child support and expect to do so until my son turns 18.

The Magistrates Court at Petrie and the Family Law Court have limited the hours that I can work to "school hours" only on the days that I have my son. Fortunately I have been able to push the boundaries a little and my employer has been very understanding.

3. Family Court Mediation

Family Court mediators currently do not even CONSIDER shared care as an option. I have even heard of cases where the Court mediator has tried to talk parents out of the shared care option.

Mediation will only work when there is a level playing field and quite clearly this does not exist as far as residency is concerned. Apart from the Cilento Principle, the other complicating factor affecting mediation is financial support. Money tends to increase desperation. As my husband has not worked since 12 December 2000 and has no intention of working he was very keen to get as much money from the separation as possible. As I discovered recently he had been to Centrelink, his solicitor and the Child Support Agency to find out what money he would receive prior to my leaving him. Had he managed to win his action for full residency of our son he would have received 75% of the property settlement, approximately \$300 per week child support and received all the Family Payment benefits plus whatever other benefits he could get from Centrelink. At age 48 his future was secure and he would not have needed to work again. Unfortunately it now appears that this was his motivation.

4. Court Action

As I left the family home taking our son with me, my husband bought an action against me in the [redacted] Magistrate's Court to order that our son be returned to him full time because he was "in danger" because my mother was caring for our son a few hours a day. This was not true but that is beside the point. His solicitor tried to take this action "ex parte" so the court hearing would have occurred without my knowledge and I would have had no chance to prepare a response. My husband's solicitors went to four Magistrates Courts before they could find one that would hear the case. Fortunately my solicitor found out about the action and we had three days to prepare. The subsequent Court judgement fortunately did not support my husband's position.

You might consider reviewing the Family Law Act to remove the ability for Magistrates to hear Family Court matters. With all due respect to Magistrates, they do not have the training or the resources to hear Family matters.

To date we have appeared before the Magistrate's Court twice and the Family Law Court once and in ten months our joint legal expenses are approximately \$37,000.

5. Role of Family Report

Family Report writers are the most powerful people in the Family Court process. What they say goes. This point will be argued by the Family Court but my solicitor has only ever seen a Family Report successfully challenged once in 15 years and this involved a blatant breach of rules. In the initial Family Court stages the only evidence taken into account other than the

barrister's submission is the Family Report. My husband engaged a \$6,000 a day barrister to fight the Family Report in Court because it did not give him full residency.

Family Reports are normally prepared some months after the separation. As my husband's solicitor had circumvented the process by going to the Magistrate's Court, our Family Report was prepared 9 weeks after separation. As the Family Court mediator explained that the report was prepared far too early because the trauma of the separation was still too fresh and that the Magistrate at [REDACTED] had overstepped the bounds of what she considered was his authority by ordering the preparation of the Report. Apparently organising Family Reports is the role of the Family Court mediator so she felt her role had been usurped.

As my solicitor has a thriving Family Law practice and because of the speed of the Court action he did not prepare me for what was going to happen other than advising me that the Report Writer is all powerful. I was advised that Report Writers are very experienced people who would easily "see through" my husband. I simply needed to tell the truth.

This was not the case. The person who prepared our report was an American lady who had prepared only two reports previously. She interviewed my husband first and he "cried all over her" and she saw me as the hard bitten career woman with very little compassion who had removed the child from the home. The only "evidence" she and ultimately the Family Law Court took into account was the phone testimony of two neighbours, one of whom worked for my husband's firm of solicitors. These neighbours would not have known our surname and the relationship consisted of conversations occurring in our driveway and our children played in the front yard occasionally. We had only lived in the area for some 12 months. At no time did the Report Writer contact anyone who actually knew us.

The Report Writer interrogated me for 3 hours and 40 minutes without a break. She also rang me once. As the separation was still so raw and because of her aggressive approach and my naivety, this interview did not go well. The Report Writer made many factual errors including getting my date of birth wrong. She took my husband's version not mine.

The Report Writer also interviewed my son and this caused him great anxiety. The interviews occurred at the Report Writer's office. As my son is so young, he had not really understood what had happened - that his parents were now living separately permanently. His behaviour deteriorated so much after this interview that the Director of his day care centre asked me to raise the matter with the Report Writer and to explain to her that how badly this process had affected my son. Preparation of this Report was far too early for him as well.

We are due to have another Family Report prepared early next year. Here I will be well prepared with evidence (which I will also provide to my solicitor) and a much clearer mind, so the outcome here will be entirely different.

6. Way Forward

We currently have an interim order for shared care. I suggested a shared care approach to my husband prior to leaving him, although I did not know at the time that this was called "shared care". I repeated this to the Family Report Writer and, while she did not take on board all my suggestions, she felt that as our son had an attachment to both his mother and father that a shared care approach was the best outcome. At least she got something right!

In my case as my husband is totally intransigent in his approach to gaining full residency of our son, we will unfortunately be going to full trial early next year. My husband has told me that he has a "\$60,000 fighting fund" and he will win at all costs. My position might be a little better if we can gain a more favourable Family Report this time but even that will not divert my husband from his chosen course of action.

7. SUMMARY AND SUGGESTED CHANGES

- (a) Working parents should be given the opportunity of shared care of their children. There should be a PRESUMPTION of shared care in the Family Law Act.

- (b) The Shared Care debate should be carefully separated from issues of domestic violence and child support payments.
- (c) A Tribunal with power to make decisions and recommendations should be established to try and gain some agreement between the parties. Agreement will not be reached through mediation.
- (d) Parents should be required to seek professional help to ensure that they do not take out their own bitterness on their children. Parent's issues must be separated from children's issues.
- (e) Rules and boundaries must be set and clearly explained to parents to help them make good decisions for their children without resorting to the court process.
- (f) A mechanism should be established to take action when a blatant breach of a Court Order occurs. Presently, who do you call to get help?
- (f) Amend the Family Law Act to remove the ability of Magistrates to hear Family Court matters.

Thank you again for taking the time to speak to me and for reading this rather long letter. Please feel free to contact me on the numbers given above if you wish to discuss anything with me.

Best of luck with your efforts to change the Family Law Act.

Regards,

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[REDACTED]
[REDACTED]