Cairns Community Legal Centre Inc

8 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

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INQUIRY INTO CHILD "CUSTODY" ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The Cairns Community Legal Centre Inc. ("the Centre") is a non-profit organization, providing free legal advice, casework and referrals to the community of Far North Queensland, for over ten years. We also undertake law reform work in relation to issues which are of particular concern to us: such as this one; the "Inquiry into Child Custody Arrangements in the Event of Family Separation".

Our submission deals with the Term of Reference (a)(i) regarding the respective time each parent should spend with their child post separation, in particular - whether there should be a presumption that children will spend equal time with each parent. We also deal very briefly with Terms (a)(ii).

Family law matters comprise a considerable component of our work. Our experience has been that every client's circumstances are different and that each case needs to be considered in the light of its own circumstances. There can be no presumptions of joint residence made – even a rebuttable presumption. A presumption (of any kind) is only appropriate where the presumption reflects what occurs, and is workable, in practice more often than not. It is our submission that joint residency is not usually the most common or appropriate arrangement. Therefore a presumption of joint residency should not be made. There can only be a set of circumstances to be considered in the light of each individual case, such circumstances being determined with regard to what is in the best interests of the children. This is the current legal position and it is our submission that this law should remain unchanged.

We have read the submissions prepared and submitted by other legal centres addressing the general question of a presumption of joint residency. In particular, we wish to specifically thank the Women's Legal Service Victoria Inc for allowing us to utilise and refer to material contained in their submission.

Terms of Reference (a)(i) – whether there should be a presumption that children will spend equal time with each parent

Current Legal Position
We strongly believe the *Family Law Act 1975* ("the Act") should not be amended to introduce a presumption of equal time to be spent with each parent after separation.

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The Act refers to the best interests of the children[1]. Given that the best interests of the child is to be the paramount consideration, s68F(2) of the Act ought to be, and is currently applied by the Court to the merits of each individual case, in determining child residency arrangements[2]. Thus, the Court, having regard to what is in the best interests of the child, makes its decision regarding child residency arrangements, in an objective and appropriate manner. Through this process, the Act already allows for joint residence arrangements *if*, considering the factors outlined in s68F(2), such an arrangement would be in the best interests of the children concerned.

The factors that the Court must apply in deciding residency post separation are thorough in considering *all* aspects of what is in a child's best interests and allow for an objective consideration of all circumstance relevant to the particular case. No preference is given to any one parent and no presumptions are made. And nor should they. Each case should be considered on its own facts.

Common and Workable Arrangements Made for Children

Where parents can agree on child custody arrangements without obtaining a court order. In these situations, less than 5% agree on a joint residence arrangement[3]. Furthermore, less than 4% of parents registered with the Child Support Agency last year had joint residency of their children[4]. These statistics suggest that parents themselves most often regard joint residence as working only in rare circumstances. This being the case it would appear to be a contradiction, and further inappropriate, to amend the law such that there be a presumption of joint residency where that does not reflect the most common situation in the majority of cases.

Where parents do obtain court orders, only a small percentage of joint residence orders are made[5]. Such orders are made having regard to what is in the best interests of the children, having regard to all the relevant circumstances of the case. Again this would indicate that not only is joint residency uncommon in practice, it is also, having regard to all relevant circumstances, more often than not an appropriate arrangement for the children. On the basis that any presumption should reflect what is most common and most appropriate, a presumption of joint residency is a contradiction of what happens and works in reality.

Further, prior to separation it is usually the case that one parent provides the overwhelming primary care of their children[6], giving up paid employment and otherwise structuring their lives around the care of the children. This occurs while the other parent has a more limited involvement in the day to day care of the children continuing to pursue their careers and other lifestyle choices which do not facilitated that parent having the primary care of the children. This being the situation in most cases prior to separation, it would again be a contradiction to make a presumption of joint residency after separation. It would also fail to recognise the principal of the "status quo".

Of the facts known, it appears that joint residency is successful only in situations where parents are able to communicate and cooperate to sincerely recognise and endorse the best interests of their children foremost[7]. In reality, joint residence arrangements are unachievable for various reasons, such as - for financial reasons, parents live too far apart, one parent may have a seasonal job or have to travel for work, parents are antagonistic, one party is violent, or joint residency would be harmful to the children.

In fact, we have found in our own experience that joint residency arrangements only really work where parents:

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[1] S68D(a) of the Family Law Act states that Division 10 deals with determining what is in a child's best interests. Further, s68E(1) states that this Subdivision 10B applies to any proceedings under which the best interests of a child are the paramount consideration.

[2] S68F(2) of the Family Law Act lists factors that the court must consider in determining what is in the child's best interests. S68K also requires the Family Court to ensure that any order determined under the factors of s68F(2) is consistent with a family violence order and does not expose a person to an unacceptable risk of family violence, considering the best interests of the child.

[3] Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra 1997, Attorney General's Department; *Child Support Scheme Facts and Figures*, 2001-02, Canberra, 2003.

[4] Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

[5] Residence Order Outcomes 1994/1995-2000/2001: Family Court data available on the internet: www.familycourt.gov.au/court/html/statistics/html

[6] Australian Bureau of Statistics, Time Use Surveys, 1992 and 1997, tabularised in ABC *Social Trends Report: Family - Family Functioning: Looking after the Children*, 1999 available on the internet at http://www.abs.gov.au/Ausstats.

[7] See Smart, C. 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July 2001, available on the internet at http://familycourt.gov.au/papers/html/smart.html

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- Live close to each other (to ensure the child does not have to attend different schools, health professionals and after-school activities). In reality, it is likely that parents will move on once separated. It may be that one parent may relocate to a different town or even interstate. In such instances, joint residence arrangements would prove to be both costly and troublesome.
- Negotiate flexible working hours (to care for children not yet attending school and to take children to and from school and to after-school activities). A flexible working arrangement may be difficult to come by and this may result in parents having to take up part-time work instead.
- Communicate regularly and cooperate (in order to organise activities which cross over residence periods or are agreed in one period for another period). However, it may be that parents are hostile towards each other and try to avoid communication.
- Fully equip both households for their children. This would be expensive.

A presumption of joint residence assumes that, and is more likely to be successful if, all parents will be able to accommodate these factors. We have found that this is rarely the case. As stated above, the largest part of separated families opt for the one parent as the resident parent, regardless of whether the decision was made with or without a court order. This being not only the most common, but also the most workable arrangements, it is difficult to see how joint residency arrangements should be presumed.

Children's Rights

At present, the Act focuses on children's *rights* and the *responsibility* of parents. Such a focus is appropriate and should remain.

Rather than considering the best interests of children as the paramount concern, a presumption of joint residence only emphasises the "rights" of *parents* to have an equal amount of time with their children. It also takes away from the focus of the responsibility of parents.

Joint Residency Can Work

We stress that these criticisms we have made opposing joint residence apply only when there *is* a *presumption*. Joint residence *can* be successful in instances where both parents have demonstrated a shared responsibility for their children prior to separation and parents are able to communicate, cooperate and negotiate engagements that come about with joint residence arrangements. Joint residency may be sustainable in a small number of cases and it *will* occur in these cases regardless of a legal presumption. This already occurs under the present law.

We are not opposed to joint residence, but firmly believe that the interests of the child will only be deliberated as paramount when each case, with its unique interests and circumstances, is considered *individually* and not decided on a presumption. The introduction of any presumption into the *Family Law Act* would act as a guide - for lawyers when advising clients, and for the Court when making orders. The negative effect that such a presumption would have on the decisions of the Court, would clearly be far greater than attempting to balance acting in the best interests of the child, with sharing parenting responsibilities. Joint residence is therefore of concern to us, only where it is to be *imposed* as a result of a presumption.

For any presumption to be compelled, it needs to be the case that joint residency works more often than not. For the reasons already stated we think that such is not the case. There is no reports or other evidence that we can find that proves that joint residence *is* in the best interests of the majority of children affected. In fact, as outlined above, the evidence is to the contrary. We believe it is risky and impractical to introduce a presumption of joint residence as only the small minority of parents are adopting such an arrangement at present and further given the limited circumstances in which joint residency actually does work.

Shared Parenting

We also stress that joint residency should not be confused with shared parenting. While referring to the rights of children, the *Act* also recognises parental responsibility[8] and actively encourages "shared *parenting*". Under s61B of the *Family Law Act*, "parental responsibility" is defined as "*all the duties, powers, responsibilities and*

[8] Division 2 of the Family Law Act is "Parental responsibility", under which s61B defines "parental responsibility" and s61C(1) states that each parent has responsibility for the child.

authority" of the child. This provision does *not* make reference to any equal division of time to be spent with children. As the old saying goes it is "quality not quantity" that is important. In fact we have found that often aiming to achieve equal division of time with both parents often severely impacts on the quality of time that a child spends with each of its parents and can consequently damage a child's relationship with both its parents.

Terms of Reference (a)(ii) - Contact with other people particularly grandparents

Grandparents are considered as people with an interest in the care, welfare and development of the child. Grandparents, as well as anyone else with an interest in the care, welfare and development of the child, have the right to apply to the Court for contact under the *Family Law Act*. In deciding such a matter, the Court will have regard to the factors under s68F(2) of the *Family Law Act* - whether contact with the person interested would be in the best interests of the child. In our opinion, the *Family Law Act* already sufficiently provides for other significant people, including grandparents, to seek an order for contact and residency, if such an arrangement would be in the best interests of the child in question.

Conclusion

We consider that a presumption of joint residency focuses on the "rights" of people other than the children. This is inappropriate. We strongly feel that emphasis needs to be placed on "the interests of the *children* as the paramount consideration". There should *not* be a presumption of equal time. Each case needs to be considered on its own facts. More often than not the facts are that joint residency is not in the best interests of the child. The law should therefore remain unchanged.

Yours faithfully,

Giselle Negri
Principal Legal Officer
For and on behalf of the Cairns Community Legal Centre Inc
(with the authority of the Secretary of the Cairns Community Legal Centre Inc)

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