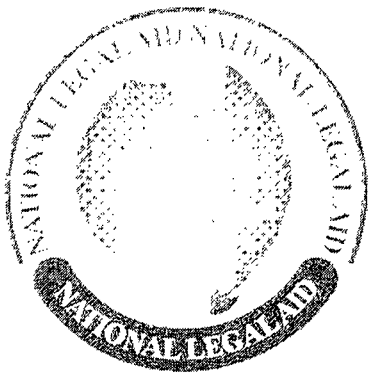

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Committee Secretary
Standing Committee on Family
and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra, ACT 2600

21st August 2003

Dear Sir or Madam,

Re: "Inquiry into child custody arrangements in the event of family separation".

I refer to the above Inquiry.

Please find attached National Legal Aid's (NLA's) submission to the Inquiry.

I thankyou for the extension of time granted for the lodgement of NLA's submission to you.

Please do not hesitate to contact us if you would like us to provide further evidence to the Inquiry.

Yours faithfully,

N.S. Reaburn
Chairperson
National Legal Aid.

National Legal Aid

Response to the Inquiry into child custody arrangements in the event of family separation

(a) Given 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

People negotiate "in the shadow" of the law. Legislative change can be expected to have an effect on matters which are negotiated, as well as those that are litigated. The full effect of the proposed changes to the Family Law Act however will be felt most in matters which are litigated.

Of all the matters filed in the Family Court only a small number proceed to a final hearing or trial. The figure most often quoted is 5 or 6%. Whatever the precise figure, it is clear that most matters do settle by way of consent orders prior to a final hearing. Some matters settle very early in the proceedings, others at the door of the Court for a final hearing.

The matters coming before courts exercising family law jurisdiction comprise a wide spectrum of degree of difficulty. Some matters are straightforward, the parties reasonable and the relationships relatively civil. These are matters in which an agreement is likely to be reached early and in which there is more likely to be a degree of shared care of the children.

The work of the Legal Aid Commissions tends to be at the difficult end of the spectrum. The Commonwealth guidelines for funding of family law matters require that applicants for legal aid are required to attend some type of alternative dispute resolution prior to being given a grant of aid (with obvious exceptions, for instance, where questions of serious violence are involved). If a grant of legal aid is made, the grant is often for further negotiations and alternative dispute resolution prior to any action being taken in a Court. The matters that survive this double screening process tend to be difficult and complex.

If there were to be a legislative presumption in favour of a "50/50" or "equal time" shared parenting regime between parents who separate, the presumption would, of course, have to be rebuttable. In order to rebut the presumption the parties will need to call evidence. The legislation will need to specify circumstances in which the presumption is rebuttable. Some of the obvious exceptions would be as follows:

Practicalities

Some parents are simply unable to care for children on an equal time shared basis. They may work shift work starting in the early hours of the morning. They may work offshore on a "week on/ week off" type basis. They may be employed by the Navy and spend time at sea. They may regularly work in a different city. One parent may live in a remote area or in a place at great distance from a child's school. No one would suggest that it reasonable for a child to regularly miss school or that the child should be expected to travel vast distances every day to get to school in order to spend equal time at each parent's home.

It may be that, following the breakdown of the parental relationship, one parent lives in accommodation, such as a one room flat, which may be appropriate for weekend contact but is inadequate for longer periods of contact, particularly if there are several children needing to be accommodated.

In many low income families there is simply not enough money to set up two households to adequately cater for the needs of the children on an ongoing daily basis. Even where there is a high degree of cooperation between parents, many household items such as beds, bed linen, wardrobes, toys, computer and so on need to be duplicated. Although many of these items will be required in any event for any overnight contact, the greater the degree of shared care, the greater the extent of duplication required. This is simply beyond the means of some families.

Under the current legal framework these practicalities can be taken into account. For instance, the non-resident parent may see the children after school until after dinner on some week days and stay overnight only at weekends and during holidays.

Capacity

The capacity of a parent to appropriately care for children may be affected by any number of issues. There may be serious mental health issues, substance abuse issues, demonstrated lack of understanding about the needs of the children and so on. In those circumstances it would not be reasonable for child to be required to spend a lot of time with that parent, particularly if the lack of capacity in the parent placed the child at risk of harm.

Attitude to the responsibilities of parenthood

One parent may have a particularly lax attitude to the child's attendance at school, extracurricular activities or safety issues.

A parent may have left a particular relationship in order to avoid the responsibilities of parenthood. To require a child to live with that parent for half of the time is not likely to be the best outcome for the child.

Violence

An obvious factor which would rebut the presumption of shared care is violence or abuse by a parent or associated person which would place the child at risk of being the subject of or exposed to such behaviour.

Cultural Background

The need for children to maintain a connection with the lifestyle, culture and traditions of a particular cultural group to which their family belongs, including Aboriginal and Torres Strait Islander peoples, is obviously a factor which would need to be taken into account.

Wishes of Children

Australia is a signatory to the United Nations Convention on the Rights of the Child (UNCROC). The convention requires that children have a right to be heard in relation to proceedings which effect them.

It may be that a child, particularly a mature child, has a clear preference to live with one parent rather than another. UNCROC would require that the Court take those wishes into account,

placing appropriate weight on the wishes, depending on the maturity of the child and the child's capacity to understand the long term consequences of their stated wishes.

Nature of the relationships

The characteristics of a particular child may mean that a shared arrangement is not suitable, for instance an emotionally volatile child or a child who demonstrates great anxiety when separated from one parent. A child may be closely bonded to a step parent or stepsiblings or half siblings. These relationships need to be taken into account.

Taking the rebutting factors into account

Each of the factors listed above would need to be taken into account in determining whether or not to rebut the presumption of an "equal time" shared care arrangement.

Each of the factors listed above is currently required by section 68F(2) of the Family Law Act to be taken into account in determining the best interest of the child when making a parenting order under the present legislation.

The only substantive difference between the existing regime and the proposed regime therefore is in the starting point. Under the new proposals, the starting point is a presumption of 50% shared care. Under the current regime, the starting point is Section 60B which is not expressed as a presumption but which, in effect, operates as a presumption in favour of regular contact with both parents and other people significant to the child, unless it is contrary to the child's best interest.

There are a number of situations in which it is not clear how the proposed presumption would operate. Some of them are as follows:

Significant other people

It is not clear how the presumption would operate where children have been cared for or have important relationships with other people such as stepparents, aunts, uncles, grandparents or other people.

Interim Arrangements

The case law that has developed under the Family Law Act provides, in essence, that if agreement cannot be reached and a judicial determination is required about arrangements for the children, as much stability as possible should be provided for the children in the interim. This means that the children will normally live with the parent who has been the primary caregiver, attend the same schools if possible, maintain the same childcare or after school care arrangements and so on. The right of the children to know and be cared for by both parents and to have regular contact with both parents (and significant other people) is accommodated by a range of residence and contact orders.

The thinking behind such an approach is that, at a time of change and upheaval in a child's life, the greater the level of stability for the child the better.

In situations in which both parents have been significantly involved in the care of the children, the Court is more likely to order a shared arrangement at the interim stage. If there is a dispute about the level of involvement of each parent or allegations of risk to a child if existing arrangements continue, the matter will be determined on an interim basis by a court relying on the evidence presented by the parties.

In December 2000, Rhoades, Graycar and Harrison released their report "*The Family Law Reform Act: The First Three Years*" which looked at the impact of the 1995 amendments to the Act, including s60B which was introduced by the Reform Act. Their research identified a significant reduction in the number of matters in which orders for "no contact" were made at the interim hearing stage, yet there was no corresponding reduction in the number of such orders at the final hearing stage as compared to the pre-Reform Act situation. One interpretation of these figures is that some children were, by implication, being exposed to a risk of harm as a result of the operation of s60B which operated as a defacto 'presumption' in favour of contact at both the interim and final stages. Query whether this effect would be heightened by a presumption of "equal time" shared care prior to a full testing of the issues.

Multiple separations

Some parents have a number of separations and reconciliations prior to a final separation. If the presumption of shared care operates from the moment of separation, the level of instability for the children will be exacerbated to an intolerable degree for some children.

Very young children

How would the presumption operate for newborn children and children who are being breastfed? Under the current regime, the courts tend to order shorter, more frequent periods of contact for very young children, increasing the length and duration of contact as the child ages. NLA urges that there be thorough research into the possible consequences on the physical, psychological and emotional development of very young children to live in a shared arrangement (particularly if imposed against the will of one parent) prior to such a situation being imposed.

Siblings with different needs

How would the presumption operate in families in which there are children with different needs? The courts generally try to ensure that siblings are not separated. This is based on psychological evidence about the importance of sibling relationships as support for children in separated families.

If there is a very young sibling, courts sometimes order that that child have contact for the first and last hour of the other children's contact with the contact parent, building up over time to the same level as its siblings.

If the other siblings are spending half of their time with another parent the sibling relationship may be adversely affected. Again, NLA urges research into these areas prior to implementation of a shared care presumption.

Impetus for change

It appears that the impetus for change has come from a number of sources. One source is parents who feel frustrated and distressed by inadequate contact and who are motivated by a desire to maintain or develop appropriate relationships with their children following the breakdown of the parental relationship.

Another source is parents who are frustrated and distressed by continuing breaches of existing contact orders and the inadequate resolution of breach proceedings.

Yet another source is parents who are motivated by a desire to reduce child support payments.

NLA is concerned that, by introducing a presumption of "equal time" shared care in an effort to address these problems, a whole new set of problems will be produced.

The focus on the best interests of the child needs to be maintained. NLA is concerned that a "one size fits all" approach is too blunt a tool to adequately deal with the individual needs of children and the circumstances of their families. The current provisions of the Act, in which there is legislative support for the right of children to know and be cared for by both parents and to have regular contact with their parents and significant others (unless contrary to their best interests), provides a good framework within which to formulate individual arrangements for children.

If there are problems with how the existing regime is working, a better approach would be to look at addressing those problems before considering wholesale regime change.

If child support is a problem, let's look at child support. If the enforcement of contact orders is a problem, let's look at enforcement. If delays in the courts are too long, let's look at what can be done about the delays. If courts are not ordering adequate time for children with both parents, let's look at why not. Perhaps there is a need for greater judicial training to encourage shared arrangements. Perhaps the matters which come before a judicial officer have particular features which militate against children spending equal time with both parents. It would be unwise to assume judicial conservatism without proper investigation.

Perhaps a way to address the perceived problem of courts not ordering shared care in appropriate circumstances is to add to the s68F(2) factors a requirement that the court be required to consider the desirability of a shared parenting arrangement so that the issue is specifically addressed.

It is the experience of NLA that shared care orders tend to be made (by consent or otherwise) for families in which there has been a significant degree of shared parenting prior to the separation of the parents. Perhaps there is a role for education of the population as a whole about the importance of both parents being fully involved in the lives of their children during relationships. In order for such a strategy to be effective there would also need to be changes in the structure of employment to encourage part time and flexible working hours so that parents are available to their children other than in the early mornings, in the evenings and at weekends.

If the proposals are implemented

If the legislation is changed to adopt a legal presumption of "equal time" shared care there are further issues to be considered.

Childcare

Some children will spend time in long day care and after school care when they have not done so previously and when they have another parent who is not working and is available to care for them.

There may need to be an increase in Government funded long day care centres which offer overnight care for children of shift workers.

Income support

If a parent has been out of the workforce for years for the purpose of raising children, they will often be dependent on Centrelink benefits and child support following separation. If a shared regime is introduced such that the child spends 50% of its time away from that parent, both the government income support and the child support will be reduced. The costs of the parent, however, may not be correspondingly reduced. Some costs, such as food, will be reduced but the cost of rent and heating, for instance, will not be reduced by virtue of having less people in the home.

Theoretically, a shared arrangement should lead to increased opportunities for the first parent to obtain employment. That may not happen for some time and may require further training,

particularly if the parent has been out of the workforce for a long time. The parent may not want to work during periods in which the children are with him or her and may need time to find an appropriately structured part time job. In such circumstances it may be that the existing family law ideology will need to take a step back from the "clean break" principal to allow greater emphasis on spouse support. This is consistent with the spirit of the proposed changes and an increased level of cooperation and mutual support between the parents.

There may also need to be a relaxation in the rules for parenting payment or other government income support such that a reasonable minimum level of income support for a parent continues, even if the children are with that parent only 50% of the time, at least until he or she finds employment. This is especially so in circumstances in which child support or spouse maintenance is not paid by the former partner.

Increased litigation

NLA believes that, if the presumption of equal care is implemented, there is likely to be a significant increase in the level of litigation. At the moment there is effectively a defacto presumption in favour of contact. In those cases where some contact is appropriate but shared care is inappropriate, the contact parent may not be willing to litigate to attempt to achieve shared care. Under the new proposals the starting point will be equal time shared care. The onus will be on the residence parent to rebut the presumption. If the contact parent relies on the presumption and the issue cannot be resolved through negotiation the matter will need to be litigated. This will have obvious resource implications for the courts and legal aid as well as privately funded parties.

(ii) In what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents

The existing legislation adequately deals with children having contact with grandparents and other persons. Such persons are able to put appropriate contact arrangements in place under the legislation as it currently stands. The courts make orders in favour of such parties. Care needs to be taken that the focus is on the rights of the children to know and have relationships with grandparents or other significant people in their lives rather than the "rights" being transferred to those other persons.

Child Support Issues

(b) Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

Whilst the formula has some shortcomings, it is the view of NLA that it generally works well, given the diversity of circumstances to which it must be applied.

It is the experience of NLA that payers of child support almost invariably believe they are paying too much given their particular circumstances, and parents in receipt of child support almost invariably believe that they are receiving insufficient child support given their particular circumstances. This is not surprising given the fall in the financial circumstances of a family when the parents separate and need to establish two separate households.

NLA notes with interest that the fairness or otherwise of the child support formula is raised at the same time as the proposal for equal time shared care.

The duty of a parent to provide financial support for children exists regardless of the contact arrangements. Contact and residence are determined according to the paramountcy principle under the Family Law Act. Child Support liability is based on capacity to pay, having regard to the circumstances of each parent and the residence and contact arrangements that are in place. It is the experience of family law practitioners that some litigating parties try to arrange their childcare responsibilities in order to minimize their child support obligations if they are a payer, or maximize child support payments if they are a payee.

National Legal does not consider desirable an increase in the number of "levels of care" for the purpose of child support. It is difficult enough to determine contact arrangements where parents are in dispute. Increasing the level of care categories would increase the number of disputes that the Child Support Agency or a court has to adjudicate. It also shifts the focus from the needs of the child on to the financial issues of the parents.

National Legal Aid has identified a number of matters related to child support which do require further consideration. They are as follows:

a) Child support agreements are sometimes unfair, especially when they have been negotiated by parties with unequal bargaining power. Consideration should be given to restricting such agreements to a duration of two years, particularly where one party is on a low income.
b) Recovery of child support from self-employed payers remains an ongoing difficulty. A strengthening of debt collection measures, particularly against self employed payers who refuse to pay child support, is desirable.
c) There needs to be provision in the child support legislation for reconciliation of estimates. A person lodging an estimate should be required to provide documentary evidence of the change in their income.
d) There are a number of inconsistencies between Child Support legislation and Social Security legislation. For example, when a couple cohabit, Centrelink determines that each person has a legal duty to support the other and individual benefits are withdrawn. Under Child Support legislation, a person does not have a legal duty to support their new partner or the new partner's children, and the formula operates as if the payer were a single person with no dependents. This can cause hardship and resentment, particularly where the partner receives no child support for children from a previous relationship.
e) The current formula does not adequately take into account the diverse needs and obligations of individual merged family units.
f) The birth of a dependent child to a payer who is on a low income effectively extinguishes the child support liability for previous children. The issue of exempt income should be addressed so that it varies with the payer's income.

The area of child support and balancing competing interests is very difficult. Inevitably, what pleases one party will cause displeasure to the other. Any changes should be made only after careful consideration of all the facts and consultation with stakeholders, rather than in response to the most vocal lobby group. The objects provided in the child support legislation remain a useful enunciation of the principles to be applied.