

House of Representatives Standing Committee
on Family and Community Affairs

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Secretary:

FAMILY COURT OF WESTERN AUSTRALIA
Chambers of the Honourable Justice Michael Holden

GPO Box 9991
PERTH WA 6848
Telephone: (08) 9224 8339
Facsimile: (08) 9224 8357

www.familycourt.wa.gov.au

Chief Judge's Chambers
Commonwealth Law Courts
150 Terrace Road
PERTH WA 6000

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

Dear Sir

SHARED CARE PRESUMPTION

I wish to make some comments for consideration by the Standing Committee in relation to the proposal for the introduction of a presumption of shared care of children following relationship breakdown.

As I write to the committee in my capacity as Chief Judge of the Family Court of Western Australia I wish to assure the members of the committee that I am acutely aware of the respective roles of the parliament and the judiciary in our system of government. I appreciate that it is the function of parliament to make the law and for the courts to interpret and enforce the law. Therefore, my observations are limited to two "operational issues" that would arise if the law were to be amended in the manner proposed.

1. Interim Determinations

If any kind of presumption of shared care were to be introduced into Part VII of the *Family Law Act 1975* I would caution strongly against that presumption being applied at any stage of the proceedings other than following a final hearing.

The committee will realise that the resources provided to the Family Court are not sufficient to allow a thorough investigation of the circumstances of each family immediately following relationship breakdown. Interim determinations are ordinarily made on the basis of untested affidavit evidence. In almost every case, the most important "facts" alleged are strongly contested by the other party. The interim decision will commonly be made without the judicial officer having seen, let alone heard, either of the parties.

The task of the judicial officer in these circumstances is difficult enough without the added dilemma of being required to consider whether the untested evidence is sufficient to displace a statutory presumption favouring one form of post-separation parenting that may differ substantially from previous parenting arrangements for the child. It would usually only be after a final hearing that the judicial officer could hope to be in a position to determine whether shared care of the child promotes or harms the child's best interests.

In this regard the committee will no doubt be familiar with research published following the introduction of the *1995 Family Law Reform Act*, which indicated that the legislation had the unintended consequence of contact being ordered at interim hearings, which was then terminated or curtailed after the trial when it was found that the contact posed an unacceptable risk of harm to the child.

2. Resources

In the event that the committee ultimately recommends the introduction of a presumption of shared care I would urge it also to recommend that the Family Court be appropriately resourced to deal with the significant increase in litigation that I confidently predict would follow from the implementation of the recommendation.

At the present time, the Court is involved in setting arrangements for the care of children in only a tiny proportion of separating families. Research in the Family Court of Western Australia has indicated that only 15% of couples with children approaching the Court for a divorce had ever instituted proceedings relating to their children. It is this 15% of families that utilise most of the resources of the Court and of the various Legal Aid bodies.

It is the universal view of the judicial officers and counsellors of the Family Court of Western Australia that the introduction of a presumption of shared care would result in a marked increase in the proportion of families that would become embroiled in litigation. If the family law system is to survive such a drastic change to the law, both the Court and the Legal Aid bodies will require significant increases in funding.

I thank the committee for the opportunity to make these comments. I hope they will be of assistance in the difficult and exceedingly important task with which the committee has been entrusted.

Yours faithfully,



MICHAEL H HOLDEN
CHIEF JUDGE