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## **WOMEN'S LEGAL SERVICE (SA) Inc.**

### **BRIEFING PAPER TO THE STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS INQUIRY INTO THE LEGAL PRESUMPTION OF JOINT RESIDENCE**

**To the House of Representatives Standing Committee on Family and  
Community Affairs  
Parliament House  
Canberra ACT 2600  
Email: [fca.reps@aph.gov.au](mailto:fca.reps@aph.gov.au)**

#### **Women's Legal Service (SA) Inc. Contact details:**

**Telephone: (08) 8231 8929**

**Facsimile: (08) 8221 5737**

**Address: Women's Legal Service  
19 Market Street  
Adelaide SA 5000**

**Email: [marilyn@wlssa.org.au](mailto:marilyn@wlssa.org.au)**

## **INTRODUCTION**

The Women's Legal Service SA Inc. (WLS) provides a free and confidential service to women in South Australia. WLS aims to empower women to achieve justice at an individual, community and political level. We recognise that women's legal problems occur in a context of social, political, cultural and economic disadvantage.

WLS believes in the right of women to justice and equality before the law. We therefore practice in ways that understand and validate the experiences of women, value and accept women as individuals, promotes safety and respect for women as individuals and empowers women to make choices and take control over their lives. In so doing, the legal issues that WLS deals with are those affecting women and children and include domestic and family violence, sexual assault, property issues and issues of contact and residence of children.

In recent years, WLS has become aware of growing concern among women regarding their rights and responsibilities in areas of law affecting their children and the concern is highlighted by the fear of militant men's groups who have not provided any clear indication to their members that harassment and intimidation by ex partners is clearly not in anyone's interest, particularly the children of the relationship. WLS is therefore well placed to comment on any proposed changes to such laws.

## **INQUIRY INTO THE CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION**

- (a) Given that 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 in 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; and*

In order to adequately answer the above question, this paper will be presented in two parts, namely:

1. Children and Shared Parenting, and
2. Children, Women and Violence.

The reason why these two heading have been selected is because they represents two major areas in the debate on shared parenting that have not been adequately dealt with, in media coverage and within the *Family Law Pathways Advisory Group Report*.

### *1. Children and Shared Parenting*

The *Family Law Pathways Advisory Group Report* states:

“The Advisory Group has found that the system's current focus on

children is limited, and concluded that children need to be heard and have their needs included at all levels of their families' involvement in the family law system. Children should have access to therapeutic support, and should have a voice in non-adversarial decision making processes and litigation about their welfare. Family decision making which includes the children helps to ensure that the best interests of the children are met.”

It would seem from the statement above that the Advisory Group feels that more should be done to ensure that the 'best interest of the child' are being upheld in all proceedings involving children within the Family Court. However, the current presumption of 'equal parenting' being heavily advocated by the Federal government would do much to severely undermine this principle by making the interests and rights of parents a paramount consideration in all proceedings involving children.

The presumption of 'equal parenting' would create a system of family dispute resolution that is more adversarial in nature than the present system. It would create tensions between parents and more importantly between parents and children, in cases where the children are old enough to decide where they would like to reside for the majority of the time. This is because if the wishes of the child are to be taken into consideration, the matter would need to be taken before the court therefore creating some hostility between the child, proposed resident parent and non-resident parent. Also more distressing are cases where there have been allegations of child abuse, whether physical or psychological, as children will invariably be placed in an environment that is dangerous, until the matter has been dealt with. Unfortunately in the current climate where there is a huge volume of cases, this could mean prolonged unnecessary suffering for these children. We would therefore argue that invariably the presumption of 'shared parenting' would subordinate the 'best interest of the child' and their welfare to the rights of parents.

This subordination of the principle of the 'best interest of the child' would be highlighted by the severe undermining of Section 68F(2) of the *Family Law Act 1975* which outlines the 12 factors that should be taken into consideration when determining the best interests of the child. These factors include:

- 1.the wishes of the child,
- 2.the nature of the child's relationship with the person concerned,
- 3.capacity of person to concerned to provide for the needs of the child,
- 4.any practical difficulties and expenses,
- 5.cultural issues,
- 6.need to protect child from any risk of physical and psychological harm either directly or indirectly eg ill treatment or violence that may affect another person,
- 7.attitudes shown by the parents towards the child,
- 8.desirability of avoiding future proceedings involving the child; and
- 9.and any other relevant factor.

Paying due respect to the arguments raised by the proponents of 'shared parenting', there has never been any conclusive evidence that 'shared parenting' is better for

children. (Parker et al) The majority of research available indicates that parental care arrangements is insignificant to the adjustment of children following divorce or separation. What has been shown to be important is parental psychological functioning. Parental psychological functioning is deemed to be of great importance by all available literature as it effects the parents' ability to co-parent their children successfully. A parents parental psychological functioning is determined by their own reactions and adjustment to the divorce and most importantly, the presence of conflict between ex-spouses. (Kline, Tschann et al)

Research has also demonstrated that although joint custody is often recommended as a preventative measure for dealing with inter-parental conflict and re-litigation, the coordination of parenting efforts often results in increased parental contact and, increased conflict. (Kline, Tschann et al) This fact is very important when one considers that the Family Court has increasingly been ordering 'shared parenting orders' in cases where one spouse vehemently opposes the order. The effect of such court orders in regards to joint residency arrangements is that the children raised in such households fare much worse than children raised in traditional sole residence families also torn by bitter fighting. The children in such families are more depressed, more withdrawn or aggressive and more disturbed. (Wallerstein et al) Therefore one can adequately conclude that a presumption that forces hostile parents to be in an environment where they are continually in contact with each other, will have detrimental effects on children, as their exposure to parental conflict is intensified.

## ***2.Children, Women and Violence***

***“My view on the social welfare, justice and legal systems in regard to women who suffer spousal abuse, leave and then attempt to manoeuvre through the system is like being raped and then going to see the doctor and getting raped again.”***  
***(Shalansky, et al)***

The current system does not adequately provide support mechanisms for women and children who are victims of violence. A presumption of 'shared parenting' will only serve to continue to allow women and children to fall through safety nets.

Reports indicate that the welfare of children is being compromised in the approach to interim decision making that has developed since June 1996 when the Family Law Reform Act came into effect. This is evident in the three particular contexts: interim residence orders; interim contact orders; and more generally, in the way that allegations of violence are dealt with at an interim stage.(Rhoades et al)

One of the ways that this has occurred is by the retreat of the Court from following a cautious path in relation to child matters. For example it is a principle of the Full Court of the Family Court of Australia that child's best interest will normally be met by interim orders that ensure stability in the child's life pending a full hearing of the relevant issues in dispute, and that such stability will usually be promoted by an order that maintains the pre-existing care giving arrangements, unless there are “strong or

overriding indications to the contrary.”(Rhoades et al) However recent trends suggest that the existing arrangements principle has been displaced by judicial concerns about parental “... equality: (that is, about not creating a status quo in favour of one parent) since the reforms were enacted”. This is reflected by the fact that interim residence orders have been made on the basis of ensuring that one parent does not obtain a tactical advantage over the other before the final hearing, rather than by an assessment of the child's best interests or by application of the “existing arrangements” principle. That is, decisions are being made on the basis of the parents' interests (or more accurately, the interests of the parent who is not the existing primary caregiver) rather than on the basis of the child's welfare.(Rhoades et al)

Another indicator of the change in the Court's attitudes is that there has been a shift in the focus of interim contact hearings, from asking whether access should be ordered, to how to maintain contact until final hearing. This shift was summarised by one judge of the Family Court interviewed who stated: “We're more inclined to give contact at interim now. It would take a lot at an interim hearing to say no contact now.”(Rhoades et al) This indicated that decision makers are often assuming that the best interests of the child will be met by maintaining contact rather than that being an issue for determination.(Rhoades et al)

An even more worrying development is that the review of matters that contain allegations of spousal violence show a trend away from suspending contact at interim hearings as the way of ensuring the child's safety until trial, and towards the use of neutral handover arrangements as the preferred protective mechanism.(Rhoades et al) This present approach to making unsupervised orders for contact at interim hearings represents a retreat from the Family Court's acknowledgment in the years before the reforms, of the adverse psychological effects of spousal abuse upon children's welfare.(Rhoades et al) This suggests that there is no clear indication to violent men that society condemns their violence towards spouses and children.

The inadequacies and injustice of such an approach is clearly shown by the contrasting of the outcomes of interim hearings, with final judgments, which shows that the rate of orders made for “no contact” at contested final hearings has remained substantially unchanged from the pre Reform Act rate. It is notable that this is the stage at which the effects on the child of the alleged violence are subjected to detailed scrutiny and evaluation. This suggests that there is a significant proportion of cases where it can be shown, with hindsight, that the interim contact arrangements were not in the child's best interests, and may well have been unsafe for the child and the carer. (Rhoades et al)

The effects of domestic violence and child abuse on children cannot be underestimated as is highlighted by the following statement from one woman:

*“I thinks that they are afraid. I think that they just walk around on the same eggshells that I do.... you know, what he will do when he is angry...they don't want me... to come to access, they want me to wait in the vehicle. They are worried about my safety...they want to see their dad, but they are scared about what their dad will do...you know, for a seven year old and a three year old that's a lot on their shoulders.”*(Shalansky, et

al)

In such cases involving violence either against the child directly or another family member arguments by proponents of 'shared parenting' that it is better for children to have contact with both parents and in particular the father seems like a major farce. Destructive male role models have a negative impact on children. Neglectful or abusive adult men portray violent and dominating images of manhood. **It is wrong to assume that any male role model is better than none.** (Silverstein)

Women who are victims of violence find the current legal system a challenging environment and a presumption of 'shared parenting' will only add to their suffering. Many clients report that their dealings with the authorities such as the Police and the Courts replicates the abusive power relationship which they endured during their relationships with violent and controlling men. Any presumption of shared care will seemingly fuel the animosity during Court proceedings where the Court process is misused by overly litigious and controlling, (many women say "obsessive") men, to effect power and control over the lives of ex partners. These women make up a significant minority of the people accessing Family Court services each year. The Australian Bureau of Statistics in 1996 found that 23 % of women who have ever been married or in a de facto relationship had experienced violence in that relationship. This means that 1.4 million women have experienced family violence by their current or former partner. (ABS) Our service concludes that about 90% of our clients who seek our assistance for representation to resolve contact and residence issues are victims of domestic violence.

An even more worrying statistic is the fact that during a sample group research of women who had been victims of violence in their previous relationship, 86 % reported incidents of violence during contact changeover or contact visits. (Kaye et al) This violence is allowed to occur because of the current regime of separating domestic violence away from issues concerning child residency and access in the Family Court, which ultimately means that a father's legal right to residence of and contact to his children and the bond with their father prevent a woman from truly breaking free of her abuser. (Shalansky, et al) Contact visits and the granting of residency provide the means for ex-partners to continue their abuse towards the partner and often towards the children. Where children witness abuse of their mother, either as physical, mental, verbal or emotional abuse they too are indirectly suffering abuse. In addition, children are affected in terms of role model types by this behaviour, to the point of internalizing the abuse where it may lead to depression, anger, suicidal tendencies or the abusive behaviour is replicated from generation to generation. Because women's shelters and refuges were set up in the 1970's and many are still currently operating, the information coming from workers in the area is that now they are seeing many of the daughters of the women who they initially assisted and they assist victims of the sons who were small children when their mothers came to the shelter for help. While this is not always the case, as many children of violent men do learn to take responsibility for their behaviour, we would argue that a masculine role model cannot be presumed to be a positive in a child's life.

*"My husband uses the access drop off and pick up times to be very verbally abusive..."*

*he does it in front of the children”.* (Shalansky, et al)

There is often a large sense of betrayal felt by women who are granted restraining orders by the court but then have the court grant the ex spouse/partner contact and residency rights. One woman outlines her confusion at the way a judge handled her case:

*“It was like dealing with two totally different people. He was really upset in one case with what [ex-partner] had done.... and that he wasn't in any kind of anger management . He seemed to disassociate that from the access issue and any impact it might have on the children, and he gave him more access.”*(Shalansky, et al)

Unfortunately for women escaping situations of domestic violence even if granted sole residency are still harassed by their former spouses as research suggests that Family Law Reform Act's concept of ongoing parental responsibility has created greater scope for an abusive non-resident parent to harass or interfere in the life of the child's primary caregiver by challenging her decisions and choices...” (Rhoades et al)

This harassment is further depicted by the fact that there has been a substantial increase in the numbers of contravention applications brought by non-resident parents alleging breaches of contact orders. Many of these applications are without merit and are predominately pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact. This is clearly demonstrated by the following statistic that of almost all (95%) of the applications brought by contact parents (most of them fathers—89%), the majority of cases (62%) were found to be without merit. (Rhoades et al)

We would argue that the present state of the legal system in relation to women, children, violence and family, a 'shared parenting' presumption will only exacerbate the structural weaknesses already inherent within the system, and perpetuate the cycle of violence by strengthening the bargaining power of abusive partners at the detriment of the other partner and children, and by allowing their abusers to gain an unfair advantage. A situation which in this day and age and under the current regime of international law covering the rights of women and children is unacceptable.

We recognize the stresses that the Family Court is under with regard to caseload and the complexity of the issues that face the Court. We congratulate the Family Court on implementing the Magellan Project and for an increasing sensitivity to the needs of litigants from diverse and culturally sensitive backgrounds. We do not however, believe that the Family Court should be in a position whereby any presumed model of parental division of time with a child should be imposed.

In conclusion, we submit the following;

1. The best interests of the child can only be paramount when each child is entitled to unique consideration of its interests and circumstances. (the best interests of the child are in the long term the best interests of parents although in period after separation this is sometimes clouded by emotive issues).

2. The factors listed in Section 68F of the Family Law Act 1975 to define a child's best interests should be weighted towards safety as the threshold determinant of a child's best interests.
3. We call on the Government to establish a national child protection service for the family law system to assist the courts in investigating safety issues where violence or abuse is alleged. Where violence is established on the balance of probabilities, there should be a rebuttable presumption of "no contact" with the violent party which would require the person who has used violence to demonstrate how contact would not pose a threat to the safety of the child, or other family members.
4. We call on the Government to provide increases in funding to vital services to support victims of violence and provide access to just outcomes in the Family Law area. These include Community Legal Services, Women's Legal Services, Aboriginal Family Violence Legal services, Aboriginal Legal Services, Legal Aid Commissions, women's shelters – especially in remote and rural regions.
5. We say that equal time shared parenting can only work where there has been equality and a non-power dynamic between the parents; where there is the economic independence of both parents; where remote, rural geography is not an issue; where both parents live within close proximity to school, sporting events; where cultural and extended family obligations are not a consideration; where the parents have equal skills in parenting and caregiving; and where the status quo was not such that one parent was ostensibly the primary caregiver and the child /children's attachment was not focused on one parent. In addition, we say that shared parenting only works well where parents consider the best interests of the child and the child's wishes are taken into account.
6. We say that the current family law provisions are adequate in terms of providing for grandparents and any other person concerned with the care, welfare or development of the child.



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