

House of Representatives Standing Committee
on Family and Community Affairs
Submission No: 1226
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8 August 2003

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

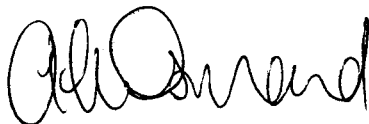
Dear Sir/Madam

CHILD CUSTODY ARRANGEMENTS INQUIRY

We enclose¹ for the consideration of the Standing Committee a Submission prepared on behalf of this firm.

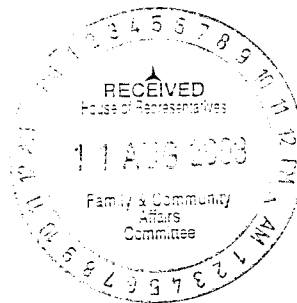
Any queries which the Committee may have in relation to the Submission should be directed to Denis Farrar, Partner.

Yours faithfully
FARRAR GESINI & DUNN



for Denis Farrar

Direct Line: 6290 9816



¹ Submissions

Submission of Farrar Gesini & Dunn Family Lawyers Canberra into the enquiry into joint custody arrangements in the event of family separation.

1. We are a firm of twelve lawyers who practice exclusively in the field of family law. Combined we have the experience of about 100 "lawyer years" of practice in the area of family law.
2. We hope that the House of Representatives enquiry will find that our submission, as experienced family lawyers, is of assistance in its deliberations.
3. Our submission is based on our collective personal experience as family lawyers. Our experience and opinions are drawn from the matters we have conducted in and out of Court. We are aware of research and studies which have been conducted in the area of custody disputes, and we have read some of them quoted in the submission of the Family Law Section of the Law Council of Australia.
4. Our thoughts are based on our case experience rather than on academic research but nonetheless we believe that, having been formed by real life experiences, our opinions are valid.
5. The practice of family law is one of the most difficult areas of legal practice. Clients are always emotional to a greater or lesser degree. Many clients are unable to be objective in their assessment of what is in the best interests of themselves and their children. Many clients do not place any value on the input of their former partner into the life/lives of their child/ren. Few, if any, clients

would acknowledge that their attitudes on child issues are framed by the anger they feel towards the other party, but this can often be the case.

6. Issues which, prior to separation, would have been worked out in the household without any dramas become reasons for disagreement, and sometimes litigation, between parents who have separated in bitterness. Parents who had no issues about the relationship between the other parent and the child/ren prior to separation often find reasons to dispute the value of that relationship post – separation.
7. Family lawyers become involved in disputes between parents at various stages:
 - Often the lawyer is the first "port of call" for advice concerning the ramifications of separation. Lawyers will normally, in that environment, give advice concerning the consequences of separating without agreement concerning children. That will normally surround the issues of interim residence and "status quo" arguments.
 - Sometimes lawyers become involved because issues arise between parents after separation. Those issues can include contact difficulties, child support problems, or real issues between parents on matters of substance concerning the way their children are cared for.
8. Family lawyers are engaged to give advice to their clients as to what are likely to be realistic outcomes in a legal context – i.e. if there were to be a dispute what

would be likely to happen. Lawyers also give advice about courses of action to minimize disputes and to maximize the best outcome for their client.

9. There is a classic "tension" between the best interests of the client that the lawyer is serving, and the "best interests" of the child, which is the underlying legal principle. In other words sometimes, after you have given realistic and correct advice, you are instructed to take a course of action which, viewed objectively, may seek an outcome which is not in the best interests of the child. Rarely is a lawyer in a position to make a definite judgement as to such matters. The tradition of the legal profession is that the lawyer is not the judge, but only an advocate. The lawyer is not there to substitute their own opinion as to what is correct for their client's instructions. After giving competent advice a lawyer is compelled to act on instructions.
10. Most lawyers of experience can recount instances of cases which did not work out as expected. The application of the "best interests principle" often sees Courts make unexpected decisions. If we are acting on the "best interests principle" then there will be a certain number of cases where the outcome is uncertain and the dispute should be placed in the hands of the Court with proper evidence presented.
11. In our opinion the imposition of a presumption of shared custody, if it means that children spend equal time with each parent, runs counter to the notion of the "best interests principle". Such a presumption would be a "sop" to the hurt

feelings or wounded pride of parents, and may be a best outcome for at least one of them, but may ignore what is in the best interests of the children.

12. In our opinion children whose parents are separated need a home base. Ideally their parents should co-operate about all matters regarding their parenting. If parents were going to co-operate they would not need a presumption of shared custody – they would reach that decision for themselves if they believed it was in the best interests of the children. At the present those parents who make shared residence work never see the inside of a Courtroom. They reach agreement about shared parenting because they are able to communicate and co-operate with each other and accept the desirability of their children spending significant periods with both parents. They are parents who put aside their hurt feelings and other emotional responses to separation. Those parents do not need a presumption.
13. The parents who would avail themselves of a presumption to have greater time with their children than would otherwise be the case are those parents who would not get there by negotiated means outside the legal system. In other words they are parents who would not share residence of their children unless the law forced them too. Those are parents who consider a shared residence to be a "parental right". They will not be motivated by what is in the best interests of their children, or if they are will certainly not have an objective view of what that is.

14. Decisions made by Courts over many years have expounded the criteria to make shared parenting work. We have read the submission of the Family Law Section of the Law Council of Australia and in particular the quote from the decision of Federal Magistrate Judy Ryan in *Hitchcock's Case*. We agree with her list of relevant factors, and observe that parents who meet the criteria that she lays down would, in our experience, work out their dispute for themselves without troubling the legal system.

15. In our opinion the current system is a "child-focused" system. The introduction of a presumption of shared residence would create a "parent-focused" system. It may make parents feel good but in our opinion it will be harmful to children. It will certainly increase the volume of disputation in the Courts.