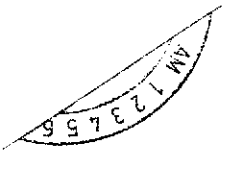
Email:

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



Dear Committee Members,

I am a PhD candidate at the Law School at the University of Melbourne. For the past four years I have been conducting research on residence and contact matters in the Family Court of Australia. I am currently writing up my research results for my thesis. I consider that this research is of great relevance to your Child Custody Arrangements Inquiry and have accordingly prepared the enclosed submission.

I do not wish my name or contact details to be published in any form. I am aware that other academics who have spoken out against the introduction of an equal time presumption have received aggressive and threatening correspondence. As I have young children, I do not wish to expose myself or my family to this.

I am happy to respond to any queries the Committee may have in relation to my submission or research.

Yours sincerely,

Submission to the Inquiry into Child Custody Arrangements in the Event of Family Separation by the House of Representatives Standing Committee on Family and Community Affairs

This submission is primarily aimed at addressing the Inquiry's first term of reference, namely (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 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.

It is based on research (as yet unpublished) undertaken for the author's Doctoral thesis on Family Court decision making in residence and contact matters. The thesis is currently being written-up. This research involved gathering data from a sample of 40 residence and contact cases heard in the Melbourne and Dandenong Registries of the Family Court of Australia in 1999 and 2000 at trial and appeal level.

Summary

The Family Law Act 1975 should not be changed to introduce an equal time presumption because;

1. The present legislative model supports the continued involvement of both parents in their children lives after separation.
2. The impediments to Court orders being made for shared parenting arrangements lie within the characteristics of the litigating population itself.
3. A commitment to maintaining the involvement of fathers in their children's lives is strongly evident in the Family Court's approach to residence and contact matters.
4. In some cases, women and children continue to be subject to violence and abuse after separation under the current legislative scheme. Any changes should be aimed at addressing this problem.

(1) Joint Parenting and the current legislative model

The present legislative model supports the continued involvement of both parents in their children's lives after separation. The legislature's intention for both parents to remain involved in caring for their children after separation is stated clearly and strongly in s60B(1) and (2) of the Family Law Act. Furthermore, parental responsibility is vested in both parents unless varied by a court order.[1] The Act allows the Court great flexibility in making residence and contact orders to suit a wide range of circumstances.[2] The current legislative scheme contains ample scope for shared parenting arrangements and no impediments. Further change is unnecessary.

(2) Families who litigate

The impediments to Court orders being made for shared parenting arrangements lie within the characteristics of the litigating population itself. Only about 4 per cent of cases actually require a judicial determination in the Family Court.[3] Histories of conflict, violence,[4] mental health problems,[5] sexual, physical, or emotional abuse,[6] substance abuse[7] are common characteristics of those cases that do proceed to trial.[8] My data shows that in the majority of cases mothers have been and continue to be the primary caregivers, and this is reflected in residence orders being made in their favour.[9] Although a significant number of fathers applied for residence orders,[10] difficulties with issues such as violence, substance abuse, and mental health impairments stand in the way of fathers these applications being successful.[11] Because of these characteristics, 'joint parenting' is an ideal that is almost impossible to realise in relation to the litigating families. Rather, what arises is a situation where residence parents (primarily mothers) have the responsibility for the day to day care and nurture of their children. In many cases, relationships between fathers and children have been tenuous. Indeed, in three cases in the sample fathers applying for residence had never even lived with their children.

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[1] s64B.
[2] See s 65C, s65D, s65E, s68F(2).
[3] Australia, Family Court of. 2002. "Family Court of Australia, Annual Report 2001-2002.": Family Court of Australia.31.
[4] Violence was an issue in 27 cases in my sample.
[5] Mental health problems were relevant in 10 cases in my sample.
[6] Allegations relating to physical or emotional abuse were made in 16 cases. Five cases involved sexual abuse allegations.
[7] Substance addiction was relevant in 10 cases.
[8] These findings are consistent with other research eg Thea Brown, Thea, Rosemary Sheehan, Margarita Frederico, and Lesley Hewitt. 2001. "Resolving Family Violence to Children; The evaluation of Project Magellan, a pilot project for managing Family Court residence and contact disputes when allegations of child abuse have been made.". Melbourne: Monash University.
[9] Mothers obtained residence orders in 80% of cases in the sample. This is consistent with Family Court of Australia figures: Court Statistics, Residence Order Outcomes – 1994-95 to 2000-01, available at http://www.familycourt.gov.au/court/html/residence_orders.html
[10] Sixteen fathers applied for residence.
[11] Fathers did obtain residence in 20 per cent of cases however.

(3) Maintaining relationships between fathers and children

A commitment to maintaining relationships between fathers and their children is strongly evident from the data.[12] The importance of fathers for children is recognised in the material emanating from judicial determinations, psychological reports and mothers' affidavit material. Mothers only argue against contact taking place in extreme situations; they are largely supportive of ongoing contact. Maintaining father/child relationships through contact is a priority, even where there is a history of violence, substance abuse or mental health impairments. Ongoing contact between fathers and children is questioned only in very extreme cases.

(4) Are women and children adequately protected from harassment and violence?

The data highlights some concerning issues regarding situations where violence, harassment and abuse have been part of the history of the relationship. It is clear that in a significant number of cases, residence parents are being harassed by being brought back to court time and time again by fathers making applications that have little chance of success. In three of the most extreme examples, fathers have had orders made against them under s118 of the Family Law Act, which prevent applications being made without prior leave of the Court.

Although judges are directed to consider the implications of violence when making parenting orders,[13] an inconsistent approach emerges from the sample. In some cases involving severe violence an appropriate approach, as laid down in Full Bench decisions,[14] is followed, resulting in restrictions on contact being made. In other cases however, a history of violence receives little attention in the decision making process.

The data indicates that there is a lack of clarity in the Family Court's approach to violence that may jeopardise the safety of some women and children. This results from the rights of children to know and be cared for by both parents and to have contact with both parents being emphasised more than the provisions in relation to domestic violence.[15] Given that children and their caregivers have an important entitlement to live in safety,[16] any legislative changes need to address this crucial issue.

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[12] Orders for no contact were only made in 8 cases in the sample. These cases involved fathers with untreated psychiatric conditions or severe levels of violence. Contact orders in favour of fathers were made in 30 cases. [The remaining two cases involved specific issues, rather than contact]. Other research has highlighted the trend for increasing amounts of contact to be ordered; Helen Rhoades, Helen, Reg Graycar, and Margaret Harrison. 2000. "The Family Law Reform Act 1995: the first three years.": University of Sydney and Family Court of Australia.

[13] Family Law Act 1975: ss68F(2)(g),(i),(j); s68K, Division 11.

[14] Eg In the Marriage of Blanch (1998) Fam LR 325.

[15] This finding is consistent with other research; John Dewar, John, and Stephen Parker 1999 'The Impact of the New Part VII Family Law Act 1975', *Australian Journal of Family Law* 13 96-118., Helen Rhoades, Reg Graycar, and Margaret Harrison. *2000 The Family Law Reform Act 1995: the first three years*: University of Sydney and Family Court of Australia.

[16] United Nations Convention on the Rights of the Child, Article 19.

Conclusion

It is unnecessary to change the legislative framework to encourage joint parenting after separation. Joint parenting is amply supported within the existing legislative framework. The goal of increasing paternal involvement after separation needs to be supported by non-legal measures that will assist fathers in maintaining and developing relationships with their children both before and after separation. To emphasise the need for father involvement after separation amounts to shutting the door after the horse has bolted. Strong and healthy post-separation relationships flow naturally from strong and healthy pre-separation ones.

Any agenda for reform in the arena of family law must prioritise the protection of family members from the damage caused by violence and abuse. This is the area where the current legislative scheme appears to be inadequate.