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Unifam Counselling & Mediation

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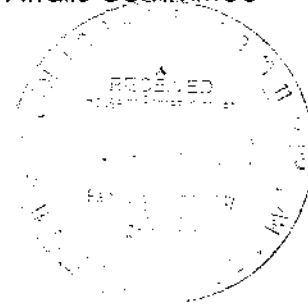
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House of Representatives Standing Committee on Family and Community Affairs
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Mrs Kay Hull, MP
Chair of House of Representatives Family and Community Affairs Committee
Child Custody Arrangements Inquiry
House of Representatives
CANBERRA ACT 2600



Dear Mrs Hull,

Please find enclosed the submission to the Child Custody Inquiry prepared by UnitingCare Unifam Counselling and Mediation.

I wish you and your committee well in your deliberations and would be pleased for the opportunity to give further evidence to the Inquiry at a public hearing if the opportunity arises.

Yours sincerely,

Clive Price
Executive Director

Inquiry into Child Custody Arrangements in the Event of Family Separation

Terms of Reference

The Committee is to investigate and make recommendations for action on the following matters:

- (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; and
 - (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.
- (b) whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.

The Committee has been asked to have regard to the Government's recent response to the report of the Family Law Pathways Advisory Group.

UnitingCare Unifam Counselling & Mediation (Unifam)

Unifam is funded by the Attorney-General's Department and the Department of Family and Community Services to provide a wide range of family and primary dispute resolution services to the communities throughout Sydney and major NSW regional cities and centres. Unifam has offices in Parramatta, Sydney, Penrith, Campbelltown, Ultimo, Gosford, Wollongong, Newcastle and Nowra.

Unifam is an "approved" counselling and mediation organisation under the Family Law Act and has been serving NSW families since 1977. Unifam's programs as part of the Family Relationships Services Program (FRSP) include Family Relationships Counselling, Family Relationships Mediation, a Contact Orders Program, Men and Family Relationships Service, Family Relationship Education, Conciliation, and Rural and Regional Primary Dispute Resolution.

In a given year Unifam will provide services to more than 5,000 clients (men, women and children) and the focus of our services include preventative counselling and education programs as well as post-separation Primary Dispute Resolution programs and programs targeting high conflict families.

All Unifam's programs work to ensure that the best interests of the child are paramount.

Unifam is a program of the Board of UnitingCare NSW.ACT.

Given Unifam's extensive history and expertise in working with families, both intact and post-separation, the organisation is ideally placed to comment through submission to the Inquiry into Child Custody Arrangements. This submission focuses especially on (a) from the terms of reference.

Family Law Reform Act (1995)

The Family Law Reform Act (1995) introduced a number of key changes to the existing Family Law Act. In particular the language of "custody" and "access" were replaced by the terms "residence" and "contact". The Reform Act placed the emphasis on continuing "parental responsibility", and stressed the importance of children's rights to know and be cared for by both parents, regardless of the parents' marital or relationship status, and a right for contact with their parents and significant others.

In addition to the change in language, from the implied ownership of "custody" and "access" to the more descriptive "residence" and "contact", the rights and indeed responsibilities of important day-to-day decisions were now to be shared by both parents rather than primarily by the "custodial" parent.

It should be remembered that these changes are relatively recent and the accompanying cultural and attitudinal changes will take considerable time, perhaps a generation. It is the view of Unifam that these changes are already taking effect with for instance slowly increasing numbers of fathers becoming resident parents.

It is Unifam's recommendation to the Inquiry that the new language of residence and contact continue and that there be no return to the outmoded concept of "custody" which, in terms of the legislation, is inappropriate and incorrect at law.

Furthermore Unifam recommends that the changes in the Family Law Reform Act 1995 which emphasise the "best interests of the child" with the attendant rights of the child after separation and the responsibilities of the parents, remain in place and be allowed to affect children's and families lives positively over time.

Families After Separation

Following separation and divorce most children will live with one of their parents, usually their mother.

The empirical evidence supports the following statements:

- more than 80% of single-parent households are headed by women and less than 20% by men.
- About 70% of Family Court residence orders are made in favour of mothers and only 20% in favour of fathers.
- Shared residence is an extremely uncommon post-separation arrangement with only 3 – 4 % of families living in these circumstances.
- Most families finalise post-separation living arrangements for children without requiring a court order.
- Most post-separation living arrangements are stable over time and largely unchanged since the time of separation.

What is equally well established by research is that:

- Many non-resident parents (usually fathers), especially those whose matters are determined by a Court, would like to have increased contact with their children and have their children live with them for a greater proportion of the time.
- There is a sizeable group of resident parents (usually mothers) who would like their children to have more contact with the other parent.

It is Unifam's view based on our practice experience and current research evidence that most Australian families make their own arrangements post-separation in what they believe are their and their children's best interests. A change in legislation that begins from a presumption of rebuttable "shared or equal custody" (residence) runs counter to what the majority of families seem to consider is their best option.

Research also demonstrates that within intact families (families who have not separated or divorced) women are much more likely to have the major roles in the caring for their children. In Unifam's view, while greater equality in child care and domestic roles between men and women is a value we would support, we believe that endeavouring to legislate that kind of equality following separation ignores how individual families function and existing family relationship structures. Furthermore it would be endeavouring to put new arrangements in place post-separation which rarely reflect those that were in place prior to divorce or separation.

Presumption of Equal Time with Each Parent

The terms of this inquiry specifically refer to the presumption that children should spend equal time with each parent post-separation unless specific circumstances rebut such a presumption.

In Australia as referred above very few families post-separation are constituted on the basis of equal or fundamentally equal time spent in each parent's household following separation. Not only is this the case in matters determined by the Family Court or the Federal Magistrates Service but also for those large number of families who either make their own arrangements or use lawyers or community mediators to assist them in developing parenting plans for their children.

Information available from the Australian Bureau of Statistics and the Child Support Agency indicate that less than 4% of all post-separation families with children use a form of shared care which equals or approximates to a 50/50 balance of time spent with each parent. Other research from Parkinson and Smyth suggest that if shared care is defined as a minimum of 109 days or nights with a parent (usually the father), then approximately 10% of all post-separation families have a form of shared care. Although it should be stressed that 109 days (or nights) does not translate into a 50/50 arrangement.

Researchers and practitioners in Australia, the United States and Britain tend to agree on the circumstances that make genuine shared care in other words joint residence more likely to occur and more viable.

These factors include unsurprisingly, low levels of parental conflict, cooperation between parents, flexibility and agreement about the parenting rules in terms of contact issues. Pragmatic issues such as children's ages and the close geographical proximity of the new households post-separation are also important.

Conversely families who have experienced conflict prior to and during separation, the group that most require outside interventions ranging from

mediation through to Family Court and Federal Magistrates service determinations, are the families for whom 50/50 shared residence (custody) is contra indicated and less likely to be a workable alternative.

Unifam would like to respectfully pose the following question. If those least conflictual, most cooperative families following separation, only very rarely choose shared residence (approximating a 50/50 balance) as their preferred parenting arrangements how can shared care be considered as the preferred model for families whose very presence at Court suggests that they are conflictual and probably uncooperative and unlikely to be able to successfully manage and negotiate those circumstances that arise with such an agreement?

Unifam does not oppose shared care (joint custody or residence) as one of a range of options to be considered by those professionals assisting families post separation. That is the community-based counsellors and mediators through to the Family Court Judges and Federal Magistrates need to rigorously consider and help families explore all options regarding children's arrangements for residence and custody and one option may be a form of joint residence (custody) appropriate to each particular family's circumstances and always bearing in mind the best interests of the children.

It should also be acknowledged that to date, especially in Australia given the low number of joint residence (50/50) arrangements for families post-separation, that there has been insufficient research to support the notion that such arrangements are for most families even a workable let alone the best option for children.

The Voice of the Child

A rebuttable presumption of 50/50 residency may have the unintended consequence of changing the onus from the best interests of the child to the "rights" of the parents to have an equal share of time. This in turn may have consequences for the well being of children and their relationships with both their parents post-separation.

Since the 1995 Reform Act the community sector, of which Unifam is a part, through its primary dispute resolution and counselling services is increasingly involving children and their views, concerns, fears, and hopes in the process of resolving residency and contact issues. Parents more than ever are hearing the voices of their children and becoming aware of the effects of the separation and any parental conflict on their children.

Hearing the children's voices can assist the adults, both parents and professionals, become more attuned to what arrangements following separation and divorce are in the best interests of the children. From

Unifam's clinical experience with many children after separation, it is clear that a small proportion would prefer residency arrangements which more closely approximate a 50/50 balance between households. What is more striking is that children would like to have the best relationships they can with their parents (and significant others) following separation. They tell us very clearly that a good relationship with a non-resident parent does not necessarily equate with equal shared care. We would make the point that while most non resident parents are fathers, Unifam works with many families, perhaps increasingly so, where the father is the resident parent. The issues regarding contact and family relationships are identical in these instances.

The research and practice literature is absolutely unequivocal on the issue of the considerable damage that conflict between parents, leading up to, during and post-separation, will have on children's well being, their emotional and psychological health and their behaviour.

Children who experience parental conflict through the separation and divorce process consistently show up through the research as experiencing greater social and health difficulties, greater drug and alcohol use, more school related problems, higher level of teenage pregnancy, poorer peer relationships and more significant behaviour problems than their peers who have not experienced a conflictual family separation. While clearly not the intention of this proposal, Unifam is greatly concerned that the proposed changes to Family Law and practice will indeed for many families increase the likelihood of high levels of conflict and the risks to children's well being.

Attachment Theory

In any decision regarding the residency and indeed parenting of children post-separation must take into account attachment theory and what it can inform professionals regarding the best interests of children.

The significant amount of literature on Attachment informs us that children require close, consistent secure attachment to a primary care giver(s) particularly in the pre-school years (0-3). Being separated from a primary care-giver especially for young children for considerable periods of time can have significant detrimental effect on children.

Where a child clearly has two parents as primary care-givers before separation then any post-separation residency arrangements should endeavour to ensure where practical that the child has significant time with each parent.

In most Australian families, even today, there is usually one primary care-giver. Most often this is the mother. The mother being the primary care-giver in no way minimises the importance of the children's relationship

with other significant attachment figures, such as fathers, siblings and grandparents. However when one parent is the primary care-giver and arguably the most significant attachment figure, residency arrangements over time can and should change and adapt. In deed it would seem that many families who have adjusted well to separation and divorce are able to come to terms with just such flexibility over time. In Unifam's experience for instance some young people, say over 12, will "vote with their feet" and may change primary residence at some stage during their adolescence.

Contact Orders Program

One of the most innovative and successful initiatives of the present Government through the Portfolio of the Attorney-General has been the piloting and more recently expansion of the Contact Orders Program. Unifam has been proud to be one of only three Contact Orders Programs throughout Australia. This program, which we call the "Keeping Contact" program is based in Parramatta and takes some 750 clients every year from the Parramatta Registry of the Family Court and the Federal Magistrates Service. Recently Unifam has extended this program to the Sydney Registry of the Family Court.

An independent evaluation reported very positively on this program. Furthermore the Government's Pathways report has recommended expansion of the program.

The clients of the Keeping Contact program are all highly conflictual and have a history of contact and residence disputes which the Courts have been unable to resolve. Many of these clients have spent upwards of \$50,000 each in legal fees and have had between ten and thirty visits to the Court. Unifam's staff have been remarkably successful in changing the focus from who lives with whom and for how much of the time, to what are the best interests of the children, and how can parents work to reduce conflict and to ensure improved relationships between the children and both their parents, resident or non-resident.

The learnings from the Keeping Contact (Contact Orders Program) include:

- That there are cost-effective alternatives to the Family Court and Federal Magistrates Service that will assist families, even the most conflictual, not only reduce their contact and residency disputes, but begin to work more cooperatively in their children's best interests.
- That modest resources invested in these program can save individuals large sums of money and the Government and

Community considerable resources which are currently expended on lengthy Court disputes.

- That litigation and the accompanying adversarial legal processes can be damaging to children to and family relationships and are often not the best way to determine where children should reside and what are the best contact arrangements for them. The Keeping Contact program can be considered a “diversionary” alternative to the Courts that empowers parents to decide their children’s living arrangements post-separation.
- That one of the most effective interventions is to allow children’s voices to assist parents make decisions that are in the children’s best interests, not a competition over how much time should a child spend in each home.

Potential Consequences of a Change in Family Law to a Rebuttable Presumption of Children Spending Equal Time with Each Parent Post Separation

Unifam through its understanding of the research and its significant practice experience is concerned that the following serious consequences may flow from such a change in Law and legal practice:

1. There will be an increase in parental conflict as each party attempts to argue merits of a standardised formula for living arrangements.
2. The rebuttable nature of the proposed presumption will refocus on the rights and wrongs real or imagined of each parent’s behaviour rather than a focus on children’s rights and needs.
3. Greater legal costs will flow from such changes for all parties.
4. There may well be an increase in applications to Court, and more instances of lengthy litigation and numerous appeals. Already Unifam is aware of many non resident parents intending to return to Court to claim their “rights” and many resident parents (usually women) deeply concerned and even afraid of the consequences as are their children.
5. It is not outside the bounds of possibility that increased conflict will result in increases in violence and allegations of child abuse in the latter case arguably in an effort to rebut the equal time presumption.

The Importance of Family Relationships After Separation

It is timely that the Government has asked both the wider community and the legal and social science professionals who work in the Family Law arena, to consider the issue of contact and residence arrangements for children post-separation.

At Unifam we believe that at the heart of the decision to hold this inquiry is a view in Government that family relationships, and in particular the relationships between children and their parents, are vital to the health and wellbeing of those children, their families and ultimately the community. Furthermore those relationships and regular contact between children and their parents after separation continue to be extremely important.

We would conclude and recommend that this inquiry is used as a critical "window of opportunity" to refocus on: how to ensure "the best interests of the child" post separation; how to reduce and minimise conflict for families post-separation; how to reduce the significant costs to both families and the community of pursuing Family Law matters through litigation; and how to develop accessible "diversionary" alternatives to the Family Court which might better meet children's and parents needs after separation. Such diversionary programs are already being developed, trialled and evaluated.

We would further conclude by saying that shared residence, including an "equal" 50/50 arrangement should be an additional option to be considered by the Family Court, by legal practitioners and by the community-based organisations when resolving contact and residency issues after separation and divorce.

Unifam does however strongly recommend that the proposal for a "rebuttable presumption" that children spend equal time with each parent following separation should not proceed into Law and practice. Ultimately we believe such a proposal in its current form may not operate in the best interests of the child.

Recommendations

1. That the changes regarding contact and residency introduced through the Family Law Reform Act (1995) remain in place and be allowed time to continue to effect family lives positively and to operate in "the best interests of the child.
2. That Courts, legal professionals and community-based mediators and counsellors be directed to include joint residence (50/50 equal share) as one of the options to consider when assisting families

resolve contact and residence matters in "the best interests of the child" post separation.

3. That an increased focus on including children's 'voices', their views, concerns, fears and hopes, become the recommended approach when resolving children's matters both through the litigation 'pathway' and through the mediation and conciliation 'pathways' as used by community-based practitioners and some Family Lawyers.
4. That Family Law practice in the community, the Courts and by legal practitioners, increasingly takes into account the effects of post-separation conflict and the adversarial process itself on children's well being. Furthermore that Government acts to reduce the amount of children's matters that are subject to adversarial litigation and supports an increasing emphasis on non-Court interventions that can minimise conflict and will focus on positive parent-child relationships post-separation.
5. That young children (0-3) in particular are able to continue to substantially reside with their primary care-giver and attachment figure post-separation.
6. That Government expands the resources provided to the Contact Orders program and other best-practice non-adversarial post-separation interventions as a means of significantly reducing conflict for families, and as an opportunity to begin to develop "diversionary" programs as a serious alternative to the Family Court.
7. That a rebuttable presumption of equal time residency arrangements post-separation not be introduced into Legislation or Family Law practice.
8. That this enquiry is used as a critical "window of opportunity" to refocus on how:
 - to ensure "the best interests of the child" post separation;
 - how to reduce and minimise conflict for families post-separation;
 - how to reduce the significant costs to both families and the community of pursuing Family Law matters through litigation; and
 - how to develop accessible "diversionary" alternatives to the Family Court which might better meet children's and parents needs after separation.

Bibliography

- Amato, P., & Gilbreth, J. (1999). Nonresident fathers and children's wellbeing: A meta analysis. *Journal of Marriage and Family*, 61, 557 – 573.
- Australian Bureau of Statistics (ABS) (1998). Family Characteristics Survey 1997. Cat No. 4442.0 AGPS, Canberra.
- Brotsky, M, Steinmen, S & Zimmelman, S. (1991). *Joint custody through mediation. A longitudinal assessment of the children*. In: Folberg, J, Ed. Joint Custody and Shared Parenting. New York, Guilford Press, 167 – 176.
- Campbell, A. (in preparation). *The Voice of the Child in Family Law: Whose Right? Who's Right?*, University of South Australia.
- Child Support Agency (2003). Child Support Scheme Facts and Figures, 2002 – 03. Canberra, Child Support Agency.
- Chisholm, R. (1996). Assessing the impact of the Family Law Reform Act 1995. *Australian Journal of Family Law*, 10, 177 – 197.
- Chisholm, R. (2000). *Children's Participation in Family Court Litigation*. Paper presented at the Ninth National Family Law Conference, Sydney.
- Dickinson, J. (2003). *The contact orders project*. Presentation to "Out of the Maze" Family Pathways Forum. June Canberra.
- Folberg, J. (1984). *Joint Custody and Shared Parenting*. The Bureau of National Affairs Inc, Association of Family and Conciliation Courts Review, USA, BNA Books.
- Johnston, J. R. (2003). *Developmental threats for children in high conflict separation families: What mediators, mental health and legal professionals need to know*. Presented at the Family Mediation Centre winter school, Melbourne, 13 June.
- Kelly, J. B & Lamb, M. E. *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*. Family and Conciliation Courts Review. Vol. 38 No. 3. July 2000.
- Kelly, J & Moloney, L. (2002). *Children in Focus. Working with high parental conflict*. Melbourne, La Trobe University Centre for Online Multimedia Educational Technologies.
- McIntosh, J. (2000). Child-inclusive divorce mediation. Report on a qualitative research study. *Mediation Quarterly* 18 (2), 55 – 69.
- McIntosh, J. (2003). Enduring conflict in parental separation. Pathways of impact on child development. *Journal of Family Studies* 9 (1), 63 – 80.
- Parkinson, P. & Smyth, B. (2003). When the difference is night and day: some empirical insights into patterns of parent-child contact after separation. Paper presented to 8th Australian Institute of Family Studies Conference. Melbourne Feb 12 – 14.
- Rhoades, H, Graycar, R, & Harrison, M. (2000). *The Family Law Reform Act 1995 – The first three years, Final Report*, University of Sydney and the Family Court of Australia.