



Department for Women

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

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| SYDNEY SOUTH NSW 1305 | |
| House of Representatives Standing Committee on Family and Community Affairs | |
| Submission No: | 1351 |
| Date Received: | 23-9-03 |
| Secretary: | |

Dear Committee Secretary

Inquiry into child custody arrangements in the event of family separation

I enclose for the Committee's attention, the NSW Department for Women's submission to the above inquiry, as notified by my previous letter of 19 August 2003.

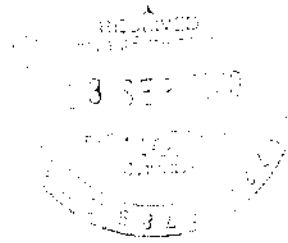
The submission is directed to terms of reference (a) (i) and (ii), concerning factors to be taken into account in deciding the respective time each parent should spend with their children post separation, whether there should be a presumption that children will spend equal time with parents following separation, and in what circumstances the Court should order that children have contact with other persons, including their grandparents.

I shall look forward to reading the Committee's report.

Yours sincerely

Robyn Henderson
Director-General





Department for Women

Submission to the inquiry into child custody arrangements in the event of family separation

Introduction.

The provisions of the *Family Law Reform Act 1995* represented a major change to the approach to family law in Australia, particularly as it relates to children. The background to and outline of the amendments in the *Reform Act* are outlined in a report examining the first three years of its operation¹. The amendments, the report states, were intended to achieve the following broad objectives:

- to encourage continued shared parenting responsibilities following the breakdown of the parents' relationship, including active involvement in care of the children;
- to remove the "proprietary" notion of children inherent in custody battles and maintain the importance of both parents to the children, regardless of who they live with;
- to focus attention on the interests of children in post-separation arrangements, emphasising the rights of children and the responsibilities of parents; and
- to encourage parents to enter into private agreements about the future care of their children, rather than resorting to a litigated solution².

These objectives have been incorporated as the object and underlying principles of Part VII of the revised *Family Law Act 1975*, as set out in s60B:

- (1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

¹ Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: the first three years*, University of Sydney and Family Court of Australia, Sydney, 2000, pp 11-21

², Rhoades et al, p14

- (b) children have a right of contact, on a regular basis, with both the parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.

Parental responsibility is set out at s61C, which provides that “each of the parents of a child who is not 18 has parental responsibility for the child”, and that this “has effect despite any changes in the nature of the relationships of the child’s parents”.

Separating parents are not required to go to Court to make arrangements for the ongoing care of the children, and are in fact encouraged to make arrangements between themselves. Parents can, if they wish to make these arrangements legally binding, apply to the Family Court for Consent Orders or to register a Parenting Plan that will set out the parents’ agreement regarding who the children will live with, how often they will see the other parent and specific issues such as education, holidays, medical and religious matters, etc³.

Even where parents are unable to agree and ask the Court to make Parenting Orders, the Court generally requires the parents to attend a mediation session with a Court counsellor to try to reach agreement and early settlement continues to be encouraged throughout the determination process.

12934 consent orders were lodged with the Court in 2001-02, an increase of 4.6 percent from the previous year⁴. By contrast, during the same period the Court made 1112 final orders⁵. Only 6.2 percent of applications for final orders proceeded to a hearing, with the remainder being resolved or settled earlier⁶ and 75 percent of all matters referred to the Court for determination were resolved through mediated agreements⁷. While these figures refer to all matters before the Court, not just matters involving children, they illustrate the degree to which people are generally able to cooperate either independently, or with the assistance of mediation.

What other factors should be taken into account in deciding the respective time each parent should spend with their children post separation?

Only in situations where parents are unable to agree, will the Court be asked to adjudicate and make parenting orders setting out arrangements for the ongoing care of the children. Further, the adjudication would generally be confined to issues in dispute, and thus guided by applications and objections placed before it by relevant parties; the Court will not ordinarily interfere in issues where there is agreement, or seek to impose a solution that has not been sought by (and therefore presumably not appropriate for) any of the parties.

³ *Family Law Act 1975*, ss 63A – 63H

⁴ Family Court of Australia, *Annual Report 2001-2002*, Canberra, 2002, p28. This would refer to all matters, not just those involving children.

⁵ Family Court of Australia, p31

⁶ Family Court of Australia, p31

⁷ Family Court of Australia, p28

In making a parenting order other than a child maintenance order⁸, the Court must regard the best interests of the child as the paramount consideration⁹. In determining what constitutes the child's best interests, the Court must consider the following factors:

- the wishes of the child;
- the nature of the relationship of the child with each parent and other persons;
- the likely effect of changes in the child's circumstances, including separation from a parent, sibling or other person with whom s/he has been living;
- the practical difficulty and expense of a child having contact with a parent and how this might impact on the child's relationship with both parents;
- the capacity of each parent, to provide for the needs of the child;
- the child's maturity, sex and background;
- the need to protect the child from physical or psychological harm;
- the attitude to the child and to the responsibilities of parenthood, displayed by each of the parents;
- any family violence that has occurred, or family violence orders in place; and
- other relevant matters¹⁰.

The Department for Women (DFW) considers that this represents a comprehensive list of factors to be taken into account when making a determination in applications for residence and contact orders. The list in any case is not exhaustive, since other factors are able to be incorporated where relevant. DFW, then, **does not consider it necessary** to include any additional specific factors.

Should there be a presumption that children will spend equal time with each parent?

Privileging the rights of parents over the rights of the children

The proposal to introduce such a presumption appears to be based on an assumption that fathers are somehow disadvantaged, or even discriminated against, in applications for residence orders made to the Family Court. The Department for Women considers that the purpose of the presumption is designed to bolster the position of fathers, and thus privileges the position of one of the parents over the rights of the children and detracts, therefore, from the paramount consideration of the best interests of the child.

In any case, the Department considers that any assumption of bias against fathers is in fact flawed. Although 69.6 percent of residence orders finalised in 2000-01 were made in favour of the mother, most of these orders would have been made by consent, as outlined above. The proportion of residence orders made in favour of fathers is in fact increasing, representing 19.6 percent of final orders in 2000-01, up from 15.3

⁸ That is, a residence (who the child will live with), contact (arrangements regarding the child's contact with the other parent) or specific issues order, which covers issues such as holidays, religious and medical matters, etc.

⁹ *Family Law Act 1975*, s65E

¹⁰ *Family Law Act 1975*, s68F

percent in 1994-95. And while a proportion of fathers are aggrieved at the outcome of residence and contact order applications, it is worth noting that 26 percent of resident mothers in a recent study believed there was not enough contact between their children and the non-resident fathers¹¹.

Given the Court only becomes involved in contested applications, it is not surprising that there is dissatisfaction at the outcome of proceedings and it would be difficult for the Court to arrive at a settlement that is amicably received by all parties. The Department does not consider that the solution lies in altering the starting point of the determination process.

In determining the outcome of contested residence and contact applications, the Court must consider the positions of both parents relative to what is best for the children, so that the resulting orders are the most suitable that can be achieved in circumstances of disharmony. Because each family's situation is unique and the governing factors outlined above will vary widely in each case, DFW considers it would be inappropriate to impose an arbitrarily designed solution as the starting point on the Court's process of determination.

Inappropriateness in situations of acrimony and conflict

Further, DFW questions whether an arrangement whereby children spend equal time with each parent after separation would be desirable in most cases. It would require, for example, a significant degree of cooperation between the parents in relation to expenditure on clothing, school books and equipment, attendance at school functions and out of school activities, etc. And yet it is precisely those parents who are in dispute and whose relationships are characterised by acrimony and conflict, who require the Court to make a determination in matters involving residence and custody issues.

General difficulties related to shared residence

Joint and split residence orders¹² are in any case already available as options, but are only taken up in a small number of cases. Split residence represented only 4.2 percent of residence order outcomes in 2000-01, while joint residence made up a further 2.5 percent¹³.

There are many constraints associated with joint and split residence, not least of which is the need for both parents to live relatively close together so that the children are able to get to school and out of school activities from both homes relatively easily and quickly. Both parents need to be prepared to regularly collect children from school or childcare and to be readily available to take leave when the children are sick or otherwise need supervision at home. In turn this requires both parents to have access to employment that has flexible and family-friendly employment conditions.

¹¹ Patrick Parkinson and Bruce Smyth, *When the difference is night and day: some empirical insights into patterns of parent-child contact after separation*, paper delivered at 8th Australian Institute of Family Studies Conference, February 2003, p11, at <http://www.aifs.gov.au/institute/afrc8/papers.html>

¹² Both these options involve shared residence, but joint residence does not necessarily involve equal time spent at each parent's home. Split residence involves the child(ren) spending equal time at both homes, on a weekly basis. Information provided by the Family Court, September 2003.

¹³ Family Court of Australia website: http://www.familycourt.gov.au/court/html/residence_orders.html

On a personal level, an order specifying that a child will spend equal time with each parent would require both parents to be willing and able to perform all aspects of childcare. Research conducted in 2002¹⁴ comparing the amount and types of childcare activities performed by mothers and fathers, demonstrated that fathers spend an average of 2.5 hours per day in childcare activities, compared with mothers' seven hours¹⁵. Further, regardless of each of the parents' employment status, age and numbers of children, fathers spent no more than 10 percent of their time alone with their children, while mothers spent no less than 22 percent of their time alone with their children; 75 percent of men's childcare was in the presence of their partners¹⁶. Although these findings generally concern families where both parents live together, they may illustrate a lack of preparedness by fathers for what would be involved in providing the full-time care for their children that an order for split or joint residence would require.

Forcing children to have two homes

Perhaps more significantly, to impose any kind of presumption in favour of a particular arrangement presupposes that children would normally prefer such an arrangement, since the Court must take the wishes of the children into account in making its determination, and that it would be in their best interests. DFW considers any such presupposition highly questionable, since any order for shared residence in effect requires children to have two homes.

Research undertaken by Carol Smart in the UK¹⁷ found that while some children living in two homes were happy with such arrangements, others described the difficulties they experienced, such as feeling they didn't have a proper home, having to give out two different phone numbers, not always having the right books for school, etc¹⁸. Court-imposed equal time arrangements tended to be devised to suit the parents and a rigid insistence on equal time did not always appear to be in the interests of the children. The study found that children were well aware of the importance of equal time for their parents and that they found it difficult to raise the possibility of having the arrangements altered. Children felt an emotional burden of not upsetting the balance between their parents. One child when asked what he would wish for replied "that one parent would just disappear after divorce"¹⁹.

The Department acknowledges that in some cases the most suitable arrangement will be for the children to spend equal time with each parent, but is concerned that in an attempt to counter alleged bias against fathers, the proposal to impose such an arrangement will in fact disadvantage many mothers.

¹⁴ Lyn Craig, *Caring Differently: a time-use analysis of the type and social context of child care performed by fathers and by mothers*, Social Policy Research Centre, University of NSW, Sydney, 2002

¹⁵ Craig, p24

¹⁶ Craig, p17

¹⁷ Carol Smart, *Children's Voices*, paper delivered at Family Court of Australia 25th Anniversary Conference, July 2001, at <http://www.familycourt.gov.au/papers/html/smart.html>

¹⁸ Smart, p7

¹⁹ Smart, p8

Reduction of child support

Child support payments from the non-resident parent to the resident parent are calculated according to the number of nights the child spends in the care of the resident parent. By changing the balance of time spent with each parent, child support payments would be significantly reduced. Eighty-five percent of single parent families are headed by women, and this proportion is projected to maintain or slightly increase into 2021²⁰. Two thirds of one-parent families have dependent children, most likely with a woman head of family²¹.

Women earn substantially less income through paid employment than men. In February 2003, women in full-time employment in NSW earned only 82.5 percent of men's average weekly full-time ordinary earnings, \$840.50 compared to \$1,019.00 for men, while the average weekly earnings of all women, including part-time and casual workers were \$591.30, approximately 64.5% of those of all men (\$916.80)²².

Women's income is further eroded because of childcare responsibilities. 70.4 percent of working mothers use flexible work provisions compared with 30 percent of working fathers. Fathers are more likely to use flexible working hours, to work at home or shift work, and women are more likely to opt for part-time work, with a consequent lower income²³. In 1997, while approximately a quarter of women working on a part-time, casual or temporary basis said they did so for family reasons; no men gave this as a reason for choosing these forms of employment²⁴.

Women's income decreases further following separation. Research over the past two decades has consistently shown that women are more likely to experience financial hardship following marital breakdown²⁵, while a survey conducted in 1993 found that three years following separation male income had generally returned to pre-separation levels, while women's income had dropped by 26 percent²⁶. In 2002, only 21 percent of female single parents were in full-time employment, while many were unemployed²⁷.

Women and their dependent children, then, are heavily reliant on child support payments received from their former partners. And while in theory, it should follow that if children spent more time with each parent, mothers' child-based expenditure would decrease, this will be dependent on the existence of a high level of cooperation

²⁰ Australian Bureau of Statistics, *Household and Family Projections, 1996 to 2021*, Cat No 3236.0, ABS, Canberra, 2001

²¹ Australian Bureau of Statistics, *New South Wales Year Book 2002*, Cat No 1300.1, ABS, Canberra, 2002, p55

²² Australian Bureau of Statistics, *Average Weekly Earnings, Australia, February 2003*, Cat No 6302.0 ABS, Canberra, 2003

²³ Australian Bureau of Statistics, *Child care*, Cat No 4402.0, ABS, Canberra, 2002.

²⁴ Australian Bureau of Statistics, *Part-time, Casual and Temporary Employment, NSW, October 1997*, Cat No 6247.1, ABS, Canberra, 1997

²⁵ R Weston, "Changes in Household Income Circumstances" in P McDonald, ed *Settling Up: property and income distribution on divorce in Australia*, Australian Institute of Family Studies, Melbourne, 1986, p100; R Weston, "Income Circumstances of Parents and Children: a longitudinal view" in K Funder, M Harrison and R Weston, eds *Settling Down: pathways of parents after divorce*, Australian Institute of Family Studies, Melbourne, 1993, p135

²⁶ R Weston, 1993, p137

²⁷ Australian Bureau of Statistics, *Year Book Australia 2002*, Cat No 1301.0, ABS, Canberra, 2002

between the parents, a fact that cannot be assumed where the parents' relationship is acrimonious.

As it is, child support payments are frequently late in arriving or not paid at all. A 2000 survey conducted by the Child Support Agency revealed only 28 percent of their clients always received their child support payments on time, while 40 percent never received their payments²⁸. Over the four years to June 2001, the total child support debt grew at an average annual rate of seven percent, to a total of \$670 million, while the percentage of payers with child support debts rose from 56 percent to 74 percent²⁹.

Thirty percent of payers reported that they could not afford to pay child support without cutting back on necessities. There might be a temptation, then, for non-resident parents to seek increased contact or joint residence, so as to reduce child support amounts while at the same time attempting to avoid contributing to essential child-based expenditure.

Parents who subsequently enter a new relationship are less likely to maintain contact with their children from their first relationship, so that children spend less nights in their care³⁰. As a result, mothers who find themselves with an increased share of childcare, will need to get a new child support determination to reflect the changed arrangements. Yet it is precisely when fathers have new relationships, particularly when they have new children, who are less able or less willing to afford child support payments.

Domestic violence

Finally, a high proportion of those cases that are resolved through the Family Court involve domestic violence. In a 1999 study, allegations of domestic violence were present in 60 percent of private solicitors' legally aid cases before the Family Court, which mainly concerned children. Seventy percent of these cases involved a history of violence in the relationship, with a state domestic violence order having been obtained in between 60 and 65 percent of cases³¹.

Domestic violence often continues after separation, particularly when there is ongoing contact, such as in relation to childcare responsibilities. National statistics collected by the ABS showed that 4.8 percent of single women were assaulted or threatened by their previous partners during the previous twelve months³².

A 2002 study of women who were negotiating child residence and contact arrangements with an abusive former partner found that 97.5 percent of women had experienced violence or abuse after separation; where violence had declined or ceased

²⁸ Tammy Wolffs and Leife Shallcross, "Low Income Parents paying Child Support: evaluation of the introduction of a \$260 minimum child support assessment" (2000) *57 Family Matters* 26, p29

²⁹ Australian National Audit Office, *Client Service in the Child Support Agency: follow-up audit*, Audit Report no 7, AGPS, Canberra, 2002, Appendix 3, at <http://www.anao.gov.au/WebSite.nsf/Publications>

³⁰ Wolffs and Shallcross, p31

³¹ Rosemary Hunter, *Family Law Case Profiles*, Justice Research Centre, Sydney, 1999, p186

³² Australian Bureau of Statistics, *Women's Safety Australia*, Cat no 4128.0, ABS, Canberra, 1996, p11

it was typically because opportunities had been reduced by minimising contact between the parties³³.

Despite this, however, 40 percent supported the value of child contact. The rest were opposed or ambivalent about it, typically out of concern for the children's safety and well being³⁴. Almost 50 percent considered that residence and contact arrangements compromised their personal safety or weren't in the best interests of the children³⁵. 86 percent of resident mothers described violence during contact visits or changeover periods³⁶.

Given the likelihood that domestic violence will be a factor in matters to be adjudicated by the Court, the Department submits that a presumption that children spend equal time with both parents following separation, is inappropriate and would serve to place women and children in situations of ongoing danger.

In summary, then, the Department for Women, then, **does not support** a presumption that children will spend equal time with both parents on the basis that such a presumption:

- privileges the rights of parents over the rights of children and detracts from the paramount consideration of the best interests of the child;
- is inappropriate in precisely those situations where the relationship between the parents is characterised by acrimony and conflict;
- ignores general difficulties associated with shared residence;
- would force children to in effect have two homes;
- would reduce the amount of child support payable by fathers, potentially leading to further impoverishment of single mothers and their children; and
- would place women and children who are victims of domestic violence at increased risk of further violence.

In what circumstances such a presumption could be rebutted?

As outlined above, the Department for Women does not support a presumption that children will spend equal time with both parents post separation.

In what circumstances should a court order that children of separated parents have contact with other persons, including their grandparents?

³³ M Kaye, J Stubbs and J Tomie, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence*, Working Paper no 4, Family Law and Social Policy Research Unit, Griffith University, Griffith, 2003, pv; available at <http://www.gu.edu.au/centre/flru>

³⁴ Kaye, Stubbs & Tomie, pp vi-vii

³⁵ Kaye, Stubbs & Tomie, p xi

³⁶ Kaye, Stubbs & Tomie, p xi

Grandparents may already apply for parenting orders, under s65C of the *Family Law Act*, along with parents, the child and any other person concerned with the child's care, welfare or development.

Applications are determined by the Court, in accordance with the factors set out at s68F, and subject to the paramount consideration of the best interests of the child.

DFW does not consider it necessary to introduce specific circumstances whereby the Court must make such an order in favour of the child's grandparents.