

The National Council of Jewish Women of Australia

Founder: Dr Fanny Reading MBE 1923
An affiliate of International Council of Jewish Women

ABN 13 096 053 140



National President
Robyn Lenn

4 August 2003

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

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 302

Date Received: 5-8-03

Secretary:

Dear Secretary,

National Council of Jewish Women of Australia is very concerned about the effects of a legal presumption of joint residence for separating families. Enclosed please find NCJWA's submission to the Parliamentary Inquiry into Joint Residence Arrangements. We raise strong arguments against it and suggest correction of some serious problems within the family law system.

Yours truly,

Robyn Lenn
NATIONAL PRESIDENT

Anne Morris
CHAIR OF NCJWA STANDING
COMMITTEE ON SOCIO-LEGAL
ISSUES/WOMEN AND CHILDREN



National President
Robyn Lenn

National Council of Jewish Women

Submission to Parliamentary Inquiry into Joint Residence Arrangements

August 2003

The National Council of Jewish Women is strongly opposed to a legal presumption of shared residence for families that are separating. We see such a presumption as, in fact, a dangerous practice that would endanger children's safety and well-being, and we outline below our arguments for this position.

1. It overrides the paramouncy of the 'child's best interests' principle which is entrenched in the *Family Law Act*.

Currently the Family Law Act clearly outlines that legal decisions regarding the care of children following separation have to be based on the best interests of the child as the paramount consideration. This allows for consideration of each child's unique interests and concerns. The presumption of joint residence would undermine children's particular needs within their families.

Overseas research has shown that shared care suits a small minority of parents (3 %), and does not meet children's needs very well at all. One study showed that children feel burdened by shared care; they carry the burden of shared care, felt responsible for ensuring 'fairness' between their parents and put their own interests below the interests of their parents. (Smart 2002).

2. International experiments in presumptive shared custody, such as in California have been unsuccessful.

The Family Law Council examined the issue of shared care, citing how the California legislature repealed its joint custody presumption in 1988. This presumption was found to place unrealistic expectations and pressure on parents and therefore also on children. Joint custody has not been found to ameliorate conflict and therefore is not necessarily beneficial to children (Family Law Council, 1992).

3. Current provisions of the Family Law Act already allow for shared residence to be arranged where it is possible and where it is also in children's best interests.

The current legal system in Australia allows for shared parenting which can be negotiated between parents who choose this option without recourse to the legal system. For shared parenting to succeed there needs to be cooperation between parents and low conflict prior to and during separation (Bauserman, 2002). Parents forced into shared parenting arrangements who are not able to cooperate will not succeed in this, and children will suffer the consequences.

4. Shared parenting arrangements are not reflective of the reality of parenting in families prior to separation.

Women are predominantly the primary carers of children prior to separation. A recent study in Australia notes that "While the paid workplace is increasingly occupied by both sexes, the unpaid work of care and home still falls mostly to women" (Pocock, 2003, 7). Pocock shows that while there has been an ideology of shared housework and childcare amongst couples, the reality does not bear this out, and "there has been little redistribution of (women's) domestic work" (Pocock, 2003, 74).

For most children their primary caregiver is their mother. Changing the pattern of child-care to suit the presumption of shared care is likely to impact negatively on children, and interfere with their relationship with their primary caregiver. This becomes extremely difficult where children of different ages have different needs from their caregiver. What are the implications of such a policy for children who are breast-fed? What are the implications for children's relationships with their siblings when they are at different ages and with different needs? This will be a major cause of instability for children, and will not meet children's needs for quality and consistent care.

5. Children and women who have been subject to violence and abuse within their families will be placed in far greater danger by a presumption of shared care.

Many recent well-researched studies show that child abuse and domestic violence are major issues for the Family Court, that they present the Court with its major challenge, and yet these issues are still not being adequately addressed by the Court.

Brown (et al, 1997) has concluded that child protection has *become* "... the core business of the court and that the court has become part of the child protection service and the wider child welfare system." (p.4). Their study found that 50% of cases at the mid point of proceedings within the Family Court are child abuse cases, and that most commonly there were multiple forms of abuse, including domestic violence.

Recent research by the Australian Institute of Family Studies (2000) identifies that 66% of marital breakdown involve violence, 33% of which were identified as serious violence. U.K. figures indicate that between 40% and 60% of separated or divorced women experienced violence in their relationships (Mullender & Morley, 1994). While violence and abuse issues are a large part of the work of the Family Court, many reports show that the Family Court is failing seriously in keeping children safe. One such report is from the "Forum on Child Protection in Family Court Matters" (2000).

Another report which is alarming in its implications for children's safety is by Brown et al, (1998). This study "showed a low but rising incidence of (abuse) cases, the serious nature of the abuse, most commonly multiple forms of abuse, a low rate of false allegations, a high incidence of other family violence, and an interrelationship between other family violence and child abuse. The study showed the court had difficulties in dealing with the cases, largely due to the problematic nature of the interface between the child protection system and the family law system. ... Outcomes for the children were poor; they included long delays, many hearings, frequent changes of residency and many children experiencing high levels of distress" (Brown et al, 2001, 5).

A report by the Family Law Council (2002) echoes these concerns. It shows that child protection concerns are not being dealt with adequately by the Family Court, and that these issues seriously affect children and the families involved, as well as taxing the resources of the family law system. The Council recommends "that to meet this

serious problem and gap in services, the Federal Government should establish its own Child Protection Service to investigate child abuse concerns arising in family law proceedings" (2002, 11).

The presumption of shared parenting will make this situation even worse. Lack of legal aid, and the gaps in services mean that parents who are not abusive can not adequately protect their children against parents that are violent or abusive. This will force more children to live with violent parents and will force non-offending parents to have to regularly negotiate with violent ex-partners, putting them at risk also. It is well established that violence towards ex-partners escalates after separation.

Furthermore, it is well-known that people who are abusive and violent tend to use the Family Court proceedings to further abuse their families and continue their control over their victims. A presumption of shared parenting will provide them with further tools for continuing this abuse. This is confirmed by a research study by Rhoades (et al, 1999) in which many respondents commented on the use of the shared responsibility concept by one parent to harass or continue abuse of the other. Hester and Radford found in their study in the UK "it is clear from our research that men are often more interested in gaining access to their ex-partners through their children than they are in seeing the children themselves (1996, 91).

In considering the importance of children maintaining a relationship with both parents following separation consideration must be given to the negative impact of a child's relationship with an abusive parent. Destructive male role models have a negative impact on children. Neglectful or abusive adult men portray and model violent images of manhood. As Silverstein (et al, 1999) point out, it is wrong to assume that any male role model is better than none.

6. Legal aid problems also put children at risk.

Federal Government's cuts to Legal Aid, which have occurred over the last few years have had a devastating impact on women's' abilities to protect themselves and their children within Family Court proceedings (Rendell et al, 2000). In Family Court matters, legal aid is mostly provided to women and children (Hunter, 1999). Parker (1999) states:

“...it is highly likely to be legally aided female clients who seek the assistance of the Family Court to protect children from experiencing violence directly or indirectly and to protect themselves from domestic violence. The less cautious approach of the Family Court since the Reform Act to matters involving allegations of violence, particularly at an interim level, combined with the restrictions to the provision of legal aid since 1996, have...created the potential for the interests of children involved in Family Court disputes to be severely compromised”(Parker, 1999).

7. Increases in litigation

A presumption of shared care will increase litigation in the Family Court. There will be further call on the limited amount of legal aid funding and as a result there will be an increase in self-representation in the Family Court. This will place further pressure on already limited resources and increase delays in Family Court proceedings. All of these factors will increase the already incapacitating burden of stress on children and their families.

8. Gendered Poverty will increase.

Being the resident mother of children is still the most likely predictor of poverty in Australia. In a 1993 study, husbands surveyed three years following their marital breakdown had returned to income levels equivalent to pre-separation while wives' income levels had dropped by 26% (Funder et al, 1993).

The Child Support system is already failing children and their carers. In 2000, a survey conducted of child support clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received. (Welfs et al, 2000).

Any arrangement of shared parenting is likely to impact on the financial well being of parents and children. It is predicted that there will be a rise in the poverty of single mothers arising from splitting the Family Payments Benefit and reducing child support. This resultant increase in poverty of mothers will increase the number of children also living in poverty.

A shared parenting presumption also reduces each parent's workforce capacity, given the necessity of the availability of both parents for childcare. It also will impact on each parent relocating. It reduces families' abilities to make their own decisions about parenting arrangements depending on children's needs, parent capacities, geographical distance between them, parent's work patterns, finances and housing.

Conclusion

The National Council of Jewish Women therefore calls for the scrapping of any proposal of presumption of shared parenting post separation. Instead we want the current serious problems in the family law system that we have highlighted to be dealt with urgently, for the safety and well-being of children and families. We call for:

- 1. Given the current serious gaps in child protection in Family Law as identified by the Family Court Magellan project and the Family Law Council we call for a change to the Family Law Act to prioritise the safety of children and women escaping violence/abuse as the threshold determinant of a child's best interests in cases involving allegations of violence.**
- 2. We call for the introduction of a rebuttable presumption of no contact where there are allegations of violence established on the balance of probabilities (similar to the NZ Guardianship Act). Persons found on the basis of civil proof to**

have used violence would have to show why they were safe before contact was allowed.

3. We call for adequate funds to be given to the relevant agencies to implement Project Magellan across the nation and/or to implement the recommendations of the Family Law Council 2002 report on Child Protection, including their recommendation for a national child protection system.

4. Given the absence of adequate legal aid for family law, particularly for cases involving allegations of violence, we call for the extension of legal aid to all parties to proceedings to resolve concerns raised regarding domestic violence and child abuse.

References

Australian Bureau of Statistics, (1996) Women's Safety Australia. Catalogue Number 4128.0. Canberra, AGPS.

Australian Bureau of Statistics, (1997) How Australians Use their Time. Catalogue Number 4153.0. Canberra, AGPS.

Australian Institute of Family Studies Divorce Transition Project. (2000) A presentation of unpublished work to the members of the *Family Law Pathways Advisory Group*, March 2000, Canberra.

Bauserman, R; 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, volume 16, no1, 91-102 at page 99.

Brown, T. (1997) New Problems, New Services, New research, New Outcomes, New Practice Models and Policies. A Paper presented by invitation to Professor Thea Brown to the 25th AASW Annual Conference, *Social Work Influencing Outcomes*, Canberra, September 1997.

Brown, T., Frederico, M., Hewitt, L. and Sheenan, R. (1998) Violence in Families. The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia. *The Family Violence and Family Court Research Program*.

Brown, T. Sheehan, R. Frederico, M. Hewitt, L. (2001) Resolving Family Violence to Children Family Violence and Family Court Research Program. Monash Uni. Vic.

Family Law Council (2002) **Family Law and Child Protection - Final Report**

K Funder, M Harrison and R Weston (eds), **Settling Down: Pathways of Parents After Divorce**,
Australian Institute of Family Studies (1993) 192, 194.

Hester, M. and Radford, L.(1996) **Contradictions and compromises: the impact of the Children Act on women and children's safety**, M. Hester, L. Kelly, J. Radford, (eds),
Women, Violence and Male Power, Open University Press, Buckingham - Philadelphia.

Hunter, Rosemary (1999) **Family law Case Profiles**. *Justice Research Centre Law Foundation of New South Wales*. June

Mullender, A. and Morley, R. (eds) 1994 **Children Living with Domestic Violence: Putting Men's Abuse of Children on the Child Care Agenda**, Whiting & Birch.
London

Parker, Georgina (1999) **The Family Law Reform Act 1995 – Has It Made a Difference Children and the Law 1999 Seminar Papers**

Pocock, Barbara (2003) **The Work/Life Collision**, The Federation Press, Leichhardt

Rendell, K, Rathus, Z., Lynch, A. (2000) **An Unacceptable Risk**. *Women's' Legal Service Inc*,
Brisbane

Rhoades, H., Graycar, R. & Harrison, M. (1999) **The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?** Interim Report. Uni. of Sydney.

Silverstein, L; **'Deconstructing the Essential Father'**, *American Psychologist*, Vol .54, number 6,
June 1999

Smart, C., **'Children's Voices'** Paper presented at the 25th Anniversary Conference of the Family
Court of Australia, July, 2001, available at <http://familycourt.gov.au/papers/html/smart.html>

Weston, R. and Smyth, B. (2000) **'Financial Living Standards After Divorce'** 55, *Family Matters*. 11

Wolffs, T and Shallcross, L **'Low Income Parents Paying Child Support: Evaluation of the Introduction of a \$260 Minimum Child Support Assessment'** (2000) 57 *Family Matters* 26.