Forbes, Bev (REPS)

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To: Committee, FCA (REPS)
Subject: Submission:child custody arrangements

West Heidelberg Community Legal Service submission

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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Dear Sir/Madam,

Inquiry into child custody arrangements in the event of family separation

I write on behalf of the West Heidelberg Community Legal Service in relation to the following terms of reference:

"(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 the 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."

Summary of conclusions

Although the Legal Service does not reject the concept of the rebuttable presumption outright, in practice it will have application in very few cases. This is because it cannot be applied unless certain preconditions have been met. Ideas for what these might be are set out below. By way of example one precondition would be effective and respectful communication between the parents.

Arguments for and against the assertion that the rebuttable presumption be applied in all family law cases are misconceived. This Inquiry is predicated on the paramountcy principle, that is, that the best interests of the child are paramount in proceedings. Any submissions which challenge the paramountcy principle are outside the jurisdiction of this Inquiry.

On balance, the Legal Service makes no recommendations in relation to the issues of whether legislation ought be introduced in relation to child contact with other persons such as grandparents; additionally the Legal Service does not have expertise in relation to the fairness or otherwise of the child support formula.

Best interests of the Child

The Legal Service notes that the concept of the rebuttable presumption is subject to the fundamental basis of Australian family law, which is that the best interests of the child are the paramount consideration. This is known as the paramountcy principle. The paramountcy principle is inconsistent with any concept of parental rights over children. In order to discuss the rebuttable presumption of shared residence it is necessary to examine other areas of law which utilise the concept of the rebuttable presumption.

Concept of the rebuttable presumption

The concept of the rebuttable presumption is well known to the law. A widely known example of a rebuttable presumption from the criminal law is in relation to the presumption of intention to trafficking drugs where a defendant is found in possession of more than a designated minimum quantity of the drug. An example from family law is the presumption of paternity where a child is born during a marriage. But in order to found the rebuttable presumption the party wishing to raise it must establish certain matters. The party seeking to invoke the presumption is required to put evidence before the Court to provide a sufficient basis for the presumption to be triggered. In a drug trafficking case the prosecution would have to produce evidence of the defendant's possession of the minimum quantity of the drug. In a paternity case the mother would have to produce evidence of marriage. If such evidence is put before the Court the presumption would be invoked with the result that the other party has the onus of rebutting the presumption.

Which party bears the onus?

Clearly the party who bears the onus is the party who wishes to achieve the result of equal time with each parent.

What evidence would trigger the presumption?

This is always a contentious question. In the context of drug laws, it is understandable that defence lawyers would argue that the minimum quantity should be a very high figure, to avoid the situation where a person who is in fact a heavy personal user is not charged with the serious offence of [deemed] trafficking. The Crown on the other hand would argue that the figure need only be larger than the small quantity typically used for personal use.

The Family Court should only consider a presumption in favour of shared residence in a case where one of the parties is actually seeking a shared residence order and has put evidence before the Court of a sufficient basis for the presumption. That evidence should include a detailed account of the role that each of the parties had played in the day-to-day care of the children up to the separation and of how shared residence would work in practice; for instance, the parties would have to live in close proximity to each other so that the children could conveniently attend this school, and maintain contact with their social networks was living with each parent. As stated above, effective and respectful communication between the parents would seem to be a prerequisite.

More complex proceedings

We interpose at this point that those cases in which the proposed rebuttable presumption is to be introduced are likely to be more complex than current proceedings. This is likely to increase costs to the parties. There is also likely to be greater demand on Legal Aid for the parties. Should the Court order that a Family Report be prepared in all such cases? Should these matters be left to the Court's discretion to determine on a case-by-case basis, or should be FLA be amended to include directions for the Court to follow in all cases?

The Interim Hearing

The Family Court ought continue to apply the principles it formulated in such cases as Cowling &Cowling 1998 FamCA19 to determine residence cases on an interim basis, that is pending the final hearing. At that stage of the proceeding, the Court affords what may be best described as an abbreviated hearing to the parties; it does not give the parties the opportunity to fully present their respective cases and does not embark on an inquiry as to who is telling the truth about disputed fax or allegations. The Court confines itself to the objective facts or the common ground that can normally be deduced from the affidavits of evidence that have been filed by the parties and, if available the

recommendations made by a Court counsellor or other expert contained in a Family Report. The Court's role at the interim hearing is to make the residence and contact orders that are most likely to promote stability in the lives of the children pending the final hearing.

The Final Hearing

Generally, orders made at the interim hearing remain in force until final orders are made the conclusion of the final hearing. In most residence cases it would be expected that the matter would not reach the stage of a final hearing for some 12 to 18 months after the interim hearing. It is generally recognised that the party with whom the children have been living pursuant to the interim residence order has a distinct advantage at the final hearing based on the status quo, that is, the Court is understandably reluctant to make an order the effect of which would be to remove the children from what by then would be regarded as a well-settled environment.

But before deciding what final residence order it should make, the Court must fully assess the merits of the respective cases that the parties have put before it. In most cases a Family Report would have been prepared by an independent expert, usually a Court counsellor or a child psychologist, and it would also be in evidence before the Court. In many cases an order for the appointment of a Child Representative will also have been made at the interim hearing and he/she would be expected to make an impartial or independent submission to the Court as to the matters in dispute. At the conclusion of the hearing the Court makes its decision on all of the evidence as to what residence order appears to it would be most likely to be in the best interests of the children.

Attitudes to the Family Court

It is a little difficult to generalise about the experiences of our clients. We are a generalist Community Legal Centre and we represent men and women in the Family Court. It is not uncommon to hear fathers expressing little confidence in the Family Court. These comments are usually made at the outset of the professional relationship. Equally, a number of mothers express the view that the father will manipulate proceedings and that their own point of view may not be listened to.

Very few clients express a desire for shared residence. As stated above, parents who are in dispute with each other in the Family Court do not usually think in terms of acting cooperatively with each other. In practice, parents cannot contemplate shared residence until they reach an awareness that they are able to act cooperatively together in the interests of the children.

Economic considerations may well militate against shared residence. It is well accepted that the overall cost of 1 larger family unit under one roof is cheaper than splitting it into two. A significant proportion of Legal Service clients are on very low incomes. In our experience poor financial circumstances limit the choice of people as to how they conduct their lives.

There are no doubt many arguments that shared residence will improve the lives of children; equally there are arguments that shared residence may damage children's lives. There is one thing that we are certain of: in the family law context, the concept "one size fits all" ignores social realities.

Yours faithfully,

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