

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 9

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Secretary: B. Forbes

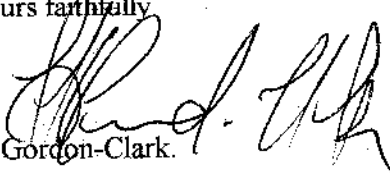
2 July 2003

Dear Sir/Madam,

I enclose a submission prepared by me in relation to the proposed enquiry into a rebuttable presumption of shared residence in relation to children under the Family Law Act.

I would be happy to expand on this further if the Enquiry so desires or to give evidence orally. I can be contacted by phone on (03) 9819 64 64 or by email on hgordonclark@impaq.com.au. I do not have a fax.

Yours faithfully


F H Gordon-Clark.



Parliamentary enquiry into aspects of Family Law

Submission.

This submission is submitted by Felix Henry Gordon-Clark of 12 Morang Road, Hawthorn, Victoria 3122 retired solicitor and current part time PhD student.

Qualifications. The author was a solicitor practising in Family Law matters in Melbourne and suburban areas for forty years commencing in 1961. Over that extended period he acted for both men and women who were involved in all types of disputes concerning residence (formerly custody), contact (formerly access) and relocation matters. He was the author of a number of articles published in the Law Institute Journal and Australian Family Law on aspects of Family Law. He worked with the late Senator Missen in 1974-5 when the original family Law Act was being debated in Parliament. His experience included disputes between both married and *de facto* parents both prior to and after the reference of *de facto* children's matters to the Commonwealth.

Introductory comments: Historic principles in matters involving children.

For approximately the past one hundred and fifty years and starting with decisions of the Court of Chancery in England, the principle that has been adopted and followed has been that in cases involving children "the welfare of the children is the paramount consideration". This principle has been variously expressed and currently finds expression in the Family Law Act, which now affects all Australian children whether born during a marriage or not, as "the best interests of the children".

It is submitted that that principle is the correct one and that all other considerations should be treated as secondary. When the Courts are required to decide on questions of residence or contact affecting children under the age of 18 the Courts should place the best interests of the children ahead of all other considerations and, to the best of their ability, make decisions that will enhance the children's well being. No limitations should be imposed whether, directly or indirectly, that have the effect of reducing the discretion of a Court in deciding what is in the "best interests" of the children in each particular case that falls for decision.

It is, of course, notorious that only approximately 5% of all cases involving children ever require a curial decision. The remaining 95% are resolved between the parties either with the help of mediators, lawyers or by the parties themselves. Resolution is assisted by the relevant laws being clearly stated and easily understood by the parents and those advising them.

Part 1. The concept of rebuttable shared residence.

The enquiry has been directed to consider whether the Family Law act should be altered to include the concept of "rebuttable shared residence". Under such a concept, if enacted, the parents of children who separate would be required to share the residence of their children unless reasons were shown to the Court that made such shared residence inappropriate. The burden of proving that shared residence should not apply would lie on the party who maintained that it was not in the best interests of the children. If a party failed to prove that "shared residence" was inappropriate the presumption would result in the residence of children being shared between the parents. Note it has not been made clear exactly how such sharing would occur nor for what length of time whether daily, weekly, monthly, six monthly or on some other basis.

It is submitted that the proposed concept is contrary to the "best interests" of the children, unworkable in most cases in practice and likely to engender a considerable increase in litigation, bitterness between the parents and legal costs. It may also have significant unexpected effects upon the ability of parents to relocate either as a result of employment or the formation of new relationships. Each of these questions will be considered in turn.

Unworkable in most cases: The concept of "shared residence" will only work in those cases where both parties continue to live in reasonably close proximity to each other. Frequently, for reasons of family, employment, or other factors, one parent will relocate either to another city, suburb, state or country. In such cases the physical distance between the homes of the two parents will render "shared residence" unrealistic and unworkable in day to day practice. Even if parents continue to reside in the same city the distances between two homes may render it very difficult for a "shared residence" arrangement to operate satisfactorily.

Increase in Litigation: the existence of a rebuttable presumption would require any parent who believed that "shared residence" was for any reason inappropriate or unworkable to prove facts, that the Court accepted, that demonstrated that "shared residence" should not apply. Failure to make good those proofs or failure to attend at the hearing for any reason would bring the presumption into play. The inevitable consequence will be that parents will be forced to go to Court to avoid the application of the presumption. There are already great delays in hearings and a large increase in litigation will only worsen an already bad situation.

Bitterness between parents: The need to establish why the presumption should not apply will lead to increases in allegations of impropriety, bad faith, revenge etc. The Courts will be inundated with claims by parents that the conduct, nature, or actual or apprehended behaviour of the other parent renders it inappropriate for a "shared residence" regime to apply. Each such allegation will require to be fully investigated to decide whether it has been correctly made or arises out of a spirit of ill will. Such allegations will only serve to further embitter parents making it less and less likely that agreement will be able to be reached. The nature of the allegations will, in most cases, be discussed with the affected children to their detriment.

Legal costs: A very large percentage of parents are currently unable to afford the costs of going to Court. Legal Aid is less and less likely to be available and when it is is

subject to severe financial limits. These facts will work against the interests of many parents causing them either to agree to "shared residence" or to try and represent themselves in complex and difficult proceedings. The additional strain on the Courts of self represented parties is already well documented.

Relocation Issues: Case involving questions of relocation either interstate or overseas are already common and cause vast problems to parents, children, and to the Courts. The incidence of such cases will increase in number if the presumption is enacted. In reality "shared residence" can only work if the parents live within a relatively small distance of each other and continue to do so. In particular, it is impractical and detrimental to the children for children to have to attend different schools depending upon which parent they happen to be then living with. A child's education will be adversely affected by constant changes in school leading to no continuity of education. This fact alone will result in the need for parents to remain in reasonably close proximity to each other if they are to share residence. There will also be the effects upon children's social, sporting and other lives which in each case will have to be weighed up and decided upon.

Any enforced ongoing close proximity, arising from a "rebuttable presumption of shared residence" will limit the ability of either parent to relocate either for reasons of employment, family, new relationships, or to sever that parent from an abusive or dangerous ex-partner. This consequence of the proposal does not appear to have been considered and requires detailed analysis. Is it in the "best interests" of children in effect to compel a parent to remain in close proximity to the other if such proximity will lead to abuse or physical or mental violence, stalking etc? There is a danger that the need for ongoing close proximity, resulting from "shared residence" will be used by some parents not to achieve the "best interests" of their children but to attempt to control the destiny of an estranged ex-partner.

Other Issues:

Assumptions appear to be being made that current non-resident parents are able to undertake the difficult tasks associated with daily care of children. In the present environment when people are expected to work longer and longer hours this assumption may not be justified. Will parents have either the necessary skills or the essential time needed to care for their children on a protracted basis as "shared residence" requires? Caring for children involves much more than providing them with companionship and love. Are parents prepared to make the sacrifices to their life styles that are demanded by having the ongoing daily or weekly care of their children?

It is claimed that "shared residence" reduces the incidence of divorce. Even if this is true the more important question is does this serve the "best interests" of the children? It is also said that children are best off being cared for by loving and united parents. This is no doubt true but in a world that is far from ideal parents will continue to have disputes with each other. It is a matter of doubt if children are advantaged by living in family backgrounds characterised by abuse, violence or other inappropriate conduct. Until a

major change occurs in the nature of human beings the problems confronting the Courts where children are to live and with whom will remain unresolved.

PART 2 Changes to Child Support Legislation.

Under current legislation the parent with whom the children do not reside is required to contribute a fixed percentage of before tax earnings to the other parent. Such contribution ranges from 18%, for one child to 36%, for four or more children. In cases where the paying parent is in employment the Child Support Agency can, and quite often does, serve notice on the employer requiring that employer to deduct a specified amount from the employee's wages and pay that amount direct to the Agency. By this means, which the Agency has the power to enforce in various ways, the working parent discovers that their wage packet, however arranged, is significantly reduced. Such enforcement frequently causes great hardship to the paying parent and, based on anecdotal evidence, can result in the paying parent being reduced to real poverty.

Reductions can be made to the basic assessment in circumstance where the children spend more than 109 nights pa with the paying parent, or in various other circumstances. The Enquiry needs to consider to what extent the present proposals for "shared residence" are, in whole or in part, driven by the desire of some paying parents to reduce the burden of Child Support payments. As the members of the Enquiry will be readily aware a great deal of bitterness and hostility has been aroused by the provisions of the Child Support legislation especially in those cases where a parent is required to make payments but is, for any reason, unable to have regular, or any, contact with the children for whom payment is being made.

It is submitted that great care needs to be taken to ensure that proposals for change are not simply driven either by a desire to reduce Child Support or to control the lives of estranged ex-partners. Anecdotal evidence suggests that there is a real risk that these concepts rather than the "best interests" of children may underpin the suggested alterations.

The Enquiry should consider whether the existing formulae continue to be appropriate and also what steps can be taken, if any, to modify the frequently dramatic consequences of the application of the Child Support system. In this connection threats, and acts, of suicide, or abandonment of employment can hardly be considered as beneficial to society ~~at large or to the effected children in particular.~~

RECOMENDATION

The present legislation does not require the Courts to consider expressly the possibility of a "shared residence" regime being appropriate. It is submitted that the Act should be amended by including a sub-paragraph to this effect as one of the matters which the Court is required to consider when deciding on what is in the "best interests" of children. Such a

requirement will compel the Court to give consideration to the appropriateness of such a regime.

There should be no change to the current principles of "best interests" being paramount. This enables the Court to deal with each case that comes before it on the individual facts of that case. No provision should be made for a "rebuttable presumption" whether for "shared residence" or of any other kind which has the effect of imposing a statutory regime or reduces the current discretion of the Court

GENERAL

It is acknowledged that some parents with whom children do not reside on an on-going basis feel very isolated and marginalised by their inability to have regular contact with their children. It is further acknowledged that such a situation can be detrimental to the children but it cannot be said that this is of universal application. On the other hand it cannot be denied that some parents use children's issues to continue or resume marital disputes about financial and other matters. Each individual case needs to be considered on the peculiar facts applicable thereto and presumptions of any sort will not operate in the "best interests" of children. Those interests are and should remain the guiding principle that applies to all children's disputes.

July 2003

Henry Gordon-Clark.