

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 38

Date Received: 28-7-03

Secretary:

From: Michael Green [REDACTED]
Sent: Monday, 28 July 2003 3:35 PM
To: Committee, FCA (REPS)
Subject: SUBMISSION ON CHILD CUSTODY ARRANGEMENTS

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

I attach my submission to the Committee. I shall be happy to give oral evidence to the Committee should that be deemed useful.

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Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry

1. It is submitted that radical legislative change is required in the area of child custody, namely the introduction of a rebuttable presumption of joint and equal parenting. Merely amending the **Family Law Act 1975** to provide for some vague concept of shared parenting is not enough to effect the cultural and legal revolution in attitude and practice that is necessary for the welfare of separated families, especially for the well-being of the children of separated parents.
2. The concept of a rebuttable presumption of joint parenting after divorce, on the face of it, appears so consistent with common sense and fairness, as well as being supported by current research on the well-being of children, that wholesale acceptance by the community would be expected. That it is still being resisted in some quarters calls for a close scrutiny of the objections that have been raised to such a change.
3. Objections to the proposal fall into several principal categories:

(a) *It won't work!*

This is the complaint of the Chief Justice of the Family Court, the judges, and most lawyers and professionals in the family law arena. It is submitted that it should be seen for what it really is, ie an emotional cry from people who do not *want* change. They believe that in their current practice they are doing the best that can be done in a difficult arena. They see it as being *too hard*. They maintain the myth that shared parenting only works in highly cooperative situations. Overseas experience, however, indicates that working joint custody programs can be implemented effectively even in conflictual situations¹.

Moreover, it seems illogical to argue that shared parenting plans will not work if they have to be imposed by the court. After all, even the present common form of contact – every second week-end, one or two nights in the “off week”, and half school holidays – demands some degree of cooperation, yet is customarily imposed by the court even in highly conflictual families.

(b) *Joint parenting is already provided for in the current Family Law Act 1975.*

This is not true. The joint parenting that is encompassed in the **Act** refers simply to the overall responsibility of both parents to contribute to the *care, welfare and development of the children*, and to the right of children to contact with both parents. The reality is that the Family Court has set up a *standard* for residence and contact after separation which is a *sole mother-custody plus increasing amounts of father-*

¹ Ahrons, C R, *The Good Divorce*, 1994 New York, Harper Perennial
Ricci, I, *Mom's House, Dad's House: Making Shared Custody Work (2nd Ed)*, New York Macmillan

contact model. It is a *bottom-up approach.* What a rebuttable presumption of joint parenting would do is establish a *top-down approach.* This will mean that instead of a contact parent being obliged to prove that more contact would be good for the children, the evidentiary onus will shift to the custodial parent who wishes to establish that this is not the case. This shift appears fair and reasonable and should result in less conflict and litigation.

(c) *Joint Parenting is more consistent with the interests of parents than of children.*

There is nothing wrong with this providing the parents are aware of what is good for their children. What the objectors are really saying is that a parent pressing for more contact is motivated only by self interest and is not concerned with what is best for his children. This is grossly unfair. The great majority of parents love their children and want what is best for them. Many contact parents are convinced that their children would benefit in a number of ways through spending more time with each of their parents, grandparents, and with others close to them. Indeed it could be argued that the current system of fortnightly contact is less demanding of the custodial parent than a shared parenting arrangement, and therefore is to that parent's benefit rather than to the children's.

(d) *A rebuttable presumption of shared parenting will place some children in abusive situations and is contrary to their welfare.*

This objection fails on at least two counts. Firstly it ignores the present procedures in the Family Court for dealing with allegations of abuse which impact on children. It is, of course, vitally important that the Court be given all necessary resources to enable it to deal promptly with allegations of serious abuse. In particular, the success of *Project Magellan* and the *Columbus Project* must ensure that these approaches are in place in all courts dealing with children's issues.

Secondly, it ignores the reality that men are not the only abusers of children. In terms of emotional and physical abuse and neglect of children, women are the more significant perpetrators². Many fathers face uphill battles in demonstrating to a court that more contact with him and less with their mother would be in the best interests of their children and good for the mother. Joint parenting would alleviate that problem.

(e) *Research on joint parenting arrangements fail to demonstrate advantages for children.*

This is short of the truth. Joint physical custody is still in its infancy in those American states where it has been introduced. Of the studies that have been done, some demonstrate significant benefits for children, others show none. However, no study has concluded that it is

² Adam Tomison, *Protecting the Children: updating the national picture*, National Child Protection Clearing House Newsletter, Vol4, No 2, 1996

seriously harmful for children of divorced parents. The most comprehensive and recent research, a meta-analysis of all the most important US studies, concluded that children in joint custody were better adjusted in terms of relationships, self esteem, emotional and behavioural attitudes than those in sole custody settings³.

(e) *Children need the stability of one home and one parent after divorce.*

This is nothing more than wishful thinking and unresearched guesswork. Physical stability is only one form of stability. The *stability* that is more important for the children of separated families is that which comes from the *security* of knowing that two parents and their associates love them, and that after divorce they will continue to preserve and develop lasting relationships with both of them. Children – especially young children – are immensely adaptable and capable of becoming comfortable in changing family situations. True it is that moving from one home to another involves organisational effort on the part of both parents and some inconvenience to the children. But the strength of their relationships with both parents is much more important for them than the inconveniences of living in two homes. The only known research into this aspect of shared parenting was canvassed by a US researcher who concluded that the *“first and most constant fear of children of divorce is one of loss.....A key element of the ultimate success in [the children’s] separation/individuation process is the security that the adolescent feels in knowing that their parents are present and available in the present and will remain present in a future new and different relationship”*⁴.

4. The above and other objections to a rebuttable presumption of joint parenting can be easily disposed of. However, it is submitted that at the root of most of the objections from feminist and women’s groups is a more persuasive fear, namely loss of family control and loss of money. It would assist rational debate on the subject if female protagonists were honest about this, because it is a reasonable proposition and one that should be addressed.

No one enjoys losing money. Joint physical custody will inevitably result in property settlements that are not as favourable to mothers as they are in sole-custody situations. Moreover, the burden of child support on fathers will be lessened and mothers will receive reduced amounts of money.

It is submitted that a more equal division of joint property must be seen as fair and long overdue. No matter how much or how little time children spend with a separated father, he needs to be able to establish comfortable accommodation for them. This becomes difficult

³ Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, Journal of Family Psychology, Vol 16, No 1, 2002

⁴ Jody Brandt Grotzinger, *Dual Household Joint Custody and Adolescent Separation-Individuation*, Dissertation presented to the Faculty of the Californian Graduate Institute, July 2002, p 97

for a man on an ordinary salary if he is stripped of two thirds of his assets. In a city with real estate values as high as Sydney, it is often impossible.

The question of recurrent child support is more difficult. There are many single mothers who live life very much *on the edge* and who need substantial support. Their former partners have either disappeared or are unemployed. Poverty is a real concern for both mothers and children. It is encouraging that this Committee will examine the policies and practices of the Child Support Agency. But it is submitted that other ancillary state and federal financial benefits should also be considered in order to discover if they are adequate to assist those families in real need.

Many separated mothers enjoy the feeling of *control of the family* that sole-mother custody gives them. On the other hand, separated fathers lament their loss of control and lack of influence in their children's lives. His complaint is that, despite the provisions for joint parental responsibility in the **Family Law Act 1975**, a custodial mother has all the power and he is rarely consulted on major decisions regarding the children. It is submitted that a more equal form of joint parenting would lead to a healthier balance of authority in the family, and would force separated parents to adopt more cooperative practices. This was demonstrated in the Bauserman analysis⁵.

5. It is submitted that the problems highlighted in the preceding paragraph are a result of the failure of mothers, fathers, the courts and professionals to recognise that divorce changes the family once and for all. It changes the rules, the patterns of parenting, the parenting roles. Attempting to impose a sole-custody, one-home situation on a separated family results in overstressed mothers, disaffected fathers and disgruntled children. The fact that, up to the time of separation, the mother was the nurturing parent and the father the financial provider, is no longer a valid model for the future separated family. If it is going to work in a fashion which allows all parties to survive and thrive, then the mother will have to surrender some parenting function and contemplate supporting the family in different ways including financial. The father will have to take on a more *hands-on* parenting role even if this means diminishing his time in the workplace. The children have to become accustomed to changing family relationships and to the physical dislocation that the fostering of these relationships necessitates.

Recent research reveals that the Australian community is ready for these changes. This research shows that substantial proportions of separated children, fathers and even mothers are in favour of

⁵ Op cit, see footnote 3

increased contact between the children and separated parents⁶. Overseas research points in the same direction⁷.

6. The proposed change in the law is good and necessary. It is good because it is fair to children and parents. It is necessary in order to engineer the massive cultural change in attitudes to family relationships after separation and divorce. Martin Luther King said: "*Law does not change attitudes but it changes behaviour.*" If there is ever a case where a change in law *must* be accompanied by a change in attitude, it is this one. Merely changing to a rebuttable presumption of shared parenting will not effect the change in parenting practices and attitudes after divorce that is in the interests of children. It will simply create more litigation as its detractors are suggesting.
7. The change in legislation must be accompanied by the following:
 - a. **Public education** on the value of sensible, cooperative parenting after divorce.
 - b. Post-separation **psycho-educational programs** for mothers, fathers and children. In the case of separated parents, intensive 8 to 10 hour programs should be mandatory. These should be conducted by approved agencies and should be directed towards the inculcation of healthy attitudes towards parenting after separation.
 - c. A **new model** or standard promoted by the Family Court as the ideal arrangement for the separated family, namely the two parents living in homes not too distant from one another, and the children moving easily from one home to the other, maintaining their sense of the community in which they were living⁸.
 - d. Reduction in and, where possible, **removal of litigious practices** in our approach to post-divorce family arrangements, including child contact and financial support, and property division.
8. The above changes have already begun to occur in our community despite the prevailing family law system. There has begun *an outbreak of common sense*, through which many separating couples are saying that they are determined to be sensitive to their children's needs and to engineer more sensible arrangements for their families. This change in attitudes and practices will be facilitated by the proposed change in the law and by the strategies suggested above.

A whole generation of children will be the beneficiaries.

⁶ Patrick Parkinson & Bruce Smyth, *When the difference is night and day: some empirical insights into patterns of parent-child contact after separation*. Paper presented at 8th Australian Institute of Family Studies Conference, Melbourne, February 2003

⁷ Carol Smart, *From Children's Shoes to Children's Voices*, Family Court Review, Vol 40, No 3, July 2002

⁸ Michael Green, *U v U- You v Me- Us v Them*, Paper presented at 8th Australian Institute of Family Studies Conference, Melbourne, February 2003