LEGAL RESOURCES CENTRE WOMEN'S

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House of Representatives Standing Committee on Family and Community Affairs

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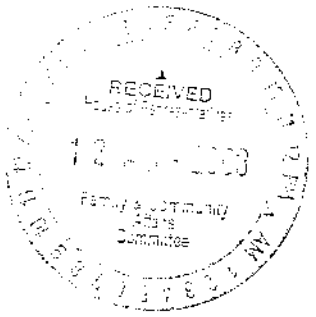

House of Representatives
Standing Committee on Family
and Community Affairs
Parliament House
Canberra ACT 2600
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Dear Committee Members

Re: Inquiry into joint residence arrangements in the event of family separation

Women's Legal Resources Centre (WLRC) is a community legal centre, specialising in women's and children's legal issues. WLRC provides free legal advice for all women across NSW through telephone legal advice services (with a specified advice line for indigenous women) and legal outreach services for women in Western Sydney.[1] The Centre also provides community legal education programs to women and community service providers. In 2001 WLRC was contacted by over 10 000 women for legal advice, information and referrals. Our service targets disadvantaged women and children including indigenous women, women from non-English speaking backgrounds, rural women and women with disabilities. The Centre's submission reflects the realities of women's lives and advocates, in particular, for the interests of our target groups.

The bulk of the Centre's work is in the area of family law and violence against women and children. Since our establishment in 1982, about 75% of the legal assistance offered by WLRC solicitors has been related to family law. A substantial number of clients have experienced sexual and physical violence from men.

[1] at Campbelltown, Fairfield, Penrith, Blacktown, Liverpool and Wyong.

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We have structured our submission according to the Committee's terms of reference.

(a)(i) Should there be a presumption that children spend equal time with each parent?

We strongly oppose the implementation of a legal presumption that children spend equal time with each parent.

1. The Current Legislation already provides for shared residence

The *Family Law Act* (the Act) clearly emphasises the rights of children including the right to know and be cared for by both parents[2]. The Act further provides that both parents are to share responsibilities towards children, a duty which is not affected by their separation[3].

It is significant that the Act clearly encourages parents to negotiate arrangements regarding children. In the event that parents cannot agree the Family Court (the Court) focuses on the best interests of the child as its paramount consideration[4]. To aid the Court in its decision making process a fairly extensive list of factors are looked at in assessing each individual case on its merits[5].

The legislation clearly outlines this list of factors considered in makings it determinations. We argue that the Act already allows for shared residence where it is in the best interests of children and suits the individual family. We also note that the Act also has mechanisms such as the imposition of penalties to safeguard compliance with orders by either parent. Consequently, it is unnecessary to implement a legal presumption for joint residence.

A legal presumption of joint residence will undoubtedly effect the Court's discretion. We submit that there should be substantial and well grounded reasons and research evidencing the need for such a presumption. In 2000-2001 only 2.5% of orders made by the Court were for joint residence[6]. Based on these figures we argue that such a presumption would not, on its face, reflect any current social trend or inclination. We also note that little is known of how well shared care really works.[7] It represents an enormous shift in Australia's family and social policy.

The Act encourages parents to share duties and responsibilities towards their children. We are not opposed to joint residence as an alternative used by parents in looking after their children. In some instances, shared residence may work well and is in the child's interests. Yet, however attractive a presumption for joint residence is, we do not agree with it being imposed on people. It undoubtedly will become problematic as the majority of cases going to Court are those where parents cannot agree or collaborate on arrangements. Consequently, any imposed joint residence will be difficult in these instances as it would require continual flexibility, good communication and consistent commitment on

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[2] Section 60B(2) of the Family Law Act 1975 (FLA)
[3] Section 61C(2) of the FLA
[4] Section 65E of the FLA
[5] Section 68F(2) of the FLA
[6] Residence Order Outcomes 1994/1995 to 2000/2001, Family Court of Australia, available online at www.familycourt.gov.au/court/html/residence_orders.html
[7] B Smyth, C Caruana & A Ferro, *Some whens, hows and whys of shared care*, Australian Institute of Family Studies, (2003)

the part of both parents. This is not a reality for many separated parents and a presumption of joint residence will not make post separation parenting between these parents more amicable.

2. Best Interests of the Child Should Remain the Primary Consideration

A presumption of joint residence appears to suggest a bias towards the interests of the parents and their rights. This is clearly contrary to the spirit of the current legislation and its central theme of paramountcy of the child's best interests.

The majority of parents negotiate arrangements without recourse to court. In most cases, mothers are the primary care givers both prior to and after separation[8]. Statistics however show that residence orders for fathers are increasing[9]. It is likely that as more fathers share in the primary care of their children before separation that they will also, for good reason, share residence of their children after separation.

A practical effect of the presumption would be that parents will need to maintain two separate and fully adequate homes for the children in close geographical proximity. This, along with any consequent need for flexible work arrangements, may detrimentally impact on the financial resources of both parents and children. Children will also have to cart things like school equipment, uniforms, other clothing and games from one house to another on each change in residence. Clearly this could be quite disruptive and unfair on some children. Children may also experience adjustment problems.[10]

We also question how the complexity of individual arrangements will be catered for. Difficulties will be experienced with remarriage or repartnering where there are several children each subject to the joint residence presumption.

Of relevance would be any long term effect on children who move from one house to another. We stress that joint residence may work in some instances. We are concerned however about the effect of the imposition of such a broad sweeping presumption on those children that are subject to joint residence arrangements. For example, one effect may be the experience of unnecessary pressure, guilt, or of feeling "torn" if not spending "equal time" with both parents, or if the child wishes to then establish him or herself in the one stable environment[11]. Children also may express their own desire for flexibility, especially as they get older[12]. These wishes and preferences will need to be taken into account. Above all else, the best interests of the child must be the primary consideration in any decision made.

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[8] Australian Bureau of Statistics, *Australian Social Trends 1999 Family-Family Functioning: Looking after the Children*, AGPS, Canberra

[9] 19.6% in 2000-2001 up from 15.3% in 1994-1995, Residence Order Outcomes 1994/1995 to 2000/2001, Family Court of Australia, available online at www.familycourt.gov.au/court/html/residence_orders.html

[10] Bauserman R, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, in Journal of Family Psychology, 2002, Vol 16, no 91-102, at p99

[11] A Wade and C Smart, *As Fair as it can be? Childhood after Divorce*, Centre for Research on Family, Kinship &Childhood, University of Leeds, 2002, Bauserman R, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangement*, at p99

[12] Smyth B, Caruana C & Ferro A , *Some whens, hows & whys of shared care*, at p6

3. Quality Time not Equal Time with Each Parent

We do not agree with the introduction of a presumption on the basis of equal time spent with both parents.

Ultimately, it will be difficult to measure what "equal time" entails and what will happen in the event that arrangements have to be changed or altered due to unforeseen circumstances. We also submit that it is not time which is of essence in parenting but the quality of the relationship. We also question how much a child's living arrangements will depend on the commitments and needs of parents if the basis of a presumption is on an "equal time" footing.

4. Rebutting the Presumption where there's Family Violence

We anticipate that family violence will be a ground used to rebut a presumption of joint residence. A majority of our clients are women fleeing family violence and abuse.

If there were a presumption of joint residence on separation, women escaping family violence will be forced to live in close proximity to perpetrators. Many women will be pressured into parenting arrangements (such as joint residence) which are not necessarily in the child's best interests. This is the experience of many women fleeing violence. As Legal Aid grants are difficult to obtain and capped in any event, many women may lack legal representation and the financial resources to litigate to rebut this presumption in court[13].

It is dangerous and unsafe to impose frequent contact between parents in these situations. It is well documented that violence and conflict increase after separation[14]. Exposure to conflict would be greater in joint residence situations[15]. The effect on children who have been subject to family violence or abuse to then witness continual and regular high conflict change overs will undoubtedly be traumatic.

Simply having family violence or abuse as a factor to rebut this presumption will clearly not be sufficient. Currently, family violence and abuse are difficult to prove in Court and may not be given satisfactory weight[16]. Extensive evidence is required to corroborate and substantiate violence and abuse. Difficulty also lies with clients who are unable to access legal aid or are self represented.

> **Case Study**: Client separated from her husband seven years ago due to physical and emotional abuse. There are three children of the relationship. Client works part time and is

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[13] see also Kaye M, Stubbs J and Tolmie J, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence*, Working Paper No.4, 2003; Family Law & Social Policy Research Unit, Griffith University, at p104

[14] Australian Bureau of Statistics, *Year Book Australia 2002 Crime & Justice Special Article - Violence Against Women*, AGPS, Canberra

[15] Bauserman R, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review* at p92

[16] Kaye M, Stubbs J and Tolmie J, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence*, at p109

unable to obtain legal aid assistance. The ex husband has continued to harass the client after separation. At one stage the client decided to obtain an Apprehended Violence Order however did not proceed as she feared there would be a backlash from the ex husband. The client was coerced into "week about" shared care arrangements after separation. Difficulties have been experienced with change overs, the undermining of decisions made by the client and manipulation by the father to get the children "on side". Children have also expressed interest in living in one house only. Client would be too fearful to rebut a legal presumption and would have few legal resources available to do so.

Case Study: Client was married to husband for 15 years. There are two children of the relationship. During this relationship the mother and children were subjected to physical abuse and verbal abuse. The client separated five years ago. Since this time, there have been incidents of stalking. The client and her children have a current Apprehended Violence Order (AVO) against the defendant. The defendant has made various attempts to revoke and appeal this AVO, without any reasonable grounds. We question the likelihood that vexatious litigants, such as this defendant, will use the court process to control clients if joint residence or equal time becomes a presumption.

Case Study: The client has limited English skills, has been a victim of domestic violence and does not have the funds to employ a solicitor to effectively respond to her matter in the Family court. Client has exceeded her legal aid cap. Her ex husband applied for residence of their child. Even though there had been substantial disclosures of sexual abuse to the client which were validated by a hospital report it was difficult to bring this evidence to court as a self represented litigant with limited English skills. Clients would struggle as self represented litigants to bring evidence proving risk of sexual abuse to rebut a presumption.

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

The legislation currently provides that parties interested in the care, welfare and development of children, such as grandparents, can apply for parenting orders and we are opposed to further changes in this area[17]. Such applications would be subject to the same determinative factors as are applications by parents. We therefore see no reason why additional circumstances should be explored given that the emphasis may then become on the rights of interested parties, rather than the rights of children.

[17] Section 65C of the FLA

(b) where the existing child support formula works fairly for both parents in relation to their care of, and contact with their children.

We do not have the expertise to comment on the current child support formula.

We are however opposed to the connection between the payment of child support and contact. Obviously, child support is there to provide adequate support for children and should not be dependent on how much contact a paying parent has or has a right to. Once again, it is legislatively enshrined that a child has a right to contact with parents. The payment of child support is an issue separate to and independent of this contact.

Should a presumption of joint residence be established we are concerned that some of our clients and their children may be adversely affected by any subsequent changes to child support payment. Single mothers head between 75-85% of single parent families.[18] Being the resident mother of children is the most likely predictor of poverty in Australia. Clearly, the reduction of necessary payments to support and adequately look after children is alarming and will have a detrimental effect on their standard of living. We also note that it is only one parent who is eligible for the Parenting Payment (single).

In most cases, resident parents are mothers who have been left to look after children (with little or no financial support) and have to rely on social security and child support payments to make ends meet. As it is, expenses are quite hefty and include every day living and household expenses, bills, rents and school fees. Making ends meet usually means that these parents are living well below a reasonable standard of living.

If anything, child support and social security payments should be increased to adequately allow for necessary and reasonable everyday living expenses, as these are generally the only payments or financial support a resident parent receives. We also note client difficulties include inadequate action being taken by the Child Support Agency in collecting child support from non-paying parents and instances where a low rate of child support has been assessed due to misrepresentation of income by paying parents. It would be more worthwhile making these types of issues the subject of inquiries rather than the fairness of child support in relation to contact.

> **Case Study:** Client separated from husband one year ago. There are three children of the relationship, one of which is unable to verbalise and has high support needs due to disability. This child, now 15 years old, requires constant support in his personal care. The client has always been the full time carer of this child. The father provides minimal child support and the mother is heavily reliant on her carer's payment to support the family. The father has expressed no interest in contact with this child. In the event that child support is connected with contact we suspect that clients may find uninterested parents having contact in order to reduce their child support liability, or for other reasons contrary to the best interests of the

[18] Australian Bureau of Statistics, *Labour Force Status and Other Characteristics of Families,* Australia, Cat No 6224.0, AGPS, Canberra, 2000

child. Furthermore, in the event that joint residence is granted, both households will need to be adequately set up and furnished for this child. The mother has always been the primary care giver and we therefore question the father's initial ability to be able to care and look after this child.

We oppose the proposal for a presumption that children should spend equal with each parent. Clearly such arrangements can be negotiated or ordered without the implementation of any presumption. We are also extremely concerned about a possible connection between contact and child support and submit that this should not be the subject of this inquiry.

Yours faithfully
Women's Legal Resources Centre
Per:
Catherine Carney
Principal Solicitor