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

House of Representatives Standing Committee on Family and Community Affairs	
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Challenging a legal presumption of joint residence

The Lismore Women's and Children's Refuge is opposed to a legal presumption of joint residence for separating families. Such a presumption represents a dangerous shift in the government's family policy because it has not arisen from evidence-based research. We object to a presumption which moves away from emerging evidence and legislation being introduced internationally that presumes no contact in cases where family violence is present.

We would advocate instead the refinement of existing legislation to best serve the interests of children, and protect them from the risk of family violence.

We urge the committee to take this opportunity to further protect children from fear and violence, and ensure parenting arrangements maintain the best interests of the child.

We would welcome the opportunity to participate in forthcoming public hearings for this Inquiry.

Current Family Law

We understand that currently there is no principle of family law that advantages either parent in family law proceedings.

We understand that where parents cannot agree on arrangements for the children and the Family Court has to decide, it is bound by law to look at **the best interests of the child** as the paramount consideration.¹

The Family Law Act sets out four clear principles about parenting of children namely:

¹ see section 65E of the FLA

- children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- children have a right of contact, on a regular basis, with both their parents, and with other people significant to their care, welfare and development; and
- parents share duties and responsibilities concerning the care, welfare and development of their children; and
- parents should agree about the future parenting of their children.²

We understand that the Court must also consider a number of other factors³ such as:

- **any expressed wishes of the children**
- the nature of the relationship of the child with each parent
- the likely effect of any changes in the child's circumstances
- the practical difficulty and expense of a child having contact with a parent
- the capacity of each parent to provide for the needs of the child
- the child's maturity, sex and background, including issues of race, culture and religion
- **the need to protect the child from physical or psychological harm**
- the attitude to the child and to the responsibilities of parenthood
- **any family violence which has occurred.**

The safety of children must be paramount in determining post-separation parenting arrangements. It is not in the interests of a child to have presumed contact, let alone shared residency with both parents, if violence or the potential for violence is present.

It is our experience at Lismore Women's and Children's Refuge that it is almost never in the best safety interests of the child to be in unsupervised care with a father who has perpetrated violence against the children or witnessed violence against their mother.

The experience of domestic violence

We support the following statements made by Domestic Violence and Incest Resource Centre (Victoria):

² see section 60B(2) of the FLA

³ see section 68F of the FLA

- Australian and international research shows that violence can increase following separation. Legal disputes over parenting often occur at this time, and they place women and children at increased risk of violence.⁴
- There are already significant concerns that, within the existing framework, the Family Law Act privileges the importance of children maintaining contact with both parents – even in cases where there is clear evidence that one parent is perpetrating violence against a child.⁵
- Significant potential exists for perpetrators of violence to use the presumption of shared residency to further harm women and children. Recent research indicates that it is more common for a violent parent to seek custody than a non-violent parent.⁶

The proposed legislation is based on a notion of presumed shared residency. This would require women to prove why joint residency should not occur in cases where an ex-partner has been or continues to be violent.

- Such an arrangement is at odds with measures being taken in Australia and overseas to work from a presumption of no contact for a perpetrator of violence.⁷
- Because shared parenting is not the norm for parenting styles prior to separation, it furthers an adversarial relationship between parents, each of whom will have to rebutt the other's capacity to care for the child. In cases where domestic violence and/or child abuse is present, this has potentially dangerous consequences.

There are several concerns about the ways in which this rebuttal impacts unfairly on women and children:

- Women leaving violent relationships fear the escalation of violence towards themselves and their children. They often experience harassment, intimidation and threats from their ex-partner in relation to access to children.

⁴ Jaffe, P., Lemon, N., and Poisson, S. (2003), *Child Custody and Domestic Violence*, Sage Publications, Thousand Oaks, Ca, p.9

⁵ Kaye, M., Stubbs, J. and Tolmie, J. (2003), *Negotiating Child Residence and Contact Arrangements Against A Background of Domestic Violence, Research Report, No. 1*, Griffith University, June 2003, p.149

⁶ Seigmann, L. (2003) 'Batterer as Parent: A Review', in *DVIRC Newsletter*, Issue No. 3, Spring Edition, Forthcoming.

⁷ Kaye et al, p.149

There is an increased risk of violence and homicide at this time; and children are at risk of violence, abduction, sexual assault and coercion.⁸

- Requiring women to counter a presumption of shared residency may further discourage them from leaving violent relationships for fear of their children's safety should joint residency be enforced.
- Women leaving violent relationships may also be involved in additional and concurrent legal action, such as seeking Intervention Orders (Victoria) and Apprehended Violence Orders (NSW). For many, their experience of the court process is, in and of itself, stressful and intimidating and it can be negative. This places them at a great disadvantage in negotiating legal processes and in providing clear evidence for rebutting a notion of joint residency.
- Women are more likely than men to experience financial hardship following divorce.⁹ When women separate from violent men, their access to pursuing, challenging and appealing child support is hampered by the fear that if fathers pay maintenance, they will want access to children; and by the threat of violence and need for distance from the perpetrator.
- Many women leaving violent relationships are in financial hardship, not to mention unstable housing, employment, and the difficulties associated with relocation. The cost of mounting a legal challenge to shared residency is prohibitive for these women. This means that self-representation will increase, at a time when women may be least able to find the emotional, cognitive and financial resources to successfully represent themselves.
- Domestic violence is a greatly under-reported crime. Victims fear being disbelieved and many have experienced being disbelieved. Those women who have avoided formal reporting processes when dealing with the violence – e.g. by avoiding police, medical assistance, and so on – have a lessened capacity to clearly demonstrate why a perpetrator should not have shared residency.
- In cases where violence is present in a family, children too are likely to be required to demonstrate a perpetrator's incapacity to parent. This is a profoundly difficult position for any child.

⁸ Kaye et al; Judicial Council of California Administrative Office of the Courts, Centre for Families, Children and the Courts (2003), *Parenting in the Context of Domestic Violence*, March, p.9

⁹ Weston, R. and Smyth, B. (2000), 'Financial Living Standards after Divorce', *Family Matters*, Australian Institute of Family Studies, No. 55, Autumn

In the time following separation, children are particularly vulnerable. They often feel torn between their parents. Any amendment that requires children to be further embroiled in conflict between their parents by having to refute a legal presumption of shared residency, particularly when one of the parents has a history of violence, is in and of itself harmful. Furthermore, 'children who are obligated to have visitation with a batterer over their objections are likely to interpret the courts actions as approving of the father's violence and disapproving of the child's wish to avoid his abuse'.¹⁰

Even when women can supply evidence of violence, research suggests that it may not be considered relevant when determining issues relating to custody. In domestic violence cases, judges are in a difficult position. They often believe that children benefit from a relationship with both parents, no matter if one parent is abusive. The imperative to maintain a notion of 'fairness' can, at times, override what is in the best interests of a child. In fact, taking serious and full consideration of the impact of violence on children might be unfair to a parent, but it is just and proper when considering what is best for a child.

- In cases where family violence exists, there are serious concerns that a presumption of joint residency opens the possibility to perpetrators of utilising legal avenues to continue to threaten, harass and abuse their ex-partners and children. It is not uncommon for violent men to threaten to seek greater access to their children.

It is never in a child's best interests to live with a violent parent.

Our arguments against a joint presumption of shared residence thus include:

- We do not support a legal presumption which privileges the rights of parents over the rights of children.
- We do not support a legal presumption which ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, protecting the child from physical and psychological harm, and family violence.
- We do not support a legal presumption which will place women and children who are victims of violence at increased risk of further violence. The presumption will force some children to live with violent fathers and will force mothers to have to regularly negotiate with and

¹⁰ Bancroft, L. and Silverman, J. p.49

be in the presence of violent ex-partners. It will almost certainly endanger the physical and psychological well-being of some children.

- The child support consequences will force single mothers, already amongst the most impoverished group in the community, to plummet further into poverty and consequently increase the number of children also living in poverty.

Conclusion

The Lismore Women's and Children's refuge objects to a presumption of joint residency in the light of the damaging effects of domestic violence.

Trends in other jurisdictions aim to move away from notions of shared residency in such cases, to one of 'no contact' or 'clear and limiting parenting plans.'

Rather than working from a position of presumed joint residency, we advocate that, in cases where domestic violence has occurred, there be a rebuttable presumption of no contact.

The California Family Code (section 3044) provides an example of this proposal. It states that:

there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child.¹¹

This Code outlines some considerations in assessing whether a perpetrator of domestic violence has overcome this presumption. Consideration is given to whether the perpetrator:

- 1) has demonstrated that giving sole or joint physical or legal custody of a child to him is in the best interest of the child;
- 2) has satisfactorily completed a batterer's treatment program that meets the criteria outlined in subsection(c) of section 1203.097 of the Penal Code;
- 3) is on probation or parole, whether he is restrained by a protective order granted after a hearing, and whether he has complied with its terms and conditions; and
- 4) has committed any further acts of domestic violence.

¹¹ Judicial Council of California, p.4

The Lismore Women's and Children's Refuge, like DVIRC, supports the 1990 US Congress Resolution, which argues that:

for the purposes of determining child custody, credible evidence of physical abuse of a spouse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse ... There is an alarming bias against battered spouses in contemporary child custody trends such as joint custody ... Joint custody guarantees the batterer continued access and control over the battered spouse's life through their children ... Joint custody, forced upon hostile parents, can create a dangerous psychological environment for a child.¹²

In cases where violence or the threat of violence is present, a presumption of joint residency is detrimental to children.

In such cases, it would be more appropriate to begin from a presumption of no contact, and from there the perpetrator must demonstrate their capacity to parent without violence.

'Parental rights' must not undermine the right of a child to live safely and securely.

We urge the Standing Committee to act responsibly and "in the best safety interests of the child".

Regards,

KABird

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¹² Morella (1990), cited in Jaffe et al, p.19.