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August 6th, 2003

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600
Australia
Email: FCA.REPS@aph.gov.au

House of Representatives Standing Committee on Family and Community Affairs	
Submission No:	1117
Date Received:	11-8-03
Secretary:	

Dear Secretary,

RE: Inquiry into child custody arrangements in the event of family separation

This submission addresses parts a) (i), (ii), and b) of the terms of reference as follows:

- a) given that the best interests of the child are of 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 a 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
- c) with the Committee to report to the Parliament by 31st December, 2003

Context of the Council of Single Mothers and their Children (Qld) Inc. (hereafter CSMC) submission to the inquiry.

CSMC was formed in 1999 after recognising there was an absence of a service in Queensland to assist the states 180,000 approximately single mothers and their children (ABS, 2002). On the Gold Coast, where CSMC is based, 28% of all families are single parent households, and thus in conjunction with other service providers¹ the need for an organisation to respond specifically to single mothers and their children was acknowledged as vital.

From the outset it was brought to CSMC's attention that while there were four (4) payer/fathers parents groups represented on the Child Support Agency's Regional Registrars Advisory Panel, in twelve years there had not been a single mothers group in Queensland represented on the panel. Hence, their experiences and concerns about child support issues went unheard at government level.

¹ Lifeline, Family and Friends Parent Aid Program, Centcare, Community Centres, Trinity Family Support Service etc.

CSMC is run by volunteers who are single mothers, and (as yet) has received no government funding besides small donations from local councillors. CSMC remains under-resourced, and understaffed due mostly to the fact that single mothers are extremely limited in both financial and time means, and are busy enough caring for their families after their paid work or study responsibilities. This is brought to the Standing Committees attention, as a relevant factor to why it is not only difficult for mothers to respond to such an inquiry (or to lobby politicians), but particularly in the time frame given (approximately 6 weeks).

Case Example:

One of CSMC's volunteers has two children (one aged 23 months). Her daily work load includes being a mum and home manager, a University student (full-time load, final year), receiving occasional contract work, as well as putting in approximately 14 hours per week as a volunteer. The father of her children has chosen not to have contact (despite the mother requesting him to have contact), as he has stated to her that family life just "doesn't suit" him.

In the real example above, the mother is highly motivated both personally and for the benefit of her children/family. Their situation is not characterised by high conflict, yet the father is not motivated or interested in being a father to his children.

Many of CSMC's members are constantly disadvantaged as they must deal with vindictive, abusive, malicious, litigious ex partners, and must continually prepare for Family Law Court hearings or trials, and/or become investigators on behalf of the Child Support Agency to provide evidence for them to pursue non-compliant or evasive 'payer' parents. They are not able to pursue certain opportunities available to them due to this time consuming unpaid work (with the psychological stress and strain it creates) that they are often compelled to engage in (on top of their regular commitments). Many mothers are completely exhausted, depressed and financially drained due to these processes, which is often the desired intent.

CSMC notes that particularly in the print media, there has been a bias presentation of the factors surrounding a rebuttal presumption of joint custody, with predominantly contact parent opinions and arguments presented, as in the examples attached (photocopies). CSMC questions the influence of this on public and official opinions, and their subsequent ability to arrive at a comprehensively informed decision on the matter. Hence, CSMC raises considerable concern over the issue being partially pre-determined.

Thank you for your consideration of the material attached. CSMC would be glad to provide additional information to assist in the Committees inquiry, should further comment or data on the issues raised in this paper be required.

Yours Sincerely,

Anita Martin
Executive Officer
Council of Single Mothers and their Children (Qld) Inc.

- (a) **given the best interests of the child are the paramount consideration:**
 (i) what other factors should....

CSMC supports positive shared parenting as experienced by approximately 3% of children in Australia in 1997, and notes that the US research indicates that such arrangements are based on high levels of cooperation, low conflict parental relationships prior to separation, as well as a number of similar demographic and shared parenting style factors.²

The present Family Law legislative framework provides for the above shared parenting arrangements to be made between parties by consent. Where parents can not agree on a workable arrangement, the court currently makes residence and contact determinations based on **the best interests of the child as the paramount consideration as set out in the Family Law Act Division 6, Section 65E.**³

It is estimated that 50% of separating parents do not need to seek the assistance of the family court in making residence and contact arrangements. Of the contested residence and contact cases, 95% obtain parenting plans and orders by consent prior to trial according to the Chief Justice of the Family Court.⁴

The 5% of contested cases decided on by the court are based on the underlying principles as set out in Section 60B(2) of the Family Law Act, which begin with the statement that:

“The principles underlying these objects are that, **except when it is or would be contrary to a child's best interests:**”

The best interests of the child as set out in Division 10, section 68F of the Family Law Act, are included as follows for clarity:

FAMILY LAW ACT 1975 - SECT 68F⁵

How a court determines what is in a child's best interests

(1)

Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).

(2)

The court must consider:

(a)

any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b)

the nature of the relationship of the child with each of the child's parents and with other persons;

² Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0 AGPS, Canberra, 1997. Also Bauserman, R., “Child Adjustment in Joint-Custody Arrangements: A Meta-Analytic Review”, *Journal of Family Psychology*, 2002, volume 16, No 1, 91-102.

³ See section 65E of the Family Law Act

⁴ The Honourable Justice Alastair Nicholson AO RFD, Chief Justice, Family Court of Australia, *Court Management of Cases involving Child Abuse Allegations..* Keynote address to The 7TH Australasian Conference on Child Abuse and Neglect, 19 OCTOBER 1999, PERTH, retrieved from:

<http://www.familycourt.gov.au/papers/html/nicholson8.html>

⁵ Commonwealth Consolidated Acts, retrieved from

http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s68f.html

- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
- (i) either of his or her parents; or
- (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
- (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
- (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the court thinks is relevant.
- (3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

CSMC opposes a rebuttal presumption of joint custody as being in direct contradiction to the paramount consideration and underlying principles of a child's best interests, as it renders a parents rights and interests, disregarding consideration of any other significant factors, as transcendent over those of a child.

"The Family Law Pathways Advisory Group found that there was not enough focus on the best interests of the child or on child inclusive practices in family law services".⁶

In considerations of the court a) and f) above, listening to and acting on the express wishes of a child according to their maturity and level of understanding, is likely to promote their sense of personal

⁶ Government Response to the Family Law Pathways Advisory Group Report, May, 2003

worth, uniqueness and value. A presumptive custody arrangement model however, disregards and devalues a child's maturity and developmental stage, as well as their knowledge of, and experience within their own particular family environment, and would effectively 'silence' a child to 'be seen and not heard'. Thus would represent a regressive step back to the 'dark ages'.

In an inquiry into children and the legal process by the Australian Law Reform Commission (1996), it states that the UN Convention on the Rights of the Child (CROC) recognises that prior to last century, "children were widely regarded as the property of their fathers".⁷ It further states that CROC shifted focus from a paternalistic approach to promote that a child who has the capability of forming their own views, has "the right to express those views on matters that effect them and are entitled to have those views given appropriate weight". CSMC believes a rebuttal presumption of joint custody would be a re-entry point for children to be considered merely as chattels, caught in a web of power and control.

Coupled with consideration e) above, a child's developmental stage and potential must be considered in making arrangements for primary carer(s). Research by Pike, 2000 highlights that in terms of individual academic achievement, primary age girls and boys residing with their fathers do not achieve as well academically as their counterparts residing in single mother households.⁸ Further and in respect of point b), more women are breastfeeding their babies and for longer (the majority from between 6 months to two years)⁹ due to increased education about the significant health advantages of breastfeeding. This is a primary reason for the continuation of the 'tender years doctrine' that maintains it is in the best interest of young children to be raised by their mother. Another factor in support of the 'tender years doctrine' and relevant to point h), is the amount of direct care such as dressing, feeding, washing, and playing with a pre-school aged child that is provided by the mother three times the rate than that provided by the father.¹⁰ Hence, a child frequently has a stronger relationship with the mother that must be given due consideration in custody arrangements if stability and continuity of care are to be continued after separation in the best interests of the child.

c) If children are required to go 'to and fro', as in a joint custody situation, the time spent with each parent, considering inevitable changes in work obligations and child care arrangements necessary, may well depersonalise and undermine relationships with both parents. For example, it would be significantly more problematic for parents who are unable to communicate reasonably, to keep a track on what a child is doing (where they are going, what friends they have, whether they have completed necessary homework etc), if the child is one week their responsibility and the other not. Comforting and sometimes even therapeutic effects such as animals, special toys and attachments would have to be forgone by the child for long periods of time, with a much further strain placed on them to have to regulate emotional attachments with other parties such as relatives, half or step brothers and sisters. As has been shown, this can have a disenfranchising, detaching and oppressive effect on a child.¹¹

Case Example: (Amy's story)

When mum and dad separated I visited dad a fair bit. His new girlfriend

⁷ The Australian Law Reform Commission 'Speaking for Ourselves – Children and the Legal Process', IP 18, Commonwealth of Australia 1996, Sections 1,2 and 6. Retrieved from <http://www.austlii.edu.au/au/other/alrc/publications/issues/18/ALRCIP18.html#ALRCIP18>

⁸ Pike, Lisbeth. T., 'Effects of residency arrangements on the development of primary school aged children', Australian Institute of Family Studies, *Family Matters No:7*, 2000. Retrieved from <http://www.aifs.org.au/institute/pubs/fm2000/fm57/lp.pdf>

⁹ Dr Sarah Buckley, 'Extended Breastfeeding', *Pregnancy, Birth and Beyond*, 2001. Retrieved from http://www.pregnancy.com.au/extended_breastfeeding.htm

¹⁰ Craig Lyn., 'Do Australians Share Parenting? Time diary evidence on fathers' and mothers' time with children. Paper presented to The Australian Institute of Family Studies 8th Annual Conference, 2003. Retrieved from <http://www.aifs.org.au/institute/afrc8/craig.pdf>

¹¹ Smart, C., 'From Children's Shoes to Children's Voices' *Family Court Review*, volume 40, No 3, 2002, p 314.

did not want my dad to have anything to do with me though. She decided she did not like me from the beginning and that was that. They got married and dad being in real estate made it difficult for me to visit with him. I often had to sit in the car waiting for him on weekends while he was with clients. Sometimes, his new wife would 'babysit' me, but when she had a baby she became even nastier to me. I did not want to go after a while, even though I missed my dad. My mum re-partnered too and had another baby and in the end I felt like I was 'the odd one out' not really belonging to either family. I didn't like going back and forth.

Consideration d) above, presents a major barrier to the introduction of a rebuttal presumption of joint custody in a child's best interests, as a mobile and unstable work sector increasingly means the relocation of workers (parents) to maintain employment. As mentioned previously, where shared parenting (joint custody) arrangements work, parties must not only agree but be free to stay in close physical proximity to each other, which is highly unworkable in cases of high conflict, and where parents need to relocate to access employment, education, or vital support structures or for health reasons.¹²

Given this, it is notable that the Majority of contested custody and access cases before the courts in Australia are characterised by a high incidence of conflict, violence and abuse, and child abuse allegations.¹³ According to the highly successful Magellan research and pilot program, abuse of a partner or child is substantiated in 91% of cases.¹⁴

Case Example:

Maree has two girls to Doug, aged 16, 14 and two adult children (22, 24) from a previous relationship who knew Doug as their step-father. Maree's youngest child is severely disabled and suffers from a range of conditions including cerebral palsy. Maree described Doug as being a quiet, hardworking man who rarely raised his voice but when he did, you knew not to challenge it or you would be 'laid flat'. Two years prior to Maree separating from Doug (after being together for almost 20 years), her eldest daughter (from a previous relationship) disclosed that Doug had sexually abused her and her sister). Maree had initially not believed the allegations, causing a rift between her daughters, until her 16 year old also disclosed that Dad had been sexually abusing her as well from as young as she could remember. The separation involved high levels of abuse, intimidation and harassment. After an extremely stressful criminal trial for all the girls, Doug was finally sentenced and is now serving his prison term. Maree and the girls have begun the arduous journey of recovery and healing.

Further to consideration d), the claims of fathers rights groups that many men are unable to have contact with their children is unsubstantiated according to ABS statistics (1997), that show 69.2% of men have contact with their children with three quarters having overnight contact.¹⁵ Further, 33% of children who rarely if ever see their other parent have contact by telephone or letter. Additional research urgently needs to be undertaken to address the issue of the large numbers of men who choose not to, or are unable to have contact with their children for a variety of reasons.

¹² Wise Sarah., 'Family Structure, child outcomes and environmental mediators: an overview of the development in diverse family studies' Research Paper No. 30, Australian Institute of Family Studies, 2003. Retrieved from <http://www.aifs.gov.au/institute/pubs/RP30.html>

¹³ Parkinson P., and Smythe B., 'When the difference is night and day: Some empirical insights into patterns of child contact after separation', Paper presented at the 8th Australian Institute of Family Studies Conference, March, 2003, page 3, paragraph 4. Retrieved from <http://www.aifs.org.au/institute/afrc8/parkinson.pdf>

¹⁴ See The Honourable Justice Alastair Nicholson above, point 3, paragraph 5

¹⁵ See Australian Bureau of Statistics at <http://www.abs.gov.au/ausstats/abs@.nsf/0/A790FF34BB1F14EACA25699F0005D616?Open>

Under considerations of the court g), i) and j), high conflict relations between parents have been shown to produce negative outcomes for children where frequent access with both parents is maintained.¹⁶ Similarly, negative outcomes have also been reported for children whose wishes and interests regarding residence and contact have not been taken into consideration.

Case Example:

Tess was nearly two when her mum had her leg broken by dad. She witnessed the incident and even though dad had been nice to her, she was very afraid of him. She didn't know what happened when her parents separated but she and her mum had to stay in safety houses and at friends places for a while. When she saw dad again he said that everything would be all right because he would make sure that Tess got to live with him. A judge decided Tess's mum had done the wrong thing by denying Tess contact with her dad and awarded her Dad residence. Tess was five at the time. Tess was extremely frightened to be leaving her mother and did not want to go. Tess's mum did not have the money to appeal the decision in court. Tess's dad continued to harass, intimidate and sometimes physically assault Tess's mum at contact changeovers. After 18 months, Tess's mum made the decision to stop contact with Tess and move interstate to prevent Tess from witnessing the distressing conflict and abuse. Tess has seen her mum three times in the last six years. Tess is now 12 and a half and has just been diagnosed with depression, following a school counsellor's recommendation that she see a psychologist because among other negative behaviours, she was self-harming.

Where joint custody was tried in California, research data revealed that children suffered from depression, withdrawal, physical illness and social failure when forced to share their living arrangements with both parents.¹⁷

Considered example of problematic joint custody:

Craig and Karen separate amicably, and the children (7, 5) spend every second weekend at Craig's as he resides only one suburb away. Craig re-partners with Lisa, and her child (Monica - from a previous marriage) lives with them two weeks of the month as her ex-husband lives 1 and ½ hours away. Monica's Dad needs to move even further away due to his work, while Craig is given a promotion and must move interstate. Due to its complexity and the friction created between parties, the case ends up going to court. **Which family will get preference in regard the joint custody arrangement? Which particular children's best interests will be taken into consideration?** Will Craig have to sacrifice a promotion to satisfy his joint custody arrangement, or will he have to move and find another job to help Lisa, his new partner, satisfy her joint custody arrangement and be closer to where her ex-partner must relocate. Should Craig's children live with him six months of the year then have to change schools, friends, curriculums etc.. to live with their mum for the other six months? What is the likely effect on Craig and Karen's children going to be in having to negotiate their emotional attachments with parents, step-parents and step siblings each time they swap between homes? What will be the effects on Monica?

The added emotional and psychological stress for children living between two homes has been noted in research undertaken in the UK by Smart (2001).¹⁸

¹⁶ Adam M Tomison, 'Exploring family violence: links between child maltreatment and domestic violence', Issues in Child Abuse Prevention, Number 13, Winter 2000, National Child Protection Clearing House. Retrieved from <http://www.aifs.gov.au/nch/issues13.html>. See also Smart, C., 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July, 2001, from www.familycourt.gov.au/papers/html/smart.html

¹⁷ Janet R. Johnston, *Family and Conciliation Courts Review*, October, 1995.

¹⁸ Smart C., 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, 2001, retrieved from www.familycourt.gov.au/papers/html/smart/html

According to the Australian Law Reform Commission (1996), in cases where custody and residence is contested, children need to be more involved in the family law proceedings without being discriminated against because of their age:

“there is an increasing perception that involvement of children in the family decision-making process may be of benefit to children, to the court and to the ultimate decision. Children have a right to be heard in all matters, including family law proceedings that affect them.

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Children's wishes may be ascertained in a range of ways within the family law setting. For example, in a family report via counselling, as hearsay evidence, in a statement of an adult witness, as a result of an interview with a judge or from an advocate if the child is separately represented.”¹⁹

In respect of considerations of the court h) and k), with regard to a child’s best interests, the above information presents a detailed account of the serious apprehensions society should have about the attitude displayed toward children in proposing a rebuttal presumption of joint custody where a parents right to ‘secure’ an equal share of a child is the paramount consideration.

Copious litigation would result from a presumption of joint custody that would ensnare child(ren) of the 50% of the population who would not have formerly gone to court, into court proceedings. This as pointed out by considerations of what is in the best interest of a child k), would be detrimental to a child’s overall wellbeing, as well as being extremely costly to the parents involved and society as a whole. The family Law Pathways Advisory Group “found that there was too much unnecessary litigation and adversarial behaviour” in current family separation practices, and a rebuttal presumption of joint custody would invariably add considerably to this burden.²⁰

Children are the paramount consideration in residence (custody) and contact arrangements. CSMC believes that further research and policy options need to be undertaken and explored thoroughly before any hasty or emotive changes are made to the Family Law Act. This should include asking children what they think about the issues of residence and contact in compliance with the UN Convention on the Rights of the Child.

With respect to (a) (ii), current family law provisions enable grandparents to make application to the court with respect to grandchildren when disputes preclude them from making other arrangements. **CSMC therefore believes the current provisions to be adequate and just.**

(b) The percentages applied to the income of non-resident parents (payers) in determining their child support liability are among the lowest in the world. **Close to 40% of all payer parents in Australia pay \$260.00 or less per year in Child Support payments.**²¹ Debts to the Commonwealth through the child support agency currently stand at close to \$700 million dollars. That means millions in Family Tax Benefit payments that have had to come from honest tax payers pockets. **Currently only**

¹⁹ The Australian Law Reform Commission ‘Speaking for Ourselves – Children and the Legal Process’, IP 18, Commonwealth of Australia 1996, Sections 1,2 and 6. Retrieved from <http://www.austlii.edu.au/au/other/alrc/publications/issues/18/ALRCIP18.html#ALRCIP18>

²⁰ Government Response to the Family Law Pathways Advisory Group Report, May, 2003.

²¹ Child Support Agency, Child Support Scheme, Facts and Figures 2000 - 2001

17.7% of payer parents nationally pay half or more of the costs towards raising their children as compared with the National Centre for Social and Economic Modelling figures released earlier this year (\$155 per parent, per week, averaged out over a child's 18 years).²² Payee's (generally mothers) are consistently reported to earn less than payers (generally fathers) (*average* income of a payer parent is \$30,111 and payee \$18,372), and are less inclined to enter into another partnership after the partnership with their child's father (57% of payee/resident parents only have 1 child). **Why then is a payee's income taken into consideration to reduce the amount of child support payable, even when the payer may be earning 10 times more than the payee?**

Why does the payee's income suddenly make the payer's financial responsibility to help raise their child decrease or disappear? Why should the payee/resident parent have to take full responsibility of the child (be penalised) because of their income earning capacity? How does this help the payer meet their responsibility toward a child(ren) they helped create? Why should a payer be rewarded monetarily for having contact with the child by having the child support they pay reduced, when they often earn twice as much as the payee, and return to their previous standard of living within three years of being separated or divorced? Any reduction in payer's child support should only apply for the first three years.

Being a mother is a predictor of poverty in Australia whether married or a sole mother.²³ A number of studies consistently shows that for the majority of fathers, their standard of living post divorce or separation returns to its previous level within three years.²⁴

CSMC does not believe the child support formula works fairly for payee/resident parents and recommends that the percentages applied to a payer parents income be increased and that the income of a resident (payee) parent not be taken into consideration at all.

Whatsmore, CSMC believes that the child support agency should return to being a division of the Australian Taxation Office, and that its powers to investigate and enforce child support liabilities be increased dramatically, with consistently evasive non-compliant payers pursued as a matter of criminal offence, and with a penalty regime imposed on repeated offenders and perjurers. Large or long-term debts are a criminal offence in most other arenas, why not for the children of Australia? What does our inefficient child support collection rate say about how we value our children and their state of poverty in the 'lucky country'?

Further, that the FTB taper rate on child support received be reduced from 50 cents to 30 cents in the dollar.

Thank You

²² Percival, R. and Harding, A. 'The Costs of Children in Australia Today', Paper presented at the Australian Institute of Family Studies Conference, Melbourne, National Centre for Social and Economic Modelling, University of Canberra, 2003

²³ Walters M., 'Sole Mothers Labour Force Participation and Welfare Reform in Australia, University of Tasmania, 2003

²⁴ Weston, R., 'Changes in Household Income Circumstances' in P. McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia*, Australian Institute of Family Studies (1986); R. Weston, 'Income Circumstances of Parents and Children: A Longitudinal View', in K. Funder, M. Harrison and R. Weston (eds), *Settling down: Pathways of Parents After Divorce*, Australian Institute of Family Studies (1993); R. Weston & B. Smythe, 'Financial Living Standards After Divorce (2000) *Family Matters*, 11.