Women's Legal Service
Victoria

Level 3/43 Hardware Lane
Melbourne VIC 3000

Telephone 03 9642 0877
Facsimile 03 9642 0232
justice@vicnet.net.au

18 July 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

Dear Committee Members,

INQUIRY INTO CHILD "CUSTODY" ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

Women's Legal Service Victoria has been providing free legal advice, information, representation and legal education to women for over 20 years. We now specialise in issues arising from relationship breakdown and violence against women. Our principal areas of work are crimes compensation, family violence and family law. The women we represent in the Family Court have generally exhausted the Legal Aid funds available to them or been denied aid. A significant number of these women are victims of family violence.

Our submission deals in detail with Term of Reference (a)(i) in relation to determining the amount of time parents should spend with their children after separation. We deal with Terms (a)(ii) and (b) very briefly at the end of our submission.

(a)(i) Determining time to be spent with children - a presumption of equal time?

In our view the Family Law Act should *not* be amended to introduce a presumption of joint residence.

THE CURRENT POSITION

A focus on Children's Rights & Parent's Responsibilities

The *Family Law* Act currently emphasizes *children's rights* by focusing the Court's attention on making decisions that are in the *best interests of the child* and by providing that children have rights to be cared for by both parents and to have regular contact with them (unless this would be contrary to a child's best interests). The Court is given discretion to make orders for the residence and contact of children looking at the individual situation of each family with reference to a number of *factors* (the s68F(2) factors[1]). It therefore deals with each case that comes before it on its individual merits, considering factors that, we submit, are comprehensive and appropriate (although later we question the weight currently accorded to some of them) and which do not favour a parent of either gender.

Whilst the *Family Law* Act refers to children's rights, it refers to parents' *responsibilities* and actively encourages "shared *parenting*" ie the sharing of the *responsibilities* of parenthood, *not* the division of *time* spent with children on the basis of strictly equal time. That being said, the Act clearly already accomodates joint residence arrangements where they are in the best interests of children.

What occurs currently with this focus

The overwhelming majority of parents agree on arrangements for the care of their children and currently the most common arrangement is for mothers to have residence of their children and for fathers to have contact. Over 85% of resident parents are mothers[2] and it is estimated that fathers exercise contact with their children in around 60% of these arrangements.[3] Many of these parents probably agree on arrangements for their children without any reference to the *Family Law* Act at all. Joint residence currently occurs in less than 5% of separated families.[4]

Of parents that obtain court orders, 70% of residence orders (including consent orders) are made in favour of mothers and 20% in favour of

---

[1] Note that s68K also directs the Family Court to ensure that any order is consistent with a family violence order and does not expose a person to an unacceptable risk of family violence – to the extent that this is consistent with the child's best interests.

[2] Australian Bureau of Statistics, 1999

[3] Australian Bureau of Statistics, 1998 – this is an estimate only as the available statistic in relation to patterns of contact generally (62% of non-resident parents exercising contact) is not divided along gender lines.

[4] Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra 1997, Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

fathers.[5] But only 5% of court orders are made after a contested hearing. In the case of these "contested" matters, as many as 40% of fathers are given residence of their children.[6]

In our view, the above data demonstrates that most separated families lean towards the mother being the primary caregiver and it is interesting to note that the overall rate of children residing with mothers is higher when the general population is looked at, rather than when examining only parents who seek court orders. It is also very significant that, despite the large numbers of parents who agree on arrangements about their children, less than 5% opt for joint residence.

INTRODUCING A LEGAL PRESUMPTION OF JOINT RESIDENCE

The significance of a Legal Presumption

A legal presumption *may* be useful in some contexts *if* it reflects a solution that is appropriate in the overwhelming majority of cases – *provided* that this solution can be rebutted where evidence shows that, in an individual case, it is not the appropriate solution. However, the significance of introducing any presumption into the *Family Law* Act needs to be acknowledged. A presumption is a blanket starting point. Although only a very few cases are ultimately decided by the Family Court, a presumption of joint residence would guide lawyers in the advice they give to their clients about what to expect. It would also direct the Court when it makes Orders, including interim orders whilst matters are progressing through the Family Court system (these interim orders have the potential to last for 12 months or more because of delays in the Family Court system). The influence of a specific presumption on outcomes in the Court would obviously be far greater than the balancing of factors that currently occurs.

Any presumption should therefore be founded on compelling evidence based on recognised research that joint residence *really is* in the best interests of the overwhelming majority of children.

Evidence about Joint Residence Arrangements

There is very minimal evidence that joint residence arrangements are in the best interests even of a minority of children. Indeed, there is very little information at all about joint residence arrangements in Australia and how

[5] Residence Order Outcomes 1994/1995-2000/2001: Family Court data available on the internet: www.familycourt.gov.au/court/html/statistics/html

[6] Moloney, L; 'Do fathers 'win' or do mothers 'lose'? A preliminary analysis of a random sample of parenting judgments in the Family Court of Australia' Presentation to Australian Institute of Family Sutdies, September 2000.

well they work for children, even in the short to medium term, let alone the long term[7]. As indicated above, less than 5% of separated parents in Australia have arrangements for shared residence and no comprehensive study has yet been completed as to the success or failure of this small percentage of joint residence arrangements. The evidence that is available, principally from overseas, tends to suggest that joint residence only promotes the best interests of children when compared to other arrangements if the relevant parents are able to cooperate with each other *and* genuinely put their children's interests first.[8] High levels of parental conflict clearly have a negative impact on children's well being and they are exposed to this to a greater extent if they have to move frequently between parents. A high level of conflict between parents should therefore be viewed as a counter-indicator to joint residence. Unfortunately, a high level of conflict between parents is a hallmark of parents who have to resort to litigation in relation to their children.

A focus on Parents' Rights

Given the available evidence, introducing a presumption of joint residence cannot be promoting the best interests of children but only the supposed "rights" of parents to have a "fair" (for which read "equal") amount of time with their children.

Pre-Separation and Post-Separation Realities

That a presumption of joint residence focuses on parents' rights is underlined by its failure to account for pre-separation or post-separation realities in families.

The reality of arrangements for the care of children *prior* to separation is that women still provide the overwhelming share of care for children[9] and have often structured their lives around caring for children by not engaging in paid work or by finding part time or flexible work arrangements. Where, prior to separation, men have had only limited involvement in actually providing for the needs of their children, they are likely to be less well equipped than their female partners to look after children after separation. The children may also be less bonded to them.

---

[7] Smyth, Caruana & Ferro, 'Some whens, hows and whys of shared care', Australian Institute of Family Studies (2003).

[8] see Smyth, Caruana & Ferro above. See also Smart, C. 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July 2001, available on the internet: http://familycourt.gov.au/papers/html/smart.html

[9] Australian Bureau of Statistics, Time Use Surveys, 1992 and 1997, tabularized in ABS *Social Trends Report: Family – Family Functioning: Looking after the children*, 1999 available on the internet at http://www.abs.gov.au/Ausstats.

A presumption that parents should spend equal time with their children assumes that all parents will be able to:

- live close to each other (in order that the children can readily attend the same school and health professionals, participate in sport and maintain friendships)
- negotiate flexible working arrangements (in order to care for younger children not at school and to take older children to and from school, health professionals, sport and social events)
- communicate regularly and easily (to negotiate logistics of activities that cross over residence periods or are agreed in one period to occur in another)
- afford to maintain two separate households that are completely "set up" for their children (ie complete sets of clothes, toys and daily necessities).

This is simply not a reality for many parents and pushing parents into joint residence arrangements where they cannot establish this kind of set up eg for financial reasons, because they are hostile to each other, or because one party is at risk of violence from the other, clearly has the potential to be damaging to children.

Rebutting A Presumption of Joint Residence

Many of the matters raised in the preceding section would be taken into consideration under the s68F(2) factors currently considered in the *Family Law* Act. So can the problems that might be caused by a presumption of joint residence be cured by allowing parents who are opposed to joint residence to rebut the presumption by reference to the factors already set out in the Act? The answer to that question is clearly no.

Firstly, this might well lead to a massive increase in litigation (with the attendant increase in demand on the Court and Legal Aid) as parents opposed to joint residence may be forced to go to Court.[10] Or worse, it could lead to parents being forced into joint residence arrangements because they cannot afford to litigate. In this regard, the evidence is clear that women are more likely to experience financial hardship after divorce than men so this will have a disproportionate effect on women.[11]

[10] This should not surprise anyone given the massive increase in litigation following the amendments made to the Family Law Act in 1996; see Rhoades, Graycar & Harrison, *The Family Law Reform Act 1995: the first three years*, 2001

[11] Weston R, Smyth B, 'Financial Living Standards after Divorce', Australian Institute of Family Studies, Family Matters No. 55 Autumn 2000,

Secondly, the parent seeking to rebut the presumption would bear an onus to establish that the factors currently contained in the Act warranted *not* following the presumption of joint residence. Obviously this would make a difference to the outcome of final contested hearings as the sort of evidence that is currently put before the Court to enable it to weigh up the factors in the Act may not be considered sufficient to rebut a legal presumption. However, an onus is of even more concern prior to a final determination of a case. It might well mean that parents would be pressured into agreeing to joint residence on an interim basis as they would not have sufficient opportunity at interim hearings to produce the necessary evidence to rebut the presumption (this issue is discussed further below in relation to cases involving family violence and/or child abuse).

Joint Residence can work

We wish to emphasise that the criticisms we have made in relation to a presumption of joint residence apply only to there being a *presumption*. We are not opposed to joint residence. Quite the contrary - for families where both parents have shared responsibilities for children prior to separation, can cooperate with each other and can establish the sort of arrangements discussed under Pre-Separation and Post-Separation realities above, such arrangements are likely to be positive for all concerned.

It is the potential for joint residence to be *imposed* on parents as a result of a presumption that concerns us. In our view, parents who are unable to resolve disputes between themselves and need to issue court proceedings are the most unsuited to providing a supportive environment for children to move between parents in a joint residence arrangement. Given that it is already open to cooperative parents to make arrangements for joint residence between themselves, introducing a legal presumption will have the greatest effect on families where the parents are in significant conflict with each other.

Family Violence and Child Abuse Cases - the most intractable disputes

A significant proportion of the Family Court's work involves cases where there are allegations of violence or child abuse and research shows that these are the cases most likely to be litigated and least likely to settle.[12]. It is in these cases that a presumption of joint residence could have the most significant and potentially disastrous effect.

[12] T Brown, M Frederico, L Hewitt and R Sheehan, *Violence in Families – Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, Monash University, Clayton, 1998, Chapter 5.

Proponents of a presumption of joint residence will no doubt suggest that the presence of family violence or child abuse could be grounds on which the presumption of joint residence could be rebutted. This *might* reduce the risk of children being placed permanently in potentially abusive joint residence arrangements. However, it fails to deal with the significant problem of "temporary" arrangements either negotiated or made by the Court at interim hearings.

The Court has very little information available to it at interim hearings because generally they are very limited by time, the Court does not hear oral evidence, and family reports and other experts' reports are often not yet available. The Court relies to a large extent on affidavit material filed by the parties which, particularly in the case of self-represented litigants (of which there are now many in the Family Court), may be considered inadequate to prove violence or abuse.

Researchers studying the effect of the reforms made to the *Family Law* Act in 1996 expressed serious concerns that the then newly introduced "child's right" (which sadly is frequently misinterpreted as "parent's right") to contact had led to an *effective* presumption that contact should be maintained. Thus, in cases where there are allegations of domestic violence there has been a trend away from suspending contact at an interim hearing to ensure the child's safety, towards using neutral hand-over arrangements. A legal presumption of joint residence clearly has the potential to lead to interim orders being made for joint *residence* and not just contact, even when violence is alleged, thus exposing women and children to even greater risk. Research clearly shows that only a small proportion of allegations of violence fail to be established at the final hearing when all of the evidence is available to the Court.[13] Given this and the fact that interim arrangements can last for as long as 12 months, a presumption of joint residence could place women and children at significant risk.

Increasing Protection for Women & Children

In our view, it is quite ironic, but also rather disturbing, that the government is considering changing the *Family Law* Act in a way that will increase the risk of violence to women and children at the same time as governments around the country (including the Commonwealth itself through its Partnerships Against Domestic Violence jointly with the states and territories) are taking significant steps in other contexts to address and reduce violence. This would clearly be a retrograde step.

[13] M Hume, 'Study of child sexual abuse allegations within the Family Court of Australia' in Family Court of Australia, Enhancing Access to Justice: Second National Conference Papers (Sydney, 1996). See also Brown et al above.

Rather than reducing the already poor protection women and children have under the *Family Law* Act[14] (especially while matters are progressing through the Court system), protection should be increased. The *Family Law* Act already directs consideration of the presence of family violence in determining what arrangements should be made for children.[15] However, in practice the "child's right" to contact takes precedence over the need to protect either the mother or child from violence and lawyers continually have to advise clients that they should allow contact or they may appear to the Court to be hostile and risk losing residence of their child altogether.

We have first hand experience of this in a Family Court matter we handled this year. Our client's daughter disclosed to her that she had been abused by her father. We applied on her behalf to have the father's contact suspended on an interim basis whilst the allegations were investigated. At the first return date of the application the Registrar suggested that the allegations had been made at a "convenient" time for the mother in the Court process, with the strong suggestion that the allegations were therefore suspect. The matter went back to court on four occasions in four successive months. On each occasion the Registrar raised his or her concerns that the child was not having contact. The child later made very similar disclosures of abuse to two separate professionals. Despite this the Court ultimately ordered supervised contact rather than no contact until the trial.

A presumption against contact where violence is proven?

Unlike the evidence examined above in relation to a presumption of joint residence, there is ample evidence that:

- family violence is a huge problem in our community[16]
- family violence continues and may even increase after separation[17]
- there is a link between spouse abuse and child abuse – that is a person who abuses their spouse is likely to abuse their child[18]

[14] We have attempted to summarise the findings of Rhoades, Graycar & Harrison. However, we urge the committee to look in detail at this study.
[15] S68F(2) and s68K.
[16] 23% of women who have ever been married or in a de-facto relationship have experienced violence (Australian Bureau of Statistics; *Women's Safety Australia*, Canberra 2000, Catalogue No 4108.9 at page 51 and see Table 6.5 at page 53).
[17] Of 35 resident mothers interviewed for an Australian study, 86% described violence during contact or contact changeover (Kaye M, Stubbs J and Tomie J; 'Negotiating child residence and contact arrangements against a background of domestic violence', Working Paper No 4, 2003, Family Law and Social Policy Research Unit, Griffith University. See also Straton, J, 'What is Fair for Children of Abusive Men?' Journal of the Task Group on Child Custody Issues, Volume 5, Number 1, Spring 1993 (Fourth Edition, 2001).
[18] See the three studies discussed in Straton, J, above. The studies discussed found that 53% to 70% of people who abuse their spouse also abuse their child.

- "merely" being exposed to or witnessing violence is highly damaging to children – causing a host of behavioural and emotional problems[19]

The *Family Law* Act should be tightened to give greater weight to the presence of family violence in determining residence and contact arrangements for children. If consideration is to be given to introducing presumptions of any kind into the *Family Law* Act then the evidence points to a quite different presumption. Rather than introducing a presumption of joint residence and forcing victims of violence to rebut that presumption, Australia should follow the lead of New Zealand which has adopted a presumption that, where violence to a child or the other party is proven, contact with the violent parent should not occur unless the Court is satisfied that the child will be safe. In the current Australian system such a presumption may have to be cast in the language of the best interests of the child but these "best interests" need to clearly recognize the importance of safety both for the child and the abused parent.

(a)(ii) Contact with Other People including Grandparents

In our view the *Family Law* Act already deals with the issue of children having contact with other people adequately. Like parents, anyone else with an interest in the care, welfare and development of children has a right to make an application to the Court for contact. Grandparents clearly fall within the category of people with an interest in the care, welfare and development of children and if contact is considered to be in the child's best interests, having regard to the s68F(2) factors, the Court will order contact. Additional criteria are not required and care should be taken to ensure that the focus of the *Family Law* Act remains the best interests of children not the rights of other persons to see those children.

(b) Whether the existing child support formula is fair

We are not experts in relation to the *Child Support (Assessment)* Act 1989. However, we are concerned that this issue is even being addressed in the same reference as a reference inquiring into the spending of equal time with parents. Are we really trying to establish what is best for children or are we trying to reduce the child support liabilities of non-resident parents? Are we to assume that, if the parties lobbying the government are unsuccessful in having a presumption of equal time to be spent with each parent introduced

[19] Edleson, J, 'Children's Witnessing of Adult Domestic Violence', Journal of Interpersonal Violence, 14, 1999. See also Australian studies: 'Child adjustment in High Conflict Families', Child: Care Health and Development, Vol. 23., No. 2 p 113-133 and Mathias J, Mertin, P, Murray A, 'The Psychological Functioning of Children from Backgrounds of Domestic Violence, Australian Psychologist, vol. 30 no 1 pp 47-56.

into the law (with its attendant effect on child support payments), they will have "a second bite of the cherry" to reduce their child support by asking the government to revisit the Child Support Formula in relation to contact time? This apparent linking of child support and joint residence strongly suggests a focus, not on the best interests of children, but on the financial interests of non-resident parents.

THE TERMS OF REFERENCE

We are concerned that the focus of all three questions posed by the inquiry appears to be on the "rights" of people other than children and that the financial interests of non-resident parents appear to be a significant motivation for the proposed changes.

Yours faithfully,

K. J. Fletcher

Joanna Fletcher
Law Reform & Policy Lawyer on behalf of
WOMEN'S LEGAL SERVICE VICTORIA INC

Authorised by Sarah Vessali, Principal Lawyer, Women's Legal Service Victoria