



DOMESTIC VIOLENCE AND INCEST RESOURCE CENTRE INC.

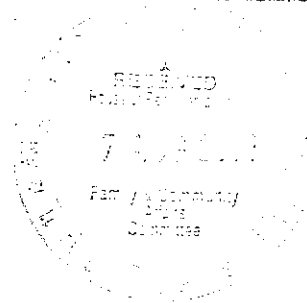
House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 260

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Secretary:

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
FCA.REPS@aph.gov.au



Tuesday August 5, 2003

Dear Secretary,

Please find attached our submission to the Committee's inquiry into Child Custody Arrangements. Given that the best interests of the child are the paramount concern, the Domestic Violence and Incest Resource Centre (DVIRC) are strongly opposed to the notion of a rebuttable presumption of equal time with both parents in principle, and specifically in relation to families where violence has occurred.

It is our belief that for some families, shared parenting can be a successful arrangement that is usually negotiated privately. We recognise, however, that some families are unable to arrive at shared arrangements without legal assistance. In these cases, which are characterised by high conflict and/or family violence, we are seriously concerned about the presumption of joint custody. Indeed this proposal 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. Further to this we would recommend education at a legal and community level to encourage separating parents to make best use of the possibilities for shared parenting already existing within the parameters of the Family Law Act.

DVIRC urges 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.

Yours sincerely,

Libby Eltringham and Alice Bailey,
For the Domestic Violence and Incest Resource Centre

Encl. DVIRC submission and letter of endorsement from Bob Pease, MASA

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Domestic Violence & Incest Resource Centre

292 Wellington Street – Collingwood - 3066

Submission to the Inquiry into Joint Custody Arrangements in the Event of Family Separation

The Domestic Violence and Incest Resource Centre (DVIRC) is a Statewide organisation providing professional development and resources to those who work with victims of family violence, including sexual assault. The Centre provides:

- professional education and training programs
- community education strategies and public forums
- publications and web-sites
- policy-focused research and discussion papers, and advice to government through participation on committees and working groups
- a lending library and information service
- a referral service
- secondary consultations for those working with victims of violence.

Introduction

The United Nations Declaration of the Rights of the Child declares that 'the best interests of the child shall be the paramount consideration'¹. This principle, which is currently enshrined in the Family Law Act, should remain the paramount consideration in determining post-separation shared parenting arrangements. Proposed amendments to the Family Law Act would invert this by privileging the rights of parents over the rights of the child. In considering parenting arrangements, it is critical that the focus remains on the rights of the child, placing them above the rights of parents. This is particularly so in families in which one parent is perpetrating violence against other family members.

Current Context of Custody Arrangements

The Family Law Act currently requires the court to ensure the rights of the child to contact with both parents, where this is in the child's best interests. It does this through consideration of joint 'parental responsibility' after separation or divorce.

Other factors currently considered by the court in deciding parenting arrangements include:

- children's wishes;
- the capacity of the parent to provide for the needs of the children; and
- maintaining a secure, settled environment for children.

The Act also requires the court to protect the child from family violence and abuse, whether direct, witnessed, or not witnessed.

By omitting consideration of these key factors, the proposed amendments reduce the capacity of the court to prioritise the interests of the child over those of the parents.

All things being equal, where there have been shared parenting responsibilities prior to separation, most women welcome the on-going sharing of parenting. Mothers are generally acutely aware of what is in their child's best interests, and are keen to promote positive relationships between children and their fathers. Many men already actively participate in their children's lives following separation. Most parents are able to reach agreement about shared parenting responsibilities outside the court system. Shared parenting is also a notion that most people in the community support in principle.

However in practice, there is no 'level playing field' in parenting, and to assume that there is obscures real differences and the consequences of these for children.

¹ Office of the High Commissioner of Human Rights, *Declaration of the Rights of the Child*, General Assembly Resolution 1386(XIV), Principle 2, November 1959

- In most families, mothers continue to be the primary care giver.² In contrast, fathers tend to be the primary earner. This family division of labour requires a high level of commitment by women to parenting and domestic labour. If fathers are to develop a capacity to care equally for children, they must be able to do this within a supportive environment that minimises potential disruption and harm to children.
- Current legislation enables people to demonstrate a capacity to parent, thus protecting the 'best interests of the child'. To amend Family Law and introduce the presumption of equal time for parents would reduce the capacity of the law to make determinations that are sensitive to different responsibilities in parenting roles.
- The proposed legislation undermines the autonomy of families to develop arrangements for parenting that reflect different parenting capacities, work arrangements, location and housing according to the best interests of the child. In contrast, the current notion of joint 'parental responsibility' more comprehensively covers the many factors relevant to parenting, such as residence, financial support, care and work arrangements. To replace joint parental responsibility with 'joint residence' obscures the complex nature of parenting and what is in the best interests of the child.
- Residence is not the primary determinant of a child's best interests. Rather, the degree to which parents are intimately involved in their children's daily life, from birth, is what fosters a secure, settled environment for a child. Equal time with a parent should not be a given, but needs to be supported with evidence of a history of care.

Separation and Family Violence

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.

Violence in the family can take many forms. It includes physical and sexual violence and threats of violence, as well as other forms of abuse which have psychological dimensions. This behaviour is a means through which one family member exerts control over others in the family.

- Joint residency can work successfully in some families following separation. However there needs to be, among other things, a high level of commitment to this arrangement, good communication and a generally positive relationship between both parents. This is not the case where family violence is present.

² Australian Bureau of Statistics (1999), *Social Trends Report: Family-Family Functioning: Looking After the Children*, <<http://www.abs.gov.au/Ausstats>>

- 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.³
- 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.⁴
- 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.⁵

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.⁶
- 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. There is an increased risk of violence and homicide at this time; and children are at risk of violence, abduction, sexual assault and coercion.⁷
- 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. 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

³ Jaffe, P., Lemon, N., and Poisson, S. (2003), *Child Custody and Domestic Violence*, Sage Publications, Thousand Oaks, Ca, p.9

⁴ 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

⁵ Seigmann, L. (2003) 'Batterer as Parent: A Review', in *DVIRC Newsletter*, Issue No. 3, Spring Edition, Forthcoming.

⁶ Kaye et al, p.149

⁷ 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
<www.courtinfo.ca.gov/programs/cfcc/resources/publications>

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.⁸ 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. Its 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 have to demonstrate a perpetrator's incapacity to parent. Clearly this is a profoundly difficult position for any child to be caught in. Children typically feel a deep sense of loyalty towards both of their parents. Indeed, this loyalty is often manipulated by perpetrators of violence and abuse to protect themselves. 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'.⁹
- 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. As Jaffe et al have noted,

the net effect is that many in this field, whether judges, assessors, arbitrators, or guardians ad litem, are being immobilised by the prospect of accusations of bias. Any suggested parenting plan that does not divide children's care time equally may be defined as prejudicial and/or unfair toward mothers or fathers. Helping professionals, in large numbers, have been ensnared by this definition of fairness. They erroneously believe that considering the relevance of domestic violence is tantamount to being partisan to mothers.¹⁰

⁸ Weston, R. and Smyth, B. (2000), 'Financial Living Standards after Divorce', *Family Matters*, Australian Institute of Family Studies, No. 55, Autumn

⁹ Bancroft, L. and Silverman, J. p.49

¹⁰ Jaffe et al, p.13

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.

- While many fathers are genuinely interested in sharing parenting following separation, nearly all of these cases are determined outside the court process. 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. This provides another means for perpetrators to remain, via legal channels, connected to their ex-partners and children.¹¹ A recent Australian study describes the experience of a woman whose ex-partner had made 29 applications to the Family Court in three years, and had 'threatened at the beginning of the proceedings that he would drag her into court every day of the week until he got what he wanted'. In another case, a woman's ex-partner promised to 'break her' by taking her three children from her and repeatedly taking matters to court.¹² This opportunity for legal action to be used as a mechanism for abuse of women and children is not only harmful, but incredibly costly to the community.

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

DVIRC has serious concerns about the on-going negative impact on children of being exposed to greater levels of violence, directly and indirectly, as a consequence of joint residency.

- Even within the existing legislation, violent parents are granted access and/or custody to their children. The United Nations Declaration of the Rights of the Child maintains that 'the child shall be protected against all forms of neglect, cruelty and exploitation'.¹³
- Research about the parenting styles of perpetrators of violence suggests that, alongside continuing abuse of their ex-partner, children also become targets of threats and violence. It is argued that a perpetrators 'motivation to intimidate their victims through the children increases when a couple separates, because of the loss of other ways to exert control'.¹⁴
- In the case of presumed joint residency, under the proposed amendment, children would be more likely to be placed in the care of a violent parent, since there will be many difficulties associated with having to show reason as to why joint residency should not be upheld.
- In cases where there is family violence it is imperative that the best interests of the child remain paramount. Rather than working from a presumption of equal time with both parents, no contact with the perpetrator should be presumed, until it can be amply demonstrated to the court that it is safe for the child to have contact.

¹¹ Kaye et al; Judicial Council of California; Jaffe et al; Rhoades, H. Graycar, R., and Harrison, M. (1999), *The Family Law Reform Act 1995, Interim Report*, April, University of Sydney

¹² Kaye et al, p.91

¹³ Office of the High Commissioner of Human Rights, *Declaration of the Rights of the Child*, General Assembly Resolution 1386(XIV), Principle 9, November 1959

¹⁴ Bancroft, L. and Silverman, J. (2002) *The Batterer As Parent: addressing the impact of domestic violence on family dynamics*, Sage Publications, Thousand Oaks, Ca, p.44

- Shared parenting both exposes children to ongoing violence and requires mothers to regularly negotiate with, and be in the presence of, violent ex-partners. This is unsafe for both women and children. Australian and international studies note the incidence of violence by ex-partners when collecting children, even when this occurs at contact centres and in spite of security measures being taken to prevent this.¹⁵ Furthermore, the number of contact centres is limited, and so most women in this situation must find alternative arrangements for changeover of care. Contact with a violent ex-partner can be highly risky, and in the case of joint residency will have to be far more frequent. This will leave children and women more vulnerable to stress, fear and the threat of violence.

- There is increasing recognition that children are negatively affected not only by direct violence, but also by witnessing violence when it is directed against another, for example their mother. Witnessing violence in the family is a form of child abuse. A US study of women's experiences of violence post-separation found that 73 per cent reported that perpetrators used their children as a pawn or tool to get at the mother. In addition, 88 per cent of perpetrators assaulted mothers for their children's behaviour; and some 20 per cent of women reported the perpetrator making their children watch as they were beaten or sexually assaulted.¹⁶

- There is also reason to be concerned about the ways in which the parenting styles of perpetrators more generally can negatively affect children. When compared to non-violent parents, perpetrators of family violence are more likely to become angry with their children and use smacking; to be controlling; and to be less consistent in their parenting. Many studies indicate that violent parents are several times more likely than non-violent parents to physically abuse their children.¹⁷ While many perpetrators may appear able to parent capably when observed in the context of supervised visitation, they alter their behaviour when they are no longer observed.¹⁸ This negatively impacts on children in multiple ways, affecting their social, emotional, cognitive and physical development.

Drawing on their clinical experience, Bancroft and Silverman (2002) outline the main risks to children arising from contact with perpetrators. These are:

- 1) continued undermining of the mother's parenting and the mother-child relationship;
- 2) continued exposure to authoritarian or neglectful parenting;
- 3) exposure to new threats or violence, psychological maltreatment, or direct victimisation;
- 4) learning violence-supportive beliefs and attitudes;
- 5) being abducted or otherwise used as a tool by the perpetrator; and
- 6) exposure to violence in the father's subsequent relationships with other women.¹⁹

Even in cases where children are no longer being directly assaulted, they continue to be affected by their experiences of violence in a number of ways, including fear, anxiety and other post-traumatic symptoms.

¹⁵ Kaye et al; Rendall, Kathryn (2001), 'Children Abused in Contact Arrangements: Some Implications for Practitioners', *DVIRC Newsletter*, Winter, pp.3-8

¹⁶ Mbilinyi, Edleson, Beeman and Hagemeister (2002) cited in Judicial Council of California, p.8 <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications>

¹⁷ Bancroft, L. and Silverman, J. p.42

¹⁸ Judicial Council of California, p.8, Bancroft, L. and Silverman, J. p.36

¹⁹ Bancroft and Silverman *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications, Thousand Oaks, Ca.

Forcing children to spend time with a violent parent on the basis of 'parental rights' to equal time, undermines the right of a child to live safely and securely.

Conclusion

The proposal to consider the 'presumption that children will spend equal time with each parent' needs to be evaluated within the current context in which the Family Court serves clients. At present, 50 per cent of all couples who separate go to the Family Court to settle property or child issues, or both. Of these, only 5 per cent of matters filed in the Family Court proceed to a final defended hearing determined by a judge.²⁰ In many cases, couples are settling on parenting arrangements through alternative channels, and mothers retain custody of children in 88 per cent of separations, most commonly by agreement between parents without legal advice.²¹

Therefore the proposed amendment applies only to a minority of couples who are unable to arrive at an agreement over parenting. It is within this minority that high levels of conflict, hostility and/or family violence are likely to be present, which necessitates a very clear focus on protecting the rights of the child. DVIRC argues strongly against undermining these rights in favour of a presumption of shared time.

Trends in other jurisdictions aim to move away from notions of shared residency in such cases, to one of no contact or of clear and limiting parenting plans. It is argued that in high conflict divorce:

any notion of joint custody [should] be replaced by very clear custody and visitation plans, limiting the parents' opportunity for renewed hostilities that would compromise children's post separation adjustment.

This is because flexibility in parenting plans '[fans] the flame for ongoing conflict ... [and] increased severity calls for decreased flexibility.'²²

Rather than working from a position of presumed joint residency, DVIRC advocates 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.²³

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

²⁰ Family Court of Australia, *Annual Report*, Australian Law Reform Commission (1999)

²¹ Australian Bureau of Statistics, 1997 1999

²² Jaffe et al, p.15

²³ Judicial Council of California, p.4

- 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) has successfully completed a program of alcohol or drug abuse counselling, if the court determines that counselling is appropriate;
- 4) has successfully completed a parenting class, if the court determines the class to be appropriate;
- 5) is on probation or parole, whether he or she is restrained by a protective order granted after a hearing, and whether he or she has complied with its terms and conditions; and
- 6) has committed any further acts of domestic violence.

The presumption of joint residency imposes a one-size-fits-all paradigm onto cases that require careful differentiation and consideration in order to ensure children's safety and security. 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.²⁴

Certain prerequisites must be present for shared residency to work. As Chief Justice Alastair Nicholson notes:

Shared parenting can work perfectly well if parents live close to one another, if there is little or no hostility between them, if they both have excellent parenting skills, and if there is no history of abuse by either parent. If all or most of these prerequisites are not present, shared parenting can be both disruptive and detrimental to the children involved.²⁵

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.

What is in the best interests of the child is ensuring that what is nurturing to a child continues and what is threatening or detrimental to a child is kept at bay. Legislation that starts from a presumption of shared residency may well undermine this objective.

Priority should be, as it currently is, on determining what is in the interests of the child, which leaves the possibility that shared residency *may* be in the child's best interests, but it will not always be the basis for establishing parenting plans.

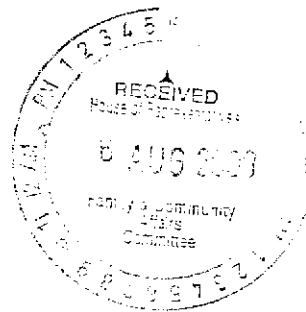
²⁴ Morella (1990), cited in Jaffe et al, p.19.

²⁵ *The Age*, Melbourne, 24 June 2003.



Borderlands, GPO Box 3079, Auburn Victoria 3123

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600
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Thursday 31st July 2003

Dear Secretary,

I am writing in my capacity as Convenor of Men Against Sexual Assault to endorse the submission from the Domestic Violence and Incest Resource Centre to the Inquiry into Joint Custody Arrangements in the Event of Family Separation.

Men Against Sexual Assault (MASA) is a voluntary network of men concerned with men's responsibility for violence and harassment. The DVIRC submission highlights the safety of the women and children following separation in families where men have been violent. We request that the Committee give high priority to these issues when formulating their report. We fully endorse DVIRC's alternatives to the proposed legislation.

Yours sincerely,

Dr. Bob Pease
Associate Professor of Social Work
RMIT University

Convenor of Men Against Sexual Assault