



Central Coast Community Legal Centre

PO Box 246
Wyong NSW 2259

Telephone: 4353 4988
Facsimile: 4353 4680

Committee Secretary
Standing Committee on Family & Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
CANBERRA, ACT 2600

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: **523**

Date Received: **8-8-03**

Secretary:

6 August 2003

Dear Committee Members,

Inquiry into equal residence in the event of family separation

As a Community Legal Centre, we have frequent contact with people who would be affected by changes to the *Family Law Act*. Most of the people that seek our help are disadvantaged in some way, the vulnerable and the victimised who feel they have no where else to turn. Some of our clients are women with young children who are fleeing family violence, others are mothers and fathers who have to alter residence arrangements for work reasons.

Our submission is particularly concerned with the proposed presumption of equal residence, inspired by men's groups who are disenchanted with the family law system. We assert that such a presumption will put vulnerable children and victimised parents at greater risk of continued violence especially during the interim period before final orders are made. More generally we do not believe that equal residence will necessarily advance the interests of children when it is imposed. Rather we would assert that what is required is increased primary assistance for families in order to facilitate the tailoring of case appropriate arrangements.

Yours faithfully,

Aimee Tan
Graduate Volunteer, on behalf of the
Central Coast Community Legal Centre, NSW

Authorised by Georgia Rayner,
Solicitor, Central Coast Community Legal Centre, NSW

Arguments against a presumption of equal residence in the event of separation

- Given that the best interests of the child are the paramount consideration, we believe that safety should be the threshold factor in deciding the respective time each parent spends with their children post separation, for in the absence of safety all other factors are of little relevance.
- A presumption of equal residence does not consider first and foremost the various interests of different children, but rather the perceived rights of the parents.
- In particular, a presumption of equal residence threatens the safety and welfare of a child who has suffered or continues to suffer violence and intimidation at the hands of a parent.
- The current, open approach provides the most flexible means of determining the best interests of the child when deciding residence arrangements.
- In order to help parents focus on the many factors that should be taken into account when deciding how to arrange residence, reform efforts and resources should focus on non-adversarial decision making support mechanisms.

Introduction

Would a presumption of equal residence *in fact* advance the interests of the child as required by the *Family Law Act*? It is impossible to say without knowing each child and their individual family circumstances. Each child's situation is different and requires individual assessment, preferably by both parents (in consultation with the child where relevant) as to the most appropriate living arrangements.

As a community legal centre we do not believe that a *presumption* of equal residence would serve the interests of the children of any of our clients. Equal residence is only likely to benefit children where parents negotiate such arrangements themselves.¹ Our primary concern is with children who may be exposed to continuing or possibly increased violence or intimidation as the result of a presumption of equal residence. If the interests of the child are truly considered first and foremost the danger to children and their primary care giver in these circumstances must be seen as a threshold factor. Even a presumption that can be automatically rebutted where violence is established would be unacceptable especially in terms of interim orders since it could place children at greater or continued risk of harm until final orders are made.

It must be remembered that residence is only one aspect of parenting. It is *not* a reward for good parenting. In making residence orders courts identify a parent whose residential circumstances make them more able to advance the best interests of the child and make them responsible for the primary residential care if that is appropriate. Other aspects of parenting can and should be nurtured where they are in the best interest of the child, in particular the role of fathers who feel that they have been sidelined by family law policies to date.

Different strokes for different folks

No two families are exactly the same. Consequently it would be counter intuitive to impose a one size fits all presumption regarding residence on all families. In order to support family nurturing and individual decision making where possible, the legislative framework for determining residential arrangements for children must be open and flexible. The provision of a default presumption would hinder rather than advance the open discussion of options. What is really required is greater support mechanisms (such as counseling and mediation) to encourage and assist families to reach agreement between themselves and avoid adversarial contests over their children.ⁱⁱ

Residence arrangements are likely to be more sustainable when they are made between the parents (in consultation with their children where appropriate).ⁱⁱⁱ In agreeing with the Advisory Group's report we would assert that the government should focus on the provision of ongoing guidance and intervention policies that support this cooperative approach, consistent with each family's particular circumstances in all situations where this is possible.^{iv} This would not only be in the interest of the families engaged in primary dispute resolution, but also relieve the pressure on the courts, enabling them to deal with cases involving violence with greater expedience.

Practical difficulties and burden on children

Most importantly, the proposed presumption would prevent a party from leaving a situation of domestic violence if the law required joint residence as the starting point. This is not just a matter of convenience but a matter of safety for both children and adults trying to escape violent relationships. The party leaving the violent relationship in such circumstances would also bear the added burden of proving that joint residence is not in the best interest of the child.

A presumption of equal residence does not effectively take into consideration the different circumstances that parents find themselves in either. While every effort should be made to promote the best interests of the child, practicality and other demands on parents must play a role in deciding residence. It may be appropriate to require parents who live in the same suburb or city to be equally responsible for the residential care of their children where there is no threat of violence, however, there are many circumstances where it simply is not appropriate or even possible. Parents who live far apart, are unable to communicate regularly and easily, do not have the finances to maintain two households or work long or odd hours, should not be made to feel that they are less caring parents because they cannot share residential responsibility for their children equally. Indeed, the pressures that a presumption of joint residence can impose on parents and families in general have the potential to be damaging to children.

In this regard, due consideration must also be given to the practical difficulties that such a presumption may impose on parents and consequently their children who may feel the need to be flexible in supporting the arrangements their parents have made.

Equal parenting does not necessarily mean equal residence

We support equal parenting, but assert that equal parenting cannot and should not be equated with equal residence. Parenting is a complex responsibility which involves much more than residential care including guidance and support in various forms. Further, residence should not be confused with contact. To determine that a child should reside with one parent is not to deny the child contact with their non-resident parent. All positive relationships should be maintained and nurtured wherever possible. More should be done to support and promote positive family roles for both parents (particularly men) after separation. But efforts to include both parents should not compromise the safety of children when family violence is an issue. Any policies designed to promote positive family roles must be flexible enough to adequately consider the best interests of the child individually and without imposing any preconceived ideas of what a child's best interests 'normally' entail.

Any "anger, frustration and hopelessness" that men feel (as reported by the advisory group) would not necessarily be alleviated by imposing a general presumption of equal residence. Dissatisfaction among men concerning court decisions determining where children should reside and false allegations of domestic violence and/or child abuse in particular would be better addressed by improving the way in which commonwealth and

state agencies interact so that issues of residence can be dealt with at the same time as apprehended violence orders.^v This would not only reduce the risk of continued danger to children, it would reduce the potential for wrongly obtained apprehended violence orders to prejudice the making of residence orders. The interests of children and mothers who have been victimized as well as fathers who have been wrongly accused of violence could best be served by dealing with such matters quickly and effectively.^{vi}

Problems with the existing legislation regarding its suggested failing to ensure that fathers have an equal opportunity to parent their children should not be addressed by imposing equal residency on all. If equal residence is in fact in the best interest of the child this should be decided on a case by case basis. We believe that there are more appropriate ways of addressing the needs of men and fathers than imposing a presumption of equal residence including counseling, the provision of information and assistance with mediation as well as more general supports. The adversarial process which pits mother against father in the court does little to dispel the view of residence as a matter of winning or losing. We need to divert people into mediation and other dispute resolution paths where possible in order to maintain family relations that are in the interest of the child.

Safety first

While it is desirable that parents and children reach agreement on residence between themselves, such agreement is not always possible. It is the task of the Family Court to make decisions concerning residence based on the needs, wishes and rights of children, not the parents in situations where parents cannot agree. Reports show that many litigated family law matters involve domestic violence which often continues after separation.^{vii} In these circumstances the reasons for parents separating may be of critical importance to matters of residence. If one parent has left the other because of violence or abuse either to themselves or the children this must be accorded relevant weight. Relationships in which violence or abuse are present may be harmful to children and should not continue. Domestic violence need not directly or physically involve the child. Any violence directed at members of the child's family can have an adverse psychological affect on the child.

It is not only the safety of the child but also that of the parent (most often women) who have been subject to domestic violence. Violence towards family members can have terrible consequences for children who witness it. In some instances of post separation

abuse violent ex-partners use their residency or contact as an opportunity to continue to control and harass their ex-partner. For example, “non-physical forms of abuse of children during contact [include] being questioned about their mother's life, or given misinformation, or not being returned when expected. [Some] mothers found that they still had to manage their ex-partner's violence to try to protect the children during contact, and to protect themselves from attack”.^{viii} In looking at the relationship between homicide victims and their offenders Easteal notes that “separation itself was clearly a contributor... coupled with a history of domestic violence, or chronic alcoholism and/or jealousy”.^{ix} Easteal further notes that other researchers such as Wilson and Daly believe that estrangement is a time of high risk for women when a man feels that he is losing his control over her.^x This is particularly true of the period just after separation.

Of particular concern is the problem that a presumption of equal residence would create in terms of temporary arrangements that are either negotiated between the parents or ordered by the court at an interim hearing. Long waiting times and lengthy court proceedings create periods of increased risk for both children and their victimised parents who would have to continue to have contact with a violent ex-partner. Furthermore a general presumption could increase the number of matters that are litigated by parents who do not want equal parenting, compounding pressure on the courts and increasing delays.

The best interests of the child not the parents

Current guiding factors listed in the *Family Law Act* s63F(2) adequately highlight the important issues that must be taken into account without making any binding presumption about what the best interests of an individual child in fact involves. All of these aspects should be reinforced by the implementation of support mechanisms rather than overriding them with a blanket presumption that equal residence is best. Presumption would be contrary to s43 which advocates the protection of people vulnerable to domestic violence

The push for equal residence is not so much in the interest of the child, it is more concerned with the perceived rights of the parents, in particular men's groups who advocate equal residence in the belief courts and the family law system in general is biased in favour of women citing the high incidence of residence being 'awarded' to mothers in support of their argument.

Relationships between parents and their children should be enhanced where this is in the best interest of the children. It cannot however be assumed that this is in fact in the best interest of children in all cases. As reported in the Report of the Family Law Pathways Advisory Group, “children need to be protected from the harm that is caused by violent and abusive relationships”.^{xi} Under existing family law provisions and with on going, appropriate and timely support, there is potential for maintaining parenting relationships, and for agreement between adults in many cases.

Conclusion

Both parents often have important roles to play in the development and care of a child. These roles may vary depending on the particular needs of the child, the availability of the parents and their suitability to look after the children. It cannot be assumed that in every situation, equal residence accords with the best interests of that child. In particular, in circumstances where there is risk of violence, the safety of the child must be seen as the primary factor in deciding residence. A presumption of joint residence has grave potential to put children at greater risk. Instead, the focus should be on the efficient processing of sensitive cases and the provision of better support services to help parents and their children work through their experiences and particular needs post separation in the least antagonistic way possible. There are ample provisions under the *Family Law Act* for shared residence as the child's right where it is in fact in the best interest of the child.

If the aim or hope is to promote the involvement of both parents in the parenting of children after separation, a presumption of equal residence cannot be implemented as a fix all or even most solution.

Endnotes

- i Equal residence arrangements are not common. In 1997 only 3% of children from separated families were in 'shared care' arrangements. See the Australian Bureau of Statistics, *Family Characteristics Survey*, Ct 4442.0 AGPS, Canberra, 1997. Also, US studies have shown that in the limited circumstances where parents make shared residence arrangements, they do so voluntarily and that their post-separation relationships are commonly characterised by cooperation and low levels of conflict. See Bauserman, R., "Child Adjustment in Joint-Custody Versus Sole-custody Arrangements: A Meta-Analytic Review", *Journal of Family Psychology*, 2002, vol 16, no 1 pg 91-102 at 99.
- ii This position is supported by the Family Law Pathways Advisory Group's report to the Federal Government. *Out of the Maze: Pathways to the future for families experiencing separation*, Canberra, 2001.
- iii This is based on evidence from other countries (primarily the UK) which suggest that joint residence is only serves the best interests of the child when parents are able to cooperate and are genuinely concerned to put the interests of their children first. See Smart, C., *Children's Voices*, 25th Anniversary Conference of the Family Court of Australia, July 2001, at <http://www.familycourt.gov.au/papers/html/smart.html>
- iv Family Law Pathways Advisory Group, *Out of the Maze*.
- v In support of and with reference to the Family Law Pathways Advisory Group's Recommendation Number 28 in *Out of the Maze*.
- vi Furthermore, we would argue that under a more integrated and streamlined system that could deal with AVO's and residence together a presumption against contact should be imposed where violence is proven. Such a presumption could be modeled on the New Zealand *Guardianship Act 1968* s16B.
- vii Hunter, R., "Family Law Case Profiles, Justice Research Centre, June 1999 p 186. Also see Brown, T., et al, *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.
- viii McInnes, E, *Public Policy and Private Lives: Single Mothers, Social Policy and Gendered Violence*, Thesis Collection, Flinders University of South Australia in National Council of Single Mothers and their Children Inc. Submission.
- ix Easteal, P., *Killing the Beloved: Homicide between Adult Sexual Intimates*, Australian Institute of Criminology, Canberra 1993, pg. 85.
- x Easteal, referring to Wilson, M., & Daly, M., 1992, "Till death us do part", *Femicide*, eds Radford, J., & Russell, D., Twayne Publishers New York, in Easteal, P., *Killing the Beloved*, pg 86.
- xi Family Law Pathways Advisory Group, *Out of the Maze*.