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Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
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House of Representatives Standing Committee on Family and Community Affairs	
Submission No:	673
Date Received:	8-8-03
Secretary:	

[REDACTED]
[REDACTED]
[REDACTED]

Dear Sir,

I wish to make a submission to the "Inquiry into child custody arrangements in the event of family separation". Please note that in the interests of simplicity and privacy for the other parties I have blurred slightly the story but the principles, examples and circumstances remain the same. I can give you a full version if you wish.

My name is [REDACTED] and I have been involved with parenting for a number of years and have experience with respect to your terms of reference. I have been at various times a parent as part of a shared custody agreement, a litigant in the family court and a step-father. I am also a [REDACTED] with 20 years of professional experience and one of the troubles with being involved in a profession that involves critical analysis of systems is that your find you applying your critical analysis skills to relationships, people and the various systems you encounter in life. I have had a chance to observe the current system in operation and I believe that I can comment on the current system.

Firstly I should recommend to you as a person of worth to contact, [REDACTED] Relationships Australia [REDACTED]. He is the coordinator of the Preston Fathers project, a government funded groups that seeks to help fathers in the process of relationship breakdowns with respect to parenting skills and self development through networking, education, group meetings and activities. He has been involved with this for many years, and as well as experiencing a breakup himself, has counseled many men and seen the problems involved with child access arrangements after separation. He was of enormous help to myself, even coming out to my workplace when I was unable to get in to see him.

My own story is as follows:

My first child was born when I was 19 and in a defacto relationship and a second child followed 18 months later. My partner and I separated 8 years later and access to our children was never in question. Although we had our problems, we both understood that the children came first. When she moved to [REDACTED] I moved as well giving up a high paying job and dropping management levels to be near my children. We had a casual shared parenting arrangement in that nominally my access was each second weekend and half of every school holidays but in actuality I took my boys to cubs every Monday night and had them overnight at least one other night per week, returning them home before school. If their mother went out I baby sat the children overnight at either my place or her place and when she studied I also babysat our children. Birthdays, Christmases and Easter were shared and both of us understood that the children came first in their access to both of us. We did have at times the occasional major argument but all our argument was not in front of the kids. The first major problem and perhaps the most serious was when we went to lawyers to sought out our property settlement. We had agreed everything in advance but just needed a lawyer to set it out correctly however her lawyer made threats via my lawyer who made threats back. These were only minor things but if we had not been talking to each other, we would have never talked again. To the lawyers these were just standard "techniques" used. In all my dealings with the family court since and the legal system I have found in the majority of cases, the same still applies. The lawyers seek to win and in many cases they loose sight of the true "clients", that being the children and seek to win. This is an unfortunate and unavoidable consequence of our current Family Court system which is adversarial in nature rather than inquisitional or based upon cooperation.

Summary 1

The shared parenting arrangement was very effective with respect to my children. They are now adults and say that they never saw them as being parented by either dad or mum but simply being parented by the two of them as one. They both like being able to be at both houses and sharing time with both parents.

Summary 2

With respect to people who are experienced and work in an adversarial system, it is very important to keep them as far away as possible for the resolution of any system relying on cooperation and mediation.

Later on I was involved in a relationship with another woman who was a friend prior to her pregnancy and had a young daughter and son. She split up with her daughter's partner when her daughter was 3 weeks old and came to stay with me as a friend. We commenced a relationship 3 months later. The father of her daughter refused to see his daughter and thus from 3 weeks of age, I was the only male father figure that the daughter saw. When we formed a relationship 3 months later, she slept in the bed with us. I was just as involved in raising her as her mother, changing nappies when we went on holidays, she sat in her seat in the front of the camper van between her mum and I and chatted to me all the time. I carried her in a hiking carrier and we spent a lot of time together. In fact when her mother couldn't settle her, it was always certain I could. We were as close as could be any father and daughter and she also had an excellent relationship with my boys. I encouraged her mother to take her to see her

father but the father wasn't really interested. When she was 19 months old, her mother decided to end the relationship after having a second daughter to me. Despite the closeness of the relationship, her mother decided she didn't want me to continue to have contact with me despite myself being a part of her daughters life for all the years. I initially started family court action for contact with my daughter and included the other daughter in the action but only for a couple of hours a fortnight. However the court kept adjourning the matter with relationship to this child despite making contact orders with respect to my own child. I was told by the magistrate that they would keep putting off making a decision and eventually after a number of months I realized it was too late as I had been out of B life for too long. It is considered against the child's best interests to be separated from primary carers and separation theory now believes that a child can have a number of primary caregivers in her life. Separation of a young child from her mother is a tragedy, separation from her father as well is considered a tragedy by the composite and thinking proportion of society however separation from significant figures can be equally tragic to the child.

I have a friend who married a widower who had two children aged 2 and 3. She raised the children however the father ended the relationship when the children were 12 and 13. The father banned her from having any contact with the children to whom she was the only mother they had known. The children wanted contact but didn't want to go against their dad or upset him.

Summary 3: the law should recognize that children form attachments regardless of biological relationships and should make allowance for the children to maintain these relationships dependent upon the time of the relationship, the intensity/involvement of that relationship and the reciprocity of that relationship.

Summary 4: When arrangements are considered regarding contact, any arrangement that involves the children's wishes leaves the children open to pressure, subtle or overt, from either or both parties. At present designing contact from scratch, places the children in a position of having to "choose" between their parents and encourages competition between the parents. If a de facto or automatic contact is set into legislation in a similar way that a traffic fine is set into law (i.e. shared parenting), then the children are not involved except if one parent doesn't wish to have that arrangement and then they have to convince the court why it should change. That parent would then be the one having to apply pressure on the children rather than 2. Also the children have the excuse that "we have to go on contact, its the law" when pressure by parents to not go on contact.

There is a statistic that shows that only a small proportion of cases actually go to the family court and only a few actually go to full trial resolution. This is given as an example that the court system works and that couples can generally work out access arrangements themselves. From my conversations with other men through Parents without Partners, and the Preston Fathers project, this is not the case. There is a significant unhappiness out there that acts as a background noise of dissatisfaction. For example my brother wants more contact with his children. He sees them every second fortnight if there mother lets them and quite often she wont. He has to travel

30 kms to collect them and then return them. He would like her to share the contact travel. He is not contacted regarding school assemblies, reports etc and is not given any say in the raising of the children. Both these are reasonable requests and would probably be successful. However he cannot change the circumstances because

- a) If he starts any attempt to change the arrangement his ex-wife will immediately stop the current contact and he would see his kids until the court orders it (which he is aware can take a while)
- b) He doesn't have the money to hire a lawyer
- c) He doesn't have the educational level or confidence to be a self representative litigant. To go in front of a court for someone who has never had involvement with the law is an extremely stressful and horrifying concept.
- d) He has heard the horror stories of other family court action.

Summary 5: having defacto contact arrangements enshrined in law such as shared parenting will enable greater participation by parents with respect to their children and remove the disenfranchisement/voiceless ness of the large number of people in society no being able to afford a lawyer or having sufficient confidence or education to be a self representative litigant. It will make parenting an automatic right rather than one that may have to be fought for against the wishes of the other parent.

I had two children to two separate mothers. With respect to the first she decided before the child was born that she didn't want any involvement with me and had decided she wanted her new boyfriend to be the father. To her annoyance, I refused to accept this and after trying to get her into counseling, she refused to accept this and I had to begin court action. Her response immediately was to make allegations regarding violence and try for a violence restraining order.

She made several applications over the time period and still continues to do so. In most of these cases, she never followed through and in the one time when she did, she was told that she didn't have a valid case and a mutual restraining order negotiated between the magistrate between us. During this time however, there where interim violence restraining orders in place and it would take a number of months until they were heard. The police came to know the situation and when they were serving them they would be embarrassed and on one occasion the particular officer told me that they didn't take them too seriously, that most of the ones they had to serve where to people in the same place as I. The Pathways Report by the Family Law Council in its survey of family law consumers and service providers (counselors etc) found that a significant proportion of women reported being encouraged by their lawyer to make an application for a violence restraining order as part of an overall strategy. When they protested that there was no actual violence or any danger occurring, they were told that it didn't matter. Unfortunately I have found that once any accusation is made, the situation becomes tainted and it makes getting suitable interim orders difficult and created a problem with respects to the resultant status quo created. IN my case, a Family Court of WA Judge found that the presence of a restraining order (which he knew was interim) was proof that violence had occurred. I have the reasons for judgement where he made this decision and found against myself having joint responsibility and made other sanctions. Although this would be able to be overturned

in an appeal, I would have to appeal to the Supreme Court [REDACTED] and it would be very difficult and expensive to do so.

Summary 6: There needs to be some means of rapidly determining the veracity or otherwise of allegations regarding domestic violence or similar with respect to family court matters as this is used as a weapon currently. Any changes made even with presumed shared parenting on separation will be susceptible to subversion by this means. Suggest that once an application is made regarding a restraining order, it is not able to be withdrawn but sent to the police for investigation. The police to produce a report or recommendation: likely or proven, to proceed to a court hearing and a charge of assault if proven. Indeterminable, proceeds to a standard application hearing, unlikely or false in which the matter is sent to a court hearing with the potential for a restraining order to be issued or for a charge of making a false allegation to be available. If a false allegation is proven, the punishment to be equivalent or greater than that of the domestic violence perpetrator as a domestic violence perpetrator places at risk a small number of people whereas a person who places the system in risk places in danger a larger number of people.

When I initially started my case for contact with my daughter, she hadn't been born yet. However due to arguments on my behalf the family court accepted the case but then kept putting off a decision until after the child was born. I sought orders that would let me have some time with my daughter after she was born and the mother was resting but the mother's attitude was constantly that this was her child. After the child was born, at the next hearing, the magistrates stated that it had only been a number of days and it was unreasonable for a father to want to see his child so soon and adjourned it again for a number of weeks. The previous hearing a different magistrate had sympathized with myself but told me that she didn't want to make orders that could be a precedent and adjourned the case until after the child was born and made a note for contact to be given. Although the magistrate read this note, he couldn't see any reason for it and ignored it.

This is not unusual, there are a number of magistrates all having different ideas and principles and 5 judges all completely different. What orders you get are completely dependent upon the judge or magistrate you get. Two of the family court judges are known to be modern, proactive and compassionate people, one is known to be extremely old fashioned, opinionated and basically believes that children belong with their mother. I spoke to a counselor of the Family Court Counseling Service who told me that one of their problems is that the psychology of what is best for kids is becoming more and more precise and having made great strides in the last 30 years. However, there is no requirement for Judges and magistrates to educate themselves or attend self education seminars (similar to that attended by engineers who have to undertake a degree of ongoing education). The Counseling service had arranged presentations and speeches but no one attended. Thus the knowledge base applied to our children is not knowledge but purely opinion and social conditioning or even bias.

Summary 7

The de facto contact arrangements should be determined by qualified or experienced experts in the field of child psychology, child care and other similar disciplines rather than people from the legal system.

Summary 8

Having defacto contact arrangements determined by experts in consultation will stop the children's best interests being determined upon the "roulette wheel" of chance as is present where it is purely the luck of the draw and identical cases can end up with opposite outcomes.

Summary 9

There needs to be included with the tenure of any Family Court magistrate or judge, a requirement for ongoing education in a similar manner as is required for professional engineers and a yearly performance assessment as is standard in private industry.

Summary 10

The safety guard of the appeal system is not available to the vast numbers of people who attend the family court. In the event of a defacto system, there needs to be an auditing system present similar to that used in the ISO 9002 system with respect to cases that do go to the Family court to monitor the cases that do need to go in front of the court and ensure that all cases are handled equally efficiently and not dependant upon the particular judge/magistrate seen.

My daughter was 8 weeks old until I could see her and then this was supervised contact. There was an obvious emotional cost. Also despite having been a parent of over 18 years including a number of years where I had my older children completely to myself, I was required to have supervised contact. The mother of my daughter was a first time mother. This was a common situation in Bunbury, apparently due to the presence of the supervision service which made it easier for a magistrate to order supervised contact if the mother raised any query that to take a risk. This of course ignored the damage to the parent child bond and the emotional cost to all parties.

My situation was by no means unusual. If a split occurs and the mother takes the children, the other parent has to undertake the legal action to get contact. This can take a couple of weeks minimum and then when the papers are lodged, if it is especially urgently a hearing can be set down for 28 days. Normally it can be six weeks and in the event of the Bunbury circuit where it is often busy, it can take two circuits or up to three months. Assuming that the other party appears, then the first hearing is simply a directions hearing in which no orders can be made except by consent then there is a wait until the next hearing which could be another 3 months. If however the other party doesn't appear, then it is adjourned and may be adjourned several times until the court is willing to proceed ex-parte. Thus it can take at least 3 months but even up to 12 months or longer before the person can see their children, and at the same time they are having to deal with the breakup and the resulting life turmoil, they are having to deal with the loss of their children and the anger towards the other person. This doesn't encourage parties to cooperate.

Summary 11

Defacto shared parenting would remove the emotional cost associated with having to wait anywhere from 3 months to a year for contact with the children

and the associated emotional cost and destruction of potentials for reasonable cooperation in the parenting relationship.

When I prepared my orders, I undertook research as to what was best for my child. Extensive creditable literature was available as to the benefits of shared parenting and there was a scarcity of credible literature against it. Because of what I read, my own experience of it and because of what I have seen of other arrangements it seems to me to be the best situation with respect to post separation custody. I thus included it in my orders. However I found little support for it with respect to the interim orders. It appeared that the magistrates didn't want to risk anything too significant but to leave that to the judges. In the final orders the judges believe that the time for experiments is over and make final orders based upon the interim orders. The fact that I asked for shared parenting was used against myself and as a measure of how unreasonable I was. The mother made no attempt to do any research or education but simply stated that this was her child. Her position was treated as being equally rational as mine.

I also took the approach that I would be positive and seek well balanced orders. This took the form of asking for orders only that were in the child's best interest and balanced between the parents I.e. Fathers day with Dad, Mothers day with mum etc. I found however that the court system was not equipped to handle cooperation but was based on the adversarial system in which two lawyers totally denigrated the other party. I observed many times the interchange between lawyers in which it was all just one big game to outdo the other and "win" and not necessarily to determine the child's best interests. There was no sense of trying to determine the best for the child. There is also the contradiction that the lawyers income is determined by the amount of litigation you undertake and the better he does his job the better is his income. Two people may have had a marital breakdown but not necessarily lost a parenting relationship or a desire to do the best for their children. Their presence in court may be a result of not knowing what is best for their children. Instead of trying to build the relationship that still exists, both are told that their best way to get ahead for what they want is to denigrate the other parent as much as possible. By the time this is finished, these two people hate each other and any chance of building a suitable relationship regarding the children is lost. Just as bad, the decision regarding the children is made on a basis of choosing the "least worst" parent rather than seeking to choose the best arrangements.

Summary 12

Defacto shared parenting will eliminate a large component of "legal" practitioners whose skills are legal based but not with respect to children or what is best for children.

Summary 13

Defacto shared parenting will remove one source of contention between parents and enable them to make decisions on the other issues in their life. It will also force people to learn to cooperate such that when the decisions regarding property settlement and similar need to be made, they have established a pattern of cooperation

Summary 14

The adversarial nature of the family court needs to be removed for any case that goes to the family court. It would be better to have an inquisitorial system or

even better, a panel system involving a few experts such as a family law specialist, a child psychologist and similar with the powers to investigate any allegation etc. and to examine the matter in a positive, active matter rather than in the form of an distant figure behind a bench watching two people fighting.

Summary 15

Defacto shared parenting would allow the initial period of cooperation after separation when parents are essentially concerned with the children to be maintained and fostered rather than being destroyed as at present.

When my case finally got to the final orders stage, it was determined that because the mother was not prepared to cooperate in any way with myself and that we were in conflict (due to me seeking shared parenting), shared parenting was not possible. In fact because of the lack of cooperation and apparent conflict the judge removed my right to joint parental responsibility despite all the evidence of myself seeking mediation and counseling, do everything correctly and that is was clearly the mother that refused to cooperate. This essentially created in my opinion the precept that "joint parental responsibility as laid out in legislation is only possible if you accept what the partner with the children wants or if that partner is prepared to let you have it. The other problem is that strategically the interests of the party with the children is best served by behaving as obstructively as possible.

The other problem I encountered was with respect to the defacto situation. The family court is currently strongly leaning towards the defacto situation that being the situation where the children are at the time of the final orders being made and the main criteria being producing a reason why it should be changed. In many situations, it was the mother who was carrying for the child before the separation and this carries on after the separation. In my case however, the action was started prior to the birth of my daughter before there was a status quo but still when it came down to the final orders, the major consideration of the judge was the existing status quo (despite this status quo being created by the family court itself) and that there was no reason to change it. The situation with respect to parenting however is changing and many families involve care by both parents especially where both parents are working. In a separation, society essentially expects the father too leave as the underlying culture is that children belong with the mother. However, because of the status quo created, essentially the parent who has the children will end up with the children. Thus the decision about where the children will be is decided by the initial first decision at a time of stress. Even worse, if the situation with respect to the status quo is known, then the children become a pawn in a game of which parent manages to grab the kids first. Even when a magistrate makes an initial "interim" hearing, they are essentially deciding who will have the final residence of the children

Summary 16

Shared parenting will remove the blackmail situation where one parties parental responsibility is held hostage to the other parents behavior.

Summary 17

In a situation where shared parenting becomes the defacto situation, there must be allowance made should any case be refereed to the family court for a different arrangement, the reason for which the application was made and this reason

should be a determinant upon the final outcome. I.e. if it is because the applicant has refused to cooperate with the shared parenting arrangement, that should be a factor against the applicant. This removes the incentive for the partner with the children to sabotage the shared arrangement simply by simply refusing to cooperate but will in fact create an incentive to cooperate.

Summary 18

The use of a status quo share parenting arrangement will remove the problem of the status quo where possession is essentially 9/10ths of the law and the possession of the children is the determinant of who will have residence. It will also remove the injustice of an litigant being disadvantaged by the process of the family court.

Summary 19

The use of a shared parenting contact arrangement will remove the incentive for any person to gain through a lack of cooperation.

The mother of my child was not prepared to accept the contact orders and regularly sabotaged them. Eventually she sought an order to reduce the contact from 104 days per year down to 48. When it was apparent that this wasn't going to work, she made allegations of sexual abuse. She had no evidence regarding this and her application was rejected and she was told that contact had to occur. Two government agencies found no evidence. When the first set of allegations were dismissed she produced a second. They were dismissed. I sought a recovery order but the court refused to issue a recovery order. There was then a ridiculous situation where by the court said that contact should occur yet wouldn't give a recovery order. The mother resubmitted the second application and this time it was successful primarily I believe due to my attempting to seek a recovery order. The court ordered a report however any assessment of my relationship will be based upon single interview with her and my child in the experts room. Thus even when there is no evidence, you are still found guilty. The court expert's (a psychologist with experience in dealing with the children of sexual abuse) report has stated that although there is no evidence that it has occurred, there is no evidence that it hasn't occurred. I haven't seen my daughter for 8 months while this is in process. It should be noted that my current wife who I live with is a child psychologist with experience in child protective services and with a 5 year old daughter. I have been told by other expert parties that give the attitude of the mother and the continued resistance and litigation, the court may simply deny myself contact for a number of years to get the matter out of the system and try to help the child by making the mother happy.

Allegations of sexual abuse are a significant feature of child residence matters but unfortunately it is hard to determine the veracity of these claims and while a significant number of people say that the actual number upon which a risk is found to be low, an equal number of people believe the amount of abuse reported is low and that the court is being too easy. In any case, it is possible to find your contact drastically reduced or eliminated entirely without being found guilty of anything.

Summary 20

Any shared parenting arrangement must have the provision to deal with sexual abuse allegations as soon as possible and with all priority as in the case of parents opposing shared parenting, this is the avenue available to sabotage this agreement. In addition there are many true cases that occur and these need to be rapidly identified.

Summary 21

It has been said that shared parenting is unreasonable as you cannot expect people to cooperate after splitting. This ignores the principle that as persons of society we have certain duties regardless of our emotional state. Regardless of how much we detest a person we cannot inflict violence upon the person and their are similar responsibilities. When it comes to children, the rights we had – with respect to individual whims stopped the minute we became pregnant, men and women and if you don't wish to cooperate with the other parent, don't have kids with them. Being a parent requires maturity. There is an encouragement to cooperate in the benefits to the children however equally there needs to be a stick in that if people refuse to cooperate without a valid reason or attempt to sabotage through false allegations, they will find themselves worse off than they would have been with shared parenting.

Recommendation 22

It has been said that each case is different so a one size fits all cannot be applied to the contact arrangements of children. I would draw the comparison to speeding . If you speed, there is a fine involved, that is a given. Each person who speeds has a separate reason for speeding and each case would be unique case depending upon mood, level of training attitude, lateness for some reason etc. We do not make all speeders go to court but have a level of fine that is set by experts. If a particular speeder feels that there is something unusual or mitigating regarding their circumstances (such as being a ambulance driver, or some one taking someone to hospital etc) they can take the matter to court. The same applies to contact although each case is different there are a set of principles that can be extracted and placed into the law. These principles are that extensive testwork has shown the best general arrangement is for children to have the maximum contact with both parents and each parent is important for a child. It is also possible for shared parenting to work. If you don't agree with these principles, then it is up to the person who disagrees to prove why it should be different. Thus the court moves from having to choose an arrangement based upon conflict to one of determining why the optimum arrangement is not applicable and then determine the arrangement if this is proven.

I thank you for you attendance on this matter and invite you to contact me if you have any queries.