

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: **746**

Date Received: **18-8-03**

Secretary: _____

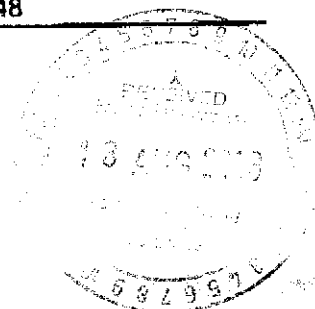
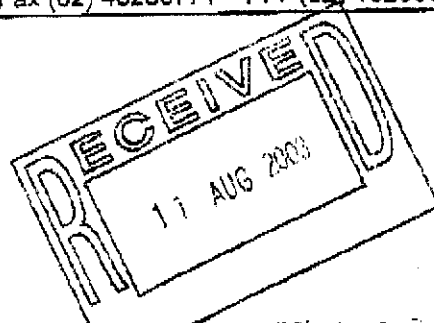
Macarthur Legal Centre

Incorporated

• 4 Broughton Street, Campbelltown NSW 2560 • PO Box 798 Campbelltown 2560
• Ph (02) 46282042 • Fax (02) 46280771 • TTY (02) 46200348

5 August 2003

Alby Schultz M.P.
191 Auburn Street
GOULBURN NSW 2580



Dear Mr Schultz,

Re: Standing Committee on Family and Community Affairs: Inquiry into Child Custody Arrangements in the Event of Family Separation

The Macarthur Legal Centre notes the establishment of an inquiry into Child Custody Arrangements in the Event of Family Separation by the Standing Committee on Family and Community Affairs and would like to draw your attention to how unrealistic and dangerous such a proposal for shared residence would be.

In any such inquiry it is important to remember that the interests of the child should come first, not the interests of child support paying and voting parents.

Under current law parents after separating already have presumed joint responsibility for their children. Children also have a statutory right to contact with both parents. In any decision on residency the best interests of the child are of paramount consideration. This means that if it is in the child's best interest to have shared residency the court already has the power to grant it. Shared residency currently occurs in less than 5% of separated families.

However, a blanket presumption of shared residency is too arbitrary and is not in the best interests of the majority of children. A presumption ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and family violence. Parents separating is a very traumatic time for children and after separation they need stability and security. Stability may not be achieved by having to divide their lives between two houses. Further children may be forced to live with perpetrators of violence and other forms of abuse. These situations are clearly not within the best interests of the child.

A presumption of shared residency is also not taking into account the reality of many families situations. Even before separation the care of the children is not generally shared equally between parents. Shared residency works when both parents live close to each other, have flexible working arrangements, can afford to maintain two separate households and are able to co-operate easily with each other. This is not a reality for many parents and pushing them into an unsuitable arrangement will only hurt the children.

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Service to Campbelltown Camden and Wollondilly Local Government Areas

Currently only about five percent of cases end up in court, with the majority of parents reaching agreement without resorting to litigation. However, if there is a presumption of shared residency there may be an increase in litigation by parents who do not want 50:50 shared residency. Delays may be increased and resources stretched further in the already overburdened Family Court and Federal Magistrates Service with parents representing themselves due to the lack of legal aid funding.

There is also the risk that some parents may be forced to cave into the other parents demand for shared residency because they cannot afford costly litigation to rebut the presumption when it is clearly not in the best interests of the child. This is also the danger when parents are violent and abusive. The presumption will also force some children to live with violent fathers and will force mothers to have to regularly negotiate with and be in the presence of violent ex-partners.

The Prime Minister wants boys to have a strong male role model in their lives. The reality is that if a father cares about their children they can already be involved in their lives if they seek residence or substantial contact. It is wrong to assume that any male role model is better than none. Where's the value in a role model that only has their son live with them to reduce their child support payment? It is more important that boys are raised by nurturing and positive parents of either sex, rather than by fathers in particular.

Any presumption needs to be founded on compelling evidence based on recognised research that shared residency really is in the best interests of the overwhelming majority of children. As noted above shared residency currently occurs in less than 5% of separated families. No comprehensive study has been completed as to the success or failure of these arrangements. Evidence from overseas suggest that shared residency only promotes the best interests of the children if the relevant parents are able to co-operate with each other and put their children's interests first.

A presumption of shared residence will also effect child support payments. The current position from the Child Support Agency's (CSA) policy called 'The Guide' is that if

1. CSA is aware that a court order or registered parenting plan is in force which deals with residency and contact for a child, and
2. CSA is notified, or becomes aware, that a person is contravening that order or parenting plan, and
3. There is no reasonable excuse for the contravention, and
4. As a result, one person has more care of the child and the other person has less care of the child than they are supposed to under the order or parenting plan, then
 - The person with more care than they are supposed to under the order or parenting plan is taken to have the level of care set out in the order or parenting plan (ie. Their 'lawful' care), and
 - The person with less care than they are supposed to under the order or parenting plan will be assessed on the basis of the actual care that they have (ie. Their 'actual' care).

If there was a presumption for shared residence from the date of separation then we need to ensure "lawful care" does not become 50 per cent for each parent. If that happens the following example shows the disastrous results. Let's assume the child is actually in the care of the resident parent for 80 per cent of the time and the non-resident parent for 20 per cent. The case eventually goes to court and the presumption is rebutted, the court awarding the resident parent 80 per cent of the care and the non-resident parent 20 per cent. This means that the resident parent is disadvantaged during the period from separation to the time the court makes the order. The amount of child support that the resident

parent is paid is not reflective of their actual situation because during that period the resident parent has been taken to have the lower level of care, the "lawful" level of 50 per cent rather the actual 80 per cent.

Being the resident mother of children is already the most likely predictor of poverty in Australia, with single mothers heading 75-85% of single parent families. Changes to child support payments because of a presumption of shared residency will further increase the number of women and children living in poverty.

Further, the child support formula has already been reviewed several times and has been made very complicated to account for various circumstances, including change of assessment. It should not be further complicated. The child support formula was initially based on research about the relative costs of raising children. This should not be watered down. It is quite alarming that the issue of whether the child support formula is fair is even being addressed in the same inquiry as shared residence. The linking of the two issues strongly suggests a focus not on the best interests of children, but on the financial interests of non-resident parents.

If a presumption of shared residence was implemented many parents may face further financial hardship. Under current social security laws only one parent is eligible for the Parenting Payment (single). Generally, the other parent has to claim the Newstart Allowance. This means that there are numerous obligations that this parent has to meet which are often time-consuming and difficult to meet if they have the care of children. If these obligations are not met the parent may lose part or all of their income. Further, the actual Newstart Allowance received is \$30 less than the Parenting Payment, the income test is harsher and there are restrictions on how much additional income they can earn.

The Macarthur Legal Centre urges you to raise these matters with the Minister of Family and Community Services, Senator Amanda Vanstone, so that her Department can take them into account.

Yours sincerely,
MACARTHUR LEGAL CENTRE


Phillip Dicalfas
Solicitor