



Federation of Community Legal Centres (Vic) Inc

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(Incorporation Reg. No. A0013713H)

8 August 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

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 753

Date Received: 17-8-03

Secretary:

Dear Committee Secretary,

Re: Inquiry into Presumption of Joint Custody

The Federation of Community Legal Centres (Vic) Inc. (FCLC) is the peak body for Victorian Community Legal Centres. There are 46 rural, regional, generalist and specialist Community Legal Centres (CLC's) in Victoria.

Statistics from the 2001-2002 Annual Report demonstrate that a large proportion of the work undertaken by rural, regional, generalist and related specialist centres (e.g. Women's Legal Service Victoria), involves family law and child support matters. Representatives of these CLC's form working parties on specific areas of law. Such is the Family Law Working party.

This submission has been put together by members of the working party on behalf of the Federation and is based on first hand experiences derived from casework and involvement in community legal education and law reform activities.

We welcome the opportunity to make comment on the terms of reference set down.

(a) given the best interests of the child are the paramount consideration;

- (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted*
- (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including grandparents.*

Statistics indicate that the Family Court does not immediately grant "custody", (which is now referred to as "residence"), to one parent when a marriage breaks down. In reality, most parents try to co-operate after separation in relation to the children's living arrangements. Family Court proceedings are traumatic and emotionally distressing for all parties involved,

particularly children. Most parents would not wish for their families to be subjected to the hostility and scrutiny of Court proceedings.

It is rare for parents to litigate in the Family Court about this matter, and generally only 5% of marriage break-ups are heard by the Family Court.¹ In these cases, the parents' relationship is so hostile that the parties can only have their case resolved by the intervention of an independent third party, namely, the Family Court.

In relation to matters that are heard by the Family Court, children generally live mainly with their Mothers because Fathers rarely apply to the Court for "custody" (residence). Mothers apply for custody/residence in about 74% of cases whereas Fathers apply for custody/residence in about 24% of cases. Generally, Fathers will apply to the Court for either residence or contact only to prevent a Mother from moving interstate.²

For the majority of cases that are not heard by the Family Court, children live with Mothers (88% of the time). Most of these decisions are made by agreement between the parents and without legal advice.³

Existing Parental responsibilities

The Family Law Act (Cth) 1975 ('the Act') is clear in its intent that children *have a right to know and be cared for by both parents*. Further, each parent has a responsibility towards their child/ren regardless of relationship break-down:

Section 60B of the Act stipulates as follows:

(1)

The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2)

The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

- a) *children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and*
- b) *children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and*
- c) *parents share duties and responsibilities concerning the care, welfare and development of their children; and*
- d) *parents should agree about the future parenting of their children.*

¹ Family Court Annual Report & Australian Law Reform Commission 1999

² Griffith University 1999 Family Court & University of Sydney 1999 and ANU & Murdoch University 2000

³ ABS 1997, 1999

The Act is worded in this manner to indicate that parents are expected to co-operate to the best of their ability about decisions regarding the children. Obviously, this would be in the children's best interests.

Therefore, if the Mother is attempting to prevent the Father from seeing the children (a common allegation made by Fathers), the Father has the ability to challenge the Mother in the Family Court.

It is noted also that since 1996, the Act uses "residence" instead of "custody" and "contact" instead of "visitation". This is again evidence of the intent of the legislation to encourage parents to work co-operatively rather than argue over a child as a possession. It is also important to note that the Act is framed to take the children's best interests as the overriding consideration in determining with whom the child lives.

Children's best interests

The Act requires the Court to look at a number of issues to work out what is in the child's best interests.⁴ It is important that a child's wishes be considered, although obviously, this would also depend upon the age and maturity of the child. The Family Court uses psychologists to help it decide what the child's wishes really are. It is common for a child to say to each parent that s/he would like to live with both parents so as to appear fair and not to take sides. This can put extreme pressure on a child. The Court will not subject a child to

⁴ any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (i) any family violence involving the child or a member of the child's family;
- (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstance that the court thinks is relevant.

give evidence. Rather, a psychologist is appointed to ascertain, whether the child does wish to live with one parent more than the other, and if so, why. Either party has the opportunity to cross-examine the psychologist in his/her findings at the time of the trial. The Court is then in a position to make a finding about the psychologist's report.

Another important issue is the nature of the relationship the child has with either parent. The reality is that most Mothers are full-time homemakers at least during the child's early years of development. Generally, Mothers remain the primary caregivers of the family and still shoulder the major responsibility in running the household. Therefore, when separation occurs, by and large, the Father has not had the experience of caring for the children to the same extent as the Mother.

The Family Court considers the status quo as a significant factor in determining the child's residence post-separation. This is due to the fact that uprooting a child from his/her usual place of residence, and altering the roles of significant players in the child's life is not considered in the child's best interests. In the less common situations where the Father is the primary caregiver, it is likely that if a contested residence dispute arose, the Father would be considered the more appropriate resident parent. In situations where the primary caregiver displays inappropriate behaviour towards the child, then the status quo is likely to be changed.

The Court will also look to the possible harmful effects on a child to be separated from either parent. Again, due to the fact that mothers are usually the primary caregivers, it is found that the effect on the child of being separated from the Mother would be harmful. The Court looks at these matters on a case-by-case basis, and there is no policy or presupposed belief that the child should live with the Mother. Again, if a child is found to be likely to be more traumatised from being separated from the Father rather than the Mother, then the Court is likely to determine that the child remain with the Father.

Importantly, the Family Court looks at the need to protect the child from being a victim of, or a witness (and therefore victim) of domestic violence. It is a sad reality that in most violent homes, the Father physically, emotionally or psychologically abuses the Mother. If the child/ren are not victims of the violence themselves, unfortunately, they are often witnesses to the violence. In such situations, it is obvious why the children should live in a home that is not headed by a violent person.

Whilst it would be preferable for all children to have frequent, loving contact with both parents after separation, unfortunately, due to the often turbulent emotions that result from relationship breakdowns, it is very difficult for all parties to not feel hurt, angered or saddened by the situation. As already mentioned, most parents do find ways to support the children emotionally, physically and financially without needing the intervention of the Court. However, most separated mothers work either part-time/casual or not at all so that they can care for the children. This is because the Mother has to take on the greater responsibilities of the household and has probably done so when the relationship was intact. In the same vein, the Father usually is able to continue to work full-time upon separation.

It is in the best interests of the children that they are provided with as much stability and security as is possible due to the already traumatic upheaval in their lives upon separation. Hence, the children should be protected from such trauma by not being subjected to inordinate change in their living circumstances.

It is correct to say that children need positive role models in their lives, and it would be preferable for the positive role models to be their parents. However, unfortunately, sometimes due to the relationship breakdown, or the nature of the relationship whilst it was still intact, may actually provide the children with negative role models, such as violent, emotionally manipulative or controlling parents. It is obviously not in the child's best interests to be constantly exposed to warring, antagonistic parents, or violent relationships.

(b) whether the existing child support formula works fairly for both parents in relation their care of, and contact with, their children

It is not a coincidence that the current Inquiry is also reporting on the perceived injustice of the Child Support System. Child Support payments are minimal compared to the actual cost of living for a family. As already mentioned, the Act provides that both parents are responsible for the care of a child. This includes financial care, and therefore, children should be financially supported by their parents. It appears that the disgruntled opponents to the Child Support System believe that they should pay for child support according to how often they see their child. However, a child is not a piece of property to be paid for upon viewing. Also, unfortunately, in some circumstances, Child Support or any other type of maintenance payment is withheld as a form of financial abuse and control. This will obviously impact upon the child's welfare.

In conclusion, we welcome any discussion and analysis of a complex area of law. It goes without saying that, we also hope that any recommendations made are done so with the best interests of the child as paramount; the standard of the existing Act.

It is important for all families to find their own ways of dealing with the pain and hurt of relationship breakdowns. When the situation is so volatile that agreements cannot be reached and where there is violence, the Court must be able to step in and decide what is in the child's best interest on a case by case basis, given all the facts presented to it.

There is no doubt that ensuring children have close and positive relationships with both parents is in their best interests but this should not necessitate children being forced to live in two homes on a rotational basis. A system that supports private agreements rather than lengthy, costly litigation has to be preferred. If a system was introduced that prescribed a living arrangement such as shared care that needs to be rebutted through the courts, this would only increase the need for litigation. This would put unnecessary pressure on an already stretched court system, not to mention on the families and their financial resources. This money could be much better spent on the children's futures.

We would welcome a thorough review of the fairness of the Child Support system, not only in relation to shared care. However, we thoroughly oppose looking at child support only in relation to contact with children. As stated previously, unless there is a closer analysis of the actual costs of raising children when parents are separated, issues of fairness cannot be addressed.

Yours faithfully,

Belinda Lo
On behalf of the Family Law Working Party
Federation of Community Legal Centres (Vic)