Submission

To the

Standing Committee on Family and Community Affairs

Child Custody Arrangements Enquiry

by

Terry Agar

7 August 2003

Submission

Introduction

I am a 43 year old father of a 5 year old son. My peers tell me that I am a good and loving father. Through a series of unfortunate events my son has never lived with me on a fulltime basis. As the law currently stands he never will. He will grow up having a part-time father. This is a situation that is actively encouraged by the Family Law Act and the way that it is interpreted by Family Court judges. No civil society should tolerate a situation that promotes the absence of fathers in the every day lives of children.

The Senate enquiry to introduce a 50:50 shared residency rebuttable presumption into the Family Law Act will be of enormous benefit to my son and other children currently denied adequate fathering by the current law and the judicial system that implements it.

My submission is a personal one. It may be biased and at times politically incorrect, but it is genuine and heartfelt. I have organised my submission under a series of headings of issues that I feel must be addressed for the benefit of my son and Australian society.

A Fair Go

I grew up in Australia with a strong notion of a fair go and the egalitarian ideals that underpin it. That was until I encountered the Family Law Act. It was my first encounter with the judicial system and severely undermined my confidence in the justice system of Australia.

Australian society has changed with men and women undertaking non-traditional roles in both work and family. Why is the judicial system and the industry which feed off it so reluctant to allow both parents major caring roles in the lives of their children?

Fathers are not the uncaring violent and abusive parent they are portrayed to be in the media by feminists and single mothers groups. They just want a fair go in the parenting of their children. Just because their nurturing role and caring is different to that of mothers, it does not mean that it is inferior. In my opinion, it is complementary to the mother's role.

Rebuttable Presumption

I strongly support the proposition of a rebuttable presumption of 50:50 shared care of children after the breakdown of a relationship. Obviously, this is a goal and possibly will not be achieved in all situations, but I believe that fair minded Australians would want to give children a fair go. My reasons for supporting it are as follows:

- Reduced adversarial approach to determining residence matters
- Reduced litigation in the courts over residence matters
- Encourages out of court settlement

- Eliminates the "winner takes all" approach to residence matters
- Eliminates the "loser" in residence matters
- Reduces hostilities between the parties
- Eliminates or diminishes the existence of a part-time parent in a child's life
- Allows one parent to cede all or part of their joint residence presumption to the other
- Places the onus on an aggrieved parent to demonstrate (with evidence) that the other should have joint residency reduced to contact only
- Enriches the lives of children and their parents
- Reduced burden of single parent families on welfare payments
- Provides two parent role models to children

A rebuttable presumption of joint parenting does not eliminate parenting difficulties in individual cases, but it provides freedom to choose different child focussed parenting outcomes.

Obviously, a joint parenting presumption should not occur if a court determines that such an arrangement is impractical or not in the best interests of the child.

Cost if Litigation

The cost of litigation in relation to residency disputes is appalling. In a society where the family and children are supposed to be central to its foundation it is amazing that the best interests of the child are determined by who has the resources to withstand the cost of litigation.

It cost $10,000 for me to obtain a court order to see my son 5 years ago. The mother was funded by Legal Aid and refused to negotiate an out of court settlement. That $10,000 and also Taxpayer's money was directed ultimately to the children of the legal profession and caused financial disadvantage to my son.

My son finally gained fortnightly overnight contact, which he should have had by right, to me, a financially impoverished father. How is the financial impoverishment of a father in the best interests of the child?

Before obtaining my orders I was advised by my members of the legal profession that seeking more than fortnightly contact was a waste of time as the court was invariably disposed to making the mother the resident parent. Only in rare circumstances did the court grant residence to a father and that was usually in circumstances of proven neglect by the mother. Consequently, I did not seek orders for joint residency, as I did not have the financial resources to withstand an inevitable loss. If a rebuttable presumption had been in place I believe that litigation would not have occurred as the mother would not have had the incentive to frustrate my contact. As it is, she knew she had the power and used it to inflict punishment on me.

Putting aside the fundamental question as to whether residency matters should be the providence of an adversarial legal system, in a just and civil society, I believe that both parties should be equally funded (or refunded) by the Commonwealth to

determine residency matters. I strongly urge the committee to consider this issue of costs with a view to making all parties equal before the law.

Enforcement of Court Orders

The enforcing of court orders is time consuming and expensive. This deters legitimate enforcement actions by aggrieved contact parents and provides an incentive to resident parents to contravene court orders. A simpler streamlined process is required such an on the spot fine by an appropriate policing authority. Alternatively, stronger sanctions such as reducing the residency period with the recalcitrant parent would ensure that the child receives the care of the parent with the correct social attitude and behaviour. The reduced residency sanction would of course be subject to the best interests of the child test.

A rebuttable presumption of shared residency would reduce the incidence of court order contravention because the power relationship between the parents is equalised. One parent does not have greater "ownership" rights over the child than the other. There is no over-empowerment of one parent who may seek to punish the other parent for whatever perceived past or current injustices that have been allegedly committed.

Personally I have never sought the enforcement of court orders, although they have been contravened many, many times. I do not have the financial resources to run contraventions in the courts. Advice from others who have taken action has lead me to form the view that the courts are not serious about enforcing their own orders and do not punish offenders unless repeated contravention actions have been taken and been proven. I believe the courts have no credibility when they purport to act in the best interests of the child and do little to ensure that the non-resident parent is able to be an essential part of the child's life.

Child Support

The current child support formula is inequitable because it does not take into account the costs of the payer having contact with the child. Under today's standard of living, contact parents have to provide a room for each child for overnight contact, which is the preferred contact arrangement. Contact parents are expected to rent or buy larger accommodation to satisfy the standard once a fortnight contact regime. Additional costs are associated with providing meals, clothing, heating, lighting, water, transport etc that is necessary to meet the needs of the children when in contact with the children. Additional costs to entertain children are incurred because they are essentially "visitors" and do not have a local friendship network.

Obviously, a rebuttable presumption of shared parenting would require a more equitable application of a new child support formula to actually reflect the equitable apportionment of the actual costs associated with raising children to each parent

Information about how the costs of raising children are unavailable from the Child Support Agency. I have requested this information from the agency but they are unable or unwilling to provide it. A copy of the CSA response to my enquiry about this issue is appended to this submission. My personal experience has been that the payee has no idea what the child support I pay is supposed to provide for my son.

Consequently, she regularly asks me for more money. My refusal to these requests causes unnecessary acrimonious feelings to the detriment of my son and his relationship to me. Incidentally, I pay her $180 per week, not an insignificant sum in my view! I also have a very good payment record. Surely it is not too much to ask the CSA to provide payees with a guide to how the costs of caring for children are calculated and information that the child support she receives should be spent on these types of expenses.

I believe that if non-resident parents have a responsibility to financially support their children then it is only fair and just that the payee be made equally accountable as to how that money is spent. A requirement to lodge a regular statement of costs incurred to care for the child would be a good start. I request that the Committee consider the issue of accountability of the resident parent and recommend changes to the Child Support Act to effect such a change.

Child Support Formula Overnight Care Threshold

The current child support formula is unfair as it does not take into account the cost of the payer incurs whilst caring for his/her children. The current 30% threshold of the total number of nights spent with the payer before a reduction in the amount payable is unreasonable. This situation is not equitable as the payee is receiving payments for caring for children when they are not in fact being cared for.

The impacts are particularly adverse on those parents, like myself who are just under that 30% threshold. There is obviously something wrong with a formula that treats payers who responsibly try to maintain a relationship with their children in the same time way as payers who don't see their children.

I strongly urge the Committee to redress this regressive aspect of the child support formula and bring it into line with the Family Tax Benefit that equitably treats the non-resident and resident parent alike.

Responsibility vs Accountability

The Child Support Act makes non-resident parents responsible for the financial support of their children, regardless of whether or not they are given adequate contact with their children. I believe that a nexus needs to be drawn between adherence to court orders and the level of child support received. In other words an incentive to ensure contact occurs is required.

A rebuttable presumption of joint parenting at separation would ideally make both parents more equally responsible for the financial support of their children. This would improve their accountability of each parent to the maintenance of proper residency arrangements.

Income Incentives

The Child Support Act offers no incentive to payers to improve their income and provide additional discretionary financial resources to your children. The Act transfers the additional income to the payee to dispose of how they see fit or in way

contrary to your on beliefs and values. This situation is particularly hard on PAYE taxpayers who unlike the self-employed, are unable to obtain income from the cash economy that is not subject to the scrutiny of the Tax Office.

I am aware that payers with second families to support are able to earn money above their basic wage for their new family that is not assessable as child support for their first family. Frankly I believe that is a recipe for a second family breakdown as the payer is away from his second family for long periods earning that additional income.

I believe that additional income earned above the normal weekly earnings of a payer should be child support exempt. After a payer has meet their normal tax and child support responsibilities they should be free to earn discretionary income to spend as they see fit without interference from the State.

My view is supported by what already happens in intact families. If either the mother or the father has a particular hobby or interest they wish to pursue, it may be funded by doing overtime at work.. The extra money they earn is devoted solely to that hobby or interest, none of it is devoted to the family's budget. The sole purpose of doing the overtime was provide money to achieve a particular personal outcome that is good for the health and wellbeing of the individual and ultimately the children.

I believe that it is unreasonable for child support assessments to include extra income earned by payers to pursue personal goals and interests. It is also unreasonable that a payer cannot earn extra, unassessed income and spend it at their own discretion on their children without the State automatically transferring a large proportion of it to the payee. It is after all in the best interests of the child to have a parent that is motivated to fulfil personal ambitions for themselves and/or the child without the interference of the State.

Superannuation

Anecdotally and from my own personal experience the current child support formula is reducing the amount of money available for retirement savings or superannuation. The lack of relief from the child support assessment until the overnight care of the child is greater than 30% of the total nights is unfair. As previously stated in this submission, a non-resident parent incurs significant costs for caring for their children, particularly in regard to accommodation provision. To meet the unfair portion their child support payments, many payers, like myself are forgoing personal superannuation contributions to make ends meets. Ultimately this under-investment for retirement is likely to result in a larger welfare bill for the nation which will be paid for ironically by the taxes of children who received the benefits of child support payments that did not recognise the true caring costs of non-residents parents.

I request that the committee consider the adverse impacts that an unfair child support assessment formula will have on the future welfare budget of the nation.

Conclusion

Many non-resident parents like myself wish to be more involved in the care of their children but are prevented from doing so by former partners and the Family Court. To

add to the injustice they are required to pay child support levels that ignore the true cost of contact with their children.

Australian society has changed and will continue to change. It is within this context the role of fathering has changed, I believe for the better. It is now time for the Australian Parliament to change the Family Law Act to recognise and support the increased role fathers' want in their children's daily lives. The Family Court has failed to reflect the changing roles of mothers and fathers through its interpretation of the existing legislation.

I sincerely hope that the Australian Parliament acts with bipartisanship to insert a rebuttable presumption of shared parenting in the Family Law Act so that my son may experience living with me on a daily basis in the near future. I believe my son has a right to have a meaningful fathering experience, not a 2 days a fortnight experience that is currently dictated by the Family Court. I also hope that the Parliament amends the Child Support Act to make the financial support of children equitable for non-resident and resident parents alike.