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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	
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Submission to:

Inquiry into child custody arrangements in the event of family separation

Terms of Reference:

On 25 June 2003 the Minister for Children and Youth Affairs, the Hon Larry Anthony MP, and the Attorney-General, the Hon Daryl Williams AM QC MP, asked the committee to inquire into child custody arrangements in the event of family separation.

Having regard to the Government's recent response to the Report of the Family Law Pathways Advisory Group, the committee should inquire into, report on and make recommendations for action:

(a) given that 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; and
- (ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

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

(c) with the committee to report to the Parliament by 31 December 2003.

Executive Summary

We would propose the following recommendations for action:

That the Family Court continue to determine cases on an individual basis taking into account the relevant issues of each case and supported by credible evidence.

That the Government makes moves to implement the recommendations as stated in the report titled "Out of the Maze - Pathways to the Future for Families Experiencing Separation" tabled by the Family Law Pathways Advisory Group.

That additional funding be forthcoming by the government to ensure the implementation of these recommendations.

That counselling becomes a mandatory component of any court proceedings.

That Funding be allocated to ensure that families are able to access counselling, parenting courses, and that case managers are utilised for cases where violence and abuse are ongoing issues.

That the area of child support (maintenance) be overhauled to ensure fairness to all who use the system. This should include a means of withholding payments (Centrelink or Child Support) from parents who refuse to disclose financial details to either the Child Support Agency or Centrelink or from parents who try to hide financial information through setting up companies or through sub-contracting arrangements.

That immediate steps be taken to reduce the time it takes for contraventions, recovery orders and other ongoing matters in family disputes to be provided a court hearing date and reach final determination.

(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;

We do not believe that there should be a presumption that children will spend equal time with each parent.

During a time of upheaval and disturbance (ie their parents separating or divorcing), children must be given the best opportunity to get through the separation with the least amount of disturbance, if possible. This is especially important for younger children who gain their sense of trust and wellbeing from consistency and predictable routines. The best way to achieve this is to maintain familiar surroundings and consistent routines and by continuing to maintain their existing arrangements as much as possible. If one parent prior to separation was an at home carer, then this should be the case after separation. This is of course not to say that these arrangements should stay in place until the children reach adulthood or a sufficient maturity to make their own decisions. As children grow and mature their needs also change. There is a wide array of published research that suggests children require different influences in their life as they mature. This can mean more reliance on their mother in the early years, a growing dependence on their father as they develop and then in the early teen years influences from other respected adults from whom they can learn and develop. The assumption that, an equal share of time between parents is the answer, is simplistic and does not meet the needs of children.

It is our understanding that those who enter the Family Court system represent about 5% of all divorce statistics. It is also our belief, through our experiences with the Family Court, that those families who use the system are influenced by or experience one or more of the following issues:

- Extreme acrimony and ongoing conflict
- Are often from lower socio-economic backgrounds
- Are unable to reach and negotiate decisions on their own for the sake of their children.
- Are not able to communicate with former partners and are therefore not able to discuss the children's expenses, medical conditions, school matters etc.
- Endure domestic violence, or other forms of abuse are prevalent or alleged;
- At least one of the parents cared for the children in the home before separation;

- There is often a power imbalance between the two parents where one parent through means fair or foul is able to unduly influence the contact arrangements for the children;
- Agreement over financial considerations has not been reached;
- Non-custodial parents believe that financial provision for the children ceases when they no longer live with the child/children or when new families are formed;
- Parents believe that they should be able to see their children when they like without some semblance of courtesies such as telephone arrangements prior to the contact, or forward planning.
- One parent will not honour agreements that have already been reached or follow orders that have already been set down.

Owing to the prevalence of one or many of these considerations in most cases, we believe that the court should continue to operate as it currently does, in that, it considers the custody arrangements on a case by case basis. Those families that can coordinate their own arrangements without the intervention of the courts do so already. It is only those families who cannot reach agreement on their own, that we feel enter the court system. These are usually the families who need intervention and ongoing support for the safety and ongoing stability of the children. Cathy Holmes, Manager Parent and Adolescent Mediation Program, during an interview on the Channel 7 Sunday Sunrise Program (22/7/03) likewise stated that "trying to have the one size-fits-all is mad. Families in Australia and across the world are so different. We need to look at it by case-by-case basis, which is what the family law area looks at now. We know that it's important for children to have contact with both parents, really good quality contact, but I guess having a 50/50 arrangement, as it's seen, isn't for everybody. It's not for all children, and it's certainly not for all parents either."

Certainly we believe that such issues as domestic violence, abuse or allegations of abuse should warrant close consideration and monitoring. These families should be directed towards counselling, parenting courses and anger management courses immediately and this should not be optional. It has been our experience that despite Domestic Violence Orders, children can be placed in grave danger when there are breaches to the orders, as police and other authorities will not intervene. These matters can take at least 6 months to reach a hearing in the courts in Queensland and in the mean time, tempers flare without adequate monitoring. It has also been our experience that the children become instruments in the parents' war games, which undermines the children's sense of stability, security and general well being. We feel that by granting these parents equal access, the opportunities for conflict and the opportunities to place the children in the middle, will be increased which in turn will prove detrimental to the welfare of our children. We also feel that until a violent party has attended adequate counselling, they pose a serious threat to their children.

It has also been our experience that those from lower socio-economic environments are more likely to perpetuate cycles of divorce and abuse. They are less likely also to understand the importance of removing the children from the ongoing conflict. This is where we feel that counselling, parenting courses and ongoing support are vital for the well being of the children.

The issue of power imbalances within families is also relevant. In some cases, like ours, there may be opportunities for one parent to control the arrangements of the children through threats and intimidation. This is abhorrent to children caught in the middle. Children want to see both of their parents and as Cathy Holmes stated on 22/7/03 **"they want both parents to be happy so they can have peace."** This can only be achieved by redressing any power imbalances and ensuring that each parent has the opportunities that they need to bond and relate with their children in a loving and meaningful way.

During the time of separation for families, there are many changes and adjustments to be made for the family as a whole. It is at this time that children and especially young children need consistent routines and familiarity to help them cope. If one parent has been looking after the children in the home environment, then we feel that this pattern should continue, at least initially. Children should not be forced into an already struggling childcare system just so that parents can feel that they have a shared 50/50 arrangement. In situations where there is an at home carer before separation, imposition of equal shared parenting responsibility will have a devastating effect on an already overloaded child care system. Parents who work will need to arrange child care while they are working. It is already widely reported that there is an under-supply of places for children under 2 years of age, and often it is difficult to locate childcare or after school care for other children. The fear is that we will create a new generation of "latch key" kids because of a lack of supply of appropriate care. All this when quite possibly one parent could remain at home with the capacity to care for the children on a full time basis.

In terms of supporting the notion of maintaining the family structure as much as possible after separation, Pru Goward the Sex Discrimination Commissioner was recently reported as saying that men needed to share the career sacrifices needed to raise families. In fact she was quoted as saying "Shared caring has to start before the divorce". She also said "men needed to put in equal parenting while marriages were intact and realise they had to rearrange their lives to be more involved with their kids after separation."

Although Ms Goward was speaking explicitly about men and fathers, her arguments are valid in all situations. In order for an equal sharing of caring for children to work it needs to have been the case prior to separation.

Families structure themselves to best suit their individual needs. While married parents often take more responsibility for certain aspects of their children's lives. This can be: one parent working, one focussing more on domestic and education activities, one focussing on sporting and cultural activities etc. To impose an arrangement, which may be foreign to a family during a time of immense stress, can only be damaging for children.

Children should likewise not be subjected to constant changes of home arrangements whilst a parent who moves out of the family home settles on a living arrangement. There are also many working parents who work long hours or who travel regularly who may find it extremely difficult on a 50/50 basis.

An arrangement imposed by the Government, through Legislation and directed by the Family Court onto a family who clearly cannot agree for the sake of their children is destined for failure, not only for the parents but also for the children. It has been our

experience that if parents cannot agree, even when orders are handed down, they will not be able to reason and sustain the directions of the orders once they step out of the courtroom. Ongoing conflict will be assured. Cathy Holmes seems to sympathise with this view when she states "The ones that aren't faring well are the ones with parents who remain in high-conflict situations. Even five, ten years down the track they're still locked in that conflict. That's where the focus needs to be. It needs to be on teaching parents, teaching adults to work on those issues, to work on that communication. Because that's what's making the difference, not the amount of time people are spending with their kids. That's what makes the difference for kid's development.

The Minister for Children and Youth Services the Honourable Larry Anthony MP, during an interview on the Channel 7 Sunday Sunrise program stated that "I am not suggesting it is 50/50 in every case. That is probably unworkable. But it does make parents think twice. Where this has been introduced in a number of jurisdictions in the USA, we're finding that the level of divorce s starting to slow." It is disturbing to us that a Minister of the Crown should be seeking to use legislation of this type to bribe parents to stay together. Evidence tells us that children who remain in situations of conflict between parents, whether the parents are married or not is detrimental to the children. The Minister should be seeking solutions to the underlying issues not necessarily the symptoms, that is divorce.

It is often said that divorce costs Australia \$X. I disagree with this. It is not divorce that costs money time etc, but the fact that parents cannot communicate with each or reach an appropriate agreement for their children. These children were born into loving caring families which have for whatever reason disintegrated and their parents, who should be ensuring the children's safety and security have forgotten what it is they should be doing as they battle with their former spouse. This is what costs money and worse, places children in the most unfortunate position of all. Instead of concerning ourselves with issues being considered in this inquiry, let us address the core problems. In order to achieve this we recommend the implementation of all of the recommendations of the Family Court Pathways document. Families who reach the Family Court system clearly need intervention, establish a system that can help. Introduce compulsory counselling, case managers for each family to help them navigate the system and potentially reduce legal costs of Family Court proceedings. Families who find themselves in Family Court should not be left to deal with all of the issues on their own.

"in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents."

Standing arrangements should be in place within the Family Court system that immediate or extended family should always be included in court orders. Matters of who cannot have contact with children and the reasons for this should be dealt with on an exception basis. Extended families and friends are an essential part of a child's development and maturity. Children should have the chance to develop relationships with all of their extended family and parent's friends networks, except where this is harmful to their health or well being, for example with the threat of violence substance abuse etc.

"whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children."

From our experience the existing child support formula is not fair to both parents. We believe that some of the problems lie in the implementation, follow up and policing of the system. We are aware of an instance where a non custodial parent is able to not pay child support for at least 4 years, not file a tax return and somehow avoid all attempts to follow up. A system that is more able to follow up and ensure that the appropriate amount of child support is actually being paid will help ease the burdens of the child support system. A number of studies both in Australia and internationally have identified that non-custodial parents increase their wealth significantly after separation and that custodial parents do not. There are a number of key factors in these findings, not least of which that most non-custodial parents are fathers who generally have a greater earning capacity. However, what these findings indicate to us, is that the burden of raising children falls to the custodial parent and that non-custodial parents are failing in their responsibilities.

We find comments by the Minister for Children and Youth Affairs that he is considering reducing the amount of child support paid by non-custodial parents if they spend more time with their children abhorrent. Being a parent is a full time life long commitment, which is the most rewarding role anyone can have in life. A parent should not be seeking, nor be given any financial incentive to spend more time with their children. If parents are not willing to devote their spare time to their children out of love, devotion and genuine interest in their children's wellbeing, why would they start after financial incentives were forthcoming? There is an argument that non-custodial parents do have additional costs for the establishment and upkeep of bedrooms and toys etc for their children. However this cost is more than compensated for by the fact that the custodial parents bears all of the cost of raising children, which are significant and are no way compensated for fully in the child support system.

Background

We have been involved with Family Court proceedings for the last 4 years. In this time we have provided support and assistance to someone who is trying to deal with a particularly difficult divorce and navigating their way through the maze of Institutions, Agencies and Organisations designed to provide advice support and decisions in cases of divorce and child custody. This person has been fighting for the wellbeing of their children for 4 years. Our experiences over this time has influenced our views and beliefs and encouraged us to make this submission. We have provided some background to the case below.

This case began when the parents involved separated in November 1998 after an incident of domestic violence.

The father in the case was gainfully employed at the time the marriage dissolved. He has since set up a contracting company and worked sporadically since the marriage ended.

The mother cared for the children at home during the marriage and has continued to do so since the marriage dissolved. The mother has also supplemented her income through casual work.

There are three children of the marriage. They were aged 2, 6 & 8 at the time of separation. They are now 7, 10 & 13. The children were initially confirmed in the care of their mother by the courts and had fortnightly access with the father. The eldest child now resides with the father and is supposed to have access with the mother, yet this is controlled only by the whims of the father.

This family has endured two trials and numerous other court appearances in 4 1/2 years. A further contravention hearing is set down for November this year (6 months from the application being filed with the court).

It was identified at the initial trial in December 2000 that this family situation was extremely volatile and would in all likelihood return to court. The case returned to the courts in March 2003 some 12 months after the initial paperwork was filed with the court. The father was able to delay the trial by failing to file paperwork and was not penalised for this.

Two domestic violence orders have been imposed against the father since the marriage dissolved. The second such order expires in August this year.

Four family reports have been undertaken for this family and all have identified extreme acrimony between the parents.

These reports have all likewise identified the urgent need for counselling for the parents and the children, yet to date, the father has not attended counselling despite court orders to do so.

At all court appearances to date, it has been identified that the father in the matter has flagrantly disregarded court orders, yet there have been no consequences imposed upon him for this.

There have been two contravention applications filed with the court. The first such application became lost in court proceedings when it was moved from the Magistrates Court to the Family Court.

The second contravention application due to be heard at the end of the year will have taken at least six months to reach a resolution. The increase in waiting time for such applications has increased from 6 – 8 weeks to 6 months in Queensland in the last 12 months. This application was placed with the court 6 weeks after this family's second trial in March this year. In this time, there were 13 serious breaches of the orders. A third application will also be necessary before the matter reaches court in November as the Father has denied the mother access with the eldest child for 3 months.

The three children in the matter have been removed from the Mother's care at least six times against court orders. The eldest child was taken by the father, against court orders, and due to delays in getting the matter to court, has gained custody of her by denying her access with her mother for 5 months. When the children have been removed from the mother's care, neither the state nor federal police has been willing to intervene, despite current court orders supporting the mother's custodial rights.

At least 12 child abuse reports have been placed with Family Services and Juvenile Aid against the mother. Not once have these agencies seen it necessary to remove the children from the mother's care, yet the reports continue. Despite Family Services placing a note on their files that all complaints by the father should be treated with extreme caution, there have been two reports this year so far. By speaking to a

different departmental agent each time, the father is able to continue to make unfounded and malicious claims and denigrate the mother's standing in the community unchecked.

The mother received Legal Aid funding for the initial trial. The father was also granted Legal Aid initially, but this was terminated when he refused to attend mediation. The father then hired a Barrister to fight his case. As Legal Aid have an equal representation policy; the mother and the children were each given representation by a Barrister. This sent the mother's funding cap over the limit. As a result, the mother was not granted Legal Aid for the second trial. The mother represented herself for the second trial.

The father has not payed child support since the marriage dissolved. He has been able to hide his income by setting up a contracting company. He has also not filed a tax return for the last 3 years. The father has been able to access extra family assistance when he has taken the children against court orders. He has also not had to supply supporting documentation when he makes a complaint with the Child Support Agency. This agency chases the mother to gain access to relevant documentation.

The father has never contributed to the provision of school fees, uniforms, books, clothing, school camps, sporting commitments, etc.

Ross LN Hurford
7 August 2003

Kelly L Hurford
7 August 2003