

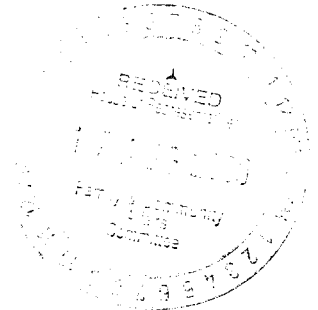
House of Representatives Standing Committee
on Family and Community Affairs

Submission No: **1027**

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Secretary:

**Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House ACT 2600**



**INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE
EVENT OF FAMILY SEPARATION**

**Submission from the Victorian Women's Trust
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August 8, 2003

The Victorian Women's Trust (VWT) is inspired by the vision of a just and humane society in which women enjoy full participation as citizens. Fully independent, the Women's Trust was established in 1985 in recognition of women's role in shaping Victoria. The VWT aims to make a difference in everything it does. We believe that by creating a better world for women, we create a better world for men, children, families and communities.

Submission Outline:

Our submission responds to the Inquiry into child custody arrangements by examining the following:

- 1. The best interests of children post parental separation**
- 2. The optimum circumstances of positive shared parenting**
- 3. The paradox of equal time**
- 4. Conclusion**
- 5. Recommendations**

Submission Summary:

Parliamentary Inquiries that may lead to better conditions for Australian children and their parents are to be welcomed. The Victorian Women's Trust appreciates the opportunity to make a submission to the Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements.

Over a third of marriages in Australia now end in divorce. A high number of children now experience family separation. It is in everyone's interests – children, women, men and the broader community – that family law processes and other welfare systems, are able to deal with the consequences of divorce in ways that minimise disruption and harm to the parties involved, especially children.

Existing family law processes and measures that support families in the event of separation could be improved. However, because there is so much at stake, it is imperative that any exploration of change and reform is handled with the utmost care, rigour and appreciation of the different lived experience of Australian families – particularly those experiencing parental separation.

In making this submission, we have placed the interests of children above all else. We ask the Standing Committee to do likewise. It is all too easy to make this claim but not back it up in practice. One of our hopes is that children's voices

will be heard in this particular Inquiry and we have made a recommendation to this effect.

We also argue that the critical issue facing adults who become parents, is the degree to which positive shared parenting is encouraged, supported and valued by society. We acknowledge that women in Australian society are the primary care-givers in most intact marriages: and that separating parents are most likely to affirm the role of mothers in so far as retaining the primary responsibility for the care of children. But, we believe economic and social conditions for children and women would improve significantly if men were further encouraged and supported in adopting a greater degree of what we term positive shared parenting than is the Australian norm.

Positive shared parenting is not synonymous with equal time and residential living arrangements that dichotomise children's lives. Indeed, a close look at the realities affecting Australian families, and those that separate, suggest the presumption of equal time is more likely to generate adverse consequences for many. As such, we would argue that the answer to better child residency arrangements does not lie with a superficially attractive but relatively simplistic 'one-size fits all' policy of equal time, but rather a concerted effort on several fronts to bring about a far greater degree of positive shared parenting.

The welfare of children post divorce depends greatly on the ability of both parents to share in the care and lives of their children. This is not a new construct and indeed is properly articulated as one of the four principles in the Family Law Act itself (1975 Section 60B). It is therefore not about whether shared parenting needs to be identified and built into existing legislation. At issue, is people's capacity, notably fathers, to effect shared parenting arrangements, when their external work environments preclude them from doing so.

This change can only come about by a radical transformation of the way in which parents, and fathers in particular, can alter their work/life balance. It would be intolerable for fathers to face the sack from their workplaces if they found themselves in an equal time situation, or something close to equal time. Unfortunately in Australia at the moment, this is more likely to be the reality.

Governments can, and should be prepared to play a significant leadership role in supporting the efforts of parents as a whole, including those who bear the costs and trauma of divorce. One such leadership role rests in triggering a much stronger commitment Australia-wide, to family-friendly work practices that provide genuine flexibility for both female and male parents.

1. The best interests of children post parental separation

The Family Law Act 1975 - SECT 60B Subdivision B identifies four principles underpinning the notion of adequate and proper parenting of children:

- (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.*

Legislation, understandably, is written in dispassionate terms. In our view, implicit in these four principles are an accompanying set of important qualities:

- (a) Parents who love their children.* It is critical that separating couples can still put their love for their children above all else.
- (b) Amicable separation of parents.* While separation and divorce can put extreme emotional pressures on the couple concerned, the best interests of children are best served when parents can maintain a civil, respectful relationship with each other. Children should not be regularly exposed to infighting or bitterness between separated couples.
- (c) Stability.* Children should be free to live with the least disruptions in their environment, preferably in a loving, stable home. This serves the interests of their mental wellbeing, as well as assisting their outside interests like friends and studies.
- (d) Safety.* Children should be free to live without physical and emotional violence, and without the threat of violence. Children should also be free to live without one of their parents being exposed to physical and emotional violence or the threat of it.
- (e) Time with both parents.* Providing both parents love and care for their children, children's preference would be to see both parents as much as possible. It is particularly important for children of indigenous and multi-cultural backgrounds to maintain a connection with their cultural identity.

- (f) *Security*. Children should have as much security and certainty in their lives - emotionally, spiritually, physically, and financially.
- (g) *Financial and Material Wellbeing*. Children have the right to food and shelter, care in sickness, dignity in growing up, and the pleasures and opportunities that education provides. Separation should not where possible, lead to the impoverishment of children, or to a more precarious existence, nor should it have an adverse effect on educational opportunities.

2. The optimum circumstances of positive shared parenting

While we have a strong belief in positive shared parenting, we do appreciate that this will not work for all couples. It is only possible if the following factors are at work:

- (a) *Respect.* Both parents respect each other's parenting roles and responsibilities, understanding they can both bring unique insights and skills to the relationships with their children.
- (b) *Time.* Both mothers and fathers have the necessary time to give their children. This means spending regular time with children - but importantly - on the child's terms.
- (c) *Location.* Both parents need to maintain geographic closeness. In some current cases of successful shared parenting, the separated couples live next door to each other. The success of such arrangements are only possible if the parents have still maintained a high level of respect for each other and are able to co-exist amicably and co-operatively.
- (d) *Safety and Trust.* The ability for one parent to have absolute faith in the other parent that the children are being adequately cared for, in a stable environment that is free from conflict and physical and emotional violence.
- (e) *Shared parenting skills.* The capability of both mothers and fathers to operate as primary care givers to their children. This encompasses many of the above factors like family friendly work practices and trust between parents. If shared parenting is to work, both mothers and fathers must be able to provide and cope with the operational aspects of parenting, that is, in terms of providing emotional, physical and financial support.

Shared parenting needs to begin prior to separation. Ideally, it should begin at birth. In her report 'Counting the Care: An Analysis Of The Time Cost Of Children', the University of NSW's Lyn Craig found that "*Motherhood adds more to the workload of women than fatherhood does to men.*"

<http://www.unsw.edu.au/news/pad/articles/1999/nov/workingmothers.html>

Following a more recent report by Craig on the times mothers and fathers spent with their children, Adele Horin reported in the Sydney Morning Herald:

"When they live with their children in intact families, as Lyn Craig, of the UNSW's social policy research centre, has shown, fathers are the playmates, not the workers. Time-use data reveals many fathers spend much less time than mothers with their children, and spend it differently. They are more likely to read to their children than feed them. They are much less likely to do routine child care, to spend time alone with their kids, or to sacrifice their leisure for their children. In the months after a divorce, many fathers spend more time on their own with their children than in all the years that preceded the break-up."

<http://www.smh.com.au/articles/2003/02/21/1045638483856.html>

- (f) *Financial and Material Wellbeing.* Both parents are able to share in the provision of adequate shelter, food, healthcare and education for their children.
- (g) *Family friendly work practices.* Both mothers and fathers need supportive work arrangements, free from discrimination so they can share the care of their children. There is little left to prediction when it comes to meeting the diverse range of children's needs – health appointments, sickness, extra-curricular demands, school holidays, after school care. It is important that parents in paid work are able to enjoy workplace flexibility without the stress of covering up their absence on children care matters. Paid workplaces need to provide genuine flexibility for both parents.

3. The paradox of equal time

The Terms of Reference oblige the Committee to consider, given that the best interests of the child are the paramount consideration, 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.

The presumption of equal time is paradoxical. On the one hand, positive shared parenting implies a significant contribution by both parents to the care and upkeep of their children. It does not necessarily or automatically imply equal residency time. On the other hand, the presumption of equal residency time can create arrangements that work against the best interests of children.

Equal residency arrangements (and equal presupposes 'half'), are technically only possible when children are within the care of both separating parents at different but equal amounts of time. Most commonly, this equal time could only be facilitated by joint residential arrangements. If equal time (and joint residential arrangements) were to become a presumption in Family Law, it would only be rebutted with successful contestation.

We have used the term "rebuttable joint residency" here to describe child residency arrangements where equal time (brought about largely by joint residential arrangements) is taken as a presumption in Family Law, but open to contest. We have used the term "residency" in favour of the word "custody" in accordance with the 1996 amendments to the Family Law act.

The Australian Institute of Family Studies' Bruce Smyth has described equal time arrangements as *"the most logistically complex parenting arrangement possible."* ('One size does not fit all, especially kids', The Sydney Morning Herald, June 21, 2003). Along with the logistical difficulties involved in equal time arrangements, there are a number of issues that profoundly impinge on the effectiveness of rebuttable joint residency arrangements:

- (a) Unfortunately, some parents can shirk their parental responsibilities. In extreme cases, one parent can run away from the responsibility of being a parent. It is not in the interests of children to be forced into a residency arrangement with a reluctant parent.

It is important to note here recent reference to the importance of male role models in connection with this Inquiry is misleading. Role models of either sex may exist in many forms – relatives, family friends, and public identities.

- (b) Separation and divorce can involve high levels of conflict between parents. The small five percent of cases that make it to the Family Court (trial) are said to be the most intractable bitter cases, whereby parents have not been able to settle on an arrangement amicably.

Regularly exposing children to the bitterness between parents is not in the best interests of children. Rebuttable joint residency provides parents with a lot more contact with each other – this is not necessarily the best outcome for children of parents who cannot get along civilly and amicably.

In her research 'High Conflict Divorce', Janet R. Johnston, Director of research at the Center for the Family in Transition (California), argues *"high-conflict divorced parents have a relatively poor prognosis for developing cooperative co-parenting arrangements without a great deal of therapeutic intervention ... custody arrangements should allow parents to disengage from their conflict with each other and develop parallel and separate parenting relationships with their children, governed by an explicit contract that determines the access plan. A clearly specified regular visitation plan is crucial, and the need for shared decision making and direct communication should be kept to a minimum"*. Further, Johnston writes, *"Court ordered joint physical custody and frequent visitation arrangements in high conflict divorce tend to be associated with poorer child outcomes, especially for girls."*
(http://www.futureofchildren.org/information2826/information_show.htm?doc_id=75590)

- (c) Shared residency arrangements where for instance, children are expected to constantly move between homes in different locations, can provide an unsettled environment for children. Moving from home to home (in many cases week in week out) can be particularly disruptive to young children. It can also prove problematic as children grow older and establish relationships in their immediate environment. The unsettling environments may negatively impact on children's education and schooling. Adults/Parental assumptions of children's resilience and adaptability are not necessarily well founded.
- (d) Family violence is under-reported and often hidden behind closed doors. While there are cases of male victims of family violence, children and women bear the brunt of the problem. Rebuttable joint residency has the serious potential to expose more children, women and men, to family violence. In the many cases where family violence has not been reported, it would be very difficult for

victims to rebut the presumption of joint residency, therefore prolonging and subjecting victims to the violence.

It is important to remember Article 19 of the United Nations Convention on the Rights of the Child, which states *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any person who has the care of the child."*

- (e) While joint residency could ensure couples get 50/50 equal residency of their children, this does not guarantee couples will provide or be able to provide more time for their children. For parents who work long hours, some children may be exposed to neglect while under their care. If one parent is able to lower their child support payments in turn for more child residency, again this does not guarantee that the parent will be putting in extra parenting time. Some parents could take up this offer of a reduction in child support payments for their best financial interests, as opposed to the best interests of the child.
- (f) Rebuttable joint residency does not necessarily provide security (emotional, physical, or financial) for children. It can provide more disruptions to children's lives, it can further expose them to the bitterness of parental relationships which have a negative impact on their well being, it can further expose children to violence, and it has the potential to be more financially constraining for parents, lessening their ability to be able to provide for their children in this sense.
- (g) Unfortunately, there are still inequities between mothers and fathers in terms of parental roles and responsibilities. Respect of parenting roles between parents is something that can only be established and earned prior to separation. In the event of rebuttable joint residency, one parent may have serious concerns about the children being placed in the other parent's care.

Australia's Federal Sex Discrimination Commissioner Pru Goward recently said more shared parenting needs to occur prior to divorce, because currently *"one parent by then [separation] has invested so much more time and energy in the relationship with the children"* ('Family Planning Howard-style', The Age, June 25, 2003).

- (h) Given that there are inequities in parental responsibilities between mothers and fathers, in turn there are also inequities in the time mothers and fathers can give their children. This is often dependent on their working hours. According to the ABS, the percentage of women working part time is 45.2%, compared with the 14.4% of men who work part time. It can be assumed, that part-time workers are able to have a more hands on parenting role of their children.

In the Federal Government's 1999 commissioned report *'Fitting Fathers into Families'*, the study found *"Fathers are working on average 47 hours per week with one-third working more than 50 hours week demonstrating only a small change from 1983 ... Over two thirds believe they don't spend enough time with their children"* (www.facs.gov.au). In the same Federal Government study, it was reported, *"A significant number of fathers reported experiencing high stress and insufficient time for family"*.

When the Australian Institute of Family Studies Bruce Smyth conducted a study into current shared residency arrangements (representing around three percent of separated couples in Australia), Smyth found that every father in this situation was forced to cut their working hours ('One size does not fit all, especially kids', The Sydney Morning Herald, June 21, 2003). This is by no means a negative, however it is doubtful whether all separating parents in these circumstances are able or prepared to provide more time for their children.

The introduction of rebuttable joint residency will also disadvantage parents who have sacrificed careers in favour of taking on the role of primary care-givers. Financially, they will require an income and having had a period of time out of the workforce, will be in a worse position to try and recommence employment. Finding work for some parents will also mean the potential of less time to parent.

- (i) If rebuttable joint residency was to become the presumption in Family Law, this would require workplaces to adopt family friendly practices. As some workplaces would not embrace this imperative, it is envisaged such a move would require more government leadership and intervention. The extent of this shift in practices, while welcome, cannot be underestimated.

By way of example, recently in Tasmania, a male public servant lodged a discrimination complaint against the State Government after his partner was awarded 12 weeks paid maternity leave, while he was granted one week's carers leave. In response, the Federal Minister for Workplace Relations Tony Abbott said:

"I think the general public are entitled to ask when they see claims like this, where will it all end? And of course every time people seek a new benefit or seek an extension of an existing benefit someone has to pay for it, and this is the problem. What about the employer who says why should he or she be paying for what is a new social fashion or new social consideration? And that's what we've always got to do in this business, we've got to balance rights and responsibilities, and for every right there is a corresponding responsibility. And as a general rule in modern society we're all too keen to claim our rights but not nearly so keen to shoulder our responsibilities." (ABC, Radio National, PM, July 29).

(j) Rebuttable joint residency is likely to disadvantage both parents in terms of relocation. This will particularly affect parents who live in rural areas where there are high levels of unemployment, limiting parents both physically in locality terms, but also financially. It would also have ramifications for parents who want to re-partner and relocate.

In the Australian Institute of Family Studies *"Financial living standards after divorce : A recent snapshot"* (Research paper No.23, December 2000), researchers Ruth Weston and Bruce Smyth examined the financial disadvantage experienced by couples post separation. Their conclusions were *"in general, women are more likely than men to experience financial hardship after divorce; and repartnering remains a key way out of financial difficulties for many divorced women (and their children)."*

- (j) Again, for one parent to have faith that the other parent is adequately caring for their child, this must occur prior to separation and cannot be forced just because rebuttable joint residency is the presumption in law. With inequitable parenting skills between some parents, one parent may feel an enormous sense of concern when the child is placed in the other parent's care. This could cause tensions to rise further between the separated couple. In terms of safety, as outlined, rebuttable joint residency has the potential to put more children at risk of violence. It also has the potential to trap couples in relationships where violence has occurred. If violence has not been reported, some couples may choose to stay in the relationship through fear of exposing the child alone to the abusive parent. While this may explain the drop in divorce rates where there is in place a presumption of rebuttable joint residency, this is clearly not in the best interests of children.

4. Conclusions

In considering child residency arrangements in the event of family separation, there are two overarching goals – the best interests of children; and, the need to support positive shared parenting. In particular, the paid workplaces of parents should come under much greater pressure to provide equitable and responsive forms of parental support, and not restricted to maternity and paternity leave.

Positive shared parenting is in everybody's interests – children, women, men, paid workplaces and local communities. However, positive shared parenting is not synonymous with the presumption of equal time with each parent.

Equal time with each parent, for a variety of factors, does not intrinsically serve the best interests of children. The presumption in law of equal time with each parent, if expressed by joint residential arrangements, has the potential to cause unnecessary disruption and harm to children.

More widespread positive shared parenting, post-divorce especially, requires a deliberate and concerted effort on a number of public policy fronts, not the least of which is the need to galvanise change in paid workplaces that give fathers and mothers the workplace flexibility required for the proper care of their children.

5. Recommendations

1. Give Children a Voice.

In the debate thus far, and in the range of opinions that will be voiced to the Committee, we doubt whether children are able to claim a voice in these submissions, and whether their voices are being heard more generally. The irony is that while the best interests of children are outlined as being crucial to this Inquiry process, it is doubtful whether children are yet to be given the means and opportunities to express what is in their own best interests. Their youth does not preclude them from having thoughts, ideas, feelings and preferred outcomes.

As Article 12 of the United Nations Convention on the Rights of the Child states, *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child"*.

We recommend as a critical adjunct to the Committee's deliberation, that it pave the way for reliable consultation with a substantial number of Australian children prior to the Committee's report to Parliament by 31 December 2003.

This is not impossible or difficult to achieve within relatively short timelines.

We suggest at the very least the Committee engage in consultation with three groupings of young people, for example (a) teenagers and young people in their

early twenties who have experienced the realities of family separation for some time, (b) young people who have recently experienced family separation, and (c) young people who have not experienced family separation. Through consultation with these different groups, the Committee would be better placed to understand the needs and requirements of children post separation.

The Victorian Women's Trust has wide experience on community consultation and dialogue. We would be only too willing to provide further advice on the design and implementation of such a strategy.

2. Shared Parenting is not synonymous with Equal Time.

Child residency arrangements that institutionalise equal time in an absolute sense and rebuttable joint residency is an inappropriate and unrealistic response. We recommend these concepts *not* be adopted as a basis for any reform to existing child residency arrangements.

3. The Value of Positive Shared Parenting.

We recommend the Standing Committee affirm principle three of the Family Law Act concerning the sharing of parental duties and responsibilities in the care, welfare and development of their children.

Moreover, the Committee considers the external factors, notably microeconomic reform, that would support more positive shared parenting pre and post separation.

Yours faithfully,

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**Authorised by Mary Crooks, Executive Director, Victorian Women's Trust,
on behalf of the Board of Directors of the Victorian Women's Trust.**