

THE ROYAL
AUSTRALIAN AND NEW ZEALAND
COLLEGE OF PSYCHIATRISTS

ACN68 000 439 047

House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 1224

Date Received: 4-9-03

Secretary:

04 SEP 2003

Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangement Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600
Australia

Dear Madam or Sir,

**RE: SUBMISSION TO THE COMMITTEE - INQUIRY INTO JOINT CUSTODY ARRANGEMENTS IN THE
EVENT OF FAMILY SEPARATION**

Please accept my sincere apologies for the late submission to the Inquiry. I hope the Committee will have the opportunity to consider the Faculty Submission.

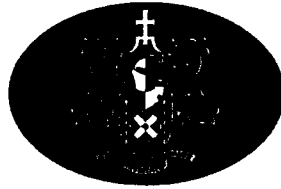
Yours Sincerely

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3 September 2003

Our Ref: 407_InqSub



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The Royal Australian and New Zealand College of Psychiatrists
Faculty of Child and Adolescent Psychiatry

Submission to the
Standing Committee on Family and Community Affairs

Inquiry Into Joint Custody Arrangements In the Event of Family Separation

2nd September 2003

Prepared by

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INTRODUCTION

Purpose of the submission

This submission is intended to assist the Committee in their deliberations on this complex matter by providing information drawn from the expertise of members of the RANZCP Faculty of Child and Adolescent Psychiatry. In this document the word "children" is used to include infants, children and adolescents aged from birth to 18 years of age.

The Faculty makes this submission in an attempt to further the best interests of those children whose parents are separating and unable to reach agreement without the intervention of the Court about their children's future.

Any recommendation to change the law relating to children in this circumstance should be preceded by and based on sound research evidence that children's best interests will be protected as a consequence, and that outcomes for them will be improved. The emphasis for any change needs to be children's needs and parental responsibilities rather than what might be understood as parental rights.

This expertise used to inform this submission is based on Faculty Member's:

- Knowledge of child development
- Knowledge of family function and dysfunction
- Extensive experience in assessing children and families at times of family change, disruption and conflict
- Knowledge of the immediate and longer term impact of parental separation and divorce on children
- Knowledge of the immediate and longer term impact of exposure to parental conflict and violence on children
- Experience in providing 30 A reports and expert testimony to the Family Court of Australia

Issues to be addressed

- Terminology
- Joint parental responsibility and care of children
- Parental cooperation and conflict
- Family diversity –parenting roles and responsibilities
- Decision making about residence and contact
- Resource implications
- Concerns about the proposed changes and conclusions

TERMINOLOGY

Custody vs Orders for Residence, Contact and Specific Issues

The Standing Committee on Family and Community Affairs is enquiring into "Joint Custody Arrangements In the Event of Family Separation".

The notion of Joint Custody in the event of parental separation can be understood to acknowledge the significance for children of contact with and knowledge of both parents in their day-to-day lives and in responsibility for and decision making about their futures.

The Faculty is concerned however that use of the term "custody" runs the risk of implying parental rights or ownership of their children rather than emphasising parental responsibilities in the service of the children's best interests. The Faculty understands that for this reason the 1995 amendments to the Act removed references to guardianship (long-term responsibility) and custody (day-to-day responsibility). A new range of "parenting orders" replaced the previous custody and access orders, namely, orders for "residence", "contact" and "specific issues".

JOINT PARENTAL RESPONSIBILITY AND CARE OF CHILDREN

Joint parental responsibility and care of children is in the best interests of the children, providing that:

- Each parent has the psychological, social and practical resources to parent adequately
- They are able being able to recognise and meet the child's physical, emotional and social needs for care and protection in a developmentally appropriate way, in a safe environment, acknowledging in particular the child's needs for continuity of relationships within the immediate and extended family and social network.
- The parents are able to work together to do this

PARENTAL CO-OPERATION AND CONFLICT

It is recognised that the majority of separating parents are able to come to amicable or at least workable arrangements about the interests of their children in circumstances where children are almost always disadvantaged. The small majority of parents (less than 7%) who appear before a Judge in the Family Court are by definition those least able to work together to do this. Their relationships are usually characterised by history of conflict and at times violence or accusations of violence and/or child abuse. These parents give contradictory and un-reconcilable versions of events and are unable to resolve their differences in the best interests of their children. Also family life is a dynamic process and requires constant renegotiation in both intact and separated families. This occurs both in response to children's changing developmental needs and to changes in family structure and function as for example separated parents re-partner often bringing other children into the family.

The number of separating parent unable to reach amicable or workable arrangements in relation to their children will not be altered by the proposed legislative change to "Joint Custody" arrangements.

FAMILY DIVERSITY

Parenting Roles and Responsibilities

Children, who may be aged between zero and 18 years of age at the time of initial separation have needs that change as they develop. Children also have their own individuality and wishes that need to be acknowledged and respected and their environmental, cultural background and upbringing will differ markedly from family to family.

Children may be conceived in circumstances as diverse as a long-term loving relationship between their parent to a single incident between parents who have never shared a relationship. The parents may have been married or unmarried and the child may be living as one of a number of siblings from different relationships. The same situation may apply in relation to the other parent when the child spends time with him/her. Family diversity is considerable in current Australian society.

In very few intact or separated families is the care of children shared equally between both parents. Most studies continue to find that women carry the majority of day to day parenting duties and involvement with their children. This occurs for a variety of complex social and financial reasons. Currently each parent has parental responsibility for their children in the absence of a Court order to the contrary. The authors do not understand this to mean that children should be *physically shared* between their parents on an equal basis. An individualised approach is always required in resolution of disputes about children, using their best interests as the paramount consideration.

In practice, most arrangements about children made after family breakdown result in one parent being the primary carer, who makes more of the day-to-day child-related decisions than does the other parent. This is likely to provide more stability for the child. These arrangements are usually agreed to by parents who are able to collaborate to an extent in relation to their children for practical and financial reasons. These families are unlikely to come to the attention of mediators, deputy registrars or judges. Those families who do come before the Court are those who for whatever reason are unable to make such amicable or at least practically workable arrangements.

DECISION MAKING ABOUT RESIDENCE AND CONTACT

Decisions about arrangements for children should be based on an understanding of the quality and stability of attachment relationships and the need to maintain primary relationships.

Arrangements for children's residence and parental contact post separation need to be based on individual family assessment of what is in the children's best interests immediate and longer term. This includes consideration of:

a) The child's developmental needs and capacities

A child's developmental needs and their capacity to develop and sustain parental relationships and to cope with disruption to their daily routines is determined by their developmental age and other intrinsic and constitutional factors. Younger children are particularly vulnerable to disruption to daily routines of sleeping, eating and playing and are least able to cognitively remember or anticipate frequent changes of household. As children become older they are increasingly able to anticipate and sustain relationships over longer periods of separation, but become more vulnerable to

disruptions of their peer, school and social networks. Consistent involvement in school and community activities affords children considerable resilience in situations that can otherwise increase their vulnerability to social and emotional difficulties. Living arrangements and parental contact needs to be organised on an individual family basis to suit the needs of the children concerned and should not be based on an assumption of 50/50 time with each parent which may have little to do with what the child is capable of understanding or sustaining.

b) The quality and nature of pre-separation relationships

It is not reasonable to assume that children have equal or even equivalent relationships with each parent prior to parental separation. The impact of separation can be minimised when children experience as little disruption to pre-separation routines as possible. Post separation arrangements need to be based on individual assessment of the best interests of the children and the quality of relationships with each parent prior to family separation.

If separated parents are expected to share their children "equally" the assumption is of a time based norm which will be unattainable in practice for many families and, may bear no resemblance to the parenting responsibilities assumed in the pre-separation family, hence having little to do with the best interests of the children.

c) The child's wishes

Children may express clear wishes about their living arrangements. These wishes need to be respected if children are not to feel disempowered and devalued at what is often a time of considerable family conflict, disruption and loss. The child's age and capacity to understand the ramifications of the wishes they express will vary with their age and cognitive capacity. Also parental attitudes and wishes may have a significant impact on wishes expressed by a child, depending on their age and role in the family dynamics. Expert advice about the extent to which a child's expressed wishes should determine the decisions made about post separation arrangements may be necessary, especially in situations of ongoing parental conflict and disagreement.

Resource Implications

Currently separate legal representation for the child is provided in Court proceedings where parents disagree, about their children's ongoing care and protection. Situations of implacable hostility and apparently unresolvable conflict require the Court to make orders to protect the child from ongoing exposure to and entrapment in parental conflict and at times violence. The number of separating families where children need this separate representation seems unlikely to change. If an assumption of "shared custody " is made that encourages separating parents to assume a "right" to 50/50 time with their children, rather than shared responsibility for their well-being, it is possible that parental conflict and disagreement over children's arrangements will increase the number of children needing separate representation or advocacy.

CONCLUSIONS

Members of the Faculty of Child and Adolescent Psychiatry have a wide range and depth of experience with children and families both during conflict, prior to and after separation. Members are well aware of and constantly see the often long term consequences for children of living in circumstances where conflict between their caregivers occurs at the expense of the children's needs for loving attention, care and protection.

Issues involved in determining the best interests of children, or at least the least, damaging option after family separation are complex and occur in situations when parents are unable to agree and cooperate. In those families currently appearing before Judges in the Family Court this frequently requires informed expert opinion and individual decision making by the Court in order to consider the complexity of the problems involved in determining issues of residence and contact. There are no simple or "one size fits all" solutions in these circumstances. In fact family diversity is such that simplistic solutions or assumptions that assume "one size fits all", run the risk of increasing parental conflict before the Courts rather than reducing it.

While the proposed notion of "Joint Custody in the event of family separation" has superficial appeal and apparent logic it:

- Appears to be based on an assumption of parental rights rather than children's best interests or parental responsibilities.
- Will not impact on those parents who are able to come to shared or joint arrangements without significant input from the Court, or those where there is ongoing conflict and hostility with the potential to impact on the child's wellbeing and safety.
- Appears to minimise the considerable diversity of family structure and function, both in intact and separating families
- Risks placing more children in circumstances of ongoing parental conflict and violence.
- Will have little impact on those families who currently appear before the Court because of their inability to make amicable or workable arrangements for their children.
- Does nothing to impact on the current resources of the Court or the requirement for expert witness reports and separate representation for the child in situations of ongoing parental disagreement and conflict and in fact may increase the need for some form of separate advocate or representative for the child.

We trust this submission is of assistance to the Committee in deliberations on this complex and important matter.

2nd September 2003

APPENDIX

The Family Law Act includes a statement of objects and the principles outlining these points. These are expressed in section 60B of the Family Law Act 1975 s60B(1) and (2).

- (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.

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