

Submission No: 1225

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Secretary: [REDACTED]

House of Representatives Standing Committee
on Family and Community Affairs
Parliament House
Canberra ACT 2600

by facsimile : 6277 4844

8 August 2003

**CONFIRMATION
OF FAX**

Dear Members,

Re: Submission - Inquiry into Joint Residence Arrangements

I am a practising family lawyer and wish to provide the following information for the committee's consideration. My comments are based upon my own experience in family law practice and are not placed in the context of broader studies for the purposes of this submission. I am aware in a general way of the research in this area and this knowledge informs my practice of family law. I was admitted as a solicitor in 1987 and have practiced substantially in family law since 1990. I have written two publications dealing with family law, an edition of *Women and Family Law* published by the Women's Legal Resources Centre and *Family Breakdown and Debt* published by the Consumer Credit Legal Centre.

Family law practice has long recognised that each case is unique on its own facts. For this reason the *Family Law Act* quite rightly sets out matters to be taken into account but does not proscribe the weight to be attributed to these matters. The exercise of discretion is a critical factor in determining matters so that the overarching aim of the family law jurisdiction - namely the best interests of the children - can be central focus.

Whilst it is tempting to have a position that can be put to separating families as a starting point, the disadvantages of adopting this course far outweigh the benefit of any perceived certainty in separation. Such a position does not accept the reality of family law : namely, that there are many factors which need to be considered to enact the rights of a child to maintain a relationship with both parents in a manner best suitable to the child.

The starting point of any inquiry really needs to be pre-separation. An examination of intact families will show mothers as primary carers in the majority of cases, many fathers with little work flexibility, many fathers earning more money which influences the decision about choice of primary carer. These factors result in fathers not sharing care of the children even in intact families. (As an aside, family friendly work practices may be a more critical factor for children than what happens after separation.)

In addition, the father's ability to share residence after separation is also effected by his work practice. This is one of the realities of separating families. There has often been a decision made (or a default position) pre-separation that the mother will either be a full-time carer or adjust her career aspirations and / or work hours such that she can be available for the care of the child or children. One must then examine closely the practicalities of joint residence post separation - who will be picking the children up from school, who will care for the child if the child is sick and needs a day off and so on. A commitment to joint residence means that both parents must be in a position to deal with these issues. Many work places do not have the flexibility to allow these aspects of joint sharing of parental activity to be implemented. From the child's perspective, the courts in most cases will uphold an argument that it is preferable for a child to be in the care of a parent rather than a third party. If the parent is not able to provide the necessary level of time available to care for a child, then surely this mitigates against a joint share arrangement.

The changes to the Family Law Act introducing the concept of joint parenting have in my view had an impact on parenting arrangements. In my observation there has been a change over my years of practice away from the "each alternate weekend" towards more involvement by both parents in the care of the children. As part of the practice of joint

parenting, parents are able to negotiate joint share arrangements which may or may not eventuate as consent orders and so form part of the court's statistics. Joint residence arrangements would appear to occur more often when children are teenagers and many of these arrangements do not end up being formalised. In fact many of these arrangements are fluid and the children move from one household to another.

There still appears to be a misconception about the meaning of joint parenting. The idea was to separate where the child lives from other aspects of parental responsibility. It seems that the notion of joint parenting equates to equal residence time. This parliamentary inquiry itself is indicative of this narrow construction of joint parenting. This then shifts the focus from what is in the child's interests to bargaining over time which is only one aspect of joint parenting.

The interrelationship between residence and payment of child support is another factor which constricts the focus of joint parenting to residence. Of course, there must be some defining factor of care to enable calculation of child support.

Parenting post separation requires some degree of co-operation and communication. Even with the most specific orders, there are always situations which occur that require consideration of some other factor or variations of existing agreements. Parents ability to co-operate and communicate varies dramatically. The parent's ability to communicate and co-operate impacts upon the children. This issue is more critical if there is to be a joint residence arrangement. At a practical level, parents need to be able to communicate about such issues as school events, dental appointments, medical treatment and so on. One cannot assume that this will happen in the majority of cases which is what would be required should there be a presumption of joint residence. If the parents are not able to co-operate such that a joint residence arrangement would work, then it is clearly not in the child's best interests.

I put forward the following hypothetical case examples (based upon real examples) which identify issues that may rebut a presumption of joint residence :

- 20 year old mother. 24 year old father. Two children aged 3 years (boy) and 4 months (girl). Parties separated before the birth of the second child. The father has seen the second child twice.

Issues : father has no established relationship with the second child;

the second child is being breastfed;

separation of siblings if there were to be a different residence regime for the older child;

lack of trust by the mother of the father's parenting abilities which could impact upon her care of the children.

- Two children aged 6 and 8. Mother has been the primary carer and works part-time from home. Father works long hours. Father has moved out of the former matrimonial home and is staying with friends.

Issues: appropriate accomodation to exercise joint residence;

father's ability to adequately supervise the children during his work hours when the children are not at school;

mother's consequential reduced child support which means she cannot sustain her part-time employment which then impacts on the children's time with the mother.

- Young child. Mother as primary carer. Father inexperienced in the care of a young child.

Issues: parenting ability (which could be addressed by parenting courses and experience);

whether some graded approach towards joint residence would be appropriate.

There are also other issues which frequently arise in family law matters that impact on joint residence :

- wishes of the children: see section 68F;
- drug use of one (or both) parents;

- violence of one parent;
- concerns about stability for the children;
- whether it can be assumed that both parents want to share residence and whether a presumption then creates a dispute which would not have existed without the presumption;
- where parties are geographically separated. This may be in separate suburbs which raises issues about the location of the child's school. It may be that the parents live in separate cities, or move for work reasons.

Finally, I wonder whether the pressure towards shared residence is parent-focussed or child-focussed. In family reports children often express a wish to have a relationship with both parents. To them, this does not necessarily mean equal time living with both parents. The literature talks about stability for children and the importance of adults not shifting the responsibility of decision-making to children. To presume that this formula equates to equal time is ignoring the realities of parenting and separation.

I would like to receive a copy of the report that is prepared.

Yours faithfully,

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