Submission to the Inquiry into child custody arrangements in the event of family separation

Introduction

As a Family Lawyer of 12 ½ years' experience (10 ½ years in private practice and 2 years at a Women's Legal Centre) I believe that I am qualified to address the terms of reference of this inquiry. In my submission I am focusing particularly on the first term of reference ie whether it is in a child's best interests for there to be a presumption of shared residence.

A rare example of a successful shared residence situation

In the last 12 ½ years I have seen shared residence work once. This was a matter where there were two boys, aged 10 and 12 years. I acted for the Father who had been involved in a serious motor-vehicle accident, and who was subsequently unable to work, other than a small amount of volunteer work for a few hours each week. The Mother worked three and a half days a week. Both parties contributed in a significant and positive way to the raising of their sons: there were no issues of domestic violence. Indeed, the parties got on exceptionally well together. They had in fact been "separated under the one roof" for a considerable period of time: this in itself being a rare thing in family law cases. When the parties finally separated physically, my client moved out of the home and moved into a second property in the same suburb. The parties were sufficiently well-off to provide for clothes and toys for the boys in each household. A psychologist was asked to prepare a report on the matter as both parties genuinely desired what was best for the boys and needed the assistance of an expert. The report writer in her report made it clear that as a "general rule" she was loathe to recommend the proposition of shared residence, however, this case was clearly the "exception to the rule".

Why shared residence generally does not work

An "exception to the rule" does indeed sum-up the issue of shared residence. Even in matters where there are no domestic violence issues (and I do not wish for one second to downplay those, as I more than most am aware, these are more common than anyone would like to acknowledge) there are still issues of resentment, anger, bitterness and often hatred left to be dealt with following a separation. This unfortunately is a reality of life: separation tends not to bring out the best in everyone.

Not many people can walk away from a relationship with warm and fuzzy feelings towards the otherside. The idea of children flourishing in a shared residence situation is based on a fallacy: a naïve assumption that parties who separate can communicate with each other on a level playing field, have nothing but the children's best interests at heart and who respect and still care for the partner they no longer wish to live with. Strangely enough, I do not come across many cases like that in my job. They remain the "exception to the rule" and unfortunately I think, always will do.

To throw children into the arena of shared residence between two antagonistic parents would be a disaster: children would be forced to move from pillar-to-post, to have their routines totally disrupted and be exposed to maximum feuding between parents who cannot agree upon anything as far as their child's welfare is concerned. Over the years practising in the Family Court, I have seen and heard all manner of applications being filed relating to the child's "alleged" welfare: ranging from a prohibition on getting a child's hair-cut whilst on contact (after a child was returned from a contact visit with a shaven, green scalp) to an application seeking the return of maternity bras (after the same were taken by the Father from a Mother who was still breast-feeding at the time.) How

parties can be expected to work together in a shared residence situation when such hostilities exist is simply "too big an ask."

The degree of communication, understanding and tolerance between the parties required to make a shared residence application work is unfortunately an unrealistic expectation in most cases.

Why starting with shared residence after separation causes problems

I often speak to women who have agreed (usually under pressure) to a shared residence situation. They then come to me several months down-the-track wanting legal advice on how they can now vary the arrangement: advising me that their children's school work is now suffering and an already bad relationship with an ex-partner has deteriorated even further. Unfortunately, these matters are difficult to resolve: the Family Court placing such an emphasis as it does on the status quo since separation. Many such children are now seeing a Psychologist to help them overcome the problems they are experiencing. Although as a primary care giver it is easy to see a link between the child's behaviour and the shared residence situation, this is not always an easy thing to prove to the court. There is usually no expert evidence of the child's psychological state immediately upon separation to compare against their psychological state after exposure to a shared residence situation.

A child's contact with other people

I have come across several cases in my career where grandparents have stepped in as "good Samaritans" to care for children when neither parent, for whatever reason, is capable of caring for the children on a full-time basis. I have also come across many cases where an application by a grandparent has been nothing more than a ruse: an opportunity for a parent (who has an order for very limited contact, and sometimes in extreme cases, even a no contact order) to spend more time with a child when the court has already ruled that this is not in the child's best interests. Although less common, I have had first-hand experience of applications by grandparents seeking contact tantamount to shared residence when their own child has died and the grandchild is seen by them as a "substitute" child. These matters are complex ones and usually involve expert psychological evidence being presented to the court. The existing law already covers, however, the contact which should be ordered in such cases.

It is already the duty of the court when ordering contact in these cases to ensure that applications by non-parents are being sought for the right reasons ie the continuation of an already existing relationship between a child and a significant "other party".

Child support formula

The existing CSA arrangements do not work fairly in favour of the resident parent, although that is not necessarily a reflection solely upon the formula itself. The main problems for our clients tend to be in relation to the assessment of the non-resident parent's income and the CSA's ability, or rather lack thereof, to collect the monies due and owing to the resident parent.

In relation to the first issue, the income "on paper" of non-resident parents who, for example, run their own businesses, are paid in cash or who have "on-side" employers bears little resemblance to their *actual* income received. For many women, the task of proving the otherside's real income is just too difficult and assessments are subsequently made on incorrect amounts.

Although the CSA has powers to make its own enquiries in relation to these matters, the feedback we receive from our clients is that, in practice, this is seldom done. Likewise in relation to the payment of arrears, the CSA is unlikely to get involved in chasing arrears unless they are considerable. By the same token, however, they will not get involved if the arrears are regarded as "too long overdue" (and the old "12 month rule" still seems to be applied in practice.) In the vast majority of cases we deal with, women simply give up because it is too difficult and too expensive to pursue these matters further (by, for example, seeking a remedy in the Family court). In many cases women are threatened by the child's father that he will pursue residence issues if more, or indeed any, money is sought from him. As a consequence the vast majority of our clients get by on a fraction of the child support which is legally due to them.

Conclusions

Shared Residence Presumption

To make what is an "exception to the rule" type of matter into a legal presumption would be absurd: the Family Court would be inundated with applications as the potential for disagreements between parties would be increased overwhelmingly, women would be exposed to even greater levels of domestic violence and children would suffer disruption to their school lives and long-term psychological consequences from maximum exposure to warring parents.

As we are so often told throughout our lives in the legal profession "each case depends upon its facts". The introduction of any new presumption into the family court arena is therefore something to be approached with extreme caution. The existing system already allows Judges to make orders for shared residence if they believe that this is an appropriate order and in the child's best interests to do so. However, there are good reasons why these continue to be the minority of cases. Let's have a bit more faith in the existing system and the judicial officers who are part of that system and who on the whole "get it right" in the vast majority of cases.

A child's contact with other people

The current legislation covers this issue, although as noted above, vigilance is required by the court to ensure that applications by non-parents are brought for the "right reasons".

Child support formula

There needs to be a major overall of the current system to ensure that non-resident parents are assessed, by a fair formula on their *actual* incomes and that this money is then actually received by the resident parent.

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