Submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the Event of Family Separation

Introduction

I have been a solicitor for 20 years and practised extensively in family law from 1983 to 1990 and from 2000 to 2003. I make the following comments in relation to the terms of reference on the basis of this experience.

(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

I do not believe that there should be a presumption that children will spend equal time with each parent after separation. Most of my clients have not had such an arrangement and I understand that it is the least common arrangement for most families after separation.[1] It is difficult to understand why the least common arrangement should become a presumption.

In my experience, the most beneficial arrangement after separation is for children to reside with the parent, who has been their primary care giver prior to the separation. In most cases, this parent is the mother. In some cases, there needs to be a change because of factors such as violence or abuse, often associated with drug or alcohol use by a parent. The current factors set out in ss 60 B, 65E and 68F of the *Family Law Act 1975* provide sufficient guidance for courts, which have to decide such matters if there is a dispute. Most often, parents are able to make arrangements about the children after separation without needing a court to make the decision for them. Most often, children reside with their primary care giver during the week and have contact with the other parent every alternate weekend and for half the school holidays. These arrangements provide stability for children in most cases.

It is my experience that requests for equal time by the non-resident parent often arise after that parent is required to pay child support, as the level of child support is reduced if the child spends more than 30% of the time with the non-resident parent.[2] This reason should not be the motivation for the introduction of a presumption of equal time.

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[1] Australian Bureau of Statistics, *Family Characteristics Survey*, Ct442.0, AGPS, Canberra 1997

[2] s 8 *Child Support (Assessment) Act 1989*

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

As previously mentioned, it is my experience that the most beneficial arrangements for children after separation are to continue to spend most time with those most involved in their care prior to separation. If grandparents have been actively involved with children prior to separation, it is usually good if that involvement can continue. If the parents and grandparents cannot agree about this and a court has to make a decision, then the factors mentioned particularly in s 68F (2) (a), (b), (e), (f) and (l) *Family Law Act 1975* seem sufficient to enable the court to consider children's contact with grandparents.

It is my experience that problems sometimes arise if grandparents try to pursue contact with grandchildren to increase the time that the non-resident parent has with the children, if that has been limited for some reason, such as violence by the non-resident parent towards the children or the resident parent. Grandparents sometimes apply for contact in this situation and then allow the non-resident parent to attend that contact. I have also observed problems arise where the non-resident parent dies and the grandparents then apply for contact for the first time in an attempt to "take the place" of that parent. These are all difficult situations, which are best managed by the specialist judges of the Family Court and the Federal Magistrates Service exercising their discretion in the best interests of the children. In my opinion, there is no need for any other circumstances to be specified.

It is my experience that problems can also arise in relation to contact with other persons, such as new partners of non-resident parents. Resident parents and the children sometimes find it difficult to accept the new partner and vice versa. These difficulties may mean that it is best for there to be a staged introduction of contact with the new partner. Again, the s 68 F *Family Law Act 1975* factors already mentioned seem sufficient to enable the court to determine the arrangements in the best interests of the children in the event of a dispute.

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

As mentioned above, some parents seem to try to increase contact to more than 30% in order to reduce child support payments because of the way the existing child support formula works. This strategy seems very unfair to the children involved and also to the resident parent, who must make adjustments to contact arrangements and make do with less money coming into the household. Generally, women who are resident parents are financially less well off than the non-resident parent after separation[3] and find it difficult to bear the reduction in child support payments. This is a difficult problem and may only be resolved by re-examining the real costs of raising children and looking at innovative ways of adjusting the formula, as well as other mechanisms to assist resident parents.

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[3] P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, AIFS, 1986; R.Weston, *Settling Down: Pathways of Parents After Divorce* , AIFS, 1993

Conclusion

There is no need for other factors to be taken into account in deciding the respective time each parent should spend with children post separation and there is no need for a presumption that children should spend equal time with each parent. There is also no need to specify circumstances in which courts should order contact with other persons, including grandparents. The existing principles and factors set out in the *Family Law Act 1975* provide sufficient guidance for the exercise of judicial discretion in cases where no agreement can be reached.

There are problems with the substantial and shared care formulas under the *Child Support (Assessment) Act 1989*. All formulas should be re-examined in the light of the real costs of raising children and the economic position of resident parents, particularly women. Other means of providing economic support to resident parents should also be examined.

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