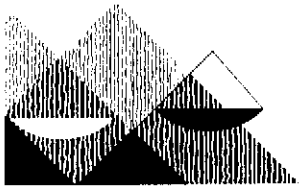
Rod Hooper
Barrister



John Toohey Chambers

1st August 2003

House of Representatives Standing Committee on Family and Community Affairs

Submission No: 1310

Date Received: 15-8-03

Secretary:

Level 3, Council House
27-29 St George's Terrace
PERTH WA 6000
[redacted]

MAILED

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

Dear Sir/Madam

RE: CHILD CUSTODY ARRANGEMENTS INQUIRY

I have been involved in the presentation of cases in the Family Court of Western Australia (and the resolution of many more that have not got to court) for the past 16 years.

I have been accredited as a specialist in the jurisdiction for the last 11 years and have practiced as a member of the independent bar for the last four years exclusively in the Family Law jurisdiction.

The present inquiry seems to have some fundamental flaws in it.

The first to be identified would be the title to the inquiry which proposes to inquire into "child custody arrangements" in circumstances where after an earlier inquiry the word "custody" was removed from the legislation and the term "residence" imported.

My concern is that there appears to be little real understanding of the meaning of joint custody and the circumstances that lead to social scientists providing us with ample material to suggest that children who following separation are raised in a joint custody regime routinely fare better than those who are not.

Postal address: PO Box Y3344 East St George's Terrace, Perth WA 6832

The social scientists (at least the 20 or so articles that I have read in recent times) refer to the phrase "joint custody" as meaning "a situation in which:

(a) the child spends at least 25 percent of their time with each parent;

(b) each parent has and considers that they have some power, influence and participation in respect of decision making concerning the welfare of the child and care arrangements generally;

(c) the child spends time with each parent in a variety of situations and settings. In other words, where all of the child's time with one parent is not during the school week and with the other parent only on weekends.

In addition, most of the social science researchers who have confirmed the advantages of joint custody have confined their research to cases in which those arrangements (as falling within the parameters outlined above) are arrived at by agreement between the parties and not imposed by the court.

As an illustration of a recent case in which the court essentially upheld a joint residence regime over an attempt by the mother to terminate a post separation joint residence arrangement, I **attach** the decision of Holden CJ in the matter of Thoomes.

If the Parliament introduces some form of presumption in parenting cases then that can only serve to detract from the principle that the welfare of the child is the paramount consideration. This is a principle that we have in common with many other similar jurisdictions such as New Zealand, America and the United Kingdom.

Further, if there were such a presumption then how would the court and the parties approach interim arrangements to be made immediately following separation?

At present, the court is likely to, pending trial, reinforce whatever arrangements have been in place between the parties during their marriage and in any period of separation up to when the matter comes before the court.

If we are to go to a prescriptive regime such as appears to now be contemplated then it takes only a moments contemplation to think of the appalling circumstances and turmoil into which many families would be thrown if following a separation they were then bound to rearrange their long standing affairs to introduce a joint parenting regime. In many cases that would be in circumstances where one parties work arrangements may not be able to accommodate it and in any event, where one party is simply disinterested.

It may lead to parents who were less involved with children before separation, demanding to be equally involved in circumstances where the disruption to children's routine and school work would be obvious.

In many cases now when parties separate they try and put together arrangements that will allow a continuation of both parties involvement in children's lives but in a manner which is least disruptive to the children.

Those arrangements are often not easy for parties to work out given their heightened emotional state and often take a considerable assistance from friends, neighbours, relatives, counselors and lawyers.

I shudder to think what may occur at such delicate and difficult times for children if the parties are essentially told by parliament that upon separation they must try to work out an arrangement in which children spend approximately equal time with either parent.

I assume (I hope correctly) that those who have the task of advising the Government and those Government and other parliamentarians who have the task of making the decision take the time to read the reports provided to Parliament on the last couple of occasions when this issue has been raised and reviewed.

I must say that my experience in practice is that it is not uncommon for the demand for greater contact to a parent whose real agenda is to reduce their obligation for financial support via the child support system.

Equally, I have seen occasions where resident parents have unreasonably refused requests for further contact against the background of a fear that to do so would increase the non-resident parent's number of "nights" and thereby lead to a reduction in child support or family allowance payments that they were entitled to.

In my view there is much of these issues at work in the forces that have pressed for the present inquiry.

There is much that could be said about the inequities of the child support system. Indeed there are many in the profession who viewed the process of enactment of the Child Support Legislation and establishment of the Child Support Agency as an attempt to shore up the woeful promise by a politician and, in legislative terms, the use of a "sledge hammer to crack a peanut".

It was our experience in Western Australia that the rate of collection of maintenance payments (being one of the primary reasons leading to the establishment of the Child Support Agency) was considerably higher in Western Australia and has not been much bettered by the Child Support

Agency in this state. This was simply because the collector of maintenance in Western Australia was properly resourced, centrally organised and located within the precincts of the court.

Be that as it may and whilst not wishing to condone the present child support scheme, it is my suggestion that much of the complaint made by payers of child support and much of the difficulties continuing to be had by the CSA in collecting child support (particularly from self employed) would be removed if the step were taken of making child support paid as a deduction from taxable income by the payer and child support received as taxable income in the hands of the payee.

I would suggest that to do so would eliminate many of the inequities in the present system.

It would also eliminate the benefit that can sometimes only flow to self employed and higher wealth individuals of being able to make family trust and child maintenance and similar arrangements as a way of channeling financial support to wife/children by way of pre-tax rather than post-tax income.

For that section of the population which is working and supporting their families from their own efforts, endeavours and resources, such a step would be gratefully appreciated and would greatly increase the equity of our present arrangements.

Yours faithfully

Rod Hooper
BARRISTER

enc