STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS
INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

SUBMISSION BY MICHAEL DAMIAN MURPHY
A. PUBLIC SUBMISSION [redacted]

There should be a rebuttable presumption of equal parenting

1. This submission is written from the perspective of a separated parent who has had a consensual agreed joint parenting arrangement with his ex partner which works, has not been the subject of legal intervention, and which apparently the children of the relationship appear to be benefiting from. I am a legal practitioner of over twenty years standing, but have deliberately chosen not to practise in family law.

The High Court endorsement of the importance of the parent child bond

2. The recent Hight Court decision in *Cattenach v Melchior* [2003] HCA 38 provides a powerful rationale for a presumption that there ought be joint parenting, and that arrangements post divorce ought commence from that position.
3. The minority of the High Court, Gleeson CJ, Hayne and Heydon JJ, in a powerful and persuasive dissent, rest a significant part of their conclusion that the common law ought not allow recovery for the cost of bringing up children on the ground that the fact that a child found out that its parents had sued a wrongdoer for its maintenance costs could cause a breach in the parent-child bond: see [26], [34], [202-204], [258-259] and esp [272]ff per Heydon J.
4. The minority decisions provide a litany of statements of the importance of the parent-child relationship, including the fact that the law has traditionally not sought to value that relationship, because it cannot be valued.
5. It is from this perspective that this Committee and the law ought commence its consideration of the genuine grievance that many men have as a result of the operation of the Family Law Act, and the liabilities and burdens administered by the Child Support Agency.
6. The conclusion of the High Court minority should lead the Committee to also conclude that if the parent-child bond is so strong and precious that it cannot be valued for the purpose of a tort claim, then too it should be the starting point from which to consider the respective *rights* and consequent *obligations and duties* of each parent upon divorce. In their reasoning the minority judges did not commence from a position that a mother's right is stronger than that of a father. It was a claim by both parents.
7. The Court did refer to the fact that the best interests of the child are to be paramount, but that must be seen as merely a conclusionary statement. In other words, the outcome of the residence arrangements should result in the conclusion that the result is in the best interests of the child. Such a statement is really restating the question.
8. If the bond between parent and child is equal from birth, and *before* divorce, then logically, it must also *remain* equal *upon* divorce. From this *a priori* position, then the law ought determine what is in the best interests of the child. This is where the minority decision of the High Court provides a powerful intellectual and moral position to commence discussion of the current law, and what changes ought be recommended.

Anecdotal evidence

9. I have a number of friends and acquaintances who have felt "burned" by the process of fighting over access and custody of their children. They are told by their legal advisors that it is likely that if they fight the question of residence to a hearing, it is likely that the mother will be given primary carer responsibility. One particular close friend took the issue to a hearing. By the time it was reached the mother had so poisoned his relationship with his children that the various social workers deemed him unfit, and he was denied *any* access to his children then aged about 8 and 10. He remains bitter to this day, and his two children have been denied the role of their own father in their upbringing. Needless to say both have failed to achieve the educational and other aspirations he held for them, and in all likelihood are and will be a net burden on society.
10. Upon being appraised of the costs of seeking to displace the *de facto presumption* which the law currently applies, fathers seeking to exercise their inate disposition, abandon the fight, and harbour resentment at the process, and at the requirement that they continue to maintain the children by way of Child Support Agency levies, while being forced to accept a second best default arrangement of every second weekend, and a week of each school holidays. An arrangement which is disproportionate to their economic contribution. They are also forced to accept decisions by their ex spouses to relocate the children from their home town or suburb, to a location, often interstate, which will produce a defacto position of sole custody due to the time, cost, distance and disruption, not least to the children, involved in exercising residence rights. It is *wrong* that the system has reached this stage. The Committee ought be aware that the *letter* of the law is often different from the *law in practice.* In practice, the vast bulk of cases are determined on the basis of what experienced practitioners *expect* that the Court will decide should the matter ultimately proceed to trial.
11. In commercial litigation, this is an efficient system, particularly where there is a relative equality in economic strength between the parties. In a family law context, a system in which practitioners resolve cases upon an expectation of what the practice of the Court is, leaves many people, particularly fathers, disillusioned and bitter. It has fed the anger of "mens rights" groups [of which I have never been involved], because there is a perception that the *outcome* of the current system is to apply a *presumption* of residence with the mother.

Limited resources, litigation fatigue, and a perception of prejudgment

12. Family law litigation is different from ordinary litigation because it usually must be funded from the joint (ex) family resources. In addition, in residence disputes, both parties know that any protracted dispute will, to any caring parent, result in dissipation of family assets to the detriment of the children. Therefore a system which relies on compromises reached in the shadow of the decision-maker will rely heavily on perceptions of practitioners as to likely outcomes.
13. My anecdotal information is that most family law practitioners will advise fathers that for them to seek equality of parenting responsibilities over the opposition of the ex spouse is not worth the candle. It will be a long drawn out fight, with no certainty of outcome, particularly where there are young children involved. In the face of that advice, combined with a perception that applications for legal aid will be biased in favour of the mother, then most men will give up the fight, and settle for less than equality of parental responsibilities. Practitioners with whom I have discussed the matter will assert that there is no bias as such against fathers, but just that they have to fight much harder than mothers to achieve an equality of parenting, and they face particular difficulties when young children are involved.

This immediately focuses a father on the downside, financial, emotional, and legal, of such a battle. They give up and the result is a current of resentment, which in its most extreme form is manifest in the activities of extremist groups. This genuine and reasoned resentment at the system must be confronted and addressed, and the grievances not allowed to continue. It cannot be dismissed as being held by extremists.

14. I am unable to say whether the Family Court has a bias, systematic, actual, perceived or otherwise, in favour of orders that are more favourable to women than men in relation to access and residence. I suspect that many non custodial fathers will assert such a bias.
15. I suggest that the Committee at least undertake a survey of a reasonable sample of contested residence applications to see what is the outcome. Even this would not be conclusive because of the wide discretionary judgments involved so that there is significant uncertainty in taking a matter to trial, with no certainty of approach by any individual judge, which in turn encourages settlements. Final hearings will also often confirm positions achieved, and entrenched, following consent interlocutory orders. Final orders on contested matters, even if they show a fair equality of orders, will not truly represent the vast bulk of agreements which will be in favour of the mother.
16. A further matter to consider is that litigation is so ferociously expensive, particularly for individuals, that society owes it to its members to design a system where litigation is really a last resort. It really is no answer that when the parties actually get to Court they will receive a fair and unbiased hearing. The truth is that this is not a realistic option for most divorcing couples. They will have to make agreed compromises because they will never be in a financial or emotional position to take the matter to a final hearing.
17. One way to address the problem is to impose default rules, such as a starting presumption. At present there is no "bright line" as to the position for contact post divorce. That generates expectations that can never be met, not least because it is very expensive to have an individualised assessment of the position for the average divorced couple. Lack of clear presumptive rules only encourages litigation in an area where all human experience teaches that the matter should be expeditiously and economically resolved so that the parties can get on with their lives, and the children can adjust to the post divorce environment. A presumption of equality, like the cost of erecting boundary fences, will encourage disputing parties to focus on the rule that will ultimately be applied, rather that allow one party to chant the mantra of the "best interests of the child" and taunt the other party to take the matter to the Rolls Royce luxury of a contested trial, many months, if not years later.
18. Such an opaque rule also encourages interlocutory skirmishing for tactical advantage, with one party knowing that a win on an interim basis, because of the transaction costs of displacing the status quo, is just out of the financial and emotional resources of the losing, usually father, parent.
19. Further if one party gains a starting position advantage by gaining interim custody, through an assertion, supported by welfare agencies, and the perception that this is in the best interests children, then it is very easy for that party to use tactical ploys to maintain that position pending the final trial, thus allowing the father-child bond to weaken through lack of sustained contact.
20. A further advantage of a rebuttable presumption is that it introduces an *evidentiary burden* on those who seek to assert that it should be otherwise. At the

moment there is no presumption at all, only what on one view is a category of illusory reference, namely the best interests of the child. There is also the perceived starting point of the professionals involved that usually the Court will order primary residence to the mother. This places an impossible, onerous and resentment creating burden on any party, usually a father who seeks to upset the presumptive position.

21. Should the parties be lucky enough to achieve an interlocutory hearing on the matter, in the face of untested competing assertions in an interlocutory hearing in congested court lists, the *prevailing* assumptions will be the starting point, and a high hurdle is placed on a father seeking equality of contact.

Consistency with property division principles

22. A further matter of significance is that in recent times feminists have often taken the view that property or financial resources of the marriage should be shared equally, or at least that should be the *starting point,* or presumption. Recent changes to superannuation arrangements is an example of the success of such a campaign. If this is the case, then it is difficult to see why a similar starting point ought not apply in relation to the time that children should spend with their parents post divorce.
23. If women demand equality in every other sphere of society, be it employment, wages and conditions, political representation, business leadership, honours, access to education etc, why is it not a corollary that they accept the *burden* of acknowledging that fathers are entitled to equality of access to their children.
24. The question of division of property is also related to the residence issue. If property is divided on the basis of a perception that the mother will have the substantial contact with the child, then this will generate an additional basis to demand more than equality in the division of matrimonial assets. This then leads to further resentment as the non custodial father is slugged a second time. First in the property division, and then under the Child Support Scheme. A presumption would allow a symmetry to apply at least in the first instance in both property and contact or residence, and would reduce the incentive for allegations being made to bolster an access argument, which is really a surrogate way of increasing the property division.

Conclusion

25. In my view, an important pressure valve currently providing a basis for agitation by the "mens rights movement" would be released by a recommendation of the Committee and subsequent legislative implementation that post separation negotiations and decisions of the Court should commence from a position of a presumption of equal time with each parent. The agitation has been sustained by a true perception that there are genuine grounds for grievance by fathers as to the present *outcome* of family breakdown as it manifests itself in arrangements about the residence and costs of maintenance of children.
26. A legislative position of a rebuttable presumption of equal time access would give fathers the legitimacy, confidence and strength seek to assert in the negotiations an opportunity to prove that they can do it. It would validate the father- child bond. It would recognise the *obligation* of parenthood so powerfully expressed in the dissent in *Cattanach.* It would be consistent with the sentiments in *Cattanach.* It would allow fathers to at least "have a go."
27. Clearly, I accept that there will be circumstances where the presumption is easily displaced. No-one is asserting that fathers, or for that matter mothers, with an incapacity to discharge parenting responsibility should be given unsupervised

access to children. That is why hysteria about abusive fathers should not divert the Committee from a determination as to what should apply *in the usual course. These exceptions* should not be allowed to divert the law from a *principled* presumption. Such a presumption recognises that in most cases, the parties are in a position to, and in reality have no real choice but to come to an amicable arrangement, but it will provide some societal *guidance* for their out of court negotiations. It sets out a norm.

28. Further, with a presumption, the law will allow recognition that any negotiated arrangement may need to be adjusted to take into account experience. At the moment, fathers are negotiated out before being given a chance, and then when the custodial parent has the children all significant decisions such as *her* location can be made from that position, to the detriment of the continuing relationship between the father and the children. Overlying this is the operation of the Child Support Agency, which increases resentment by fathers who do not have equal residence, and is a very blunt and inflexible instrument for allocating the costs of the bringing up of children to the economic resources available to the parties. A presumption will also force both parties to make their own decisions as to their economic interests, eg whether to enter or re-enter the paid workforce, whether or not to re-partner, from a position that the decision will not be given decisive weight in a decision on a separate issue, namely the continuing parenting arrangements for the child.
29. Thus why should a mother be in a position to relocate interstate with the children just to suit her needs, when if there was a rebuttable presumption of joint parenting, then she would be met with the response that the locale of the children is where both parents reside, and locations decisions must be adjusted with the interests of *both* parents in mind. The outcome will be in the best interests of the children, but the lens through which the decision is viewed is different from one which commences with what the mother has been able to achieve in the shadow of a Court in which the perception if not the actuality is that generally mothers are favoured in residence decisions.

MICHAEL DAMIAN MURPHY