

Submission No. **1596**
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Secretary:

PARLIAMENTARY ENQUIRY INTO JOINT RESIDENCE

A Submission

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The Terms of Reference that we will address are as follows:

- (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;

Background

We are compelled to make representations to this enquiry because of our experience and observations of the effects of family breakdown on the lives of children.

Our work in the Family Support field has shown us that the situation in intact families is still predominantly one where mothers are the primary carers of children and mothers are the parents most likely to change their work patterns to casual or part-time to adjust to their children's needs and that 23% of women who have ever been married or in a defacto relationship have experienced violence in those relationships.

Further to that our experience as Family Support Workers has given us a caseload where 85% of sole parents are mothers and their experiences pre-separation have involved violence and post-separation are likely to include financial hardship not the least because providing a safe and stable lifestyle for their children means trying to ensure that the violence does not continue. This can require them to change work hours, move house, find additional support etc.

Also a 2002 study found that of the 35 resident mothers, 86% described violence during contact changeover or contact visits.¹

Further we wish to make a statement of general principle that recognizes that intact families can be described to include a variety of living arrangements and so there cannot be a 'one-size-fits-all' solution to families who are complex, have a multitude of needs and patterns and operate in a variety of ways.

What we understand from the Family Law Act

There is no principle of family law that advantages either parent in family law proceedings. Although mothers more often have legal "residence" (current term for custody) of children, most of these orders are made by consent. Further, the

¹ Kaye M, Stubbs J and Tomie J; *Negotiating child residence and contact arrangements against a background of domestic violence*, Working Paper No 4, 2003, Family Law and Social Policy Research Unit, Griffith University, p36. Available on line at <http://www.gu.edu.au/centre/flru/>. Analyses of cases in the Melbourne and Canberra Registries of the Family Court between 1994 and 1995 found that one half of all cases going to Pre Hearing conferences involved allegations of child abuse. T Brown, M Frederico, L Hewitt and R Sheehan; 'Child Abuse and the Family Court' [1998] *Trends and Issues in Crime and Criminal Justice* no91, pp 2-3. See also

Family Law Act provides that each parent has parental responsibility (current term for "guardianship") for his or her child and that this is not affected by parental separation.²

Where parents cannot agree on arrangements for the children and the Family Court has to decide it is bound by law to look at the **best interests of the child** as the **paramount consideration**.³

The Family Law Act also sets out four clear principles about parenting of children namely:

- children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- children have a right of contact, on a regular basis, with both their parents, and with other people significant to their care, welfare and development; and
- parents share duties and responsibilities concerning the care, welfare and development of their children; and parents should agree about the future parenting of their children.⁴

The Court must also consider a number of other factors⁵ such as

- any expressed wishes of the children
- the nature of the relationship of the child with each parent
- the likely effect of any changes in the child's circumstances
- the practical difficulty and expense of a child having contact with a parent
- the capacity of each parent to provide for the needs of the child
- the child's maturity, sex and background, including issues of race, culture and religion
- the need to protect the child from physical or psychological harm
- the attitude to the child and to the responsibilities of parenthood
- any family violence, which has occurred.

Basic Premise:

Based on these understandings we believe that a shift toward "*the presumption that children will spend equal time with each parent*" is a shift away from the '*best interests of the child*'. We disagree with such a shift of emphasis because it places the rights of parents over the best interests of the child. This forms the basis of our submission.

² See section 61C(2) of the FLA

³ see section 65E of the FLA

⁴ see section 60B(2) of the FLA

⁵ see section 68F of the FLA

Further arguments against the legal presumption of joint residence for separating families:

- It ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and family violence.
- It reduces families abilities to make their own decisions about parenting arrangements depending on children's needs, parent capacities, geographical distance between them, parent's work patterns, finances and housing and extended family contact.
- Shared residence is the least common post-separation arrangement with only 3% of children from separated families in 'shared care' arrangements in 1997.⁶ Less than 4% of parents registered with the Child Support Agency last year had equal (or near equal) care of their children.⁷
- In a 1993 study, husbands surveyed three years following their marital breakdown had returned to income levels equivalent to pre-separation while wives' income levels had dropped by 26%.⁸
- Changes to family law will not necessarily make family friendly work places. Current male work practices and cultural models of maleness do not readily allow men to take time out to care for children. Are men likely to accept a similar level of poverty?
- Replicating households will present practical difficulties for many separated parents and children and the burden of running two households will be too great for many.

US studies have shown that where shared residence couples make these arrangements they do so voluntarily, often without legal assistance and irrespective of legislative provisions. These studies have also shown that relationship between shared residence parents are commonly characterized by cooperation between the parties and low conflict prior to and during separation.⁹

Our experience as Family Support Workers is that these same sorts of voluntary arrangements also operate as arrangements that might change at different times to accommodate the changing needs of children. Parents will put their needs for contact with their children in a secondary place to the children's current social, emotional, recreational and educational needs.

⁶ Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra. 1997.

⁷ Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

⁸ *Settling Down: Pathways of Parents After Divorce*, above, note 11 at p 137.

⁹ Bauserman, R; 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, volume 16, no1, 91-102 at page 99. See also Rhoades, H, Graycar, R and Harrison M; 'The first years of the Family Law Reform Act 1995', *Family Matters* No 58, Autumn, 2001 page 80 available at <http://www.aifs.org.au/institute/pubs/fm2001/fm58/hr.pdf>

In family support work approximately 70% of clients are affected by family violence.

The presumption of joint residence will place women and children who are victims of violence at increased risk of further violence.

This will force some children to live with violent fathers and will force mothers to have to regularly negotiate with and be in the presence of violent ex-partners.

It also provides a dangerous tool in the hands of abusive men who wish to control their women partners after separation.

Nurturing and positive parenting does not automatically require equal amounts of contact as prescribed in the joint residence provisions.

Many men already participate actively in their children's lives after separation. In these families neither fathers nor mothers need the law to tell them to do this. Further, most mothers wish to share parenting duties and responsibilities cooperatively with fathers who were significantly involved with their children prior to separation.

Nurturing and positive parents make their own decisions about arrangements depending on their children's needs and the parents' individual situations.

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