

**SUBMISSION BY THE ATTORNEY-GENERAL'S  
DEPARTMENT**

**INQUIRY INTO CHILD CUSTODY ARRANGEMENTS  
IN THE EVENT OF FAMILY SEPARATION**

by the House of Representatives

Standing Committee on Family and Community Affairs

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## **A General considerations**

### ***Current position under the Family Law Act 1975***

Part VII of the *Family Law Act 1975* (the Family Law Act) relates to children. It deals with the concept of parental responsibility and contains provisions concerning parenting orders, child maintenance orders, and other orders and injunctions relating to children. It details the principle of the best interests of children. Part VII also contains enforcement provisions for orders affecting children.

The object of the Part, as set out in section 60B (1), is to:

ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

Subsection 60B (2) further provides that:

The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:

- a) children have the 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
- b) 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
- c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- d) parents should agree about the future parenting of their children.

Part VII provides that in making a parenting order, the court's paramount consideration is the best interests of the child.

### ***Parental responsibility***

Division 2 of Part VII of the Family Law Act deals with the concept of 'parental responsibility'. Parental responsibility means, in relation to a child, all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.<sup>1</sup> Subsection 61C (1) states that each of the parents of a child who is under 18 years old, has parental responsibility for the child. This has effect despite any changes in the nature of the relationships of the child's parents, for example, by the parents becoming separated or by either or both parents marrying or remarrying.<sup>2</sup>

Parental responsibility includes all the usual responsibilities that parents have for their children including, as examples only, responsibility to maintain the children, to select their schooling, their medical treatment, their religion, their names, where the children will live and with whom they associate.

This responsibility can be affected by a court order – subsection 61C (1) has effect subject to any order of a court.<sup>3</sup> The Family Law Act provides that a court may make a parenting order which varies a parent's duties, powers and responsibilities in relation to the child where this is determined to be in the best interests of the child.

A parenting order does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent, if any, expressly provided for in the order, or necessary to give effect to the order.<sup>4</sup>

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<sup>1</sup> Section 61B

<sup>2</sup> Section 61C(2)

<sup>3</sup> Section 61C(3)

<sup>4</sup> Section 61D(2)

## ***Best interests of the child***

Section 65E of the Family Law Act provides that in proceedings for a parenting order in relation to a child, the court must regard the best interests of the child as the paramount consideration.

There is no presumption in the Family Law Act providing for residence orders to be made in favour of either the mother or the father.

Section 68F of the Family Law Act provides that in determining what is in the child's best interests, the court must take into account a range of factors, including (in summary):

- any wishes expressed by the child
- the nature of the child's relationship with both parents
- the likely effect on the child of any changes in the child's circumstances
- the practical difficulty and financial costs of a child having contact with a parent
- each parent's capacity to care for the child
- the child's maturity, sex and cultural background
- the need to protect the child from physical and psychological harm caused by abuse, ill treatment or violence to a child or a member of their family
- the attitude of the parents towards their child and their parenting responsibilities, and
- any family violence or family violence orders concerning the child or a member of the child's family.

The focus on the best interests of the child means that the court does not begin with an assumption that any particular residence or contact arrangement is appropriate.

### ***Parenting orders***

A parenting order includes a residence order (i.e. where and with whom a child will live), a contact order (i.e. with whom a child is to have contact), a specific issues order (i.e. any other aspect of parental responsibility for example, responsibility for the long-term or for the day-to-day care, welfare and development of the child) or a child maintenance order.

The Family Law Act provides that a parenting order may be applied for by either or both of the child's parents, the child, a grandparent of the child, or any other person concerned with the care, welfare or development of the child.<sup>5</sup>

### **Residence orders**

Formerly, a person granted custody had sole responsibility for decisions about the daily care and control of the child. A residence order deals with the issue of with whom the child is to reside at different times and does not, of itself, change in any way the sharing of parental responsibility for a child.

If a residence order is in force, a person must not:

- remove the child from the care of a person
- refuse or fail to deliver or return the child to a person, or
- interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.<sup>6</sup>

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<sup>5</sup> Section 65C

<sup>6</sup> Section 65M

## **Contact orders**

A contact order deals with the issue of with whom a child is to have contact, such as a parent or another person interested in the child's welfare.

If a contact order is in force, a person must not:

- hinder or prevent a person and the child from having contact in accordance with the order, or
- interfere with the contact that a person and the child are supposed to have with each other under the order.<sup>7</sup>

## **Specific issues orders**

The court can make a specific issues order that provides that a particular person has responsibility for the day-to-day care, welfare and development of the child, if this is in the child's best interests. The court can also make orders on specific issues like who is responsible for decisions about the child's schooling, medical treatment, holidays or religious education.

If a specific issues order is in force, and it confers responsibility on a person for the child's long-term or day-to-day care, welfare and development, then a person must not hinder that person in, or prevent them from, discharging that responsibility.<sup>8</sup>

## **Court's discretion in making parenting orders**

The Family Law Act gives the court scope for discretion in making orders determining disputes in children's matters, as all family law cases are different. The discretion must, however, be exercised within the legislative guidelines set out in Part VII.

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<sup>7</sup> Section 65N

<sup>8</sup> Section 65P

Section 65D provides that in proceedings for a parenting order, the court may make such parenting order as it thinks appropriate, subject to the provisions in Division 6 (relating to parenting orders other than child maintenance orders).<sup>9</sup> Thus, when making a parenting order, the court must regard the best interests of the child as the paramount consideration.<sup>10</sup>

## **Enforcement of parenting orders**

The *Family Law Amendment Act 2000*, which commenced on 28 December 2000, introduced a three-stage enforcement regime for parenting orders.

The three tiers of the parenting compliance regime consist of:

- Stage 1 – preventative measures, to improve communications between separated parents and educate parents about their respective responsibilities in relation to their children
- Stage 2 – remedial measures, to enable parents to resolve issues of conflict about parenting and to help in the negotiation of improved parenting, and
- Stage 3 – sanctions, to ensure that, as a last resort, a court takes other action in relation to a parent who deliberately disregards a court order.<sup>11</sup>

Division 13A of Part VII deals with consequences of failure to comply with an order and other obligations that affect children.

### **Stage 1 of the parenting compliance regime**

Stage 1 relates to prevention of breaches by providing information to the parties.<sup>12</sup> It is designed to ensure that parents have as much information as practicable to assist them to understand their responsibilities as parents.

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<sup>9</sup> Section 65D

<sup>10</sup> Section 65E

<sup>11</sup> The concept of the three-stage regime is introduced in section 65AA.

<sup>12</sup> Section 65DA



There is an obligation on the Family Court to make clear in its orders what obligations the orders create and the consequences that may follow if a person contravenes the order.<sup>13</sup> This is to be expressed in language that is likely to be readily understood by the person to whom the explanation is given.<sup>14</sup>

If any of the persons to whom the order is directed is not represented by a legal practitioner, it is the duty of the court to explain the availability of programs to help people understand their responsibilities under parenting orders, and the availability and use of location and recovery orders to ensure that parenting orders are complied with.<sup>15</sup> The provisions also require legal practitioners, if requested by the court, to provide this information to persons to whom the order is directed.<sup>16</sup>

## **Stage 2 of the parenting compliance regime**

Stage 2 is designed to be the remedial stage to give parents the chance to better understand their obligations as parents under the parenting orders that have been made.

Stage 2 applies where:

- there is found to be a contravention without reasonable excuse of any type of order affecting children except a child maintenance order
- there has been no similar finding in relation to that same order (i.e. no second or subsequent breach)
- or there has been a similar finding and the court is satisfied in any event that it is more appropriate for that contravention to be dealt with under stage 2.

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<sup>13</sup> Subsection 65DA(2)

<sup>14</sup> Subsection 65DA(8)

<sup>15</sup> Subsection 65DA(3)

<sup>16</sup> Subsection 65DA(6)

However, if the court is satisfied that the person who contravened the order has behaved in such a way that showed a serious disregard for his or her obligations under that order, stage 3 must apply.<sup>17</sup>

The orders available under stage 2 are that the court may:

- order a contravening person, and another specified person if appropriate, to attend upon a provider of a post-separation parenting program to assess whether the person is suitable for such a program and, if found suitable, direct the person to attend
- make a further parenting order that compensates for contact foregone as a result of the contravention, or
- adjourn the proceedings to allow either or both of the parties to the order to apply for a further parenting order that discharges, varies or suspends the primary order.<sup>18</sup>

A post-separation parenting program is a program that is designed to help people to resolve problems that adversely affect the carrying out of their parenting responsibilities (including by providing counselling services or by teaching techniques to resolve disputes), and that consist of lectures or discussions (including group discussions) or other activities.<sup>19</sup>

### **Stage 3 of the parenting compliance regime**

Stage 3 is designed to ensure that parents who intentionally disregard parenting orders are dealt with by some form of sanction.

Stage 3 applies:

- for a second or subsequent breach of the same order

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<sup>17</sup> Section 70NF

<sup>18</sup> Subsection 70NG(1)

<sup>19</sup> Section 70NB

- where the person does not have a reasonable excuse for the current contravention, and
- where either the court is satisfied that the person behaved in a way that showed a serious disregard of his or her obligations under the order, or a court has previously determined that the person has, without reasonable excuse, contravened the order.<sup>20</sup>

At stage 3 the court must make the order or orders that are available to it that it considers to be the most appropriate in the circumstances.<sup>21</sup> The orders available under stage 3 are:

- a community service order
- a bond
- a variation of the order contravened
- a fine of up to 60 penalty units (i.e. \$6,600), or
- a sentence of imprisonment for a period of 12 months or less.<sup>22</sup>

### **Amendments to parenting compliance regime in Family Law Amendment Bill 2003**

The Family Law Amendment Bill 2003, which is currently before Parliament, includes amendments that are intended to improve the operation of the parenting compliance regime. In a number of cases, the amendments are designed to give the court dealing with an application for enforcement of a parenting order greater flexibility in what the court can order to deal with the contravention.

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<sup>20</sup> Section 70NJ

<sup>21</sup> Subsection 70NJ(2A)

<sup>22</sup> Subsection 70NJ(3)

## **Preliminary indications of the use of stage 2**

The three stage parenting compliance regime effectively came into force in April 2001 when the first list of post-separation parenting programs was authorised and published by the Attorney.

Stage 2 of that regime is the main difference from the previous enforcement regime for parenting orders in that it provides for the court to make orders sending parties to post-separation parenting programs. The program is designed to make parties more aware of their responsibilities as parents and to encourage a better ongoing relationship between the parties and thereby assist in a greater level of compliance with parenting orders.

Preliminary figures from the Family Court suggest that such orders are being made in less than 5% of applications for enforcement of orders. Anecdotally there are a number of reasons for this. Firstly, the regime is still relatively new and appropriate programs have not always been available. Further, it seems that in very many cases the original orders that have been made are not able to work effectively between the parties. In many cases where orders are made by consent it appears that couples are agreeing to orders without really appreciating what the orders might actually mean in practice. So the first court appearance is often about varying the original orders to make them more workable.

## ***Means of enforcing a parenting order***

With the exception of where breaches of orders amount to a flagrant challenge to the authority of the court and amount to contempt, the court cannot enforce its orders of its own motion.<sup>23</sup> Family law matters are civil proceedings and the court cannot take action to impose a sanction to enforce an order without an application from one of the parties. A party to a parenting order who is aggrieved and who wishes the court to do something to rectify the situation is

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<sup>23</sup> See section 112AP of the Act

responsible for filing an application for enforcement. There is no external mechanism for enforcement of contact orders.

### ***Residence not custody***

The Family Law Reform Act 1995 (the 1995 Reform Act), which commenced on 11 June 1996, introduced a series of reforms to the Family Law Act that shift the focus away from notions of self-interest of parents, to the child's best interests.

In particular, instead of using the concepts of 'custody' and 'access', which foster a notion of property or ownership in children by parents, the Family Law Act now refers to the broader concept of 'parental responsibility' and provides for the court to make 'parenting orders'.

The best interests of the child have been the paramount consideration in the making of parenting orders since the Family Law Act came into force. The 1995 Reform Act sets out the principle in section 65E, which is consistent with the United Nations Convention on the Rights of the Child. As discussed elsewhere in this submission, this section makes it clear that when the court is deciding whether to make a parenting order in relation to a child, the best interests of the child must be the paramount consideration.

### ***Increase in fathers obtaining residence orders***

In litigated cases the percentage of residence orders made in favour of the mother was 74.6% in 200-01<sup>24</sup>. This figure has declined from 77.8% in 1994-95.<sup>25</sup>

In the same period, residence orders in favour of fathers have increased steadily from 15.3% in 1994-95 to 19.6% in 2000-01. Orders providing for joint

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<sup>24</sup> Family Court website <[http://www.familycourt.gov.au/court/html/residence\\_orders.html](http://www.familycourt.gov.au/court/html/residence_orders.html)> viewed 7 August 2003.

<sup>25</sup> *ibid*

residence have declined from 5.1% in 1994/95 to 2.5% in 2000/01.<sup>26</sup> The increase in orders in favour of fathers appears to come from a decrease in orders in favour of mothers and a decrease in orders for shared care.

### ***Joint residence not preferred option in non-litigated cases***

As at June 2002, the Child Support Agency (CSA) had 657,332 active cases. Of the parents who pay child support through the CSA or whose child support arrangements are monitored by the CSA, only 3.7 had children in 'shared care'. 'Shared care' is defined by the CSA as being 40.0% to 59.9% of the nights in the child support year.<sup>27</sup>

Time children spend with payee		CSA collect		Private collect		Total	
Care code	% of Nights	Number	%	Number	%	Number	%
Substantial	30.0-39.9	793	0.3	1 653	0.5	2 446	0.4
Shared	40.0-59.9	5 799	1.9	16 996	5.5	22 795	3.7
Major	60.0-69.9	5 006	1.6	9 385	3.0	14 391	2.3
Sole	70.0 and over	299 014	96.3	283 225	91.0	582 239	93.6
<b>Total</b>		<b>310 612</b>		<b>311 259</b>		<b>621 871</b>	

From the above figures relating to private clients where couples essentially agree on the arrangements they want, it is clear that in over ninety percent of cases parents chose to make arrangements for their children to be in the sole principal care of one parent, usually the mother.

<sup>26</sup> <[http://www.familycourt.gov.au/court/html/residence\\_orders.html](http://www.familycourt.gov.au/court/html/residence_orders.html)> viewed 7 August 2003.

<sup>27</sup> Subsection 8(1) *Child Support (Assessment) Act 1989*.

## **B Advantages and disadvantages of a rebuttable presumption for equal time post-separation parenting**

### ***Advantages of a rebuttable presumption***

In an ideal situation both parents should be equally involved in the care of their children, both before and after separation. The Family Law Act proceeds from the basis that both parents have parental responsibility for their children.<sup>28</sup>

Increased contact with both parents is in the child's best interests and a presumption of equal time with each parent may well encourage such an increase.

An arrangement under which children can spend equal time with each parent provides both parents with a psychological affirmation that they continue to have a role in their children's lives. It is appropriate that the burdens and pleasures of child rearing be available to both parents.

A presumption of equal time may lead to an increase in the level of contact even if equal time is not agreed or ordered. A presumption of equal time is designed to create more certainty of outcomes.

Increased contact between children and their fathers may lead to greater compliance with child support obligations.<sup>29</sup>

Because shared care requires such a high level of cooperation and flexibility, it may promote parental co-operation.

### ***Disadvantages of a rebuttable presumption***

The disadvantages of the presumption fall into five broad areas:

- (i) a presumption derogates from the focus on the best interests of each individual child

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<sup>28</sup> Subsection 61C(1)

<sup>29</sup> Family Law Council *Patterns of parenting after separation*, April 1992 p 14.

- (ii) there is a need for high level ongoing parental co-operation to make an equal time regime work
- (iii) there are significant issues surrounding family violence
- (v) the impact on court services and the costs to individual parents, and
- (iv) there are significant practical difficulties to the implementation of an equal time regime.

### **Best interests**

The focus of parties in determining arrangements for their children should be on the best interests of those children. The presumption of equal time has the potential to undermine that focus.

### **Parental co-operation**

Shared care requires a high level of co-operation and flexibility between separated parents.<sup>30</sup> There is much research that indicates that high levels of ongoing parental conflict have a negative impact on children:

Maintaining nurturing relationships between children and parents, even after separation, is known to be good for the children's wellbeing. Policies, services and support networks for families experiencing separation need to support and enhance these relationships when they are beneficial to the welfare of the children. However, the stress and conflict around separation frequently puts children and family members at risk, and the capacity within the family to care for children in their best interests is often lost.

Where violence or abuse is present, these relationships may be harmful to the children and should not continue.<sup>31</sup>

The Government's response to the Pathways Report acknowledges the deleterious consequences for children of parental conflict:

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<sup>30</sup> Smythe, B, Caruana C and Ferro, A *Some whens, hows and whys of shared care: What separated parents who spend equal time with their children say about shared parenting* Australian Institute of Family Studies Australian Social Policy Conference 9-11 July 2003.

<sup>31</sup> The Pathways Report, op cit p1-2.



Family separation and divorce is frequently associated with entrenched parental conflict. Such conflict is damaging to the individuals involved, particularly to children, and has detrimental and costly effects for governments and the wider community.<sup>32</sup>

Research indicates that parental conflict:

can violate children's core developmental needs, posing a serious threat to their psychological growth;

has a profound influence on adolescent development and future adult behaviour and can be the strongest predictor of violent delinquency;

is a more potent predictor of poor child adjustment than is divorce; and

is detrimental to the fathering role, partly due to the mother's withdrawal from facilitating situations that enhance the father-child relationship.<sup>33</sup>

Parents need to communicate and interact whether they care for their children on an equal time basis or one parent has the principal care and the other parent has contact. The degree of communication and contact is, however, much greater if children spend equal time with each parent because the parents need to convey information about the children and make arrangements for the children to a much greater degree than if one parent has contact only.

## **Family violence**

Family violence issues may not be properly addressed, often because of the unequal bargaining positions of the parties. This may lead to shared residence being imposed in inappropriate cases. In the Griffith University Report, *Negotiating child residence and contact arrangements against a background of domestic violence*, women were concerned that 'they were being pressured to reach an agreement, that counsellors had a starting point that contact was necessarily in the child's best interests.'<sup>34</sup>

The Pathways Report also commented that women in particular are concerned about the power imbalance in the family law system and about the impact of

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<sup>32</sup> The Government's Response to the Pathways Report, p5.

<sup>33</sup> *ibid*, p5.

witnessing violence upon children even where children are not subject to such violence themselves:

Many women are concerned that there is a power imbalance (often due to fears about violence and reprisals) throughout the system that discriminates against them, particularly with regard to financial outcomes.<sup>35</sup>

Further:

Family violence and allegations of violence affect other parenting issues in addition to residence and contact orders. Violence is not always as simple as one person victimising their spouse. It has commonly been claimed that allegations of violence are made in an attempt to gain a tactical advantage in family law cases. Sometimes those who are violent to their spouse are also violent to their children. In families where there is adult-to-adult violence there is more likelihood of children witnessing violence, becoming violent towards adults and other siblings, and in later life exhibiting violent behaviour in their own relationships.<sup>36</sup>

### **Impact on courts and costs**

Following the introduction of the 1995 Reform Act there was a marked increase in the level of litigation. In 1994-95 there were 10,000 applications to the Family Court for orders with respect to custody and access. In 1996-97 the number of applications with respect to residence and specific issues increased to over 30,000.<sup>37</sup>

It is the Department's view that the introduction of a rebuttable presumption would lead to a further increase in litigation because of the need to rebut the presumption in many cases. If there is to be a presumption of equal time care, then there may be more disputes between parties with both seeing 'equal time' as their right even when equal time would not be appropriate and would require a court to resolve the differences between them. In situations of parental conflict parties are much more likely to litigate in favour of what they are likely to see as their right rather than come to a negotiated outcome.

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<sup>34</sup> Kaye, M, Stubbs, J and Tolmie, J, *Negotiating child residence and contact arrangements against a background of domestic violence*, Griffith University Socio-Legal Research Centre School of Law, Griffith University, June 2003, pviii.

<sup>35</sup> Pathways Report op cit p13

<sup>36</sup> *ibid* p14.

## **Practical difficulties**

Parents will need to live within a reasonable distance of one another in order to maintain consistency in the children's schooling and other activities.

Child care may present difficulties particularly if parents cannot reach agreement about this issue.

The children may need to adjust to different standards of living. Each party will need to have the capacity to equip and maintain a home large enough to accommodate the children and to provide them with duplicate sets of toys, books and other equipment which cannot conveniently be moved with the children. If co-operation is poor this may extend to clothes and school uniforms.

## **C. Legal impact of equal time presumption**

Should an equal time presumption be introduced into the Family Law Act, one possible outcome of its operation could be that it would effectively replace the principle that the best interests of the child are the paramount consideration. This would depend on whether the presumption required strong and credible evidence to overcome it or some weaker level of evidence. If the presumption is strong and is not challenged by the parties involved, then it would follow that equal time arrangements may be made even in those cases where such an arrangement is not in the best interests of the particular child.

Presumptions in legislation work best where they represent the norm or usual situation. As the authors of *Cross on Evidence* have stated:

...the confusion [as between presumptions of fact and law] highlights the important fact that presumptions of law are convenient methods of proving elusive facts and that they are or ought to be well founded upon public policy and every day experience.<sup>38</sup>

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<sup>37</sup> op cit <<http://www.familycourt.gov.au/htm/statistics4.html>> viewed 7 August 2003.

However, in the case of equal time parenting after separation, it would appear from the lack of frequency with which this arrangement is currently either chosen by separating parents or ordered by the court, that the presumption will be challenged in the majority of cases because it is not the norm that couples would choose for themselves.

Should an equal time presumption be introduced, a decision will need to be made about the strength of the presumption. This would involve deciding on what basis the presumption could be rebutted and who should bear the onus of rebutting the presumption. For example, a question is whether the presumption should only be rebuttable on the presentation of evidence ‘beyond a reasonable doubt’ that an equal time arrangement is not in the best interests of the particular child, or whether the test should be set at the level of ‘reasonable satisfaction’,<sup>39</sup> or on the basis of the ‘balance of probabilities’ test.

### ***Evidentiary problems in rebutting the presumption***

Establishing a negative proposition (i.e. that it is not in the best interests of a particular child to spend equal time with each parent) may, more often than currently, involve the parent challenging the presumption by bringing evidence of the shortcomings of the other party before the court. This is likely to increase the acrimony of proceedings.

The difficulty of proving a negative proposition has been commented on judicially.<sup>40</sup> In this case, the court noted the heavy onus on those having to show a negative proposition.

Inappropriate settlements may take place in circumstances where parents have unequal bargaining positions.

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<sup>38</sup> *Cross on Evidence*, Butterworths, Australian Edition, 1996, paragraph 7260.

<sup>39</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>40</sup> *Dillon v R* [1982] AC 484

## **D Terminology used in the United States**

The position in the United States (US) is quite complex particularly as child custody in the US is a matter which falls within the jurisdiction of the state governments rather than the Federal government.

In the US there are a number of custody arrangements awarded by courts. There is a basic distinction between ‘legal custody’ and ‘physical custody’. Within these parameters custody may be sole, joint, split or divided. The definition of custody varies from jurisdiction to jurisdiction. However, broadly speaking, ‘joint legal custody’ means both parents retain the rights and powers to make decisions regarding the child's health and welfare. ‘Joint physical custody’ means that both parents retain the right to share, although not always equally, in the daily residential care of the child. This is sometimes referred to as shared parenting. ‘Split custody’ applies where there is more than one child and each of the parents has at least one child living with them. ‘Divided custody’ allows each parent to have a child live with them for set periods of time.

In relation to ‘joint custody’, statutes may include: a rebuttable presumption of joint custody, a preference for joint custody, an option for joint custody or a simple direction to judges to order the custody arrangement in the best interests of the child. A presumption of joint custody generally directs that joint custody, whether physical or legal, should be ordered by judges in most cases, provided there is not a compelling reason to deny such an arrangement.

Unlike statutes with a presumption of joint custody, statutes establishing a preference for joint custody may merely require courts to consider joint custody, or may require the court to state its reasons for denying an award of joint custody.

The strength of the presumption varies. Some states recognise a presumption in favour of joint custody only when parents agree to a joint custody

arrangement. Other states have rules that affect only the burden of proof, making joint custody the default rule but allowing an order other than joint custody if one parent establishes that joint custody is not in the child's best interests. Some states impose a stronger presumption. An example is legislation that provides that shared parenting responsibility is required unless shown to be detrimental to the child.

In California, which was the first US state to introduce a presumption of joint custody, the presumption was removed in 1988 on the basis that it had had 'little impact on actual arrangements for children, which almost invariably reflected the mother preference of most divorcing couples'.<sup>41</sup>

## **E The current position of grandparents under the Family Law Act**

Section 65C of the Family Law Act provides that a parenting order in relation to a child may be applied for by:

- either or both of the child's parents
- the child
- a *grandparent* of the child, or
- any other person concerned with the care, welfare or development of the child (emphasis added).

As stated above, when making a parenting order in favour of a person, including a grandparent, the court must regard the best interests of the child as the paramount consideration.

Further, section 69C of the Family Law Act, which sets out who may institute certain kinds of proceedings in relation to children, provides that, unless a

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<sup>41</sup> *Patterns of Parenting After Separation* Family Law Council, April 1992, p36.

contrary intention appears, such proceedings may be instituted by the grandparents of a child.

Section 60B, which contains the objects underlying Part VII of the Family Law Act, provides that ‘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.’ This provision would cover grandparents.

Section 68F, which sets out the factors that the court must consider in deciding what is in the best interests of the child, makes several references to a child's relationship with, or contact with, ‘other persons’, which would also cover grandparents.

While it would be possible to make further specific reference to provide that the reference to ‘other persons’ includes grandparents, it is not clear what impact, if any, such a change would have.

The Family Court does not keep separate statistics with respect to orders for contact and residence made in favour of grandparents. However, the Family Court statistics on the Family Court website report the numbers of residence and contact orders made in favour of persons other than the parents of a child or children from 1994-95 to 2000-01. These will include other relatives, such as aunts and uncles, and in some cases other persons with close links to the children.

With respect to residence orders in favour of non parents, the numbers fluctuate between a low of 376 (2.8%) in 1994-95 and a high of 727 (5.3%) in 1999-2000. The number of residence orders made in favour of non parents in 2000-01 was somewhat lower at 538 (4.1%).<sup>42</sup>

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<sup>42</sup> Family Court website <[http://www.familycourt.gov.au/court/html/residence\\_orders.html](http://www.familycourt.gov.au/court/html/residence_orders.html)>

With respect to contact orders in favour of non parents, the range was from 274 (1.8%) in 1994-95 to 508 (3.2%) in 1998-99. The number of contact orders made in favour of non parents in 2000-01 was also lower at 445 (3.1%).<sup>43</sup>

## **F How the inquiry relates to the Pathways Report and the Government's response to the Pathways Report**

The idea that there should be a presumption of equal time with each parent was one of the issues raised in submissions to the Family Law Pathways Advisory Group (the Pathways Advisory Group).<sup>44</sup> The Pathways Report did not recommend this approach. Rather, it recommended:

...that the family law system, in whole and in all its parts, be designed to maximise the potential for families to function cooperatively in the interests of children after separation. In doing so, it would ensure fair and equitable treatment for all, with particular attention to the on-going parenting roles and support needs of both parents...<sup>45</sup>

The Pathways Advisory Group also recommended the expansion of access to services that help men to co-parent their children effectively after separation.<sup>46</sup>

The Government's Response to the Pathways Report (the Government's Response) was released in May 2003. One of the key themes of the Government's Response was 'better outcomes for children and young people'. In particular, the Government's Response noted that positive ongoing contact with both parents helps children to come to terms with separation and is associated with positive longer term outcomes for their development including the ability to form healthy adult relationships.<sup>47</sup>

The Government's Response included recurrent resources for services funded by the Attorney-General's portfolio that are providing assistance to separating families. The Government's Response also included ongoing funding for

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<sup>43</sup> *ibid* <[http://www.familycourt.gov.au/court/html/contact\\_orders.html](http://www.familycourt.gov.au/court/html/contact_orders.html)>

<sup>44</sup> The Pathways Report, p6.

<sup>45</sup> *Ibid* p xv (recommendation 1).

<sup>46</sup> *Ibid* p xxiii (recommendation 7(b)).

<sup>47</sup> The Government Response, May 2003, p11.



services for men under the Men and Families Program within the Family and Community Services Portfolio.

The Pathways Report's recommendations were wide ranging and directed not only to Government but also to the courts and to private professionals and organisations working within the family law system. The Government's Response addressed a number of the recommendations but there is more work to be done, at government and non-government level. An interdepartmental Pathways Taskforce is continuing to advise the Government on the implementation of the Pathways Report and to coordinate Pathways initiatives at the Commonwealth level.<sup>48</sup>

### ***Improving contact***

In their recent paper, Parkinson and Smythe report that there is substantial agreement between separated mothers and separated fathers that there should be an increase in contact:

A significant proportion of both mothers and fathers would like to see more contact occurring: 41% of resident mothers reported that they would like to see more contact while 74% of non resident fathers would like to see more contact.<sup>49</sup>

As long as the contact is safe and appropriate, improving the amount of contact non-resident parents have with their children is likely to improve the relationship between the child and the non-resident parent and provide the child with both a father and a mother in their lives. The Pathways Report highlighted the importance of helping separated parents work to resolve their conflicts and to establish better contact with their children without the need to go to court. Two programs that are already helping parents to maintain or re-establish

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<sup>48</sup> The Taskforce is jointly chaired by the Attorney-General's Department and the Department of Family and Community Services. Other members are the Department of the Prime Minister and Cabinet, the Department of Health and Ageing, the Department of Finance and Administration, the Department of Immigration, Multicultural and Indigenous Affairs, the Family Court of Australia, the Federal Magistrates Service, the Child Support Agency, Centrelink and the Aboriginal and Torres Strait Islander Commission.

contact with their children are children's contact services and the Government's innovative Contact Orders Program.

### ***Children's contact services***

The handover of children for contact is often a flash point for separated families in conflict. Children's contact services provide a safe neutral environment for handover of children and also provide supervised contact where that is required. They are highly regarded services and in many cases make contact possible where it otherwise would not occur. The Commonwealth currently funds 35 children's contact services around the country. They generally have significant waiting lists and many areas do not have easy access to them as there are only a small number in each State.

The Pathways Report recommended that children's contact services be expanded to be accessible at an early stage in the separation and for resources to be available to assist parents to self-manage contact in the future.<sup>50</sup> By making the services available at an early stage, a child's contact with the non-resident parent can be maintained or restored more easily than later in a conflict when it may be much more difficult to restore the relationship.

As part of the Government's Response to the Pathways Report, \$16.9 million over four years was allocated in the 2003-04 Budget to ensure recurrent funding for existing children's contact services. Further expansion of these services would require additional funding.

### ***Contact Orders Program***

The Contact Orders Program is designed to assist families experiencing significant contact problems and persistent non-compliance with contact orders. The program started as a small pilot with services in Parramatta, Hobart and

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<sup>49</sup> Parkinson, P *When the difference is night and day: Some empirical insights into patterns of parent child contact after separation*, Australian Institute of Family Studies Conference, *Steps forward for families: Research, practice and policy*. 12-14 February 2003, p14.

<sup>50</sup> Pathways Report op cit p xxvii (recommendation 15.6).

Perth. In the 2003-04 Budget, the Government provided \$5.2 million over four years to provide ongoing funding for the three original services and to establish new services in Melbourne and south east Queensland. That funding also enabled a small expansion of the Parramatta service to cover a wider area.

The program uses a variety of approaches to reduce conflict and improve the ability of separated families to deal with the difficulties between them that have been impacting on contact arrangements. The services are tailored to individual needs of each family member and include education, telephone support, individual counselling, mediation and work in groups. For example, men are often referred to group sessions with other men with similar concerns. In addition intensive support is provided if crises arise while people are in the program. Overall the program is designed to provide families with a better way to deal with issues in the ongoing relationship with their children. The program is particularly effective because it helps parents focus on the effect their conflict over contact is having on their children.

Evaluation of the program has shown that it is successful in reducing the levels of conflict and helping parents to move towards more effective child contact arrangements. Eighty-eight percent of clients reported achieving a positive outcome from participating in the program. However, even with the expansion to two new sites as a result of the last Budget, its impact is limited by the small number of services across Australia.

### ***Another option - early intervention***

While it is essential that we assist families to reduce conflict and re-establish contact where it has broken down, earlier information and advice could help prevent disputes over contact. It could also assist parents who wish to try an equal time approach. Anecdotal evidence suggests that a considerable amount of court time is taken up in dealing with unrealistic orders for contact that have been made with the consent of both parties.

What may be needed is a service providing easily accessible information and advice about contact and shared parenting at an early stage in a separation. Such a service could advise separating parents on the importance for the child of contact with both parents, the range of possible ways of maintaining contact or shared residence and the possible pitfalls that need to be avoided. It could also provide referrals to other support services, such as the children's contact services and counselling services, which can assist parents in making contact or shared residence work.

An early intervention service could involve telephone information and support, face to face information sessions, parenting education (particularly to help fathers develop the skills needed to undertake more of the care of their children), and other assistance designed to help parents reach workable agreements that meet the needs of their children. It could also include access to legal advice on drafting contact orders, where parents wish to seek consent orders from the courts. Poor drafting of consent orders can make it difficult for the courts to enforce orders when breaches occur.

The Pathways Taskforce is examining the feasibility of such an early intervention service. However, the implementation of such a proposal would need to be considered by the Government in the Budget context.