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

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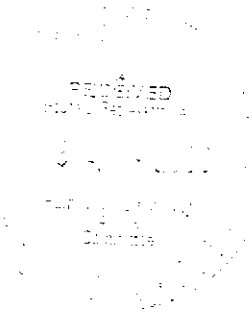

8th August 2003

Dear Sir/Madam,

SUBMISSION ON CHILD CUSTODY ARRANGEMENTS

Please find attached a submission to your Committee in relation to child custody arrangements.

I would be pleased to appear in person before the Committee should there be an opportunity so to do.

Kindly acknowledge receipt of this submission. A hard copy of this letter and submission is being posted to you in addition to the Facsimile transmission.

Yours faithfully,

Lindsay Gordon

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

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INTRODUCTION

The current situation with Lawyers being involved in, advising and determining the custody and care of children in an adversarial system is fundamentally flawed. The very nature of the concept of two opposing sides competing in what should be a cooperative and conciliatory process to serve the best interests of the children in a balanced care environment, conflicts with all common sense.

The issue of custody, care and welfare of children is best *determined* not by Lawyers or a Court, but by persons experienced in social, child care and psychological issues. The decisions of those persons are social decisions but can be converted to a Court Order for certainty or enforcement reasons, but the decisions themselves should not be made by the Courts on a *Legal* basis.

One of the most important factors is the speed with which the custodial arrangements with respect to children should be determined.

At the moment either parent can apply on relatively short notice to the Family Court (around 4 weeks) to have an interim arrangement put in place with respect to the children. The problem is that if there is a contest between the parents then the interim orders remain in place until the matter can be determined by the court at a full hearing. This is often linked to the Property Application and may not be determined for up to 3 years. The tactic of delay is often used to one parent's advantage and is rarely for the benefit or in the best interests of the children. A delay of 3 years particularly in relation to a child of up to 10 years of age can fundamentally effect that child bearing in mind the percentage of that child's life that the 3 years represents. During that time bonds between that child and the other parent can be substantially damaged or even destroyed completely.

Given that the whole case is not heard at the interim hearing then if one parent has obtained a result substantially to the exclusion of the other, then that parent will frequently use the Court system to cause delays so that the interim result lasts as long as possible and often becomes the default final result. The rationale of the Court is in those cases that as the situation by the time of the final hearing has been in place for so long, then it would be disruptive to the children to change it. Whilst that rationale may have some degree of merit, it completely ignores the inappropriate conduct of the parent delaying or the delays in the system which ultimately will work to the detriment of a proper result for the children. Thus the parent causing the delays or conflict is being "rewarded" for conduct which is inappropriate.

As awards to each parent in relation to financial issues, such as property settlements are determined partly on the basis of the custodial arrangements for the children, the primary aim of many parents, and particularly their Legal Advisers is to gain predominant custody of the children to the exclusion of the other parent as far as possible to further the party's claim for a larger portion of the property settlement. This aim is clearly not something in the best interests of the children and in fact, is a *conflict of interest*. What in fact is occurring is that that parent is putting his or her financial interests ahead of the children's interests. It is for this reason that the residence and contact arrangements for the children should be entirely finalised prior to the determination of the property and financial issues of the parents.

In many cases the early determination of the children's issues will result in the property and financial issues being able to be resolved without the need for a Court hearing. This would produce a more rapid cost effective resolution to all matters in dispute between the parents. Issues of children's residence and contact are emotional issues which, in many cases, parents wish to pursue at any cost (both emotional and financial). The property and financial issues become caught up in the children's issues and are not resolved because the children's issues are not resolved. Had the children's issues been resolved in many cases it would be unlikely that property issues would proceed to a hearing as the cost/benefit analysis can much more readily be considered without the intangible emotive issues relating to the children.

The adversarial and drawn out nature of the present situation results in a much greater cost to the public purse than a more involved conciliatory system. For instance there is substantial anecdotal evidence that a large number of suicides (particularly male) occur as a direct result of the conflict occurring in relation to Contact and Residence proceedings. In addition much of the domestic violence which occurs *after* separation can be attributed to the perception that Husbands have of a system that they perceive is fundamentally unfair and pitted against them. The cost to society is often hidden in absenteeism, loss of productivity, increased health costs though depression and other resulting mental problems not to mention the cost of emergency services through hostage situations, suicides, murders or other assaults.

Many of these problems could well be removed by a system in which particularly Husbands can feel they are treated as equal parents to Wives rather than simply the money provider. In addition, with Husbands being able to have more time with their children the cost of child rearing is more evenly shared. Husbands would also be pore prepared to provide child support where they feel they are also emotionally part of the children's lives.

At present separated Husbands feel more as if they are visitors to their children's lives rather than as participants in them. Further more, on contact visits (which are frequently one weekend per fortnight) the Husbands are looked at as "good time dads" rather than carrying the equal burden and responsibility of child rearing as the Wife. This in turn sends the wrong message to children who grow up believing that fathers do not need to be or should not be engaged in child rearing to the same extent as the children's mothers.

FACTORS WHICH SHOULD BE TAKEN INTO ACCOUNT IN DECIDING THE RESPECTIVE TIME EACH PARENT SHOULD SPEND WITH THEIR CHILDREN POST SEPARATION:

1. The best interests of the children by taking into consideration the matters currently referred to in section 68F of the Family Law Act 1975.

2. My experience has been that there are many practitioners who, as a matter of course, encourage the lack of communication or active confrontation between separated parents to promote or further the position of one parent in the custodial proceedings. This is done at the emotional expense of both the other parent and the children. This "tactic" has proved very fruitful in the past for those utilizing it to further their position but has resulted in confrontations and is the type of behaviour that can promote violence and aggression. Furthermore, this confrontationist approach sets an appalling example to children as to the manner in which to behave in what is already a delicate situation. This type of deliberately uncooperative behaviour should be a factor mitigating *against* the parent utilizing it and practitioners encouraging or promoting it should be disciplined by their professional bodies.

The Family Law Act 1975 provides that Legal Practitioners are obliged to provide material to litigants which inform the parties of the availability of counselling and other services of the Court. The reality is that there are no readily available facilities of which litigants may avail themselves if one parent *refuses* even if the Court has ordered the counselling. It is in the interests of the parent who predominantly has the care of the children (usually the wife) to refuse to be involved in such counselling and conciliatory activities. This position is usually encouraged by the Lawyers as they make the parent acutely aware that the property settlement which also is to occur will result in a larger share of the matrimonial assets being awarded to that party if they have the custody of the children for the majority of the time.

The Family Law Act 1975 specifically states that a party cannot be penalised at all for failing or refusing to attend Court ordered counselling. This should not be the case and if a party or that party's practitioners behave in a fashion so as to refuse to cooperate with the party who is not the main custodial parent so as to attempt to exclude that parent from the lives of the children or the children from the care of that parent, then that factor should be taken into account as a factor designed to subvert the processes and procedures of the Act and also to be not in the best interests of the children. In other words the fact that a parent is refusing conciliation or counselling (without very good reason) should reflect adversely on that parent.

3. There should be a presumption that both parents should be involved as much as is practicably possible in the lives of each of their children and that to exclude either parent there should be clear evidence that the children would be affected *detrimentally* by being with that parent.

4. The contribution that each parent could make to the educational achievement of each of the children should be considered and if it can be demonstrated that a parent could provide social, educational or psychological benefits to the children then that should weigh in that parent's favour.

5. Financial considerations *alone* should not be considered a factor where the parents are in conflict. The Court correctly recognises parents obligations to support children, however, no recognition is given to the fact that where the parents are in heated conflict, that any contributions made by one parent to the other may well simply be used by the receiving party to further finance the "battle" rather than using the funds for the purposes of child support. It is also for this reason that the removal of delays and the speedy resolution of the children's issues would result in a more satisfactory outcome over all.

SUGGESTED REFORMS

1. The custody (contact and residence) of children should be separated from any issues of financial or property settlements with the Family Court and should be determined preferably within the time which the interim orders would normally have been made or, at the outside, 6 months from separation or application.

2. Contact and Residence should be determined by a new division of the Family Court where Lawyers are not permitted to represent parties and could be termed as a "Children's Parental Care Board". The only persons who should be involved are Social Workers, Medical Practitioners, Psychologists and persons experienced in Child Care or similar disciplines. The issues should not be determined by using rigid legal criteria but on a social basis with the best interests of the children to be considered as paramount. The manner of determination should be by negotiation, conciliation and cooperation not in an adversarial fashion. Investigations or enquiries can be conducted by the Children's Parental Care Board prior to determination to

enable the Board to be fully acquainted with the particular situation. Investigation could include visits to the parties homes rather than the more sterile artificial situation which frequently intimidates children through visits to Court appointed Psychologist or suchlike. This would produce a more transparent non adversarial proceeding. Parties can be required to contribute to the cost of the determination by virtue of a means tested contribution. That would particularly be the case if the parties were in substantial dispute. If there were allegations of physical or sexual abuse these too would be able to be determined easier with a less detrimental effect on the children.

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3. There should be a presumption that the best interests of the children are served by both parents being involved in the children's lives to the maximum extent possible.

4. Property and financial proceedings between the parties should only be determined at a time after the Children's residence and contact has been finalised and in a separate proceeding.

I would welcome an opportunity to appear in person to address the committee.

Lindsay Gordon.