8th August 2003

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

INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

Dear Committee Members

I am a lawyer who has worked in a Community Legal Centre for the past eighteen years, with the last eight years being spent specifically as a Child Support Worker for liable parents. During these years I have advised and undertaken casework for both carer parents (parents with residency) and liable parents (non-residence parents). During the last ten years I have worked with approximately a thousand people with Child Support problems, many of whom have also had residency or contact issues. I have specialised knowledge of only a sector of the wider community, as do other special interest community groups. However the problems/issues my clients have encountered indicate existing problems in the areas of child support and contact/residency.

This submission deals in detail with term of reference (a)(i) and (b). It deals very briefly with (a) (ii).

(a)(i) what other factors should be taken into account in deciding time each parent spend with their children; a presumption of equal time.

I support the proposal that there be a presumption that children spend equal time with each parent.

CURRENT POSITION

The existing presumption
Currently a situation exists which has been accepted as a social norm that one parent will have principal care/residence and the other will have contact "every second weekend" and perhaps part of the school holidays. This has become an existing "presumption". While this is not stated in the Family Law Act, the perception of the population, and the advice that is often given by solicitors to their clients is that this type of arrangement would be acceptable to the Family Court whereas others would/may not be.

While the Family Law Act emphasizes parental responsibility and that it is the *child's right* to have contact "on a regular basis, with both their parents" and to " have the right to know and be cared for by both their parents", in reality children have no enforceable rights when it comes to residence/contact issues. The child is never the one to initiate an application to see more or less of one parent: this is always done by one of the parents. A child cannot enforce contact with an unwilling parent, nor can they enforce that contact take place when a carer parent refuses to allow it. In fact children's wishes are only one factor be taken into account in deciding contact/residency and may be disregarded by the Court.

The Family Law Act sets out criteria to be considered when determining contact/residence issues, with the paramount consideration being what is "in the best interest of the child". But psychologists' views differ on what is best for the child: whether it is best for a child to have one principal residence, or to have more balanced contact with both parents.
There has been very little research done on the outcomes for the children and research that has been carried out has used relatively small sample groups. There has been no Australian research on the outcomes of joint residency situations.

Currently disputed matters can proceed to the Family Court of Australia for determination. Only 5% of all matters proceed to the Family Court and only approximately 1% go to a hearing before the Court, with the rest being settled along the way. An analysis of some of the Family Court data, showed that in the case of these contested matters 40% of fathers are given residence of their children. However, as the research has not been extensive, and more importantly these cases represent only approximately 1% of extreme matters, this analysis of the Family Court figures means very little. There has been no comprehensive analysis done in Australia of the general situation.

The cost of proceedings
Ideally every situation in dispute would be considered individually but this cannot happen under the current system which is slow and expensive.
While the 5% of cases which go through the Family Court may be analysed in depth, the vast majority, 95% of cases, do not go through this court process. The parent/s make their own decisions based on their currently held beliefs, friends advice, or on the legal advice that it would be a difficult process and very costly for the non-residence parent to obtain contact for more than the usual second weekend and part of the school holidays. The legal costs of proceeding to a hearing in the Family Court are approximately $10,000-$30,000 per party.

Non-residence parents are often advised they should "settle and save their money" when they are not in agreement with proposals. Legal Aid is not usually available for someone to obtain more contact time if they have regular contact of some sort. If a non-resident parent obtained every second weekend or even every fourth weekend contact time, it would be considered there was "no real dispute" about contact, and there was no "cost-benefit" in providing legal assistance.

The reality then becomes that those non-residence parents who can afford large legal fees may obtain more contact through the court process, which process can currently can take over a year. However the vast majority of parents do not access the court system. This majority group includes:

- Situations where contact does not take place at all whether by choice of one parent or both parents; and

*parents who reach private arrangements which may be may be satisfactory in the short or long term.
There has been very little research done on the outcomes in situations where parents do not access the court system. **There are often assumptions made that that things are working well for this majority group of parents and this may not be the case at all.** Many non-residence parents are not able to negotiate contact or regular contact with the carer parent and so eventually "give up" and do not see their children at all. Sometimes private arrangements work well for a time, then fail because of a wide range of reasons. These parents do not wish to, or cannot afford to go through the court process.

Recommendation: That comprehensive research be undertaken in Australia into the effect of separation on children and outcomes for children in all situations (ie no contact/some contact/joint residency) throughout the general population.

A PRESUMPTION OF JOINT RESIDENCE; HOW WOULD IT WORK?

A joint residency presumption would be not be a mandatory edict and would only involve a proportion of situations.
Many fathers who have had only a very brief relationship with the mother which has lead to unexpected pregnancy, have no bond with the child and don't want any contact. Many other parents want to exercise contact but would not wish to undertake joint residency for many reasons such as: work requirements, disinclination for full time parenting, or the impracticability of living arrangements (eg, distance, size, incompatibility with new family).
Where both parents wanted the children to reside with them they could, as currently happens, try to reach agreement by discussion/counselling/mediation/through lawyers, bearing in mind that the presumption existed. Finally, if still in dispute, the matter could go to Court for further negotiation and (in 1% of extreme cases) for hearing by the Court.

IN WHAT CIRCUMSTANCES COULD THE PRESUMPTION BE REBUTTED?

It is obvious that the presumption would need to be rebutted where the facts of an individual case showed that joint residency would not be appropriate. The matters set out in section 68F of the Family Law Act , could still apply to rebut the presumption. Domestic violence is covered under this section.

Practical issues such as the need for proximity of residences of parents, and the continuity of schooling and medical treatments, and attitude of the parties would also need to be considered. If existing factors are used to rebut the presumption, there may be very little difference in outcome to those 1% of cases currently being decided by a court hearing.

The greatest change which the adoption of the presumption of joint residency could provide would be a change in social attitude. If the general population came to consider joint residency as a social norm, which would be granted by a court where the situations of the parents made it possible, they would adjust their expectations and reach private agreements with this in mind. The agreements may not be a 50/50 split but may include arrangements which have

greater flexibility and allow greater participation by both parents in their children's lives.

THE ISSUE OF MONEY

It has been argued that the debate of joint residency is fuelled by non-residence parents linking child support and child residence. Whilst this might apply in the minority of cases, most parents who have existing bonds with their children, whether carer or liable, want to see their children as much as possible and be a positive part of their lives. But financial aspects are vital to both parents and determine what kind of lives they can provide for their children, and indeed how much contact they can have with them. Many arguments put forward by both non-residence and carer parents, and by their advocates, are based on money issues, even if this is not acknowledged. And whether we like it or not the system we have does link child residence and money matters. The amount of time children spend with a parent will determine that parent's amount of property settlement, child support and Centrelink payments. Both parents are usually very well aware of how these issues are linked, and lawyers are careful to advise their clients of financial implications of arrangements regarding the children: they would be negligent not to do so.
At worst children are used as pawns by parents to obtain financial advantage, but all parents need to know how their decisions will effect them financially. I have seen numerous parents who have reached agreements about contact and then find they cannot afford to carry them out.

For Carer/Residence Parents

Centrelink
If a parent were to exercise more contact or have joint residency this may mean a lowering of payments to the other parent.
Currently, if there is a change to joint residency a carer parent's income will drop because of reduced Child Support Payments being received. The change will also reduce the carer's Family Tax Benefit payments from Centrelink,. Under current legislation only one parent would be eligible for Parenting Payment, the other for Newstart Allowance. The Newstart Allowance provides lower payments and requires parents to look for and obtain work, which would affect their role as caregiver.

The Family Tax Benefit
Currently if a parent has contact with a child for 10% of the time they are eligible for part of the Family Tax Benefit for that child. Separated parents are able to split Family Tax Benefit according to the percentage of time each parent has for the care of their children. This has caused problems for carer parents, as the non-resident parent can put in a claim for Family Tax Benefit at the end of the financial year which results in a debt owed by the carer to Centrelink. It is clear that this situation should not continue and I thoroughly endorse recommendations of the National Welfare Rights Network in relation to Family Tax Benefit.
However, although the introduction of the splitting of the Family Tax Benefit has caused some problems for carers it is also been a very great benefit to non-residence parents, especially those on very low incomes or in receipt of Centrelink benefits themselves. The Family Tax Benefits has greatly assisted these people to afford to have contact with their children. Even so, I see parents who cannot afford to transport (cost of car/registration/petrol) and feed their children on contact visits and so do not

exercise contact . Staff at emergency relief centres in Geelong report that liable/non-residence parents are a major user group of their services, as they cannot afford basic needs.

These financial issues are must be carefully considered so that the presumption of joint residency enhances the lives of children by providing them with quality time with both parents (and their families), and does not have a severe, negative financial impact on either parent and consequently the children.

Recommendations: I have had the benefit of reading the National Welfare Rights Network on this issue and thoroughly agree with the recommendations they have made, although not their conclusion.

For Liable Parents

There is a clear perception by many liable parents that whereas full force of the law via the Child Support Agency assists the carer parent to obtain Child Support, no such system is given to a non-resident parent trying to go to court to obtain contact/residence, or to enforce a Court Order which is being breached. Unless legal fees can be afforded, contact cannot be exercised, and eventually all contact with the child/children ceases. Currently it would cost approximately $2,000 to $3,000 for an applicant to return to court in relation to a breach of an order, and courts rarely give penalties to carer parents who breach, even when the breach **can** be proved beyond all reasonable doubt.

Recommendation: The Committee should investigate ways to provide cheaper and more accessible avenues to enforce orders that have been breached.

(b) Whether the existing Child Support Formula works fairly for both parents in relation to the care of, and contact with their children.

THE CURRENT SITUATION

Currently the Child Support Agency uses a formula to determine how much Child Support is paid by the liable/non-resident parent to the carer parent. The Agency uses the most recent taxable income of the payer and subtracts an amount which is equivalent to 110% of the current yearly single Centrelink Pension ($12,315.00 in 2003). The resulting figure is then multiplied by a percentage depending on the number of children. For one child this is 18%, for two 27%, for three 32%, etc.

The Child Support Agency does not vary its formula to allow for contact time unless the child spends at least 30% of time, or 110 nights a year with the liable parent, The payment formula changes again where the child spends between 146 – 219 nights per year with both parents.

PROBLEMS WITH THE FORMULA

Costs of contact

The liable parent must provide food for the children, accommodation, beds and bedding, and often clothing (and entertainment) while the children are with him/her. This has meant that parents within lower income brackets cannot afford to have more contact with their children, or even to afford the existing contact agreed upon.

Barry has 100 nights of contact per year with his son but receives no discount on his child support payments. He says he is paying for "465 days of the year." He is lucky because he gets an above average salary, has no other dependants, and can afford it. Someone on a below average salary who wanted contact with 3 children, would not be able to afford to see them.

Since the formula makes no discount for contact times under 110 nights of the year, parents who try to "do the right thing" by their children and be involved in their lives are being financially disadvantaged, and are treated in the same way as those who never see their children and so have no contact costs.
The Child Support formula is currently a heavy burden for many payers on lower incomes. If their contact time is to increase, the amount of child support they pay needs to decrease.
Recommendation: The Child Support formula should have a sliding scale which reduces payments to account for amount of contact with the amount of payments changing when the payer has contact with children on at least 10% of nights (which includes the "every second weekend" contact). This would enable low income parents to exercise more contact, and would diffuse current frequent disputes where carers refuse to allow extra contact over the 110 night "barrier". An adoption of the 10% level of contact by the Child Support Agency would also bring it in line with Centrelink's Family Tax Payment Formula, so there would not be an anomaly between the two organisations.

Costs of contact and Change of Assessment in Special Circumstances
An application can be made to the Child Support Agency to change the child support assessment in special circumstances where at least one of a number of grounds exist. Under one of these grounds, the liable parent can apply for a reduction of child support where they have spent an amount equivalent to 5% of their Child Support Income Amount (their last taxable income figure) on contact with their children. However, for the purposes of this ground (following Family Court decisions) the Child Support Agency does not count food, clothing purchased, bedding or other household items needed for contact, but only costs such as travel and accommodation. Further, they will only take into account expenses if they have already been paid. If the parent cannot afford the airfares to have contact with the child and so cannot exercise contact, then the Senior Case officer will usually make no reduction in the amount of Child Support paid. Where the contact/liable parent has already paid the expenses the Senior Case Officer may make a deduction for the amount paid but not on a dollar for dollar basis. For example, if $2,000 was spent on airfares and accommodation this amount would be deducted from a payer's Child Support Income amount, so that a CSI amount of $27,000 would be reduced to $25,000 and the amount payable for one child would be reduced by 18% of $2,000, which is $360. So the non-residence/liable parent would spend $2,000 on contact with their child and pay $360 less in child support for the year. This makes keeping in contact from long distances a very costly business, which in practical terms means that those on average incomes or below cannot afford to see their children regularly or at all.

Also, this ground does not take into account any court cost of applying for contact with a child or for enforcing breached orders. This is the major grievance of the many clients I see. They feel that they are "doing the right thing" and paying Child Support and because of this they cannot afford to go to court to obtain orders as to contact or

enforce contact orders where there have been breaches by the other parent who is not "doing the right thing."

(a)(ii) in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.

I am aware through anecdote that many grandparents (who are often retired pensioners) cannot afford legal proceedings and are advised that they are less likely to obtain contact than a parent.

> *In one case a grandmother wanted contact and agreed by "consent" to a half hour of contact with her grand-children per year: on Christmas Day to hand over the Christmas present.*

EFFECT ON CHILD SUPPORT AND CENTRELINK PAYMENTS

The committee would need to consider, when time is granted to a grandparent or another party, how this could affect Child Support Payments or Centrelink entitlements of the two parents. According to Centrelink policy guidelines minor variations to the pattern of care do not effect the payment for the Family Tax Benefit but this would need to be ensured by legislation. A similar provision would also need to apply to Child Support legislation or the financial arrangements between the parents could be similarly thrown into chaos if a third party obtained even a few nights of contact.

Yours faithfully,

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