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15th August 2003

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

Dear Committee Secretary,

I am pleased to attach two Submissions from the Family Mediation Centre in Melbourne, an Agency approved by the Federal Attorney General's Department to provide mediation and conciliation services to separating couples as well as counselling for separated men.

Submission 1 is from the Family Law Program at the Centre.

Submission 2 is from the Men and Family Relationships Program at the Centre.

Thank you for your acceptance of these Submissions and the extension of the date to Friday 15th August 2003.

A copy has been emailed to you and a hard copy posted.

We will be glad to provide any additional comment or information which you may request.

With kind regards,

Ian R Permezel
Chief Executive Officer

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SUBMISSION 1

THE PRESUMPTION OF REBUTTABLE JOINT CUSTODY

A RESPONSE BY

THE FAMILY LAW PROGRAM

FAMILY MEDIATION CENTRE

The Government inquiry into child *custody* (residence) arrangements highlights a number of important issues needing review. However this submission focuses mainly on point (a)(i).

(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

Synopsis

Although we support the notion that children should ideally have meaningful and secure relationships with both parents (and other relevant persons, including grandparents), we are concerned that a possibility of a rebuttable presumption of joint residence philosophy will not meet the **best interests of children**. As a consequence, we would not support the introduction of changes to the Family Law Act in the area of rebuttable joint *residence* as outlined in (a)(i) above.

In order to ensure the best interests of children are met, current initiatives in 'child inclusive practice' in the primary dispute resolution (PDR) field need to be further explored and adequately resourced. Furthermore, the relevance and application of such practice within the judicial process should also be supported.

Who are we?
The Family Mediation Centre (FMC) has, since 1985, provided mediation services for separating couples as an agency approved by the Federal Attorney General's Department. We are lawyers, social workers and psychologists, qualified under the Family Law Act to conduct mediations, conciliations and counselling for couples and their children who are separating or divorcing.

The following submission is drawn from a wealth of knowledge gained by family law mediators over the past 18 years. Our work has centred around the needs of children and families during the often painful and confusing process of separation and divorce.

Why should we comment?
Since the inception of mediation at FMC in 1985, we have always strived to assist couples to reach agreements that are fair to each party and respectful of their individual family culture. Reforms to the Family Law Act were introduced in 1996 to replace the concepts of custody and access with an emphasis on a child's right to know and be cared for by both parents and for parents to share duties and responsibilities of caring for a child. In general the **best interests of the child** were the paramount consideration in any decision making regarding children.

We became aware at the FMC that our PDR practice needed to encompass these changes. Our practice has now evolved to include separate interviews with children in order to better understand their experiences and needs at this difficult time of separation. We then feed back this knowledge to parents in the following session. This ensures parents have a better understanding of their children's specific needs at this time, with the aim that both parents are then more able to make decisions regarding residence and contact arrangements which recognise a child's right to have both parents in their lives and to have their individual needs met.

What is important when considering the" Best Interests of the Child"?
In direct interviews with hundreds of children each year we have listened to them describe their experience of divorce and separation. This, combined with a sound knowledge of the research literature, has provided us with an understanding of what is important for parents to consider when making short and long term decisions about where children reside after separation.

- Low Conflict and adequate parental communication

An abundance of recent research in Australia and overseas emphasises the conclusion that enduring parental conflict can disrupt children's development and pose a serious threat to their psychological growth (McIntosh, 2002). Therefore any dispute resolution procedure that adheres to the aims of the reformed Family Law Act "*Best Interests of the child*" needs to be guided by processes which encourage parents to lower their conflict and to work together to assist their children to 'survive' the divorce process. Hence court processes must ensure procedures which move parents away from making positional and often conflict ridden statements about *time* (when and how much) spent with children, to a focus on solutions which stem from a question of "How can our children be allowed and encouraged to develop secure and stable relationships with each of us as parents?"

- Time with each parent measured in quality not minutes

In order to develop these secure and stable relationships with parents, children need to be spending adequate and quality time with both parents. This may be considered a shared care arrangement although not necessarily equate to a 50/50 arrangement. The exact layout of shared time would will need to be considered in terms of the age and stage of development of the child (Kelly & Lamb 2000, Garon, Saba Donner & Peacock 2000) and their individual needs at that specific time (keeping in mind the need to review these arrangements as the child develops and their needs change over time). However, when parents are in high conflict children find a shared care arrangement can be extremely disruptive. In such situations it is immensely difficult for children to feel safe and to establish themselves in both homes and move between the two homes. In our experience it is in these high conflict cases that children often resist going to one parent's house for fear of the resentment/anger they may experience between their parents during and after the 'change over' occurs. This supports the above notion that a low conflict parental relationship is needed when a shared parenting arrangement is considered - a relationship which is rarely present in the 5% of couples seeking a court ordered parenting arrangement. Hence an equal time based arrangement for couples applying for a court determined order is rarely workable due to the high level of parental conflict.

Although we do not believe that asking children who they want to live with is appropriate, many children we have interviewed, without prompting, describe wanting a shared arrangement with their parents. However when exploring this comment further with these children it is evident that they are not prescribing an equal time arrangement. Their desire is for an arrangement which appears fair to both parents (hence not escalating parental conflict) and allows the child time with each parent to maintain a positive and supportive relationship. In fact many children say that a 50/50 arrangement would be impractical, if not impossible because one parent lives such a distance away from the other parent/school/sporting activities/friends and extended family etc. This demonstrates the point that in a child's mind hours and minutes are not the currency they deal in, it is more likely to be about the quality of interaction they have with each parent, and the support each parent provides for them including their schooling, peer relationships and the support for their relationship with the *other* parent.

Why not have a "presumption of rebuttable joint residence"?

A presumption of rebuttable joint residence as a starting point begins negotiations from a position of apparent "fairness to parents" rather than "in a child's best interest". The very fact that the presumption is *rebuttable* imposes the need for parents to engage in further conflict to outline a case against the other parent which rebuts the presumption of equal time. Hence this approach encourages further entrenched conflict between parents, an approach which is in exact opposition to the healthy development of their children. Therefore in needing to focus on dispute resolution processes which aim to diminish parental conflict and highlight children's needs, we refer to Moloney (2003) and his submission to this current enquiry in which he begins to describe a new approach to family law litigation, an approach which the FMC believes has abundant potential –

"Child Focussed Litigation"

For example, if practices based on child focused or child inclusive principles were adopted, it would be incumbent on parents to present to a judge or adjudicator, material that outlined a proposed structure for each child located firmly in the context of demonstrating how that structure was designed to meet each child's needs. The focus of such a presentation would be on plans around parent-child interactions. The structure itself (i.e. how the time is to be shared) would have relevance only with respect to how it links to a capacity to support good parenting processes.

In such a system, ambit positional claims by parents would be firmly discouraged. The key question to which the Court would be encouraged to return again and again, would be, "How do you plan to parent your child(ren) and how do you intend to link this plan with your former partner's plan to parent the child(ren)"? Thus the language of litigation would focus on proposed parenting arrangements rather than residence, primary care, contact, access or visitation - all of which serve win/lose ways of thinking that commodify children and inevitably diminish the status of one of the parents...

Procedures such as this contrast with current adult oriented adversarial practice in which structure is at the centre of the debate and processes evolve as best they can once structure is decided. They do not, of course, relieve the adjudicator of the obligation of making a decision if such processes do not lead to a resolution beforehand. In my view, however, beginning with statements that link each child's needs, perceptions and attachments to proposed structural arrangements, better satisfies the aims of the Family Law Reform Act and the aspirations of the United Nations Convention on the Rights of the Child. It is also more likely to result in arrangements in which parenting after separation is shared, not necessarily (probably not even normally) 50/50, and not according to a pre-determined (albeit rebuttable) formula, but in ways that are satisfying to children and to both their parents.

This approach encourages consideration of the importance of the *other* parent's relationship with the child as opposed to rebutting/arguing for the other parent to have less opportunity for a relationship with the child.

Conclusion

For the reasons outlined in this submission we do not support the introduction of changes to the Family Law Act to introduce rebuttable joint *residence* as outlined in (a)(i). We do not believe the proposed changes focus on the 'best interests of children'.

We believe that the current Act with its reforms of 1996 adequately emphasises the need to focus decision making around children's individual needs. However it is arguable whether current judicial practice adequately reflects the spirit and intent of those reforms. Those involved in the litigation arena would benefit from the experiences of PDR professionals who have incorporated a child inclusive approach to family law decision making. In order to ensure that the best interests of children are met, 'child inclusive practice models' need to be expanded in the PDR field and in judicial processes, and such practices need to be adequately resourced.

References

Garon, R.J., Saba Donner, D. & Peacock, K. (2000). From Infants to Adolescents; A developmental approach to parenting plans. Family &Conciliation Courts Review. 38 (2) April 2000 168-191.

Kelly, J. & Lamb, M. (2000). Using child development research to make appropriate custody and access decisions for young children. Family &Conciliation Courts Review. 38 (3) 297- 311.

Moloney, L. (2003). Bargaining over children. From a presumptive practice to child-focused litigation. Paper submitted to the Commonwealth Government Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the Event of Family Separation.