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

SUMMARY OF MAIN POINTS

The current practice of family law in Australia is hostile to the granting of shared residency (joint custody) orders. There is a body of research indicating that substantial contact with both parents after separation is vital to the psychological adjustment and well being of children.

A legal presumption of joint custody results in more co-operative parental behaviour in the best interests of the child. Parental conflict at the time of separation should not be a reason for denying joint custody.

There are circumstances where the protection or special needs of children require a rebuttal of the presumption of joint residency. Such cases should be reviewed as circumstances change.

Where contact with one parent is substantially reduced a court should attempt to redress the balance by ordering contact between the children and other members of that parent's family.

There should not be a single model of joint residency but the court should assist parents negotiate acceptable shared parenting agreements tailored to their particular circumstances.

Existing child support formula is not fair for both parents.

Appendix 1: Summary of research on which this submission is based.

Appendix 2: "Preventing parentectomy Following Divorce" by Frank S. Williams M.D.

BACKGROUND

I belong to a group of grandparents (GRANS) deeply concerned about the effects of current Family Law in Australia. Most of us have experienced the trauma of a marriage breakdown within our families and have witnessed first hand the suffering and hardship caused, especially to children and non-resident parents. Many of us know the personal grief occasioned by the loss or disruption of a previously loving relationship with our grandchildren.

While conceding that we may have experienced the more dysfunctional end of the continuum of separated families I nevertheless believe our experience is more typical than is generally acknowledged. My concern is that the way the law is worded and the way the law is practised actively fosters vicious and destructive behaviours on the part of one or both parents. Such negative behaviour is detrimental to the well being of the children of the marriage and very destructive to the "losing", ie the non-custodial, parent - even leading, in too many cases, to suicide. The adversarial practice of law in this country and the extremely high cost of legal representation exacerbate the situation.

It is over 25 years since the Family Law Act was formulated. In this time there has been considerable social and economic change in Australian society. Many women expect to continue their careers after childbearing and parenting roles are not rigorously assigned to either mother or father. The Family Law Act and the Child Support Act fail to reflect this reality.

Defenders of the current system argue that the Family Court is impartial, that the Family Law Reform Act 1995 makes provision for shared parenting, and that the best interests of children are paramount. I ask the Review Committee to consider the following points:

1. When fathers apply to the Family Court for parenting orders very few cases actually go before a judge. Most fathers simply cannot afford to go to this length and, to have any hope of success, they must have a damning case against the mother.

2. There is an almost universal reluctance amongst lawyers to seek joint residency orders over the objection of the mother. The most they will do is try to obtain an extra week night visit, maybe a couple of extended weekends, and twice weekly phone contact. The mother's lawyers never concede contact of more than 109 nights because this would reduce child support payments.

3. There seems to be general acceptance of the idea that, although joint parenting may be the ideal plan for the children it is "logistically too complicated" for most parents.

4. Mothers commonly breach contact orders with impunity.

5. The Chief Justice of the Family Court, Alistair Nicholson, has more than once commented publicly that many men only seek more contact with their children in order to gain a financial benefit. This does not read like impartiality to me.

My son simply wanted shared residency orders for his then 10 year old son. He was willing and able to adjust his work life to accommodate such an arrangement but he was consistently discouraged from pursuing this course. I heard lawyers tell him that the court was biased in favour of mothers and that he stood to lose even standard contact if he persisted.

THE BEST INTERESTS OF THE CHILDREN

"Last year the Australian Research Alliance for Children and Youth estimated 20 percent of children had mental health problems, a figure that is on the increase. Mental health professionals don't know why, but family breakdown and a greater awareness of conditions have certainly contributed." ("Minding the children", The Age, 27/7/03.)

It is widely accepted that most children are confused and upset at the time of family breakdown and "wish" their parents would stay together; that even with seemingly unsatisfactory parents, children want to be wanted, loved and believed in by both; that these feelings persist for years. It is also known that children often hide their true feelings for various reasons, such as loyalty, fearing to be misunderstood or to cause further hurt. Assertions about their "best interests" are usually made by other adults - parents, social workers, lawyers and ultimately judges. Because, generally, children tend to get on with their lives, it is conveniently assumed that the separation/divorce and subsequent living arrangements are, at the very least, doing them no harm.

It is time to question these assumptions.

There is ample evidence that children of broken marriages often blame themselves in some way for the failure of their parents' relationship and also feel abandoned by the non-residential parent, regardless of whether that parent initiated or desired the separation. It is also often the case that this parent desperately desires more contact with and care of the children but is prevented by court order instigated by the residential parent.

Frank S. Williams M.D., a psychiatrist and psychoanalyst with extensive experience with children and adolescence points out the long lasting effects of what he terms "parentectomy" both on children and the excluded parent. "A parentectomy is the most cruel infringement upon children's rights to be carried out against human children by human adults. Parentectomies are psychologically lethal to children and parents." ("Preventing Parentectomy Following Divorce" -Keynote Address to the National Council for Children's Rights (US). I include the full Address as Appendix 2.)

OPPOSITION TO JOINT RESIDENCY ARRANGEMENTS

It seems to be generally accepted that joint/residency is a "good thing" BUT that it will only work if the separating parents are basically on good terms and willing to co-operate and put up with inconvenience for the greater good of their children, and that it is "logistically too complicated" for more than a small minority.

Williams points out that such an ideal definition of joint custody is not the only one which will benefit children.

"From my own clinical experience with children, I would agree with the position that one home provides stability and continuity. However, when parents are divorced, the children cannot enjoy the benefit of both parents living with them in the same home. Therefore shuttling between homes may be inevitable. In divorce, we usually do not have the option of choosing what is in the best interest of the children. Instead, we most often must choose the least detrimental of several detrimental options. This is especially so when a child has been psychologically bonded to two parents. Of two potential evils for children - the evil of shuttling between the homes of two loving, caring parents versus the evil of losing one such parent - certainly the lesser evil is

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shuttling between two homes. It is the continued parental bonding, not the number of homes or vehicular travel, that will be the crucial determinant of children's forward psychological development following divorce. a rigid structured schedule of even 50-50 shared residential overnight's, as well as a pre-defined structure decision-making authority plan for each parent may be appropriate to best serve the children.

Recent research findings in the US emphasise the many benefits of some form of joint custody to children and to society, the possibility of successful joint parenting orders even when there is parental conflict at the time of separation and initial objection by one parent, and the need for the courts to assist parents negotiate flexible child-centred agreements. Importantly, they indicate that an existing presumption of joint custody disposes parents to be more constructive and co-operative in regard to post separation custody arrangements. (See Appendix 2)

GROUND FOR REBUTTAL

Where there are infants and very young children in the family it may be inappropriate to pursue joint residency because of the special needs of the child; breast feeding babies, for example, need their mothers most of the time. This does not mean the father should be cut out of his child's life but it may mean that close bonds are not formed.

Serious allegations of child abuse and/or neglect should be professionally investigated and quickly determined for the welfare of the child and the reputation of the parent. If proven, or found to be substantially well founded, this should be a ground for rebuttal of joint custody in favour, perhaps, of some form of more supervised contact. It should be made perfectly clear to all parties that false, malicious or trivial allegations will attract severe penalties.

It should be noted that while men are habitually blamed for all domestic violence, violence may also be perpetrated by mothers, and that research shows that children most at risk of abuse are those living with solo mothers and in step families where the biological father has little or no contact with his children. Biological fathers who have a strong and nurturant bond with their children are unlikely to abuse them.

In circumstances where a parent has a serious mental illness or addiction which may preclude them from caring responsibly for their children, this may be a ground for rebuttal.

COURT ORDERS FOR CONTACT WITH OTHERS

Extended family contacts foster a sense of security in the wider social environment and are a form of protection for children. Special bonds are often formed with grandparents which are important to the developing child's emotional growth and sense of self worth. Young children don't understand why these contacts are often restricted or cut off after separation and again may feel that they are somehow to blame.

If joint custody were the rule there would be little need for separate contact orders with other persons but when access to one parent is restricted consideration should be given to ensuring wider family contact. Even when a father has "traditional" contact orders, other family members are hesitant to intrude on his limited time with his children.

In circumstances, such as mental illness, addiction, or violence, where the court deems it inappropriate for a parent to have joint custody, it is even more important to maintain contact with that parent's wider family, even to being equivalent to joint custody - provided, of course, that grandparents or other family members were willing and able to provide that level of support.

In my view wider family contact has these advantages for children:

(1) It can be a steadying, positive influence helping children adjust to their changed lives, less of their world falls apart after the separation of their parents.

(2) It has a protective function. Children know that other family members are aware of them, they are not solely dependent on one parent, they have somewhere else to turn.

(3) It can have a preventative function - vulnerable children are less likely to be abused if there is a greater likelihood of the abuse being detected by other

caring adults.

EXISTING CHILD SUPPORT FORMULA

From accounts I have heard from supporting parents (mostly, but not all, fathers) the Child Support Agency is a rigid bureaucracy operating according to inflexible formulae and procedures.

I submit that it does not work fairly for both parents and is in fact a major obstacle to the introduction of more flexible residency and contact orders which would benefit children but may reduce the financial advantage of the resident parent.

The existing child support system, embedded as it is in our cultural assumptions about the need for the mother to be the primary caregiver, the need for children to remain in the family home (and widespread biases about the nobility of women and the perfidy of men), is a powerful incentive for women to initiate separation and oppose or restrict a father's contact with his children.

It is unfair that the child support formula is applied to the gross rather than the net wage. The Agency is unfair, and unrealistic, in its presumptions about the supporting parent's earning capacity and its ruthless accumulation of debt against that parent should his actual earnings fall below the Agency assessment.

Further inequality is generated because the Family Court and the Child Support Agency appear to work in isolation from each other. For instance, when there are children, the mother can be expected to retain the family home (often with the father continuing to pay the mortgage) as well as receiving a substantial proportion of the father's disposable income in child support (as well as other government allowances). This allows her to continue to live much as she was accustomed to before the separation but reduces the average middle wage earner to near penury. He will probably have lost most of his life's savings, live in rental accommodation, and will find it very difficult to afford to buy another house.

Of course the above financial burdens adversely affect the non-resident parent's real and perceived relations with their children. Cramped accommodation, for one thing, is often used as a reason for opposing overnight stays. Although he may be providing financially for his children he is allowed no input as to how the money should be spent nor any control to prevent it being wasted. Many children do not understand that their father provides for them, only that he does not appear to.

Most fathers do not object to supporting their children but do resent being treated as no more than a cash cow, with no other value for their children and no genuine desire to maintain a loving, close and ongoing relationship with them.

Given that substantial "everyday" post-separation contact with both parents is now regarded as overwhelmingly beneficial to children, it is not unreasonable for men to ask for a corresponding reduction in their child support payments. What is vastly unjust is to claim that "men often sought more contact with children to gain a financial benefit." (Family Court Chief Justice Alistair Nicholson, reported in *The Age*, 3/9/2002.)

SUMMARY

There should be a legal presumption that children of separating parents will spend equal time with each parent with the proviso that this can be rebutted if, after professional investigation, there is found to be a valid fear that children will be damaged through contact with one or other parent; or if there is specific benefit to a child to spend more time with one parent, as, for example, breast fed babies.

The ideal of equal time may be difficult to implement in practice and parents should be encouraged and assisted to negotiate flexible and specific, child-centred shared parenting agreements. There should be provision for non-prejudicial review of such agreements as circumstances change.

In circumstances where contact with one parent is substantially restricted, for whatever reason, a court should order contact with one or more members of that parent's wider family, including grandparents.

The existing child support does not work fairly for both parents in relation to their care of, and contact with, their children.

Yours faithfully,

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Appendix 1.

Benefits of Joint Custody: Statistics, Analyses, Data and Anecdotal Evidence
for
Joint Custody.

The material below, with full attribution, has been made available by SPARC
(Separated Parenting Access and Resource Centre) and may be found on the
Internet

<http://www.deltabravo.net/custody/jointbenefits.htm>

A brief review of research relating to joint custody in the US includes the
following points:

States favouring joint physical custody awards have significantly lower divorce
rates, and that those states that favoured sole custody also had more divorces
involving children. This indicates that public policies promoting sole custody
may contribute to a high divorce rate.

Children benefit from joint custody even if there was marital conflict before
separation. Positive results for children are not simply a result of more
co-operative parents choosing joint custody. Joint custody after divorce makes
children's lives more similar to their lives before, and to the lives of their
peers in two-parent households.

Father deprivation is a form of child abuse. In post-divorce families children
do better with active, meaningful participation of both biological parents.
Children from fatherless families are more likely to be runaways, to be in
trouble with the law, to leave school early, to be violent, to have psychiatric
problems. Adolescent boys in particular are at dramatically greater risk of
suicide.

Without a lot of support, separating couples can't be relied upon to play fair.
Many men feel shut out of a system that is more supportive of mothers than of
fathers.

When parents do not agree, it is usually the woman who is opposed to joint
custody. Women do not need to ask for, nor agree to, joint custody. They are
presumed by society, lawyers, the courts, and themselves to have a right to keep
the children in their care and protection. It is the fathers who must ask for
joint custody and it is often in the mother's power to agree or disagree. The
mother's position is particularly enhanced if she knows a refusal to share
parenting will preclude a joint custody order regardless of her reasons. In this
context, it would be important to study women who refuse a request for joint
custody.

The quality of the relationship between the parents, especially at the time of
separation, does not predict whether a joint custody arrangement can work. If
there is a legal and social expectation that parents must negotiate with each
other, there is a higher likelihood that it will occur that if the expectation
is that they are too embittered to even talk to one another. Many fathers in
conflictual situations stated that joint custody could be successful if the
legal agreement specifically enumerated the responsibilities of each parent and
did not depend on their goodwill towards each other as a means of resolving
differences.

40% of custodial mothers admitted they had refused to let their ex-husbands see
their children for reasons that had nothing to do with the children's wishes or

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safety but were somehow punitive. 53% of non-custodial fathers claimed their ex-wives refused to let them see their children. 50% mothers saw no value in the father's contact with his children and actively tried to sabotage it, or resented the father's contact. Children in joint custody were reportedly more satisfied with the amount of time spent with each parent than were children from single custody families. Children expressed dissatisfaction with the paucity of visits under the reasonable visitation standard (ie every second weekend). Frequent visits had a positive effect on post-divorce adjustment. The decision to keep children with the mother is theoretically made in the child's best interests; however, when children were surveyed later in life, fewer than half felt their mother's motives had anything to do with their best interests; only a quarter felt it was because their mother loved them. Joint custody does not mean that physical custody is necessarily equally divided, it does mean that both parents have equal input into major decisions affecting their children. Joint custody awards over the objections of one parent have proven successful. The relitigation rate is half for joint custody than for sole custody. By presuming joint custody as early as possible in the court process, parties are impelled to attend to the child's needs, thereby encouraging mature behaviour and discouraging divisive, childish conflict. Shared parenting with mutual responsibility - joint custody - is in the best interests of the child, parents, society, and the court system. Courts can assist parents in settling their disagreements by providing a context for negotiation and helping to mould specific child-centred joint custody agreements. The ability to co-operate around parenting issues can be encouraged and enhanced with limited and relatively inexpensive education, counselling, or skilful mediation.