

A rebuttable presumption of joint custody (residence) is dangerous and not supportable for a number of reasons:

- 1. It reduces the rights of the child from unique consideration to one prescribed model.** Currently the Family Law Act clearly outlines that legal decisions regarding the care of children following separation have to be based on the best interests of the child as the paramount consideration. This allows for consideration of each child's unique interests and concerns. A rebuttable presumption of equal shared care arrangements assumes that shared care is in the best interests of children in all cases. It also privileges the rights of parents over the rights of children by over-riding the paramountcy of children's best interests principle.

This presumption would constitute rigid Government control over family life post-separation, dictating how families parent children, failing to take into account pre-separation parenting patterns, and the uniqueness of each child's interests.

No consideration is given to the complexities of family arrangements and the issue of blended families. What happens when there are children from different relationships within the family? What will be the impact on sibling relationships if some of them are living in different homes for some of the time? This does not promote stability for children.

Overseas research has shown that shared care was more likely to be organised to suit parents than to suit children. One study showed that children carry the burden of shared care, felt responsible for ensuring 'fairness' between their parents and put their own interests below the interests of their parents for shared care. The study showed that this was oppressive for children. (Smart 2002).

- 2. International experiments in presumptive shared custody, such as in**

California have been unsuccessful. The Family Law Council examined the issue of shared care, citing how the California legislature repealed its joint custody presumption in 1988. This presumption was found to place unrealistic expectations and pressure on parents and therefore on children. Joint custody has not been found to ameliorate conflict and therefore is not necessarily beneficial to children (Family Law Council, 1992).

3. US studies have shown that where shared residence couples make these arrangements they do so voluntarily, often without recourse to the legal system. The current legal system in Australia allows for shared parenting and can be negotiated between parents who choose this option. There is a need for cooperative parenting and a relationship without animosity or distrust, where both parents are able to focus on the interests of children. This has been confirmed by overseas studies, which show that the relationship between shared residence parents, are commonly characterised by cooperation between parents and low conflict prior to and during separation (Bauserman, 2002).

Parents who take recourse to the Family Court generally have high levels of animosity and conflict, which is not conducive to the cooperation and positive communication necessary for shared parenting. To enforce such an arrangement on parents can only be detrimental to children.

A presumption of shared parenting is likely to increase litigation in the Family Court and therefore create further instability for children already dealing with the separation of their parents.

4. **Equal and shared parenting arrangements are currently not reflective of the reality of parenting in families prior to separation.** Women predominantly continue to be the primary carers of children prior to separation. Women still do the bulk of caring for children and domestic work. Where childcare was noted as a person's main activity women spent twice as long as men caring for children (ABS, 1997).

For most children their primary carer is their mother in intact families. Children's primary bond attachment is usually with one parent, usually the mother. A presumption of shared parenting will create instability for children and interfere with their relationship with this primary caretaker. Consideration also needs to be given to a child's age and at what stage in a child's development they can be separated for long periods of time from their primary carer. What happens when a child is being breast-fed? What happens to sibling relationships when one child remains with the mother because of her tender years and other siblings are separated from her in a shared parenting arrangement?

A presumption of shared parenting also does not take into account the investment in time and resources that the primary parent (usually the mother) has put into parenting.

5. A number of studies have highlighted the problems of child abuse and domestic violence within the separating family.

U.K. figures indicate that between 40% and 60% of separated or divorced women experienced violence in their relationships (Mullender & Morley, 1994)

Australian Bureau of Statistics (1996) show that single women who have previously been partnered were at highest risk of assault with 42% reporting violence at some time during their relationship.

Recent research by the Australian Institute of Family Studies (2000) identifies that 66% of marital breakdown involve violence, 33% of which were identified as serious violence.

Brown (et al, 1997) study has concluded that child protection has *become* "...

the core business of the court and that the court has become part of the child protection service and the wider child welfare system.” (p.4). Their study found that 50% of cases at the mid point of proceedings within the Family Court are child abuse cases, and that most commonly there were multiple forms of abuse, including domestic violence.

There is also strong evidence to show that where there are allegations of domestic violence and/or child abuse that the current system of family law is inadequate in its ability to protect children from violence.

The Family Law Reform Act (1995) came into being in 1996. The main changes are contained in the new Part VII. The relevant principles provide that children have “*the right to know and be cared for by both their parents*” and “*a right of contact*” with both parents (Rhoades et al, 1999).

Changes to the Family Law Act in Australia were influenced by the development of the Children’s Act in the UK (Rhoades et al 1999). Research into the development of the pro-contact legal culture in the UK by Smart (1996) demonstrated that violence against women and children is hidden in decisions about contact because of the pro-contact values in family law (Rendell et al, 2000).

Research by Rhoades (et al, 1999) into the Family Law Reform Act 1995 show that the Reform Act’s ‘*right to contact*’ principle has been given greater emphasis by most practitioners and judges than the family violence aspect of the reform. Their research found that the rate of orders refusing contact at an interim hearing has declined dramatically since the introduction of the reforms.

“Although the majority of interim contact applications involve allegations of potential harm to the child, usually because of

domestic violence, it is now rare for contact not to be ordered at an interim hearing” (Rhoades et al, 1999, p. xviii).

Rendell’s (et al 2000) confirmed this trend concluding that contact with the non-residential parent was the “*starting point*” for the family law system, even when there were allegations of severe domestic violence.

“The experience of the focus group participants and the survey respondents suggest that the Family Court tends to make decisions which maintain children’s contact with their fathers” (Rendell et al, 2000 p.46).

It is apparent that it is rare for contact between a parent and their children not to be ordered at an interim hearing. This is regardless of the possibility of domestic violence or child abuse. Many of the respondents in the research conducted by Rhoades (et al, 1999) commented on the use of the shared responsibility concept by one parent to harass or continue abuse of the other.

“Many solicitors noted that their current advice to parents who do not want their former partner to have contact with the children because of domestic violence is that they are unlikely to be successful in obtaining an order suspending contact at an interim hearing. Their view is that the court is now more likely to maintain contact until the final hearing unless the allegations suggest a risk of physical harm to the child” (Rhoades et al 1999 p.25).

This is supported by research into contact issues conducted by Rendell (et al, 2000) in Queensland:

“The AFC research tends to suggest that the post separation attitude of the mother towards the father’s ongoing relationship

with his children may be given more weight by decision-makers than his violence and abuse towards herself and the children both before and after separation” (Rendell et al, 2000 p.109).

If any presumption of shared parenting is brought into law it is probable that these problems would be exacerbated and that women and children would be subjected to an increase in continuing violence and abuse.

In considering the importance of children maintaining a relationship with both parents following separation consideration must be given to the negative impact of a child’s relationship with an abusive parent. Destructive male role models have a negative impact on children. Neglectful or abusive adult men portray violent and dominating images of manhood. As Silverstein (et al, 1999) point out, it is wrong to assume that any male role model is better than none.

6. Legal aid problems.

Federal Government’s cuts to Legal Aid, which have occurred over the last few years have had a negative impact on women’s’ abilities to protect themselves and their children within Family Court proceedings (Rendell et al, 2000).

In Family Court matters, legal aid is mostly provided to women and children (Hunter, 1999). Parker (1999) states:

“...it is highly likely to be legally aided female clients who seek the assistance of the Family Court to protect children from experiencing violence directly or indirectly and to protect themselves from domestic violence. The less cautious approach of the Family Court since the Reform Act to matters involving allegations of violence, particularly at an interim level, combined

with the restrictions to the provision of legal aid since 1996, have...created the potential for the interests of children involved in Family Court disputes to be severely compromised” (Parker, 1999).

Rendell (et al, 2000) argue that the Legal Aid Services is “*permeated by the pro-contact culture*” (p.69) and based on the assumption that contact with a non-residential parent, regardless of allegations of family violence, will be ordered by the Court. Therefore women who wish to prevent or restrict contact are discouraged from doing so and the possibility of legal aid funding to litigate contact arrangements is unlikely.

“Some focus group participants were told by their solicitors that it would be impossible to get a ‘no contact’ order or that LAQ (Legal Aid Queensland) would not fund such proceedings and they would have to reach an agreement for contact” (Rendell et al 2000, p.69).

It is predicted that a change to the legislation in favour of a presumption of shared care is going to increase litigation in the Family Court. This will place pressure on legal aid funding and a resultant increase in self-representation in the Family Court. This has implications in terms of increasing delays in Family Court proceedings and place pressure on already limited resources.

7. Poverty

Being the resident mother of children is still the most likely predictor of poverty in Australia.

In a 1993 study, husbands surveyed three years following their

marital breakdown had returned to income levels equivalent to pre-separation while wives' income levels had dropped by 26% (Funder et al, 1993)

More recent studies have revealed a statistically significant relationship between gender and financial living standards after divorce (Weston et al, 2000).

In 2000, a survey conducted of child support clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received. (Wolfs et al, 2000).

Any arrangement of shared parenting is likely to impact on the financial well being of parents and children. It is predicted that there will be a rise in the poverty of single mothers arising from splitting the Family Tax Benefit and reducing child support. This resultant increase in poverty of mothers will increase the number of children also living in poverty.

A shared parenting presumption also reduces each parent's workforce capacity, given the necessity of the availability of both parents for childcare. It is likely to lead to a lower access to income in both households, thus impacting on economic resources available to the children.

It also will impact on each parent relocating. It reduces families abilities to make their own decisions about parenting arrangements depending on children's needs, parent capacities, geographical

distance between them, parent's work patterns, finances and housing.

Conclusion

We therefore call for **the scrapping of any proposal of presumption of joint custody post separation.**

Given the current serious gaps in child protection in Family Law as identified by the Family Court Magellan project and the Family Law Council we call for **a change to the Family Law Act to prioritise the safety of children and women escaping violence/abuse as the threshold determinant of a child's best interests in cases involving allegations of violence.**

We call for the introduction of a rebuttable presumption of no contact where there are allegations of violence established on the balance of probabilities (similar to the NZ Guardianship Act). Persons found on the basis of civil proof to have used violence would have to show why they were safe before contact was allowed.

We call for adequate funds to be given to the relevant agencies to implement Project Magellan across the nation and to implement the recommendations of the Family Law Council 2002 report on Child Protection.

Given the absence of adequate legal aid for family law, particularly for cases involving allegations of violence, we call for **the extension of legal aid to all parties to proceedings to resolve concerns raised regarding domestic violence and child abuse.**

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