

A Legal Presumption of Joint Residency

WESNET Submission to the House of Representatives Standing Committee on Family and Community Affairs, Parliament House, Canberra, ACT, 2600

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WESNET is the peak body for women's services within the Supported Accommodation and Assistance Program (SAAP) which is jointly funded by the Commonwealth and State/Territory Governments. There are approximately 400 such services which include:

- Women's refuges/shelters
- Halfway houses
- Women's medium-term housing schemes
- Information and referral services, sexual assault services, and outreach services

Women escaping domestic violence, single women and those who have experienced sexual assault, and their children are the main clients of SAAP women's services.

Through its Canberra based national office and via its large network of members and associate members WESNET plays an important role in identifying unmet need, canvassing new and emerging issues, facilitating policy and sector debate and lobbying government to provide improved responses, in partnership with non-government stakeholders, to the problem of domestic and family violence within our community.

WESNET's OBJECTIVES

- To provide leadership as a national women's peak advocacy body in relation to domestic and family violence.
- To contribute to and monitor policies, legislation and programs which impact on women and children experiencing domestic and family violence.
- To promote equity of access to services for all women including Aboriginal women, Torres Strait Islander women, women from immigrant, refugee and/or non-English speaking background, women in rural and isolated areas, older women, young women and women with a disability, and give issues relating to equity of access highest priority.
- To promote community awareness of violence against women and its personal and social consequences at a national level and support and facilitate the community education role of services at a local level.
- To undertake research relating to the provision of support and accommodation services for women and children escaping violence and for women using SAAP funded services for other reasons.
- To build and promote collaborative relationships with key stakeholders.
- To ensure a viable, well governed and credible organisation representing WESNET members nationally.

Introduction

WESNET is concerned and opposed to a legal presumption of joint residency for separating families. A presumption offers a simplistic, 'one-size-fits-all' solution to families who are complex, have a multitude of needs and patterns and operate in a variety of ways.

Our concerns include:

- How are women and children who have and are experiencing domestic violence addressed in this proposed bill?
- How is the impact of domestic violence on children addressed in this bill?

"Data from a 1996 Australian Bureau of Statistics national bench mark study showed that 23% of women who have ever been married or in a defacto relationship had experienced violence in that relationship. This means that one in five Australian women have experienced family violence by their current or former partner representing a total of 1.4 million women." (ABS; *Women's Safety Australia*, Canberra 2000).

A significant body of research demonstrates that there is a high incidence of domestic violence cases going to the Family Court (Hunter R "Family Law Case Profiles" *Justice Research Centre*, June 1999 at p186) and that domestic violence against women continues after separation and during changeover and handover visits.

The effects on children living in a domestic violence situation even if they do not directly see the violence are well documented (Worth & Mertin 1997). Children who suffer from exposure to violence will display symptoms such as disrupted routines, eg, sleep and eating disturbances, nightmares, toileting difficulties, bedwetting (Blanchard, Molly & Brown, 1992), behavioural problems (O'Keefe, 1995) eg, acting out aggressively, withdrawing, tantrumming, learning difficulties (Mathias, Mertin & Murray, 1995), eg, inability to concentrate, decreased interest in schooling, and acting out in class, developmental delay and difficulties in social and emotional functioning, etc., (Rosenberg, 1987).

Research has demonstrated that children living in domestic violence are at much greater risk of suffering trauma as a result of child abuse in other forms (neglect, physical, sexual, and emotional abuse) than other children (Worth & Mertin 1996).

For children who have had difficulty resolving their experience of violence, there are implications for their own parenting and for the next generation. There is evidence of the inter-generational transmission of marital aggression (Kalmuss, 1984; Parkinson, 1995).

Miranda Kaye, Julie Stubbs and Julia Tolmie (2003) Families, Law and Social Policy at Griffith University completed a report on the experiences of women negotiating residence and contact arrangements with an ex-partner where domestic violence is an issue, the findings based on interviewing 40 women and 22 professionals such as lawyers, counsellors, court assistance scheme workers included:

- "The majority of women had experienced high levels of violence and abuse since separating from the partner, and the domestic violence was given very little consideration when making decision about child contact."
- "It was also identified that there were high incidences of violence occurring at contact changeover against the women and children."
- "It was also identified that women were being pressured in accepting agreements to appease the partner, and children were extremely distressed in being forced to go on contact visits when they clearly did not want to."
- "Women were not bringing breaches of court orders to the Family Court due to cost factors and the lack of mechanism that would ensure compliance with the order by the abusive parent."

Overall the report found that:

- "the system is not responding appropriately were there have been incidences of violence and any contact arrangements made under these circumstances should ensure the best interests of the child are paramount."
- "the system is not responding appropriately and effectively to the needs of women and children where there has been domestic violence, and this issue clearly needs to be

addressed as a matter of urgency considering the high incidence of domestic violence in our community."

Under the current Family Law Act there is no principle that advantages either parent in family law proceedings and it provides that each parent has parental responsibility for their child and that this is not affected by parental separation. Where parents cannot agree on arrangements for the children and the Family Court has to decide it is bound by law to look at the **best interests of the child** as the **paramount consideration**.

The best interest of the child as the paramount consideration is a critical point of law when faced with the reality of the impact of domestic violence on a child and its mother. Living with domestic violence has been likened to living in a "war zone" and clearly research and the high incidence of domestic violence needs to be acknowledged and addressed by the Parliamentary Committee as a matter of urgency.

Problems with a legal presumption of joint custody

- It privileges the rights of parents over the rights of children by over-riding the paramourcy of the 'child's best interests' principle which is entrenched in the Family Law Act.
- It ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and family violence.
- Current provisions of the Family Law Act already include mechanisms for shared residence being a child's right where it is in the child's best interests.
- Many men already participate actively in their children's lives after separation. In these families neither fathers nor mothers need the law to tell them to do this. Further, most mothers wish to share parenting duties and responsibilities cooperatively with fathers who were significantly involved with their children prior to separation.
- 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.
- It does not reflect current caring practices in intact families where mothers are still predominantly the primary carers of children and undertake most of the domestic work. Shared residence would mean arrangements for some families post-separation would be significantly different from pre-separation arrangements.
- It ignores the evidence from research that shared residence works for some families where there has been a history of cooperation, a history of shared care pre-separation and where parents voluntarily enter these arrangements irrespective of the law.
- The child support consequences will force single mothers, already amongst the most impoverished group in the community, to plummet further into poverty and consequently increase the number of children also living in poverty.
- It will present practical difficulties for many separated parents and children and the burden of running two households will too great for many families.
- It will place women and children who are victims of violence at increased risk of further violence. The presumption will force some children to live with violent fathers and will force mothers to have to regularly negotiate with and be in the presence of violent ex-partners. It provides a dangerous tool in the hands of abusive men who wish to control their women partners after separation.
- There will be an increase in litigation as parents who do not want 50:50 shared residence may feel the need to go to court. Given the lack of legal aid funding, many people will self-represent, increasing delays and stretching the resources of the Family Court and Federal Magistrates Service.
- It may lead parties to re-open finalised cases in the belief that a joint residence presumption law will bring them a different outcome. Community agencies are already reporting contact from women whose former partners are threatening to take them to court, or back to court, to get new arrangements for the children.

Outcomes for children

- Many things influence outcomes for children in sole-parent households – time spent with each parent is only one factor. Others include poverty (40% of sole parents get no child support), exposure to on going conflict, pre-separation conflict or violence. Also, it is the nature of contact with each parent that makes the difference, not the extent of contact.
- While the presence of fathers who model respectful and non-oppressive ways of being men is always welcome, the dynamics of gender are far too complex to support simplistic cause-and-effect predictions about the presence or otherwise of fathers. Also, the absence of a father may be correlated with other important factors driving poor outcomes for children eg poverty, exposure to violence and conflict.
- A presumption of joint custody denies each child unique consideration of their needs after separation. Just because fathers (or mothers) usually contribute to good outcomes for children does not mean that all children, in all circumstances, will benefit from forced equal time living with both parents.
- The law currently prioritises the best interests of children. This proposal moves us away from this principle. When parents can't agree, children need us to focus on their genuine best interest, not the rights of their parents. The proposal ignores the factors listed in the *Family Law Act* which must be considered by the Court in deciding parenting orders, such as children's wishes, capacity of the parent to provide for needs of the children, maintaining children in a settled environment and family violence.
- Both fathers and mothers can contribute to good outcomes for children, but joint custody only works in low-conflict situations, where both parents freely choose it, both are financially stable and they live near each other.
- Most research favouring joint custody compares children whose parents have freely chosen the arrangement, with children who are more likely to be living in poverty and are more likely to have been exposed to conflict between their parents.

Concerns about safety.

- 25% of separated women say that emotional or physical violence, or substance abuse, was the main reason they left the relationship.
- DV and other controlling behaviours frequently continue after separation, and separation increases women and children's risk of abuse.
- In cases of violence or child abuse, women still face a huge struggle to protect their children. Even if the court accepts that abuse has occurred, decisions are frequently made that force women to parent with men who they have reasonable cause to fear, and who they fear might harm their children.
- Children's contact and handover centres around the country are overwhelmed with requests for services, a measure of the level of need in the community from women who have to arrange contact with abusive fathers.
- What increased level of proof will be required to rebut joint custody and provide safety for women and children who have experienced violence?
- How about a rebuttable presumption of no contact in cases of domestic violence?

Other issues

- The Family Court only makes decisions in 5% of the toughest and most complex cases, and in 30-40% of those cases fathers get custody. Most parents reach a workable, if not perfect arrangement after separation that reflect prior caring patterns and the pragmatic realities of each couple's aspirations, capacities and skills.
- Women are already financially disadvantaged after separation. Having sacrificed careers and education opportunities to stay at home as primary parents to their children, separated women have lower levels of workforce attachment, fewer work skills and less work experience; as a result, they have a lower earning capacity and ability to provide for their

children after separation.

- Studies have shown that even when joint custody is imposed, mothers still end up doing more of the core work of parenting, but they do it with less access to financial resources.
- In 2000, a survey conducted of Child Support Agency (CSA) clients revealed that only 28% of payees reported always receiving payments on time, while 40% reported that payment was never received. The total child support debt grew at an average rate of 7% in the four years to June 2001, to a total of \$670 million.
- The average duration of a sole parent who receives a parenting payment (single) is only 3.3 years. Sole parents are the most active in seeking employment of all welfare recipients. 51% are already in the workforce in some capacity (either full-time, part-time or casual). 62% of those work full-time. Over 70% of those with adolescent children and 35% of those with children under school age are in paid work or education.
- Recent "reforms", such as changes to the child support formula, the splitting of the Family Tax Benefit and the introduction of a punishment-based 'mutual obligation' regime are making it even harder for single parents to cope.
- The change will provide some fathers with opportunities to reduce their child support obligation, while not actually leading to more equitable sharing of core parenting work.
- The change will see an increase in litigation as parents who do not want 50:50 shared residence feel the need to go to court, and parties seek to re-open finalised cases. Custody battles can go on for years already; children in particular will not benefit by the opening of old wounds.
- Given the lack of legal aid funding, many parents will self-represent, increasing delays even further.
- There are shortages of suitable and affordable housing and child care places, and of family-friendly, flexible jobs – these factors all impact on separated parents' ability to provide good care for their children.
- Supporters of the policy say it will reduce divorce, but it won't make relationships stronger, and it might trap women in unhappy marriages.

In conclusion WESNET would like to acknowledge the National Network of Women's Legal Services, The Australian Domestic and Family Violence Clearinghouse, Positive Shared Parenting Alliance for information provided to develop this submission.

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