

Submission No: **388**

Date Received:

Secretary:

SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE FAMILY AND COMMUNITY AFFAIRS

ISSUES

I would like to present the following as central to this debate.

- A. No Government activity can force couples to stay together, and to do so would be dangerous. However to attempt to negotiate a fair and equitable settlement in the painful period following separation will generally allow emotion rule the process. The emotions of child custody outweigh money many times over!
- B. Although the issue should centre on custody and access, both men's rights and women's rights groups will try to hijack the debate into a battle of the sexes.
- C. The needs of the children must be paramount. This varies from the "rights" of the child as expressed by the family court, but it is my experience that the Court delivers "rights" only to the custodial parent. This sometimes occurs at the expense of the rights or needs of the child.
- D. The term "custody" should be reimposed unless the Family Court formalises and enforces the rights of non-custodial parents. Although the Court likes to pretend the non-custodial parent has authority to actively parent their child, in all areas the wishes of the custodial parent will be enforced by all levels of Government and authority short of returning to the Court every time. The use of the word "residency" only salves the conscience of the court.

- E. The Child Support Agency should not be the whipping boy of this debate. I have nothing but praise for the functions and functionaries of the CSA. I have found them reasonable and at all times polite and ready to assist. It is my understanding that some eighty percent of non-custodial parents make all attempts to support their children and have no problem with the CSA. I suggest some research would support this figure. Of the remaining twenty percent many will be deliberately avoiding their responsibilities and deserve no sympathy. A small group will of course be suffering unnecessarily, and instead of a general witch-hunt of the CSA all resources need to be directed to identifying and assisting this group.
- F. The child support process must treat all children equally, irrespective of which family they dwell with. This already occurs in many cases I believe, but must be transparent. A man with a set income could have a percentage set aside for child support, and this should be equally divided between all children including those now living with him. Justice must be blatantly seen to be done.
- G. There needs to be a greater discernment in asset distribution, to remove the "reward" of gaining custody. Under present laws the winner of a custody battle will gain the family home and other assets to "raise the children", and this puts an unfair financial burden on the loser. Once the children are raised the winner, the custodial parent, continues to win. The joke says "don't get married, just find a woman you don't like and buy her a house", and like many are funny because they are based in fact. Other options exist, and are discussed later.
- H. The Family Court ignores the need for both parents to actively parent their children. This is despite research evidence as to the importance of having both parents actively involved for the welfare of the child.
- I. The Family Court will allow the custodial parent to move anywhere in the country, often the world, and remove the child from the non-custodial parent. This is a prima facie example of the rights and needs of the child coming second to the rights of the custodial parent. It demonstrates the absolute need to "win" custody to maintain a long-term relationship with your own children under the current Family Court protocols.
- J. The Family Court and Family law profession all have vested interests in this debate, not the least being a financial interest. Any attempt to simplify the laws will be opposed, and the use of "high moral ground" will undoubtedly be central to this opposition. Be assured however the pecuniary concern is paramount for barristers and solicitors, and the Court itself will move mountains to avoid moral responsibility.
- K. The winner in the Family Court is the one who gets on welfare first.

FURTHER DETAIL

I will attempt to flesh out and present some solutions to this issues raised above.

- A. The breakdown of a relationship is a painful and emotional time. All parties generally feel the victim, and it is human nature to rationalise and explain your own sins even if you are 99% responsible for the break-up. In this arena of blame and counter-blame how can the best interests of all parties be the first consideration?

Much more work needs to be done in this area, with the aim of reaching agreement on the best way to meet the needs of children before relationships dissolve. These agreements ideally need to be reached before marriage takes place! It is a paradox that we can agree to financial settlements prior to agreeing to a marriage contract, but cannot put in place an agreement for access to any children we may produce. Surely this shows our poor priorities in a shameful light, and again highlights that it is easier to get out of a marriage contract than a Tupperware contract. It is certain that more young men would consider marriage if there was any degree of certainty over any children produced (The West Australian, February 1st 2003, Weekend Extra). As it stands the law is a disincentive for men to wed or have children. Our declining birth rates are but one piece of evidence.

Of course no contract could guarantee custody, but could determine access at a reasonable level for both parents including the non-custodial one. Violence or abuse would negate any agreement. I myself would have used such a contract, and would never have married my ex-wife if I were asked to go three months between visits as happens now. If I knew in advance I could be reduced to an absentee father on the whim of my ex-wife and a Family Court Judge I would never have married.

Many couples already have such agreements; mainly those who never get to the Family Court. However should one parent decide to renege on the deal the Family Court will ignore any agreement and over-ride it. Any family court lawyer will seek to have it overridden as their job is to get the best deal for their client, and the custodial parent now has all rights and will be advised not to give any ground, even if would be in the best interest of the children. We revert again to the problem of the custodial parent being the "winner".

- B. The greatest risk in this process is that we allow those men and women with a grudge to dominate the debate. There are indeed many men who shirk their responsibilities as non-custodial parents, but some women do also. There are many women who use the Family Court to further their own ends at the expense of their ex-partners (and ultimately children), but some men are learning to do so.

This is a debate between those who gain custody and those who lose it. If it becomes a battle between misogynists and feminists we all lose, and it behoves the committee to identify these extreme elements.

C. THE NEEDS OF THE CHILD MUST BE PARAMOUNT. Although the Family Court pays particular lip service to the “rights” of the child, I ask to Committee to pay particular attention to this point. This is because the “rights” of the child seem to be at the whim of a Family Court Judge, and may in fact contradict the Family Law Act. The ability of the custodial parent to move interstate or overseas is a prime example. The Family Law Act (1975) Section 60B (2) states “ The principles underlying these objectives are that, except when it is or would be contrary to a child’s best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married, or have never lived together: and.....

I would ask the Committee to ask the Family Court how a non-custodial Parent separated by thousands of kilometres could possibly know and in particular care for a child. Yet the Court will not prevent the custodial parent moving throughout the world.

I would refer you to the work done by Dr Paul Amato in the United States of America on the needs of children in split families (Appendices 1 and 2). It is obvious that children need financial security AND active parenting from both parents. On further study it becomes apparent that the Australian Family Court has been approaching the issue of support and access inappropriately. Appendix 2 relates to the well being of children, and supports other studies showing the importance of financial support. However it also demonstrates that active parenting by the non-custodial parent is even more important, and that this means the ability to teach and discipline. Even frequent short contact does not allow the non-custodial parent to do these things, so as the women’s lobby will no doubt tell you more short term contact does not always assist children’s welfare. The non-custodial parent must be able to actively parent, which means we must grant that parent the “right” to do so. This requires sufficient contact to be able to assist with homework and provide family meals and routines, but also requires us to value the non-custodial parents role. The Family Court has blatantly displayed its’ lack of value for this role by not enforcing access orders; the imbalance in effort between enforcing access versus custody by all Australian Courts is another demonstration of the Family Law system choosing a “winner” and a “loser”.

The Family Court of Australia is fully prepared to negate active parenting by the non-custodial parent. I suggest this is the greatest of errors, and the cause of much of the disquiet about the Court. Many non-custodial parents would be more willing to contribute financially, and feel less aggression towards ex-spouses and the Court if they were recognised as important and allowed to “actively parent”. THIS POINT IS VITAL. PARENTS WHO HAVE A SAY AND ARE IMPORTANT WILL NOT CONSIDER HARMING THEIR CHILDREN OR THEMSELVES. We have seen recently parents of both sexes committing murder-suicide because they believe they have been disempowered. Although no excuse for this action exists, it can be explained if his wife tells a man she is “taking the children” and he will have no right to a role in their life. One of the greatest failings of the Family Court is that for many men this statement is true, and this leads to their horrible acts. The Family Court misleads everyone saying the only one with rights is the child; under their current system the one with most of the rights is the custodial parent. Whilst this is allowed to continue injustice will continue to dominate family law.

- D. In the nineties the Family the Family Court coined the term “residency” to replace “custody”. However it changed nothing in functional terms of giving non-custodial parents a greater role in active parenting. In fact at that time the non-custodial parent had more chance of interacting with their children than they do now, as the change to allow free movement away from non-custodial parents has occurred since. Thus the only beneficiary of the change is the Court itself, who now only disempower non-custodial parents in action and not in words per say.
- E. Please leave the Child Support Agency alone. I realise many men blame the CSA for all their problems but they really do a good job (at least the best they can).
- F. Seems obvious really. Set aside a percentage of a non-custodial parent’s wage as child support, and divide it between all their children. It may seem silly, and will in my opinion probably not alter CSA payments much as other children are already taken into account by the CSA, but it will appear more equal. This will help greatly.
- G. The division of wealth following a marriage break-up where there are no children in Australia seems one of the best systems in the world. Each party takes out of the marriage what they took in, and any growth is split evenly. This is patently fair and well managed.
However where children are concerned the system is not always fair. Whilst it is true the children must be housed during their childhood, the transferring of the family home to the custodial parent is not always fair or equitable. For a large proportion of Australians the family home is their only significant asset, and over the childrearing period may appreciate significantly. If the non-custodial parent has no other significant asset, they should retain a half interest in the home. When the children reach adulthood, the house can then be treated in the normal way by the court – split evenly if the non-custodial parent has fulfilled their financial obligations and is not otherwise wealthy, or given to the custodial parent if those obligations have not been met. This would be an excellent carrot and stick approach.
- H. The winner and loser approach of the Family Court has already been discussed.
- I. Ditto.
- J. I am concerned at the potential ability of the Family Court and the legal profession to dominate this debate. The vested interest of this group is greater than that of the radical sexists elements of both genders, and the Family Court in particular has shown itself over time to be unwilling to listen or accept criticism. This is perhaps understandable, given the unpleasant nature of much of the criticism it receives, but is counterproductive to making improvements to the system. The opinion of the head of the Family Court of Australia should carry equal weight to someone who has suffered at the hands of his Court. As with most Courts, the more complex the laws the more profit for the lawyers. And the power to the Judge. Egos and purses must not rule us.

K. I could write a book on “how to win in the family Court”. I run a small business employing six people, but when going through the Family Law process I was advised by my Family law specialist to shut it down and go on welfare. This is the only way the income earner can “win”! This happens frequently, as men are now waking up to the reality of the Court. Men I know are doing it now! This committee needs to look at why the breadwinner in a family is the automatic loser, and why the Court would reward the parent on welfare over the working parent? The answer superficially could be given as more time being able to be spent on the children, but school aged children often fit into work practices now. In addition, many hours of day-care go to non-working parents who use it as “time out”. Whilst the Family Court consistently defines the working parent as the “loser” our society will become more welfare dependant and our children will suffer. Whilst granting many working parents custody may not be feasible, we must find a way to guarantee them contact and the ability to actively parent their children. The balance of work and childcare should be given the same priority in split families as intact ones. It seems incongruous that a parent is doing the right thing providing for children in an intact family, but will be penalised in separation by the Family Court for doing so. How can the Federal Government look to getting single parents back into the workforce, when the Family Court drives them out?

SUMMARY

The Federal Government has shown great initiative in sponsoring this debate. The task now for the committee is to recognise the vested interests of the many vocal groups contributing, and reach the truth. Few Australians believe the Family Law system is fair, or works well. Horror stories abound. The Court must no longer be able to dismiss this. The outcome of this inquiry will perhaps tell us if the Family Court serves of the people of Australia, or dictatorially rules them.