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

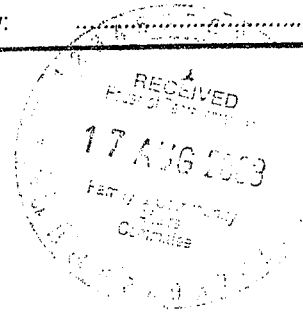
House of Representatives Standing Committee
on Family and Community Affairs

Submission No: 861

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Dear Committee Members

Inquiry Into Child Custody Arrangements In The Event Of Family Separation

please find attached the Youth Affairs Council's submission to the Inquiry Into Child Custody Arrangements in the Event of Family Separation.

Please feel free to contact me if you have any further queries on (03) 9612 8919.

Yours sincerely

A handwritten signature in cursive script that reads "Paula Grogan".

Paula Grogan
Policy Officer

On behalf of the Youth Affairs Council of Victoria

**Inquiry into child custody arrangements in
the event of family separation**

A Submission by the Youth Affairs Council of Victoria

youthaffairs
COUNCIL OF VICTORIA INC.

Introduction

The Youth Affairs Council of Victoria (YACVic) is the peak body representing the youth sector. YACVic provides a means through which the youth sector and young people voice their opinions and concerns in regard to issues and policies affecting them. YACVic works with and makes representations to government and serves as an advocate for the interests of young people, workers with young people and organisations that provide direct services to young people. YACVic also promotes and supports the participation of young people in debate and policy development in areas that most affect them.

As the presumption of joint residence will have a significant impact on the children and young people involved in Family Court cases, YACVic welcomes the opportunity to contribute to this inquiry. In the recent media debate about this issue, YACVic was concerned that the debate was parent focused rather than child focused. Unfortunately, the public debate often degenerated into a gender war involving the rights of fathers vs the rights of mothers. Although the consideration of the interests of the child is one of the fundamental principles underpinning current family law, the child was rarely mentioned in this debate. Several YACVic members contacted us expressing concern about the lack of focus on the child. For this reason, YACVic is contributing to this inquiry to ensure that the interests of the children and young people remain paramount.

While YACVic believes that it would be preferable for all children to have frequent and positive contact with both parents after separation, unfortunately it is sometimes difficult to achieve this given the often turbulent emotions that result from relationship breakdowns. While YACVic does not oppose the concept of joint residence where both parents agree to share responsibilities, cooperate with each other and act in the best

interests of the child, YACVic does not support a *presumption* of joint residence. Such a presumption offers a simplistic, one-size-fits-all solution. However, families are complex and have a multiplicity of needs and these needs must be determined on an individual basis. Thus, YACVic does not believe that the Family Law Act should be amended to introduce a presumption of joint residency.

The current Family Law Act

The current Family Law Act emphasises children's rights and directs the Court to make decisions that are in the best interests of the child. The Family Law Act sets out four clear principles about the parenting of children:

- children have a 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
- children have a right of contact, on a regular basis, with both their parents, and with other people significant to their care, welfare and development; and
- parents share duties and responsibilities concerning the care, welfare and development of their children; and
- parents should agree about the future parenting of their children.¹

The Court must also consider a number of other factors such as

- The expressed wishes of the child.
- The nature of the relationship of the child with each parent.
- The likely effect of any changes in the child's circumstances.
- The practical difficulty and expense of a child having contact with a parent.
- The capacity of each parent to provide for the needs of the child.

¹ See section 60B(2) of the Family Law Act

- The child's maturity, sex and background, including issues of race, culture and religion.
- The need to protect the child from physical or psychological harm.
- The attitude to the child and to the responsibilities of parenthood demonstrated by each of the child's parents.
- Any family violence that has occurred.²

The Court is required by law to make decisions based on the needs, wishes and rights of children, not parents.

The Court has the discretion to make orders for the residence of children looking at the individual situation of each family. Thus, the Court looks at all matters on a case-by-case basis. There is no principle or presupposed belief that advantages either parent in family law proceedings. The intention of the Act is to encourage parents to focus on their children's well being.

YACVic believes that the current legislative framework already encourages parents to share responsibilities of their children's care. The Family Law Act provides that each parent has responsibility for their child and that this is not affected by parental separation.³ The Act also accommodates joint residence arrangements where they are in the best interests of children. Thus, Australian law already endorses the principles of shared parenting and provides for joint residency if it is in the best interests of the child.

For this reason, YACVic does not believe there is a need to amend the Family Law Act. The overwhelming majority of parents agree on arrangements for the care of their children. Only 5% of custody orders are made after a contested hearing.⁴ Of these 5% of cases, the parent's relationship is often so hostile that the Family Court must intervene to resolve the case.

² See section 68F of the Family Law Act

³ See section 61C(2) of the Family Law Act

⁴ Nicholson, A. (2003) 'Children and Children's Rights in the Context of Family Law', Paper presented to LAWASIA Conference Children and the Law: Issue in the Asia Pacific Region Brisbane. Available at www.familycourt.gov.au/papers/html/context.html

Joint residency

Joint residence occurs in less than 5% of separated families in Australia.⁵ Studies have shown that where shared residence occur, parents usually make these arrangements voluntarily and often without legal assistance. These studies have also shown that the relationship between shared residence parents are typically characterised by cooperation between the parents and low conflict prior to and during separation.⁶ The research also suggests that joint residence only promotes the best interests of children if the parents are able to cooperate with each other and put their children's interests first.⁷

However, as noted above defended cases often involve a high degree of conflict between parents. Conflict will have a negative impact on children's well being and they may be exposed to this to a greater extent if they have to move frequently between parents.

Joint residency may also prove counterproductive to children, and indeed parents, because it can be highly impractical. The presumption of joint residency assumes that all parents will be able to:

- Live close to each other.
- Negotiate flexible working arrangements.
- Communicate regularly and easily.
- Afford to maintain two separate households that are set up for their children with complete sets of clothes, toys etc.

⁵ Australian Bureau of Statistics; *Family Characteristics Survey*, Ct 4442.0, AGPS, Canberra 1997, Attorney General's Department; *Child Support Scheme Facts and Figures, 2001-02*, Canberra, 2003.

⁶ Bauserman, R. (2002) 'Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review', *Journal of Family Psychology*, 2002, volume 16, no1, pp91-102. See also Rhoades, H., Graycar, R. and Harrison, M. (2001) 'The first years of the Family Law Reform Act 1995', *Family Matters* No 58, p 80.

⁷ See Smart, C. (2001) 'Children's Voices' Paper presented at the 25th Anniversary Conference of the Family Court of Australia, July 2001. Available at <http://familycourt.gov.au/papers/html/smart.html>

This is simply not a reality for many parents and forcing parents into joint residence arrangements has the potential to be damaging to children where:

- The parents live considerable distances away from each other and consistency of schooling and peer relationships cannot easily be maintained (to say nothing of the travel difficulties encountered by the child).
- The parents continue to express hostility to each other, are unable to cooperate with each other or are inflexible.
- The parents cannot ensure that their work patterns and living arrangements can accommodate the demands of the children.
- The accommodation and other facilities to meet the needs of children in two households are not financially within the reach of both parents, given that separation frequently results in less resources being available.
- Prior to separation one parent has had the major role in child care and the other parent does not have the parenting skills necessary to meet the needs of the children.⁸

While joint residency may be in the best interests of the child in some cases, there should not be a *presumption* of this is law. It is important that the Court retains the discretion to make arrangements that are flexible and that take into account each family's circumstances. YACVic does not believe that an automatic presumption of joint residence promotes the best interests of the child.

The best interests of the child

When parents separate, children need stability and security. This should be of paramount consideration, not the parent's desire for equal residency. It is important that children's rights and interests are not confused with those of the parent. Joint residency may not always be in the best interests of the

⁸ Nicholson op cit

child. Research suggests that children often carry the burden of shared residency and may feel responsible for ensuring 'fairness' between their parents. Indeed fifty-fifty residency can become 'uniquely oppressive' for some children.⁹

YACVic is concerned that in cases of alleged violence or child abuse that a presumption of joint residence would have the most significant impact. It is obviously not in the child's best interests to be constantly exposed to antagonistic parents or violent relationships.

In addition, YACVic believes that by providing for rebuttable joint residency (ie allowing parents who are opposed to joint residency to rebut the presumption) will lead to more contested hearings in court. Alternatively, some families may be forced into joint custody arrangements because they cannot afford to contest this presumption in court. Both situations will result in greater antagonism between parents and this is clearly not in the best interests of the child.

Children may also find it hard to establish roots if they have to shuffle between two homes. Importantly, children may not want to spend equal times with their parents.

It is very important the Court has the ability to listen to the wishes of the child as prescribed in the Family Law Act. Taking into account the wishes of the child is important because:

- It will increase the likelihood of better decisions and outcomes.
- There is likely to be greater acceptance of the outcome by the child.

⁹ Smart C. (2002) 'From Children's Shoes to Children's Voices' *Family Court Review*, volume 40, No 3 July 2002, pp 307-319.

- Children have the basic right to express their opinions and to be treated with respect as outlined in the Convention of the Rights of the Child to which Australia is signatory.¹⁰

Research indicates that 'children are likely to feel happier and the arrangements are more likely to 'work' if the children know what is going on and that they have been consulted about the arrangements'.¹¹

The key messages coming through from research about children's participation in family law matters include:

- Children want to know what is going on.
- Children want to be consulted and their views taken into account.
- Children want flexible, workable arrangements that change to meet their changing needs and circumstances.¹²

Flexibility is key. Parenting arrangements need to be flexible to take into account the different needs of children as they develop and the demands on their own time through study, employment recreation etc increase. Rigid schedules of court ordered contact may be counterproductive by undermining the relationship children have with their parents.¹³

Child support

YACVic is not an expert in the subject of child support formulas. However, we are concerned that that the issue of child support formula is being addressed as part of this inquiry. The linking of child support and joint residency suggests a focus on the financial interests of parents rather than on the best interests of children. Parents should not pay for children according to time spent with their child. Rather child support arrangements should reflect the cost of raising a child.

¹⁰ Cashmore, J. (2003) 'Children's participation in family law matters' pp. 158 – 176.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

Conclusion

In conclusion, YACVic does not support the presumption of rebuttable joint custody for the following reasons:

- The presumption undermines the paramount consideration of the best interests - a principle that is entrenched in the Family Law Act.
- The presumption privileges the rights of parents over the rights of children.
- The presumption 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 where it is in the child's best interests.
- The presumption 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.
- The presumption ignores the evidence 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 presumption will present practical difficulties for many separated parents and children and the burden of running two households will too great for many families.
- The presumption may place children who are victims of violence at increased risk of further violence.
- There will be an increase in contested cases as parents who do not want 50:50 shared residence may fight this in court. This may prove to be damaging to the child.