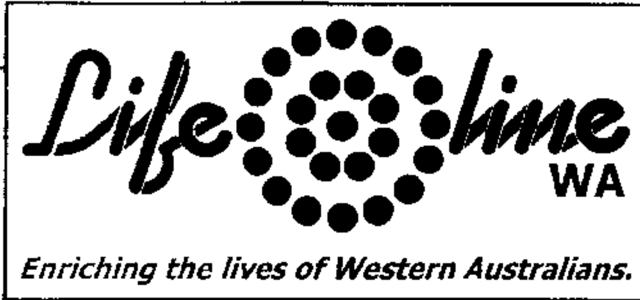

House of Representatives Standing Committee
on Family and Community Affairs
Submission No: 1171
Date Received: 8-8-03
Secretary:

SUBMISSION TO THE STANDING COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS

INQUIRY INTO CHILD CUSTODY ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

Introduction

The following submission has been prepared by Dads@Lifeline (formerly the Lone Fathers' Family Support Service), Lifeline WA. Dads@Lifeline is a professional family support service funded by the Department for Community Development (WA) to provide support to fathers and their children after separation. This support principally takes the form of counselling, crisis intervention, paralegal assistance and legal referral for men at various stages after separation. The service is professionally staffed with a Manager and two tertiary qualified Counsellors.

Dads@Lifeline is also the host program for a recently funded social research project examining the decision making processes of separating parents regarding their children's living arrangements, entitled *What Did We Do About the Children?* The project is the first of its kind in Australia. It is being funded by Lotterywest and will be conducted over two years (2003-2005).

Finally, it is worth noting that Dads@Lifeline is a foundation member of the steering committee of the Family Law Foundation of Western Australia (Inc), a network of social service and legal agencies endeavouring to raise the standard of community awareness and debate regarding family law. While the Foundation is making its own submission to this inquiry, it is apparent that that submission will not reflect the full range of opinions of the steering committee, hence this submission from Dads@Lifeline.

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Submission Summary

This submission will primarily concern itself with the question of post-separation living and parenting arrangements for children. We recognise that there are other matters not covered by our submission. However, it is our conviction that if as a society we can improve on post-separation parenting and residency arrangements, then issues of child support and grandparent access will sit in a very different context than currently prevails.

Client Feedback and Observations

By way of background, Dads@Lifeline has been providing support services to fathers and their children for approximately 21 years. During this time, the client group has grown dramatically from a relatively small group of residential (custodial) fathers to a vast number of predominantly contact (access) fathers, or would-be contact fathers. The service currently assists approximately 300 new clients each year, many requiring time intensive case management and ongoing assistance.

Our client group falls into four main clusters:

1. Fathers who are obstructed in their desire to have contact with their children;
2. Fathers who have contact with their children but on an inadequate or tenuous basis (ie subject to the goodwill and co-operation of their ex-partner);
3. Fathers who wish to maintain a high level of involvement in their children's lives - in some cases a shared parenting arrangement - but who are restricted from doing so by their ex-partner and discouraged from taking legal action by the perception that the family court is biased in favour of the mother; and
4. Residential and contact fathers who are functioning effectively in their children's lives and who, in many cases, have reorganised their working lives in order to be more available to their children.

There are three main concerns regarding the current family law system which are repeatedly fed back to us by our clients and their solicitors.

- The current system favours the pre-separation and/or immediate post-separation primary caregiver (generally the mother) without adequate regard to individual circumstances and context. The potential injustice of this can be seen in the most common separation scenario which is as follows. Most separations are initiated by the woman but it is most commonly the man who leaves the family home (typically in the hope that by showing goodwill he will maximise the chances of a future reconciliation). Unfortunately, most men do not realise that by leaving the family home (with even the best of motives) they have immediately disadvantaged themselves in the eyes of the family court – the post-separation 'status quo' regarding care of the children is taken as a benchmark for any subsequent court determination, even if that status quo has prevailed for only a matter of weeks or months and was only ever intended as a short-term 'time out'.

- The current family law climate rewards whichever of the two parties is more able to apply the law with cunning and assertiveness (ie in many cases whichever of the two parties has the best lawyer). Honourable, responsible and transparent behaviour finds no reward in our adversarial family law environment but is in fact a strategic disadvantage. Some clients report that they are advised by their lawyers to be minimal and selective in their self-disclosure, lest it be used against them, and to emphasise any adverse allegations they can bring against the other party.

- The current family law system fails to restrain residential parents who, for no good reason, obstruct the contact parent's relationship with the children either by moving away or minimising contact arrangements. Given that the vast majority of contact parents are men, this leads to a now well publicised subset of the population (angry, frustrated contact fathers) whose frustration and anger creates a negative reputation in the wider community. This is turn leads to the perception that these contact fathers are not suitable as residential parents which in turn reinforces the trend to leave the child in the care and control of the mother. The unfortunate thing is that this cycle is thereby maintained without adequate awareness of the context that has given rise to it.

It could be said that, in family law, possession is nine-tenths of the law. In other words, the current system gives the residential parent an *a priori* advantage over the contact parent which amongst our client group is all too often abused.

While family law terminology has changed from 'custody' and 'access' to 'residency' and 'contact', there has been little if any change in the community's view of the family law system and the way in which family law is conducted in this country. There are still clear winners and losers and the system remains adversarial at heart.

Far too many fathers report that they start out with the best of intentions, highly motivated to maintain contact with their children, but are thwarted by adversarial ex-partners who are keen to protect their financial and power advantage as a residential parent.

Far too many grandparents contact us who are grieving the loss of their relationship with their grandchild/ren and who are afraid that their son (the father of the child/ren) will take his life as a direct result of losing his relationship with his child/ren (ie not because of the separation but because he is being obstructed in his desire to maintain regular contact with his child/ren).

We acknowledge that there are those who regard the current system as working quite well, in particular some residential parents (generally women), some family law practitioners, and some who derive their livelihood from the current system. We acknowledge that their reality is likely to be very different from that of our clients. The majority of our clients cannot afford private legal advice or representation, have difficulty gaining access to Legal Aid or Community Legal Centres and are disadvantaged educationally.

In summary, we regard the current family law system as inadequate and inequitable in four areas:

1. Too little is required of parents post-separation. We have failed as a society to take seriously our responsibility to ensure that - excluding situations of proven violence, abuse or neglect - a child has unfettered access to both parents post-separation. For example, it is demonstrably unjust that a residential parent can relocate a child interstate even if the contact parent objects, notwithstanding the obvious and far-reaching damage to the child's relationship with the contact parent. This could hardly be said to be in the best interests of the child, notwithstanding the frequent invocation of that phrase in such judgements.

2. Too few resources are currently invested in the post-separation adjustment process. Mediation and co-parenting courses should be mandatory for separating couples who are having difficulty collaborating. Non-compliance with that requirement, and non-cooperation with the other party, should lead to the logical consequence of reduced involvement with the children. Also, education and support services that assist children to adjust to separation should be widely available.

3. Inadequate accountabilities currently prevail in the family law system. For example, court orders awarding contact can easily be breached by a residential parent with no immediate consequence and the onus is on the aggrieved party to bring the matter back to court, by which time irreversible damage has been done.

4. Finally, it is worth noting (although not within the terms of this inquiry) that there is a serious inequity in the resources available to each gender after separation. Not only do services for women dramatically outnumber services for men, but we often hear that our clients' ex-partners have 'done the rounds' of Legal Aid and the Community Legal Centres (ie registered themselves as a client at all available centres) in order to block our clients' access to low-cost legal assistance (ie our clients are refused assistance on the basis of a 'conflict of interest').

In short, the current system brings out the worst in many people. It is time that a new system was developed which creates the expectation that people will bring their best to the matter of post-separation parenting arrangements, and applies sanctions where they fail to do so.

Since the Family Law Act of 1975, we have had a succession of piecemeal reforms which have led to a patchwork legislation and increasing discontent in the community. We believe it is time for comprehensive reform that addresses the interconnected systemic issues – in particular the nexus between post-separation parenting and residency arrangements, child support, Centrelink benefits and taxation policy. The manipulations of the current system are many and varied, particularly by residential parents who seek to maintain a financial and power advantage over the non-residential parent, and the disadvantages and disincentives for non-residential parents are formidable.

Recommendations

1. We support the rebuttable presumption of shared parenting – except in cases of proven violence, abuse or neglect - for the following reasons:

- *The current system (which a priori favours a disproportionate parenting arrangement post-separation) creates inequities and leads to a situation where children easily become property to fight over or a financial commodity with which to bargain.*
- *The current system is adversarial at heart – it leads to clear winners and losers. It perpetuates (rather than putting to rest) relationship conflict - in many cases the current system institutionalises that conflict.*
- *The current system does not reflect the social change of the past twenty five years, particularly with respect to gender roles and divisions of labour.*
- *The current system does not reflect the wide variety of parenting arrangements in our society. Fathers who wish to maintain an active (and perhaps equal) involvement in their children's lives after separation face formidable obstacles to doing so.*
- *Finally, but perhaps most importantly, the current system leads to deleterious outcomes in terms of child development and children's behaviour and, in many cases, models to them the practice of maintaining conflict and division rather than problem solving and collaboration.*

2. We strongly recommend an examination of the nexus between the care of children and the finances. There are currently far too many financial incentives for the primary care-giver to minimise the non-residential parent's contact with the children, and far too many financial 'punishments' for the non-residential parent (including in the taxation system). Our adversarial family law system has led to an adversarial and divisive child support system.

3. We strongly support the view that no parent should be able to obstruct contact between a child and his or her extended family, in particular the grandparents, and his or her established neighbourhood networks. In this regard, we take the view that (assuming no violence, abuse or neglect has been proven that thereby necessitates an inequitable care arrangement) if a separated parent wishes to relocate (eg interstate, overseas or even a distance greater than an hour's drive), then they should not be able to take the child with them. Children are not the property of even the primary care giver, but are part of an extended family and community which becomes all the more important after separation. (See Braver et al, 2003, regarding the long-term negative personal and financial effects of parents moving away, with or without the child). While one cannot countenance any constraint on a parent who wishes to move away, the current practice of residential parents taking children with them must be stopped.

As Albert Einstein said, 'No problem can be solved by the consciousness that gave rise to it.' Australia has had nearly thirty years of the current system, born of an old paradigm regarding parenting, gender relations and the best interests of the child. The time for an overhaul of that system, and the consciousness that gave rise to it, is long overdue.

We recognise that such an overhaul would be a significant undertaking. However, if we maintain the current system we will continue to incur the social, economic and psychological costs associated with it for current and future generations. Our hope is that we will leave a different family law system for our children.

Urban Myths: A Brief Critique

The Joint Custody Inquiry will no doubt hear many arguments defending the current system and arguing against the rebuttable presumption of shared parenting. The following is a brief critique of some of the more spurious of these that have recently appeared in the media and in public discourse.

Objections to the Rebuttable Presumption	**Critique**
'One size does not fit all. The proposed change forces people into shared parenting.'	The proposed reform is not based on one-size-fits-all but proposes a different starting point for post-separation negotiations or decisions. No one is being forced into anything – a rebuttable presumption does not amount to an imposition. Under the broad umbrella of 'shared parenting' couples would be able to negotiate (or the court determine) a wide variety of arrangements, not necessarily '50:50' residency.
'This proposed reform is about parents (particularly men) asserting their rights, not about the rights of the child – the legislation is already adequate.'	The current legislation enshrines the principle of a child's right to have a relationship with both parents and this is widely recognised as being in the child's best interests, except in cases of violence, abuse or neglect. The problem is that the current system does not go far enough in defending that right and ensuring that it is a reality, even in situations where the child wishes to keep equal contact with both parents.

'The current system is working fine and this is demonstrated in the low number of cases that go to court and, of these, the low percentage that end up going to trial.'	The assertion that 'the current system is working fine' flies in the face of widespread and growing discontent in Australia regarding our family law system. Recent estimates in the media are that 50% of cases approach the court and, of these, only 5% end up with a court determination. Assuming the accuracy of these figures, one cannot regard the former as a low percentage (given the government's stated desire to keep separated parties out of the court) and little is known about the 95% who withdraw from court proceedings – whether this is because a mutually acceptable solution is found or rather because of attrition, threats, finances, disillusionment etc.
'The proposed change will lead to a flood of litigation.'	The current system is already log-jammed with litigation leading to damaging delays. In some cases, the current system exacerbates conflict and invites further litigation. Estimates vary as to the likely consequences of legislative change – it may well reduce the propensity to litigate, particularly if alternative dispute resolution processes are mandatory. Any legislative change will require appropriate corresponding social services (eg education, mediation).
'Men should share in the parenting on a '50:50' basis during the marriage if they want shared parenting after separation.'	Do we, as a society, want to give couples the message that their parenting arrangement whilst in the relationship should be a hedge against the possibility of separation? It would appear that in most families, men continue to assume the role of breadwinner in good faith, maintaining an active involvement with their children outside of work hours and with no thought that this might be to their disadvantage in the event of separation. Neither do these men realise that this arrangement might be taken as indicative of their wishes in the event of separation.
'Men will seek shared parenting as a way of minimising child support obligations and then dishonour the arrangement.'	Current abuses and manipulations of the family law and child support systems are rife on both sides of the gender divide. In the rebuttable presumption scenario, parties of both sexes should be held accountable for any dishonouring of agreements, with natural and logical consequences applying.

'The rebuttable presumption will only work where couples get on well and are low in conflict.'	Most couples learn how to get on well over time, some with the aid of professional assistance. (It could be argued that it is important for children to see their parents address, manage and resolve their conflict, not avoid it or scapegoat one another as currently commonly happens.) High conflict couples can learn to manage conflict constructively, particularly where their relationships with their children (and their finances) are at stake. This is acknowledged in the most recent paper from the Australian Institute of Family Studies: Smyth, Caruana and Ferro (2003). Bauserman (2002) noted in his meta-analysis of all available joint custody research to date that *sole* custody situations have the highest levels of conflict.
'Shared parenting is impractical and unaffordable – the requirement that people have two houses is punitive and draconian.'	Having two houses is only one of several options in shared parenting. Recent media stories have highlighted that where separated parties are committed to maintaining a shared parenting arrangement (even in an otherwise high conflict relationship), several arrangements are viable. 'Where there's a will, there's a way.'
'The rebuttable presumption will lead to greater child poverty and inadequate financial support for mothers.'	The first assertion is without evidence. The second statement assumes that separated mothers have an *a priori* right to financially prevail upon their ex-partners (including for their own needs) regardless of other variables. Clearly the nexus between parenting and residency arrangements, child support and Centrelink benefits needs to be examined.
'The proposed change will expose women and children from violent situations to further intimidation if not violence.'	Handover services and supervised contact services can eliminate this problem. Any proven violence, abuse or neglect (by either party) should be grounds for rebuttal of the presumption of shared parenting.
'Shared parenting has not been proven to be better than the current common arrangements.'	Shared parenting is the great untried option – it has not been comprehensively trialled, resourced, reviewed or researched. However, early research suggests that children in joint custody arrangements fare better than children in sole custody arrangements and that their outcomes are commensurate with children from intact families (Bauserman, 2002).

'Shared parenting has not worked overseas.'	This generalisation begs closer examination, not the least because we may be able to learn from any difficulties encountered in other countries. In the USA, the trend is increasingly towards either shared legal custody or shared physical custody or both, (ie variations on shared parenting). It is also worth remembering that other countries employ a wide range of post-separation arrangements, some of which do not entail case-by-case legal argument but regard post-separation arrangements as an administrative matter.

History

Finally, it is worth reflecting on this current debate in the light of history. For many centuries, men were assumed to have a natural right to custody and this was consistent with the view that children (and women) were, in effect, their possessions - extensions of the man. During the nineteenth century, and then with the coming of Freud and psychoanalytic theory, the 'tender years' doctrine gained prominence – the view that young children needed the nurturance of their mother. This led to a gradual reversal of the historic trend, concerns about 'maternal deprivation' and debates about 'the best interests of the child'. In most court decisions, the trend during the modern era has been to award custody to the mother.

Our own Family Law Act (1975) purposefully went a step further, not only enshrining the concept of the best interests of the child but privileging the mother-child relationship and seeking to maintain the pre-separation 'status quo'. In recent times, fathers have only been successful in obtaining custody if the mother has been proven to be unfit or if the father happens to have been the primary care-giver during and/or after separation. We can see how the pendulum has swung from one extreme to the other, arguably in response to social trends and convictions of the day but still in an either-or paradigm and still bogged down in case-by-case argument and litigation.

The rebuttable presumption of shared parenting is the pendulum trying to find some middle ground. It holds the possibility of a complete change, away from the either-or paradigm of winners and losers and away from institutionalised conflict, to both-and possibilities and the expectation that parents will collaborate even if they are no longer partners.

The rebuttable presumption of shared parenting recognises the important contribution of fathers in the development of children (Amato and Gilbreth, 1999) and re-establishes the possibility of fathers remaining intimately involved in their children's development, even after separation. It opens the way to joint physical custody which Bauserman (2002) concluded (in examining all of the available studies to date) leads to better adjusted children across a number of measures.

Given the changes over the last thirty years in gender roles, the wide variety of parenting arrangements that couples have developed in recent times and the demonstrated benefits to children, the rebuttable presumption of shared parenting is the only appropriate and just starting point in this post-modern era.

Conclusion

Dads@Lifeline commends the Prime Minister for initiating this inquiry. The issue of post-separation parenting and residency arrangements has not gone away in recent times. If anything, the debate has become more heated and the discontent more widespread. Many Australians - both men and women - parents, second partners, step-parents, grandparents and extended family, are crying foul. Dads@Lifeline urges the committee to fearlessly seek an equitable and just family law system.

We understand that the committee will be visiting Perth. We would appreciate the opportunity to make representation.

If I can be of further assistance, please do not hesitate to contact me.

Yours sincerely,

Noel Giblett
Manager Counselling Services
LIFELINE WA

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