Australian Domestic & Family Violence CLEARINGHOUSE

Submission to the House of Representatives Standing Committee on Family and Community Affairs Enquiry into Joint Residence Arrangements in the Event of Family Separation

Submitted by:

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The Clearinghouse is funded by *Partnerships Against Domestic Violence*, an Australian Government initiative working with States and Territories and the community to find better ways of preventing and responding to domestic violence.

The Clearinghouse is linked to the Centre for Gender-Related Violence Studies, based in the University of New South Wales School of Social Work.

The context of this submission

This submission is made on behalf of the Australian Domestic and Family Violence Clearinghouse (ADVFC), a national centre funded by the Australian Government funding initiative *Partnerships Against Domestic Violence*. The ADVFC has a mandate to collect and disseminate information and materials about family and domestic violence issues. In particular, we have a role to inform professionals working in areas relating to domestic violence about pertinent research, policy and practice initiatives. To achieve this goal, the ADVFC has implemented a number of strategies including the production of newsletters and comprehensive issues papers, the development of online databases and web-based information about programs and current issues, as well as providing a library and information service.

Our work in this field places us in an ideal position to comment on the current research and practice debate about family law issues and domestic violence. This submission attempts to provide an overview of some of the recent research, reflecting on the complex issues arising within this context and the relevance this has for the current enquiry concerning joint residence arrangements in the event of family separation.

In particular, this submission will respond specifically to term of reference a) i) outlined by the Inquiry:

a) given that the best interests of the child are the paramount consideration:

i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption should be rebutted;

The material presented below argues that the presumption that children should spend equal time with both parents should be rebutted where it raises

serious safety and child protection concerns for women, children and young people living with domestic violence. Reforms to the Family Law Act in 1996 enshrined certain principles that have already had a deleterious impact on women and their children in these circumstances. Additional presumptions such as the right to 'shared residency' are likely to further erode the safeguards necessary to ensure the safety of children and young people living with domestic violence.

Prevalence of violence in Family Court adjudicated cases

Brown et al in their study reviewing cases before the Family Court in the Melbourne and Canberra registries found that the most common single cause given for the partnership breakdown was partner-to-partner violence. This constituted 66% of separating couples, with 33% describing the violence as serious (Brown, Frederico, Hewitt & Sheehan 2000, p. 854). Such data provides a clear picture about the circumstances of families approaching the Family Court when negotiating residence and contact arrangements. It appears that the majority of families needing to go to final hearing in the Family Court are those looking for assistance in achieving arrangements that are designed to protect them from violence.

The links between the occurrence of domestic violence and child abuse are demonstrated by findings from the study examining child abuse allegations in custody and access disputes before the Family Court. Brown et al (1998) found that of a sample of 40 families before the Family Court, 70% of the child abuse cases studied had spouse abuse occurring (p.23). High levels of violence, even for conflicting and separating families, were present for these families. It is therefore imperative that the Family Court has a sound understanding of the prevalence and impact of family violence in order to make appropriate decisions about the best interests of the child.

Impact of domestic violence on children and young people

Much has been written about the significant impact of domestic violence on children and young people (Laing 2000, Edleson 1999, Jaffe, 2002, Gevers & Goddard-Jones 2003). Witnessing domestic violence - including

psychological, emotional and physical violence – can have serious and long-term effects on children and young people's emotional, psychological, cognitive and physical developmental progress. The literature indicates that children witnessing domestic violence experience it emotionally has though it is being inflicted on them, with impacts that are similar to experiencing child abuse.

Negative effects for both children and adolescents (Gevers 1999c) may include:

For infants and children:

- Poor health.
- Poor sleeping habits.
- Excessive crying and screaming.
- Severe shyness and diminished self-esteem.
- Aggressive behaviour.
- Emotional distress and somatic complaints.
- Anxiety and depression.
- Social isolation due to secrecy, shame and the separation of home and community life.

For adolescents:

- Fear and trauma akin to post traumatic stress disorder.
- Depression, especially in girls.
- Adjustment difficulties such as health problems, cognitive deficits & adolescent aggression.
- Difficulty in forming adult intimate relationships.
- Increased homelessness.
- Injury resulting from attempts to intervene in order to protect the abused parent.

The beliefs and attitudes developed by children growing up in violent environments can lead to the belief that violence is acceptable and used to gain control, or is a means of control (Indermaur, Atkinson & Blagg 1998).

- Inter-generational transmission of violence and aggression (Irwin and Wilkinson 1997).

In the past, it was thought that babies and infants were too young to be affected by domestic violence. However, this view has changed in recent years. Evidence now shows that 'ongoing violence during an infant's life can result in permanently altered development of the central nervous system...long lasting effects including increased anxiety; increased startle response; sleep abnormalities; hyperactivity; and mood disorders'. Infants may also develop short and long-term attachment disorders after ongoing exposure to domestic violence (Bagshaw and Chung 2000).

McIntosh (2000) further reports:

- Infants exhibit disturbances in response to parental violence from at least six weeks of age.
- Young children exposed to domestic violence are dramatically more at risk for disturbed attachment relations to their mothers.
- The neuro-developmental impacts of prolonged domestic violence on children can be likened to the shock of war or abduction.
- Domestic violence combines elements of inescapable shock together with an acute or chronic deprivation of sensitive care giving. The latter as much as the former is the catalyst for psychological and developmental damage.

Sunderman et al comment that:

> *Children who witness violence at home display emotional and behavioural disturbances as diverse as withdrawal, low self-esteem, nightmares, and self-blame, and aggression against peers, family members and property (1995, p. 232).*

There is evidence that violence may be repeated inter-generationally, with more than sixty per cent of abusive men in one study having witnessed domestic violence as children (Ray 1994).

Research shows that in many families where there is domestic violence there is also child abuse. Studies have shown an overlap between violence towards women and violence towards children of up to 40 per cent (Hughes 1986, Edleson 1999). Current research estimates that domestic violence and other forms of child abuse co-exist in 30–60 per cent of cases. The co-occurrence of being both a victim of child abuse and witnessing spousal violence significantly increases the severity of impact upon the child.

It has also been demonstrated (Kilpatrick & Williams, 1997) that children do not necessarily recover from violence and abuse they have been exposed to once they are no longer living in that environment. Kilpatrick (1997) found that 19 out of the 20 children in the study who had lived with domestic violence qualified for a diagnosis of Post Traumatic Stress Disorder (PTSD) and the majority scored within the moderate to severe range of PTSD. The children who were interviewed had been separated from the violence within a period of time ranging from 6 weeks to 3 years.

The psychological consequences for children and young people who continue to be exposed to further acts of violence and abuse, or are forced to spend time with a parent they are frightened of, dislike or distrust, must be taken into consideration when contemplating the presumption that children should spend equal time with both parents. Such a presumption would undermine the existing factors to determine 'the best interests of the child' outlined under s68F FLA which include:

- The nature of the relationship of the child with each parent,
- The capacity for each parent to provide for the needs of the child,
- The need to protect the child from physical or psychological harm,
- The attitude to the child and to the responsibilities of parenthood, and
- Any family violence which has occurred.

Violence continues after separation

Current knowledge about men who are abusive to their partners indicates that in many cases violence does not cease after separation. The time of leaving a violent relationship is well known to be a time when women, children and

young people's safety is jeopardised. Approximately thirty percent of Australian women killed by male partners are killed after separation (Easteal 1993, Carcach & James 1998). Children have also been the targets of this frightening reality (reported in *Chhay 1994*). The majority (97.5%) of women interviewed in the Kaye et al study 2003 reported significant levels of violence and abuse since separating from their partner.

Abuse of women and children through continuing contact

It is vital that the Court consider the violence and abuse that is likely to occur in the future as an important factor in determining what is in the best interests of the child.

Research conducted by Rathus, Rendell and Lynch (2000) on behalf of the Abuse Free Contact group recorded unacceptable levels of violence at the post separation stage. In this research, interviews were conducted with legal practitioners, domestic violence workers, counsellors, and women who were 'residential' parents, about the system's response to women and children affected by violence and abuse after separation.

Reports about post separation abuse involved different forms of abuse including threats and actual violence at handover, using children to convey abusive or derogatory messages or using systemic processes such as the Family Court as an ongoing form of abuse. Use of the Family Court as abuse includes regularly seeking amendments of orders to allow interference in the exercising of day-to-day responsibilities such as who takes children to sport and how clothes are laundered.

Despite the aim of the 1996 legislative reforms to reduce litigation, it has in fact steadily increased. For example, numbers of contravention applications brought by non-resident parents, which allege that contact orders have been breached, has increased. In 1995/96 there were 786 applications, increasing to 1,976 in 1999/2000. A review of the 1998/99 applications found that the majority were brought by non-resident fathers (89%), and the majority (62%) were found to be without merit. Several studies have concluded that the

family law system is a context in which abusive spouses can use issues of contact and residence to continue to exercise coercive control over their partners (Rendell, Rathus & Lynch 2000).

In a finding similar to other international studies, most of the women initially wanted their children to have contact with their fathers and thought that this would be positive for their children, despite the domestic violence which they had experienced: 'It was only after the realisation that the children were unsafe that the women wanted to change the arrangements.' (Rendell, Rathus & Lynch 2000, p. 43). The women experienced the abuse and threats to harm their children on contact as part of the pattern of coercive control which is at the core of domestic violence. For example:

> *'You're still being abused because your children are being abused and they're a part of you and they're in pain and they're unhappy and they're suffering then you're unhappy. So basically they are just an extension of you and that abuse is still inflicted on you through them.'* (Rendell, Rathus & Lynch 2000, p. 40)

For some women, 'the site of the struggle shifts and the experience of abuse changes' (McMahon & Pence 1995, p.194). Clearly there are circumstances where the safety of the child and its emotional wellbeing must override any consideration of a parent's right to contact and shared residence arrangements.

Claims that allegations of domestic violence and child abuse are untrue

The Family Court is required to deal with a number of cases where the former female partner is alleging domestic violence and child abuse, and the alleged perpetrator denies the allegations. Many men claim that the mother uses false accusations as a 'weapon' in custody and contact matters, and in some cases that the children have been influenced by their mothers to support these claims. Men suggest that once the claim is made it is impossible to prove otherwise, and some judgements reflect this view.

The Australia Bureau of Statistics in its 1996 voluntary survey found that 23% of women who had ever been married or in a de facto relationship had experienced physical or sexual violence from their partner. Of women who experienced violence from a previous partner, 67.8% said they had children in their care during the relationship, and 67.6% of these women said that the children had actually witnessed the violence. Therefore, a significant proportion of the female population who have been in relationships have experienced domestic violence, and their children have witnessed this violence. Further, it has been estimated that a very tiny proportion of reported adult sexual assault cases are false (approximately 1.4% of reports by victims)(Office of the Status of Women, 1995).

A defence commonly used is to claim 'Parental Alienation Syndrome' (PAS), where a separated parent disrupts and "denigrates a child's relationship with the other parent to give expression to their own hostility towards the other parent" (McInnes, 2003). Symptoms of PAS are said to include:

- A lack of ambivalence in negativity towards the other parent
- The 'independent thinker' phenomenon- where the child thinks the negative ideas, thoughts and emotions are all their own
- Total support of the alienating parent, without question
- Absence of guilt over abusing the absent parent
- Use of what are 'obviously' borrowed scenarios from other people's memories- i.e. the child did not see, or it did not happen
- Spread of animosity towards the target parent's family (Gardner 1998)

PAS

> "differs from the concept of 'parental alienation' by rescripting children's disclosures of abuse by a parent as false allegations coached by the other parent...PAS thus offers violent controlling ex-partners a pseudo-scientific set of 'symptoms' to deny allegations of child abuse and pathologise the alleging child and protective parent" (McInnes, 2003)

McInnes argues that in cases of 'parental alienation', many children maintain positive feelings for the other parent and may even resent the hostility of the alienating parent, specifically when they have not been exposed to any violence or abuse. In contrast, "expressions of fear, disclosures of abuse, emphatic rejection of the abusing parent and a strong connection with the protective parent are consistent with exposure to abuse. Yet these are the main symptoms given for the PAS paradigm" (McInnes 2003, p.3).

McInnes argues that the Australian regime for enforcement of contact, such as education courses, fines, imprisonment, and reversal of custody, restricted and supervised contact, punishes mothers who defy court orders to expose their children to further abuse by the father. She argues this reflects the regime recommended by the principle proponent of PAS, Gardner (McInnes, 2003).

The popularity of PAS survives extensive empirical research findings showing that false allegations of child abuse are very much the exception rather than the rule.

The Australian Family Court Magellan project (Brown et al 1998, 2001) identified that child abuse cases in the Family Court were rarely without foundation, and were often serious and complex:

> "The study's findings contradict beliefs about child abuse in the context of partnership breakdown. Child abuse allegations made in the Family Court were found to be false no more frequently than child abuse allegations made in other circumstances: some 9% were found to be false...Moreover, child abuse in the Family Court cases was not mild and exaggerated abuse, but the more severe abuse with physical or sexual abuse being found in some 70% of cases. "

In relation to allegations of child sexual assault: "[T]he empirical studies of child sexual abuse allegations in custody disputes belie the popular conceptions of the 'falsely accusing' mother" (Jenkins 2003, quoting

Humphries 1999), and other views that allegations are 'rife' or an 'easy way' to get custody. In a comprehensive six month survey by Thoennes and Tjaden (1990) of eight domestic relations courts in the US, only 2% of cases involved allegations of child sex abuse, which reflects other studies in Australia and overseas. Mothers accusing the child's father of sexual abuse occurred in only 48% of these cases (other allegations coming from child protection authorities, families and friends). "These figures suggest an under-reporting by mothers of child abuse in divorce proceedings, rather than the reverse" (Jenkins, (2003) citing Thoennes and Tjaden (1990)).

Role of Contact Centres and Supervised Contact

Contact centres have performed a valuable role in providing a safe environment for changeovers to occur between parents in dispute and their children and are well placed to observe this reality. It is well noted that mechanisms such as supervised contact are required to provide safety for children where the behaviour and actions of the parent cannot be guaranteed to operate in the best interests of the child. Supervised contact can occur in contact centres, where the parent spends time in the centre with the child, or be undertaken by others such as family and friends, usually of the non-resident parent.

However, contact centres provide much anecdotal evidence about the continuing nature of abuse. For 60 per cent of separated parents using the services of the Fremantle and Rockingham Child Contact Centres, spousal abuse and conflict continued during contact visits (Sheehan, 2001, 6). The Strategic Partners evaluation of Australian contact centres found '[t]o date, contact services have been designed and oriented for parents more than children.' (Strategic Partners 1998). With regard to safety, the Child Impact study (conducted over 12 months at four contact services) found that, for a sample of older children:

> *Three-quarters of these children said they felt safe to visit here. Those who did not were all in supervised contact. None of them were seen by staff to be high vigilance cases, and in each case, staff were unaware*

that the child was significantly worried by some aspect of the visiting process. (Strategic Partners 1998, p. 78)

Children who had no prior contact with staff at the contact service were at an extreme disadvantage. Staff did not know the children or their coping styles and often misinterpreted introverted coping strategies as an absence of distress. In other cases children experienced a critical failure of care during a contact visit, such as the worker leaving the room or being out of earshot (Strategic Partners 1998, 76). These lapses are examples of the varying standards operating at contact centres and it is for this reason that minimum standards are recommended.

McIntosh (2000, p. 16) formulated the following recommendations to respond to children affected by domestic violence:

- staff of contact centres need to be trained in early identification of children who are distressed by visiting;
- court orders which jeopardise children's emotional well-being and recovery from violence should be challenged;
- contact should be based on the perpetrator of violence demonstrating 'understanding of the child's experience of violence and a willingness to work toward a recovery of trust', and the child's readiness.

In other circumstances contact is supervised informally by the mother herself, or by family and friends. Kaye, Stubbs and Tolmie report that such supervision arrangements had all proved problematic (Kaye, Stubbs & Tolmie 2003, 152). In particular, the researchers found that the resident parent or their family members when supervising contact further exposed themselves to violence and abuse. Other problems occurred when contact was supervised by a relative of the contact parent. Respondents in the study gave accounts of being verbally abused by a supervising relative or experiencing violence from their partner without intervention from the supervising party. They were also concerned with the level of supervision and commitment to ensuring the

child's safety. Chetwin et al (1999) found that when access was supervised by extended family members, the children were not always emotionally safe and most informal supervisors regarded their role as being a presence rather than providing active supervision (Kaye, Stubbs & Tolmie 2003, 132).

Rights to shared residency overriding best interests of the child?

As discussed above, the impact on children of witnessing domestic violence can be serious, resulting in long-term psychological and physical harm, akin to child abuse. Contact arrangements can be used to continue the cycles of control and violence against one parent, and can continue to inflict harm on the child.

> *Many legal and mental health professionals may try to minimize the impact of abuse and suggest that an individual can be an abusive husband but a good father. This belief is inconsistent with our knowledge of the trauma children suffer in these circumstances.* (Sudermann & Jaffe 1999, p.37).

Women and children continue to be re-victimised by contact arrangements that force children to have contact with non-resident parents against their will, often in contact centres where the child's distress is not identified or benignly observed. Seven out of the 49 children observed in the child impact study did not show signs of adjusting well to the contact visits and the behaviour and actions of the non-resident parent did not get better. These children were those who had experienced threats by the non-residential parent of abduction or violence. Most importantly, observers noted that in each case 'the capacity of the visiting parent to facilitate healing showed little room for improvement' (Strategic Partners 1998, 87). These children genuinely feared the visiting parent and this fear was also shared by their residential parent. Parents that show no willingness to interact in ways that assist children to overcome the impact of previous violence and emotional abuse will continue to inflict further harm on their children.

An emerging argument by some parents is that the percentage of their financial contribution towards the child should be matched by the time they

are able to spend with the child. The desire to reduce child support liabilities is frequently a motivating factor for seeking and making shared residence arrangements (Rhoades 2000, p.42). Rhoades 2000 reported that 61% of solicitors surveyed by questionnaire said they would seek a shared residence arrangement if they were acting for a father who wished to reduce his child support obligations (p. 123). Such an argument reduces children to chattels that can be fought over, whose parent's rights are prioritised, rather than seen as unique individuals that have specific needs and rights to safety, emotional security and well-being. Determinations of the best interest of the child should not be based on parental 'rights' and economic concerns.

In principle shared parenting plans are an ultimate goal in families where there is a history of cooperation and communication between parents. Some parents, despite a breakdown in the relationship, can continue to negotiate about shared parenting commitments and make arrangements for the optimal care of their children. Rhoades et al (2001) note that:

> 'cases such as *Pagden*, *H and H-K* and *Forck and Thomas* established that such orders were not appropriate unless the parties' approaches to parenting were compatible, and there was a relationship of "mutual trust, co-operation and good communications" between the parents, factors that are generally absent in litigated matters. *Pagden* also noted that the judges of the Family Court had "not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties'.

In contrast to the observation in *Pagden*, Rhoades et al (2001) note that residence orders giving each parent equal time have been made in contested hearings since 1996, and 'in circumstances where there is a high degree of conflict between the parties' (at 82). This has occurred in cases where this approach has been tested (as interim orders) and one parent has found them unworkable.

In families characterised by violence and intimidation, the same approach to parenting responsibilities, and "mutual trust, co-operation and good

communications" does not exist. Rhoades et al emphasise that a shared residency concept is totally at odds with the types of parents who litigate within the family court (2001, p.80).

Rhoades, Graycar & Harrison 2001, found that mothers continued to do the bulk of the care giving work after separation and that as one respondent commented, many fathers still do not consistently make themselves available to the children. Studies examining the frequency of contact with the non-residential parent, usually fathers, and children's adjustment concluded that 'the frequency of contact does not ensure positive meaning in the father-child relationship, as fathers range from very involved and caring to those who are self absorbed, inconsistent or emotionally abusive' (Kelly 2001, p. 103). Increasing contact or making shared parenting a presumption, may increase the amount of contact abusive non-residential parents will have to children, increasing the harm they suffer.

Shared residency already a reality

Research findings highlighted by Smyth and Parkinson are testimony to the reality that in many families there are shared residency arrangements in place upon separation. The vast majority of separating couples reach an agreement, with only five per cent of matters proceeding to a full hearing before a judicial officer (Family Court of Australia 2002). A large majority of men who are separated (64%) have contact with their children and almost three quarters of these men have children staying overnight with them (Smyth & Parkinson 2003, p. 9).

Focus group participants in the Rendell et al study commented that the pressure from their legal representative to consent to contact and residency arrangements was overwhelming. In addition, Rhoades et al reported that many women fearing violence, consented to contact arrangements that did not provide them with the level of protection they had wanted (2001, p. 7). Women articulated a number of reasons as to why they had consented to such agreements. They stated the consensual arrangements occurred for the following reasons; because solicitors advised their clients about the current

trend by Judges to order contact at interim order stage, they consented because they felt this was the only arrangement their partner would agree to; or were unwilling or did not have the financial resources to continue to fight the matter in court.

Evidence from other research confirms this and suggests that women are continually pressured to agree to residency and contact agreements that are unworkable and unsafe. The most recent research on this reported by Kaye, Stubbs and Tolmie (2003) indicated that whilst 43.9% of agreements about residence and contact were mostly finalised by consent orders, that there was evidence to suggest that these private agreements should not necessarily be assumed to be 'truly consensual' (p.11). Armstrong (2001) reports that women felt that not agreeing to such arrangements made them appear uncooperative and difficult. Increased funding for legal aid is necessary for women living with violence so that safe arrangements can be negotiated without exposing them to intimidation and abuse.

Current obstacles to the Family Court's ability to make orders for the child's safety

Rendell el al have highlighted concerns about limited evidence available at interim hearings that provide the court with the ability to adequately assess the potential risks to the child when there are allegations of domestic violence and abuse. The authors question whether the court can make adequate decisions about residency and contact arrangements at interim hearings that are in the best interests of the child.

Rhoades, Graycar and Harrison (2001), in their research into the operation of the Family Law Reform Act 1996, suggest their findings demonstrate that:

> 'interim residence orders have been made on the basis of ensuring that one parent does not obtain a tactical advantage over the other before the final hearing, rather than an assessment of the child's best interests or the "existing arrangements" principle. That is, decisions are being made on the basis of the parent's interests (or more

accurately, the interests of the parent who is not the existing primary caregiver), rather than on the basis of the child's welfare.' (p. 81)

They note that despite the express statement of the Full Court in *B and B* that the reforms had not created a presumption in favour of contact, and that the child's best interests are the ultimate determinate of parenting orders, there has been a shift to ensuring contact is maintained until the final hearing, despite the risks of harm to the child.

The comparison of pre and post Reform Act interim cases showed there has been a dramatic reduction in the proportion of orders suspending contact at interim hearings since the reforms were enacted. While orders for 'no access' were made in 24% of the 1996 judgments, only 4% of the 1997 interim cases resulted in an order for 'no contact' (Rhoades 2000, p.127). This is interesting in light of the findings about judgements concerning 'no contact' at final hearings. Rhoades et al found that when the evidence of domestic violence is adduced and tested, contact was denied in 21% of the pre-reform Act judgements, and a similar proportion (23%) of final judgements made after the reforms.

Clearly, this suggests an alarming trend, at interim order stage at least, that judges are reluctant to order 'no contact' orders regarding the non-resident parent who has been shown to be abusive. The ramifications of this are that many children are then being exposed to situations where 'contact' let alone 'residence' is not in their best interests. It is asserted that this would be even more difficult if amendments to the Family Law Act were enacted that promoted shared residency as a right for both parents.

Rathus, Rendell and Lynch in their report *An Acceptable Risk: A report on Child Contact Arrangements* when there is violence in the family, concur with Rhoades et al and suggest that a pro-contact culture has emerged since the 1996 Family Law reforms. They highlight that the 'right to contact' principle has been given greater emphasis by most practitioners and judges than the

domestic violence aspects of the reforms (Rathus, Rendell & Lynch 2001, p.2).

The trend identified above, which has occurred without endorsement of a presumption of contact, will be strengthened if there was a presumption about shared residence.

A further concern is the time delay between interim hearings and matters proceeding to a final determination. This results in more extended timeframes where children are being exposed to ongoing abuse and left in vulnerable and unsafe environments.

Effective responses

The Family Law Reform Act 1996 introduced clear objects and principles (s.60B(2)), subject to the paramount consideration of 'best interest of the child', as defined under s.68F(2) of the Act.

Section 60B(2) states the four principles as:

1. Children have a right to know and be cared for by both parents, regardless of whether their parents are married, separated, have never married or have never lived together; and,
2. 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
3. Parents share duties and responsibilities concerning the care, welfare and development of their children; and,
4. Parents should agree about the future parenting of their children.

In light of Rhoades et al's observations about the trend for primacy of 'right of contact' over other factors identified as in the best interests of the child, we propose that an additional principle be added to this section as an overriding presumption. This principle highlights children's rights to safety and emotional

wellbeing as equal to or greater than all other principles and objects of family law. The principle could be stated as follows:

> 'children have the right to be free from all forms of physical, sexual, or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.'

This reflects the text of the UN Convention on the Rights of the Child, Article 19(1).

Within Australia initiatives such as the Columbus (WA) and Magellan (Vic) projects have been specifically developed as early intervention programs for cases where child abuse and domestic violence allegations with child protection implications have been made in the context of family law proceedings. A multi-disciplinary approach is taken to gather information, coordinate a case management response and conduct risk assessments that can be presented to the court at the interim hearing. This ensures early identification and fast tracking of such cases where effective case management can assist the court in determining what is in the child's best interests.

The evaluation of the Magellan pilot program was extremely positive. In comparison with an earlier study of child protection cases within the Family Court, the pilot program reduced the number of hearings by almost 50 per cent, from an average of five court events to three and reduced the time taken by almost 50 per cent, from an average of 17.5 to 8.69 months. Cases proceeding to a judicial determination were reduced from 30 per cent to 13 per cent and the incidence of highly distressed children was reduced from 28 to 4 per cent. There was also a reduction in the cost of cases, attributed to the investment of resources in the very early stages of the disputes rather than towards the end (Brown et al. 2001).

Other countries such as New Zealand have taken specific steps within their legislation to incorporate principles that give priority to the safety of the child and the vulnerable (non offending) parent. New Zealand lawmakers have resiled against a shared parenting presumption. The New Zealand Law

outlines very specifically that it is an act of psychological abuse if one causes the child to witness physical, sexual or psychological abuse of a person with whom the child has a domestic relationship. Further safeguards are laid out for the court and its advocates. The legislation requires that if there are allegations of abuse, then the court must decide on their validity in making decisions about the best interests of the child. The result of this is that the court shall not give residence or supervised contact to any parent unless the court is satisfied that the child will be safe.

Other tools utilised within the New Zealand legislation include the use of risk assessment reports, which officers of the court must complete. Advocates have noted that the advantage for children in these circumstances is that the violence they are living with is contextualised rather than seen as a separate and trivialised issue. Such risk assessment measures ensure that the offending parent and child are given the opportunity to voice their wishes about joint residence arrangements. The parent who is abusive is also given the opportunity to demonstrate what steps they have taken to prevent further violence from occurring.

Risk assessment is a critical issue when assessing the efficacy of a presumption of shared residence. A presumption in favour of shared residence arrangements assumes that all parents pose similar risks to children. As the field has developed a more comprehensive understanding of the responses required to effectively protect women and children from violence and abuse, the importance of utilising risk assessment frameworks and tools has emerged.

Those working with men who are abusive clearly state that it is not useful to assess all men perpetrating violence on their partner as posing equal risk. Efforts to determine those who have a genuine desire to change their attitudes and behaviour are required if the court is to ascertain whether men who have been violent pose an ongoing risk to their ex-partner and children.

Conclusion

Sudermann and Jaffe (1999) highlight the following points in situations where there are allegations of violence:

- 'Safety planning has to be the central focus rather than the promotion of the children's relationship with the visiting parent
- Assessing the lethal nature of the relationship is more important than asking the parents to put the past behind them
- Assessments have to include measures of the nature and impact of violence
- Specialized services such as supervised visitation centres and staff trained in woman abuse are essential.' (Sudermann & Jaffe 1999, p. 37).

Prior to the 1996 reforms, women's legal groups thought that the addition of violence as a factor to be taken into account when determining a child's best interests gave much needed recognition to the impact of direct and indirect violence on children (Armstrong 2001, p. 140). To consider shared residence arrangements as a fundamental or overarching right, once again ignores the criticisms of the most recent amendments to the Act, that certain principles about the 'right to contact' work against ensuring that the safety and welfare of children is paramount. Contemplating that children should spend equal amounts of time with a supportive parent and one whose behaviour has emotional and physical consequences on them trivialises the impact of domestic violence on children and young people and operates in a counterproductive way to safeguarding the rights of children as paramount. Shared residence and contact is often not going to be in the best interests of the child.

The FLA should be amended to clarify what is meant by "shared parental responsibility", and to make it clear that there is no presumption of shared residence. The Act should also make clear that there is no duty of consultation when exercising day-to-day parental responsibility. If presumption of shared residence were to be introduced into the legislation,

the capacity of the FLA to provide for the safety and wellbeing of women and children will be seriously damaged, following a trend introduced by the 1996 reforms. If it were to be introduced, at the very least a presumption that a child has a right to be free from violence should be included and drafted so as to give it greater importance than the right to shared residence.

It is argued that unless family violence considerations are given due weight, women and their children will continue to be exposed to further violence.

Recommendations

It is recommended that:

1. The Court make resources available at the interim order stage to properly assess the risk to children and young people when allegations of domestic violence are made;

2. The safety of children should be an overriding principle taken into consideration when assessing shared residency arrangements and the Court not make an order that exposes a child to an unacceptable risk of family violence;

3. The future risk of violence being perpetrated on children living with domestic violence be given due weight and be seen as a factor rebutting the presumption of shared residence; and

4. Consideration be given to implementing practices demonstrated by the Columbus and Magellan projects that allow cases involving domestic violence and child abuse allegations to be tagged and properly assessed by the court and associated professionals so that children and young people's safety is ensured.

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