

Hi all please find below the text of a Bill which has been read in the House ([www.aph.gov.au](http://www.aph.gov.au)) providing for a presumption of joint residency of children after separation. Following that is a summary of arguments against. Please lobby. Elspeth

## **Family Law Amendment (Joint Residency) Bill 2002**

Division 10AJoint residency

Subdivision A

What this Division does

### **68MA What this Division does**

This Division recognises the fundamental right of every child to experience the love, guidance and companionship of both parents after their separation or divorce by assuring a child of frequent and continuing contact with both parents and to encourage parents to share the rights, duties and responsibilities of child rearing.

### **68MB Meaning of *joint residence order***

In this Division, *joint residence order* means an order made under subsection 64B(3) designating both parents as a child's residence providers, and providing that residency of the child is shared in such a way as to assure the child of frequent and continuing contact with both parents. The child's contact with each parent must be as equal as possible. A joint residence order obligates the parties to exchange information.

Subdivision B

Parenting orders and parenting plans

### **68MC Parenting orders**

(1) In deciding to make a residence order in relation to a child, the court must regard the best interests of the child as the paramount consideration, as set out in subsections 68F(2) and 68F(3), in the following order of preference:

- (a) to both parents jointly in a joint residence order;
  - (b) to either parent;
  - (c) to any other person deemed by the court to be suitable and able to provide an appropriate and stable environment.
- (2) In considering whether to make an order under paragraph (1)(b), the court shall have regard, with all the factors set out in subsections 68F(2) and 68F(3), to which parent is more likely to allow the child frequent and continuing contact with the non-residence provider parent, and may not determine a parent as a designated residence provider because of the parent's gender or race.
- (3) The parent requesting to be the designated residence provider has the burden of proving that a joint residence order would not be in a child's best interest.

(4) The parents may agree to a residence order in favour of one parent.

### **68MD Parenting plans**

In making a residence order, the court in its discretion may require the submission of a plan for the implementation of the parenting order.

### **68ME Presumption**

- (1) There is a rebuttable presumption that joint residence orders are in the best interests of the child.
- (2) The presumption in favour of a joint residence order may be rebutted by showing that it is not in the best interests of the child, after consideration of clear and convincing evidence with respect to all the factors in subsections 68F(2) and 68F(3).

## 68MF Reasons

(1) If the court declines to award a joint residence order, the court shall state in its decision the reasons for denying the award.

(2) An objection by a parent to a joint residence order is not a sufficient basis for a finding that a joint residence order is not in the best interests of a child, nor is a finding that the parents are hostile to each other.

(3) A statement that a joint residence order is not in the best interests of a child shall not be sufficient to meet the requirements of this Division.

## 68MG Modification

(1) A joint residence order may be modified or terminated upon the petition of one or both parents or on the courts own motion if it is shown that the best interests of the child require modification or termination of the order.

(2) In an application for modification or termination, the court shall consider evidence of substantial or repeated failure of a parent to adhere to the plan for implementing the joint residence order.

(3) The court shall state in its decision the reason for modification or determination of the joint residence order if either parent opposes the modification or termination order.

(4) Any order specifying a parent as the child's designated residence provider may be modified at any time to a joint residence order.

## 68MH Records

Notwithstanding any other provision of law, unless the court orders otherwise, access to records and information pertaining to a minor child, including but not limited to medical, dental and school records, shall not be denied to a parent because the parent is not the designated residence provider.

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Some arguments against this are:

1. The perspective emphasises a 'parents' rights' approach not a 'child's best interests' focus.
2. Current law assesses each child's situation in decision-making. A one-size-fits-all approach will diminish children's rights to have each individual's unique interests weighed by the court.
3. There are critical and urgent flaws in the Australian family law processes supporting children's safety which need addressing : see Family Law Council Final Report on Family Law and Child Protection:

[www.ag.gov.au/www/flcHome.nsf/Web+Pages/6FE4627A8A8B9BD4CA256C5B00101D85](http://www.ag.gov.au/www/flcHome.nsf/Web+Pages/6FE4627A8A8B9BD4CA256C5B00101D85)

The report details how the current federal/state interface routinely fails to protect children with severe consequences. It calls for a Federal Child Protection Service to better inform the courts of risks to children's safety. While the serious flaws in the current system exist the grave risks to children exposed to violence would only be exacerbated by introducing a formulaic approach to post-separation parenting arrangements.

4. A further reform is required to the Family Law Act 1975 Section 68F which provides the list of factors a court is to consider in determining a child's best interests. The relative weighting of each factor is up to the judge, and currently the risks to children's safety are not given primacy in the process of determining a child's best interests - New Zealand and California are two jurisdictions which have made safety of the child a first condition of determining its best interests. Reforms were only enacted after a spate of deaths. (Note that the Australian Institute of Criminology

Data on Child Homicides (Strang, H. 1996 AIC Trends and Issues paper No. 53) identifies family disputes as the most common context (35%) of child murders.) A briefing paper on this reform direction by NZ academic Ruth Busch is attached fyi.

Splitting parenting responsibilities 50/50 provides for an immediate reduction in child support obligations for payer parents. NCSMC considers the proposal of shared parenting is underpinned by the substantial economic rewards to payer parents (mainly fathers, but also new wives) without regard to children's interests. The research literature on shared parenting indicates that: where both parents have been actively involved in the child's life prior to separation and where this is a voluntary arrangement by parents who can co-operate in the child's interests and where parents have some geographic proximity, shared parenting can work well. Where mothers/children have been subjected to violence by the father, safety concerns prohibit trust or co-operation. For men who use violence, shared parenting is a continuing opportunity to control and abuse all members of the family regardless of their separation. It functions as a barrier to mothers leaving violent relationships because they know they will be forced to continue the relationship through the children. The Queensland Women's Legal Service provided a research report which details how mothers return to violent offenders because they cannot protect their children during contact visits and if they return to the relationship they can at least attempt to stop the abuse of the child. Rendell, K., Rathus, Z. and Lynch, A., (2000), An unacceptable risk: A Report on child contact arrangements where there is violence in the family, Brisbane, Women's Legal Service.

5. The research data on men's parenting behaviour in relationships (see Michael Bittman's time use research) doesn't show that men in relationships have significantly increased parenting time with their children over the past decade. With 95% of separating families reaching post separation parenting arrangements by agreement, the fact that nine out of ten children live with their mothers after separation represents a statistically stable social norm wherein unpaid care work is distributed largely to women - both in relationships and after they have ended. Men's full-time working lives do not typically accommodate being the unpaid primary carer for young children. The roles that each parent fulfilled within the relationship tend to be continued after it ends.
6. In summary The 50/50 shared parenting presumption represents a minority view which is not reflected in actual practices in Australian society. It is inaccurate to claim that 90% of children live with mothers after separation because of Family Court decisions when the statistics on Family Court decision-making show that, of the population of separating parents who seek Court orders (many don't), only 5% of cases result in judicial determination and the rest are settled by agreement. A 50/50 presumption would be a diminution of children's rights in family law from the current position where each child's unique interests are considered, to a formulaic approach which offers substantial financial benefits to fathers in the form of child support reductions and would exacerbate the existing drastic system failure in protecting children exposed to violence.

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