



Concerns in relation to

the draft

Guardianship of Children

(Presumption of

parental equality)

Bill 2007



Introduction

Following the briefing on the draft Guardianship of Children (presumption of parental equality) Bill 2007, Women's Aid would like to detail our grave concerns over some aspects of the Bill.

We appreciate the consultative process that the Labour party is engaged in over this Bill and the fact that NGOs were involved from an early stage and we acknowledge the hard work and that has gone into the drafting of this Bill.

While we broadly support Guardianship for unmarried fathers, we have extremely serious concerns on the Section of the Bill that deals with presumption of joint custody and equal time because it has serious implications for the safety and welfare of many separating families. In light of these concerns, we will not be supporting changes regarding the introduction of a presumption of joint custody and equal time in Family Law.

Guardianship

Women's Aid supports guardianship for unmarried fathers. It is our view, however, that those who share guardianship of a child should be able to avail of the same protection from domestic violence as unmarried or co-habiting couples. The Domestic Violence Act should be therefore expanded so that all parents, married and unmarried, regardless of cohabitation, have access to the same protection under the DV Act.

Under the current Domestic Violence Act:

- unmarried partners who are not living and have not lived together in the past but have a child in common, are not protected.
- unmarried partners who lived together can only apply for a Barring Order if the applicant has lived with the respondent for 6 of the 9 previous months and has equal or greater ownership rights to the family home
- unmarried partners who lived together can only apply for a Safety Order if the applicant has lived with the respondent for 6 of the 12 previous months

In effect, this means that there will be cases where, under the proposed Bill, both parents will be granted guardianship, but they will not be able to avail themselves of the protection of the DV Act in cases where domestic violence occurs.

For example, unmarried parents who have never cohabited are not covered by the Domestic Violence Act. Should one of the parents experience domestic violence at the hands of the other, they would not be eligible for protection under the Act. Because parents with joint guardianship generally must keep contact with each other in relation to decisions regarding the child, this may provide the violent partner with opportunities to continue harassing and abusing the other parent. It is imperative that the same protection from domestic violence available to married or cohabiting parents should be available to parents who have never lived together or have ceased to do so for longer than the required period.

Exemption and provisions

The draft Bill contains some exemptions to joint guardianship in the following cases:

1) where one parent has become the father of the child as a result of non-consensual intercourse. We agree with this exemption, but we are concerned that this exemption can be overridden if the father applies to the court for guardianship with the consent of the mother.

What protection from coercion will be given to the mother? Will there be a review from the court? Will this apply in case of incest?

2) where the parents agree by deed that one parent will not be the guardian. This deed however can be revoked.

What are the circumstances and procedures for revoking the deed?

3) when the parent does not wish to assume guardianship in respect of the child, or the respondent is



unknown or the whereabouts cannot be traced, **and** that the position of the respondent as a guardian of the child is inimical to the child's welfare.

Women's Aid believes that where the position of the respondent as a guardian is inimical to the child welfare, this should be a ground in itself not to grant guardianship.

In relation to the proposal to grant automatic Guardianship to unmarried fathers retrospectively, **would this also apply to cases that have already been adjudicated and where a decision was made not to grant Guardianship?**

Presumption of joint custody and equal time

The Bill provides that in any proceedings relating to custody to/ access of a child it shall be presumed, until the contrary is proven, that it is in the best interest of the child:

- that both parents should have custody of the child jointly
- that the child should spend approximately equal time with both parents
- that parents should cooperate and consult with each other in relation to decisions concerning the child

Women's Aid has great concerns that these presumptions are not child focused and would particularly disadvantage women and children experiencing domestic violence and child abuse.

Our concerns are as follows:

- The presumption of equal time with each parent is not child-focused and not necessarily in the best interest of the child. The proposed legislative changes shift the focus of the proceedings away from the best interest of the child and the unique situation of each family towards a pre-determined outcome, allegedly best for all families.
- While equal time may work for some children, a presumption does not take into account age, developmental stage, child preferences and interests, relationships with parents, whether the separated parents live close to each other, whether they both have the time, flexible working arrangements and the financial resources to make this work.
- Research from other jurisdictions has proven that equal time works best for separating families where the ex-partners manage to stay on friendly terms, live relatively close and can support this arrangement from a financial and practical point of view. This arrangement is based on parents being able to maintain a cooperative, non-abusive, and non-conflictual relationship after separation. Clearly these are families that are most likely to make their own arrangement after separation without recourse to the court. Families who are unable to make their own arrangements and seek judicial determination of custody, are most likely to be in high conflict and therefore the least likely to be able to make such a complex arrangement work
- Joint custody and equal care arrangements may entail risks for children's emotional and psychological development, especially if they are very young or if there is a high level of conflict and non-cooperation between the parents.

Specific concerns for women and children experiencing domestic violence

Woman's Aid has serious concerns regarding the impact of a presumption of joint custody and equal time on women separating from abusive partners.

The issue of domestic violence in the context of separating families, as in Irish society in general, is not a marginal one.

According to the National Crime Council Report on Domestic Abuse in Ireland, about 1 in 7 women have experienced **severely** abusive behaviour of a physical, sexual or emotional nature from a partner at some time in their lives. One woman in 11 has experienced **severe physical** abuse in a relationship. The same report also states that there is a **clear link between domestic abuse and**



marital breakdown, with 60% of separated or divorced women having experienced severe abuse [1].

In 2006 the District Court dealt with 5,027 applications for custody and access and with 9,924 applications under the Domestic Violence Act. While there is no way of knowing how many related to the same family, many custody and access orders are made in the context of domestic violence.

Both research and our direct work experience, confirm that violent men use contact and shared parenting as a way to continue controlling, monitoring, abusing and intimidating their ex-partner. Joint custody and even more so, equal time, would provide abusive men with an ideal tool to continue their abusive behaviour through a number of tactics, such as direct abuse of the mother at change over times, using children to relay threats and abusive messages, not returning the children on time or threatening to abduct them, neglecting the children when in their care, monitoring the mother through the children.

Separation is a period of heightened risk for women experiencing domestic violence. Risks around separation and child custody /access for women escaping domestic violence have been well documented, to the extent that both factors are identified as risk indicators in lethality risk assessment tools across various jurisdictions.

It is extremely worrying therefore that domestic violence is not even named in the proposed Bill, and that safety of the child and of the abused parent is not stated as a consideration when deciding on custody arrangements.

It is also unrealistic to assume that women separating in a context of domestic violence will be able to "consult and cooperate" with the abusive partners in relation to all decision, events and other matters of importance concerning the child. This requirement will simply put women at an increased risk of continuing abuse and give abusive men more opportunities to harass them.

Mediation is also highly inappropriate in cases where domestic violence is present, as one party would be highly intimidated by the other and would be unable to negotiate a safe and fair outcome for themselves and their children. Women may agree to disadvantageous arrangements or may not be able to freely articulate their fear and concerns in the presence of the abuser.

Links between domestic violence and child abuse

Research has proven that there are strong links between domestic violence and child abuse, with the two often co-occurring in a family. Moreover, witnessing domestic violence is in itself a form of abuse and it has been proven to have detrimental consequences for children [2].

Protecting the mother from violence is in these cases the best form of child protection. It is Women's Aid's experience that in the Family Law Court there is no risk assessment of children witnessing domestic violence and that domestic violence is often considered "a separate issue" to custody arrangements, with little understanding of the damaging impact it has on the child.

We are strongly concerned that a presumption of joint custody and equal time will put children at risk through either direct abuse and/or witnessing the abuse of their mother.

Presumption of joint custody and equal time

Once a particular post-separation arrangement becomes a presumption in Family Law, it is very difficult to rebut it. The presumption would establish this particular custody arrangement is appropriate, without any information on the specific case to support this conclusion, and would shift the burden of proof to the party seeking to prove that joint custody/equal time is inappropriate.

The experience from other jurisdictions where shared parenting and equal time have been made presumptions in Family Law, is that this presumption is extremely difficult to rebut and women who raise domestic violence or child abuse in Family Law Court are accused of making false allegations and are judged uncooperative and obstructive, even if the allegations are often not even investigated.



Women's Aid research in Ireland found that at present the Irish Courts are not dealing appropriately with access and custody cases where domestic violence is also present, that unsafe access to children is often granted and women suffer continuing abuse at the hand of ex-partners through child custody and access arrangements [3]. Even when domestic violence against the mother is proven, the "right to contact" with the abusive father often overrides the right to safety of the mother and of the child.

We believe that the proposed Bill would only exacerbate this situation.

It is Women's Aid view that joint custody and equal time may be an option in some cases, but should not be a presumption in Family Law.



References

- 1 National Crime Council and Economic and Social Research Institute, *Domestic Abuse of Women and Men: Report on the National Study of Domestic Abuse*, 2005, The Stationery Office, Dublin
- 2 World Health Organisation, (2002) *World Report on violence and health*, World Health Organisation, Geneva
- 3 Women's Aid, (2003), *Child custody and access in the context of domestic violence*, Dublin