



The University of Sydney



**The Family Law
Reform Act 1995:
Can changing legislation
change legal culture,
legal practice and
community expectations?**

Interim Report, April 1999

by

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This research was conducted with the financial assistance of the Australian Research Council and the Family Court of Australia through the ARC's Collaborative Grants Scheme (now SPIRT).

We would like to thank the many judicial officers, legal practitioners, counsellors, mediators, domestic violence workers and others who gave unstintingly of their time in a variety of ways to make information available for this project.

We are also grateful to the Family Court staff who assisted with access to judgments, publication of the report and technical support.

Additional research assistance was provided by Suzanne Christie.

Despite the efforts of all involved the authors would like to point out that responsibility for the content of the report lies solely with them.

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EXECUTIVE SUMMARY

THE RESEARCH PROJECT

This is an interim report describing findings of a research project undertaken during 1997 and 1998 into the practical impacts of changes to the *Family Law Act* that were effected by the *Family Law Reform Act 1995* (“the *Reform Act*”). The reforms came into operation on 11th June 1996. The research project, which is funded by an Australian Research Council grant to the University of Sydney and the Family Court of Australia, commenced in March 1997. The aim of the project is to assess the immediate and longer term effects of the changes to the children’s provisions of the *Family Law Act* over a three year period. This report covers the findings of that investigation to date, particularly the extent of the changes to family law practice and the outcomes of disputes about children, measured against the aims of the *Reform Act*. The following issues are addressed in this report:

1. How (if at all) does the advice given to separated parents differ from that given before the *Reform Act*?
2. Are contact parents given the opportunity to spend more time with their children than access parents did before the *Reform Act*?
3. Are contact parents given the opportunity to exercise more responsibility for their children than access parents did before the *Reform Act*?
4. Have litigated disputes between parents reduced or increased as a result of the *Reform Act*?
5. To what extent (if at all) have orders for contact been affected by the provisions dealing with family violence and the principle that “children have a right of contact, on a regular basis, with both their parents”?

The research into these questions was undertaken by way of personal interviews with Family Court judges and judicial registrars, and family law solicitors (including private and community legal centre practitioners) and barristers in Sydney, Parramatta, Newcastle, Melbourne/Dandenong, Brisbane and Adelaide. In addition, family law solicitors, Family Court counsellors and private and community based family counsellors and mediators throughout Australia were surveyed by way of questionnaires and semi-structured personal interviews. The researchers received 166 completed questionnaires from solicitors, 55 completed questionnaires from Family Court counsellors, 113 completed questionnaires from private and community counsellors and 46 completed questionnaires from private and community mediators. Thirty (30) Family Court judges (including Judicial Registrars), 45 family law solicitors and 13 Family Court counsellors were interviewed. Of the 166 solicitors who completed questionnaires, 71 were accredited specialists in family law, and 125 had practised family law for 10 years or more. Several domestic violence services were also surveyed. Secondly, the researchers observed hearings of interim children’s matters in the Melbourne, Brisbane, Sydney, Adelaide, Parramatta, Dandenong, Newcastle and Coffs Harbour registries of the Family Court, as well as a circuit court sitting in Bendigo. Thirdly, a selection of 209 pre- and post-*Reform Act* interim and final judgments and orders were analysed and compared.

SUMMARY OF FINDINGS

1. How (if at all) does the advice given to separated parents differ from that given before the *Reform Act*?

The effects of the reforms upon advice to clients have not been uniform across all stakeholders. There was a noticeable divergence between the responses to the reforms of solicitors on the one hand, and counsellors (both Court and private and community-based practitioners) and mediators on the other, with the former generally being more cynical about the government's shared parenting aims and more pessimistic about the likelihood of change than the latter. Many lawyers appear to be tired of family law reforms like the *Reform Act*, which, in the words of one solicitor, "promise much, create a lot of confusion and deliver very little". Practitioners from each professional group were sometimes critical of the advice to clients given by members of other professions. For example, some solicitors criticised counsellors for 'pushing shared parenting' and pressuring women into unsafe contact arrangements, while some counsellors and mediators were critical of lawyers and judges for failing to make changes to their practices to reflect the 'shared parenting' and 'right to contact' aims of the reforms.

Responses to the questionnaires suggested that many legal practitioners continue to treat the concept of 'residence' as a change from 'custody' in name only, whereas the majority of counsellors reportedly appreciate that the intention of the legislative changes was to alter fundamentally the previous custody and access division of responsibilities. These results may reflect solicitors' greater cynicism about the co-parenting reform agenda. It seems apparent that two years down the track, some legal practitioners are still becoming accustomed to the new terms, and that the concept of 'residence' remains alien to the vast majority of separating parents who seek assistance to resolve disputes about the arrangements for their children. On the other hand, the majority of solicitors who were surveyed have changed their advice to clients about post-separation parental responsibility since the *Reform Act* came into operation, while relatively few counsellors and mediators said they had altered their advice to parents. The reason for the lack of change among the latter groups appears to be that many see the reforms as simply reflecting longstanding counselling / mediation practices, particularly with respect to the emphases on shared responsibility for parenting and the child's right to contact with both parents. For example, counsellors and mediators were more likely than solicitors to encourage clients to use a shared parenting arrangement rather than a 'traditional' residence and contact arrangement.

There were also differences within each group in the advice given to clients. For example, community legal centre solicitors in particular have found it increasingly difficult to obtain legal aid funding for women who want to oppose contact on the grounds of domestic violence concerns, because of the interaction of the 'right to contact' principle with funding cuts, and have had to alter their advice to clients accordingly. In addition, it appears that a practitioner's advice to parents is often based upon their personal views of the reforms, rather than a strictly 'professional' view. For example, for a large number of those people who were interviewed, their beliefs about whether or not access fathers had been unfairly treated under the previous legislation affected their 'reading' of the *Reform Act*. The advice given to clients by solicitors, and to a lesser extent by counsellors and mediators, has also

been affected by the practices of the judges and judicial registrars in their local registries since the reforms came into operation. The main examples of this involve advice about relocation and interim applications for contact.

A number of solicitors and counsellors have found the nature of their work has become more difficult or complicated since the reforms, especially with respect to formulating parenting arrangements and negotiating settlements. This was said to result from the wider range of parenting arrangements available under the *Reform Act*, including ‘symbolic’ residence/residence orders, and from having to deal with ‘angry fathers’ who incorrectly believe the reforms promise them ‘greater rights’ or ‘equal time’ with their children.

None of the professional groups who were surveyed are regularly using parenting plans, and the Court’s statistics show that far fewer parenting plans have been registered than were child agreements before the *Reform Act*. Similarly, the vast majority of solicitors have not changed their advice to clients about the use of primary dispute resolution services since the reforms were introduced.

2. Are contact parents being given the opportunity to spend more time with their children than access parents did before the *Reform Act*?

The interviews with judges and judicial registrars, and the review and comparison of interim cases, suggest there has been a shift in the focus of parental disputes about interim arrangements from ‘who should be the custodial parent?’ to ‘how much contact is in the child’s best interests and/or should the contact arrangements be supervised?’. Whereas in the pre-*Reform Act* interim cases, both interim custody and access were usually ‘live issues’, the majority of post-*Reform Act* interim hearings are essentially contested applications for contact (even though an application for interim residence may be included). Solicitors and counsellors also report that fathers are frequently seeking more liberal contact arrangements than before the reforms, and noted an increase in the number of fathers seeking contact or shared residence orders. The observations are supported by the Family Court’s statistics which show that applications for contact orders have increased since the *Reform Act* came into operation. Although the majority of surveyed practitioners believed the amount of contact time being ordered has not changed, some ‘marginal’ shifts were noted, and many said that fathers are obtaining orders for contact in circumstances where they would not have been given access before the reforms (for example, because of a history of domestic violence). Some solicitors also noted that fathers often obtained agreements for liberal contact, or shared residence, after encouragement from counsellors. The responses to the questionnaires support this observation, indicating that counsellors are generally more supportive than lawyers of shared parenting arrangements, and more likely to encourage clients to make such arrangements. A number of counsellors were also critical of solicitors, judges and registrars for failing to ‘adapt’ to the co-parenting ideal of the reforms when framing parenting orders.

The rate of orders refusing contact at an interim hearing has declined dramatically since the introduction of the reforms. Although the majority of interim contact applications involve allegations of potential harm to the child, usually because of domestic violence, it is now rare for contact not to be ordered at an interim hearing. In some regions, post-*Reform Act*

orders for children to live ‘week about’ with each parent until trial are not uncommon, and have been made despite allegations of domestic violence. Such orders have been made on the basis that it would be unfair to create a status quo in favour of one parent before the allegations are tested at trial. These changes contrast with the outcomes of final hearings, in which the rate of orders refusing contact does not differ markedly from that for ‘no access’ orders prior to the introduction of the *Reform Act*. It is clear from the review of judgments that the shift in interim orders is, at least in part, attributable to the *Reform Act* principles, particularly the ‘right to contact’ principle in s60B(2)(b) and the idea of parental ‘equality’ which is said to be in keeping with the ‘spirit of the reforms’. However, the increase in delays in getting to a final hearing may also have contributed to this outcome, by making judges more reluctant to suspend contact on the basis of untested allegations.

3. Are contact parents given the opportunity to exercise more responsibility for their children than access parents did before the *Reform Act*?

One complaint made by counsellors was that lawyers and judges have been continuing to frame orders in a way that recreates the ‘power imbalance’ of the former custody and access orders. However, although many of the surveyed final orders provided for the resident parent to have sole day to day responsibility for the children, this was usually a consequence of findings of fact by the trial judge that indicated it was not appropriate for the contact parent to have such responsibility, or occurred when contact had been refused altogether. The majority of parenting orders make no reference to the division of parental responsibility, or provide for each parent to have day to day responsibility for the children while they are living with that parent. It is as yet unclear whether such orders effectively give contact parents more responsibility than access parents were able to exercise under the previous legislative scheme.¹ However, it is apparent from the responses to questionnaires that many counsellors, and some solicitors, believe this to be the case. It is also clear that many contact parents believe they have a ‘right’ to be consulted generally about day to day decisions.

On the other hand, many respondents from each group complained that contact parents are not exercising or not being permitted to exercise any greater responsibility in practice for their children than had been exercised by non-custodial parents before the reforms. The majority of solicitors, counsellors and mediators who were surveyed said there continues to be a divergence between the theory and practical reality of shared parental responsibility after separation for a variety of reasons, including:

- the unwillingness of contact parents to exercise responsibilities, leaving the parent with whom the child lives to do the bulk of the work;
- the unwillingness of ‘hostile’ resident parents to share the care of children or parent co-operatively;

¹ The Full Court of the Family Court suggested in obiter in *B and B (Family Law Reform Act 1995)* (1997) 21 Fam LR 676, that a requirement of consultation upon the resident parent in relation to day-to-day matters was impracticable, but that “consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like”: at 730. On its face, this does not depart from the division of responsibilities created by custody and access orders under the previous legislation.

- the persistence of the proprietorial ‘custody’ and ‘access’ concepts in the community;
- the tendency to replicate pre-separation caregiving roles in which it is usual for one parent (usually the mother) to be responsible for the bulk of the caring work;
- the reality of the separation process which is not conducive to co-operation between the separating partners;
- the logistical difficulties of co-parenting across two households.

Many respondents from each group also commented on the use of the shared responsibility concept by one parent (usually the contact parent) to harass or continue abuse of the other parent (usually the resident parent), and some solicitors reported on the continued occurrence of contact parents who fail to exercise the contact they had sought and obtained.

4. Have litigated disputes between parents reduced or increased as a result of the *Reform Act*?

The Family Court’s statistics show there has been a marked increase in the number of applications for contact orders, as well as applications for residence/specific issues orders, since the *Reform Act* came into operation. In addition, there has been a substantial increase in the number of litigated disputes arising out of alleged breaches of parenting orders (‘Form 49 applications’). These results mirror the trends in the UK following the introduction of the Children Act 1989 (UK). In that jurisdiction it has been suggested that the increase in applications is at least in part attributable to the consequent “change in fathers' attitudes - contributing to a growing tendency to assert the importance of their role in their children's lives”.² The reports of some judges and solicitors who were interviewed for this project also suggest that many of the Form 49 applications are brought by unrepresented contact fathers, that many of these applications are unmeritorious and are used as a mechanism to harass the resident parent, and that much Court time is being wasted in dealing with them.

² Gwynn Davis, "Privatising the Family?" [1998] *Family Law* 614 at 617.

5. To what extent (if at all) have orders for contact been affected by the provisions dealing with family violence and the principle that “children have a right of contact, on a regular basis, with both their parents”?

The *Reform Act* creates something of a tension between the underlying principles set out in s60B(2) (particularly the ‘right to contact’ principle), and the requirement in s68K that the Court ensure that a parenting order does not expose a person to “an unacceptable risk of family violence”. It appears that the *Reform Act*’s ‘right to contact’ principle has been given greater emphasis by most practitioners and judges than the domestic violence aspect of the reforms. Many of those who were interviewed were unaware of the existence of s68K or the provisions of Division 11 which regulate the interaction of family violence orders and orders for contact. On the other hand, the overwhelming majority of practitioners and judges are familiar with the ‘right to contact’ principle, and many have consciously changed their practices or decision-making to accommodate it, particularly in relation to the issues of contact and relocation. The research suggests that an interim order refusing contact has become more difficult to obtain since the *Reform Act* came into operation, despite allegations of domestic violence, and that this is attributable, at least in part, to the ‘right to contact’ principle. There has also been an increase in applications for the return of resident parents who have relocated without the contact parent’s consent, and for injunctions to restrain a resident parent from moving. It appears that in some registries it has become more difficult since the *Reform Act* for resident parents to obtain permission to relocate, and that in many cases, the different outcome is the result of the judge’s reliance on the s60B(2) principles. Some judges have altered their practice to take account of the tension between the ‘right to contact’ principle and s68K, by making orders for indirect contact (for example, by way of cards and letters), where they would have refused access altogether under the pre-*Reform Act* legislation.

INTERIM REPORT

CHAPTER ONE: INTRODUCTION, BACKGROUND TO THE REFORMS AND OBJECTIVES OF THE RESEARCH

Introduction

This is an interim report of research undertaken during 1997 and 1998 into the practical impact of changes to the law dealing with children under the *Family Law Act 1975* (Cth).³ Those changes were effected by the passage of the *Family Law Reform Act 1995* (Cth) ("*Reform Act*"), which came into operation on 11th June 1996. This research project, which comprises an investigation of the effects of the *Reform Act* on parental disputes about children, commenced in March 1997.

The research is funded by an Australian Research Council grant to the University of Sydney⁴ and the Family Court of Australia. The aim of the project is to assess the immediate and longer term effects of the changes to the children's provisions of the *Family Law Act* over a three year period. The research has entailed an investigation of the background to the changes, and an examination of the extent of the changes to family law practice measured against the aims of the *Reform Act*. To date, that examination has explored a number of issues, including:

- the personal views of professionals involved in family law matters (lawyers, counsellors and judges) about the reforms;
- the extent of changes to the practice and advice of professionals involved in family law matters;
- the extent to which the reforms have led to an increase in shared residence arrangements being ordered or consented to;
- the extent to which the reforms have provided opportunities for increased contact between contact parents and their children;
- the extent to which the reforms have provided opportunities for increased responsibilities for children to be undertaken by contact parents;
- the extent to which a "presumption" in favour of contact has arisen because of the reforms, and in particular,
 1. whether it is now more difficult for resident parents to obtain an order suspending contact; and
 2. whether it is now more difficult for residence parents to obtain permission to relocate with the child;
- the extent to which the provisions dealing with family violence have led to changes in practice;
- how the provisions dealing with family violence interact with the s60B(2) principles, particularly the child's "right to contact";

³ See for a preliminary discussion of the research project, Margaret Harrison and Regina Graycar, "*The Family Law Reform Act 1995: Metamorphosis or more of the same?*" (1997) 11 *Australian Journal of Family Law* 327.

⁴ The grant was originally made to the University of New South Wales but was transferred to the University of Sydney when Professor Regina Graycar accepted an academic position there.

- the extent to which the principles in s60B(2) have led to changes in practice;
- the extent to which the reforms have increased or reduced disputes between parents about specific aspects of their children's care.

Questions about the extent to which the reforms have affected parental attitudes and agreements will be explored during the next stage of the research project.

The project so far has concentrated on canvassing the views of Family Court judges and judicial registrars and family law solicitors and barristers in Sydney, Parramatta, Newcastle, Melbourne/Dandenong, Brisbane and Adelaide. Family Court counsellors and private and community based family counsellors and mediators throughout Australia have also been surveyed by way of questionnaires and semi-structured personal interviews.⁵ Secondly, the researchers have observed hearings of interim children's matters in the Melbourne, Brisbane, Sydney, Adelaide, Parramatta, Dandenong, Newcastle and Coffs Harbour registries of the Family Court, as well as a circuit court sitting in Bendigo. Thirdly, a selection of reported and unreported pre- and post-*Reform Act* interim and final judgments and orders covering six Family Court registries have been reviewed and compared.⁶ For the purposes of the second stage of the research, a survey of separated parents who are considering arrangements for their children under the new law has commenced in Victoria, New South Wales and Queensland. In addition, staff working in domestic violence services, women's legal services, and child contact services in Victoria, Queensland and New South Wales have recently been surveyed.

This report contains a summary of the findings as at 30 December 1998. The assessment of the nature and extent of change flowing from the *Reform Act* is contained within the following framework:

1. How (if at all) does the advice given to separated parents differ from that given before the *Reform Act*?
2. Are contact parents given the opportunity to spend more time with their children than access parents did before the *Reform Act*?
3. Are contact parents given the opportunity to exercise more responsibility for their children than access parents did before the *Reform Act*?
4. Have litigated disputes between parents reduced or increased as a result of the *Reform Act*?
5. To what extent (if at all) have orders for contact been affected by the provisions dealing with family violence and the principle that "children have a right of contact, on a regular basis, with both their parents"?

It is important to note that other changes to the practice of family law occurred at about the same time as the reforms came into operation and these may have interacted with the

⁵ The researchers have received 166 completed questionnaires from solicitors, 55 completed questionnaires from Family Court counsellors, 113 completed questionnaires from private and community counsellors and 46 completed questionnaires from private and community mediators. Thirty Family Court judges (including Judicial Registrars), 45 family law solicitors and 13 Family Court counsellors were interviewed. Of the 166 solicitors who completed questionnaires, 71 were accredited specialists in family law, and 125 had practised family law for 10 years or more.

⁶ A total of 209 unreported judgments were reviewed.

reforms in a variety of ways which are difficult to measure. The changes include the introduction of simplified procedures in January 1996 and the implementation of more rigorous legal aid guidelines, including new “caps” on the amount of aid granted in family law matters in or about late 1996. This latter change resulted in a reduction in the availability of legal aid funding for family law matters generally.⁷ However the impacts were (at least initially) experienced differentially in the various States due to differing practices associated with the interpretation of the guidelines and the use of existing resources. Possibly a combination of more accessible procedures and the reduced availability of legal aid has led to an increase in the numbers of self-represented litigants, which has increased delays in hearings and arguably reduced settlement opportunities.⁸

Delays are also of concern. Currently the Court is failing to meet its performance standards in child matters in all registries, with average time from filing to hearing exceeding 70 weeks in 5 of 11 registries against a standard of 43 weeks.⁹ Such delays to final hearing increase the need for interim hearings in children’s matters as parents seek either to maintain the status quo in relation to their children, or have it altered before more time elapses. A recently completed Family Court survey has indicated that currently 35% of Family Court defended hearings, duty matters and directions hearings involve one or more unrepresented parties.¹⁰

Background to the *Reform Act*: Aims and Objectives

There have been several reviews of the *Family Law Act* since it came into operation, including two significant ones by Parliamentary committees,¹¹ as well as the Australian Law Reform Commission (ALRC) inquiry into Matrimonial Property.¹² In addition, the Family Law Council has reviewed and reported on a number of matters arising under the legislation, and the Australian Institute of Family Studies has undertaken several key studies, including a major study of the economic consequences of marriage breakdown.¹³ The most recent Parliamentary review, by the Joint Select Committee on the Operation and

⁷ J Giddings (ed), *Legal Aid in Victoria: At the Crossroads Again*, Fitzroy Legal Service, 1998.

⁸ See John Dewar, Jeff Giddings and Stephen Parker, *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland: Report* (1998), Chapter 3. The authors note that cases in the Family Court involving unrepresented litigants “can take much longer than those where parties are represented. Their failure to understand the rules of evidence often means that cases have to be adjourned; and they are less likely than represented litigants to settle in an O.24 conference or ‘at the door of the court’”. See also Rosemary Hunter, “Litigants in Person” (1998) 12 *Australian Journal of Family Law* 171; *In the Marriage of Johnson* (1997) 22 Fam LR 141.

⁹ Family Court of Australia *Annual Report 1997-98*, at 32.

¹⁰ *Survey of the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants*, Family Court Research Report (forthcoming).

¹¹ Joint Select Committee, “Family Law in Australia”, 1980; Joint Select Committee, “The *Family Law Act 1975*: Aspects of its Operation and Interpretation”, 1992.

¹² Australian Law Reform Commission, *Matrimonial Property*, Report No. 39 (1987).

¹³ Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, 1986; and Kate Funder, Margaret Harrison and Ruth Weston, *Settling Down: Pathways of Parents after Divorce*, 1993. The research on which these books were based formed part of the ALRC’s work on matrimonial property.

Interpretation of the Family Law Act, reported in 1992.¹⁴ The Committee had wide-ranging terms of reference, yet made only minor recommendations in relation to children's issues, focussing mainly on property issues.

A significant number of submissions to that inquiry, as to many of the others, were made by men concerned that their 'rights' were ignored by the Family Court and the legislation. Throughout the Act's history, there have been claims that the Court 'favours women' and 'discriminates against men'.¹⁵ One Family Court study of the outcomes of custody disputes opens by noting that the research was undertaken to explore claims by 'the Army of Men' that the Family Court discriminated against men in favour of women. It was claimed that men had a less than 2% chance of being awarded custody, a claim clearly refuted by the Court's research.¹⁶ Men's rights groups, and those sympathetic to their concerns, constituted a majority of those who made submissions to the 1992 Joint Select Committee.¹⁷

In the meantime, the Family Law Council had completed its report on Patterns of Parenting After Separation in 1992.¹⁸ One of the issues raised by the Council was the unsatisfactory nature of the language of guardianship, custody and access. It was acknowledged that, despite the attention often given to custodial parents (usually mothers) who allegedly 'thwart' attempts by non-custodial parents to have access to their children (a matter raised before the Joint Select Committee), a significant problem was the tendency of non-custodial parents to distance themselves from their children, to lose contact with them and to fail to support them. Having examined the changes in England, brought about by the *Children Act 1989* (UK), and in some other jurisdictions where the language of 'custody' and 'access' had been abandoned, the Council suggested that a move away from the 'win/lose' connotations of the notion of custody may encourage more 'non-custodial parents' to keep in contact with their children. The *Children Act's* focus on shared parenting was based on the view that "children who fare best after their parents separate or divorce are those who are able to maintain a good relationship with them both",¹⁹ and a

¹⁴ Joint Select Committee, *Family Law in Australia*, 1980; Joint Select Committee, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, 1992.

¹⁵ See, for example, Regina Graycar, "Equal Rights versus Fathers' Rights: The Child Custody Debate in Australia" in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender*, 1989; Miranda Kaye and Julia Tolmie, "Fathers' Rights Groups in Australia" (1998) 12 *Australian Journal of Family Law* 19; Caroline Milburn, "Angry Middle-Aged Men" *The Age* 9 December 1998.

¹⁶ Sophy Bordow and Frank Horwill, *The Outcome of Defended Custody Cases in the Family Court of Australia*, Research Report No 4, Family Court of Australia, 1983, at 1; Sophy Bordow, "Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome" (1994) 8 *Australian Journal of Family Law* 252. These studies found that fathers had a greater chance of being awarded custody in defended rather than undefended cases. The study of orders made in 1980 in the Melbourne registry of the Family Court found that 79% of orders, including, significantly, consent orders, vested sole custody (then 'care and control') in the mothers. In defended cases - 10% of the total cases - fathers obtained sole custody in 31% and when 'split decisions' were taken into account (either separating children, or joint custody), custody of at least one child of a family was awarded to the father in 44% of the cases.

¹⁷ Of the individual submissions received, 524 were from men and 148 from women.

¹⁸ *Patterns of Parenting After Separation*, A Report to the Minister for Justice and Consumer Affairs, prepared by the Family Law Council, April 1992.

¹⁹ England, Law Commission, *Review of Child Law: Guardianship and Custody*, Report No. 172 (July 1988), para 4.5.

recommendation by the English Law Commission that the legislation should encourage “both parents to feel concerned and responsible for the welfare of their children” after separation.²⁰

The Family Law Council’s report was not implemented. However, some time after the release of the Joint Select Committee report, the Attorney-General asked the Family Law Council to examine and report on the operation of the *Children Act*. That request was made in the light of the Government’s predisposition to depart from the current regime of guardianship, custody and access in the *Family Law Act* and to enact provisions based on those contained in the English *Children Act*.²¹ The timetable for this examination was particularly tight: the Council was asked to respond within a three month period which included the Christmas break, and this prevented it from undertaking its usual process of public consultation combined with the establishment of a committee, often with members co-opted from outside the Council. Its response was delivered to the Attorney-General in March 1994, broadly recommending that the *Children Act* terminology be adopted in Australia.

It was suggested that the evidence from England showed that “reactions to date to the changes in terminology made in that Act have been positive and Council remains convinced that the custody/access model should be replaced and that a change in terminology similar to that in the UK legislation will assist in improving arrangements between separating parents in relation to the ongoing care of their children”.²² During 1994 and 1995, various drafts of a Family Law Reform Bill were prepared. Consultations were held with bodies such as the Family Law Council, the Family Law Section of the Law Council of Australia and the Family Court of Australia. However, a parallel development was an inquiry by the Australian Law Reform Commission (ALRC) into equality for women.²³ In the first part of its main report, the ALRC pointed out some concerns about the operation of the family law system in relation to women who had been targets of violence, and made a number of recommendations directed at ensuring that more regard was paid to safety, both for those women and for their children.²⁴ Broadly, this led women’s organisations, brought together by a newly created ‘National Women’s Justice Coalition’, to join in the consultation process about the Reform Bill and, in particular, to call for changes to some of the draft provisions.

The *Family Law Reform Act* was finally passed in late 1995 and came into effect on 11th June 1996. During the first part of 1996, a major education campaign was undertaken by the Government with the assistance of the Family Court and the legal profession to inform the community about the changes in attitude and perception that the *Reform Act* was intended to bring about.²⁵

²⁰ Ibid, para 2.10.

²¹ Family Law Council, *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989*, 10 March 1994, at ii.

²² Ibid, para 31, at 7.

²³ ALRC, *Equality Before the Law: Justice For Women*, Report No 69 Part 1, 1994.

²⁴ Ibid: see especially Chapter 9.

²⁵ A number of counsellors who were surveyed for this research commented that the government should have engaged in an education campaign at the time of the introduction of the *Reform Act*. Clearly, the campaign did not reach as widely as hoped if counsellors working within the court were unaware of it.

Despite the amount of scrutiny to which the *Family Law Act* has been subject, ironically it is clear that there is no specific reform background to the Part VII amendments. First, the desire to mirror the English *Children Act* provisions fails to acknowledge the fact that a major aspect of that legislation is the law dealing with public, rather than private, children's matters.²⁶ Its own reform agenda was very much based in revising the law dealing with the former, not the latter. So far as its private law aspects were concerned, they were aimed at attitudinal rather than legal change, ie, it was hoped to encourage non-resident parents (ie, fathers) to keep in contact with their children.²⁷ In that respect the Australian aims were quite analogous; they were directed at promoting a normative standard of parenting behaviour for those whose relationships had broken down.

More specifically, there was no real 'mischief' to which the *Reform Act's* co-parenting reforms was responding. For example, the background to the *Reform Act* can be contrasted with the situation prior to the enactment of the Child Support Scheme, when research had clearly demonstrated that few children were receiving adequate amounts of child maintenance and action was needed to change that situation.²⁸ Unlike the impetus for the child support reforms, there was no evidence that children were being harmed by the law and practice governing custody and access.²⁹ The majority of calls for reform to custody law had come consistently from aggrieved non-custodial parents, and in particular, fathers' rights groups who claimed that the legislation and the Family Court discriminated against them.³⁰ As noted above, those claims were not supported by the empirical studies which showed the Family Court made orders in favour of fathers at twice the rate of those made by consent.³¹

²⁶ The catalyst for the changes embodied in the *Children Act* was the child abuse crisis which arose in Cleveland in 1987 and the subsequent "Cleveland Report" of Lord Justice Butler-Sloss: A. Jane Bridge, Stuart Bridge and Susan Luke, *Blackstone's Guide to the Children Act 1989*, at 1-2. See for a comparison of the *Reform Act* and the private law provisions of the *Children Act*, John Dewar, "The *Family Law Reform Act 1995* (Cth) and the *Children Act 1989* (UK) Compared - Twins or Distant Cousins?" (1996) 10 *Australian Journal of Family Law* 18.

²⁷ Bren Neale and Carol Smart, "Experiments with Parenthood?" (1997) 31 *Sociology*, 201 at 203-04, 214; Richard Collier, *Masculinity, Law and the Family* (1995: Routledge), 177-78; Carol Smart and Bren Neale, "Arguments Against Virtue - Must Contact be Enforced" [1997] *Family Law* 332 at 335. Recent statistics indicate that one in five families with dependent children in England are lone-parent households, usually headed by women: Kevin Hewitt, "Divorce and Parental Disagreement" [1996] *Family Law* 368. This concern was also expressed by the Family Law Council in its 1994 report, *Patterns of Parenting After Separation*.

²⁸ Peter McDonald (ed.), *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) at 262.

²⁹ Richard Chisholm, "Assessing the Impact of the *Family Law Reform Act 1995*" (1996) 10 *Australian Journal of Family Law* 177 at 185.

³⁰ Miranda Kaye and Julia Tolmie, "Fathers' Rights Groups in Australia" (1998) 12 *Australian Journal of Family Law* 19 at 33; Regina Graycar, "Equal Rights Versus Fathers' Rights: The Child Custody Debate in Australia" in Carol Smart and Selma Sevenhuijsen (eds), *Child Custody and the Politics of Gender*, Routledge, 1989. Demands from fathers that their rights be properly recognised were also a feature of the background to the English reforms: Jeremy Roche, "The *Children Act 1989*: Once a Parent Always a Parent?" (1991) 5 *Journal of Social Welfare and Family Law* 345 at 346 and 355; Richard Collier, *Masculinity, Law and the Family*, 1995, at 177; and Arthur Baker, "Post-divorce parenting - Rethinking Shared Residence" (1996) 8 *Child and Family Law Quarterly* 217.

³¹ See note 14. See also Janet Fife-Yeomans, "Court to investigate custody 'bias'" *The Australian* 1 October 1998.

Further, the need to encourage parents to share their parental responsibilities after separation was not based on any uncontested research information. Rather the research evidence that was available established that multiple interacting variables (including the custodian's financial circumstances and the level of communication and conflict between the parents), rather than the single factor of parent-child contact, influence children's adjustment following parental separation.³²

The Australian amendments were intended to achieve a number of objectives.

- First and foremost, to effect an attitudinal shift.³³ The aim was to make a difference to “the approach taken by parents towards their children” following the breakdown of the parents’ relationship.³⁴ In particular, it was hoped to encourage both parents to remain involved in the care of their children after separation, and to see them “continuing” to “share” their parenting responsibilities despite their separation.³⁵

³² See Judith Wallerstein and Joan Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (1980: Basic Books); Joan B. Kelly, “Current Research on Children’s Postdivorce Adjustment: No Simple Answer” (1993) 31 *Family and Conciliation Courts Review*, 29; Carol Smart and Bren Neale, “Arguments Against Virtue - Must Contact be Enforced” [1997] *Family Law* 332, 335; Cockett and Tripp, *The Exeter Family Study: Family Breakdown and Its Impact on Children* (1994; University of Exeter Press); Paul Amato and Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (1997: Harvard University Press); Ailsa Burns and Rosemary Dunlop, “The Sleeper Effect - Myth or Reality?” (1995) 57 *Journal of Marriage and the Family* 375. Studies of children’s post-separation adjustment are often misused by proponents of shared custody laws who fail to distinguish between parent-child contact where the parents are cooperative and contact where there is conflict between the parents: Janice Drakich, “In Whose Best Interest? The Politics of Joint Custody” in Bonnie J. Fox (ed), *Family Patterns, Gender Relations*, 1993, 331 at 337. The most recent research, which entailed a review of 200 studies of children’s post-divorce adjustment from the last 30 years, also concluded that there is no simple or direct relationship between children’s adjustment and parental separation, and suggested that a continuation of parental involvement does not always benefit children, particularly when there has been family violence: see Bryan Rodgers and Jan Pryor, *Divorce and Separation: The outcomes for children* (1998; Joseph Rowntree Foundation). See also Ailsa Burns and Rosemary Dunlop, “How do you feel about it? Children’s reactions to their parents’ divorce, at the time and three and ten years later”, Paper presented to the 6th Australian Institute of Family Studies conference, Melbourne, 25-27 November 1998.

³³ This was also an objective of the English reforms: England, Law Commission, *Review of Child Law, Guardianship and Custody*, Report No. 172 (July 1988), paragraph 2.4.

³⁴ House of Representatives, Family Law Reform (Consequential Amendments) Bill 1995, *Hansard*, 28 November 1995, 3957. See also Richard Chisholm, “Assessing the Impact of the *Family Law Reform Act 1995*” (1996) 10 *Australian Journal of Family Law* 177 at 184.

³⁵ *Family Law Act 1975* (Cth), s60B(2)(a) and (c); House of Representatives, Family Law Reform Bill 1994, *Hansard*, 21 November 1995, 3303; Senate, *Family Law Reform Bill 1994, Explanatory Memorandum*, (November 1994), para 5. See also Family Law Council, *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989*, 10th March 1994, 13. The Council’s *Letter* recommended the *Family Law Act* make it clear that parental responsibility for children “does not cease on separation and that the best interests of the child will generally require continuing contact with both parents and complementary parenting skills.” This approach has been recommended in other jurisdictions: see for example, United States, Commission on Child and Family Welfare, *Parenting Our Children: In the Best Interest of the Nation*, (September 1996), Recommendation 17, which suggested that “[g]overnments at all levels should adopt as a priority the goal of keeping both parents involved emotionally and financially in the lives of their children”. The Commission’s view was that replacing “the value-laden terms ‘custody’ and ‘visitation’ with terms such as ‘parental decision-making’, ‘parenting time’, and ‘residential arrangements for children’” was “less likely to foster conflict and more likely to foster shared parenting responsibilities”.

- Second, to reduce disputes between parents following separation, by removing the “proprietary” notion of children inherent in custody battles.³⁶ An important psychological aspect of that aim is the idea that neither parent should be considered more important, regardless of where the children live or who is the child’s primary carer.
- Third, to direct attention to the rights and interests of children rather than the needs and concerns of their parents in post-separation arrangements and decision-making.³⁷ The legislative changes seek to emphasise the idea that children have ‘rights’, while parents have ‘responsibilities’.
- Fourth, to encourage parents to enter into private agreements about the future care of their children, rather than resorting to a litigated solution.³⁸ To this end the *Reform Act* also encourages the use of “primary dispute resolution” mechanisms, such as counselling and mediation, to resolve matters which might otherwise be determined by a court.³⁹
- Fifth, to ensure that contact would not expose people to a risk of violence because of inconsistent contact orders and “family violence orders”, and to ensure that evidence of domestic violence is taken into account when making parenting orders.⁴⁰

It should be noted that the *Reform Act* does not mirror the *Children Act*’s principles in all respects. For example, the *Children Act* makes no reference to the issue of domestic violence,⁴¹ whereas the Australian reforms contain a number of provisions specifically designed to ensure parenting arrangements do not expose children and their carers to a risk of violence. Those changes to the legislation were largely the result of the ALRC’s inquiry into equality for women,⁴² and in part, reflect the practice of the Family Court prior to the reforms. Another important distinction is that the English legislation’s ‘no order presumption’⁴³ - the principle that a court should only make an order if it can be shown that to do so would be better for the child than making no order at all - has not been adopted as part of the reforms here. The *Children Act* also makes no reference to parenting plans.

³⁶ House of Representatives, Family Law Reform Bill 1994, *Hansard*, 21 November 1995, 3303; Senate, *Family Law Reform Bill 1994, Explanatory Memorandum*, November 1994, para 1.

³⁷ Senate, *Family Law Reform Bill 1994, Explanatory Memorandum*, November 1994, para 4.

³⁸ *Family Law Act 1975* (Cth), ss14, 60B(2)(d), 63B(a), 65F(2)(a); Senate, *Family Law Reform Bill 1994, Explanatory Memorandum*, November 1994, paras 4 and 5. See also Family Law Council, *Patterns of Parenting After Separation*, April 1992, Chapter 3.

³⁹ *Family Law Act 1975* (Cth), ss14, 65F(2)(a); Senate, *Family Law Reform Bill 1994, Explanatory Memorandum*, November 1994, para 2.

⁴⁰ *Family Law Act 1975* (Cth), Div 11; Senate, *Family Law Reform Bill 1994, Explanatory Memorandum*, November 1994, paras 6 and 7.

⁴¹ Note however that the more recently enacted *Family Law Act 1996* (UK) contains provisions making violence a relevant matter in proceedings under the *Children Act*.

⁴² See note 21.

⁴³ *Children Act 1989* (UK), s1(5).

The law governing children's disputes before the *Reform Act*

Before the passage of the *Reform Act*, the *Family Law Act* provided that each of the parents of a minor child was a guardian of the child, and that both parents had “joint custody” of their children.⁴⁴ Custody involved the right and responsibility to make decisions concerning the daily care and control of the child, while aspects of guardianship referred to the responsibility for making decisions about the child's long-term welfare.⁴⁵ The Family Court⁴⁶ was empowered to make orders altering this statutorily prescribed situation, for example, by vesting sole custody of the child in one parent, with an order for the other parent to have periodic access to the child. The most common form of order made by consent of the parents (and to a lesser extent after contested proceedings) was for sole custody to be vested in the child's mother, with the father having regular access to the child.⁴⁷ After disputed proceedings, orders altering parents' guardianship powers were rare.⁴⁸

Disputes about the future care of children were governed by the principle that the welfare of the child was the paramount consideration for the decision maker.⁴⁹ Part VII of the *Family Law Act* provided a list of matters which were required to be considered in determining what orders would best promote the child's welfare. Those matters included the child's wishes,⁵⁰ the nature of the relationship between the child and each parent,⁵¹ the likely effect of changing the existing child care arrangements,⁵² and the need to protect the child from abuse.⁵³ In addition, a number of case law principles were developed by the Family Court and the High Court to flesh out the matters in that statutory “welfare checklist”.

⁴⁴ This provision was found in *Family Law Act 1975* (Cth), s63F(1).

⁴⁵ *Family Law Act 1975* (Cth), s63E; *In the Marriage of Harrison v Woollard* (1995) 18 Fam LR 788; *In the Marriage of Newbery* (1977) 2 Fam LR 11,652.

⁴⁶ And in certain circumstances, courts of summary jurisdiction: see the current *Family Law Act 1975* (Cth), ss69J and 69N.

⁴⁷ Sophy Bordow, “Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome” (1994) 8 *Australian Journal of Family Law* 252. This was also the pattern of orders in England prior to the introduction of the *Children Act 1989* (UK): Richard Collier, *Masculinity, Law and the Family*, 1995, at 178.

⁴⁸ See *In the Marriage of Harrison v Woollard* (1995) 18 Fam LR 788.

⁴⁹ *Family Law Act 1975* (Cth), s64(1)(a).

⁵⁰ *Ibid*, s64(1)(b).

⁵¹ *Ibid* s64(1)(bb)(i).

⁵² *Ibid* s64(1)(bb)(iii).

⁵³ s64(1)(bb)(va).

First, it was established that there was no presumptive “parental right of custody or right to access”,⁵⁴ and no onus upon a parent to establish that access would be detrimental to the child.⁵⁵ Nevertheless, the cases also made it clear that the court would “give very great weight to the importance of maintaining parental ties”, on the basis that it was considered to be “prima facie in a child’s interests to maintain the filial relationship with both parents”.⁵⁶

Secondly, the cases provided a number of circumstances which might lead to a refusal of access. In *M and M*,⁵⁷ the High Court provided that access should not be ordered where it would expose the child to an “unacceptable risk” of abuse, that is, where the likely detriment to the child’s welfare outweighed the potential benefits of maintaining contact with the parent.⁵⁸ In *Bieganski*,⁵⁹ the Full Court decided that the legislative obligation to protect children from abuse extended to protection from emotional harm, and cautioned trial judges to consider the limitations of supervised access in protecting children from such harm. Other cases established that the effect of the access parent’s conduct on the custodial parent (such as where there has been a history of domestic violence) was relevant to determining whether access would be in the child’s interests,⁶⁰ and might justify a refusal of access where it was “likely to impact adversely” on the custodian’s capacity to care for the child.⁶¹ Similarly, access might be suspended where “the need for peace and tranquillity in the custodial parent’s household” was considered “a more compelling need for the child” than contact with the non-custodial parent.⁶² Several cases decided shortly before the *Reform Act* was passed also held that an unacceptable risk of harm to the child might be established by evidence of domestic violence in the household, even though the child him or herself was in no danger of being physically assaulted or had not witnessed the violence.⁶³

Thirdly, it was established that in determining what orders to make, a judge had a “responsibility to reflect community standards and opinions”, but was not permitted to rely on any presumptions or personal views about the appropriate parenting roles of mothers and fathers.⁶⁴

⁵⁴ *M and M* (1988) 166 CLR 69 at 76.

⁵⁵ *In the Marriage of Brown and Pederson* (1991) 15 Fam LR 173.

⁵⁶ *M and M* (1988) 166 CLR 69 at 76.

⁵⁷ *M and M* (1988) 166 CLR 69.

⁵⁸ *M and M* (1988) 166 CLR 69 at 78.

⁵⁹ *In the Marriage of Bieganski* (1993) 16 Fam LR 353.

⁶⁰ *In the Marriage of Irvine* (1995) 19 Fam LR 374. See also *In the Marriage of Grant* [1994] FLC 81,253 at 81,259.

⁶¹ *In the Marriage of Bieganski* (1993) 16 Fam LR 353 at 368.

⁶² *In the Marriage of Sedgley* (1995) 19 Fam LR 363 at 371.

⁶³ *In the Marriage of JG and BG* (1994) 18 Fam LR 255; *In the Marriage of Patsalou* (1995) 18 Fam LR 426; *In the Marriage of Jaeger* (1994) 18 Fam LR 126.

⁶⁴ *Macmillan and Jackson* (1995) 19 Fam LR 183 at 192 and 193. The trial judge in that case had made orders giving custody of a young boy to his maternal grandparents, rather to the applicant father. In doing so, the judge was critical of the father’s plan to refrain from seeking employment outside the home until the child reached school age, because in the view of the trial judge, such a period of unemployment would lead to “entrenched welfare dependency” and represented a “poor role model” for the child. See also *Gronow and Gronow* (1979) 144 CLR 513 at 526-29.

Outline of the *Reform Act* amendments

The main changes to the *Family Law Act* are contained in a new Part VII. In summary they are:

- The inclusion in Part VII of a statement of objects and the principles underlying those objects.⁶⁵ The relevant principles are contained in s60B(2), which, among other things, provides that children have “the right to know and be cared for by both their parents” and “a right of contact” with both parents.⁶⁶ Those principles are expressed to apply “except when it is or would be contrary to a child’s best interests”, and a separate section (s65E) provides that a court must regard the best interests of the child as the paramount consideration in deciding whether to make a particular parenting order.⁶⁷
- Changes to the terminology of court orders. The former powers of guardianship (long-term responsibility) and custody (day-to-day responsibility) that were vested in the parents of a child have been replaced by a single concept of “parental responsibility”.⁶⁸ A new range of “parenting orders” replace the previous custody and access orders, namely, orders for “residence”, “contact” and “specific issues”.⁶⁹
- Changes to the effect of court orders. First, the legislation makes it clear that parental responsibility for children remains unaffected by the parents’ separation or the children’s living arrangements.⁷⁰ Second, unlike custody orders, a residence order does not vest a person with sole decision making power for day-to-day matters,⁷¹ nor does it take away any aspect of the non-resident parent’s responsibility for the child:⁷² it simply names the person or persons with whom the child will live.⁷³ In order to give one parent sole day-to-day or long term parental responsibility for a child, a specific issues order to that effect now needs to be made.⁷⁴ Nevertheless, the legislation also suggests that the scope of a non-resident parent’s decision-making responsibilities may be necessarily reduced while the child is living with the resident parent, even in the absence of an express order to that effect.⁷⁵

⁶⁵ *Family Law Act 1975* (Cth), s60B(1) and (2).

⁶⁶ The other s60B(2) principles are that, “(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and (d) parents should agree about the future parenting of their children”.

⁶⁷ The pre-*Reform Act* provision required the court to regard the welfare of the child as the paramount consideration. The best interests requirement was seen as being more in conformity with the UN Convention on the Rights of the Child but is not considered to effect any change in the substantive law, see *B and B (Family Law Reform Act 1995)* 21 FLR 676 at 730.

⁶⁸ Rather unhelpfully defined in *Family Law Act 1975* (Cth), s61B as “all the duties, powers .and responsibilities and authority which, by law, parents have in relation to their children”.

⁶⁹ *Ibid* s64B.

⁷⁰ *Ibid* s61C.

⁷¹ *Ibid* s64B(3).

⁷² *Ibid* s61C.

⁷³ *Ibid* s64B(3).

⁷⁴ *Ibid* s64B(6).

⁷⁵ *Ibid* s61D(2)(b).

- There is a revised list of matters which a court must consider when determining the child’s best interests for the purposes of making a parenting order.⁷⁶ The list now includes as relevant matters any family violence “involving a member of the child’s family”,⁷⁷ the existence of family violence orders,⁷⁸ and the need to maintain an indigenous child’s connection with his or her culture.⁷⁹
- The legislation contains a number of provisions designed to ensure that children and their carers are protected from violence. Judges are now required by the Act to ensure their orders for residence and contact do not expose any person to an ‘unacceptable risk’ of family violence.⁸⁰ In addition, a new Division 11 deals with the problem of inconsistent contact and domestic violence orders. It requires the Family Court to refrain from making any contact order that is inconsistent with a family violence order unless it is in the child’s best interests to do so.⁸¹ Where a judge or magistrate intends to make an inconsistent order, she or he must comply with a number of requirements, including an obligation to explain the reasons for the order to the parties.⁸² Magistrates are also empowered to vary or suspend a contact order when making a family violence order.⁸³

The emphasis on the protection of family members from violence is seen again in s43 in Part IVA, which sets out the objectives of the Act. The *Reform Act* added to the list of existing principles in s43 ‘the need to ensure safety from family violence’.⁸⁴

- The amendments include a range of provisions aimed at encouraging parents to use mechanisms such as mediation and counselling services to resolve disputes about children before resorting to litigation.⁸⁵ Essentially these emphasise the importance of mechanisms such as mediation, counselling and arbitration which, as the new term ‘primary dispute resolution’ implies, have been and remain the usual first and most frequently used form of dispute resolution for most separated couples.
- The Act also now provides for the registration of “parenting plans” (parental agreements about the future care of the children), by which any ‘parental responsibility’ provisions of a private agreement may be converted into enforceable orders.⁸⁶

⁷⁶ Ibid s68F(2).

⁷⁷ Ibid s68F(2)(i). This provision gave effect to recent Family Court decisions. See for example, *In the Marriage of JG and BG* (1994) 18 Fam LR 255; *In the Marriage of Jaeger* (1994) 18 Fam LR 126. See also Juliet Behrens, “Ending the Silence, But ... Family Violence Under the Family Law Reform Act” (1996) 10 *Australian Journal of Family Law* 35.

⁷⁸ Ibid s68F(2)(j).

⁷⁹ Ibid s68F(2)(f).

⁸⁰ Ibid s68K.

⁸¹ Ibid s68K(1).

⁸² Ibid s68R.

⁸³ Ibid s68T.

⁸⁴ Ibid s43(ca).

⁸⁵ Ibid s14.

⁸⁶ Ibid Part VII Div 4. Parents are “encouraged .. in reaching their agreement, to regard the best interests of the child as the paramount consideration”: *Family Law Act 1975* (Cth), s63B(b). This replaces the provision for registration of ‘child agreements’ under the previous s66ZC of the Act.

Predictions and concerns about the reforms in Australia

As already noted, the *Reform Act* was not introduced in response to any problem identified in social science research into children's adjustment to parental separation. Nor was it the result of documented inadequacies in or specific difficulties with the legislation prior to its introduction. A pre-*Reform Act* study carried out by the Australian Institute of Family Studies suggested that reforms designed to effect a change in attitude to the responsibilities of parenthood (as distinct from a change in behaviour) were unnecessary, as most parents already believed that remaining involved in their child's life after separation was important.⁸⁷ In England too, the philosophy underpinning the *Children Act* had been assessed as unrealistic by many commentators who doubted that the symbolic valuing of the role of the 'absent parent' would succeed in producing a greater involvement of fathers in their children's care.⁸⁸ Indeed, Brenda Hoggett,⁸⁹ one of the Law Commissioners who had recommended the *Children Act* reforms, had conceded as much, noting that while the pre-*Children Act* law was "unduly complicated, incoherent and unclear", it was "not fundamentally wrong".⁹⁰

Predictions about the impact of the reforms in Australia were mixed. At the time of its introduction, legal practitioners publicly "welcomed the philosophical shift" behind the *Reform Act*, but cautioned that any change in parental attitudes was likely to be "evolutionary rather than revolutionary".⁹¹ Lawyers also suggested that more time would be needed with clients to explain the reforms, and that it would "take some time for the new terminology to sink in".⁹² As in England, some were sceptical of the capacity for the new legal terminology and a philosophy of "sharing" to have any effect upon parental behaviour, particularly in the context of a relationship which had broken down.⁹³

One of the most contentious aspects of the reforms involves the principle of the child's right to regular contact with both parents. Some practitioners and commentators considered this to be the most positive aspect of the reforms, as it would ensure that non-resident parents would be able to have "a greater say in the upbringing of the child" than

⁸⁷ Australian Institute of Family Studies, *Evaluation of the Impact of Part VII of the Family Law Reform Act 1995* (1996); Kate Funder and Bruce Smyth, "Family Law Reforms and Attitudes to Parental Responsibility" (1996) 45 *Family Matters* 10.

⁸⁸ Jeremy Roche, "The *Children Act* 1989: Once a Parent Always a Parent?" (1991) 5 *Journal of Social Welfare and Family Law* 345 at 356; Kevin Hewitt, "Divorce and Parental Disagreement" [1996] *Family Law* 368. See for a similar conclusion in the North American context, Janice Drakich, "In Whose Best Interest? The Politics of Joint Custody" in Bonnie J. Fox (ed), *Family Patterns, Gender Relations*, 1993, 331 at 337.

⁸⁹ Now Lady Hale.

⁹⁰ Brenda Hoggett, "Joint parenting systems: the English experiment" (1994) 6 *Journal of Child Law* 8 at 11. The Law Commission's report noted that the proposed reforms "would make little difference in substance" to the parenting of children, but expected that they would more closely resemble "the everyday reality of being a parent": England, Law Commission, *Review of Child Law, Guardianship and Custody*, Report No. 172 (July 1988), paragraph 2.4.

⁹¹ Cathy Laird, "No winners, no losers: Coming to terms with the Family Law Reform Act" (1996) 70 (7) *Law Institute Journal* 10.

⁹² *Ibid.*

⁹³ Richard Ingleby, "The Family Law Reform Act - a Practitioner's Perspective" (1996) 10 *Australian Journal of Family Law* 48 at 49.

was possible under the former custody and access regime.⁹⁴ Others viewed that possibility with concern. First, it was thought that the reforms provided a contact parent who wished to harass his former partner with the opportunity to seek orders relating to the minutiae of her care of the child.⁹⁵ Second, coupled with the statutory exhortations to “share” and “agree” about parenting arrangements, the child’s right to contact was seen to have the potential to be used to pressure a mother with legitimate concerns about her child’s welfare into an agreement that compromised her own safety and the child’s best interests.⁹⁶ This concern was underlined by case law developments in the UK,⁹⁷ and findings from research into the impact of the *Children Act*, which show the development of a strong presumption in favour of contact by the English courts, and pressure to provide contact to violent fathers being applied by lawyers and counsellors.⁹⁸ A particular problem that was forecast for the Australian context concerned the issue of “relocation”.⁹⁹ It was feared that a woman who attempted to seek safety from a violent partner by relocating the child’s place of residence was likely to find it difficult to satisfy the Court that she should be permitted to move if the relocation would significantly reduce the father’s contact with the child.¹⁰⁰ Other concerns for women centred on the legislation’s promotion of primary dispute resolution processes such as mediation and counselling, and their inappropriateness for women separating from abusive partners.¹⁰¹

⁹⁴ Ibid. See also Bettina Arndt, “Parents Should Move on Without Relocating”, *The Age* 21 March 1997.

⁹⁵ Richard Chisholm, “Assessing the Impact of the *Family Law Reform Act 1995*” (1996) 10 *Australian Journal of Family Law* 177 at 196; Juliet Behrens, “Shared Parenting: Possibilities ... And Realities” (1996) 21 *Alternative Law Journal* 213; Peter Nygh, “The New Part VII - an Overview” (1996) 10 *Australian Journal of Family Law* 4 at 16; Richard Ingleby, “The Family Law Reform Act - a Practitioner’s Perspective” (1996) 10 *Australian Journal of Family Law* 48 at 51.

⁹⁶ Maggie Troup, “The Family Law Reform Bill No 2 and its Ramifications for Women and Children” (1995) 5 *Australian Feminist Law Journal* 111 at 118; Juliet Behrens, “Ending the Silence, But ... Family Violence under the *Family Law Reform Act 1995*” (1996) 10 *Australian Journal of Family Law* 35.

⁹⁷ See *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124; *Re M (Contact: Welfare Test)* [1995] 1 FLR 274; *Re P (Contact: Supervision)* [1996] 2 FLR 314.

⁹⁸ See Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996: Policy Press); Carol Smart, “Losing the Struggle for Another Voice: The Case of Family Law” (1995) 18 *Dalhousie Law Journal* 173 at 179.

⁹⁹ One commentator described this as the “pivotal issue” behind the reforms: Bettina Arndt, “Parents should move on without relocating”, *The Age*, March 21, 1997, A17.

¹⁰⁰ Lisa Young, “Are primary residence parents as free to move as custodial parents were?” [1996] *Australian Family Lawyer* 31; Richard Chisholm, “Assessing the Impact of the *Family Law Reform Act 1995*” (1996) 10 *Australian Journal of Family Law* 177 at 195; Maggie Troup, “The Family Law Reform Bill No 2 and its Ramifications for Women and Children” (1995) 5 *Australian Feminist Law Journal* 111 at 118; Rebecca Bailey-Harris and John Dewar, “Variations on a theme - Child law reform in Australia” (1997) 9 *Child and Family Law Quarterly* 149 at 162.

¹⁰¹ Miranda Kaye, “Domestic Violence, Residence and Contact” (1996) 8 *Child and Family Law Quarterly*, 285; Juliet Behrens, “Ending the Silence, But ... Family Violence Under the Family Law Reform Act” (1996) 10 *Australian Journal of Family Law* 35. Note that Reg 62 of the *Family Law Regulations* provides that mediation may be inappropriate where the ability of a party to negotiate freely is affected by a history of family violence, and the reforms also exempt parties from the obligation to attend counselling before the making of final orders if there is a history of domestic violence: *Family Law Act 1975* (Cth), s65F(2). Despite those precautions, one study of the incidence of domestic violence among users of family mediation services showed that women clients reported violence and abuse in a number of cases where agencies had not identified violence. Many of the women who reported violence in the survey had not informed the agency about the violence because of embarrassment or reluctance to raise the issue: Keys-Young,

CHAPTER TWO: INFLUENCES ON THE AUSTRALIAN REFORMS AND EARLY CASE LAW DEVELOPMENTS

The impact of the *Children Act 1989* (UK)

As mentioned, the *Children Act* makes no reference to domestic violence being a factor to be considered by courts when decisions about contact are made.¹⁰² Neither does the Act contain a statement of principle that children have a right to regular contact with each parent.¹⁰³ Nevertheless, the English Court of Appeal has interpreted the legislation as creating a ‘very strong’ presumption in favour of maintaining contact between a natural parent and child.¹⁰⁴ The test used by the English courts involves a balancing exercise, in which the risk of harm from contact is weighed against “the fundamental emotional need of every child to have an enduring relationship with both his [or her] parents”.¹⁰⁵ It has been held that in carrying out that balancing exercise, judges “should not be unduly perturbed by the prospect of some distress being caused to children by contact”, and that “a certain amount of distress is acceptable in the long-term interests of children in knowing both their parents”.¹⁰⁶ The Court of Appeal has more recently affirmed that contact should not be prevented unless there are cogent reasons for doing so, and that when considering whether to make orders for contact, courts should take a medium and long-term view of the child’s development and not accord excessive weight to short-term problems, such as the contact parent’s present psychiatric instability.¹⁰⁷ It has also been held that (what was referred to as) the “implacable hostility of a mother” might justify a refusal of contact, but only where the level of the resident parent’s fear puts the child at “serious risk of major emotional

Research / Evaluation of Family Mediation Practice and the Issue of Violence, Final Report, (July 1996: Legal Aid and Family Services), at 69-70.

¹⁰² Note however that family violence is now a relevant matter in *Children Act* proceedings by virtue of the more recently enacted *Family Law Act 1996* (UK). The *Children Act*’s “welfare checklist”, which is set out in s1(3), makes no reference to family violence, but s1(3)(e) requires the decision maker to have regard to “any harm which [the child] has suffered or is at risk of suffering”. Compare *Family Law Act 1975* (Cth) s68F(2)(i) which expressly refers to family violence, regardless of whether it has been witnessed by the child, and s68F(2)(j) which refers to family violence orders.

¹⁰³ Compare *Family Law Act 1975* (Cth) s60B(2)(b). The *Children Act* contains no “presumption” that contact is in the interests of a child whose parents are separated. However the more recent *Family Law Act 1996* (UK) (not yet in operation), deals with divorce applications, and includes such a provision in relation to residence and contact decisions. The *Family Law Act 1996* (UK), s11, provides that in any proceedings for a divorce, the court must consider whether it should exercise its power under the *Children Act* in respect of any children of the parties. In doing so, the court is required to have regard to a list of matters, including

“(c) the general principle that, in the absence of evidence to the contrary, the welfare of the child will be best served by -

- (i) his (sic) having regular contact with those who have parental responsibility for him and with other members of his family; and
- (ii) the maintenance of as good a continuing relationship with his (sic) parents as possible”.

¹⁰⁴ See *Re H (Minors)(Access)* [1992] 1 FLR 148; *Re M (Contact: Supervision)* [1998] 1 FLR 727.

¹⁰⁵ See for example, *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 at 278 per Wilson J; *A v L (Contact)* [1998] 1 FLR 361; *Re A (Contact: Domestic Violence)* [1998] 2 FLR 171.

¹⁰⁶ *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 at 278 per Wilson J; *Re W (A Minor) (Contact)* [1994] 2 FLR 441 at 447 per Sir Stephen Brown P; *Re P (Contact: Supervision)* [1996] 2 FLR 314 at 328 per Wall J.

¹⁰⁷ *Re M (Contact: Supervision)* [1998] 1 FLR 727. See also *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 at 129.

harm”.¹⁰⁸ Judges have also threatened resident parents with removal of the child from their care for non-compliance with contact orders,¹⁰⁹ and jailed resident parents who consistently refuse to provide contact to their former spouse.¹¹⁰ The latter approach represents a significant shift in attitude from that taken by the English courts prior to the *Children Act*.¹¹¹

The perception that domestic violence may have minimal relevance to the issue of child contact is also reflected in the legal advice given to parents.¹¹² A number of studies carried out in England since the introduction of the *Children Act* have found that both lawyers and mediators have tended to view domestic violence as irrelevant to contact,¹¹³ or that they advise clients that it is of little interest to the courts.¹¹⁴ One empirical study found that few family mediators had attempted to screen for domestic violence, with many relying on the assumption that women in abusive relationships would identify themselves or screen themselves out of the process.¹¹⁵ Other findings indicate that women have found themselves under pressure from their professional advisers to agree to what they considered to be unsafe contact arrangements rather than be viewed as “unreasonable” or “hostile”,¹¹⁶ and that the concerns of an abused spouse were often subjugated to those of the spouse who wishes to have contact with the children.¹¹⁷ A recent empirical study of 36 English family law barristers concluded that this “robust” approach to contact appears to be very much one-sided: all those interviewed supported the position that contact with the non-resident father is beneficial for children even where there has been domestic violence, yet none

¹⁰⁸ *Re P (Contact: Supervision)* [1996] 2 FLR 314 at 329. The trial judge in that case found the father had “poor impulse control”, and that the father had attempted to strangle the mother and had threatened to kill the children. The father had spent 6 months in prison for that assault before issuing his application for contact. The trial court made an order that the father have only indirect contact with the children, because of the possible detriment to their welfare from the mother’s anxiety if direct contact took place. The Court of Appeal upheld the father’s appeal, finding that the trial judge had given “excessive weight” to the mother’s anxiety.

¹⁰⁹ See *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124.

¹¹⁰ See *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533; *F v F* (1996), unreported decision of the Court of Appeal, discussed in Susan Maidment, “Parental Alienation Syndrome - A Judicial Response?” [1998] *Fam Law* 264; Judge Stephen Gerlis, “Contact - Losing Interest” [1997] *Family Law* 50; Sarah Harman, “Contact and the Obdurate Parent” [1997] *Family Law* 62; *In re M (a Minor) (Contact order: Committal)*, unreported decision of the Court of Appeal, 16 December 1998.

¹¹¹ See *Churchard v Churchard* [1984] FLR 635.

¹¹² Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996: Policy Press), 4 and 13; Adrienne Barnett, “Child Contact and Domestic Violence: The Ideological Divide (or, Searching for the ‘Bad Father’ in Family Law)”, Paper presented to the Gender, Sexuality and Law conference, Keele University, 19-21 June 1998; Carol Smart, “‘Good’ and ‘Bad’ Lawyers? Struggling in the Shadow of the New Law” (1997) 19 *Journal of Social Welfare Law* 377.

¹¹³ Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996: Policy Press), 4-5.

¹¹⁴ Viktor Hall, “Domestic Violence and Contact” [1997] *Family Law* 813 at 816; Bren Neale and Carol Smart, “Experiments with Parenthood?” (1997) 31 *Sociology* 201 at 213.

¹¹⁵ Marianne Hester, “Mediation Practice and Domestic Violence” [1997] *Family Law* 713.

¹¹⁶ Carol Smart, “‘Good’ and ‘Bad’ Lawyers? Struggling in the Shadow of the New Law” (1997) 19 *Journal of Social Welfare and Family Law* 377; Marianne Hester and Lorraine Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark* (1996: Policy Press), 4; Carol Smart and Bren Neale, “Arguments Against Virtue - Must Contact be Enforced” [1997] *Family Law* 332.

¹¹⁷ Viktor Hall, “Domestic Violence and Contact” [1997] *Family Law* 813 at 816.

believed the law should intervene to “order a man to have contact if he doesn’t want to”.¹¹⁸ Another study showed “a slow but steady increase” in the number of litigated disputes over children since the English reforms were passed, and concluded that the *Children Act* had encouraged contact parents “to engage in a conflict which before would have seemed fruitless”.¹¹⁹ That view has also been reflected in observations by some psychologists and counsellors in England. For example, one clinician has commented that “many non-resident parents (usually, but not exclusively, men) ... are using *Children Act 1989* proceedings as a way of perpetuating continual abuse or control against their ex-partners”.¹²⁰

There is also evidence that despite the ‘no order presumption’ in the *Children Act*, the number of court orders in private children’s matters has increased since the English reforms were passed. Although the number of contact orders made in the first year of the *Children Act*’s operation (1992) was far fewer than before the Act was passed, their incidence increased by 117% between 1992 and 1996.¹²¹ It has been suggested that this increase reflects “a change in parental attitudes - especially, perhaps, a change in fathers’ attitudes - contributing to a growing tendency to assert the importance of their role in their children’s lives”.¹²² It has also been suggested that the availability of the new ‘specific issues orders’ under the *Children Act* may have “encouraged resort to the court in respect of quarrels which had previously been dealt with through informal negotiation”.¹²³ Other research has found that the courts are reluctant “to acknowledge that some alleged abusers make contact applications not necessarily for the sake of the children but as a way of perpetuating the abuse”.¹²⁴

Judicial interpretation of the Australian Reform Act

In July 1997, the Full Court of the Family Court handed down the first decision to interpret the *Reform Act* provisions relating to the making of parenting orders. *B and B (Family Law Reform Act 1995)* (hereafter *B and B*),¹²⁵ was a relocation dispute involving a mother who wished to move with the children from northern Queensland to Victoria against the wishes of the father. The father argued that the reforms represented a “sea change” in the culture of Australian family law, in that legislative endorsement was given by the *Reform Act* to the child’s right of contact with both parents, a right which was incapable of being exercised if the children were to live such a distance away from one parent.¹²⁶ That view was not supported by the Full Court. The decision in *B and B* made it clear that the pre-*Reform Act*

¹¹⁸ Adrienne Barnett, “Child Contact and Domestic Violence: The Ideological Divide (or, Searching for the ‘Bad Father’ in Family Law)”, Paper presented to the Gender, Sexuality and Law Conference, Keele University, 19-21 June 1998. This study also found that the belief that contact benefits the child regardless of the father’s violence towards the mother was generally justified by a reference to “the psychological literature”. None of the barristers interviewed was able to identify the literature upon which their view was based.

¹¹⁹ Bren Neale and Carol Smart, “Experiments with Parenthood?” (1997) 31 *Sociology* 201 at 201.

¹²⁰ Kevin Hewitt, “Divorce and Parental Disagreement” [1996] *Family Law* 368 at 369.

¹²¹ Gwynn Davis, “Privatising the Family?” [1998] *Family Law* 614 at 615.

¹²² *Ibid* at 617.

¹²³ *Op cit* .

¹²⁴ Georgina Peacock, “Domestic Abuse Research” [1998] *Family Law* 628.

¹²⁵ *B and B (Family Law Reform Act 1995)* (1997) 21 Fam LR 676.

¹²⁶ *Ibid* at 693.

principles that had been developed to deal with custody and access disputes continue to be applicable to residence and contact applications.¹²⁷ Significantly, it was held that the best interests principle qualifies the child's right to regular contact with each parent, and remains the "final determinant" for a judge faced with an application for parenting orders.¹²⁸ The principles set out in s60B(2) of the Act were said not to create any presumption or starting point for decisions about parent-child contact, but rather to provide a "context" for the consideration of the child's best interests along with the matters provided for in the statutory "checklist".¹²⁹ The Court was not required to make any decision about the mode of sharing parental responsibilities for children in the absence of a specific issues order (ie; whether parents are obliged to consult one another before making decisions),¹³⁰ but suggested that a requirement of consultation in relation to day-to-day matters was impracticable.¹³¹ On the other hand, it noted that "consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like".¹³²

The Full Court has also interpreted the *Reform Act* provisions in relation to a number of specific areas of children disputes. Continuing the approach developed before the reforms, the Court in *Re Andrew*¹³³ held that in determining an application for contact, an appropriate consideration is the effect of that contact on the caregiver's ability to provide adequately for the needs of the child should contact be ordered. In *A v A*,¹³⁴ the Full Court confirmed the continued applicability of the High Court's "unacceptable risk" test to decisions about contact, as well as the relevance of the resident parent's genuine belief in the existence of a risk.¹³⁵ In its consideration of the impact of the reforms on relocation applications,¹³⁶ the Full Court held that the introduction of s60B(2) had not fundamentally changed the approach to determining such disputes, and confirmed the validity of pre-*Reform Act* relocation matters, with the qualification that consideration of the principles in s60B(2) now needs to be included in the decision making process.¹³⁷

Finally, in *Cowling*,¹³⁸ the Full Court affirmed and re-stated the pre-*Reform Act* criteria¹³⁹ for determining interim orders in children's matters. Those criteria are that the child's best

¹²⁷ *Ibid* at 728.

¹²⁸ *Ibid* at 733.

¹²⁹ *Ibid* at 735.

¹³⁰ The *Children Act 1989* (UK) provides that there is no duty of consultation. That provision was based on the Law Commission's recommendation that a legal duty of consultation was "unworkable and undesirable": England, Law Commission, *Review of Child Law, Guardianship and Custody*, Report No. 172 (July 1988), paragraph 2.10.

¹³¹ *B and B (Family Law Reform Act 1995)* (1997) 21 Fam LR 676 at 730.

¹³² *Op cit*

¹³³ (1997) 20 Fam LR 538.

¹³⁴ (1998) FLC 92-800.

¹³⁵ *A v A* (1998) FLC 92-800 at 84,996. In another case, *Re David* (1997) 22 Fam LR 489; FLC 92-776, the Full Court upheld the orders of the trial judge that the child live with the father and have no contact with the mother because the mother had deliberately taken steps to undermine the father's relationship with the child, including making false allegations of child abuse.

¹³⁶ *B and B (Family Law Reform Act 1995)* (1997) 21 Fam LR 676.

¹³⁷ *Ibid* at 733 and 735.

¹³⁸ *In the Marriage of Cowling* (1998) FLC 92-801.

¹³⁹ See *In the Marriage of Cilento* (1980) FLC 90-847.

interests will normally be met by orders which will ensure stability in the child's life pending a full hearing of the relevant issues, and that such stability will usually be promoted by an order which maintains the existing residence and contact arrangements unless there are "strong or overriding indications to the contrary".¹⁴⁰

John Dewar¹⁴¹ has also examined the impact of the *Reform Act* and has surveyed relevant stakeholders in Brisbane to determine whether their practices have changed as a result of the amendments. He argues that the UK and Australian family law reforms illustrate the trend towards less discretionary and more rule based decision making, that this emphasises both children's rights and the equality of adult legal relations, and that the latter is also consistent with greater recognition of the rights of contact parents.

Dewar's interviews with Brisbane respondents show that nearly all believed that the *Reform Act* had substantially weakened the primary carer's negotiating position (and consequently her legal position). The research also found that there was an inverse relationship between the impact of the *Reform Act* and the respondent's proximity to the trial process. This relationship meant that barristers and judges reported relatively few changes occurring as a result of the reforms, in contrast with the perceptions of solicitors and counsellors, for whom they were more relevant.¹⁴²

¹⁴⁰ *In the Marriage of Cowling* (1998) FLC 92-801 at 85,006.

¹⁴¹ John Dewar "Reducing Discretion in Family Law (1997) 11 *Australian Journal of Family Law* 309 at 323-24.

¹⁴² *Ibid* at 323-24.

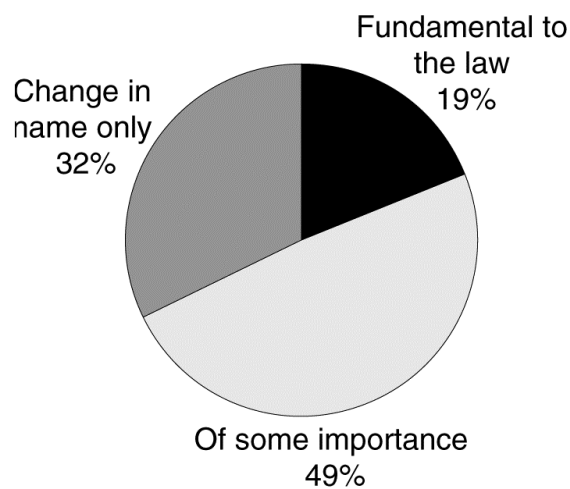
CHAPTER THREE: RESEARCH FINDINGS

Practitioners' understanding, advice and practice

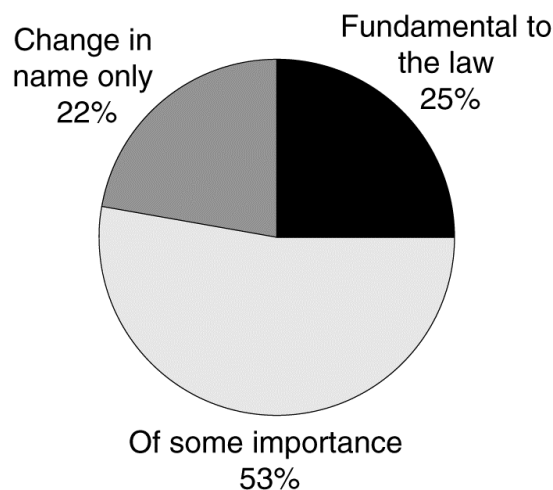
Solicitors

In May 1997, in the first phase of the project, questionnaires were administered to 61 family law practitioners, before the Full Court handed down its decision in *B and B*. Practitioners were asked how the *Reform Act* terminology differed from or was similar to the previously used 'guardianship', 'custody' and 'access', and how central the new words were to the amendments overall. Their responses were as follows:

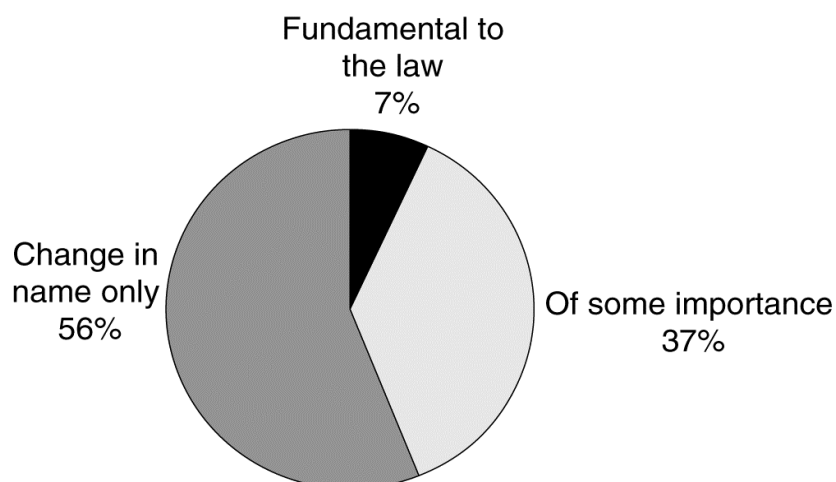
- 'guardianship' in relation to 'parental responsibility'



- 'custody' in relation to 'residence'



- 'access' in relation to 'contact'



Although the number of respondents was small, their answers in relation to contact were of interest, given that in reality 'access' and 'contact' are identical; a point that was recognised by just over half (56%) of the respondents. In contrast, 22% saw 'custody' and 'residence' as being identical, although the Act defines residence as being relevant only to the issue of with whom the child will live, without attaching any legal rights or responsibilities. Further questionnaires were issued to solicitors in July 1997, February 1998, and April 1998. The failure of some practitioners to recognise the legal significance of the *Reform Act's* changes to the law of custody continued to be demonstrated in the later surveys. One-third of respondents to the July 1997 questionnaire, 44% of the respondents to the February 1998 questionnaire and 26% of the respondents to the April 1998 questionnaire said that 'residence' represented a change in name only. Only 27% of the solicitors who responded to the May 1997 questionnaire, 15% of respondents to the February 1998 questionnaire and 36% of the respondents to the most recent questionnaire identified 'residence' as being a fundamentally different concept to 'custody'. Those percentages contrast markedly with the responses of counsellors (discussed next).

Practitioners were also asked about their explanation to clients of the concept of parental responsibility and whether that explanation differed from their pre-*Reform Act* practice. Of the 61 respondents to the earliest questionnaire, 35 (57%) said their explanation had changed while for 24 respondents (39%), the reforms had made no difference to this aspect of practice. The proportion of lawyers who had altered their explanation had increased by the time of the later questionnaires. Sixty-seven percent of respondents to the July 1997 questionnaire, 67% of the respondents to the February 1998 questionnaire and 72% of the respondents to the April 1998 questionnaire said their explanation of parental responsibility differed from that given to clients before the reforms. Again, these figures provide a significant contrast to the responses of counsellors (discussed next).

For the majority of those solicitors who said they had altered their explanation of parental responsibility, the differences related to the notion of parents having an equality of status under the new legislation and, more specifically, to the idea that the resident parent had less ‘control’ of the children than custodial parents had been able to exercise. A few commented that their explanation to clients emphasised the children’s right to contact with both parents which had not existed before the reforms. Although the reforms provide that children, and not parents, have rights, a number of respondents made reference to the idea of increased ‘rights’ for contact parents. Another common method of explaining post-separation responsibility was to focus on the notion of co-operation between the parents, and particularly the practical aspects of that. The following are examples of solicitors’ explanations of parental responsibility under the *Reform Act*.

“I explain that residence does not equate to concept of virtual ‘ownership’ of children that custody was.”

“I compare position before and after - suggest that sole custodian used to assume they ‘took all’ - residence means less.”

“More rights for non-custodial parent - and duties.”

“That the emphasis is on the children’s rights to be raised and cared for by both parents and that the goal is to attempt to achieve a co-operative result.”

“The law now requires both parents to be actively involved in the care, welfare and development of the child although the parents have separated.”

In addition to the questions addressed above, each of the questionnaires canvassed more generally practitioners’ personal views of the reforms and the extent to which the amendments had affected their practice and their advice to clients. Follow-up interviews were also conducted subsequent to the Full Court’s decision in *B and B*.¹⁴³ Solicitors’ personal evaluations of the reforms ranged from comments that the new provisions were merely “verbal window dressing” and “old wine in new bottles”, to views that they had effected a real change to the “balance of power” between parents. Many of the respondents focused on the ‘right to contact’ aspect of the changes. Some solicitors clearly supported the increased recognition of contact fathers, while others saw that shift in a more sinister light.

Many lawyers were cynical about the *Reform Act*’s purpose and the likelihood of change, again reflecting a contrast with the views of many of the counsellors who were surveyed. The following are examples of solicitors’ comments.

“The reforms seem to be a political exercise to satisfy lobby groups but in practice make no significant difference.”

¹⁴³ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676.

“It is merely a sop that makes the non-resident parent feel involved or that they have lost less.”

“The reforms are essentially typical of most family law “reforms” - which are mostly just changes, not necessarily improvements - promise much, create a lot of confusion and deliver very little. You can’t legislate human nature.”

“I find the number of changes to the Act and Rules and their frequency confusing & difficult to keep up with, even though I’m practising only in family law. The rewritten Part VII is somewhat a maze even to experienced practitioners - and I find it logically difficult to follow.”

“I see most, if not all, of the Reforms as having more the character of education than changes to the law. Education is both **highly** necessary and appropriate for separated parents in relation to children - but I do not see amending the Family Law Act as the way to achieve it. The Act is - or should be - primarily directed to resolving conflict when it arises. ”

“I believe that the reforms have only effected change in terminology. The legislation was clearly directed to the 5% of couples who cannot resolve child issues amicably but I do not believe that changing the names in any way alters the perceptions and attitudes of those people - they will always want their day in court.”

A number of practitioners reflected on the public perception of the reforms and the consequences of that. The majority of such comments noted negative consequences, such as an increased opportunity for conflict and litigation. The following are examples of such reflections.

“There is a public perception that contact parents, usually fathers, have more control over residence parents. There is also a perception that grandparents now have rights that they did not have before the amendments. I don’t think the amendments have affected ‘reasonable’ people very much at all. I think they have aggravated the aggressive & antisocial behaviour of others - perhaps as a result of disappointment of unrealistic expectations. ”

“They encourage non-resident parents to imagine they have a significant role in their children’s upbringing, but in high conflict families this can’t work and the resident parent will get sole parental responsibility. This is likely to make the non-resident parent feel more frustrated and embittered than under the previous regime as a perceived right is lost whereas with custody orders, the resident parent automatically had legal authority as to day-to-day matters. The reforms work only for those couples who are able to work with a high degree of co-operation in the interests of their children - these people would have done this anyway.”

“Fathers are fighting harder than ever for more involvement in children’s lives and for an EQUAL rights approach to children. A lot of litigation about children seems to have been encouraged. It to some extent has been seen as a charter for non-resident parents’ rights. Best interests of children perhaps diluted somewhat”.

“In practice the reforms have allowed abusive partners to further harass the children’s carer.”

Others commented specifically on the changes in terminology and the level of uptake of the new language by the community.

“The community sees the changes as cosmetic only and it is sometimes hard to sell the new terminology.”

“New terminology definitely helps placate fathers when structuring parenting arrangements. Also new reforms remind mothers they don’t have sole responsibility for decision-making”.

Practitioners’ personal views of the reforms appear to affect their advice to clients. For example, those lawyers who were sceptical about the reform objectives, or who believed the amendments were “just words”, have tended to frame their advice in much the same way as they had done under the previous legislation, simply translating the custody and access concepts into the new terminology. On the other hand, solicitors who said they had welcomed the reforms because of their focus on children, tend to “sell” them to clients by focusing on the benefits to children of having time with both parents. Others from this group said they also tend to point out the benefits for the resident parent in giving generous contact, for example, “free baby-sitting”. Finally, there were a number of solicitors among those interviewed who saw the reforms in terms of increased recognition for fathers, and who have used the new provisions to lever more liberal contact arrangements from the resident parent. The following comment is typical of those solicitors:

“The reforms have made it easier to convince the wife /mother to agree to give contact to the husband”.

As noted above, a number of practitioners said that their practice had become ‘more complicated’ as a result of the reforms. For example, whereas an order for custody ‘covered everything’, solicitors said they now need to “carefully design orders”, including detailed orders about each parent’s respective responsibilities for the children. Some were unhappy about this increased workload which they saw as ‘complicating matters’, and those solicitors who do large amounts of legal aid work said they were finding it particularly difficult to provide adequate services to clients. However, there were some solicitors who viewed the increased workload as a positive thing, either because they saw it as benefiting the clients (“It gives you more options to work with”), or because they saw it as having benefits for lawyers (“We’re all having a little bit of fun because we’ve got more things to fight about now”).

Solicitors' perceptions of the *Reform Act's* impact upon specific areas of practice were varied (specific aspects of practice are discussed in more detail below). Advice about relocation, interim residence orders, and the relevance of domestic violence to interim contact decisions, were the most frequently noted areas of change to practice resulting from the reforms. For example, lawyers in several regions said their advice to clients had been affected by the court's preference for making interim orders for the children to live "week about" with each parent. Also, there was a general sense from many solicitors in all cities surveyed that the court is now giving contact to parents who would not have been successful in obtaining an order for access. This related particularly to cases where domestic violence is alleged as a reason for suspending contact. Many solicitors noted that their current advice to parents who do not want their former partner to have contact with the children because of domestic violence is that they are unlikely to be successful in obtaining an order suspending contact at an interim hearing. Their view was that the court is now more likely to maintain contact until the final hearing unless the allegations suggest a risk of physical harm to the child, whereas prior to the *Reform Act* it was more common for access to be suspended or supervised until trial. Many said they would no longer seek an interim order for contact to be suspended unless the circumstances were 'exceptional'. Some attributed the change in practice to the "right to contact" principle now embodied in the Act, and believed the reforms had "turned back the clock". In the words of one practitioner:

"Domestic violence is now downplayed like 10 years ago - unless it affects the children, he'll still get contact".

A number of solicitors also noted that the court is more willing to make orders for 'generous amounts' of contact than prior to the reforms, and this was said to be occurring "a lot of times over very strenuous and relevant objections of residence parents". In addition, many solicitors noted an increased willingness among other practitioners to agree to more 'liberal contact' regimes than had previously been the case.

Another aspect of advice to clients that was frequently commented upon concerned relocation applications. A number of lawyers said they had changed their advice on this issue because of the 'right to contact' principle in s60B(2) of the *Reform Act*, while many others said their advice had been affected by changes in judicial practice. It was thought that any changes to relocation decisions would virtually disappear after the Full Court handed down its decision in *B and B*¹⁴⁴ in July 1997. However, the generally held view among practitioners both before and since that case, was that permission to relocate was more difficult to obtain than prior to the enactment of the reforms, and, conversely, it had become easier to get an injunction to restrain a resident parent from moving away. In several regions, lawyers also noted an increase in the making of interim orders for a resident parent's return when the children had been relocated without the contact parent's consent.

¹⁴⁴ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676.

One area of the *Reform Act* amendments that appears to have had, at most, minimal impact upon the practice of solicitors, is that dealing with parenting plans. Only three of the solicitors interviewed had assisted parties to draw up a parenting plan, and only one of those plans had been subsequently registered. Similarly, an overwhelming majority of the solicitors who responded to the questionnaires (91%) noted that they were using parenting plans less frequently than they had used child agreements under the pre-*Reform Act* legislation.¹⁴⁵ This is supported by Family Court statistics, which show that far fewer parenting plans have been registered than child agreements prior to the reforms.¹⁴⁶ Solicitors generally agreed that consent orders under Order 14 of the *Family Law Rules* remain the most-used mechanism for settling parenting matters. Many referred to the cumbersome registration and amendment requirements as being impediments to the use of parenting plans.

Solicitors were also asked whether there had been any changes to the hearings of children's matters as a consequence of the reforms. Several practitioners commented on the continued use of pre-*Reform Act* terminology by some judges, and the tendency of some to speak of 'awarding' residence to a parent. Some also commented upon the continued use of 'custody' and 'access' by other practitioners. However, some changes to interim hearings were noted. These related particularly to the practice of several judges and judicial registrars who regularly sit in the Duty Lists, of explaining the *Reform Act* concepts to the parties and/or giving them examples of the kinds of 'parental responsibilities' which require consultation between the parents. A number of solicitors, particularly in Brisbane, spoke of the positive effects of that approach for their clients. For example, one said that even when her clients did not get the order they had wanted, they tended to accept it because "the 'judge' had taken the trouble to include them" in the proceedings.

Finally, solicitors were asked whether they are relying more on primary dispute resolution mechanisms than they had prior to the reforms, and about their practice of advising clients about counselling and mediation. The responses showed that while Court counselling is still heavily relied on, most lawyers (86%) are not using primary dispute resolution services any more than they had done before the *Reform Act*. Of those who have increased their reliance on counselling, some explained this as being related to the requirements for legal aid funding, and not because of the reforms. Very few practitioners have been promoting mediation (with a couple of notable exceptions who use mediation as a routine part of their practice), and some conceded they had little understanding of what a family mediation service provides.

¹⁴⁵ Child agreements were provided for under the previous *Family Law Act 1975* (Cth), s66ZC.

¹⁴⁶ In the 1997/98 year, 352 parenting plans were registered nationally. By comparison, 1008 child agreements were registered in 1995/96, and 1088 were registered in 1994/95.

Family Court Counsellors

The responses to the questionnaires suggest that Court counsellors are generally more supportive of and enthusiastic about the reforms than lawyers. The following are examples of comments made by counsellors.

“On the whole I believe these changes should give children a better deal and allow them contact with both parents. ... I think the changes are positive - apart from protection issues of violence and abuse most people do not have legal problems, they have relationship problems.”

“On the whole the reforms are a step in the right direction & I feel positive about their thrust & hopeful that they will prove beneficial to children.”

“It is an opportunity for attitudinal change and to remind the community of children’s needs & rights. But there was an inadequate level of public education about the new act.”

Furthermore, most of the counsellors who were surveyed appeared to be aware of the changes effected by the *Reform Act* to the law of custody. For example, 58% of the counsellors who responded to the questionnaire recognised that ‘residence’ and ‘custody’ were fundamentally different concepts, while only 2% thought that ‘residence’ represented a change in name only. By way of contrast, 44% of solicitors who responded to the February 1998 questionnaire and 26% of solicitors who responded to the April 1998 questionnaire identified ‘residence’ as a change from ‘custody’ in name only. (Solicitors’ responses are discussed in detail in the previous section.)

Nevertheless, the amendments appear to have had relatively little impact on the practice of most counsellors. Of those surveyed by questionnaire, only 35% said they had altered their explanation of parental responsibility since the reforms. By contrast, the majority of solicitors who were surveyed had made changes to their explanation to clients (see earlier section). The reasons given by counsellors for that lack of change centred on their perception that the *Reform Act* merely reflected “the way in which counsellors had been thinking of parental responsibility for many years”. Many saw the reforms as “embodying existing counselling practice” or commented that the effect of the reforms had simply been to “strengthen the approach counsellors already used” and provide “legal support” for their position. Those views related particularly to the *Reform Act*’s emphasis upon parents continuing to share the responsibilities for their children after separation, and to the child’s right to an ongoing relationship with the contact parent. Several responses suggested a misunderstanding of the legislative provisions. For example, some counsellors made reference to the “contact parent’s right” to see the child, and a few thought that the legislation “requires [counsellors] to encourage joint parenting”.

Counsellors were also asked about their explanation to clients of the concept of parental responsibility, and whether that explanation differed from that given prior to the reforms. For most, their responses to this question tended to focus on the ‘new’ concept of “co-operative parenting” and the idea that there has been a move away from the “power imbalance” of the previous custody and access law. Many also made reference to the idea

of a “shift in power” having been effected by the reforms, with the former “exclusive control” of the children by the ‘custodial’ parent having been removed. Most of those surveyed conveyed a sense that the law now strongly encourages parents to share the care of their children after separation, something which was not encouraged under the previous law. The explanation of some respondents went further, suggesting the law now *requires* parents to share the care of their children. A second and related aspect of counsellors’ explanations of parental responsibility was an emphasis upon the “equality” of decision making power as between resident and contact parents. Again, some saw this in more prescriptive terms, suggesting to clients that the law requires parents to consult one another before making decisions, or that parents are obliged to “reach agreement” about the children’s care. A number of counsellors described post-separation parental responsibility as a “continuation” of the pre-separation situation, with each parent retaining “the same parental responsibilities that they had prior to the separation”.

A number of the Court counsellors who were surveyed were critical of the advice given to parents by lawyers, and of judges’ failure to make changes to their practice. Criticisms centred on the suggestion that lawyers had “not taken the reforms on board”, were tending to treat the changes as “just words” rather than a matter of substance, and were continuing to frame orders in a way that reproduces custody and access orders. The following comments are examples of the criticism levelled at the legal profession, particularly with respect to the drafting of parenting orders.

“There is absolutely no acknowledgment that (usually) fathers have any ‘day to day’ responsibility for children during the time they spend together. This seems to me to be totally contrary to the spirit of the reforms.”

“It seems that lawyers have just been substituting the new terminology to fit in with the old concepts. It seems to me that the important but subtle shift required in thinking about the concepts the reform act was designed to introduce is not easy for them to grasp.”

“One wonders whether Judges & senior legal people can change their whole philosophical viewpoint without any real opportunity for them to process their personal reactions, prejudices, biases etc. Counsellors at least have a milieu in which such processing is considered healthy & appropriate.”

Others suggested that judges and registrars should be refusing to make orders that give one parent sole responsibility for the children, or at least “raise questions” about that arrangement, so as to “send a message to the lawyers” about the reforms. Some counsellors were also critical of lawyers for continuing to rely on an “adversarial approach” to resolving problems about children, rather than promoting mediation.

Although counsellors appear to be more enthusiastic about the co-parenting agenda of the *Reform Act* than solicitors, many nevertheless suggested that the reforms have been wrongly interpreted by some parents and that this has led to anger and frustration, and to increased litigation by fathers seeking to assert their “rights”. This view relates to the perception of some contact parents that the *Reform Act* had “promised” them “equal time”

or “half time” with the children. Some counsellors attributed such misunderstanding to misrepresentations of the reforms in the press. Others commented on the capacity for explanations of ‘shared parental responsibility’ given in Family Court information sessions to mislead. In one registry, counsellors blamed a local men’s rights organisation for much of the misunderstanding and anger they had experienced among fathers who use the counselling service. A number of counsellors talked about the bitterness and frustration of contact parents, particularly when counsellors explained to them that the law does not require an equal sharing of time. The following comments are examples:

“I often find myself explaining that the concept of shared parental responsibility does not mean that children live half the time with each parent”.

“The *Reform Act* has emboldened parents to ask for equal time. That’s how many fathers have interpreted it. I tell them, ‘It means each of you has responsibilities, but how you share your time is up to you or the Court. The law doesn’t say equal time.’ They get very disappointed. They tend to see the Family Court as a terrible place”.

Several counsellors reported an increase in the number of Duty Reports being ordered in the judicial duty lists since the reforms. Again, this was attributed to the “push by fathers” for shared residence orders and from fathers seeking interim contact in circumstances which would have given rise to access being suspended before the *Reform Act*. Court counsellors were also asked about their use of parenting plans and only 6% reported using them. Many (42%) said have never used a parenting plan, or use them rarely. Counsellors in one registry explained that parenting plan kits were not readily available at the counselling section of the Court. Others commented that they advise parents who wish to make a written agreement that a parenting plan is only “one option”, and also advise them to see a solicitor about consent orders. Some counsellors said they were reticent about promoting the use of parenting plans because “they are a legal document”. The concern here was that by signing a parenting plan (as the legislation requires counsellors to do when parties have not been legally advised¹⁴⁷), they would be “giving their imprimatur to the agreement”. These counsellors preferred to refer clients to a lawyer to have consent orders drawn up. In one registry, that fear had been specifically addressed by a meeting between the registrars and counsellors, in which the registrars had reassured counsellors that the agreements signed by the counsellors are independently checked by the registrars prior to registration. This had resulted in increased use of the plans by counsellors. Other Court counsellors spoke of the “legal culture” of the Court as being responsible for the greater use of consent orders, suggesting that parents who have asked for a parenting plan form have often been given a ‘consent order kit’ instead. Some also blamed legal practitioners for failing to support the parenting plan reforms.

¹⁴⁷ *Family Law Act 1975* (Cth), s63E(2)

Private and Community Counsellors

The responses of private/community counsellors are very similar in nature to those of the Court counsellors. The majority of respondents (63%) had not changed their explanation of parental responsibility to clients since the reforms had come into operation. Like the Court counsellors, many saw the reforms as having codified an already long-standing counselling practice. The following comments were typical of those surveyed:

“I have always seen shared parental responsibility as the ideal and am now supported by the reforms to the Family Law Act”.

“I have always emphasised to separating couples their responsibilities as parents and now have the law to support me”.

Those who had altered their practice in giving advice tended to emphasise the parents’ “equal responsibility for parenting” under the *Reform Act*, and the differences between that and the former ‘custody’ and ‘access’ situation. Some also noted that domestic violence had become “more of an issue” in their advice. The vast majority however (94%) said that there is a considerable divergence between the theory and practical reality of shared parenting. A range of factors was said to be responsible for that divergence. Some factors were said to be within the control of the parties, while others were simply endemic to the separation process. Many noted the reforms had failed to make a difference to post-separation arrangements in practical terms because of the lack of public education about the changes and/or because of continued ‘adversarial tactics’ by lawyers. Others commented on the pervasiveness of domestic violence as the major obstacle to shared parenting. The following comments are examples of counsellors’ views:

“This is not necessarily a reflection on people’s genuineness. Most parents would - and do - agree with the theory of shared responsibility but find the practical reality difficult, often as a result of the personal pain of separation”. (Melbourne counsellor)

“Mostly women end up carrying lots of responsibility and male partners still have children for limited time and do not consistently make themselves available to the children”. (Parramatta counsellor)

“Few separated couples are adult enough to work together as a parenting team”. (Brisbane counsellor)

“Because often cases involve domestic violence and the abuse continues through the children”. (Gold Coast counsellor)

“The non-resident parent often does not accept any or only limited parental responsibility”. (Maroochydore counsellor)

“Despite changes to wording and publicity, it is very hard to separate parenting responsibility from marital relationship issues, and ‘custody’ and ‘access’ remain as the concepts in the minds of the parents, especially fathers”. (Sydney counsellor)

In their general observations about the reforms, many of the private counsellors stressed their personal commitment to the ‘spirit’ or ‘philosophy’ of the reforms, and, as noted above, commented critically on the lack of education in the community about the changes. Others were less enamoured of the *Reform Act*’s emphasis upon shared parenting. For example, some said this had simply served to “lengthen the period of negotiation before settlement”. Some commented on the opportunity such an emphasis had given to contact parents to harass the resident parent. The following comment is typical of that perspective:

“There are benefits in highlighting parents’ need to agree on specific parenting issues, but in circumstances where power and control are motivating forces, every time re-negotiation takes place on an order, power is given to the objecting parent. This has become a new tool of control and an endless cycle of court orders”.
(Parramatta counsellor)

Many also made comments about funding, more specifically the lack of adequate funding for the Court and for child contact services to deal with the consequences of the reforms. Some respondents focused specifically upon the interaction of the reforms with the cuts to legal aid funding for family law matters. For example:

“Legal Aid has been a huge issue. Women have been put in a position of danger because they have been unable to change parenting plans (no legal aid) and forced to continue to do something under the threat of blackmail of ‘you’ll lose the children’”. (Adelaide counsellor)

Counsellors were also asked whether they thought the reforms had made a difference to the outcomes of any particular types of dispute. A small majority of respondents (51%) identified a number of areas which they said had been affected by the amendments. The most frequently cited was the issue of relocation, with many respondents noting that the Court is “less likely” to permit a child to move interstate with a parent than it had been prior to the introduction of the *Reform Act*. Another difference that was noted by some was a greater recognition by the Court of the effects of domestic violence on children.

There was also a majority (62%) who said that the reforms have changed the way parents think about children’s issues after separation. A number of changes were noted, not all of them the ones envisaged by the government when the reforms were introduced. Several respondents suggested positively that there had been an increased awareness among fathers of their continuing responsibilities for their children after separation. Others noted the reforms had raised the expectations of non-resident parents who wished to play a greater part in their children’s upbringing (which were sometimes frustrated), and had given rise to increased commitment by grandparents to maintaining contact with their grandchildren after parental separation. More negatively, respondents also noted an increased likelihood that a non-resident parent will “fight for contact” regardless of the children’s interests, as well as increased harassment by contact parents through constant challenges to the resident parent’s care of the children.

Finally, counsellors were asked about their use of parenting plans. The majority of respondents (53%) had never used a parenting plan or used them very rarely. Only 15% said they use them often.

Private and Community Mediators

Almost all of the mediators who were surveyed (84%) recognised that the reforms represent a ‘fundamental’ change to the law of custody, and that ‘residence’ is not simply ‘custody’ by another name. However, in a similar vein to the comments of counsellors, a number of mediators suggested they had not needed to change their practice to conform to the *Reform Act*’s philosophy, as the reforms ‘sit comfortably’ with the approach they had been using for some time.

Mediators were asked to describe the ways in which they considered the law regarding parental responsibility has changed since the reforms came into operation. The responses suggested the following list of matters were important in that respect:

- the separation of responsibility for children from the child’s place of residence;
- the shift to both parents being ‘equally’ responsible for their children’s well being after separation;
- the emphasis upon children having rights, especially the right to see both parents regularly;
- the move from the concept of ‘ownership of children’ to one of ‘responsibility for children’; and
- a focus on joint decision-making by parents.

Most mediators (81%) also said the reforms have changed the way parents think about children’s issues after separation. They reported having observed an increase in clients’ awareness of children’s need to have regular contact with both parents, and an increase in their understanding of the importance of children maintaining contact with members of their extended family, such as grandparents. Some noted an increase in the number of fathers who express an ‘entitlement’ to contact and are prepared to pursue it. Others noted an increase in the numbers of parents who are aware of the impact that parental separation has upon children, or are aware of the idea that ‘children have rights’.

However, like counsellors and solicitors, the majority of mediators (84%) reported a divergence between the legislative ideal and the practical reality of shared parental responsibility, with many noting that mothers still tend to be the parent who takes primary responsibility for the care of the children. The same range of factors was noted as being responsible for that divergence as was articulated by the other groups of professionals. The following comments by mediators are examples of the reasons given for the lack of shared parenting in practice.

“Because parental responsibility is still closely aligned to the pathology of the previous relationship”. (Perth mediator)

“Many mediation clients are frustrated by their ex-partner’s unwillingness to share their ongoing responsibilities of parenting”. (Brisbane mediator)

“The parent with whom the child ‘lives’ still seems to be left with the major responsibility for parenting and most often this still appears to be the mother”. (Hobart mediator)

“Most clients still talk about ‘custody’ and ‘access’ and think in terms of the proprietorial aspects of those concepts”. (Dandenong mediator)

“By and large, legal practitioners have failed to embrace the Reform Act as a change in anything more than terminology.” (Melbourne mediator)

Mediators were also asked about the impact of the reforms upon specific disputes. Most mediators (65%) agreed the reforms had brought about a change to the outcomes of certain kinds of disputes, most significantly to the issue of relocation. Like solicitors and counsellors, many respondents commented that the Family Court has been more reluctant to allow parents and children to move interstate since the *Reform Act* was passed. Several of the mediators referred to the higher profile given to the issue of domestic violence by judges of the Court, but some also commented that this did not always affect outcomes.

Mediators’ assessments of the reforms generally reflected disappointment with their failure to effect the intended changes to attitudes. Like the counsellors, some criticised lawyers and judges for ‘failing to embrace’ the changes, for example, by refusing to encourage or order shared residence arrangements. Others commented that the *Reform Act*’s primary dispute resolution agenda was essentially a “meaningless exercise” given the lack of legal aid funding for clients to resolve conflict through counselling and mediation.

Some noted there had been negative consequences of the reforms, such as increased frustration among fathers whose expectations of greater input into their children’s lives had not been realised, and increased opportunities for harassment of the child’s carer by abusive ex-partners. Many commented that they believed men and women had responded differently to the ‘power restructuring’ agenda of the *Reform Act*. For example, there appeared to have been an increase in men believing they “have more rights”, while women were said to feel increasingly “less secure” in their parenting or felt “pressured to make contact arrangements when they believe this is not in the child’s best interests”. Respondents noted greater numbers of men seeking residence or a shared residence arrangement, and fewer women opposing contact.

On the issue of parenting plans, it appears they are being used at a greater rate by mediators than by the other groups surveyed, with 43% of the respondents using them ‘very often’. Whether these plans are being drawn up with a view to registration, or are merely being relied on as a tool to assist settlement (as was their original intention) was not ascertained.

Are contact parents given the opportunity to spend more time with their children than access parents did before the *Reform Act*?

Each of the surveyed groups was canvassed about the extent of changes to children’s living arrangements (both by consent and court ordered) since the *Reform Act* was passed.

Solicitors were asked whether they are drafting or seeking orders for shared residence, and whether the court is making such orders. They were also asked about the amount of contact being sought and ordered, and whether that differs from the pre-*Reform Act* situation. Those questions also formed part of the questionnaires given to solicitors and counsellors. In addition, counsellors, judges and judicial registrars were interviewed about their practice, observations of judicial duty lists were undertaken, and a review and comparison of pre- and post-*Reform Act* judgments, both interim and final, was made.

‘Genuine’ Shared Residence Orders/ Arrangements

Solicitors

Solicitors were first asked about their own practice. A number of practitioners said there had been ‘a rush’ of fathers suddenly demanding ‘equal rights’ to their children when the *Reform Act* was passed. Most solicitors were not in favour of genuine shared residence orders (ie, orders for the children to live with each parent for substantially equal periods of time) but said their use would obviously be dependent on the circumstances of the case. Some of those who were interviewed did promote them, particularly as an interim measure, and one believed they were a good idea although had not used them. There were also a number of solicitors who reported clients having agreed to a shared residence arrangement, sometimes involving children living for substantially equal periods of time with each parent, in counselling sessions. Some said this was a consequence of counsellors telling clients that the court will require parents to share the parenting of their children.

Lawyers were also asked about the Court’s practice, and whether there had been any increase in the numbers of shared residence arrangements being ordered since the reforms came into operation. Most solicitors were of the view that final orders for genuine shared residence remain extremely rare, particularly in contested matters. On the other hand, several solicitors in Adelaide, and to a lesser extent practitioners in Sydney and Melbourne, reported that interim orders for children to live “week about” or on a “split week” basis with each parent had become commonplace since the reforms. Some noted that the relevant judge or judicial registrar often made reference to the reforms in support of those orders.

Court Counsellors, Private and Community Counsellors and Mediators

Like the solicitors who were interviewed, a number of Court counsellors said there had been a sudden demand by fathers for ‘equal time’ residence arrangements when the reforms came into operation. Some counsellors said that such requests were still occurring, and that they often encountered men’s anger and frustration after explaining to them that the reforms do not require a shared residence arrangement. One counsellor said that men frequently argue that “50% is fair”. The vast majority (85%) of respondents to the Court Counsellor questionnaires also said the reforms have increased the expectations of fathers and correspondingly affected the expectations of mothers. The following comments are examples of their perceptions.

“A lot of men think the reforms mean they have more rights eg. the right to have the children half the time. A lot of women think the changes mean they can never move, or they have to let the father have shared (50/50) residence”.

“There is a higher expectation (by men especially) of shared parenting orders (but not always resulting in hopes being met)”.

“Men frequently take it to mean that shared parenting is automatic.”

Overall, Court counsellors were more supportive of some form of shared residence arrangement than solicitors, and more likely to suggest such an arrangement to clients. As noted previously, a number of counsellors were critical of lawyers for failing to ‘adapt to the reforms’, and particularly for failing to promote shared parenting. One counsellor commented:

“For example, when I say ‘Have you thought about them staying with him more than every second weekend?’, they often say ‘My solicitor said he should only get them every second weekend’.”

However, most Court counsellors viewed equal time arrangements as disruptive and destabilising and said they would not suggest them unless there is both physical proximity and a high level of co-operation between the parents. One third of those who responded to the questionnaire said they frequently encourage parents to adopt a residence/residence format in framing agreements, but again, very few counsellors suggested that the reforms were intended to allow children to spend substantially equal periods of time with each parent. Several counsellors commented critically upon the Court’s practice of making interim orders for the children to live ‘week about’ with both parents, and one person noted there were some interim ‘week about’ orders that had been in operation for more than two years.

A smaller proportion (20%) of the private counsellors who responded to our questionnaire said they ‘frequently’ encourage parents to make shared residence arrangements, while twenty-eight per cent said they ‘sometimes’ encouraged clients to do so. However, the majority (51%) said they had never or rarely encouraged parents to make such an arrangement. Again, shared residence was said to be appropriate only where the children could maintain their friendship networks and activities with minimal disruption and the parents are co-operative.

Mediators were also asked about their understanding of shared parenting. No one expressed the view that it referred to children spending equal amounts of time with each parent. However, like the counsellors and solicitors who were surveyed, a number of mediators commented on the increase in the numbers of fathers seeking a shared residence arrangement for the children, and noted that men often believed they had ‘a right’ to such an arrangement. The following are examples of the definitions of shared parenting provided by mediators:

“Shared decision-making; not shared time.”

“Both parents maintaining ‘residence’ status no matter what the contact arrangements are for the children with each of them.”

“Working closely together as parents. ”

“Whatever the parties want it to mean. That can be the father having some share through to both parents equally supplying parenting services to their children.”

Judges

None of the judges believed they had made a final order for shared residence involving substantially equal time with each parent, and judges generally felt it was inappropriate to make such an order in a contested matter. Several judges commented on their personal belief that a rotational living arrangement was not a workable long-term option because of the high level of disruption to the child’s life. Most of those who were interviewed also said their approach to making residence orders had not changed as a result of the reforms. However, a few noted that the principles in s60B had affected their practice in the making of interim orders. For example, one said that she now tried to “be a bit more evenhanded” in the time children would spend with each parent, and another, who said that he tried to make “split-week” interim orders where possible, commented that “s60B gives you something to hang it on”. Those respondents saw such arrangements as reflecting the ‘spirit’ of the reforms.

The majority of judges/ judicial registrars however did not believe the reforms require a shared residence arrangement to be preferred or even considered. A number of judges were particularly critical of the making of ‘week about’ interim orders, seeing them as simply avoiding and delaying the making of a decision about the children’s long-term care and stability. One of these judges also noted that such orders appeared to have more to do with the “equality rights of parents” than with children’s best interests. The problem of parties having to return to court to have equal time interim orders reviewed when a child commences school was noted by another judge as a major problem with such orders. This judge commented upon the consequent waste of Court time and the added expense for the parents.

Unreported Judgments and Duty List Observations

The review of judgments uncovered only one case of a genuine shared residence arrangement being ordered after a final hearing. The judgment review and the Duty List observations revealed that the ‘residence and contact’ format remains the most commonly ordered arrangement, even at the interim stage. In the majority (68%) of the surveyed post-*Reform Act* interim cases,¹⁴⁸ and the vast majority of the observed matters, orders were made in that form. The judge in one List was observed to declare his personal view that a shared residence arrangement would rarely be in a child’s best interests.

¹⁴⁸ It should be noted that of the 209 unreported judgments that were reviewed, the statistics in this section are based on a cohort of 160 unreported cases dealing with residence and contact. Cases which dealt solely with a relocation application, a Form 49 application, or an application for specific issues orders, were excluded. While this is a relatively small number, trends can be identified.

However, the review of interim judgments and observations of Judicial Duty List matters confirmed that interim orders involving genuine shared residence arrangements are not uncommon. Of the post-*Reform Act* interim orders reviewed, 29% were residence/residence orders, the bulk of which involved an ‘equal time’ arrangement. The majority of those equal time orders came from the Adelaide registry, although they were also made, albeit less frequently, in other registries. Such arrangements were also ordered under the previous legislation, but it appears that the use of shared parenting arrangements on an interim basis has become more common since the reforms were enacted. While orders for shared custody or shared access were made in 18% of the reviewed pre-*Reform Act* interim judgments, only two of those represented an equal time arrangement.

The practice of making ‘equal time’ interim orders appears to be contrary to the case law principles governing the process of decision making in interim matters which require the decision maker to focus on providing stability for the child by maintaining the existing child care arrangements, unless that course appears likely to endanger the child’s welfare.¹⁴⁹ It is apparent from the review of interim judgments that ‘equal time’ residence orders have been attributed to, or have been ‘bolstered by’, the principle that children have a right to be cared for by both parents, and by the philosophy of ‘parental equality’. For example, interim shared residence orders were made in several cases so as not to advantage one parent at the trial by creating a ‘status quo’.

The review of judgments also showed that interim shared residence is most commonly ordered where the children are quite young and have not yet commenced school. This reflects the views of most of those judges/judicial registrars who were interviewed and who had made such orders. However, some judges have made shared residence orders even where the children are of school age and/or where the parents live some distance from one another. For example, in one Adelaide judgment, orders were made for the children to live week about with each parent although there was a six hour drive to effect hand-over every weekend.

‘Symbolic’ Residence/Residence Orders v. Residence and Contact Orders

Solicitors

As noted above, the most common form of order used by solicitors, and ordered by judges, is for ‘residence and contact’, that is, for the children to ‘live with’ one parent and ‘have contact with’ the other parent at specified times. Nevertheless, many solicitors (47% of those who responded to the questionnaires) said they are ‘sometimes’ drafting symbolic residence/residence orders, even though the children will be living primarily with one parent. Only a few practitioners (6%) said they use such a framework routinely, whereas 45% of solicitors said their usual practice is to draft residence and contact orders. Most commented that they would only draft symbolic residence/residence orders in ‘appropriate circumstances’, for example, where the parents have “a working relationship” or “fairly

¹⁴⁹ *In the Marriage of Cilento* (1980) 6 Fam LR 35 at 37; *In the Marriage of Cowling* (1998) FLC 92-801 at 85,006.

open lines of communication”. Other practitioners had used symbolic residence/residence orders for ‘tactical’ reasons, for example, to allow the ‘contact parent’ to “feel as though he has equal responsibility” for the children, and in order to facilitate a settlement. Many solicitors (61%) also said they are more likely to seek a residence/residence arrangement if they are acting for a father with child support obligations, than if the client is the mother and primary carer of the children. Some said this was because of the child support issue, but most made comments along the lines that they do it because “fathers insist”, or because it is “face saving for fathers”.

Relatively few solicitors (35%) said they believe the use of residence/residence orders is likely to increase the possibilities for co-operative parenting, and a number of those qualified their answer by saying that co-operation was unlikely to occur unless a relationship of mutual trust already existed. Some noted that a residence/residence order could create, rather than remove, a source of possible dispute. All interviewees agreed that a shared residence format is inappropriate if the ‘contact parent’ is abusive or is likely to harass the ‘resident parent’.

Court Counsellors, Private and Community Counsellors and Mediators

A number of those who responded to the questionnaires and several of the counsellors who were interviewed work as both counsellors and mediators. Differences were noted between mediation and counselling clients, with the former being seen as more amenable to shared residence than the latter.

One third of the Court counsellors who were surveyed said they are ‘frequently’ encouraging parents to agree to a residence/residence format, rather than residence and contact, and another 40% said they ‘sometimes’ suggest a residence/residence format to clients. Some professed a belief that allowing both parents to ‘have residence’ should be the standard parenting arrangement, because it “reflects the intention of the *Reform Act*”, and many suggested that such an arrangement is generally appropriate whenever children have overnight visits with the ‘contact’ parent. Others said they tend to encourage residence/residence agreements only where parents are genuinely co-operative and the children live for substantial periods of time in both households.

Shared residence arrangements are also not uncommonly used by private and community counsellors. Such arrangements were said to be frequently encouraged by 20% of the private counsellor respondents, and twenty-eight per cent said they ‘sometimes’ encourage clients to use a shared arrangement. Again, shared residence was seen to be most appropriate where there is physical proximity between the parents’ homes so that the children can maintain their friendship networks and activities with minimal disruption, and when the parents are co-operative. Such an arrangement was seen as inappropriate where domestic violence is an issue.

Overall, there appears to be a greater enthusiasm for shared residence arrangements among counsellors than among lawyers and judges. Most of the Court counsellors who were surveyed (76%), and a majority of private counsellors (58%), said a shared residence arrangement was likely to increase the possibilities for co-operative parenting between separated parents. This compares with only 35% of the lawyers and a similar proportion of

the judges who were surveyed. Counsellors' reasons for preferring residence/residence arrangements related to the "psychological effects" of the "connotation of equality", and the inference that the 'contact parent' is "more involved" in the child's life than a 'contact parent' would normally be. The following comments are examples of counsellors' views.

"It sends something of a message to each parent that they have 'equal rights' in parenting their children, taking away the notion that one has more legal control than the other".

"It acknowledges the 'equality' of each parent even if 12 days are with mum and 2 days are with dad. It allows each parent to feel involved with their children."

"Psychologically it takes away the 'I own them' attitude."

"It reduces the implication that one parent has a more powerful position in relation to the child".

Judges

All of the judges who were interviewed said that 'residence and contact' orders remain more common than residence/residence orders. However, approximately one-third of the judges surveyed said they would frame orders in terms of residence/residence where possible, for example, where it will not be a source of constant dispute between the parents. The practice of most of those judges who use such orders is to provide for the children to 'live with' one parent at specified times (for example, each alternate weekend and during school holidays), and to 'live with' the other parent 'at all other times'. One judge however said he prefers to specify the times the children will live with each parent, rather than specifying only the times the children will live with the 'contact' parent. In his view, that 'equality' approach reflected the spirit of the reforms.

Most of the judges agreed there is often little scope for the making of such orders by the time of a final hearing, as the parties are clearly unable to co-operate if they have reached that stage. Most also said they were reluctant to make them unless asked to, and only two judges had ever suggested a residence/residence order might be appropriate when the parties and their lawyers had not raised that possibility. Others said they would only consider the making of such orders where there is a substantial 'contact' period (ie; more than the traditional arrangement of each alternate weekend).

Like the solicitors and counsellors, a number of judges spoke of the "psychological" importance of residence/residence orders, for example, in giving "dad a sense that he has quite a lot of responsibility", or in trying to "maintain bonding" between father and child or even allaying a parent's 'bad feelings' about the separation. These judges commented positively on the greater flexibility available to them in being able to frame orders that provide for children to 'live with' each parent, by comparison with the more limited pre-*Reform Act* 'custody' and 'access' regime.

All judges agreed that residence/residence orders are not appropriate where they are likely to be used to harass the children's primary carer or there is a high level of conflict between

the parents. However, one judge noted that they may still be used as an interim measure where domestic violence has been alleged because the allegations have not yet been tested.

It appears that the residence/residence format is favoured more in the making of interim orders than after a final hearing. For example, one judge expressed a preference for using the residence/residence format in interim orders “so as not to strip a parent of responsibilities too early”. Several other judges also noted ‘equality’ arguments as the basis for preferring a residence/residence format in interim orders, for example, so as not to create a status quo in favour of one parent prior to the final hearing. On the other hand, several of the judges and judicial registrars who regularly hear Duty List matters said that residence/residence orders were rarely appropriate in the cases they heard. These judges/judicial registrars noted that the overwhelming majority of cases before them are essentially disputes about contact, rather than residence, and that most involved allegations of violence or abuse which rules out a shared residence arrangement.

Unreported Judgments

The review of judgments suggests that symbolic residence/residence orders for the children to ‘live with’ one parent for specified periods, and with the other parent ‘at all other times’, are not uncommon. Nevertheless, both the majority of the post-*Reform Act* final orders (65%) and interim orders (68%) were framed as ‘residence and contact’ orders rather than as a shared residence arrangement. For the most part, that reflected the form of orders sought by the parties, but residence and contact orders were also made in a number of cases in which one of the parties had sought a shared residence arrangement. The Court’s rejection of a residence/residence format usually occurred because the parents were clearly unable to co-operate with one another, or because of the contact parent’s violence or psychiatric condition. There was one case however, in which neither parent sought a shared arrangement, but the counsellor who prepared the Family Report recommended such a regime so that the parents, who were both assessed as being “deficient” in their parenting, could “act as a check and balance on the deficiencies of the other”. It should be noted that the counsellor’s recommendation was not followed by the judge in that case. However, the counsellor’s approach reflects the comments of the judge in another case, who noted that a shared arrangement would allow “two bad parents to keep a check on each other”.

Residence/residence orders were made in 29% of the post-*Reform Act* interim judgments, but the majority of those represented equal time orders. Only 12% of the final orders involved a residence/residence arrangement, and only one of those provided for the child to live with each parent for substantially equal periods of time. In most (76%) of the cases in which symbolic residence/residence orders were made, the children were to live with the ‘contact’ parent for more than the traditional access period of ‘each alternate weekend and half of the school holidays’ (for example, for three out of four weekends, or for five nights per fortnight).

Contact orders: Amount of parent-child contact

Solicitors and judges were asked about the amount of contact being sought and obtained by contact parents, and whether there had been any increase in applications for parent-child contact since the reforms.

Court Statistics

Family Court statistics indicate there has been an increase in the number of applications for contact orders since the *Reform Act* was passed. Nationally, 23,958 contact orders were sought in 1997/98 and 21,897 in 1996/97. This compares with 14,144 access order applications in 1994/95 and 13,814 in 1995/96. However, as a percentage of all orders sought, the rate of applications for contact has remained constant. Contact applications represented 20.7% of all orders sought in 1997/98 and 20.8% of all orders sought in 1996/97, while access orders represented 19.6% of all orders sought in 1994/95 and 20.9% of orders in 1995/96.

Although the number of contact orders in the first year of the *Children Act's* operation in England (1992) was far fewer than before the Act was passed, between 1992 and 1996 the number of contact orders rose by 117%.¹⁵⁰ It has been suggested that the increase reflects “a change in parental attitudes - especially, perhaps, a change in fathers' attitudes - contributing to a growing tendency to assert the importance of their role in their children's lives”.¹⁵¹

Solicitors

Many of the solicitors who were surveyed commented that fathers were frequently seeking more liberal contact arrangements than was usual before the reforms, and that fathers were often pursuing applications for contact in circumstances where they would not have been encouraged to do so prior to the reforms. Many solicitors also commented that fathers were often obtaining orders for contact in circumstances where they would not have been successful before the introduction of the *Reform Act*, for example, where there had been domestic violence (this aspect of the reforms is discussed in more detail below). However, very few of the practitioners who were interviewed in the early stages of the research thought that contact parents were obtaining greater amounts of contact with their children than access parents had obtained prior to the reforms. There appears to have been a slight shift in this regard, with about one-third (32%) of the respondents to the most recent questionnaire (issued in April 1998) noting that the amount of contact between non-resident parents and children had increased. One-third of the respondents to that survey also said that interim contact orders for more than the ‘standard access period’ of two days per fortnight (both consent and court ordered) were ‘frequently’ made. Where an increase in contact was noted, this was said to be represented most commonly by orders for

¹⁵⁰ Gwynn Davis, Op cit

¹⁵¹ Gwynn Davis, Ibid at 617.

weekend contact to extend until Monday morning instead of finishing on Sunday evening, and/or for an additional night with the children mid-week.

Although some practitioners said that the desire to reduce child support payments was often the main motivation for extra contact, most attributed the increase to contact parents being “more prepared to pursue their rights” since the reforms, or to particular judges and judicial registrars being “more aware that the child should have as much time as possible with both parents”. Several solicitors in Melbourne, Sydney and Parramatta said that fathers were sometimes obtaining ‘generous’ amounts of contact by consent as a result of advice from counsellors. A number of those solicitors expressed concerns about this trend, because their clients had later regretted the agreement. Two solicitors noted this as being a particular problem for clients who do not speak English fluently. For example, one solicitor described a female client who had agreed in counselling to give the father substantial weekly contact, even though she was afraid of him. The client had apparently believed the counsellor was a judge, and had felt compelled to agree to the proposal. A similar point was made by several solicitors from a community legal service and by staff at a domestic violence service which had been surveyed. Another solicitor made the following more general comment:

“The counsellors are pushing shared residence and more contact. They are ignoring the reality of the situation: the parties are there because they’ve separated but counsellors are taking the view of an ideal world and pushing frequent contact with both parents. I tell my clients to disregard what the counsellor told them.”

Judges

The picture given by judges and judicial registrars is that orders for contact for more than two nights per fortnight are not uncommon, both in interim and final orders. However, not everyone saw that as a reflection of the reforms, and the majority said they had not altered their practice in this regard, and did not see the need to alter their practice, because of the *Reform Act*. Nevertheless, many said they had noticed a shift in the amount of contact being sought by practitioners and, more particularly, by litigants in person.

Several judges expressed surprise at the suggestion that the reforms might result in greater amounts of contact, given that the child’s welfare or best interests has always been the paramount consideration for the court. In the words of one:

“What did they think before? That access was an optional Christmas present? One had to be just as child-focused then as now.”

A number of judges stressed that they had always attempted to give children as much access time with parents as possible, and had never felt restricted to making orders for “alternate weekend access”. One judge explained:

“I’ve never thought you can build a relationship with a child if you only see them two days every fortnight”.

On the other hand, there were a few judicial registrars and judges who said they had tried to move away from the ‘alternate weekends’ regime where possible, although one of those judges noted that he was “always mindful of the child support implications of granting extra contact”. Most of those made comments along the lines that they now made a greater effort to give as much parent-child contact as is practical given the child’s weekly activities. For example, several interviewees spoke of the need to ask about bedtimes and sport and homework obligations before deciding what orders will work. Another judicial registrar explained his change of practice in terms of “keeping the relationship going” between father and child, which he saw as being in keeping with “the spirit of the reforms”. His view was:

“I think more than 3 days apart from a parent is too long for a young child for bonding purposes. It’s rather nice for the child to be able to have dinner with the non-resident parent during the week”.

Another judicial registrar admitted the increase in the amount of contact in interim orders was a direct consequence of the reforms:

“Because of s60B, you’re not so stuck with the old 2 days a fortnight idea”.

Are ‘non-resident’ parents exercising more responsibility for their children than access parents did before the *Reform Act*?

Orders about day-to-day parental responsibility

Solicitors

Solicitors were asked whether it is usual for them to draft or seek orders about day-to-day and long-term parental responsibility when dealing with residence and contact arrangements. Overall, 48% of those lawyers who were surveyed by questionnaire routinely include orders about day-to-day responsibility when seeking or drafting residence orders. There were regional variations on this aspect. For example, a much higher percentage of solicitors in Melbourne than in Sydney said they regularly draft orders dealing with day-to-day care, welfare and development. Very few solicitors (11%) routinely use residence orders that make no reference to parental responsibility. The remainder of those surveyed said they ‘sometimes’ draft consent orders dealing with parental responsibility.

Of those solicitors who were interviewed, a small majority said their usual practice is to provide for each parent to have day-to-day responsibility for the children while they are living with that parent, and to make no order as to long term responsibility. Some of those qualified their answer by saying that they would seek sole day-to-day responsibility for the resident parent if the contact parent is likely to use his parental responsibility to harass the resident parent or unduly interfere with the care of the child. Only two solicitors said they do not normally draft any orders about parental responsibility, that is, they simply concentrate on residence and contact. The remaining solicitors said their orders tend to approximate the previous custody and access regime, that is, they draft orders giving sole day-to-day responsibility to the resident parent.

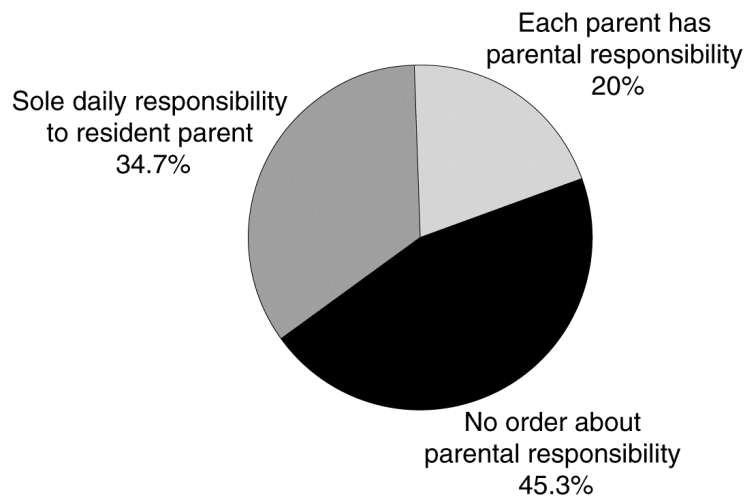
Judges

The view of most judges was that there is little difference between final orders for residence and the previous custody orders. Many said that their practice of making orders about parental responsibility is guided by the proposals of the parties and by the circumstances of the case, and that they would only make an order about day-to-day parental responsibility if asked to do so, or if that is an issue raised in the case. These comments related particularly to the making of final orders. For example, several judges commented that they would make an order for the resident parent to have sole day-to-day responsibility for the children if it was clear from the evidence that shared responsibility would be “a source of continuing dispute”. Some judges said they make orders that the parties “retain” long-term responsibility for the children; others make no order about that aspect. One judge said she usually provides the parties with an explanation and examples of day-to-day and long-term responsibilities, and particularly points out those decisions which require consultation and those which do not. Another judge commented on the lack of a clear distinction between decisions that fall within a parent’s day-to-day responsibility and decisions that are part of the parents’ long-term responsibility, and the scope for disputes engendered by that uncertainty.

Unreported Judgments and Duty List Observations

The review of final orders made after a contested hearing shows an emerging practice of giving each parent responsibility for the child’s day-to-day care, welfare and development while the child is living with that parent. However, orders giving sole responsibility for daily matters to the resident parent remain more common, but this practice largely reflects findings of fact by the trial judge that indicate the contact parent should not be given any scope to interfere with the resident parent’s care of the child. The largest group of judgments entailed orders which made no reference to parental responsibility, but simply dealt with residence and contact. The following represents the breakdown of orders about parental responsibility found in the surveyed judgments.

Orders about parental responsibility in post-*Reform Act* final judgments:



Orders for resident parents to have sole day-to-day responsibility for the children tended to be made in cases where there were findings of violence or a risk of sexual abuse, where there was a high level of conflict between the parents, or the contact parent had “an unsettled lifestyle”, or suffered from a psychiatric condition which affected his or her capacity to parent. In some of those cases, an order vesting the resident parent with sole long-term responsibility was also made, particularly where there was to be no direct contact between the child and the non resident parent. In one case, in which the father was found to have constantly harassed the resident parent, a separate order was made that he “have no parental responsibility for the children whatsoever”.

In the observed duty list matters and the unreported interim judgments, the most common form of order made no reference to parental responsibility but dealt only with residence and contact arrangements.

Specific Issues Orders

Solicitors and judges were also asked about their practice of seeking/making specific issues orders dealing with particular aspects of parental responsibility.

Court Statistics

Significant increases have been recorded in relation to applications for residence and specific issues orders in the Family Court. In 1997/98 there were 38,411 such applications, an increase from 33,304 in 1996/97. This compares with 12,595 applications for custody orders in 1995/96 and 13,315 applications in 1994/95. The increase in the number of these applications since the reforms also represents an increase in such applications as a percentage of all orders sought. For example, applications for residence/specific issues orders represented 33.2% of all orders sought in 1997/98 and 31.6% of all orders sought in 1996/97. By contrast, applications for custody orders made up 18.7% of all orders sought in 1995/96 and 19.7% of all orders sought in 1994/95.

The reasons for these increases are not readily apparent. They may be due to an overly cautious attitude by the legal profession (possibly manifested by an emphasis on specific issues applications) or the previously discussed higher expectations of parents. A similar, albeit delayed, trend was documented in the United Kingdom by Gwynn Davis.¹⁵² In both jurisdictions the numbers of child-related orders also increased. In Australia 14,115 residence orders were made, either by consent or judgment, in 1996/97 and 15,216 were made in 1997/98, an increase of 7%. Over that period 17,280 contact orders increased to 18,214 (5%) and specific issues orders went from 9,732 to 11,720 (17%).

Solicitors

The aspect of the reforms which met with some scepticism before their implementation was the extent to which parents and their legal advisers may seek to delineate the various aspects of parenting responsibilities by way of specific issues orders. Given that residence does no more than describe with whom the child lives, commentators such as Nygh had predicted that practitioners may routinely draft and seek specific issues orders “specifying the range of authority for the ‘residence provider’” to avoid “the interventionist non-residential parent” from making unilateral decisions about the children’s care.¹⁵³ He suggested that the availability of specific issues orders might mean “the new law will not be more simple and less divisive, but quite the reverse”.¹⁵⁴ Ingleby also identified specific issues orders as providing “warring parents with the opportunity to seek orders relating to the minutiae of each other’s care of the child”.¹⁵⁵ In the context of the UK *Children Act* English research has suggested that the availability of ‘specific issues orders’ may have encouraged greater resort to the courts in respect of trivial disputes.¹⁵⁶

Of the solicitors surveyed by questionnaire, only a few (14%) said they regularly draft parenting orders which include specific issues such as schooling and medical treatment decisions. Most respondents (63%) noted that they “sometimes” seek such orders, and the remainder “rarely” apply for them. For the majority of solicitors their practice in this respect has not changed since the passage of the *Reform Act*. The following figures show the breakdown of solicitor use of orders regulating specific issues of care pre- and post-*Reform Act*.

¹⁵² Gwynn Davis, "Privatising the Family?" [1998] *Family Law* 614 at 615.

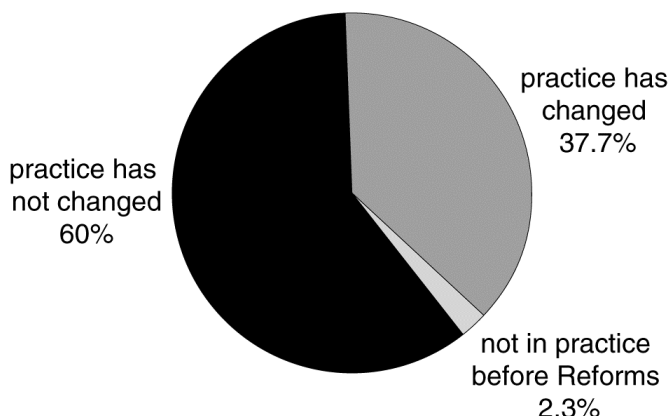
¹⁵³ Peter Nygh, "The New Part VII - An Overview" (1996) 10 *Australian Journal of Family Law* 4 at 16.

¹⁵⁴ Op cit.

¹⁵⁵ Richard Ingleby, "The Family Law Reform Act - a Practitioner’s Perspective" (1996) 10 *Australian Journal of Family Law* 48 at 51.

¹⁵⁶ Bren Neale and Carol Smart, "Experiments with Parenthood?" (1997) 31 *Sociology* 201 at 201; Gwynn Davis, "Privatising the Family?" [1998] *Family Law* 614 at 617.

Comparison of solicitor use of specific issues orders pre- and post-*Reform Act*:



Similarly, the majority of solicitors who were interviewed said they had not altered their practice in this respect. However, there were a number of practitioners in each state who had noticed an increase in disputes about specific details of the resident parent’s care of the children after parenting orders had been made. This sometimes resulted in those solicitors redrafting the orders with a greater attention to the details of those disputed issues than had been given in the original orders.

Judges

The responses by judges were similar to those given by solicitors. Almost all judges said they had noticed no change in the number or type of specific issues orders sought, and that the expected flood of specific issues requests had failed to materialise. There were some exceptions to that. One judge said she had experienced an increase in the number of fathers seeking orders allowing them “a strong input” into long-term decisions, particularly regarding issues of the children’s education. She also commented that she is now making many more conditional contact orders at interim hearings (for example, an order that the contact parent refrain from using drugs) than she had made prior to the reforms. Another judge thought there had been something of an increase in applications and that it was largely solicitor driven. This judge also noted that sometimes specific issues orders encouraged disputes. Yet another remarked that the lectures to practitioners which accompanied the introduction of the reforms suggested that professional negligence claims may result from a failure to seek a specific issues order. She attributed the increase in the numbers of orders sought to this fear of litigation. A fourth judge said that she had been using specific issues orders more often since the reforms in an attempt to “head off” later litigation in cases where she could see the likelihood of that occurring if the orders were insufficiently detailed.

Unreported Judgments

Typical of both pre- and post-*Reform Act* judgments were orders for the provision of school reports and photos to the access/contact parent, orders requiring consultation about medical treatment and choice of school, as well as injunctions restraining a parent from

consuming alcohol during contact visits or to ensure a parent continues to undergo therapy or treatment as a condition of contact. There was no discernible increase in the frequency or detail of those kinds of orders since the *Reform Act* came into operation.

Responsibility for children

Solicitors and counsellors were asked whether they thought the legislation was making a difference to post-separation parenting in practice. The responses indicated that nothing much has changed - the division of responsibility for children appears to remain gendered, with mothers still tending to be the primary resident parent and still doing much of the decision-making and “the hard work”.

Solicitors

The majority of respondents to the questionnaires (77%) noted that there is a considerable divergence between the theory and the reality of post-separation parenting under the *Reform Act*, and agreed that most of the day to day responsibilities for children are still exercised by the resident parent in practice. Most solicitors (73%) also said that there is no difference in practice between the current powers and responsibilities of a contact parent and those of an access parent prior to the reforms. The following comments were typical.

“The decision making ‘powers’ of the contact parent are more illusory than real”.

“Time makes them forget their responsibilities gradually”.

“Generally one party takes on responsibility so it is trite to say that both retain parental responsibility.”

Many of the solicitors who were interviewed also noted a divergence between the amount of contact time being sought by fathers, and the amount of time that fathers actually spend with the children after parenting orders have been made. This comment related particularly to the frequency of complaints received from resident parents about the contact parent’s failure to collect the children for contact or failure to exercise contact on a regular basis. Most agreed they receive complaints from resident parents about this kind of “breach” of contact orders as frequently as they receive complaints from contact parents about the resident parent’s failure to provide contact. In the words of one solicitor:

“People ask for the world and end up taking very little”.

Some solicitors bemoaned the fact that “in reality the non-resident father still never gets to make decisions”, and some were critical of the court for failing to take a “hard line” on enforcement of this aspect, and for generally allowing “women to hijack the reforms”. Others who said there had been no change to the division of labour expressed women’s continuing primary responsibility for children in terms of men’s failure to do anything but “want rights without responsibility”. Some spoke of clients whose male partner had successfully obtained orders for generous amounts of contact, including during the week, but still expected the mother “to do all the work”, for example, washing the children’s

clothes, taking the children to medical and dental appointments, and running the children to sporting activities. The following explanations for that lack of change are typical of the views expressed in the questionnaires.

“The non-resident parent lacks interest in being actively involved in caring for the children after separation”.

“Practically speaking, the primary resident parent still has to make most decisions for the children, just as the ‘custodial’ parent did.”

“It is unrealistic to encourage both parties to suddenly play a significant role in caring for the children, when the fact is that prior to separation only one of the parents usually performed the central carer role”.

Some solicitors noted that they are unlikely to see much of a shift towards co-operative parenting given that, by definition, their clients are not going to be those parents who have been able to negotiate and reach agreement.

Court Counsellors, Private and Community Counsellors and Mediators

Counsellors were also asked whether they thought the reforms were making a difference in practice. Like solicitors, the overwhelming majority of Court counsellors (96%) and private and community counsellors (84%) noted a divergence between the ‘theory’ and ‘practical reality’ of shared parental responsibility. Their responses listed a similar range of explanations for that divergence as that provided by solicitors, including a lack of will on the part of both contact parents and resident parents, as well as a number of practical and logistical obstacles to co-operative parenting. Some respondents were critical of lawyers and judges for continuing to make orders giving the resident parent the bulk of responsibility for children and thereby ‘thwarting’ the theory of shared responsibility. Many noted the impact of factors such as domestic violence and a lack of co-operative parenting prior to separation as impediments to the post-separation sharing of responsibilities for children.

Although the majority of mediators (81%) said they believed the reforms had changed the way parents think about children’s issues after separation, like solicitors and counsellors, most (84%) also said the practical reality of shared parenting after separation had not matched the legislative ideal. Like counsellors, many mediators expressed their disappointment and blamed similar factors for the failure of co-operative parenting to materialise.

The following comments are examples of responses by counsellors and mediators to this issue:

“When parents have not exercised responsibility jointly regarding children at separation, usually conflict and unresolved issues prohibit the theoretical concept of joint responsibility to operate in any effective way”. (Counsellor)

“Practical reality of separation means children’s lives cannot calmly be distributed between two households unless parents have minimum conflict, and maximum ability to communicate. Not common factors in separation!” (Counsellor)

“At a practical level shared parenting requires high levels of co-operation, a willingness to share responsibilities and a readiness to shed and delegate parental responsibility. Realistically much of what is required is unable to be achieved from 2 separate households”. (Counsellor)

“Mostly women end up carrying lots of responsibility and male partners still only have the children for limited time and do not consistently make themselves available to children.” (Counsellor)

“The non-resident parent still often does not accept any or only limited parental responsibility.” (Counsellor)

“Generally the mother appears to be left to deal with the practical reality of child care and separation regardless of any theoretical concept or expectations following court orders.” (Counsellor)

“Many mediation clients are frustrated by their ex-partner’s unwillingness to share their ongoing responsibilities of parenting.” (Mediator)

“Parental responsibility is still closely aligned to the pathology of the previous relationship.” (Mediator)

Have litigated disputes between parents been reduced or increased as a result of the *Reform Act*?

Solicitors and judges were asked whether the reforms had made a difference to the level of parental disputes about the care of children.

Family Court Statistics

The Family Court statistics for the previous three financial years show a steady increase in Form 49’s (applications in respect of an alleged contravention of a child order) filed. In 1995/6 the number was 786, in 1996/7 it was 1434 and in 1997/98 it was 1659.

Solicitors

A number of solicitors said they believed there had been an increase in disputes between parents following the making of parenting orders. The majority of such disputes were said to be instigated by non-resident fathers. Some solicitors said this was a result of the “unrealised hopes” and “increased bitterness” of fathers who had expected to obtain greater parenting rights under the reforms, and/or were critical of mothers for failing to share decision-making responsibilities. Others said the increase in disputes stemmed from contact fathers who expected mothers to do “the lion’s share of the work”, but “took every opportunity” to challenge their care of the children and/or the lack of consultation about day to day decisions. Examples included disputes about the resident parent’s choice of medical practitioner or school for the children, the method of treating a child’s health or educational problems, and disputes about contact arrangements. Some disputes meant that the parents were in constant communication, for example, with the contact parent making numerous phone calls to the resident parent’s home and place of work.

Solicitors also noted that that they were seeing applications involving trivial or ‘technical’ breaches of orders, which had not existed before the reforms. Examples of this included complaints about the resident parent having taken the child to a doctor without consulting the contact parent, allegations of ‘breach of parental responsibility’ when a resident parent had not taken a child to the doctor in circumstances where the contact parent believed that was appropriate, and complaints that contact had not taken place strictly in accordance with orders.

It appears that one consequence of such disputes for these solicitors has been an increased workload, particularly in drafting detailed orders in an attempt to protect clients from such applications. For example, a number of solicitors said that they now routinely draft orders about things such as medical treatment decision making, and stipulate the exact times for contact, rather than leave it as “from after school Friday”, so there is little room for dispute.

Observations of Judicial Duty Lists

A number of contravention applications for breaches of parenting orders were observed in the duty lists of several registries. In all but one of these, the applicant was a self-represented father. Many were dismissed because the alleged breach was not made out, or because the breach was of an informal arrangement rather than an order. In some cases, a technical breach was made out, but the judge or judicial registrar considered it to be trivial and no sanction was ordered. Several of those applications were dismissed because the application was considered to be motivated by an attempt to harass the resident parent, rather than a genuine show of concern for the child. For example, in one case, the contact father had brought a contravention application and sought a specific issues order permitting him to take the parties’ teenage son to a counsellor, because the boy had been discovered reading a pornographic magazine in his bedroom. The father, who was self-represented, argued that the resident parent had breached her ‘parental responsibility’ by failing to consult him about the child’s punishment, that she had “no right” to deal with the issue unilaterally, and that he had “a right as a father” to be consulted about the matter. That

argument was put despite the existence of a family violence order which restrained the father from approaching the resident parent “save in the presence of a police officer”. The father’s application was not successful.

Judges

A number of judges and judicial registrars characterised contravention applications as being brought predominantly by fathers who act for themselves and interpret the *Reform Act* as giving them “more rights than they have”, particularly in relation to day to day matters. Several noted that such applications are frequently frivolous and without merit. For example, one judge said that many of the contravention applications in his registry were brought by fathers “who are not getting contact that conforms to the orders”, but that “50% of those applications don’t have merit” and are a “waste of the Court’s time”. Another commented that “a significant number” of Form 49 applications are brought by “a controlling male hanging on to something that may technically constitute a breach” but which is “not meritorious”.

A few judges spoke of making detailed specific issues orders in final orders when they judged there was a likelihood of further litigation if arrangements for the children were not “properly spelt out”. This approach was seen as “heading off” Form 49 applications that might occur if too much flexibility is given within an order.

Family Violence and ‘Right to Contact’

To what extent have orders for contact been affected by the provisions dealing with family violence and the principle that “children have a right of contact, on a regular basis, with both their parents”?

Relevance of a ‘family violence order’ / use of Division 11 and s68K

Solicitors and judges were asked about the *Reform Act* provisions dealing with the interaction of family violence orders and contact orders. Problems of inconsistency apparently do not technically arise in several States where the standard practice of magistrates courts is to make family violence orders that are “subject to” Family Court orders.¹⁵⁷ For example, an order will be made preventing a person from coming within the vicinity of the resident parent’s premises “except for the purposes of exercising contact ordered by the Family Court”. Hence no issue of inconsistency arises.

¹⁵⁷ A recent review of the operation of Division 11 also concluded that inconsistent contact and family violence orders appeared to be “a very rare thing because of the increasing tendency in most jurisdictions to exempt court ordered contact from the operation of the family violence order”: Kearney McKenzie & Associates, *Review of Division 11: Report* (February 1998), at 15-16.

Solicitors

In the responses to the questionnaires, very few solicitors said they had much experience with the interaction of contact and family violence orders since the reforms came into operation. Some of those who had experience of the new provisions noted a number of problems with them. First, there were complaints that local courts /magistrates courts were reluctant to suspend contact orders, even though the contact was inconsistent with the family violence order being made.¹⁵⁸ Secondly, many of the respondents in this group noted that judges seemed unaware of the provisions. Thirdly, a number of solicitors commented that the drafting of Division 11 is “too complicated”, and the provisions confusing. Fourthly, several respondents complained about being unable to send clients to counselling where family violence orders exist. A few solicitors noted positive consequences of Division 11. For example, some said they thought that Family Court judges are now taking violence “more seriously” in deciding contact arrangements, for example, by “paying more attention to the detail of contact hand-overs”.

Solicitors were also asked specifically about the use of s68R, which requires a judge or judicial registrar to provide an explanation to the parties of the reasons for making a contact order that is inconsistent with a family violence order. Of those solicitors who were interviewed, only one had been involved in a case where a Family Court judge ordered contact which was contrary to the terms of an intervention order.¹⁵⁹ The judge in that case called on the child’s representative to provide the relevant explanation to the parties.

Judges

Judges and judicial registrars were asked about their reliance upon the provisions of Division 11 and their use of s68K (which provides that the court must ensure a parenting order “does not expose a person to an unacceptable risk of family violence”) when formulating contact orders. The majority of judges who were interviewed said they had not used Division 11. Many said this was because family violence orders usually provided an exception for court ordered contact, so that there was no need to use the new provisions. One judge commented that the relevant provisions are “too cumbersome” and do not “encourage judges to use them”, while another expressed the view that the use of pro-forma family violence orders with exceptions for court ordered contact is “a cop out” which “avoids the real problem of women’s safety”. However, a number of judges appeared to have a limited knowledge of the existence of Division 11 and s68K. Although many judges noted that a background of family violence orders was extremely common in parenting order disputes, it seems that very few routinely use the provisions of Division 11 or s68K when formulating contact arrangements. Similarly, few judges said they routinely ask counsel about the existence of family violence orders. On the other hand, a number of

¹⁵⁸ This is also consistent with the findings of Kearney McKenzie and Associates (1998) who noted the view of practitioners that “magistrates do not want to become involved in family law”: at 19. Magistrates have power under s68T of the *Family Law Act 1975* (Cth) to vary or suspend a contact order when they make a family violence order.

¹⁵⁹ This is consistent with the findings of the recent review of the operation of Division 11, which noted that s68R “is rarely used”: Kearney McKenzie & Associates, *Review of Division 11: Report* (February 1998), at ii.

the judges and judicial registrars noted that most lawyers appeared to be aware of their obligation to inform the court of the existence of such orders. This was particularly so in those registries where the existence of a family violence order was said to be commonplace in children matters. Several judges and judicial registrars from those registries said that it was noticeable when a case does not have a domestic violence order.

Unreported Judgments

The review of judgments indicates that, while the existence of family violence orders is widespread in contact proceedings, Division 11 is rarely referred to when deciding appropriate contact arrangements, and none of the judgments expressly mentioned s68K. In the majority of cases in which there was evidence of an existing family violence order preventing the father from approaching the mother's home, orders were made for the children to be collected for contact from a neutral point, such as the children's school or a police station. This was also the approach favoured in the reviewed pre-*Reform Act* cases in which access was ordered.

Contact applications where there are allegations of domestic violence

Solicitors

Solicitors were asked about the impact of domestic violence upon both interim applications for contact and final orders. At interim hearings, there will usually only be an affidavit by one party alleging the violence, and an affidavit by the other party denying those allegations. No other evidence is adduced at that stage. Typical of the responses to this question was the comment that allegations of domestic violence will have little or no effect upon interim contact orders unless there is "a genuine risk of the kid being belted". As one solicitor put it:

"If it affects the child physically, you'll get supervised contact or no contact, but otherwise, the reality is the judges are going to order it". (Parramatta solicitor)

This type of response was common across all areas surveyed, except in Melbourne, where some solicitors said the outcome depended upon who was hearing the matter. There was also a divergence of opinion about whether that inevitability represented a shift in approach since the reforms were passed. A number of practitioners said they had not noticed any major change in this respect, and that certain judicial registrars and judges had always been reluctant to suspend access at interim hearings. Others believed the lengthy delays in getting to a trial had affected the practice in interim hearings, making decision-makers wary of severing contact. On the other hand, many solicitors said they thought the reforms, with its emphasis on the child's right to contact, had created the change. A number of them spoke of the irony of having legislation which explicitly makes domestic violence a relevant factor for the first time, together with a principle that the child has a 'right' to contact. In their view, the Court had come to a stage of dealing with allegations of violence more sympathetically by the time of the reforms, and they felt the new legislation had turned the clock back "ten years". In the words of one:

“I had years of telling women that domestic violence is not going to get them anywhere unless it’s affecting the children - it’s no different now”. (Brisbane solicitor)

Only one solicitor (in Adelaide) said the reforms had led to an increase in false allegations, which were being used “to cut dad out of the picture”. The vast majority thought there had been no increase in the incidence of cases involving domestic violence since the reforms, and did not believe the reforms had given rise to false allegations of violence.

The most common response to allegations of violence in interim hearings was said to be an order for ‘neutral hand-over’, that is, an order that the parties or their representatives exchange the children in a public place, such as a police station or at McDonalds. Others noted that orders for the contact parent to collect the children from school on Friday afternoon and return them to school on Monday morning, were commonly made when violence is alleged. In several registries, most notably in Brisbane, the more usual response to allegations of violence was said to be for interim contact to be supervised at a contact centre. Most practitioners said that only if the allegations were ‘serious’, (meaning for example that the violence involved a particularly brutal assault or “stalking” of the resident parent, or if there is a risk of direct harm to the child), would contact be suspended.

Many of the solicitors who were interviewed agreed that demonstrating a risk of ‘serious violence’ at an interim hearing is “dependent on your affidavit drafting ability”. As the allegations are not tested at an interim hearing, and there is no Court-ordered Family Report to assist the decision maker, solicitors said the assessment of whether contact poses a risk to the child will often hinge on the nature, and the details, of the allegations raised in the resident parent’s affidavit material. This was said to be particularly problematic for those clients who cannot afford to obtain a private welfare report about the children’s and/or the mother’s emotional state to support the application. Many solicitors were concerned that in the absence of details indicating ‘serious violence’, judges and judicial registrars tend to treat allegations of violence as “parental conflict”, that can be minimised through the use of a neutral hand-over arrangement, rather than as an issue of the child’s welfare. One solicitor who deals primarily with legally aided clients said the importance of a “good affidavit” was a real problem for her clients, many of whom do not speak English. For example, she explained that it is difficult to draft the kind of affidavit required when the woman does not have “the right language”, legal aid funds will not cover the amount of time it would take to get all the relevant details, and there are insufficient funds for an interpreter.

An additional disadvantage for legally aided clients was said to be their inability to afford a private welfare report to support allegations of violence and its impact. Some solicitors noted that certain judges are attempting to deal with this problem at interim hearings by ordering the preparation of a Duty Report by the Court’s counselling section, which occurs at no cost to the client. However, a number of counsellors and solicitors expressed concerns about the reliability of Duty Reports, and many of the solicitors who were interviewed said they would like to see a return to the use of interim Family Reports in cases involving allegations of violence or abuse.

A further impact of the legal aid funding difficulties was commented upon by some workers from domestic violence services and Community Legal Centre solicitors in different States. Several of these respondents reported that, other than in exceptional cases, women are now unable to obtain legal aid funding to oppose an application for contact, even where there has been a history of domestic violence by the applicant father. Others have mentioned that aid will rarely be provided for a variation of contact but is more likely to be granted where it is alleged that contact has been denied and a contravention application is made. For aid to be given for a variation of a contact order would require proof of distress to the children, supported by medical reports. One solicitor noted that the majority of her family law clients are now men, because,

“[w]hat they want is contact, and legal aid will fund that, but they won’t fund a woman who wants to contest contact because of domestic violence”.

Judges

Judges and judicial registrars were asked about their practice of dealing with domestic violence allegations in interim hearings for contact orders. Many of those interviewed, particularly those who regularly sit in the judicial duty lists, said violence is a common issue in children matters. In fact, as noted earlier, judges and judicial registrars in some registries said that Duty List cases that did not involve allegations of violence are rare. However, almost all judges and judicial registrars believed there had not been any increase in the rate of cases involving domestic violence allegations since the reforms were passed. Only two judges said they had encountered “unfounded allegations” of domestic violence “as an attempt to stop contact”, although another hinted at this by referring to the frequency with which he considered ‘tactical’ measures to be relied on.

Judges/judicial registrars generally noted that their principal concern in interim hearings is to ensure the safety of the parent and child, and to obtain enough material to assess the allegations, the effect of the violence upon the resident parent, and the quality of the relationship between the child and contact parent. Most noted that such allegations present a “real problem” at the interim stage where there is little material upon which to base those assessments. Like the solicitors, judges admitted that the affidavit material is “pretty important” at an interim hearing. One judge commented that “bold assertions are terribly hard to assess”, whereas she found it easier to “attach considerable weight to allegations that are particularised”. Another indicated his dissatisfaction with these hearings by saying,

“What we do in interim matters is highly artificial. We present it as a judicial exercise but it’s more artful dodging.”

A number of judges and judicial registrars also mentioned the existence of family violence orders as a factor that may lend weight to an application for contact to be suspended or supervised until the final hearing. For example, one judicial registrar commented:

“A domestic violence order signals to me that this is a dangerous bastard”.

However, there were regional variations, as well as differences between individual judges. For example, one interviewee in Parramatta suggested that if contact were suspended in every case where there were family violence orders, “no one would ever see their children”. Several judges also said that intervention orders usually carried little weight because they were relatively easy to obtain. Another judge drew a distinction between temporary orders and final orders, saying that the former are “not very persuasive”, but that she takes “considerable notice” of the latter.

Several of those interviewed said that if the material raises “serious” allegations, they might order a Duty Report or appoint a child representative. That approach was said to be used more often where there are allegations of child abuse, but is also considered an option in cases of domestic violence, for example, if there are “safety issues”. Those who use this approach said that it often helps in one of two ways: either the matter will then settle, or the report is “invaluable” in determining whether interim contact is appropriate. One judge commented that she is often assisted by the counsellor’s assessment of the mother’s level of fear and ability to cope with contact. Several judges remarked that they would like to see a return to the use of interim Family Reports to assist with determinations of contact.

The most common response to interim contact applications involving allegations of violence was said to be an order for hand-over to take place at a neutral point. In some registries supervised contact is also frequently used, either provided by a contact service, or by asking the parties to nominate a third party (which is usually a family member) to supervise contact visits until trial. Some judges / judicial registrars use a combination of those approaches, and try to have someone supervise the hand-over of the children. For most judges, their approach to domestic violence allegations contrasts with their response to allegations of sexual abuse, where the outcome is more usually an order for supervised contact or suspension of contact until the final hearing. As one judicial registrar said of sexual abuse allegations:

“Even if the allegations are unfounded, I’ve got to be cautious to protect the children”.

Unlike allegations of sexual assault, domestic violence allegations were viewed by some as being an issue of parental conflict, rather than an issue of harm to the child. For this reason, a neutral ‘hand-over’ arrangement was seen to be the appropriate solution in the majority of cases. In the words of one judicial registrar:

“You pick a neutral point for collection [of the children] because hopefully in public the parties will modify their behaviour”.

Others saw the use of neutral changeover arrangements as the best way of ensuring the safety of the parent and child until there is more material, or because of the lack of availability of a supervisor or a vacancy at a supervised contact centre. A number of judges complained about the lack of supervised contact services and spoke of the need for more funded centres. The most commonly used hand-over places were said to be McDonalds, a police station, and the children’s school. Several judges, however, said they preferred not to have children exchanged at a police station.

Judges and judicial registrars were also asked whether the “right to contact” principle and/or the new provisions about family violence had made a difference to their decision-making in contact cases. Most interviewees said that their own practice had not changed, and that s60B had not made a difference to outcomes. Several judges and judicial registrars said that the reforms had made a difference insofar as they now have regard to the principles in s60B when making decisions, but thought those principles had not made any difference to outcomes. A number of judges also noted that domestic violence had been a relevant matter in access decision-making, and that the *Reform Act* had merely codified the relevant case law in that respect. As noted, very few judges appeared to be aware of the existence of s68K or use it explicitly when making contact orders.

However, there were a number of judges who said that the reforms had affected their practice, and several who said the reforms had affected the submissions by counsel in children’s matters. Two judges believed they had become more cautious about ordering contact where there is a pattern of violence or harassment by the contact parent since the reforms, and several said they were making more orders for indirect contact rather than no contact at all. Secondly, a number of judges commented that they know there are some members of the Court who refuse to take violence into account, or who “think there should be contact no matter what”. Several judges also suggested there was a corresponding “lack of will” among some solicitors and barristers since the reforms for making submissions about domestic violence. In the words of one judge:

“No one is prepared to say no contact any more.”

Another judge described a case in which the mother’s counsel sought orders for interim supervised contact, rather than “neutral hand-over”, because “the kids were traumatised”. He said:

“I ordered there be no contact at all. I often feel as though the parties’ advisers don’t understand the significance of violence. They aren’t asserting a sufficient judgment. They’re not educated about domestic violence. It’s a major problem”.

Yet another judge was critical of solicitors for being overly cautious about seeking a ‘no contact’ order, citing a particular case where violence was admitted by the husband and alleged by the wife but no argument was put that contact should be refused.

On the other hand, when asked about a possible connection between this “lack of will” and the reforms, not all of these judges were certain that the s60B principles were directly responsible. Although most did see a connection, one judge proposed that it is rather part of a “general backlash against women’s issues”, and that the language of the reforms has been co-opted by those who believe the interests of women have been “taken too far”.

The above views can be contrasted with those expressed by several other judges about the relevance of s60B and its effect on their practice. These judges acknowledged that the s60B(2) principles had affected their decision-making. One judge said she took the principles “very seriously”, and found them to be a useful statement about “the importance of parental contact”, which she had used to justify a refusal to suspend a father’s contact

because of domestic violence. Another said that his decision-making reflects a willingness to keep some form of contact going for the child's long term best interests if at all possible, "even if dad is pretty hopeless", and that that approach is consistent with the spirit of the reforms. A third commented that the 'violent' conduct complained of by mothers rarely warrants the termination of contact, particularly when the child's "right to contact" and long-term interests in knowing the father is considered.

Duty List Observations

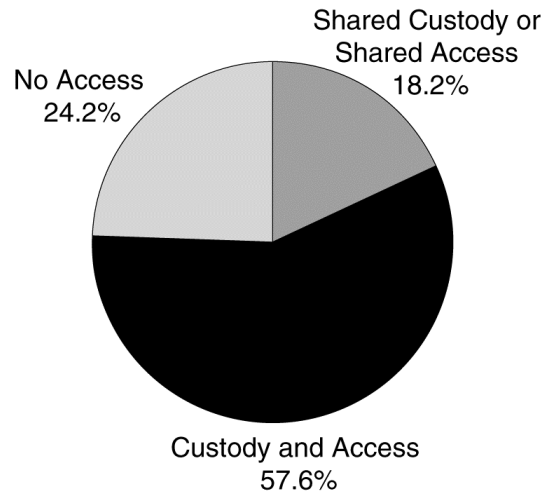
The vast majority of the interim hearings that were observed in the duty lists concerned the issue of contact. In most cases, the dispute involved allegations of domestic violence or some other risk of harm to the children. The observations of those matters indicated that most of the judicial registrars (who do a considerable amount of the duty list work) encourage contact wherever possible. It was rare for a 'no contact' order to be made in a duty list, and such orders usually resulted only where the non resident parent had not seen the child for some time in any event or failed to appear at the hearing. Where there was a suggestion of aberrant parental behaviour, considerable reliance was usually placed on supervised contact and contact centres, particularly in Brisbane, Newcastle, and Adelaide. In other registries, such as Melbourne, there was a greater use of some form of hand-over regime at a 'neutral' place, or a family member (usually the maternal grandmother) was asked to supervise contact for a short period. It was not uncommon for a child representative to be appointed, and this was observed particularly in Adelaide and Brisbane, with the matter being set down for hearing some months later. Duty reports were sometimes ordered in the Melbourne registry. In some registries, particularly Brisbane, the judicial registrar often took the time to explain the Act's 'shared parenting' principles to the litigants as well as point out the benefits of contact for the children.

Unreported Judgments

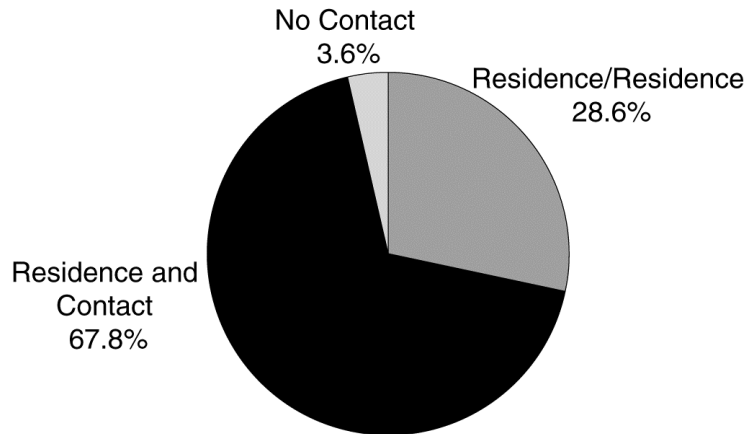
The review of judgments confirmed the comments made by solicitors that the most common response to interim contact applications where there had been domestic violence, was an order for "neutral hand-over", and that it has become more difficult to obtain an order suspending contact for domestic violence. The following set of figures¹⁶⁰ indicates there has been a dramatic reduction in the incidence of orders suspending contact at interim hearings since the reforms were enacted.

¹⁶⁰ Based on a comparison of 160 pre- and post-*Reform Act* unreported judgments.

Form of order found in pre-*Reform Act* **interim judgments**:

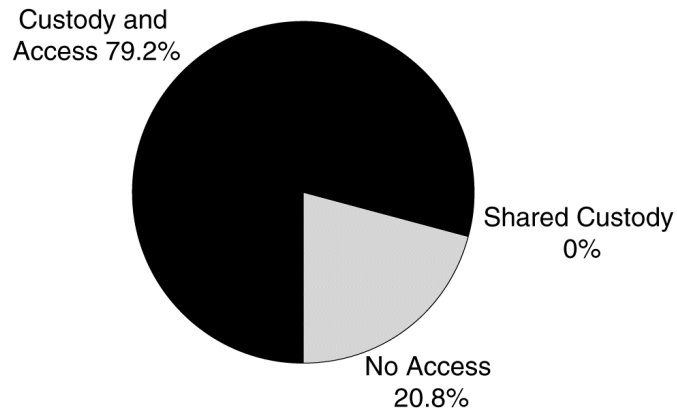


Form of order found in post-*Reform Act* **interim judgments**:

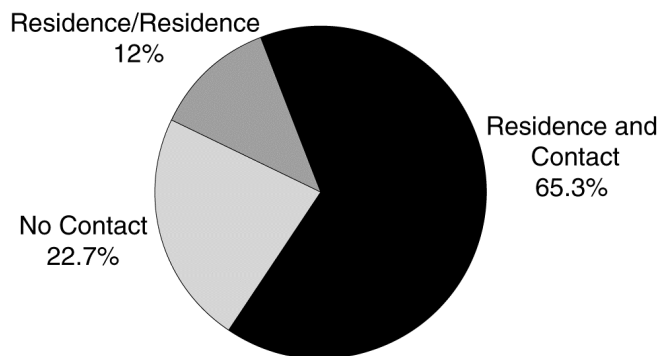


However, it appears there has not been a comparable effect upon outcomes at final hearings, when the evidence of domestic violence is adduced and tested, as the following figures show.

Form of order found in pre-*Reform Act* **final judgments**:



Form of order found in post-*Reform Act* final judgments:



These figures suggest that interim contact orders are being made in circumstances where contact is not in the child's best interests, and when it may well be unsafe for the child and the resident parent. It appears from the review and comparison of judgments, that there has been something of a shift in attitude to the issue of interim contact. In the pre-*Reform Act* cases, access was often suspended until trial because the allegations of violence had not been tested. The usual response in the post-*Reform Act* judgments is to ensure contact between the father and child is maintained until trial for the same reason, ie; because the allegations have not been tested. Although there is no reference to the 'right to contact' principle from s60B in most judgments, the determination by some judges to maintain contact if at all possible represents a shift away from the approach to allegations of violence prior to the *Reform Act*. It is also possible, as some solicitors suggested, that the lengthy delays in getting to a final hearing, which are now a feature of most registries, have had an impact upon the outcomes of interim contact applications.

The practice at interim hearings varied from registry to registry. In the Melbourne and Victorian circuit cases, it was more common for supervised contact to be ordered where violence was raised as an issue, usually with supervision by a nominated family member. By comparison, allegations of violence were sometimes disregarded altogether in interim matters in Adelaide, because the allegations could not be tested until trial. For example, in a number of the post-*Reform Act* interim judgments from the Adelaide registry, orders were made for the children to live 'week about' with each party despite the allegations of violence. In one of those cases, involving a 13 month old child, there were current restraining orders against the father. The judge in that case noted that "if the mother's version is correct", it would justify a limitation of contact, but that as the allegations could not be tested until the final hearing, it would be unfair to make interim orders for sole residence because that would give "one party something of an advantage over the other when it comes to deciding where they should live permanently". The review of post-*Reform Act* cases also indicates that judges and judicial registrars have usually sought to keep some form of contact in place, even where there has been evidence of convictions for breaches of existing family violence orders. For example, in one case in which the father had been gaoled for stabbing the mother six times in the neck and face during the previous contact visit, the judicial registrar indicated his willingness to allow supervised contact as soon as the father had arranged a suitable supervisor.

In final hearings, orders for supervised contact have been used less frequently than in interim orders. The majority of cases tend to fall into one of two categories: those where contact was suspended because of the father's conduct (and its indication of his parenting capacity or its effects on the mother or children), and those where the violence did not rule out contact but played a role in formulating a workable contact regime. In a number of the post-*Reform Act* cases, the judge's reasoning showed an attempt to maintain some form of father-child contact if possible, even where there had been findings of violence perpetrated by the father. This was usually achieved through the use of temporary supervision of the contact visits. For several judges, this outcome resulted from emphasising the long-term benefits to the child of "knowing" the contact parent, despite the detrimental affect upon the child of the father's conduct in the past. Another change that appeared from the comparison of pre- and post-*Reform Act* judgments is a greater use of orders for indirect contact (by phone calls or letters and cards). However, the proportion of 'no contact' orders made after a contested hearing is not dissimilar to the pre-*Reform Act* situation.

The review of judgments uncovered relatively few cases where supervised contact was used in final orders, both before and since the *Reform Act* came into operation. In each of the cases where it was ordered, there were findings that the mother was genuinely afraid of the father and anxious about contact. The rationale for supervision was to allay the mother's fears. Orders were usually also made for the mother to have sole day-to-day responsibility for the children.

Approximately one-third of the post-*Reform Act* cases that were reviewed resulted in orders for contact to take place with a 'neutral' hand-over point, such as a police station or the children's school. Sometimes this was a consequence of a finding that contact would not adversely affect the mother's capacity to care for the child provided she did not have to come into contact with the father. In other cases, neutral hand-over was ordered despite the mother's fears and findings that the father had been stalking the mother, or "lacked insight into the effects of his behaviour on the children". For example, an order for contact with the children's school as the collection point was made in one case in which there were findings that the father was "dominating, cruel and manipulative", "violent and controlling", and had "exposed the children to a disparaging view of their mother". As mentioned above, there were also several cases where this form of contact was ordered despite a finding that contact posed a present risk to the child's welfare, because the particular judges considered there were long-term benefits for the child in having "a realistic view" of their father, or in not having to grow up with the psychological disadvantages of having "an absent parent". This view was also reflected in some of the Family Reports prepared for the hearings, both before and since the reforms. For example, in one pre-*Reform Act* case in which there had been a pattern of violence by the father against the mother and her children (and the family pets), the counsellor's view was that the child's proper psychological development rested on having knowledge of her father, whether he was "good, bad or indifferent". This view was not adopted by the Court in that case. Some judges have also made comments reflecting their perceptions of the nature of domestic violence. For example, in one case the judge made a finding that the father was "not a violent man by nature", but had been "affected by alcohol and stresses that he has just found impossible to bear" (the father had been at risk of being deported when he attacked the wife and threatened suicide). In that

case, the judge decided that “[i]f the father has some sort of contact with the child, he is more likely to be settled and to be able to get on with his life”.

Where contact was suspended because of domestic violence, that usually occurred because of the resident parent’s “genuine” fears about contact, which resulted from the father’s violence. Some cases involved a denial of contact because the father’s conduct and attitudes represented a “poor role model” for the child. Only one case involved a finding that there was a direct physical risk to the child from contact. In a number of cases the mother and children were living at an undisclosed address, or were also seeking permission to relocate to escape the father’s violence (relocation is discussed below). Final orders suspending contact were most often accompanied by orders giving the resident parent sole day-to-day and sole long term responsibility for the children.

There were several cases among the pre- and post-*Reform Act* judgments in which the mother’s anxiety was found to be genuine but irrational. Direct contact between the father and child was refused in three of those cases, two of which were decided under the previous legislation. In each of the other cases, orders were made for direct contact subject to a neutral hand-over arrangement, and the resident parent was cautioned against putting her own concerns or hatred of the father ahead of the child’s interests. One post-*Reform Act* judgment included a threat that the child’s residence might be changed if the mother persisted in her opposition to contact. Another post-*Reform Act* case included self-executing orders for the father to become the resident parent if the mother failed to provide the child for contact visits. These kinds of warnings and orders were not found in the pre-*Reform Act* judgments. However, the numbers are too small to support any link to the reforms.

Relocation applications

Solicitors

The principles governing relocation applications under the *Reform Act* are spelled out in *B and B (Family Law Reform Act 1995)*.¹⁶¹ The first questionnaire used to canvass the views of lawyers was issued prior to the Full Court’s decision in that case.¹⁶² Solicitors who completed the questionnaire were asked to nominate particular situations which they thought would produce a different legal outcome as a result of the reforms. One quarter of the respondents nominated relocation as such an issue. Each of those respondents made comments to the effect that resident parents had become subject to greater restrictions of movement, and that it had become easier to obtain an injunction to prevent the resident parent from moving. As noted earlier in this report, *B and B* made it clear that the principles involved in relocation decisions had not been changed by the *Reform Act*, and that the ‘right to contact’ principle is qualified by the child’s best interests, which remains the determinative consideration. Subsequent surveys and interviews of solicitors took place after *B and B* was handed down. Despite the Full Court’s decision, many practitioners

¹⁶¹ *B and B (Family Law Reform Act 1995)* (1997) 21 Fam LR 676.

¹⁶² Questionnaire L1 was used to survey family law practitioners at a Leo Cussen Family Law Intensive in Melbourne on 3 May 1997. The Full Court’s decision in *B and B (Family Law Reform Act 1995)* was handed down in July 1997.

remained of the view that permission to relocate is more difficult to obtain since the *Reform Act* was passed.

Solicitors were asked specifically about their experience of relocation cases, and whether the reforms have made a difference to the advice they give to clients who wish to relocate. Most of the solicitors who were interviewed agreed that it is now “a little bit harder” to get permission to move away with the child, because of the s60(2)(b) right to contact. A number had had clients who had moved without the contact parent’s consent, and had been ordered to return, or had been successful in obtaining an order for the return of their client’s former partner and the children. Those orders had been made at interim hearings, so that the resident parent was required to return with the children pending a trial of the relocation issue. Some of those orders were said to have been made in circumstances where the mother had fled to avoid the father’s violence. A few had been made by way of a self-executing order that the father would become the residence parent if the mother failed to return the children for a contact visit by a certain date.

Most of the solicitors who were interviewed said that they now advise resident parents who wish to move of the risk of being ordered to return if they leave without the contact parent’s consent. Some said that advice had been given in stronger terms prior to the decision in *B and B*, and a few expressed disappointment that *B and B* had not “closed the floodgates” of relocation, or noted their personal belief that the “Full Court got it wrong” or that “s60B says it should be harder to move”. One Parramatta solicitor said she found it difficult to advise women about whether they might be successful in getting an order permitting them to move, because the decisions seemed “inconsistent”. She said she had run three relocation cases since *B and B*. In one case, the client was in hiding from her former partner, and there was a history of violence evidenced by family violence orders and convictions for breaches. In that case the woman was ordered to return to Brisbane. The same solicitor had also run a case in which her client’s former partner had moved without notice to Perth to join her new husband. The client was unsuccessful in his application to have her ordered back to Sydney. The difference in outcome in those cases reflects the advice that several solicitors said they give to clients, namely, that “you can move if you have a new husband or a job to go to, but not if you want to get away from a violent ex-husband”. The explanation for that may be that it is easier to satisfy the ‘bona fides’ aspect of a relocation application by showing an economic advantage or a new husband¹⁶³ than by alleging fear of domestic violence or harassment by the contact parent. A further possible explanation for the disparate outcomes experienced by the Parramatta solicitor is the differing approaches of various judges to issues of violence and to applications for return of a resident parent (discussed below).

¹⁶³ The Full Court in *B and B* noted that relocation to improve the economic position of the family unit or for the purposes of repartnering, were valid reasons for a move: *B and B (Family Law Reform Act 1995)* (1997) 21 Fam LR 676 at 735.

Judges

In interviews with judges and judicial registrars, most referred to *B and B* and said that the principles governing relocation applications had not changed, and that s60B was subject to the best interests principle. When pressed about whether things might be different “on the ground”, several said they thought it was probably “marginally more difficult” to get permission to move now, or admitted that s60B had made a difference to the outcomes of cases. A number of judges related cases in which they had refused a mother’s application to move, but which they said they would have decided differently before the *Reform Act*. In the words of one, the difference was that,

“[t]here was no right to be cared for by both parents back then”.

As noted already, much of the decision-making around relocation has occurred at the stage of an interim application, either for permission to move, or for an order that the resident parent return with the children. In the latter situation, it appears that it is ‘routine’ for some judicial registrars and judges to make an order for the return of the child. The general response is summed up in the following comment of one judge:

“If the resident parent has gone without any notice and the father was having substantial contact, then I would certainly bring them back”.

Another judge who thought the reforms had changed attitudes to relocation referred to the impact of s60B, and to the principle that resident parents “no longer have all the power”.

Judges and judicial registrars generally agreed that an interim order for the return of a resident parent was necessary because the bona fides of the move have not been tested, and cannot be tested at an interim hearing. Several judges spoke of such applications as a “contempt” or “breach” issue. For some, orders for the resident parent’s return was said to be the appropriate response no matter what reasons for the move were given in the resident parent’s affidavit material. For example, a number of judges said they had made orders for the return of a mother and child in circumstances where “the woman was likely to be successful in due course”, including where the material indicated the mother had moved to escape violence. Some judges spoke in terms of the child’s entitlement to contact, which the resident parent had obstructed by moving. In the words of one:

“They don’t understand that the child has a right to contact with that other parent”.

On the other hand, a number of judges took a different approach. One judge said he had sometimes refused to order a mother’s return where he considered “she would win in the long run”, but said that in handing down judgment in such cases, “you have to word it carefully”. Other judges said they believed the issue was one of the child’s best interests, rather than a contempt matter, and disagreed with the view that those best interests were necessarily served by bringing the resident parent back so that the child could have contact. For example, several judges said that the appropriate test is whether ordering the resident parent to return is in the child’s best interests, and that this requires taking into account matters such as the length of time the child has been settled in the new location. One judge commented that the view that the parent must be ordered back until there could be a full hearing of the matter *presumes* that that course is in the child’s best interests, which is contrary to the Act.

Unreported Judgments

The review of post-*Reform Act* judgments¹⁶⁴ confirmed that permission to relocate has rarely been given at an interim hearing. That outcome generally results from the problem that the resident parent's reasons for moving, and the relationships between each parent and the children, cannot be assessed at that stage. On the other hand, in final hearings, roughly twice as many resident parents were permitted to move as were restrained from moving.¹⁶⁵ It is difficult to gauge the extent of change those results represent, as there were very few relocation matters among the unreported pre-*Reform Act* final judgments, and none among the pre-*Reform Act* interim cases. To that extent, it appears as though the reforms may have encouraged contact parents to bring proceedings to stop the resident parent from relocating, and / or encouraged lawyers to advise parents accordingly.

Another apparent change is shown by the number of post-*Reform Act* cases which dealt with an application by the contact father to secure the resident parent's return from interstate. Again there were no similar matters among the pre-*Reform Act* judgments. The review of cases suggests that interim applications for the resident parent's return are just as likely to be refused as granted. However, it seems that such applications are more likely to be successful in some registries (such as Adelaide and Brisbane) than others (such as Melbourne and Sydney). Also, the resident parent is more likely to be ordered to return with the children where she has moved away because of the contact parent's violence, than where she has relocated to take up a new job or to join a new partner. For example, one Melbourne case involved the father's interim application to have the mother return from Queensland, where she had moved without his consent. The mother's material contained allegations of violence by the father, and a list of breaches of family violence orders which the police were following up. The judge noted that he could make no findings about the mother's allegations, yet 'found' that the mother's unilateral decision to move had been made "to frustrate contact", and ordered the child be made available in Melbourne for supervised contact with the father by the following weekend. By way of comparison, in another Melbourne matter, the father's application was refused because the mother had settled into a more lucrative employment situation in the new location.

There were a number of final orders from each registry giving permission for resident parents to move to escape a violent partner, or to remove the child from the father's harassment. The presence of a report about the children, and the ability to test the parties' evidence, appeared to have been the factors which made the difference between the outcomes of final hearings and interim applications where violence was an issue. There were also final orders refusing applications to have the resident parent ordered back. For example, in a Melbourne case, the mother had fled to Darwin to escape the husband's violence. Unlike the situation at the interim hearing, there was a Family Report which indicated that the child did not want to see his father and that the mother was genuinely

¹⁶⁴ In addition to the review of unreported judgments, the researchers observed a number of interim relocation applications during the duty list observations, which are included in this discussion.

¹⁶⁵ A separate study conducted in Western Australia after the *Reform Act* came into operation also found that the majority of applicants there were permitted to move after the final hearing: Lisa Young, "Residential Parents' Freedom of Movement: an update", Paper presented at The Family Law Practitioners Association WA (Inc) Eleventh Weekend Conference, 1997.

terrified of the husband. The judge dismissed the husband's application to have the mother returned and suspended all contact.

Overall, approximately one third of the final judgments in which permission was given to move involved a move for economic reasons. Another third concerned a move to join a new partner who had employment commitments elsewhere, and the final third involved a move to escape harassment or violence by the contact parent. In most of the cases in which permission to relocate was refused, the proposed move was ruled out because of the high costs of facilitating regular contact, and concerns about the consequential loss of relationship between the father and his children. In one case, permission was refused despite a finding that there were bona fide economic reasons for the move, because of the child's very young age: it was held that relocation would defeat the father's ability to form a relationship with his daughter. The majority of judgments where permission was refused mentioned s60B, with some noting that the child's right to contact with both parents was the determinative factor. That is, in several of those cases, the reasons for decision suggest that the outcome would have been different but for the reforms.