

FAMILY LAW UPDATE

In this edition we reprint a shortened version of the Executive Summary of a report of research undertaken into the operation of the Family Law Reform Act 1995, from the time it came into effect in June 1996 to the end of 1999.

We would be interested in readers' responses to this report, for possible publication in our letters pages in the next issue of *Family Matters*.

The first three years of the

Family Law Reform Act 1995

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1. This is a summary of the main findings of a three-year research project undertaken with the support of an Australian Research Council (ARC) collaborative grant awarded to the University of Sydney, with the Family Court of Australia as the Industry Partner. An interim report of this research was published in April 1999.

No evidence of shift towards shared parenting among the target population

2. There is no evidence to suggest that shared caregiving has become a lived reality for the children of separated parents who have engaged with the "family law system" since the coming into force of the Family Law Reform Act 1995 (hereafter "Reform Act"). Interviews with, and surveys of, lawyers and counsellors suggest that there have been no real changes in practice as a result of the reforms. Most respondents agreed that mothers continue to do the bulk of the caregiving work after separation, and that, as one respondent commented, many fathers still "do not consistently make themselves available to the children".

3. The research also suggests that parents are entering into workable and flexible shared residence arrangements after separation, but that these arrangements are being reached without legal assistance and without any knowledge of the Reform Act. Our interviews with separated parents who are cooperatively sharing their parental responsibilities, including using a flexible shared residence arrangement, established that such arrangements were not attributable to the Reform Act and that these parents would have chosen to share their parental responsibilities regardless of the principles enunciated in the Family Law Act . . .

4. This can be contrasted with the level of disputes and lack of flexibility, particularly the increasing use of detailed specific issues orders about shared parenting, for those parents who use the Court or have orders drafted by solicitors under the Family Law Act. As one of the Registrars of the Family Court summarised the problem, "the shared parenting concept is totally at odds with the types of parents who litigate". Our findings reflect earlier United States research which demonstrated that the advantages of shared parenting were dependent upon parents having voluntarily agreed to the arrangement, and upon a previous history of co-operation between the parents (Steinman 1981; Pearson and Thoennes 1990).

From certainty to confusion

5. . . . The research suggests that there have been multiple conflicting interpretations of the present statutory scheme by lawyers, judges, counsellors, parents and Centrelink staff. . . . [S]ome non-resident parents believe the new shared parenting regime provides them with "rights" to be consulted about day-to-day decisions affecting the child. The concept of shared parenting has also led some parents, particularly fathers, to believe that the law requires the children to live half the time with each parent. These parents tend to respond with anger and frustration when advised that the Act does not require this outcome.

6. The lack of clarity in the legislation has thus provided fresh ground for disputes between parents.

Increased disputes

7. . . .

8. Our research suggests that the [Reform Act's concept of ongoing parental responsibility has] created greater scope for an abusive non-resident parent to harass or interfere in the life of the child's primary caregiver by challenging her decisions and choices. . . .

9. A related consequence has been an increase in the number and detail of specific issues orders qualifying and quantifying the resident parent's authority and responsibilities. This can create even more areas of possible dispute and bases for challenge of the carer by non-resident parents.

Specific issues orders have now started to become more commonplace than in the early days following the coming into force of the Reform Act, and they tend to be much more detailed and differ in nature from the kind of orders made before the reforms. For example, orders are now used to delegate particular areas of responsibility to parents (for example, who will take the child to sport this week), and are sometimes used to impose standards of caregiving expected of the resident parent (one order reviewed provided that the mother must "ensure that [the child]'s school clothes are properly laundered"). Previously, comparable orders were used only to regulate longer-term matters, such as to ensure that the resident parent forwarded copies of the children's school reports to the non-custodial parent every year.

10. . . .

Terminology

11. One of the stated reasons for moving away from the language of custody and access was to disrupt the "win-lose" mentality that was seen to accompany that language. However, it seems that the change of language has not permeated the consciousness of those litigating under the Act: the vast majority of parents have never heard of "residence" and still ask for "custody".

12. . . .

13. Even those people who work within the system on a daily basis have found it difficult to change their terminology, with some solicitors and judges agreeing to continue with the practice of using the old language. Our surveys of, and interviews with, practitioners also indicate that many solicitors use "residence/residence" orders for symbolic reasons – for example, to "placate" non-resident parents, rather than to represent any real sharing of parental responsibilities. The research also suggests that solicitors, judges and registrars continue to approach residence as involving the same legal concepts as custody.

Best interests of children?

14. In deciding whether to make an order in relation to a child, a court must regard the best interests of the child as its paramount consideration. This legislative principle governs the making of interim residence and contact orders just as it does the making of final orders. However, the evidence available at an interim hearing to determine the child's best interests will be far more limited than that relied upon at the final hearing. In particular, there will not normally be a Family Report to assist the court to make its decision. Our research suggests, confirming Dewar and Parker's (1999) study, that children's welfare is being

compromised in the approach to interim decision making that has developed since June 1996 when the Reform Act came into effect. This is evident in three particular contexts: interim residence orders; interim contact orders; and more generally, in the way that allegations of violence are dealt with at an interim stage.

We deal with each of these in turn.

Shift in approach to making residence orders at interim hearings

15. The Full Court of the Family Court has consistently held that a child's best interests will normally be met by interim orders that ensure stability in the child's life pending a full hearing of the relevant issues in dispute, and that such stability will usually be promoted by an order that maintains the pre-existing caregiving arrangements, unless there are "strong or overriding indications to the contrary."

The threat of violence in the caregiver's household would, for example, justify a change of residence under this principle. Our research suggests that the existing arrangements principle has been displaced by judicial concerns about parental "equality" (that is, about not creating a status quo in favour of one parent) since the reforms were enacted. The findings demonstrate that interim residence orders have been made on the basis of ensuring that one parent does not obtain a tactical advantage over the other before the final hearing, rather than by an assessment of the child's best interests or by application of the "existing arrangements" principle. That is, decisions are being made on the basis of the parents' interests (or more accurately, the interests of the parent who is not the existing primary caregiver), rather than on the basis of the child's welfare. The current delays in the Family Court in reaching a final hearing have contributed to this practice.

Shift in approach to making contact orders at interim hearings

16. . . .

17. The reforms introduced the notion of children having "right" of contact with both parents into the Family Law Act. However, the legislation makes it clear that this right only operates to the extent that contact is found to be in the child's best interests, and that those best interests remain the court's paramount concern when determining contact orders. This position was confirmed by the Full Court in *B and B*. The Court there held that the reforms had not created a presumption in favour of contact, and that the child's best interests are the ultimate determinant of parenting orders. . . .

18. Despite the decision in *B and B*, our research confirms Dewar and Parker's (1999) findings that there has been a shift in the focus of interim contact hearings, from asking whether access should be ordered, to how to maintain contact until the final hearing. This shift was summarised by one judge of the Family Court interviewed for our research: "We're more inclined to give contact at interim now. It would take a lot at an interim hearing to say no contact now."

19. It has also affected the practice of legal practitioners: solicitors told us that they are now less inclined to ask for suspension of contact for fear of their client appearing to be a hostile parent. As one judge noted in relation to practitioners' submissions: "No one is prepared to say 'no contact' any more."

20. In practice, therefore, decision makers are often assuming that the best interests of the child will be met by maintaining contact rather than that being an issue for determination. . . .

Shifts in outcomes at interim hearings where domestic violence is alleged

21. The third situation in which it appears that the safety of children has been compromised by the reforms is in the context of decision making where allegations of violence form part of the background to the case. The review [of matters that contained allegations of spousal violence] showed a trend away from suspending contact at interim hearings as the way of ensuring the child's safety until trial, and towards the use of neutral hand-over arrangements as the preferred protective mechanism. The most common response in the post-Reform Act judgments to allegations of violence was to order unsupervised contact between the father and child using either a collection point that did not require face-to-face contact between the parties (such as collection of the children from, and delivery to, the children's school), or by directing that the contact hand-overs occur in a public place under the scrutiny of a third person (such as at a police station or a Contact Centre).

22. Supervised contact was used as a safety mechanism far less frequently than a neutral handover point, and the rate of orders for supervised contact remained constant between the samples. . . .

23. In recent years, it has come to be acknowledged that the "core business" of the Family Court now comprises cases involving violence or child abuse and that these are the cases most likely to be litigated, and least likely to settle. Our research confirmed findings from research that shows that a substantial proportion of interim contact cases involve allegations of domestic violence or abuse (Brown et al. 1998; Fehlberg 1998). . . .

24. The present approach to making unsupervised orders for contact at interim hearings represents a retreat from the Family Court's acknowledgment in the years before the reforms, of the adverse psychological effects of spousal abuse upon children's welfare. That recognition and case law have been effectively displaced by the right of contact emphasis. It is ironic that that body of case law developed without an express reference in the Act to the impact of domestic violence on children's welfare, yet one of the Part VII reforms was to include in the legislation a number of statutory references to the need to ensure the safety of children.

25. By contrast with the outcomes of interim hearings, our examination of final judgments disclosed that the rate of orders made for "no contact" at contested final hearings has remained substantially unchanged from the pre Reform Act rate. It is notable that this is the stage at which the effects on the child of the alleged violence are subjected to detailed scrutiny and evaluation (for example, by way of a Family Report). This suggests that there is a significant proportion of cases where it can be shown, with hindsight, that the interim contact arrangements were not in the child's best interests, and may well have been unsafe for the child and the carer (Dewar and Parker 1999).

26. As with other orders being made at interim hearings, the delays in reaching a final hearing in the Family Court have

contributed to these shifts, with judges and registrars concerned about disrupting the child's relationship with the father for a lengthy period on the basis of untested allegations.

Shift in approach to making residence orders at final hearings

27. There has been a second significant shift in the practice of making residence orders as a consequence of the Reform Act. Prior to the introduction of the reforms, the Family Court rarely made joint custody orders in contested proceedings. Cases such as *Padgen, H and H-K*, and *Fork and Thomas* established that such orders were not appropriate unless the parties' approaches to parenting were compatible, and there was a relationship of "mutual trust, co-operation and good communications" between the parents, factors that are generally absent in litigated matters. *Padgen* also noted that the judges of the Family Court had "not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parties".

28. The research demonstrates that residence orders giving each parent equal time with the children have been made in contested proceedings since 1996, and in circumstances where there is a high level of conflict between the parties. Such arrangements have been ordered over the strong objections of one parent, usually the mother, including in cases where they have been tested (as interim orders) and one parent has found them unworkable.

Interaction of child support and shared residence arrangements

29. The research suggests that the desire to reduce child support liabilities is frequently a motivating factor for seeking and making shared residence arrangements. . . .

30. The Child Support (Assessment) Act 1989 currently provides that the amount of child support otherwise payable is reduced where a parent has contact with a child for at least 30 per cent of the nights in a child support year (the 109 nights requirement). At the time this Act was amended in 1993 to include this variation, it was predicted that it would result in significant pressure being placed upon carers by liable parents simply to secure a reduction in the rate of support. Our research suggests that pressure to agree to a shared residence arrangement that meets the 109 nights requirement has been exacerbated by the shared parenting reforms.

Increasing incidence of disputes about contact

31. One of the most significant findings of the research is the large increase in the numbers of contravention applications brought by non-resident parents alleging breaches of contact orders.

32. . . .

33. The research findings suggest that many such applications are without merit and that many are pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact. . . .

34. Our review of contravention judgments from 1998/99 confirmed those observations. Almost all (95 per cent) of

the applications were brought by contact parents (most of them fathers – 89 per cent), and the majority of cases (62 per cent) were found to be without merit.

35. . . .

Increased pressure on women who fear violence to provide contact

36. Our interviews with parents suggest that unsafe contact orders are being made by consent. Most of the parents we interviewed as part of this research had expressed concerns about domestic violence when their contact arrangements were made. We found that many women had agreed to contact arrangements that did not provide them with the level of protection they had wanted. Either they had felt coerced into agreeing to the arrangements by their lawyer (who in turn had advised them about the “usual” approach of the Court at interim hearings to allegations about the father’s violence), or they had believed that there was no other option the father would agree to and they had no resources or were unwilling to “fight”. Many had agreed to unsupervised contact on alternate weekends with a neutral hand-over arrangement, although they had wanted supervised contact.

RECOMMENDATIONS

1. The Family Law Act should be amended to clarify what is meant by “shared parental responsibility” (s 60B(2)(c)), and to make it clear that there is no presumption of shared residence. The Act should also specify that there is no duty of consultation (with the other parent or parents) when exercising day-to-day parental responsibility.
2. It is essential that in making decisions based upon the child’s best interests, the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings. For this reason, the Court needs to have available to it enough information to make these assessments. Ideally, family reports should be available in each case that involves an issue of a child’s welfare, although this obviously would have considerable resource implications for the Court.
3. The need to ensure the safety of children should be included in s 60B, as a principle underlying the objects of the Act. An understanding of the deleterious effects of domestic violence on children is an essential part of the background knowledge a decision maker must bring to

bear on deciding children’s “best interests” issues. This should involve moving the caution in s 68K, that a court not make an order that exposes a child to an unacceptable risk of family violence, to a more prominent place in the Act, specifically to s 60B.

4. The procedure for dealing with contravention applications should be modified to ensure that those hearing the applications can amend the orders the subject of the dispute without requiring a separate application. At present, the court may only do this where there is a specific application for variation before the Court. (But see now Family Law (Amendment) Act 2000, Schedule One.)

5. If the government wishes to pursue the aim of encouraging parents to share parenting, there needs to be developments in other laws and practices that would facilitate this outcome. Specifically, workplace practices should enable men to parent more actively before as well as after separation since research shows that parenting after separation and divorce is more likely to be cooperative where that has been the practice during the subsisting relationship.

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Helen Rhoades, of the Faculty of Law at the University of Melbourne, was the Principal Researcher employed to undertake the research. The Chief Investigator was **Professor Reg Graycar**, from the University of Sydney, and the Industry Partner was **Ms Margaret Harrison**, of the Family Court of Australia.

The full report is available online at <http://www.familycourt.gov.au/papers/html/fla.html>, or by contacting the Family Court of Australia: phone (03) 8600 4333.

In April 1999, an interim report entitled *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* was published and widely circulated. It is also available on the web pages of the Faculty of Law and the Family Court of Australia.