FAMILY COURT of AUSTRALIA

SUBMISSION

of

THE FAMILY COURT OF AUSTRALIA

Part B

Statistical Analysis

And

Part C

Full Court Analysis

Standing Committee On Family and Community Affairs Inquiry into Joint Custody Arrangements In the Event of Family Separation

Prepared by the Family Court of Australia: 6 October 2003

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1. Introduction

1.1 About this Survey

The Family Court foreshadowed in its first submission to the Inquiry the need to provide relevant statistical data to illustrate the nature of parenting matters coming before it, and to describe how those matters are dealt with.

Unfortunately, family law debates are too frequently driven by anecdote rather than by empirical evidence, which makes the inclusion of such evidence particularly important. The data in this submission relates mainly to a survey of randomly selected cases extracted from the management information system database for each of the Court's three largest registries; Sydney, Melbourne and Brisbane.

The sample is sufficiently large to be representative of the population of cases in the system, and was drawn from several registries to ensure that no local factors unduly influenced the results. The files were stratified as described below, were taken from cases dealt with between January and June 2003, and include an approximately equal number of cases in each category sampled from each of the three registries:

The sample consists of:

- **450** applications for consent parenting orders; (referred to as 'consent applications'),
- **300** applications for final parenting orders which were settled prior to trial (referred to as 'settled applications') *and*
- **91** judicially considered parenting matters that went to judgment (referred to as 'judicially determined matters').[1]

Parties seeking consent orders from the Court must file an application in accordance with Form 12A. Before so doing they may have received legal advice and/or may have attended mediation sessions, within the Court or external to it. An order made pursuant to this process has the same effect as a judicially determined order.

The vast majority of parties applying for parenting orders resolve their matters before trial. Disputes are settled for a variety of reasons and along a

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1 In the figures these are referred to respectively as Forms 12A , Form 3F (settled) and Form 3F (trial) applications

continuum of time and events. Factors that may be relevant to particular families include the assistance of Court ordered or externally provided mediation, the receipt of legal advice, and a realisation that litigation is not their preferred option, or that a party has little chance of success.

As in other areas of the law, parties negotiate, (and often compromise their original claims) in order to avoid litigation and its attendant costs and stresses. In family law, the need to maintain some form of relationship with the other parent of the child, and of getting on with one's life, are factors which, for many encourage the resolution of disputes at some stage prior to trial.

Non judicially determined settled or consent outcomes may not provide optimal outcomes for all parents – or their children. As with all Court orders, they may become impracticable as the children grow older, the parents move away or re-partner, or some other life event occurs. However, they represent an arrangement which can be varied or enforced, should this become necessary, and one which provides some certainty to all concerned.

The pathways taken by all those applying for parenting orders, and the manner in which their disputes are managed, may also be influenced by the nature and extent of their legal representation. Self represented clients, especially in family law, find it difficult to separate their emotional involvement from the issues in dispute, making it particularly hard for them to negotiate a settlement.

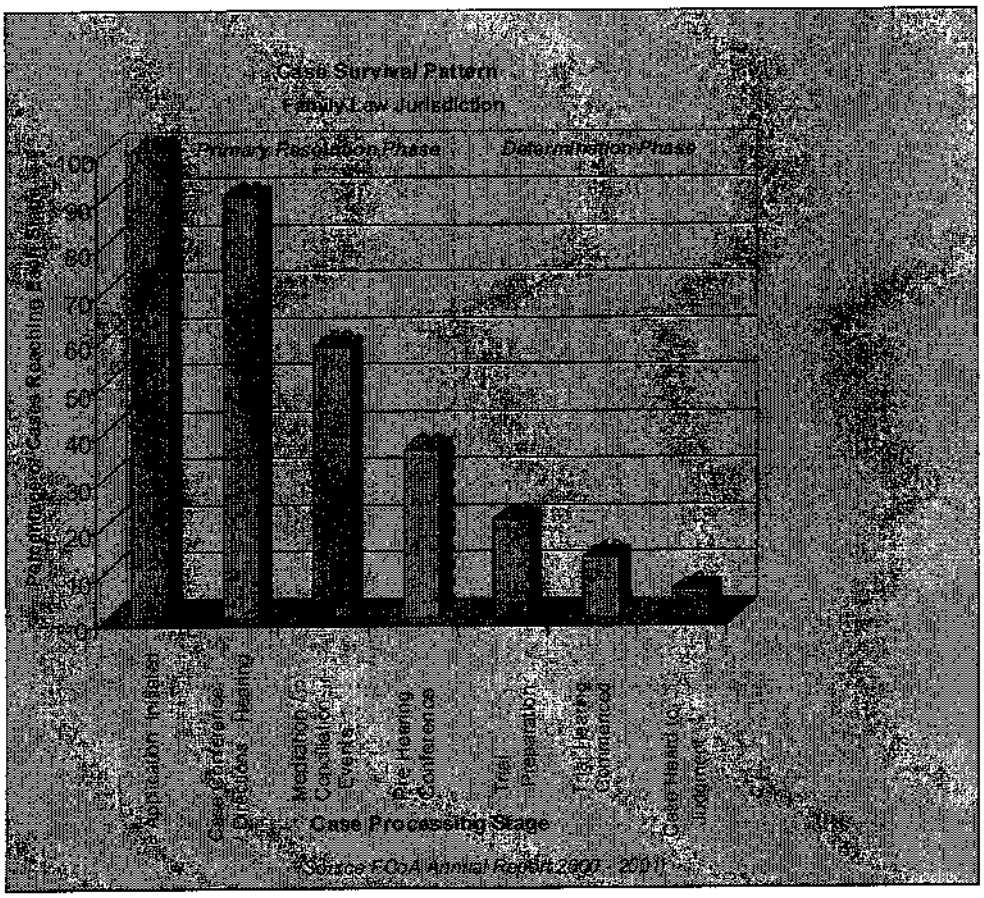
Cases which require a judicial determination may involve complex legal issues, disputes about facts, or serious allegations relating to child abuse or domestic violence. They may also be characterised by unresolved emotional issues which block or delay settlement and require the involvement of an external decision maker.

2. Parenting Matters in the Family Court of Australia

2.1 How Are Matters Dealt with?

The small proportion of family disputes which result in a judicial determination is typically estimated to be approximately 6% of all applications filed. ***Figure 1*** shows this pattern for parenting and other matters in the financial year 2000/2001.

Figure 1: Survival Pattern of Applications by Stages – 2000-2001

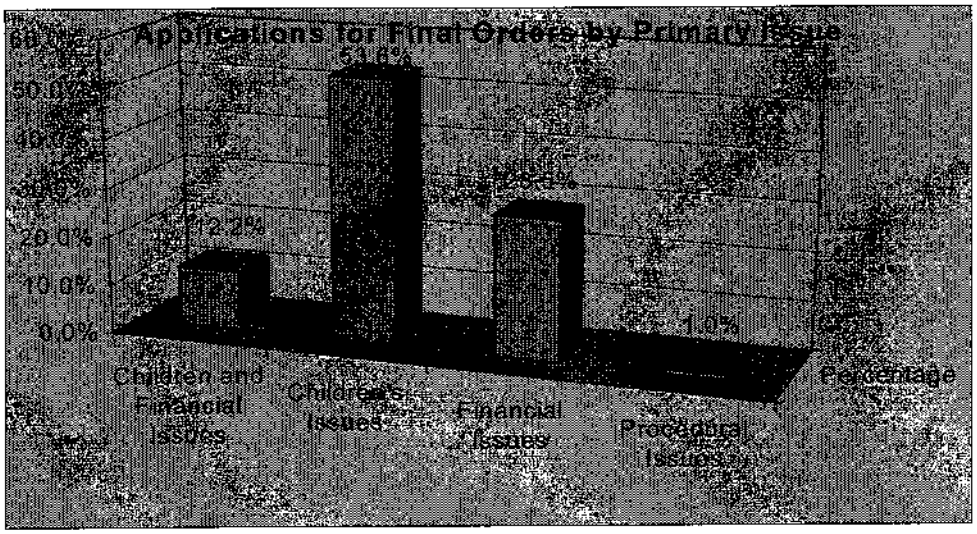


In terms of the volume of the Court's total workload, during the financial year 2002 / 2003 11,607 consent applications were filed, compared with 16,695 applications for final orders. In the same period 1,115 parenting and other matters were heard to conclusion and determined by a judge.

Thus in that year, when the *total number* of all applications for final orders is accounted for, the actual percentage of cases dealt with as contested hearings was 7% of the aggregated applications (excluding those for consent orders).

The distribution of contested issues, as measured by the applications filed, is shown in Figure 2.

Figure 2: Applications for Final Orders According to Issues in Dispute –



Note: These categories do not sum to 100%. In a small percentage of cases the nature of the application was not able to be determined

Just under 66% of all applications filed involved children's matters, either alone or in combination with financial issues.

2.2 *Married and Non Married Parents*

The population of clients who may apply for parenting orders includes not only parents, but also the child him or herself, a grandparent, or any other person concerned with the care, welfare or development of the child.[2] The Court has jurisdiction to hear and determine disputes involving the children of both unmarried and married parents and accordingly some parents may apply for divorce independently of their child-related dispute, or divorce proceedings may be unavailable and irrelevant to them. Many divorcing couples with children seek nothing other than a dissolution of their marriage. However, where a divorce is sought, the Court is required to be satisfied that proper arrangements have been made for the care, welfare and development of the children of the marriage before the decree nisi can become absolute.[3] To this end applicants for divorce are required to set out information about the arrangements made for the children, including details about their health, education, financial support and contact with the other parent.

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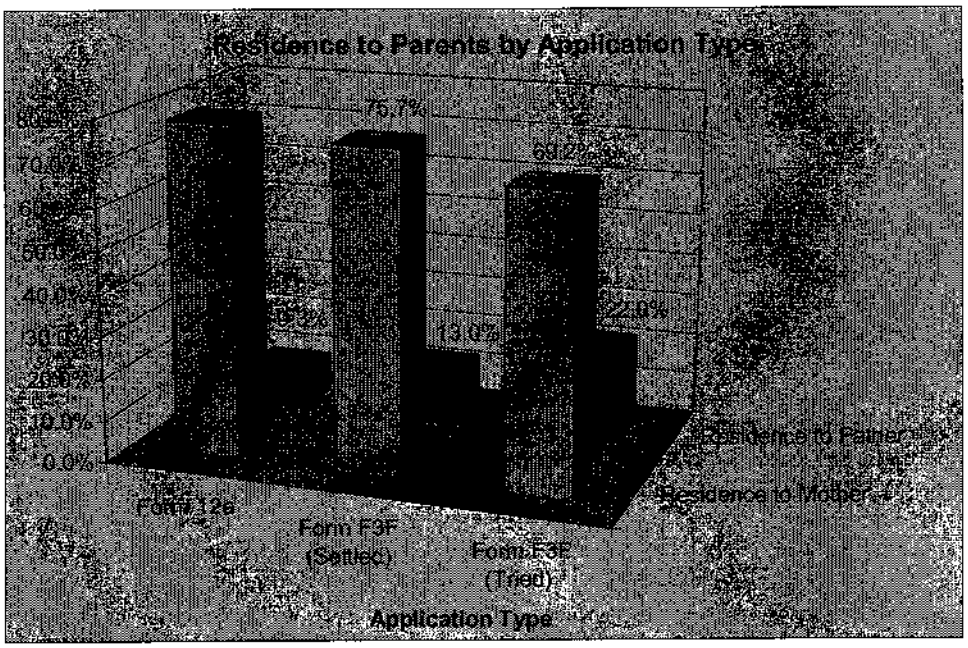
2 Section 65C Family Law Act.

3 Section 55A(b)(i) Family Law Act

2.3 *Comparing Consent, Settled and Judicially Determined Parenting Outcomes*

The types of arrangements parents consent to are useful indicators of what they consider is most appropriate for their children in the context of their particular circumstances. These arrangements thus provide a measurement against which settled and judicially determined outcomes can be compared.

Figure 3: Comparison of Residence Outcomes According to the Type of Application Made – 2002 - 2003



Note These categories do not sum to 100%. For the purposes of clarity this figure does not depict cases in which the outcome was that the child would live with someone other than a parent, with both parents or residence was split. See also section 2.8 for a discussion of shared residence.

The extent to which parenting outcomes may be influenced by Court processes or other factors cannot be determined in a statistical survey of this nature. However, what the sample analysis shows (Figure 3) is that where parents consent to particular arrangements for their children, mothers are more likely to have the children living with them (78%) than they are if the parenting dispute settles prior to trial (76%) or the outcome results from a judicial determination (69%). Conversely, fathers are more likely to be the resident parent where the matter goes to trial (22%) than where it is settled prior to trial (13%) or the outcome is the result of a consent agreement (9%).

The propensity for mothers to be the primary carers of children after separation extends across the spectrum of parents who access the Court's services – whether they do so peripherally (as in consent matters) or more directly via applications for final orders and in contested matters. This

outcome does not support contentions of either any legislative preference or systemic bias, but is more likely to be influenced by the greater involvement of mothers in the parenting role prior to separation, and to the greater likelihood of fathers' involvement in the paid workforce militating against them undertaking that role following relationship breakdown.

A survey of consent matters in parenting cases conducted in the Court in 1980 produced very similar results for mothers, but not for fathers. In that survey mothers were seen to be the primary carers in 79% of cases, and fathers assumed that role in 18% of cases, with another 3% resulting in one or more children lived with each parent[4].

Analysis of the judicially considered matters in the sample showed that 25 of the 91 judgments involved no dispute as to residence at the time of trial, the matters in contention being contact and/or specific issues such as arrangements for the health or education of the child, or the surname by which s/he was to be known. The outcome in 22 of these 25 cases (88%) where residence was not judicially determined was that the children would live with the mother. In the 66 judicially considered cases where residence **was** in dispute the judicial determination was that the children would live with the mother in 41 cases (62%) and with the father in 19 (29%) cases.

The statistics provided in this submission cannot explain the various negotiating strategies or tactics used by parents, nor can they provide reasons for the apparent reluctance of fathers to dispute residence, or to pursue a residence application at trial. This may be motivated by a fear of being unsuccessful, or advice to that effect[5]. It may also indicate that work or other commitments preclude fathers from assuming the major parenting responsibility for their children.

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4 Bordow, S (1994) 'Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome', Australian Journal of Family Law., vol. 8, number 3.

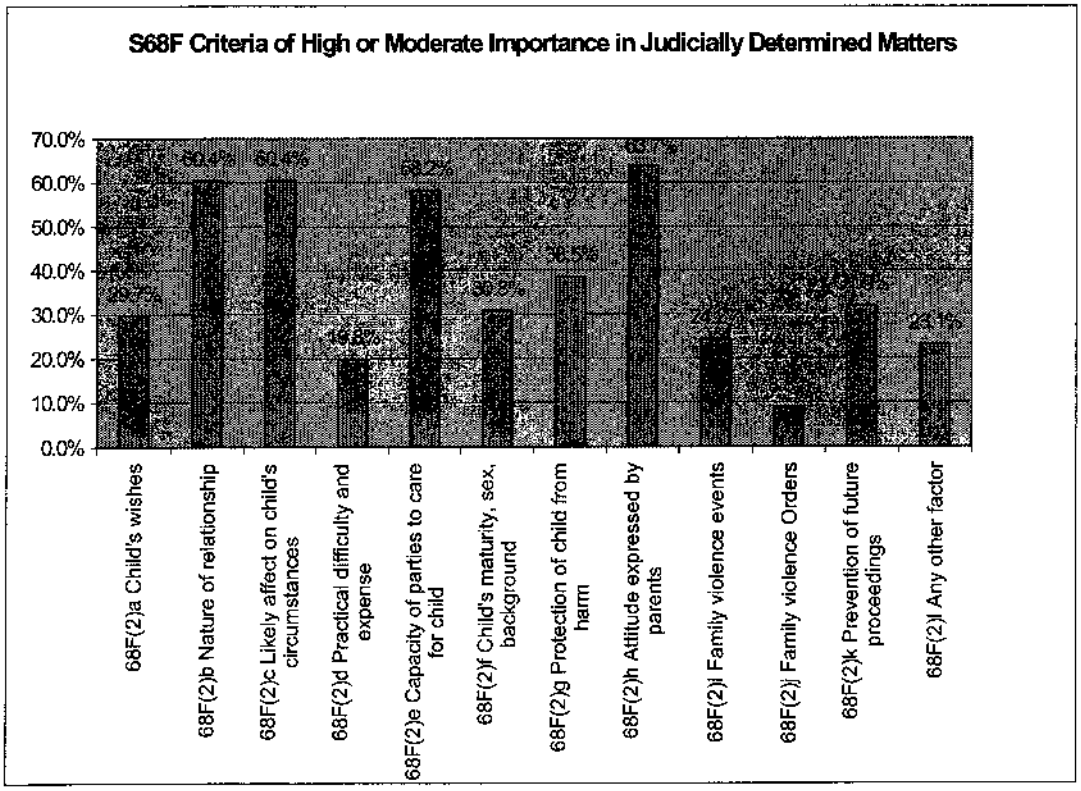
5 Although on the evidence provided here fathers are far more likely to obtain residence from a judicial determination than they are as a result of a settlement.

2.4 What Factors are Decisive When Judge Makes a Parenting Order?

As noted in the main submission, section 68F of the Family Law Act sets out 12 matters which the Court is required to consider when determining what is in the child's best interests.

The contents of the judgments surveyed were analysed by legally qualified staff including Judges' Associates to assess the weight given by judges to the section 68F factors. In cases where no weight was attached to a particular factor it may have had no relevance to the matter under consideration, for example in the case of a pre verbal child his or her wishes are not an issue and neither are Aboriginal cultural traditions in relation to a non indigenous child. In some cases there may be no allegations of risk of harm or violence. Figure 4 shows the results for factors rated as having a *moderate* or *high* importance in the judgments analysed.

Figure 4: Section S68F Criteria of High or Moderate Importance in Judicially Determined Matters
The figure shows the wide range of factors which are of relevance to judges when considering what is in the best interests of children in the litigated disputes which come before them.



Note: This figure depicts the number of occasions in which the indicated criterion was considered in the judgment to be of moderate or high importance. The percentages are therefore not cumulative..

2.5 What are the Patterns of Contact Either Agreed Between the Parties or Ordered by the Court?

The full sample was also analysed to obtain information about the frequency of contact either agreed to by the parties or judicially determined This is a complex issue, as the range of options is extensive and there are significant **qualitative** aspects of contact – particularly its value and importance to the child – which obviously cannot be statistically measured in a survey of this kind.

In relation to consent applications, the data were complicated by the fact that in a high percentage of cases the parties had agreed that future contact would be *"as agreed"* by them from time to time rather than couched in terms of days[6]. However, this in itself is an indicator of low levels of conflict between the parents who file such applications.

For the purposes of this submission a form of coding was used to establish, whether there were any substantial discrepancies between the contact available to (1) mothers versus fathers, and (2) outcomes according to whether the contact arrangements were made by consent or were Court ordered.

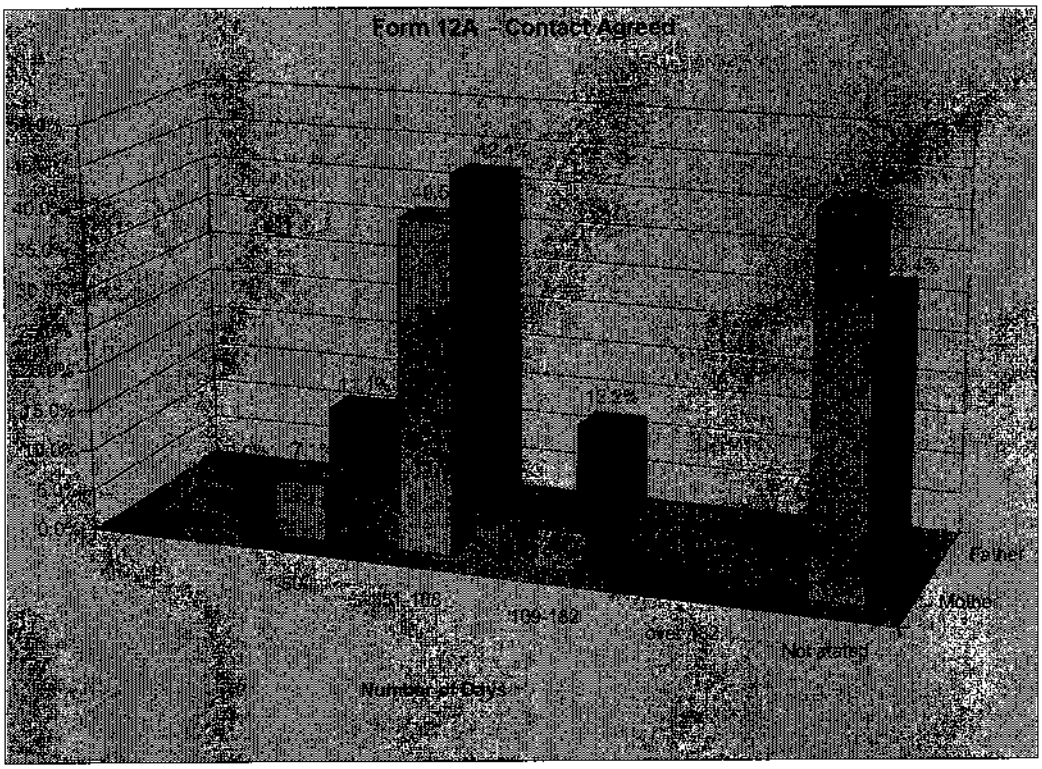
The following broad groupings were used to reflect common patterns of contact agreed or ordered.

0 days: *No contact*
1-50 days: *Contact less than every second weekend*
51-108: *Contact every second weekend and half school holidays.*
109-182: *More than above but less than 50%*
183 and above: More than 50% contact
Not stated: *This group mainly includes "contact as agreed."*

The following three Figures (Figure 5, 6 and 7) show the outcomes of this analysis according to the different samples.

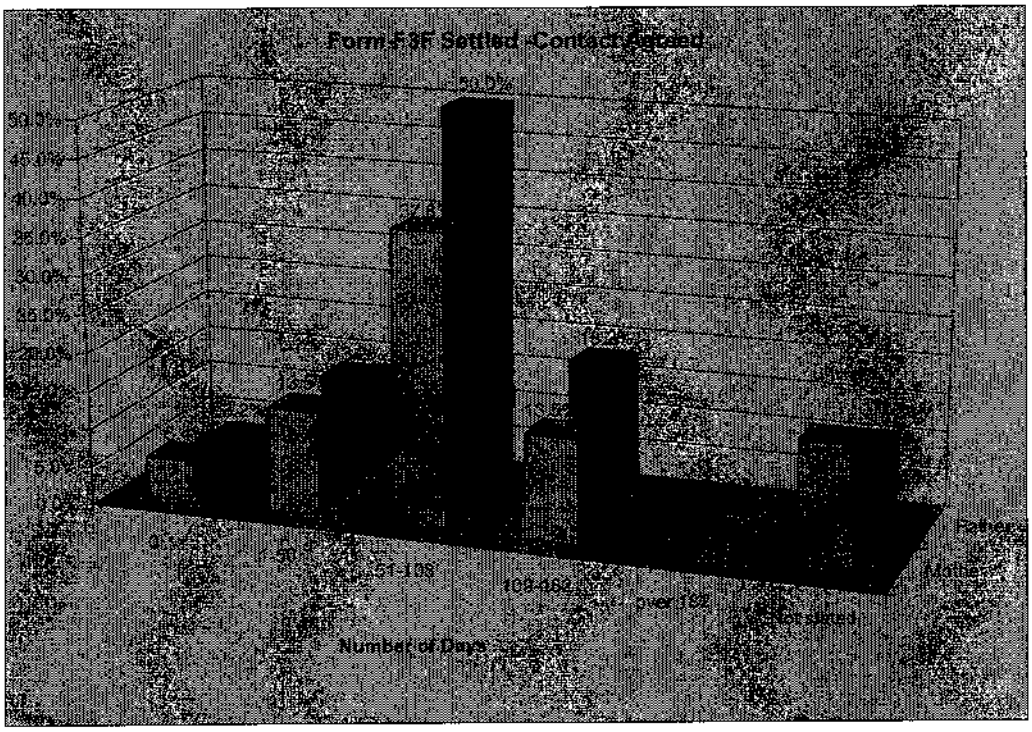
6 It therefore appears in the figure as 'not stated'.

Figure 5 : Contact Agreed to in Consent Applications – 2002 - 2003



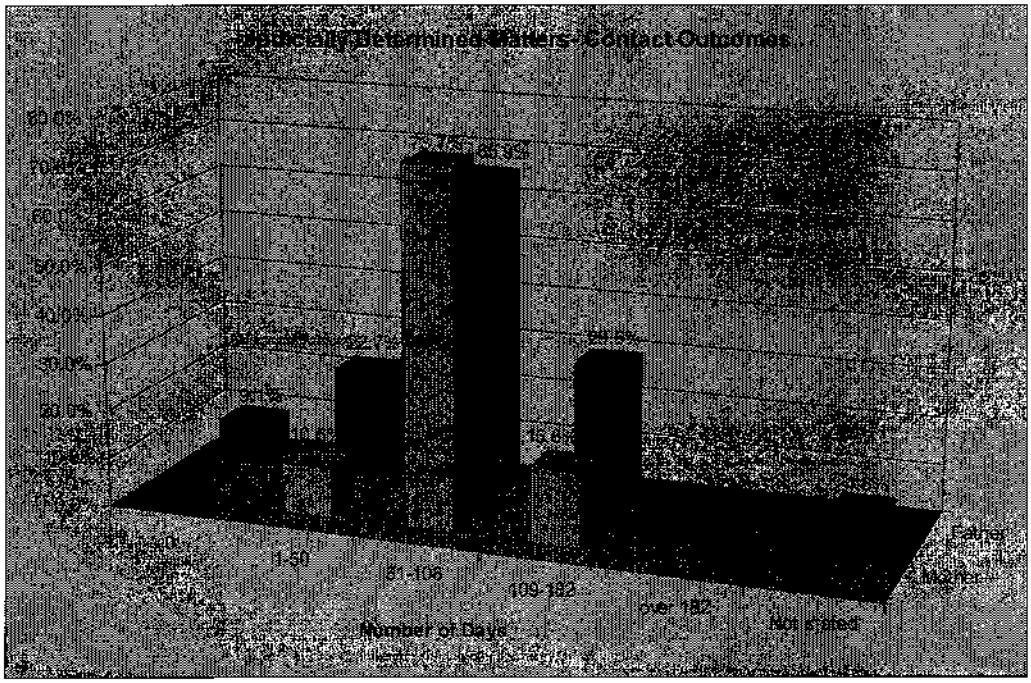
Note: This figure depicts the contact agreed to be granted to the non resident parent. The categories do not sum to 100% due to rounding and coding errors.

Figure 6: Contact Agreed to in Settled Applicants – 2002 - 2003



Note: This figure depicts the contact agreed to be granted to the non resident parent. The categories do not sum to 100% due to rounding and coding errors.

Figure 7: Contact Ordered in Judicially Determined Matters – 2002 – 2003



There is broad consistency in the patterns of contact for all three samples, with the category of 51 to 108 days being the most common for both settled applications and judicially determined matters. Whilst there was no discrepancy between patterns of contact for mothers and fathers, it is noted that given the propensity for the children to be living with their mothers, the number of contact mothers was small.

The seriousness with which the Court considers that children should maintain contact with both parents is also illustrated in figure 7, with no contact orders being made in relation to only 3% of fathers and 5% of mothers[78].

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7 Contact orders sometimes include a condition that there be supervision, or a restriction (eg. on location or who the child may meet) where violence is a concern.

2.6 Allegations of Sexual Abuse and / or Domestic Violence

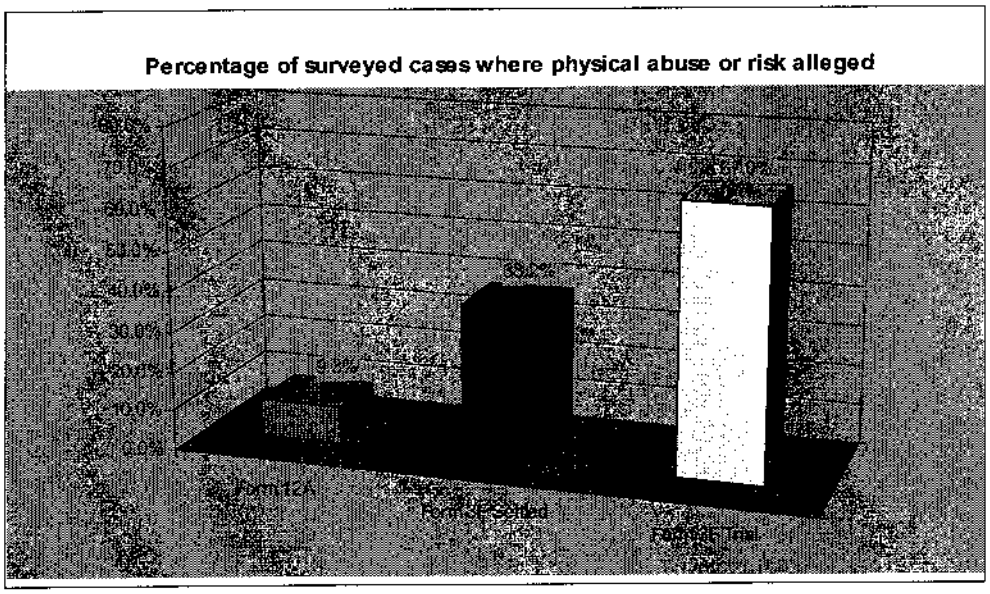
The Court's first submission refers to the high incidence of allegations of family violence in parenting applications that come before it. Although the safety of children is of primary concern to the Court, its role is not to determine whether an alleged perpetrator of violence is 'guilty' of any offence, nor to necessarily make a finding as to its occurrence. Rather, the High Court has made it clear that the Court must, in such circumstances, protect the child from an unacceptable risk of violence occurring[9].

The sample was analysed to determine whether allegations of family violence had been made against a member of the child's immediate or extended family in relation to a child or a family member.

2.6.1. Allegations of Physical Abuse or Risk of Physical Abuse

As figure 8 illustrates, such allegations are made in a high percentage of cases, particularly those which went to judgment. In that sample physical violence was an issue in more than two thirds (67%) of the judgments. As information about the manner in which these allegations were dealt with was only available for those cases which were judicially determined, this section of the submission concentrates solely on the judgment sample.

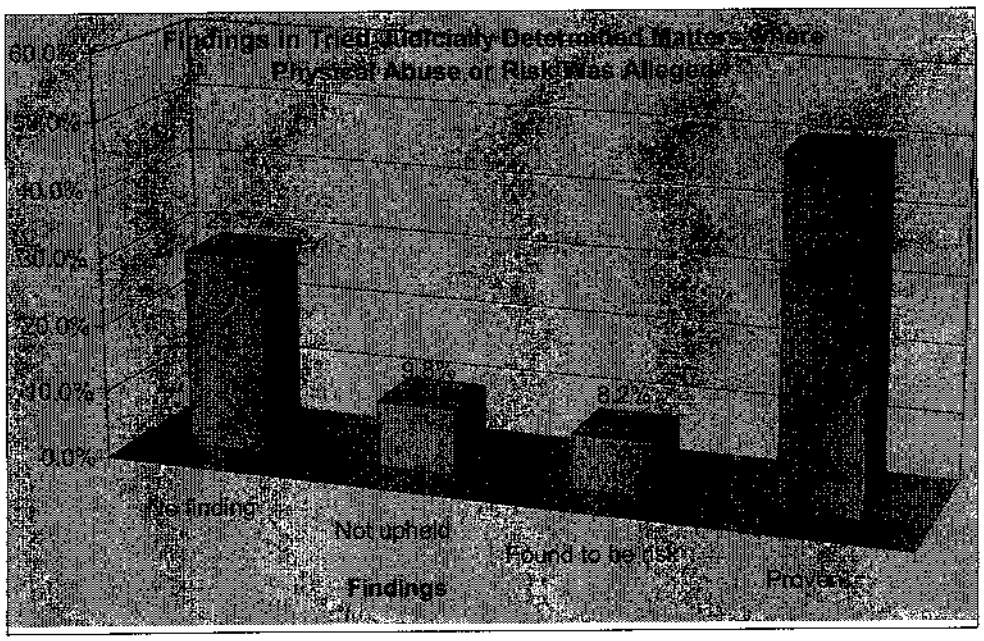
Figure 8: Percentage of surveyed cases where physical abuse or risk is alleged



9 M v M (1988) 166 CLR 69.

In order to gain a clearer indication of the outcomes of these allegations, the findings relevant to family violence in judicially determined matters was examined. As figure 9 below shows, in 59% of cases where such allegations were made, the Court either made a finding upholding the allegation (51%) or found that there was an unacceptable risk of family violence (a further 8%.)

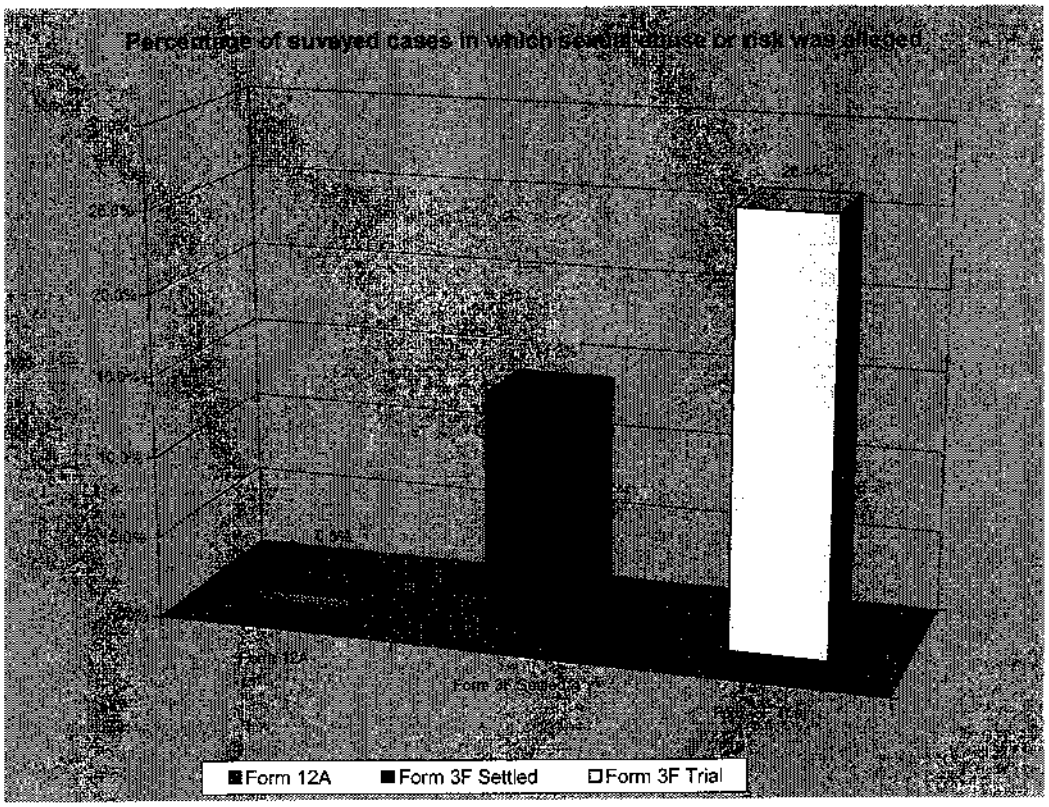
Figure 9: Findings in Judicially Determined Matters where Physical Abuse Risk was Alleged



2.6.2 Allegations of Sexual Abuse or Risk of Sexual Abuse

Parties may also allege that a child has been sexually abused, and figure 10 shows the frequency with which such allegations were made in the sample, whilst figure 11 examines the outcomes of those allegations in relation to the judicially determined matters.

Figure 10: Incidence of Allegations of Sexual Abuse or Risk



Figures 11: Findings in Judicially Determined Matters where Sexual Abuse or Risk was Alleged

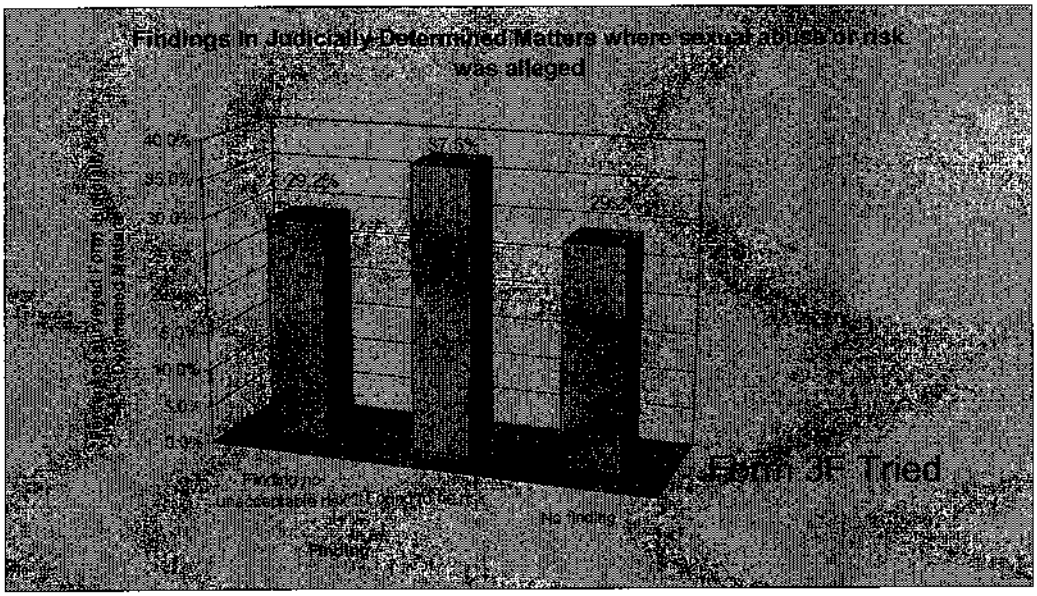
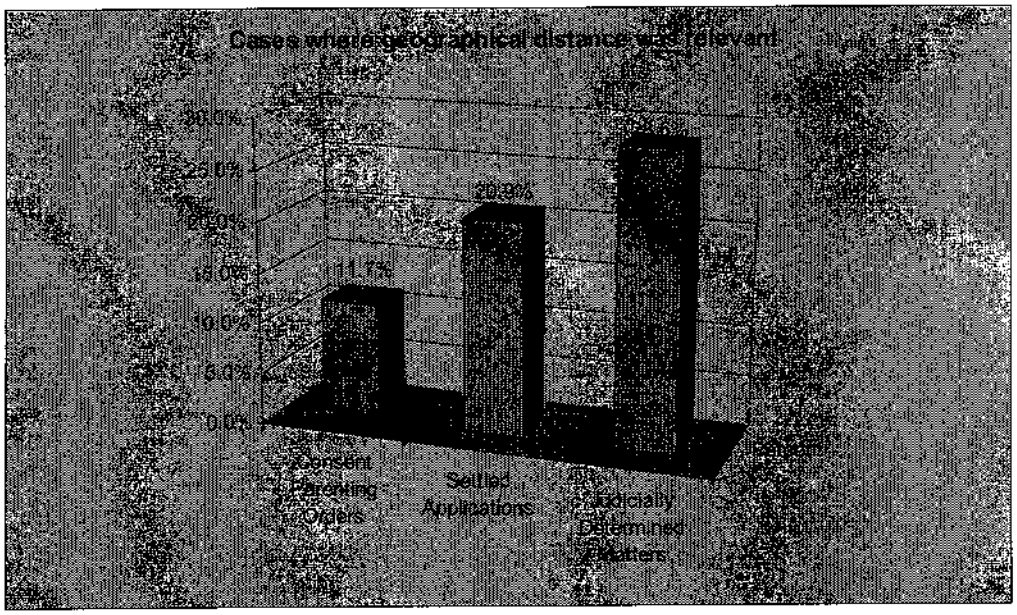


Figure 11 shows that there was found to be an unacceptable risk of sexual abuse in 38% of the cases in which they were alleged.

2.7 Other Factors relevant to Shared Parenting - Geographic Issues

The location of parents following separation is obviously relevant when arrangements about the children are being negotiated or judicially determined. Distance is a subjective issue, which is dependent on factors such as the age of the child and the resources available to the parents. Figure 12 shows the frequency with which it is apparent that the location of the parents was a relevant factor in the cases included in the sample.

Figure 12: Cases where Geographical Distance was Relevant



It is evident that in a relatively high percentage of judicially determined matters (29%) the location of the parents is an important issue, and possibly a major source of dispute between the parties.

2.8 Shared Residence under Current Legislation

The Family Law Act encourages parents to remain responsible for their children after separation, and share duties and responsibilities concerning their care, welfare and development. The nature of such sharing is not spelt out, as parents are also urged to agree about their future parenting and to maintain contact with their children[10]. The Act does not specify any optimal outcome and parents may agree to a shared residence arrangement should they wish. As this survey of matters shows, in a very small percentage of cases shared residence is ordered by the Court, and this occurs most commonly by each parent having a residence order made in his/her favour. Such orders do not necessarily imply that the children will spend equal amounts of time with each parent, but rather that each will have the child living with them for significant periods. The basis for such outcomes were detailed in the Court's substantive submission at Part 4.2 "Judgments Relating to Shared Parenting"[11]

The survey cases were examined to determine the frequency with which shared residence (as defined by the parties or referred to in judgments) was the outcome of the proceedings. As the figure shows, such an outcome was uncommon, but was more likely to occur in sample consent applications (8%) than in those which were settled prior to trial (4%) or judicially determined (2%).

This finding – particularly as it relates to judicially determined matters – reiterates the observation in the Court's submission that litigating parents are more likely to be hostile and un-cooperative with each other than are those who are able to negotiate a settlement involving their children. Shared residence is most unlikely to be in the best interests of children in such circumstances.

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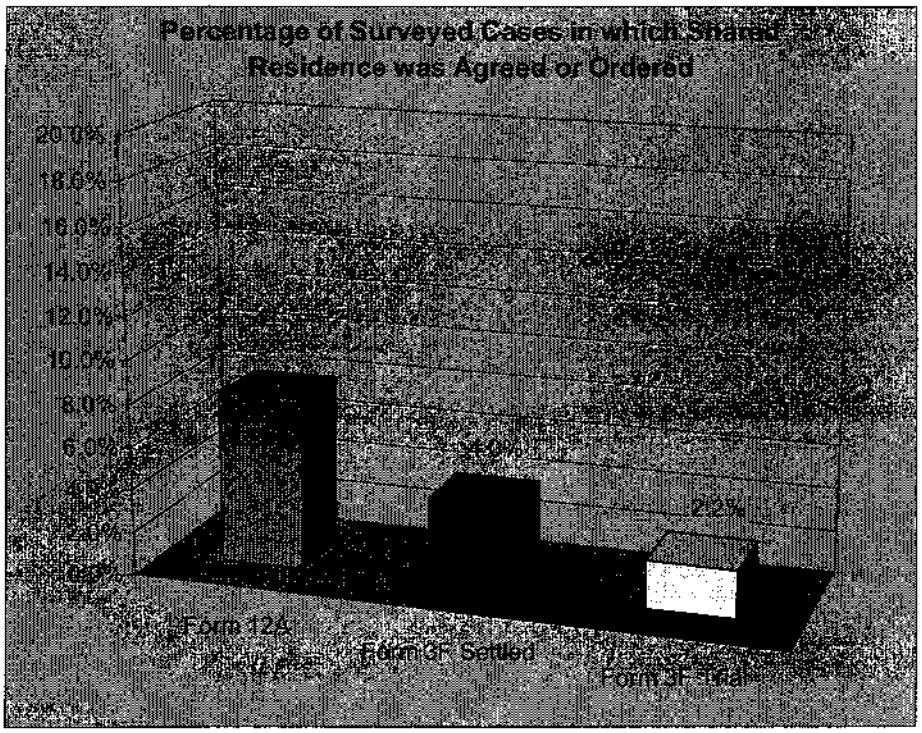
10 Section 60B Family Law Act

11 Page 20

Figure 13: Percentage of Surveyed Cases in which Shared Residency was Agreed or Ordered



3. Conclusion

The survey data in this submission complements the information provided by the Court in its major submission to the Committee, and draws it together. It illustrates the characteristics of children's matters which are the subject of Court orders, whether consensual or ordered. It also demonstrates the ways in which these disputes are managed by the parties, and by the Court, and shows the complexity of the issues raised, particularly in those disputes which go to trial.

Despite criticisms that the Court is biased towards mothers and against fathers when residence of children is in issue, the data show that parents themselves are more likely to agree that the primary carer after separation should be the mother than is the Court to order such an outcome. This suggests that the reasons for the so called 'mother preference' is societal rather than specific to the Court – or the Family Law Act.

The frequency with which allegations of child abuse are not only alleged but are considered by judges to be relevant to children's best interests also indicate how perilous are the lives of many children whose parenting arrangements come before the Court.

Full Court Cases Concerning Children

1993-2002

1. Introduction: Full Court Decisions

The final section of this submission is a review of ten years of decision-making in children's cases decided by the Full Court of the Family Court. This was undertaken as a separate exercise from the statistical analysis of settlements and first instance matters. Judgments from 1993 to 2002 have been considered. The period covers a period of legislative (and terminological) change, and some significant developments in case law. This section incorporates both statistical information and highlights important issues in Full Court decision making.

The Full Court of the Family Court is constituted by three or more judges of the Court, the majority of whom are required to be members of the Appeal Division.[12] Currently the Chief Justice and seven additional judges are assigned to the Appeal Division.

Full Court decisions represent a very small proportion of the cases which come before the Court. During the ten year period considered in this analysis the Full Court dealt with, on average, only 27 cases per year involving children. However, such decisions are influential beyond their numbers. They are the decisions most likely to be reported, and are therefore the most visible precedents for judges, practitioners and self represented litigants alike. They represent an examination of the legislation and of single judge decision making at a high level and as such define, inform and develop family law and practice. The cases that come before the Full Court are, in some instances , unusual but they also represent the realities and vagaries of Australian family life.

2. Elements of Judge's Decision Making

2.1 Discretion

In the ten years considered, the Full Court allowed the appeals sought in 29% of cases and either remitted the matters to a trial judge, or made its own orders. There is a reluctance to intervene in discretionary judgments, as the High Court explained in *House v The King* [13]

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then

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12 Sections 4 and 21A Family Law Act

13 (1936) 55 CLR 499 at 504-505 (per Dixon CJ, Evatt and McTiernan JJ).

his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

The trial judge has the advantage of making a 'first hand' assessment of the evidence adduced by the parties. Such evidence might relate to parenting capacity, children's wishes, allegations of violence, or any number of other issues the parties bring to Court.

2.2 The Best Interests of the Child

The Court is required to regard the best interests of the child as the paramount consideration when deciding whether to make a particular parenting order.[14]

2. Basic statistical details

The following represents a basic analysis of Full Court judgments in children's matters for the years 1993 to 2002. The material shows total numbers of appellants, their relationship to the child and the outcomes of the appeals. It cannot, and does not seek to, consider the merits of the arguments relied on by the parties to the appeals.

These figures provide a starting point for a more detailed examination of a selection of these cases, which have involved key issues of concern, namely: shared residence; allegations of violence and sexual abuse; and cases involving persons other than parents[15].

A table which covers this period follows the text.

1993

A total of 20 appeals dealt with children's issues. In 15 cases the appellant was the father, and five of those appeals were allowed. Four mothers appealed, two successfully, and the one appeal by a child representative was allowed.

None of the 20 appeals involved shared parenting, but two involved relocation, and violence was alleged before the trial judge in seven cases, in five of which the trial Judge had found the abuse had occurred or presented an unacceptable risk to the child.

1994

A total of 26 appeals dealt with children's issues. In 18 of those cases the appellant was the father and in four of those appeals the appeal was allowed. Six mothers

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14 Section 65E Family Law Act

15 Allegations of violence include allegations of sexual abuse.

appealed, and two of these appeals were allowed. The one appeal by a grandparent was allowed, but another brought by paternal grandparents and a paternal aunt was dismissed. Two of the 26 appeals involved shared parenting, one involved relocation and violence was alleged before the trial judge in another 12. The trial Judge had found that the abuse occurred or an unacceptable risk was present in six cases.

1995

A total of 33 appeals involved children. In 16 of these the appellant was the father and three of those appeals were allowed. 13 mothers appealed, with five appeals being allowed. There were three appeals jointly by mothers and fathers against first instance decisions in favour of other family members, but none was upheld. The child representative appealed one judgment, but that appeal was dismissed.

None of the appeals involved shared parenting, but two involved relocation. Violence had been alleged before the trial judge in 14 cases and in nine of those the trial Judge found there was an unacceptable risk or that the abuse occurred.

1996

There were 28 appeals on children's issues and in 18 of those cases the appellant was the father. All but one of these appeals was dismissed. Eight mothers appealed, four successfully. One appeal brought by grandparents was dismissed, as was one brought jointly by the father and paternal grandparents.

Neither shared residence nor relocation were the subject of any appeals. However violence had been alleged before the trial judge in 12 cases, and in 10 of those the trial Judge had the found abuse had occurred, or there was considered to be an unacceptable risk.

1997

There were 23 appeals concerning children and in 11 of those cases the appellants were fathers, whose appeals were allowed in five cases. The father and child representative successfully appealed in one case. In 4 of the 10 cases in which mothers appealed the appeals were upheld. Two appeals involved the issue of shared parenting, and relocation was a factor in four. Violence was alleged in ten cases and was found at first instance to be an unacceptable risk in eight cases.

1998

There were 34 appeals involving children. The father was the appellant in 17 of the cases, with three such appeals being upheld. In one case the father and his wife, (who had entered a surrogacy agreement with another couple) appealed and were unsuccessful. In 14 matters the mother was the appellant, with seven favourable outcomes. In one case the mother and biological father appealed, but their appeal was dismissed. One grandmother appealed unsuccessfully.

Of the 34 appeals in 1998, shared residence was a factor in two, and relocation an issue in eight. Violence or sexual abuse was alleged in 13 cases and found to have occurred or to present an unacceptable risk to the child in ten first instance matters.

1999

There were 22 appeals involved children. The father was the appellant in 13 cases, and four of these appeals were upheld. The mother was the appellant in nine cases, and five of these appeals were upheld.

Shared parenting was a factor in three appeals and relocation was an issue in another seven. Violence was alleged at first instance in nine cases and found by the trial Judge to have occurred or to amount to a risk o in five.

2000

A total of 28 appeals involved children. The father was the appellant in 15, and his appeal was upheld in four cases. One successful appeal involved the father and his aunt and uncle as appellants. In another the appellants were the father and his mother and the appeal was allowed in part, granting them unsupervised contact. In 5 of the 11 cases in which the mother was the appellant the appeal was upheld.

Shared parenting was a factor in two appeals, and relocation a factor in nine. Violence or abuse was alleged before the trial Judge in seven cases and was found in five cases.

2001

A total of 26 appeals involved children. The father was the appellant in 12 cases, but only one such appeal was upheld. The mother was the appellant in 13 cases, with four favourable outcomes. One appeal by a paternal grandmother was dismissed.
Of the 26 appeals, shared parenting was a factor in two cases and relocation an issue in four. In 13 cases violence had been alleged at the trial, and upheld in 11.

2002

A total of 26 appeals concerned children. In 15 of those, the father was the appellant, resulting in two favourable outcomes. The mother was the appellant in ten cases, with two favourable outcomes. The paternal grandmother was the appellant in one unsuccessful appeal.

Of the 26 appeals, shared parenting was a factor in two and relocation in another two. Violence was alleged before the trial Judge in seven cases and found to have occurred or there was an unacceptable risk of it occurring in three.

Table of Factors in Full Court Cases 1993 – 2002

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	*Totals*
Total	20	26	33	28	23	34	22	28	26	26	266
Appeal by Father	15	18	18	19	12	18	13	17	12	15	157
Appeal by Mother	4	6	15	8	11	15	9	11	13	10	102
Appeal by Significant Other	0	3	0	2	1	3	0	2	1	1	13
Appeal by Child .	1	0	1	0	1	0	0	0	0	0	3
Appeal allowed	8	7	8	5	10	10	9	12	5	4	78
Trial Judge in error	8	8	10	5	10	9	9	11	5	4	79
Shared parenting	0	2	0	0	2	2	3	2	2	2	15
Relocation	2	1	2	0	4	8	7	9	4	2	39
Violence and/or Sexual Abuse alleged	7	12	14	12	10	13	9	7	13	7	104
Violence and/or Sexual Abuse found at trial	5	6	9	10	8	10	5	5	11	3	72

Note 1: Total number of appeals and appellants does not always add up due to joint appeals, for example, a father and paternal grandmother make one appeal, but are counted as two appellants.
Note 2: Some cases deal with more than one issue, for example, shared parenting and relocation.

3. Key Issues

4.1 Shared Custody or Residence

Over the ten years examined, shared custody (as it was called before 1996) or shared residence (as it is now known in the legislation) was a factor in 15 Full Court appeals. For the purposes of the analysis shared custody/residence was identified as being the arrangement immediately post separation; sought at first instance by one of the parties; ordered by the trial judge; or sought on appeal. The exact time the child spent with each parent was not always expressed - sometimes a judgment simply refers to, for example, "a shared residence arrangement was in place after separation". However, in the cases where it is expressed, it is fortnight about, week about or half week about (50/50). When it was not expressed, the parties said they wanted "shared residence" but did not define a percentage of time or days per week.

The case of **L and L** (unreported, 26 September 1994) involved an 11 year old child who, upon separation had lived with her mother and subsequently her father, with access with the mother. Consent orders were made in 1992 to reflect this arrangement. The mother applied for sole custody and discharge of those orders in 1993, on the basis that the child wanted to live with her. That application was dismissed. The mother, seemingly gravely concerned about the child, retained her after an access visit, and instructed her solicitors to inform the husband's solicitors of this. The husband's application for return of the child resulted in her being removed by the police.
The mother then filed an application seeking interim custody, on the basis that the child had expressed suicidal thoughts in relation to living with her father. The counsellor who interviewed the child concluded that she was nervous and frightened of her father and had developed mechanisms for keeping the father at a distance. This behaviour was causing her considerable stress and anxiety.

The trial Judge determined that it was in the child's best interest not to live with the father full time, and ordered interim week about contact, in an attempt to alleviate some of her anxieties. The father appealed, arguing there had not been a sufficient change in circumstances to warrant the new arrangement. While expressing no view on the week about arrangement, the Full Court allowed it to continue on the basis that it was interim, it was unnecessary to launch an appeal, and the child's interests would best have been served by the father seeking an expedited hearing for final orders.

In 1997 there were two cases of note. The first, **C and B** (unreported, 15 April 1997), involved domestic violence. After separation, the mother and children had gone to a women's refuge on two different occasions and domestic violence protection orders had been taken out. On one access visit the father made threats to the mother's former solicitor against the mother's life, and on two other occasions he arrived drunk at a contact centre and behaved abusively towards the mother and staff. On another occasion the father went to the mother's house and had to be removed by police. He was placed on probation for breaching the protection orders. Contact was reduced by court order to four hours per fortnight, supervised. However, the father made threats against the contact supervisor, resulting in her withdrawal. The father also made threats against the mother's life.

Despite this pattern of behaviour the father sought shared custody of the children. The judge ordered contact by letter only and put in place a number of restraints on the father

being near the children's school or home. The mother was ordered to encourage the children to respond to the letters sent by their father and to provide photos and school reports annually. The trial Judge said:

> "The father's application for sharing the care of the children is simply not open on the evidence. ... The level of conflict, a level for which the father is virtually entirely responsible I find, is such that the very continuation of contact by the father with the children is in serious question as will be discussed further shortly. That level of conflict renders consideration of a shared parenting arrangement out of the question." (Cited at page 9 of the Appeal.)

The father appealed and the appeal was dismissed. The Full Court said:

> "We are satisfied that there was ample material before the trial Judge to enable him to conclude, as he did, that the level of conflict between the parties for which the father is virtually entirely responsible, rendered consideration of a shared parenting arrangement out of the question. It was open to the trial Judge to find that the children were well established in their present arrangements, that the father has a long history of difficulties with alcohol, aggression, violence, denigration and belittling of the mother and that there would be risks, at least in the short term, to the emotional health of the children if there was a change in their primary care. In coming to his decision, the trial Judge considered that the best interests of the children were the paramount consideration. (At page 20 of the Appeal.)

The second case concerned with shared custody/residence was ***K v Z*** (1997) FLC ¶92-783. After separation there was a pattern of half weekly shared residence, which later settled in to a pattern of week about. The mother subsequently enrolled in a university interstate, and claimed that she and the father agreed that during the two years of her course the children would live with the father. They would spend the following two years with the mother. After only five months, the mother returned and in an effort to be closer to the children, enrolled in the same course of study, but in a city some 150 kilometres away from the father. Both parents applied for residence.

The trial Judge found that the mother had moved away to satisfy her own needs, rather than those of the children and that, although both children (who were under five) wanted to live with her, she had influenced them in this view. He ordered that the children live with the father.

The mother appealed and the Full Court found that the trial Judge had overlooked the significance of the children's distress at not seeing their mother as regularly as previously. They also found that the mother's move to pursue study should not have been considered a negative factor, but rather that it had occurred to allow her to gain economic independence for herself and the children.

In reversing the decision of the trial Judge and ordering that the children reside with the mother, the Full Court said:

> "We wish to emphasise that this decision is intended to make provision for what we perceive to be in the children's best interests while the wife completes her studies and the parties are obliged to live in different cities. Should they once again find themselves living in the same city then the matter may have to be reviewed given especially that the first preference of the children was to continue a shared parenting arrangement." (At page 84657.)

The matter of **G and G** (unreported, 24 April 1998, [1998] FamCA 94) was decided the following year. After separation, contact between the child and the father occurred on

alternate weekends, subsequently extending to a period of 5 nights out of 14. This arrangement continued for two months until the father stopped mid week contact, re instating it to alternate weekends.

Both parents applied for residence and the trial Judge, having considered the wishes of the child, ordered alternate weekly residence. The mother appealed against this decision on the ground that the trial Judge had placed undue emphasis on the child's wishes. She also expressed concerns about the father's work hours and his ability to manage day to day parenting tasks.

The Full Court held that the trial Judge had erred in giving too much weight to the child's wishes to the exclusion of other important factors relevant to the child's best interests. [He may also have misunderstood the nature of the arrangement prior to the trial]. The appeal was allowed and the matter was remitted for rehearing.

In 1999 the case of **N and B** (unreported, 14 May 1999 [1999] FamCA 461) involved contact arrangements, originally made by agreement, but which the mother later argued were disruptive, and damaging to the young child's sleep patterns and routine.

A further arrangement was made which reduced the number of changeovers between the parents. This changed (when the child started school) to a virtually shared care arrangement and was then modified so that the child spent two days of each week and each alternate weekend from Friday to Sunday with his mother, and the remainder of the time with his father.

The mother applied for residence to enable her to move with the child to her partner's farm. The trial Judge found that there had been high levels of conflict between the parents, including the father's use of violent and threatening language, including threats to kill the mother and telling her she should suicide. He also threatened to take the child to Malaysia and to Melbourne.

The trial Judge approached the child's wishes with caution, as the father had discussed the circumstances of the trial with the child, whereas the mother studiously avoided doing so. She ordered that the child live with the mother and have defined contact with the father. The Full Court found the trial Judge properly regarded the child's best interests as the paramount consideration and had taken into account the child's wishes. The appeal was dismissed.

In 2000 the matter of **F and B** (unreported, 2 June 2000, [2000] FamCA 676) came before the Full Court. At first instance the trial Judge heard evidence that the parties had agreed to a shared care arrangement prior to separation, when the baby was 8 months old. This arrangement involved each parent being entirely responsible for the child when the she was in his or her care. This resulted in the father not allowing the mother to breast feed or comfort the baby during his designated caring times. The parties later separated under the same roof and the father increasingly took the baby elsewhere when she was in his care.

Consent orders were made for shared residence when the child was three, and its continuance became an issue. The trial Judge concluded that the father exercised an inordinate degree of control over the mother and that the child should reside with the mother and have contact with the father. The trial judge found:

> "That the present shared residence arrangement is not in [the child's] best interests and that, in particular, it would not be appropriate when [the child] starts school in 2000. [The mother] said the child missed her and needed to spend more time with her. She said that the child was stressed by the present arrangements, and that her, that is the mother's will, was overborne by the father. She said there was conflict between them and they were unable to agree or negotiate any matters relating to [the child's] welfare." (Cited at page 5 of the Full Court judgment.)

The Full Court noted that the trial Judge had put in place an arrangement which would minimise the opportunities for conflict between the parties.

> "There is no question that the issue of control was a significant factor in her Honour's reaching her conclusion, and the issue was dealt with thoroughly and at length in her judgment. Although her Honour did not specifically refer to whether the mother exercised an inordinate degree of control over the father, it is clear from her reasons that she had considered this aspect of the relationship of the parties in depth, and did not accept the father's contention. We accept that the evidence strongly supported the conclusion reached by her, and that this ground has no substance." (At page 17, paragraph 42.)

The Full Court also noted in relation to communication between the parents:

> "Her Honour referred at considerable length to the problems that the parties had experienced in reaching agreement on parenting issues, and concluded that the shared parenting regime should not continue. She was satisfied that "the father does impose his will on the mother and there has been no improvement in the parties' ability to negotiate" (at AB32). The trial Judge concluded that, in relation to some specific issues, for example, the choice of the child's school, the mother should have the right to choose the school the child was to attend in 2000. She clearly did give consideration to these issues, but did not reach the conclusions sought by the father. She obviously did not accept that the issue about the school was "the last area of conflict" between the parties." (At page 21, paragraph 53.)

In relation to shared parenting, the Full Court, in dismissing the appeal found:

> "It is readily apparent that her Honour concluded that it was in [the child's] best interests not to continue in a shared parenting arrangement because of the ongoing friction and lack of cooperation, and attempts by the father to exercise control." (At page 27, paragraph 74.)

In the 2001 case of **B and K** (unreported, 14 August 2001, [2001] FamCA 880) involved a shared residence arrangement. However the trial Judge found that the parties had separated after the father had raped the mother, and ordered that the two children reside with each parent on a fortnightly basis.

The mother appealed, arguing that shared residence was inappropriate, given the father's behaviour towards her, and that the trial Judge had failed to properly consider that factor and the resulting difficulties between the parties of communicating. In dismissing the appeal, the Full Court held that the trial Judge had properly taken the rape into account, together with the counsellor's evidence that it had no impact on the children.

4.2 Cases involving Violence and Sexual Abuse

The reported cases which follow provide a snapshot of the violence and sexual abuse issues the Court is called on to consider. In over a quarter of the Full Court cases decided (27%) over the ten year period, violence and/or sexual abuse was found to have occurred, or a finding was made that there was an unacceptable risk of it occurring.

In coming to its decision the Court will examine the evidence in relation to any claim of abuse and make a decision based on the best interests of the child. In such cases the question of supervised contact is often considered. The Court has recognised that any contact in certain circumstances, may in fact be so frightening that it causes further harm to the child or children concerned.

The case of *B and B* (1993) FLC ¶92-357, established the principle that access should not be granted when there is an unacceptable risk to the child. The Full Court in that case said:

> "In our opinion, a trial Judge who has made a finding that an unacceptable risk of sexual abuse exists, or that sexual abuse did occur, should look to the level of trauma, in the widest sense, that has been occasioned to the child or children or may be occasioned in the future, to determine if supervised access is appropriate. If there is an unacceptable risk of the child or children being exposed to physical, emotional or psychological harm by reason of contact with the abusing parent, then an order for supervised access is not appropriate because of the Court's obligation to protect children from such harm." (At page 79780.)

In ***Re C and J*** (1996) FLC ¶92-697 the joint judgment of Fogarty and May JJ noted:

> "The Court has the widest discretion to make whatever orders are appropriate in the best interests of the child by way of access or contact. Supervision is one option. The significance of [*B and B*] was as a timely reminder that supervised access was not to be used routinely and by way of compromise in cases of this sort. The Court pointed out a number of difficulties inherent in that approach. Firstly, such orders may not give proper consideration to the real issues. Secondly, practical difficulties are usually encountered in arranging satisfactory supervisors, especially long term. Thirdly, whilst supervision may protect a child from repetition of sexual or other abuse, it may not protect the child, and indeed may exacerbate the situation, in relation to what might be described as the psychological consequences of the child being bought into contact with a person who has abused or may have abused that child." (At page 83342.)

In ***A v A*** (1998) FLC ¶92-800 the father sought unsupervised contact with the children at first instance. There had been a serious physical assault and sexual assault against the mother resulting in her hospitalisation for over a month. She asserted it was perpetrated by the father, although criminal investigations were inconclusive and the trial Judge found there was no unacceptable risk. There was strong evidence before the Court that the father had perpetrated the assault. The Full Court accepted that evidence.

> "In our view this was a case where there was clearly an unacceptable risk to the children. The nature of the assault bespeaks a violent and disturbed person. As there is a possibility that the husband is that person it seems to us to be unacceptable for this Court to place these children in any position of risk arising from those circumstances." (At paragraph 4.3, page 85000.)

4.3 Full Court Cases involving Significant Persons

As noted above, appeals are sometimes bought by grandparents, aunts and uncles. Section 65C of the *Family Law Act* 1975 provides:
A parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or
(b) the child; or
(ba) **a grandparent of the child; or**
(c) any other person concerned with the care, welfare or development of the child. (emphasis added)

Despite this provision, over the ten year period, significant others were the applicants in appeal proceedings in only 4% of cases.

In the case of ***Re K*** (1994) FLC ¶92-461 the parties in dispute were the maternal aunt, the paternal grandparents, the paternal aunt and the father. The father had been charged with the murder of the child's mother and was awaiting trial at the time of the Family Court proceedings. The trial Judge ordered that the maternal aunt have custody of the child and this decision was upheld on appeal.

The case of ***Y & X*** (unreported, 2/2/96) involved an appeal by a child's father and his parents against orders that the child live with the maternal grandparents. The father had been charged with the murder of the mother, but the trial did not proceed past the committal stage. The maternal grandparents provided a proposal for the child's education with reference to cultural heritage issues. However, the trial Judge found the father to be a heavy drinker who was prone violence and whose assaults on the mother had resulted in her hospitalisation The trial Judge considered the paternal grandparents application to be merely a "backstop" for the father to have residence. The subsequent appeal was dismissed.

In **D and F** (unreported, 19/6/01, [2001] FamCA 382) the appellant was the paternal grandmother who had unsuccessfully applied for residence of the child at first instance. The trial Judge had found the case to be very finely balanced, with both parties displaying a very high degree of care and engagement with the child. The order was that the child live with his mother. The Full Court found, as had the trial Judge, that the fact of parenthood was a significant factor in making decisions such as these, notwithstanding the merits of the grandmother's case.

4. Conclusion

The cases above represent a sample of those that come before the Full Court and which some of the issues raised that arise.

Given the significance of the issues at stake in the parenting cases that come before the Court, both at first instance and on appeal, it is unsurprising that many parents find the process itself difficult and the outcomes often unsatisfactory. However, as the summaries show, the Court (as the Act requires it to do) considers the best interests of the child concerned when arriving at its decision, and does so on the best available evidence.