CHAPTER FOUR: MARRIAGE GUIDANCE AND FAMILY MEDIATION

Introduction

4.1 Under s11 of the *Family Law Act 1975* the Government provides funding to approved marriage counselling organisations. The *Family Law Amendment Act 1983* inserted into the *Family Law Act* the following definition of marriage counselling:

> *'**marriage counselling**' includes the counselling of a person in relation to:*
>
> *(a) entering into marriage;*
> *(b) reconciliation of the parties to a marriage;*
> *(c) separation of the parties to a marriage;*
> *(d) dissolution or annulment of a marriage; and*
> *(e) adjusting to the dissolution or annulment of a marriage...*[1]

4.2 Under Part II of the *Family Law Act* the Attorney-General is empowered to make grants to approved marriage counselling organisations 'upon such conditions as the Minister thinks fit' and 'such sums by way of financial assistance as the Minister determines.'[2]

4.3 Section 12(2) states:

> ***[Satisfaction of Minister required]** The Minister may approve any such organisation as a marriage counselling organisation where the Minister is satisfied that -*
>
> *(a) the organisation is willing and able to engage in marriage counselling; and*
> *(b) marriage counselling constitutes or will constitute the whole or the major part of its activities.*

1 Section 4(1)
2 Section 11

4.4 From this legislative base, the Attorney-General's Department has developed the following definition of marriage counselling for use in funding guidelines:

> Marriage counselling is operationally defined as a process where a neutral third party, focusing on the emotional dynamics of relationships and the stability of the marriage within a family unit, assists parties to deal with the stresses they encounter as they move into, live within, or move out of the family unit.[3]

4.5 Criteria for the approval of organisations found in s12(2) of the Act state that to be eligible for funding, marriage counselling must constitute the whole or major part of the organisation's activities. In practice the Department has interpreted its own operational definition widely, such that it now apparently encompasses counselling of parties to de facto relationships. Family mediation and family therapy sessions which are 'directly related to the stability of the marriage within the context of the family unit' are also funded under the marriage counselling vote.[4] Over one-third of all counselling interviews provided by such organisations must be sessions at which couples are seen together - a requirement which is designed to stress the importance of encouraging the participation of men.[5]

4.6 The 32 organisations currently approved as marriage guidance organisations under the Act include:

4.6.1 National Marriage Guidance Councils which operate in each State and Territory;
4.6.2 Catholic Family Welfare Agencies;
4.6.3 Anglican Marriage Guidance in various States; and
4.6.4 agencies such as The Family Life Movement and the Adelaide Central Mission.

4.7 In addition, many organisations and individuals that are not eligible for funding under the terms of the *Family Law Act* offer marriage and family counselling or mediation as part of a wider service. For example, private psychiatrists and psychologists offer various forms of counselling, and increasingly, lawyers and psychologists are offering private mediation services. Social workers operating in community centres, and the clergy also offer counselling; some States, such as Queensland, are funding Community Justice Programs which include mediation.[6]

---

3 I Wolcott & H Glezer, **Marriage Counselling in Australia: An Evaluation**, Australian Institute of Family Studies Monograph No 8, 1989, p 1
4 ibid, p 23
5 ibid, p 24
6 Family Law Council, **Family Mediation**, 1992, p 8

4.8 The *Family Law Act* refers to mediation but does not define it. The definition of mediation which is adopted for the purposes of discussion in this report is that which has been adopted by the Family Law Council, and by the Family Court. Mediation has been accepted by these bodies to be:

> ... a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasises the participants' own responsibilities for making decisions that affect their lives.[7]

4.9 With the exception of funding provided for the establishment of the Family Conciliation Centres at Noble Park in Victoria and in Wollongong, the Commonwealth to date has funded only mediation services provided by approved marriage guidance organisations.[8] The number of approved agencies funded for the provision of mediation has in recent years increased from 8 to 11. Some marriage counselling agencies such Unifam in Sydney and the various branches of Marriage Guidance Australia provide mediation, marriage and family counselling as complementary services.

Effectiveness of approved agencies

Marriage counselling

4.10 The Committee considered two aspects of the effectiveness of existing marriage counselling services:

4.10.1 effectiveness in terms of improving relationships and conferring personal benefits on clients, such as better communication skills or the reduction of emotional distress; and

4.10.2 cost-effectiveness, or the ratio of the estimated costs and benefits of providing public funding for marriage counselling.

AIFS study

4.11 In 1986 the AIFS was requested by the Attorney-General to undertake a study to measure the effectiveness of marriage counselling. The study was to look at 'the effectiveness of marriage counselling on marital status and the long-term stability of

---

7 J. Folberg and A. Taylor, **Mediation: A Comprehensive Guide to Resolving Conflict without litigation**, Jossey-Bass, San Fran 1984, p 4, cited in Family Law Council, **Family Mediation**, p 1

8 Transcript, 13 March 1992, p 1221

relationships'. A Steering Committee was established to define the nature and scope of the study and included representatives from a wide range of agencies including the National Marriage Guidance Council, the Australian Council of Marriage Counselling Organisations, the National Catholic Association of Family Agencies, the Attorney-General's Department, the Family Law Council, the Department of Social Security and the Australian Council of Educational Research. The results of the study, which were published in I Wolcott and H Glezer, **Marriage Counselling in Australia, An Evaluation**,[9] provide valuable information regarding the characteristics and expectations of the clients of such services, their perceptions of the marriage counselling process, and the range of factors which may have an impact on the effectiveness of the counselling process. The authors noted at the outset of their report that the study was not intended to measure the cost-effectiveness of marriage counselling, although the study design did incorporate components that enabled some assessment of direct and indirect cost savings to the community.

4.12 In order to determine effectiveness, the study concentrated on the following outcomes:

4.12.1 change in relationship status;
4.12.2 change in level of commitment to the relationship;
4.12.3 satisfaction with counselling;
4.12.4 improvement in problem area, personal life and viability of the relationship.

4.13 All new clients presenting to approved agencies for marriage counselling in Australia were approached by counsellors to participate in the study, prior to their first interview, and those who agreed to participate were followed up eight months later. The report resulting from the study was published in 1989.

4.14 With respect to marriage counselling services provided by approved agencies, the conclusion drawn by the AIFS from the surveys undertaken in their study was that counselling appeared to be highly effective for the majority of clients who came to improve their relationship or to prevent breakdown.[10] Ninety one per cent of men and 79 per cent of women who had considered divorce, but had sought counselling before their marriage had deteriorated to the point of separation, felt after counselling that they were less likely to divorce.[11] Over 80 per cent of clients said that they would recommend counselling to others.[12] However, the study found that men were less likely to be satisfied than women with the counselling service they received:

---

9 Wolcott & Glezer, op cit, 1989
10 ibid, p.6
11 ibid, p 5
12 ibid, p 4

> Counselling appears to be less effective for many men, particularly in cases where their partner was not interested in continuing the relationship. Fewer of these men remained in counselling, so were unable to benefit from the potential assistance in coping with the separation and its consequences for themselves as individuals, fathers and as a future marital partner. Women tended to see more value in these personal aspects of counselling whatever the outcome of the relationship.[13]

4.15 The AIFS has also concluded that, from a cost-benefit perspective, public funding of approved marriage counselling agencies is 'a very inexpensive way of reducing later costs in litigation, social security benefits and personal and social consequences'. It has estimated that funding of marriage counselling results in an annual cost-saving to government of around $47.5m in terms of funding for Family Law Courts, Legal Aid and Supporting Parents Benefits.[14]

4.16 It has also been argued that, even where counselling does not lead to the reconciliation of the marriage, it may nevertheless result in less costly, less hostile divorces, which feature less litigation and 'more sensitive handling of custody and access' matters.[15] The AIFS found that very few couples who had attended marriage counselling, and subsequently separated, had used lawyers or entered the litigation process.

4.17 Apart from marriages saved, less traumatic divorces, and consequent savings to the public purse, counselling may confer a variety of personal benefits to clients. Such benefits may result indirectly in savings through improved productivity, improved health, and so on. It is important to note, in this regard, that the AIFS has estimated that as many as 59 per cent of workdays lost in sick leave are related to family problems.[16]

4.18 Other less tangible benefits are indicated by client responses to the AIFS survey, which showed that:

4.18.1 almost half the separated men, and two thirds of the separated women felt that they had changed personally for the better following counselling; and

4.18.2 almost 60 per cent of women, and 45 per cent of men (who generally attended fewer counselling sessions than their wives)

---

13 ibid, p 6
14 ibid, p 5
15 ibid, p 6
16 West Australian, Tuesday 9 June 1992, p 5

indicated that they had received some assistance with the separation process.[17]

4.19 Evidence provided by the AIFS study and by witnesses to the current inquiry suggests that the effectiveness of the various counselling services offered, and the range and extent of the benefits that accrue from that counselling, are directly related to whether or not counselling is received early on in the dispute, at an early stage of marital difficulties, or soon after separation.

4.20 Overwhelmingly, the Committee has heard that there is a need to educate people to seek such services earlier on in their relationship - most particularly men. The Assistant Director (Clinical) of the Marriage Guidance Council of South Australia pointed to AIFS research which shows that those who were the least satisfied with marriage counselling they received tended to have some of the same characteristics as those who were the least happy with the services provided by the FCCS.

> Those who were least satisfied with the service...tended to be men or tended to be couples where the woman had already been saying for some time that she was not comfortable and happy with the relationship and wanted changes.[18]

Mediation

4.21 In June 1992, the Family Law Council published its report **Family Mediation**,[19] which provides a recent analysis and assessment of current major issues surrounding the provision of these services. The report was the result of a wide process of consultation with individuals and organisations with expertise or interests in the field of mediation. The terms of reference for the Council's inquiry were as follows:

> To examine family mediation as a method of dispute resolution with a view to developing policy on family mediation, with particular attention to:
>
> . research and evaluation
> . qualifications and training
> . legislation
> . desired models and practices of mediation
> . funding.[20]

---

17 Wolcott & Glezer, op cit, p 5
18 Transcript, 22 October 1991, p 438
19 Family Law Council, **Family Mediation**, 1992, AGPS, Canberra
20 ibid, p 14

4.22 The Family Law Council's report highlighted the dynamic growth of mediation services here and overseas. The Council suggested that:

> ...the development and expansion of family mediation services has taken place with little discussion and debate on the fundamental issues and assumptions underlying that development...there is a need for all those involved to take a step back.[21]

4.23 The effectiveness of mediation services in Australia has not yet been the subject of any thorough assessment. The Council, in its report did not attempt a formal assessment of the effectiveness of mediation services in Australia. The Council did suggest that, due to methodological difficulties, results of studies done here and overseas to date have generally been inconclusive.[22] The Council noted that its report is limited to a general discussion of broad issues because, given the rapid development of the area, a detailed review was impossible and, in any case, would be out of date before publication.

4.24 Another factor complicating the assessment of the effectiveness of mediation in the resolution of marital or divorce-related disputes in Australia is the dearth of available information that is specifically related to the mediation of these types of disputes.

4.25 Nevertheless, agencies providing mediation services generally believe that in appropriate circumstances, and with the assistance of a capable mediator, the mediation process can be very effective, and a relatively cheap means of dispute resolution. For example, the Marriage Guidance Council of South Australia told the Committee that:

> The research shows already, from the model we are based on in Victoria, that about 70-75 per cent of people reach satisfactory agreements through alternative dispute resolution.[23]

4.26 In recognition of the potential for savings to the public purse, some State Legal Aid Commissions have attempted to redress the imbalance between the supply of and demand for legal aid by making it mandatory for suitable parties to attempt to resolve their disputes via mediation in the first instance, rather than receiving legal aid for litigation. The Legal Aid Commission of Victoria has indicated that whilst it has not to date kept details of the results of cases which have proceeded to legal aid funded mediation, anecdotal evidence indicated a high success rate.[24]

---

21 ibid, p 15
22 ibid, p 58
23 Transcript, 22 October 1991, p 435
24 Letter to Committee Secretary from Andrew Crockett, Director of Legal Aid, dated 8 May 1992

4.27 In addition, the Queensland Government's Community Justice Program claims that 75 per cent of the cases accepted for mediation since the commencement of the program in July 1990 indicated a high rate of satisfaction.[25] It is not clear how many of those cases related to marital disputes or family law matters, but the service claims that the durability rate of mediated agreements has been around four times higher than that for court imposed settlements, including those ordered by the Family Court.

4.28 The Committee also notes that the Evaluation Report of the Family Conciliation Centre Pilot Project, commissioned by the Attorney-General's Department in 1985, found that the Wollongong and Noble Park communities served by the pilot multi-purpose centres saw the centres as meeting a genuine community need.[26]

4.29 The Noble Park centre, in particular, was found to be a resounding success. The Centre provides a unique combination of services, including a very careful intake and induction procedure for clients, financial counselling and referrals to other services where needed. The evaluation team also noted the Centre's valuable community education role, its regular program of liaison with other community agencies and the legal profession, and its initiatives in relation to the education of the legal profession in alternative dispute resolution techniques.

4.30 Whilst it was unable to quantify the relative costs of funding centres such as Noble Park, compared to the costs of funding separate services, the team who conducted the evaluation report suggested that there appeared to be potential for public savings. It also suggested that the consumer satisfaction and excellence of service and administration which characterised Noble Park made it a very valuable model.[27]

Conclusions

4.31 The Committee concludes that there is considerable evidence that the costs to parties themselves of resolving disputes via the mediation process may in many cases be far lower than the cost of litigation. However, information provided by the Legal Aid Commission of Victoria illustrates the major practical limitation to the potential of mediation as a means of dispute resolution: that is, both parties to the dispute must be willing to attend and participate constructively in the mediation process.[28] The Commission advised that in place of grants of assistance for issuing proceedings the Commission was offering people mediation. In the first six months the Commission made 279 offers of mediation. Of those 279 offers made, 79 were taken up by the applicant but only 40 mediation sessions occurred. The difference in the offers accepted and the mediation sessions taking place was due to the reluctance of the other party to attend.

---

25 Information provided by the Queensland Premier's Department on 21 November 1991
26 Evaluation Report of the Family Conciliation Centre Pilot Project, Vol 2, p 290
27 ibid
28 Letter to the Committee from the Legal Aid Commission of Victoria, 8 May 1992

The Commission further advised that, despite no figures being presently available on the results of the mediation process, anecdotal evidence indicated a high success rate.[29]

4.32 The Committee has also heard evidence which suggests that even if both parties agree to attend mediation soon after separation, it may be difficult to forge an agreement at this time due to the freshness of the emotional hurt borne by one or both parties. A Brisbane Family Court counsellor with long experience with separating couples stated that:

> When people are separating there is usually a power imbalance. There is usually a feeling of imbalance. You have one person who is separating and has made a decision to move away over a two year period. It is only when that person leaves that the other is suddenly hit and left in a high anxiety state...for them to mediate just does not work because he says, 'You are a cold hard bitch, where are your feelings? The woman says to him, 'If you were sane, rational and sensible about this we would be able to work it out'. There is no chance of mediation.[30]

The clientele of approved organisations

4.33 The AIFS' 1987 survey of services provided by marriage counselling agencies found that with two broad exceptions, the clients of marriage counselling services are 'broadly representative of Australians in general', in terms of ethnicity and socio-economic status.[31] Recent non-English speaking migrants are less likely than others to use the services, and people of upper socio-economic status, particularly women, are more likely than the average to use the services.

4.34 The survey found overwhelmingly that people attending marriage counselling did so to try to save or improve their marriages: 89 per cent of men and 77 per cent of women stated that the major goal of counselling for them was to remain in the relationship. Women (23 per cent) were more likely than men (11 per cent) to come to counselling with the intention of separating or remaining separated. Likewise, more women (46 per cent) than men (28 per cent) claimed to have initiated counselling.

4.35 Despite the preponderance of people who come to marriage counselling to save their marriages, respondents to the AIFS survey, some of whom attended counselling individually, also claimed to have attended counselling in the hope of gaining assistance with:

---

29 ibid
30 Transcript, 20 November 1991, pp 804-5
31 ibid

4.35.1 improving communication skills;
4.35.2 handling conflicts;
4.35.3 understanding the dynamics of the relationship; and
4.35.4 coping with emotional distress.[32]

4.36 The National Director of Marriage Guidance Australia, Dr W Hartin, pointed to the wide range of situations which prompted people to seek counselling from his organisation:

> We see people at all stages of their relationship - prior to a first marriage, prior to a second marriage, people in de facto relationships who will never marry, people within a marriage, people preparing for a second marriage, and people after a marriage.[33]

4.37 Dr Hartin also pointed to the differing desires and expectations of those who have already separated and attended counselling:

> The clientele who come already separated are quite mixed. There is a group who do not know what they want. They are totally confused and they have separated as a way of relieving tension and stress. There is another group where one partner wants the marriage to go on and the other does not and sometimes that switches around. There is another group that is quite ambivalent. They want to go on but they do not want to go on with the marriage the way it was...there are some who come who have already made up their minds and one definitely does not want to go on at any price under any circumstances.[34]

4.38 There is no detailed or comprehensive profile of those who use the mediation services provided by these, or other independent agencies, nor of the percentages of those clients using mediation who present with specific types of dispute for resolution. It would appear, however, that couples and their children present to these services seeking resolution of various types of disputes between parents and their children or between siblings. Some agencies make a conceptual distinction between the broader field of family mediation and that of divorce mediation, which is 'confined to resolving the disputes which arise at any time in the separation and divorce process'.[35]

4.39 The Committee has not been able to obtain comprehensive information as to the percentage of mediation clients who attend directly as a result of referrals from other agencies. One agency providing mediation services, the Marriage Guidance Council of South Australia, suggested that most clients of that service were self-referred.

---

32 ibid
33 Transcript, 23 April 1992, p 1615
34 ibid, p 1607
35 Family Law Council, op cit, p 2

However, marriage and group counsellors from within the organisation also referred some couples and families who presented for counselling to mediation, in order to deal with specific disputes. Referrals from lawyers are apparently increasing.[36]

The role of approved agencies

4.40 Approved marriage counselling and mediation provide complementary services to those of the Family Court Counselling Service. They provide a wide range of counselling approaches to difficulties or needs that may arise along the whole continuum of the relationship, before, during or after the marriage.

4.41 Although there is clearly a need to increase public understanding of the benefits of seeking counselling, the major limitation on the role that such services are currently able to play is insufficient funding. Lack of funds to meet even the current level of demand for services has resulted in long waiting times for appointments, a factor which, as noted in Chapter Three, tends to reduce the effectiveness of the counselling when it actually takes place.

Referral by Family Court Counselling Service

4.42 As discussed in Chapter Three, the Committee has heard evidence which suggests that there is a real need for the availability of a variety of counselling support services within the Family Court, to supplement the conciliation service. For example, some people may be best served by counselling if they are able to see the same counsellor at various stages of the divorce process. Some who need post-divorce counselling may feel most comfortable seeing a counsellor who already knows the situation, or who has helped to conciliate during the divorce.

4.43 The previous Select Committee Inquiry into the Family Law Act reported in 1980 that, despite the stated policy of the Family Court Counselling Service to encourage referrals to approved agencies, relatively few such referrals actually took place.[37] The Select Committee's report also provided evidence of a cool relationship between the Court and the agencies, with some competition and conflicting views about the appropriate role each should play.[38] Twelve years later, evidence provided by the Family Court and by some marriage guidance agencies supports the view that there is still a need to strengthen relations between the FCCS and approved agencies, and that referrals are still relatively few.[39]

---

36 Transcript, 22 October 1991, p 435

37 Joint Select Committee on the Family Law Act, **Family Law in Australia**, Vol 1, AGPS, 1980, p 169

38 op cit, 169-171

39 Transcript, 24 September 1991, p 316

4.44 The Director of Marriage Guidance Australia, for example, suggested that:

> ...those referrals certainly do occur, but the percentage of people referred from the Family Court is very small in relation to the total number of referrals.[40]

4.45 The Chief Justice of the Family Court has suggested in oral evidence that the Court has not had the time it would like to devote to forging closer links with marriage guidance agencies, because counselling staff are already overcommitted.[41] Elsewhere, however, he has suggested that:

> It is, perhaps ... doubtful whether the Court counselling service has operated in a complementary fashion in its work to that of marriage guidance. However, if this be so, it is not, I believe, the fault of the Court. There was, at an earlier stage, close co-operation between the Court and marriage guidance organisations which, unfortunately, has not been continued through no fault on the part of the Court, in that marriage guidance organisations have chosen to pursue an independent line.[42]

4.46 The Director of Counselling Services at the Adelaide Central Mission suggested that referrals from the Court might help to prompt 'hard to reach clients' to attend external counselling services:

> Some families may gain substantial help from counselling but one member, usually the man, may be reluctant to seek help. An invitation from the Family Court may carry considerable weight in drawing a reluctant person into counselling. The Family Court Counsellor may then be able to engage the client in the process of counselling, and make a referral to a voluntary agency.[43]

4.47 One Family Court counsellor and a Family Court registrar, who lodged a joint submission to the inquiry, suggested that there was a definite need to improve liaison between the Family Court and approved agencies:

> The availability of the counsellors, particularly in the crisis intervention stage of any dispute, is as notorious as the funding of the Court itself in that there are at times substantial delays caused primarily by lack of staff.

---

40 Transcript, 22 April 1992, p 1613

41 Transcript, 29 May 1992, p 78

42 **The Idea of an Independent Family Court 15 years on - Was it a good idea?** Paper delivered to the Fourth National Family Law Conference, Gold Coast, 20 July 1990, p 26

43 Letter to Committee Secretary dated 24 April 1992

These delays can be compounded by the fact that there is no liaison between various Government counselling agencies or a pool of counsellors that can be called upon to assist in the emergency situation. The establishment of a liaison officer within the Family Court in each counselling section, with that officer's primary role being one of co-ordination between the various government agencies, would assist in crisis intervention and be able to provide a far more complete service. Counsellors in the Family Court should also, as part of their training and development, be able to cross over to other agencies for short periods of time in order to experience their specific problems and gain an insight into the workings of other agencies so that that understanding can be used to assist people that come to the Court Counselling Section for assistance.[44]

Conclusion

4.48 The Committee believes that there is a need to expand the role of approved marriage counselling and mediation agencies to make their services more accessible. If more people could be encouraged to seek counselling on a voluntary basis at an earlier stage of marital difficulties or specific disputes, the rate of marital breakdown might decrease and the growth in case-load experienced by the FCCS in recent years might be halted. The Committee also supports suggestions to facilitate liaison between the Family Court and mediation and marriage guidance agencies.

4.49 Rivalries in relation to the competition for funding may have limited the extent of co-operation between approved marriage guidance agencies, and between the agencies and the Family Court. Nevertheless, the Committee considers that more could be done by the Family Court to co-operate with these agencies and to play a more active role in the promotion of existing 'psychological support' oriented counselling services in the wider community. The Court currently has a policy of arranging referrals where it cannot meet requests for such counselling from its own resources. The Committee also believes that the Family Court Counselling Service should be referring more clients to external counselling services. The Committee believes that the FCCS should also actively encourage clients who appear to need additional 'psychological support' oriented counselling to seek it, either from the Court or from local approved agencies.

Recommendations

4.50 The Committee recommends that:

16 the Family Court Counselling Service play a more active role in educating its clients as to the availability and potential value of

---

44 Submission 825, Vol 25, pp 4855-6

complementary counselling services available within approved marriage counselling and mediation organisations; and

17 the Family Court actively promote short term interchange of its counsellors between the Family Court Counselling Service and approved agencies.

Accreditation and quality control

Marriage counselling

4.51 Responsibility for the approval and on-going monitoring of marriage counselling agencies lies with the Attorney-General's Department, which has developed standards for the selection, training, supervision and continuing education of counsellors. The Committee is satisfied by the evidence presented to it that existing standards for the accreditation of marriage counselling agencies, and mechanisms for quality control, are sufficient to maintain generally high standards of service on the part of these organisations. The Family Court has expressed the view that there is no need for the Court to have a role in the accreditation of marriage counselling agencies; according to the Chief Justice, 'they run very well themselves'.[45]

4.52 A member of the Management Committee of the Australian Council of Marriage Counselling Organisations noted that in general terms, supervisory procedures are necessary. He added that:

> I do not know of any profession that has been required to be as accountable as that of marriage counselling. We are supervised fortnightly under the requirements of the regulations of the department; we have senior supervisors; we have in-service training programs; and the effectiveness of marriage counselling has been researched by the Institute of Family Studies. I defy you to show me any solicitor or, in fact, any social worker whose work has been so investigated.[46]

4.53 The Committee is satisfied by the evidence presented to it that existing standards for the accreditation of marriage counselling agencies, and mechanisms for quality control, are currently sufficient to maintain generally high standards of service on the part of these organisations.

---

45 Transcript, 29 May 1992, p 81
46 Transcript, 29 August 1991, p 235

Mediation

4.54 Currently, as the Commonwealth only funds mediators who work within approved marriage guidance agencies, those mediators are subject to a similar level of on-going monitoring and supervision as are counsellors who provide counselling services. The Committee notes, however, that people who are operating as mediators outside approved organisations possess a wide variety of qualifications, and that some may have very little formal training. Witnesses in Perth suggested to the Committee any requirement for mediators to have formal qualifications may be too restrictive, when qualities such as being a good listener and having tact and diplomacy may be equally vital.[47]

4.55 Similarly, the Director of the Citizens Advice Bureau (WA), which provides a mediation service, agreed on this view of training for mediators, stating that:

> You cannot equip a person with a degree for mediation as you can for law...it is something for which you have to have the ability to listen and to understand.[48]

4.56 On the other hand, the Family Law Council is against reducing the level of training and qualifications required of Commonwealth funded mediators. The Council has recommended that the Government take action to establish uniform standards, basic training and accreditation of all mediators.[49] It advocates the establishment of a diploma course in mediation in at least one university in each state. Once courses of this type have been established for several years, completion of a diploma course would then become the necessary pre-requisite qualification for the practice of mediation.[50]

4.57 The Council recognises the importance of certain personal skills and qualities for the effective practice of mediation. It argues that, in addition to this formal training, those who wish to undertake the diploma course should be screened to check that they have the personal attributes which are necessary in a good mediator.[51] Until a sufficient number of graduates have completed the diploma course, the Council believes that Government should only fund mediators who meet the current standards laid down by the Attorney-General's Department.[52]

4.58 The Committee concurs with the view that there is a need to develop basic uniform standards in relation to the training of mediators. It believes that the promulgation of such standards and the development of an accredited diploma course

---

47 Transcript, 20 February 1992, p 1114
48 Transcript, 20 February 1992, p 1152
49 Family Law Council, **Family Mediation**, 1992, p 56
50 ibid, p 57
51 ibid, p 56
52 ibid, p 57

will help to ensure that the service offered by mediators working in various capacities will be of a high quality.

Recommendations

4.59 The Committee recommends that:

18 diploma and post-graduate courses in mediation be established as soon as possible in at least one higher education institution in each State;

19 a diploma, with appropriate practical experience, be required as the base level qualification for mediators; and

20 until such courses are established and a sufficient number of graduates have completed the courses, only those organisations that meet standards currently required by government be publicly funded.

Funding

4.60 In relation to the funding of approved marriage guidance agencies and mediation agencies the Committee has three major concerns:

4.60.1 the amount of funding that is being provided;
4.60.2 current funding mechanisms; and
4.60.3 at government level, the level of support for and promotion of mediation and marriage guidance services.

Funding levels

4.61 Despite the provision of an additional $15m over three years, some of which has been marked for new projects rather than the maintenance of existing services, there is still a much greater demand for existing services than can be provided at current funding levels.

4.62 Grants to marriage counselling agencies for the period 1990-91 to 1992-93 are shown in the table below:[53]

---

53 Sources: Attorney-General's Department, **Annual Reports 1988-89, 1989-90** and **Program Performance Statements 1991-92 and 1992-93**

Marriage Counselling Grants

1988-89	1989-90	1990-91	1991-92	1992-93
$6.969m	$7.695m	$13.296m	$16.662m	$19.657m (est)

4.63 In 1991-92 the following additional grants were approved within the Family Services area of the Attorney-General's portfolio:[54]

Marriage Counselling	$1,800,000
Marriage Education	$122,000
Family Mediation	$159,200
Adolescent Mediation and Family Therapy	$17,000
Family Skills Training	$180,000
Peak Agencies	$93,500

4.64 The Department makes the following comment in the Program Performance Statements document:

> As part of the augmentation of existing Family Services' programs, OLAFS (Office of Legal Aid and Family Services) has rationalised its funding arrangements with service providers. A financial reporting format and a form of contract including an agreed base level of funding for funded agencies have been developed and agreed with the relevant peak bodies and several agencies. This more rational approach will allow agencies to be confident of their funding levels and thus enable more effective long term planning which will improve the provision of service. The regular consultation between the Peak Body Consultative Council and the Department improved communication between the government and service provision organisations. Further, it facilitated the application of needs based planning criteria to ensure the selection of appropriate proposals for funding.[55]

Marriage counselling

4.65 Submissions to the inquiry which addressed the issue of marriage counselling were almost unanimously of the opinion that there is a strong case for increasing funding for approved marriage counselling organisations.

---

54 Source: Attorney-General's Department, **Program Performance Statements, 1992-93**, p 171
55 ibid

4.66 For example, the Family Law Council's submission to the inquiry argues that:

> Marriage counselling services are demonstrably not as widely available as they need to be. A long history of underfunding has made expansion into some disadvantaged areas economically very difficult.[56]

4.67 In addition, the 1987 report of the AIFS stated that marriage counselling agencies had for several years been concerned about 'increasing deficits, rising fees, inadequate staffing levels and increased waiting lists' due to inadequate funds.[57] This critical shortage of funds was recently highlighted by the Executive Director of the WA Marriage Guidance Council, who pointed out that, despite a recent boost in government funding which had provided for an expansion of counselling services, there was still a three month waiting list for counselling.[58] Clearly, for many people who seek counselling at a critical phase of their relationship, a three month wait will mean that assistance comes too late.

4.68 As noted earlier in this chapter, the AIFS has estimated that a saving of some $47.5m per annum in legal aid, supporting parents benefits and funding for the courts accrues from a $7.695m Commonwealth outlay on funding for marriage guidance services in 1989-90.[59] It is also clear that there are many less quantifiable, but substantial benefits in terms of reduced work days lost, reduced burdens on health services, youth homelessness, and so on.

4.69 Many other submissions pointed indirectly to the consequences of the inadequacy of funding to meet current demands. They told of the frustration engendered by long waiting times to get counselling appointments, and of the inaccessibility of such services to many people living in outer urban and rural areas. Others suggested that there was a significant need to advertise those services that are available more widely, and to increase public understanding of the personal and relationship benefits that clients may gain from counselling.

Mediation

4.70 The Committee received many submissions which advocated an expansion in the availability and use of family mediation services. However, not all of those who advocated the use of mediation saw a need for increased funding for mediation services provided by organisations external to the Family Court. In particular, following the consideration of available evidence and consultation with interested groups and

---

56 Submission 546, Vol 16, p 3159
57 Wolcott & Glezer, op cit, p 18
58 The West Australian, Tuesday 9 June 1992, p 5
59 Wolcott & Glezer, op cit, p 5

individuals during its recent study of Family Mediation services, the Family Law Council switched from its preliminary position in support of increased public funding for mediation. The Council cited the main reason for its change in position as the current expansion of private mediation and State funded mediation services.

4.71 The Family Law Council, in its report on mediation, recommended that the Government should maintain funding for those organisations currently receiving it, but should not approve applications from new organisations seeking funding until there is evidence of a demand for those services.[60] Although it is in favour of uniform standards for the accreditation of public and private mediators, the Council advocates a 'wait and see' approach to the assessment of whether the balance between the private provision of services at fees set by the market and Government subsidised services is adequate to meet community needs. The Council has further recommended that long term funding and extension of government subsidised mediation services should be reviewed in the light of performance after an adequate trial period.[61]

Promotion of counselling and mediation services

4.72 Evidence presented to the Committee has suggested that, to be fully effective, the provision of extra public funding for marriage counselling and mediation services, must be complemented by additional funding to:

4.72.1 promote the availability of such services;

4.72.2 increase public understanding of the aims and nature of counselling and mediation, and

4.72.3 change community attitudes towards seeking counselling or mediation intervention at an early stage of relationship difficulties or disputes.

4.73 In their submissions to the Committee, many people, most particularly men, suggested that they had not been aware of those marriage counselling services that were available in the local area at the time when counselling might have been able to improve their marriage, or prevent it breaking down. Perhaps, in some cases, these comments reflect the experience of people who were initially reluctant to seek outside help, and hence did not make concerted efforts to find out what was available. However, those who are the least likely to consider seeking help, or to find out what help is available, may be the very people who are most in need of it. The Committee therefore believes that there is a need to investigate means of promoting the use by such people of counselling services that are already available in the community.

---

60 Family Law Council, op cit, p 45

61 ibid

4.74 Marriage counselling agencies themselves have not been funded sufficiently to allow extensive advertising campaigns, and many would be reluctant to attempt to generate additional demand for their services when they cannot meet current demands. The National Director of Marriage Guidance Australia, for example, told the Committee that:

> Our dilemma is that if we were to make the availability of the service more widely known, we would increase the number of applicants for the service and we would not be able to meet the demand.[62]

4.75 Another problem reported in evidence is that many of those who may consider seeking counselling are put off doing so by erroneous perceptions of what counsellors aim to do, and by misconceptions about the philosophies of marriage counselling agencies with respect to marriage breakdown. On this point, the Reverend Eric Stevenson, a member of the Management Committee of the Australian Council of Marriage Counselling Organisations, had this to say:

> There is a great need for a Commonwealth-wide media program which will acquaint people with the existence of the resources we offer. I think that the concept of marriage counselling and marriage education has been misunderstood, and, in fact, malpresented...
>
> Marriage counselling is not there to try to save the face of Australia in respect of its divorce record. It is there to help people to do with their relationship what should decently be done to it. Sometimes that means a decent burial...we have a lack of knowledge for a start on the part of the electorate..there is still a high proportion of people who use our services or who do not use our services on the assumption that the marriage counselling agencies are going to try and push them back together....

4.76 Reverend Stevenson added that:

> We would like to see a repeat of the exercise, on a much larger scale, that was instituted about three years ago in which there was a Commonwealth wide media coverage but a very poor one because it was so poorly funded. By the time you looked up from eating your toast and marmalade, it was gone from the television screen. We need something that is far more effective...[63]

4.77 Some evidence of the lack of awareness of the value and availability of mediation services is provided by a comment from a witness representing Parents Without Partners (PWP), an established mutual support organisation. She suggested that

---

62 Transcript, 23 April 1992, p 1602
63 Transcript, 24 September 1991, pp 322-3

the PWP office in Brisbane did not know of any mediation services in Queensland, but added, 'if we knew of any, we would refer people to them'.[64]

4.78 The fact that the activities of the State Government's Community Justice Program, which employs 70 part-time mediators, and has its legislative base in Queensland's *Dispute Resolution Centres Act 1990*, were not known to the organisation provides an illustration of the need to ensure that funding for mediation programs is complimented by greater funding for publicity of services.

Funding mechanisms

4.79 Currently, approved organisations are funded to not more than 75 per cent of ongoing expenditure. The shortfall is made up from fees charged to clients. Most organisations charge fees on a sliding scale according to the client's income, and the number of people who depend on that income. They have frequently expressed frustration at having to charge fees for counselling which aims to prevent marital breakdown, when counselling provided by the Family Court is free.

4.80 Dr Hartin, the National Director of Marriage Guidance Australia, outlined the difficulties occasioned by current funding mechanisms:

> As you know, the Commonwealth Government funds our service to the extent of not more than 75 per cent of expenditure. Consequently, the remainder has to be made up from fees charged to clients. These fees are charged on a sliding scale according to people's income and the number of people in the family who depend upon that income. In times like these, as you would appreciate, there are many people who are not able to pay anything at all and the demand for the service increases...The newly adopted method of funding is to fund organisations according to a formula which is: last year's grant plus the CPI as declared by the Department of Finance. As you will understand, marriage counselling is a very labour intensive industry and so 80 per cent of our costs are incurred through salaries and our costs very frequently escalate at a greater rate than the declared CPI. That is true not only of salaries but things like rent. Since the organisations are not allowed to incur any deficits, that puts them in the difficult position of having to contract their services.[65]

4.81 Comments from respondents to the AIFS marriage counselling survey, referred to earlier illustrate why marriage counselling organisations are reluctant to raise fees any further:

---

64 Transcript, 21 November 1991, p 668
65 Transcript, 22 April 1992, pp 1601-2

> I would have continued certainly if the cost for the sessions was less than $5 as my spouse disagreed with counselling and I had to find the money out of housekeeping...
>
> I am really disappointed that we had to stop going because of that fee...it could have made a difference...; and
>
> Young families are often struggling to make ends meet and counselling fees may add to tension or make counselling less desirable.[66]

4.82 A further issue raised by some witnesses was the allegedly negative consequences of competitive funding mechanisms, which are exacerbated when funds are insufficient to meet total demands. It has been suggested that co-operation between approved agencies has been limited by the fact that funding is in part dependent on evaluations of the relative efficacy of each agency, in addition to the demand for its services.

4.83 One Family Court counsellor suggested that:

> On a personal level between individual counsellors there is usually a strong bonding and respect. However, at the administrative and professional level, the competition for funds usually means that there is an unofficial disparaging of each other's abilities, functions and roles...certainly any attempt at co-ordination of those functions and roles would appear to be a 'pipe dream' whilst all the organisations are competing for funding...the funding of the organisations would also necessarily have to be looked at to take, if possible, the competitive aspect of that funding out of the arena.[67]

Marriage and human relationship education

4.84 Many submissions to the inquiry have strongly recommended that there be a more co-ordinated, and well-targeted campaign to provide community education in areas such as the following:

- 4.84.1 communications and dispute resolution skills;
- 4.84.2 anger management, particularly for men;
- 4.84.3 parenting education;
- 4.84.4 pre-marital education, which stresses the rights and responsibilities attaching to marriage;

---

66 Wolcott & Glezer, op cit, p 140
67 Submission 825, Vol 25, p 4858

4.84.5 human relationship education programs in primary and high schools, which deal with issues such as communication skills, and the rights and responsibilities of marriage and parenthood.

4.85 Most of those witnesses who advocated more extensive human relationship education stressed that it is crucial that such education be commenced as early as possible in schools. Many churches provide pre-marital counselling and the Committee considers these services to be worthwhile and valuable to the community. The Committee also heard that by the time a couple decide to marry, they are often too 'starry-eyed' to take in the messages of marriage education, or to consider rationally whether or not they are likely to be compatible in the long-term.

4.86 The Chief Justice of the Family Court, the Hon Alistair Nicholson, has been a staunch advocate of the need for increased funding for marriage and human relationship education. During the Committee's hearing with representatives of the Family Court, he stressed that:

> One of the first areas that we ought to be addressing as a community as a whole...is the question of relationship education. I think that starts in the schools. I do not think that this question can be properly addressed without commencing with relationship education. I stress relationship rather than marriage although it would encompass marriage. The reason I do that is that we have got a situation now where young people are forming relationships very soon after they leave school. Those relationships may or may not turn into marriage but they certainly often are productive of children. Really, they have had very little preparation, I believe, and I do not think that our education system assists them very much in preparation for that step.[68]

4.87 The Committee is aware that some States are providing funding to schools for human relationships programs in schools, mainly in high schools.[69] The Committee has also heard several witnesses comment that there are some encouraging signs amongst younger couples, and young men, in particular, who are taking more interest in how to make their relationships work.[70]

4.88 However, the following comments, which came from a male witness who was in his early thirties and had been through a divorce, provide a perspective on the problem. In response to a question from the Chairman about the preparation he had undertaken for the responsibilities of marriage, he said:

---

68 Transcript, 29 May 1992, p 1871

69 I Wolcott, **Human Relations Education in Australian Schools: A Review of Policies and Practices**, AIFS Policy Background Paper No 6, September 1987

70 See, for example, Transcript 22 October 1991, p 439

> Basically, nothing...I suppose counselling...was available, but it was a matter of thinking that you may be in a position to need it. I did a lot of things which were not best for our marriage in the long term...it is easy to make mistakes. But, before I was married, I tended to think divorce happened to other people ... when I realised, it was too late...Being able to communicate with your partner is extremely important. If you do not realise and learn how important it can be - just in life, apart from your marriage - you have not got much hope...a lot of things which add to the tension you do not want to talk about, but if you can teach kids the importance of that, it has got to be a big help. It will not save all marriages, that is for sure, but it is going to be a big help. I was never taught to communicate.[71]

Conclusions

4.89 The Committee has also concluded that there is a strong economic argument for the continued expansion of funding for approved organisations offering marriage counselling. The Committee notes that the public and private costs, both financial and emotional, of preventing marital breakdown are much lower than the cost of the divorce process to the community. The Committee also believes that waiting times for appointments, which can be up to three months in some parts of the country, must be reduced in order that clients can receive the assistance they need at a time when that assistance has the best chance of achieving the resolution of disputes or disharmony. The Committee firmly believes that marriage counselling organisations must not be placed in a position where the only alternative to reducing waiting lists is raising fees to the point where more couples might be deterred from attending.

4.90 In relation to funding of mediation services, the Committee shares the view of the Family Law Council, that Government should not approve funding for new organisations until there is evidence of a demand for additional Government provided services. Given that there are many services related to the operations of family law legislation, which might be enhanced by the injection of further resources, the Committee believes that scarce public resources must be directed as efficiently as possible. It believes that it is important that the Commonwealth does not discourage the entry of private service providers to a developing mediation 'market'. Therefore it is necessary to ensure that government assistance is targeted to assist those who cannot afford the rates set by the developing mediation market, and does not provide a disincentive for those who can afford it to use services offered by private practitioners.

4.91 The Committee is strongly of the view that there is a compelling cost-benefit argument in favour of more funding for 'preventive' education, which might help to reduce the number of marriages which reach the stage of breakdown. Successive

---

71 Transcript, 1 May 1992, pp 1841-2

governments have given this field far too low a priority for funding, and the Committee believes that immediate action should be taken to rectify this situation.

4.92 The Committee notes that there is strong evidence that emotional and health problems stemming from family and marital problems is severely reducing the potential productivity of the Australian workforce. As suggested by Marriage Guidance Council executive Chris Hall, it may be in the interests not only of employees, but of employers themselves, to provide in-house counselling services.[72] The Committee believes that in addition to the provision of extra public funds to help rectify current supply/demand imbalances, a concerted attempt should also be made to encourage the private provision of counselling services in the workplace.

4.93 The Committee believes that there is a need for mechanisms for the evaluation of the relative efficacy of agencies in order to determine the relative portion of available funds to go to each one. The Committee reluctantly concludes that there is no way of taking all of the competitive element out of the funding process without reducing the level of accountability of approved organisations, or the cost-effectiveness of relevant public expenditures.

4.94 The Committee is of the view that there is also a need for community education as to the availability of marriage counselling and the value of mediation services in the resolution of disputes over concrete issues - be they in relation to separation and divorce, or in relation to disagreements within families which, if unresolved, may develop into irresolvable conflicts. It notes that the Family Law Council's recent report on mediation recommends that the Government 'provide suitable funding for community education on mediation.'[73]

4.95 The Committee concurs with this recommendation and strongly suggests that any funding expended on the rehabilitation of marriages will result in decreased costs in the future. It is also important that any community education campaign is well researched and focused to ensure that the message reaches those who might benefit from mediation. One component of such a campaign might involve the establishment of links with non-government organisations which have been established to provide support for those who are experiencing marital breakdown, in order to facilitate an exchange of information and the distribution of information through already existing networks.

4.96 The Committee also believes that, in the long term, of all the steps that it has recommended in this report, funding for public education about marriage and human relationships is likely to be the most significant in terms of reducing the human misery and financial hardships that all too frequently result from marital breakdown.

---

72 West Australian, 9 June 1992, p 5

73 Wolcott & Glezer, op cit, p 45

Recommendations

4.97 The Committee therefore recommends that:

21 **sufficient funding be provided to approved marriage counselling organisations to enable the prompt provision of appointments to potential clients, and to improve the accessibility of marriage counselling to those living in rural and remote areas;**

22 **the Commonwealth Government take steps to raise the awareness of private employers of potential cost-benefits of making available to their employees the use of counselling services;**

23 **appropriate steps be taken to promote community understanding, and use of, counselling, mediation and other related services;**

24 **appropriate funding be provided for effective community education about counselling and mediation;**

25 **the Commonwealth Government substantially increase funding for community education in relation to:**

25.1 **the rights and responsibilities of marriage and parenthood;**
25.2 **effective parenting;**
25.3 **communications and dispute resolution skills;**
25.4 **anger management; and**

26 **particular attention be given to the further development of schools-based education programs which provide basic education in the areas set out in recommendation 24 above.**

Rationalisation of funding for related services

4.98 A number of submissions to the Committee suggested that there was a need to rationalise and better co-ordinate the funding of marriage counselling and mediation with the development and funding of other support services for families. The Committee is of the view that, in the long-term, there is a need for mediation to be considered in the wider context of funding of the range of related services, such as marriage counselling, financial counselling, parenting education and the like, in order to ascertain the potential benefits or savings that may result from the co-location of services. However, the Committee is also conscious that responsibility for the provision of such services lies with State governments.

4.99 In 1989, the AIFS suggested that the many artificial distinctions made between different types of marriage and family counselling, and marriage education (which is funded under the Marriage Act 1961) for the purposes of funding needed further review.[74] The submission provided by the AIFS to this Committee two years later reiterated this criticism.

4.100 The Institute has stressed that the welfare and opportunities of many separated families 'are likely to be more influenced by social security, taxation, employment, child care and housing policies, laws and programs than by Family Law Act provisions'.[75] It notes the range of Commonwealth departments which provide various family and marriage support services, and has repeatedly suggested that:

> Greater co-ordination of policies related to the provision of marriage and family support services is essential to assure availability and accessibility of a range of services.[76]

4.101 In 1989, the Institute's report of its evaluation of marriage counselling agencies noted that the Attorney-General's Department had itself questioned whether or not it was the appropriate funding department for marriage counselling activities. The Institute's submission to this Committee's inquiry again queries the 'appropriateness of the role of the Attorney-General's Department in allocating funding for marriage counselling'.[77] It further suggests that the States, or another Commonwealth department, might better understand community needs. Moreover, the AIFS believes that there should be consideration given to the funding of multi-purpose centres which might provide a range of interrelated services such as marriage counselling, parenting education, financial counselling and mediation services. The Institute notes that administrative costs might be reduced with this approach.

4.102 The broad issue of funding for family support services falls outside the scope of the terms of reference for the Committee's inquiry. Nevertheless, the Committee strongly supports the view that there is an urgent need for the Commonwealth to co-operate with the States to investigate means of improving the co-ordination and integration of the development and funding of marriage counselling, mediation, marriage education, and other services which provide various forms of support for families. The Committee also believes that greater consideration should be given to the cost benefits of joint Commonwealth/State funding for multi-purpose family support centres, which might offer various types of counselling, mediation, and other forms of information and advice relevant to the needs of families.

---

74 ibid, pp 24, 158
75 Submission 777, Vol 24, p 4645
76 Wolcott & Glezer, op cit, p 158
77 Submission 777, Vol 24, p 4652

CHAPTER FIVE: THE PROPER RESOLUTION OF DISPUTES IN RELATION TO CHILDREN

PART I - LEGAL ISSUES

Introduction

5.1 Part VII of the *Family Law Act 1975* governs proceedings in relation to children. As an overriding consideration, the Family Court must regard the welfare of the child as the paramount consideration in proceedings where children are involved.[1]

5.2 The Committee has received a number of letters and submissions complaining that, in practice, the arrangements made for many children following divorce are not in the best interests of those children, and that the Family Court is in some cases failing to protect the welfare of affected children. Many submissions argued that the traditional court process was an inappropriate mechanism for the resolution of disputes where children are concerned and where emotions are likely to run high. However, the Committee notes that most matters (95 per cent) are resolved before they get to court and it is possible that the remaining five per cent can only be settled through a judicially imposed solution. The Family Court Counselling Service, which is involved in the resolution of many disputes that do not proceed to a contested trial, states that its prime focus is to attempt to assist separated couples to reach agreements which will be in the best interests of their children.[2]

5.3 This chapter and Chapter Six deal with the proper resolution of disputes in relation to children. In this chapter, the report deals with the legal issues - the meaning of custody, access and guardianship under the *Family Law Act*, evidentiary matters and the question of separate representation for children, and the exercise of discretion by the Family Court.

---

1 Section 64(1)(a)
2 Submission 940, Vol 30, p 5833

5.4 The following chapter will deal with custody and access issues - child agreements and parenting plans, access arrangements and related problems and the issues which arise out of allegations of child abuse.

The meaning of 'custody', 'access' and 'guardianship'

5.5 Division 5 of Part VII of the Act relates specifically to custody and guardianship of children (sections 63E to 66 inclusive). Section 63E defines custody and guardianship under the *Family Law Act*. Sections 63E(1) and (2) state:

> *63E(1) **[Guardianship of child]** A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, **other than:***
>
> *(a) the right to have the daily care and control of the child; and*
> *(b) the right and responsibility to make decisions concerning the daily care and control of the child.*
>
> *63E(2) **[Custody of child]** A person who has or is granted custody of a child under this Act has:*
>
> *(a) the right to have the daily care and control of the child; and*
> *(b) the right and responsibility to make decisions concerning the daily care and control of the child.*

5.6 These sections state the difference between custody and guardianship. Essentially, the difference between custody and guardianship is that custody is the daily care and control of the child, while guardianship includes responsibility for the long term welfare of the child. It would appear from a number of submissions and oral evidence before the Committee that, firstly, the real difference between the two is not well understood, and secondly, that the concepts of guardianship and the rights and responsibilities of both parents as guardians are particularly vague.

5.7 The previous Joint Select Committee in 1980 noted that some confusion regarding the meaning of the terms custody, guardianship and care and control remained, notwithstanding attempts in the *Family Law Act* to define these terms.[3] The Committee also noted the need for the Commonwealth and States to agree on a common definition. The specific recommendation made by that Committee was:

---

3 Joint Select Committee on the Family Law Act, **Family Law in Australia**, 1980, AGPS, p 48

4.17 The Committee recommends that the Family Law Act and other legislation of the Commonwealth and the States should be examined by the appropriate authorities to ensure a consistent use of terms such as guardianship, care and control and custody. Where necessary, terms should be defined so that the nature of the relationship between a child and the person standing in a relationship towards the child are precisely expressed.[4]

5.8 Prior to 1983 legal custody of a child involved 'a bundle of powers, including the power to control the child's education, choice of religion and property, as well as the personal power of physical control'.[5] Legal custody was more akin to guardianship and did not necessarily entail having the child physically residing with the legal custodian. The Family Court advises that the court prior to 1983 usually made an order of joint legal custody of children to both parents and placed the children in the care and control of one of them.[6]

5.9 Mason J stated in **Fountain v Alexander** (1982) 40 ALR 441, that custody was virtually the equivalent of guardianship.[7] There existed some confusion following the broad interpretation of custody about the concept of guardianship and what guardianship actually meant. This confusion was noted in the Watson Committee Report of 1982 and led to the 1983 amendments, containing the present definition of custody.

5.10 The 1983 amendments to the *Family Law Act*,[8] inserted the definitions as set out in para 5.5 above. The debate on the issue of terminology has not been resolved, instead it has expanded since the previous Joint Select Committee's report to include, not only the confusion about the meaning of custody and guardianship, but also the relevance and connotations of the terminology, particularly of the term 'custody' with its connotations of imprisonment,[9] and the effect those connotations can have on parental behaviour following separation. This latter aspect is dealt with later in the chapter.

Guardianship

5.11 At present, the Family Court will normally make an order giving sole custody to one parent, with access to the other and both parents continuing as joint guardians of the child. The Family Court argues that boundaries between decisions which are part of the responsibility of custodianship and those that are an aspect of

---

4 ibid, p 49
5 Per Gibbs CJ, in **Fountain v Alexander** (1982) 40 ALR, 441 at 447
6 Submission 940, Vol 30, p 5832
7 at 454
8 No 72 of 1983
9 The Oxford dictionary, 7th edition, 1982, defines 'custody' to mean, first, guardianship, care as in 'parent has custody of child', second, imprisonment. The Macquarie dictionary defines custody similarly - 1. keeping, guardianship, care; 2. the keeping or charge of officers of the law.

guardianship cannot be definitively drawn.[10] However, case law contains a number of statements on the extent of guardianship. In **Chandler** (1981) FLC 91-008, Nygh J had this to say about guardianship:

> The parties remain jointly responsible for all major issues affecting the welfare of their children; that includes such issues as the education of the children, what school they are to attend; it also includes such issues as any major medical treatment of the children - leaving aside of course, emergencies, when someone has to make an immediate decision to put a child into hospital. It will, in due course, include any decisions that the parents will have to make concerning the future careers of the children, as to whether they should or should not attend a tertiary institution, whether they should or should not engage in or be trained for a particular occupation - all, of course, up to the age of 18, or such age as the child makes it quite clear that he or she is able to make a decision by himself or herself.
>
> It also implies an obligation to consult the other spouse in any changes as regards the residential arrangements of the children...It also involves an obligation on the [custodian] to keep the [non-custodian] informed of all educational progress, such as school reports or serious problems arising in school or any medical matters such as any treatment the child is undergoing.
>
> At the same time, it does not mean that the [non-custodian] has a right to interfere with the day to day care and control of the children. These include arrangements as to who takes the children to school, who picks them up, with what children do they play and all the other minor administrative decisions which a parent has to make from day to day concerning the children.

5.12 One of the major problems for non-custodial parents is the removal of their children inter- and intra-state. The extent of a guardian's rights in this matter are unclear. In **R v R** (1984) FLC 91-571, the Full Court stated that one of the powers of a guardian is the power to determine the place of residence of the child.[11] However, the Court qualified this statement by saying:

> But that power is not absolute. Since it concerns the welfare of a child it is subject to variation, or limitation by an order made under s64(1)(c) of the Act. It is subject also to the provisions of s70A of the Act which

---

10 Submission 940, Vol 30, p 5848
11 At 79,616

creates offences of and provides penalties for the removal of children from Australia in the circumstances set out in that section.[12]

5.13 Submissions to the Committee expressed dissatisfaction with guardianship and the limited nature of that status. Submissions argued that guardianship was irrelevant and despite being a legal guardian, in practice their involvement in decision-making concerning their children was insufficient or non-existent. Some submissions stated that they had been advised by their lawyers that guardianship was the stronger status, but which turned out to mean they did not have sufficient contact with their child/ren or sufficient involvement in their upbringing. Submissions to the Committee also suggested that, at times, non-custodial parents who wish to exercise legitimate guardianship responsibilities are denied even basic information about their children's health or progress at school by their ex-partners. The following extracts from submissions illustrate the problem:

> Submission 294: My ex wife has sole custody of our children because I was not advised by my solicitor what the difference was regarding sole and joint custody [guardianship]. The solicitors fixed this up amongst themselves. I feel now that my rights as a parent have been stripped from me...not being a joint guardian, I do not have any say in my children's education, medical or religious decisions concerning them although I only live 20 klm's away.[13]

> Submission 429, Parent Without Rights: Guardianship, or joint guardianship, as is presently ordered by our Family Courts, is one of the most misunderstood orders issued by the Family Court. Nobody (not even Judges, barristers, solicitors or Family Court officials) is able to explain to parents just what such an order means, particularly to the parents who do not have the day-to-day care and control of the children. It is unclear and confusing also to school authorities, where the parent without the care and control of the children is seeking school reports and scholastic information concerning their children.[14]

> Submission 583: As a joint guardian I have had no say in the educational, medical and religious decisions concerning our children.[15]

> Submission 820: Guardianship, as explained to me by legal practitioners, conveys rights for health care and educational decisions for the children.

---

12 ibid
13 Submission 294, Vol 6, pp 1350-51
14 Submission 429, Vol 12, p 2472
15 Submission 583, Vol 18, p 3479

> Although I had court orders to this effect, school reports were rare and no notification when my son was hospitalised for chronic asthma.[16]

Access

5.14 The debate on access relates not so much to the meaning of the term as to obtaining access. Most submissions which commented on access were concerned that, despite having an access order, access was continually frustrated or denied and the Family Court was an ineffective means of enforcing its own access orders. This problem is dealt with in detail in Chapter Seven. The debate in this section is confined to the meaning of access and how access is to be determined. It now appears to be generally accepted that it is the child's right to know and to have contact with both parents and that access to the children by the non-custodial parent is granted on that basis. Access is granted in the best interests of the child and a court will normally only deny access if the court considers that it will not be in the best interests of the child:

> In my opinion the balance of the authorities is to the effect that access will not be refused unless the court is satisfied that on balance access is not in the best interests of the child because there will be harm to the child resulting from access, or at least that the risk of harm to the child is sufficient to justify a refusal of access or for some other good reason.[17]

5.15 The Family Court's most recent statement on the topic is in **Brown v Pedersen** (1992) FLC 92-271:

> Whatever may have been the accepted principle in the past, this Court has long laid to rest any notion that a parent has a right to 'access'...we cannot accept the proposition that the onus of establishing good and compelling reasons for denying access lay on the wife, or for that matter, any onus lay on the husband to establish the contrary. Rather, as the High Court pointed out in **M v M** (1988) FLC 91,979 at 77,080 proceedings for custody or access are not to be viewed as adversary proceedings in the ordinary sense, but as an investigation of what order will best promote the welfare of the child.[18]

5.16 The Family Court argues that, if it was considered to be appropriate to frame laws relating to access with an assumption that children have a right to know each parent, the legislation should also give to the Court the right to suspend that right in the following situations:

---

16 Submission 820, Vol 25, p 4835
17 Strauss J, in the case of T, unreported judgment, 27 March 1986
18 Submission 940, Vol 30, p 5856

(a) where access will create a real danger to the child's physical or emotional well-being;
(b) where access will be so thoroughly disruptive to the custodial parent's routine that the benefit to the child of continued contact between child and absent parent will be out-weighed by the effect of such disruption on the child;
(c) where the child wishes to have no further contact with the access parent and is sufficiently mature to have those wishes respected.[19]

Joint custody/shared parenting

5.17 Under the present law each of the parents of a child who is not yet 18 is a guardian of the child and both parents have joint custody of the child, until the court makes an order to vary those arrangements.[20] Joint custody is not defined under the Act and it is not clear how it differs from guardianship. Chisholm and Jessep state:

> Normally, as we understand it, when the court makes an order that one parent should have the primary care of the child and the other should have regular visiting rights, that order is expressed by saying that one parent should have custody and the other access. Such an order leaves both parents as guardians of the child and thus affirms their continuing overall responsibility for the child.[21]

5.18 It is clear from submission comment and oral evidence that confusion abounds about the meaning of joint custody. Chisholm and Jessep state that there is considerable uncertainty about the meaning of joint custody, that in fact joint custody has a range of meanings and the meaning varies from one jurisdiction to another.[22]

5.19 The Family Court regards joint custody as embodying the following ideas and values:

(i) both parents are viewed as equally important in the psychological and physical life of the child;
(ii) both parents share authority for making decisions about the children;
(iii) parents co-operate in sharing the authority for the responsibilities in raising their children;

---

19 ibid, p 5857
20 Section 63F(1)
21 Submission 760, Vol 22, p 4384
22 ibid, p 4383

(iv) children spend a significant amount of time living with each parent.[23]

5.20 The Family Court goes on to further define joint custody or shared parenting:

> The distinguishing feature of joint custody is that both parents retain legal responsibility for the care and control of the child(ren) as an intact family. Joint custody after divorce is an arrangement in which both parents have equal rights and responsibilities regarding major decisions. It provides an equal voice in the child's education, upbringing, religious training, medical care and general welfare.[24]

5.21 Joint custody can also be equated with 'shared parenting', where both parents have the children for substantial periods of time and both parents make decisions concerning the daily care and control of the children. There is nothing in the legislation at present to prevent shared parenting if parents want to enter into such an arrangement. However, it requires co-operation and communication between the parents and probably a reasonably close physical location of the two residences. Even if a shared parenting arrangement is undertaken it is likely that there will be one primary residence for the child/ren.

Advantages and disadvantages of joint custody/shared parenting

5.22 The advantages and disadvantages of joint custody/shared parenting arrangements were listed by the Family Court as follows:

5.22.1 Advantages:

- the psychological affirmation to the parents that they continue to have a role in the child's life;
- the sharing of the burdens and pleasures of child rearing;
- both parents are able to have time to themselves and for new relationships, being relieved of the constant ongoing responsibility that would exist for the parent having sole custody;
- the promotion of parental co-operation.

5.22.2 Disadvantages:

- if conflict re-emerges and the shared parenting arrangements break down another 'separation' may take place;

---

23 Submission 940, Vol 30, p 5838
24 ibid

- pragmatic problems, eg, different standards of living, duplication or lack of clothes, toys, the problem of living out of a suitcase;
- the tolerance of differences in child rearing methods, necessity of avoiding being critical of the other parent;
- the building of new lives requires respect, privacy and autonomy for each parent and non-interference in the other parent's time.[25]

5.23 The Family Court sees the benefit to children to be the continuing relationship with both parents, however the major disadvantages are the lack of stability in the child's life and the potential for the children to be used as weapons, spies or messengers in parental conflict.[26] The Family Court discusses when joint custody is likely to work and when it will not.

5.24 The Family Court cites research work which suggests that joint custody is only viable in the following situations:

5.24.1 where both parents are reasonably capable of assuming responsibilities of child rearing. When there is a significant difference in values then other custodial arrangements should be used;

5.24.2 where there is a demonstrated capacity to co-operate easily and meaningfully in regard to the children and a willingness to compromise to ensure viability of the arrangements, ie, co-operation and communication;

5.24.3 where there is geographical proximity of homes of each other and close to the child's school;

5.24.4 where there is low or resolved parental conflict.[27]

5.25 Joint custody will not work when:

5.25.1 parents cannot communicate with each other;
5.25.2 parents cannot co-operate with each other;
5.25.3 parents are actively litigating for their children.[28]

---

25 Submission 940, Vol 30, pp 3839-40
26 ibid, p 5841
27 ibid, pp 5841-42
28 ibid, p 5842

5.26 The Family Court adds that:

5.26.1 if parents are litigating for the custody of their children then they have not demonstrated an ability to communicate, co-operate and resolve relationship conflict between themselves;

5.26.2 joint custody arrangements are not needed to be court ordered if parents have negotiated themselves;

5.26.3 an order for joint custody does not change the parental attitude to behaviour if there is an unwillingness to co-operate or negotiate in the first place.[29]

5.27 The Family Court advised that the court rarely made orders for joint custody. The practicalities which work against a successful joint custody/shared parenting arrangement were described by Kay J as follows:

> The reality of a child's life is that, save in rare and exceptional circumstances, equal sharing of time is generally unattainable, because of the geography of the parties, or the personality of the parties or the needs of the child. In most cases it cannot be achieved.
>
> In many cases it is seen as being unsettling for the child...I think it is fair to say that the Judges of this court have not generally embraced the concept of shared parenting in cases where there is any degree of conflict between the parents.[30]

5.28 The Family Court referred to another case where Rowlands J declined to make a joint custody order as 'mutual trust, co-operation and good communication' were lacking in the parents' relationship with each other and those factors were seen as being important elements of a successful joint custody arrangement.[31] Notwithstanding this, the Family Court also advised that the Court can make an order for joint custody or shared parenting, which was in the best interests of the child, despite the fact that the parents' were in dispute.[32] Such an order had been made by Kay J, because the child had already adapted well to a shared parenting arrangement, the parents lived in close proximity to one another and the child was still relatively young. The Court affirms in its submission that the major factor determining the type of custody arrangement is that which will best promote the child's welfare. It is interesting to note that in the UK a court exercising jurisdiction under the *Children Act 1989* will only make an order if the order will positively contribute to the child's welfare.

---

29 ibid, p 5842

30 **Hall v Fordyce**, unreported judgment of Kay, J, 23 March 1990

31 Submission 940, Vol 30, p 5833

32 ibid

Evidence and submission comment

5.29 Many submissions to the inquiry, almost all of them from men, were highly critical of the attitude exhibited by the Family Court Counselling Service, and by judges of the Court, to 'joint custody' arrangements. While many such submissions advocated the virtues of joint custody, they did not specify precisely what they meant by the term. For the most part, it would appear that the term 'joint custody' was being used to describe arrangements which would provide both parents with a more equal share in the day-to day care and control of children, by providing that children be able to spend longer and more frequent periods of time living in the home occupied by their father.

5.30 Some of these submissions have suggested that the Family Law Act be amended to include a presumption of joint custody, with the objective of ensuring that sole custody would only be awarded in exceptional circumstances, such as in cases of child abuse, or serious domestic violence.

5.31 One witness argued strongly against court ordered joint custody. Ms Rebecca Wade said:

> Joint custody sounds great as a set theoretical ideal if we lived on an ideal planet where everybody could get on beautifully with each other. If joint custody is to work, I think you would need such a tremendously high degree of goodwill and co-operation from parents, you would wonder why they divorced in the first place.[33]

5.32 The witness went on to argue that often court ordered joint custody was ultimately detrimental to the children and their having any idea of a fixed home, settled life or consistency in their lives.[34] This view is supported by recent American research, which summarised the effect of joint custody arrangements as follows:

> The promised benefits of joint custody, however, have not materialised...joint residential custody arrangements often proved to be expensive, emotionally wrenching, logistical nightmares for parents and children. Many parents are now settling for less complicated arrangements, with one parent being the primary caretaker of the child but both parents having joint legal custody and an equal say in the child's health, education, religious upbringing and so forth.[35]

---

33 Transcript, 6 February 1992, p 921
34 ibid, pp 922-23
35 K Jost and M Robinson, **Children and Divorce**, CQ Researcher, v 1(5), June 1991, p 359

Conclusions

5.33 The Committee believes that the meaning of guardianship, custody and joint custody are not sufficiently explained under the *Family Law Act*. Much of the dissatisfaction expressed in submissions related to the ill-defined concepts of guardianship and custody, particularly the former. Guardianship, while sometimes advised by lawyers as being the 'stronger' status, was seen by parties as conferring little or no role on them so far as having any responsibility for decision making in their children's lives was concerned.

5.34 The evidence before the Committee supports the view that the Family Court's reluctance to order joint custody in contested cases is fitting and appropriate. The Committee's concern with the joint custody/shared parenting approach is the significant degree of co-operation required between the parties, something which may not be possible following a contested custody case. Usually, such co-operation is only present where parties have come to an agreement without the involvement of the courts. Once the court becomes involved and a solution is required to be imposed there is significantly less chance that parties will be able to accommodate 'joint custody/shared parenting' roles. The Committee agrees with the Family Court that only in reasonably rare cases would court ordered joint custody be a workable solution. For the most part, the Committee accepts that joint custody or shared parenting will only be an option if the parties work towards that arrangement with minimal involvement of or intrusion by the Family Court.

5.35 The underlying concern of many advocates of joint custody is the need to increase the involvement of both parents in the care of their children after separation. The Committee shares the view that this is a very desirable goal. However, the Committee has concluded that the weight of evidence before it suggests that, while joint custody arrangements may be beneficial to children in cases where both parents are willing and able to co-operate and communicate, couples who litigate over arrangements for their children are unlikely to be capable of sustaining such a high level of contact and co-operation. The apparent extent of conflict experienced by couples in situations where access has been ordered by the Family Court following litigation highlights the potential damage to children that might result if joint custody was ordered in unsuitable circumstances.

Connotations of the terminology

5.36 The Family Law Council addressed the issue of values and assumptions in language in its report, **Patterns of Parenting After Separation**. The Council considered that an examination of the language within which issues of children, parenting and divorce are discussed was an important step towards understanding the difficulties associated with parenting after separation. The Council argues that words such as

'custody', 'access' and 'guardianship', despite their legal definitions, do not necessarily reflect the practice of the relationship between parents and children.[36]

5.37 The Family Law Council concluded that:

5.37.1 the concept of guardianship needed to be retained to describe the long term responsibilities of arrangements for the child;

5.37.2 the words 'custody' and 'access', with their connotations of ownership should be replaced if a shared parenting approach was adopted.[37]

5.38 In its report, the Family Law Council points to a number of research studies based on examinations of the attitudes of separating partners which concluded that the words 'custody', 'access', 'non-custodial parent', and 'sole custody' carry strong connotations of 'ownership' of children and that such terms appear strongly linked to notions of winning and losing in the minds of litigants.[38] The Council points to changes in the law in a number of US states to accommodate these perceptions and to changes in the law in the UK.

5.39 The National Catholic Association of Family Agencies, stated to the Family Law Council:

> Parents require terminology that implies that their co-operation about parenting issues is both required and important, even after separation. The present terminology appears to highlight the scope for disagreement rather than co-operation.[39]

5.40 It was apparent from many submissions that the meaning of custody and guardianship is misunderstood, and particularly the meaning of 'joint custody'. However, only about 10 submissions argued for a change of terminology, most specifically supporting the Family Law Council's proposals.[40] Several other submissions argued for the 'shared parenting' concept, but were more concerned with the concept and the outcome than the terminology.[41] This was reflected in a statement made by the present Chairman of the Family Law Council who argued against a change of terminology:

> Speaking as a practising lawyer, the thing that concerned me particularly was the thought that we may simply be changing the labels without changing the fact and that people are smart enough to realise shortly after

---

36 Family Law Council, **Patterns of Parenting After Separation**, AGPS, 1992, p 29
37 ibid, p 30
38 ibid, p 31
39 ibid, p 45
40 See, for example, submissions 322, 403, 415, 447, 448, 454, 694, 747, 755, 777
41 See submissions 442, 446, 786, 850

> the event. As happened when the Act was changed last time, when we changed 'custody' to 'care and control', they knew that this was the new one they had to go for.[42]

5.41 Mr Faulks went on to argue that what was required was the regulation of the continuing responsibility of parenthood, which is the direction taken by the new legislation in the UK. This legislation is discussed in the last section of this chapter.

5.42 A representative from the Noble Park Family Mediation Centre, speaking from the experience of having worked with separating parents, suggested that the current terminology of 'custody' and 'access' should be changed:

> We prefer when we are speaking to people to talk in terms of what arrangements they are going to make for the children without labelling those arrangements or those decisions in any way. People are frequently able to do that, yet then get bogged down in whether they get a court order about custody and, if so, who has custody and what arrangement it lays down.[43]

5.43 The Law Council of Australia has supported the view that there is a need to change the Act in the direction now recommended by the Family Law Council; its submission to the inquiry noted that such reform may do some good and it is difficult to see that it would cause any harm.[44] The Institute of Family Studies has also suggested that its research points to a need to find alternatives to the term 'custody'.[45]

5.44 Some proponents of a change in terminology cite the recent UK *Children Act 1989*, which removed the terms 'custody' and 'access' and replaced them with 'residence' and 'contact'. However, the reasons for the UK legislation rephrasing the concepts of custody and access to resident and contact do not seem to be solely based on problems related to the connotations of the terminology. They appear to also be an attempt to remove differences in meaning between the concept of custody as applied in the divorce courts and that which applied in proceedings under the *Domestic Proceedings and Magistrates Courts Act 1978*, the *Guardianship of Minors Act 1971*, and the *Children Act 1975* and to remove the doubt which existed about the precise legal effects of custody orders.[46]

5.45 A number of other submissions argued for more joint custody or shared parenting arrangements, as opposed to sole custody/access.[47] From the submissions it

---

42 Transcript, 13 March 1992, pp 1233-34
43 Transcript 23 April 1992, p 1772; see also the Marriage Guidance Council of Australia, Transcript, 22 October 1991, p 444
44 Submission 415, Vol 11, p 2228
45 Transcript, 22 April 1992, p 1495
46 Bainham, **Children: The New Law, *The Children Act 1989***, Family Law, Bristol, 1990, pp 33-34
47 See submissions 780, 850

appears that it is the more limited role that non-custodial parents object to, more than the terminology. Non-custodial parents want to move to a situation of shared parenting in order to have more involvement in the lives of their children.

The view of the Family Court

5.46 The Family Court's submission to the inquiry recommends no immediate changes to the terminology of the Act.[48] The Family Court believes that, in the short-term, the only measure that need be taken with respect to terminology is the insertion of a more explicit definition of the term 'guardianship', where it is included in the Act.[49] In support of this position, the Family Court points to evidence which suggests that many people are not aware of what the term 'guardianship' means in legal and practical terms, nor of the fact that divorced couples retain joint guardianship of their children except in the relatively rare event that the Court makes a specific order to the contrary.

5.47 The Family Court's submission implies that non-custodial parents might feel less deprived of their status as parents, and more inclined to take an active role in the care of their children after marital breakdown if they realised that, as a guardian of their child, they have legal status as a parent with a significant role to play in many major decisions regarding the welfare and upbringing of their children. The Court therefore supports increased public understanding of the practical and legal meaning of the term 'guardianship'.[50]

5.48 In oral evidence to the Committee the Chief Justice of the Family Court reiterated his concern about the vagueness of the term 'guardianship':

> My concern is that I do not think many people understand what guardianship means and the Act does not say. All it talks about is all the powers, all the attributes that normally go with guardianship. The person in the street I do not think understands what that means. I am quite sure a lot of lawyers do not understand it either.[51]

5.49 The Chief Justice went on to argue that, rather than propose a change in terminology, which might have little or no practical effect, a better course of action would be for the Act to explain what it means.[52]

---

48 Submission 940, Vol 30, p 5846
49 ibid, p 5850
50 ibid, p 5849
51 Transcript, 29 May 1992, p 1902
52 ibid, p 1905

5.50 In a paper commenting on the Family Law Council's **Patterns of Parenting After Separation**, attached to the Family Court's submission, Joske, J suggested caution in any moves to change terminology. Joske, J argued:

5.50.1 in the absence of any established benefit, a change in terminology should be rejected, particularly bearing in mind the confusion that a change in terminology is likely to cause in the community and the problems of enforcement that would be likely to arise both nationally and under the provisions of the Hague Convention;

5.50.2 research is silent as to what benefits or otherwise were achieved by the amendments which came into force on 25 November 1983. Joske, J states that this is unfortunate in circumstances where further proposals are being advanced for changes in terminology;

5.50.3 while imprisonment is one meaning ascribed to the word custody, Joske seriously doubts whether this fact has caused problems in the past. He states further that what must not be overlooked is the fact that parents are normally possessive towards their children and that this will not be affected by any change of name;

5.50.4 in discussing a 1989 AIFS study, Joske notes that there appeared to be confusion and ignorance in relation to matters of custody and guardianship and that the problems of non-custodial parents arose from their position as they perceived it to be in fact rather than what it was called in law.[53]

Conclusions

5.51 The Committee believes that, no matter what the terminology actually is, it is important that the concepts of guardianship, custody/residence, access/contact are clearly defined in legislation. The Committee does not have a firm view about what terminology is used, and would need further evidence placed before it to be convinced that the terminology of custody and access has a significant effect on the behaviour of parents following separation. The Committee is of the view that it is the availability of access to children by non-custodial parents, or more importantly, the ability of children to be able to maintain contact with both parents, which is the crucial issue in this area. To this end, both parents need to understand what their roles as custodial parent/non-custodial parent, resident parent/contact parent are and what rights and responsibilities they have to each other and to the child/ren.

---

53 Submission 940, Vol 30, pp 5907-11

5.52 The Committee notes the importance of the Family Law Council's report on **Patterns of Parenting After Separation** and the recommendation to replace the words custody and access if a shared parenting approach is adopted. However, the Committee is concerned that any changes to terminology should be fully considered prior to legislative enactment. The Committee is conscious of the potential for problems unless amendments are undertaken jointly between the Commonwealth and the States. The Committee is also of the view that the effect of the UK legislation, the *Children Act 1989*, needs to be assessed fully, prior to similar action being undertaken in Australia. If benefits are not forthcoming then it may not be wise to proceed along the same lines. The Hague Convention on Civil Aspects of International Child Abduction is in the conventional language of custody and access and consideration may need to be given to any flow on effect.

5.53 The Committee believes that the meaning of guardianship should be more clearly spelt out under the *Family Law Act*. It is obvious that both custodial and non-custodial parents are not aware of the extent of the status of guardianship and it may well be advantageous if this is more clearly stated in the legislation. Legislative amendment to this effect would clarify to both parties the extent of their rights and responsibilities to each other as parents of their child/ren and may go some way to meeting the concerns of non-custodial parents who do not feel sufficiently involved in a parental capacity with their children. The better enforcement of these rights is most important. The Committee considers that the Family Court should clearly specify in every order granting one parent custody and the other parent access rights that both parents still retain guardianship responsibilities for their children. The order should also specify what guardianship entails.

Recommendations

5.54 The Committee recommends that:

27 **the concept of guardianship be retained in the *Family Law Act 1975*;**

28 **every order for custody/access made by the Family Court specify the guardianship rights and responsibilities of both parties, and particularly of the non-custodial parent, and the extent of these rights and responsibilities;**

29 **there be no change to the terminology of the *Family Law Act 1975* in relation to custody and access, until such time as there is clear evidence that a change would be advantageous to the settlement of custody and access disputes; and**

30 **the Family Court provide to parties who apply for dissolution of marriage or to initiate proceedings in the Family Court an information leaflet on the meaning of the above terms, the arrangements that may occur in practice and the rights and responsibilities of parties to each other in their parenting role.**

The exercise of discretion in children's matters

5.55 Section 64(1) of the Act guides the Family Court in making decisions in children's matters. That section states:

> *64(1) **[Factors considered]** In proceedings in relation to the custody, guardianship or welfare of, or access to, a child -*
>
> *(a) the court must regard the welfare of the child as the paramount consideration;*
> *(b) the court shall consider any wishes expressed by the child in relation to the custody or guardianship of, or access to, the child, or in relation to any other matter relevant to the proceedings, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case;*
> *(ba) subject to paragraphs (a) and (b), the court shall, unless in the opinion of the court it is not practicable, make the order that, in the opinion of the court, is least likely to lead to the institution of further proceedings with respect to the custody or guardianship of the child;*
> *(bb) the court shall take the following matters into account:*
> *(i) the nature of the relationship of the child with each of the parents of the child and with other persons;*
> *(ii) the effect on the child of any separation from -*
> *(A) either parent of the child; or*
> *(B) any child, or other person, with whom the child has been living;*
> *(iii) the desirability of, and the effect of, any change in the existing arrangements for the care of the child;*
> *(iv) the attitude to the child, and to the responsibilities and duties of parenthood, demonstrated by each parent of the child;*
> *(v) the capacity of each parent, or of any other person, to provide adequately for the needs of the child, including the emotional and intellectual needs of the child;*
> *(va) the need to protect the child from abuse, ill treatment, or exposure or subjection to behaviour which psychologically harms the child;*

(vi) any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account; and

(c) subject to paragraphs (a), (b), (ba) and (bb), the court may make such order in respect of those matters it considers proper, including an order until further order.

Submission comment

5.56 Many submissions expressed great dissatisfaction with the manner in which judges of the Family Court exercise their powers of discretion in children's matters. Some argued that the Act allows judges too much leeway in the exercise of discretion. Many letters and submissions provide anecdotal and first hand accounts of clients who have been given advice such as 'the outcome will depend on whether we get Judge X or Judge Y'.

5.57 Some submissions have suggested that there should be tighter guidelines to structure the exercise of discretion, so that outcomes may be more predictable. Other submissions argued that allowing a judge, who may have little formal training in areas such as child psychology or the dynamics of child abuse, to have the final say in the resolution of such disputes is not appropriate, and that in cases where litigation is absolutely necessary, arrangements should be determined by a panel or tribunal which might include a judge, a child psychologist and a social worker.

5.58 A number of submissions have suggested that there is a need to require judges to undergo more training in a number of non-legal fields, in order that they can analyse the strength of the evidence before them more effectively, and better exercise their discretion to make more appropriate orders. The Committee has also heard suggestions that, because many child abuse cases involve very difficult questions in relation to the interpretation of the evidence that comes before the court, judges should receive some specialist education in this area.[54]

5.59 The Committee notes that the Family Court accepts that judges may require further training in these very difficult areas:

> In the case of judges, training in clinical indicators of abuse and its long-term effects could assist in their understanding of evidence presented to the Court.[55]

---

54 See, for example, the Domestic Violence and Incest Resource Centre, Submission 669 Vol 20, p 3907, and the Adelaide Women and Children's Hospital Child Protection Service, Submission 711, Vol 21, p 4097

55 Submission 940, Vol 30, p 5885

5.60 A related matter which was mentioned in a number of submissions is the adequacy of statements of reasons provided by judges of the Family Court on presentation of their decisions. The Committee notes that in the past, some judges have provided insufficient details in their judgments, with the result that parties who 'lost' the case do not understand the reasoning behind the decision, and feel unjustly persecuted. The Chief Justice has admitted that the Court has had complaints on this issue in the past, and has taken steps to address them:

> In fact I have been particularly concerned in the Full Court - and I think we have mentioned that in our submission - to insist that judges give adequate reasons in this area. I think it has been a legitimate complaint. Some judges have given reasons, but the reasons have not been full enough, particularly for an appellate court to examine them or for the people who are the recipients of the order to understand why the order was made. I think it is very important that they should do that. But, certainly, as a court, we have upheld appeals in custody matters where the reasons have been inadequate. It presents a problem because, if there does not look to be anything very wrong with the decision, you are more reluctant to uphold an appeal simply because of inadequate reasoning. The reason is being supplied, but the sorts of cases that we have upheld have been cases where the decision itself needs some explanation and none was given. In those circumstances, we have not hesitated to send it back for a retrial.[56]

5.61 The Committee notes the Full Court decision of **Bennett v Bennett** [1991] FLC 92-191, where it was held that the judge at first instance moved directly to making a conclusion after considering all the evidence of the case. Insufficient reasoning was given which meant the process followed could not be ascertained. The reasons need not be extensive but there must be sufficient to enable parties to follow the judge's line of reasoning. The Full Court reiterated this view in the case of **Horsley v Horsley** [1991] FLC 92-205 where it was held the trial judge did not give sufficient indication as to which submissions were accepted or rejected. There was also insufficient consideration of essential issues which precluded an examination of the trial judge's reasons. In both cases the appeals were allowed due to the insufficiency of reasons. The Committee notes the duty of judges to give adequate reasons for their decisions.

Conclusions

5.62 In litigated cases where parties do not wish to use the options of mediation or arbitration, or are unsuitable candidates for these forms of dispute resolution due to a perceived imbalance of power or intransigence on the part of one parent, the Committee believes that the exercise of judicial discretion, guided by the considerations

---

56 Transcript, 29 May 1992, p 1906

in s64(1) of the Act, is essential. The Committee considers that it would be dangerous to reduce the scope of judicial discretion on children's matters to the application of rigid formulae. As each situation is different there is a need to tailor decisions to meet the needs of individual children, and the capacities of individual parents to share responsibility for meeting those needs.

5.63 The Committee notes that, following recommendations made by the previous Joint Select Committee on Family Law, s64 of the Act was amended to include a more specific and extensive list of factors which judges must weigh up in the exercise of discretion in matters related to children. The Committee believes that additional actions might be taken to help to meet concerns about the exercise of judicial discretion expressed in submissions to the inquiry. These actions include appropriate judicial education and training and improved reasons for judgment. The Committee believes that it is essential that judges give clear reasons for judgment in terms the layman can understand. The outcome of a contested custody case is likely to leave one party substantially aggrieved and it may be possible to alleviate some of the disappointment felt by the unsuccessful litigant if the reasons for the decision are clearly set out.

Recommendations

5.64 The Committee recommends that:

31 **the Family Court develop a more systematic and intensive program of judicial education in relevant non-legal matters, and particularly in factors such as domestic violence and child abuse which can influence the welfare of the child; and**

32 **judges of the Family Court give clear and adequate reasons for decisions and/or orders made by them in matters relating to children.**

Interim custody orders

5.65 Section 64(1)(c) of the *Family Law Act* provides that courts have the power to make interim custody orders. The Committee notes the difficulty in making such orders is that the information before the Court will not necessarily be sufficient to enable it to come to a decision based upon a full consideration of the issues about the welfare of the child. That decision may then remain in place for a considerable period of time before a further decision is made or settlement is reached. This could be the first step in establishing a status quo which a court may be reluctant to vary or alter.

5.66 The Full Court of the Family Court established guidelines to be followed in interim custody applications in the case of **Cilento v Cilento** [1980] FLC, 90-847, where the Court said:

> ...Interim applications for custody are not to be encouraged ... while the court must always have regard to the welfare of the child as the paramount consideration that welfare will not be promoted by a decision based on inadequate and hastily prepared material presented at a circumscribed hearing. In many cases a period of settling down is necessary to enable a proper decision to be made. ...If the above approach is adopted the court can ensure that such evidence adduced is confined to relevant issues. Such evidence would in the majority of cases be short. Once an order for interim custody is made, a change in circumstances of either of the parties would be irrelevant unless such a change placed the child in jeopardy if he remained where he was.[57]

5.67 In essence the Full Court was of the view that an interim order is a holding one and is not necessarily based upon disputed facts. As a matter of practice Courts cannot give a full hearing to an application for interim custody which is an interlocutory matter. In the case of **Pertini v Davis** [1982] FLC 91-223, the Full Court said:

> ...The case of Cilento and Cilento ... expresses a very strong view against the practice of interim hearings in custody matters when there are no firm grounds for such intervention...[58]

5.68 Another difficulty with an interim custody application is that the matter mainly proceeds on affidavit evidence without full examination or cross-examination of the witnesses. Also there is no proper access to counselling facilities which may be of assistance to have a report when not relying upon evidence from witnesses.

Conclusion

5.69 The Committee is of the view that interim custody orders should only be made where there are firm grounds for intervention to protect the welfare of the child concerned. The cases of **Cilento v Cilento** and **Pertini v Davis** express strong support for the view that interim custody hearings should not be granted unless there are compelling reasons for such an order to be made.

---

57 At p 75,345
58 At p 77,218

Recommendation

5.70 The Committee recommends that:

33 interim custody orders only be made where there are firm grounds for intervention to protect the welfare of the child concerned.

Family reports

5.71 One of the responsibilities of the counselling service is 'reportable counselling', or the provision of reports ordered by the court on the functioning of the family, in order that the judge may arrive at the best decision for the family. Section 62A of the *Family Law Act* makes provision for the preparation of family reports. Sections 62A(1), 62A(2) and 62A(6) state:

> ***62A(1) [Welfare of child]*** *Where, in any proceedings under this Act, the welfare of a child who has not attained the age of 18 years is relevant, the court may direct a court counsellor or welfare officer to furnish to the court a report on such matters relevant to the proceedings as the court thinks desirable and may, if it thinks necessary, adjourn the proceedings until the report has been furnished to the court.*
>
> ***62A(2) [Matters that may be included in report]*** *A court counsellor or welfare officer may include in a report prepared pursuant to a direction under sub-section (1), in addition to the matters required to be included in the report, any other matters that relate to the welfare of the child.*
>
> ***62A(6) [Report may be evidence]*** *A report furnished to the court in accordance with a direction given under this section may be received in evidence in any proceedings under this Act.*

5.72 Subsection 55A(2) also provides for the preparation of a family report in proceedings for a dissolution of marriage where the Court is in doubt as to whether proper arrangements have been made for the welfare of the children of a marriage.

5.73 The Family Court advises that the family report, in general, covers the following areas:

- a description of the family dynamics, profiles of the family members and their interrelationships;
- attachments of a child and any wishes or needs of the child expressed or indicated;
- the nature of the relationship of the child with each of the parents and with other significant persons in the child's life;

- the effect on the child of any separation from a parent or other significant person with whom the child has established a relationship;
- the desirability of any likely effect of the change in the arrangements for the care of the child;
- the attitude to the child and the responsibilities and duties of parenthood demonstrated by each parent or other significant person in the child's life;
- the capacity of each parent or significant person to provide adequately for the physical, emotional, intellectual and social needs of the child;
- such other matters relevant to the family assessment and the issues in the court proceedings which the counsellor considers may assist the Court in determining the best interests and promoting the welfare of the child.[59]

5.74 The Family Court also states that the family report is a 'professional appraisal of family functioning' and is prepared from a non-legal and non-partisan perspective, independent of the case presented by either part in a dispute. The Court advises:

> In the course of its preparation usually the counsellor will have interviewed the family in various combinations and settings, carried out the assessment and observation of the children, and contacted schools, health centres, and other significant individuals involved. If appropriate, home visits will have been made and contacts with legal practitioners pursued. Submissions which have suggested that these reports are prepared upon a superficial basis are inaccurate.[60]

5.75 The Family Court also argues that there is a high degree of accountability for counsellors preparing reports, as they can be cross-examined, as can any other expert witness.[61] It is emphasised that family reports are ordered by the Family Court to assist the court.

5.76 The Australian Association of Social Workers, the professional association which represents the views of many counsellors both inside and outside the Family Court, describes 'reportable counselling' within the Family Court:

> This form of counselling may constitute a negligible proportion of the case load of some registries, or a very large proportion, probably depending on

---

59 Submission 940, Vol 29, p 5655
60 ibid, p 5655
61 ibid, p 5655

the relative effectiveness of their voluntary counselling endeavours in preventing or resolving disputes.

The effort involved in preparing such family reports is out of proportion to the numbers involved in any case. There are two broad styles of report preparation. One involves interviewing all available members of the family in an office situation, usually during the one day, and writing the report on the basis of those interviews. The other style involves a mixture of office interviews and home visits carried out over an extended period.

The first approach minimises the effort required from the counsellor, at the cost of having the findings of the report based on a limited and artificial view of the family. The second is more costly in terms of counsellor time and effort, but should produce a more realistic picture of the family.[62]

Submission comment

5.77 A significant number of submissions and letters to the inquiry expressed dissatisfaction with the quality of family reports.[63] Many felt angry that 'inaccurate' reports, or reports based on perceptions of families in an abnormal situation, had appeared to influence the outcome of cases with results that allegedly were not in the best interests of the children involved. Others felt that judges had paid too little attention to the contents of family reports, and had been influenced unduly by unreliable claims made in affidavits.

5.78 It is clear that an inaccurate report can have devastating consequences. For example, in one submission to the Committee, family reports were criticised for the following reasons:

(1) the length of time the family reports took to prepare (10 months), and the consequences the delay had for the parties;

(2) the lack of objectivity and the bias contained in her family report;

(3) the difficulty of preparing a family report based on two interviews, particularly at such a difficult time;

(4) the prejudices of the counsellor, who in this case labelled the full-time mother as unemployed;

---

62 Submission 650, Vol 20, p 3839

63 See, for example, submissions 309, 557, 650 and especially 671

(5) the attitude of the counselling staff to the family report, who, in response to an explanation on her report, argued that such reports were of little importance - why then go through the long wait, the interview, the expense and the hurt and humiliation?;

(6) the 'secrecy' regarding the reports - the counsellor was not cross-examined at the hearing (she was on sick leave) and the lack of any requirement for counsellors to explain their reports to the parties.[64]

5.79 The Family Court has expressed varying attitudes about the importance of family reports - it seems that either they can be taken very seriously, or they can be disregarded by a judge.[65] Confusion about the significance of family reports and their purpose seems to be at the root of much dissatisfaction with such reports. Some submissions also reflect a perception on the part of litigants that the counselling service is not sufficiently independent of the legal arm of the Court to be the appropriate body for the preparation of such reports.

5.80 The Committee notes that the Law Council has recommended that the function of reporting to the Court be undertaken by specially trained experts and not by Family Court counsellors.[66] The Law Council suggested that:

> It should be open for private organisations and psychologists to be accepted as suitable for preparation of reports. The benefits of such an expansion of persons providing reports is that there would be greater choice, there would be a sense of striving to obtain the best possible results in the provision of reports and there would be cross-fertilisation of ideas at meetings of reporters from the various services and organisations and from those in private practice.[67]

5.81 In response to complaints about family reports which were made in submissions to this inquiry, the Family Court has strongly defended the quality of these reports. The Family Court advised that in 1990-91, 2,279 family reports were prepared by the counselling service. Around eight per cent of all cases seen by the counselling service involved the preparation of family reports. Family reports are particularly time intensive:

> The average report involves 5-8 times more counsellor hours than a conciliation conference....given the labour intensity of reports and the

---

64 Submission 306, Vol 6, pp 1403-5
65 Submission 940, Vol 30, p 5844; and Transcript, 20 May 1992, p 1935
66 Submission 415, Vol 11, p 2194
67 ibid

requirement that they be prepared as close to the hearing date as possible backlogs have developed because of the lack of staff resources.[68]

Conclusions

5.82 If it appears that some assessment of a family must be made before it is possible to reach a conclusion about what is in the best interests of children, then it is important that such an investigation is not cursory. Family reports must be timely and should be discussed with the parties prior to their being tendered to the Family Court. If the Family Court is unable to meet the demand placed on it for properly prepared family reports, then the Committee feels that such reports should be undertaken by private counsellors commissioned by the court on a fee for service basis.

Recommendations

5.83 The Committee recommends that:

34 where necessary, the Family Court contract out the preparation of family reports;

35 organisations and individuals be approved by the Family Court for the preparation of such reports.

Separate representation for children

5.84 At times it is in the interests of a child to be represented in proceedings before the Family Court. Section 65 of the *Family Law Act* provides for the separate representation of children and states:

> *65. Where, in any proceedings under this Act in which the welfare of a child is relevant, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it considers necessary for the purpose of securing such separate representation.*

5.85 The previous Joint Select Committee did not consider it necessary to make recommendations concerning the separate representation of the child. That Committee stated:

---

68 Submission 940, Vol 29, p 5656

If, as recommended in this Report, the available resources are directed towards the conciliation elements of the court's work in the area of pre-trial and counselling, then more cases would be settled before they had progressed to the point of acrimony where a separate advocate to represent the child was needed.[69]

5.86 In 1989 the Family Law Council produced a report, **Representation of Children in Family Law Proceedings**, which canvassed the major issues relating to separate representation for children. The Council considered the following matters:

5.86.1 is it the role of the separate representative to act on the instructions of the child or on his or her own view of what promotes the welfare of the child?

5.86.2 should the answer to this question be the former option, what is the role of the separate representative if the child is too young, or for any reason unable to give instructions?

5.86.3 further, what is the mechanism to be used to determine into which category the child falls?

5.86.4 what is the role of the separate representative and how is it undertaken?

5.86.5 from where does the child's representative get his or her instructions?

5.86.6 is it necessary to revise the guidelines for separate representatives issued by the Principal Registry of the Family Court with a view to establishing basic practical procedures for the guidance of the uninitiated and the re-direction of the experienced?

5.86.7 in what circumstances should an order for separate representation be made?

5.86.8 should the separate representative be able to initiate proceedings on behalf of the child?

5.86.9 what is the comparison between the provision for separate representation and the provision for the appointment of a Next Friend under Order 23?

---

69 **Family Law in Australia**, op cit, p 52

5.86.10 what is the position of the separate representative when there is more than one child with conflicting interests and/or instructions?

5.86.11 what training or qualities are required for a separate representative?

5.87 In the following discussion the Committee limits its consideration to two issues: the role of the separate representative, and under what circumstances an order for separate representation should be made.

The role of the separate representative

5.88 The role of the separate representative is not stated in the *Family Law Act*. The Family Court states that the primary function of the separate representative is that of helping the Court in its protection of children:

> As part of that function the advocate appearing for the separate representative presents evidence and argument to the court so that it has the benefit of an impartial presentation of material focused on the child's best interests.[70]

5.89 However, there is confusion about the precise role of the separate representative. The question is to what extent they are an advocate to place material before the court to assist the court in making a decision in the best interests of the child or whether the separate representative is there to act upon the child's instructions - 'is the separate representative a representative of the interests of the child rather than the child per se?'[71]

5.90 Under the UK *Children Act 1989* a court has the capacity to appoint a guardian ad litem (GAL). The GAL is not an advocate and must instruct counsel. The GAL and counsel work as a team for the child's best interests under the leadership of the GAL. Bainham describes the role of the GAL as follows:

> The point is worth emphasising that the GAL is more than a mouthpiece for the child. While his duties undoubtedly include ascertaining and presenting the child's views his overriding duty is a protective one, ie to safeguard the *interests* of the child. It has been observed many times that a child's *interests* may not be synonymous with his *views*.[72]

---

70 Submission 940, Vol 30, p 5875
71 ibid, p 5875
72 Bainham, op cit, p 193

5.91 The role of the separate representative within traditional adversarial proceedings is also a difficulty. The Family Law Council argues that proceedings about the welfare of a child are not proceedings to which the child is a party and a person representing the child therefore cannot participate in the adversarial process and is independent of it.[73] The Family Law Council concluded that the role of the separate representative should be:

> ...that of a neutral and independent assistant to the court who focuses on the position of the child in the dispute. The separate representative has no adversary functions nor any role as a legal advocate. The separate representative is a case co-ordinator who ensures that all the evidence which is relevant to the child's welfare is placed before the court.[74]

5.92 The Family Law Council proposed a team approach to the position of separate representative, a lawyer to act as case co-ordinator, collector of evidence and court advocate, and a social worker to interview the child and family and make the appropriate reports.[75] The Council in effect sees the role of separate representative to be similar to that of an *amicus curae* whose function is to act as an impartial advocate for the purpose of placing material before the court. The Government did not accept the Council's recommendations on the role of the separate representative and referred most of the other recommendations to the Family Court for comment.[76]

The Family Court

5.93 The Family Court states that a basic issue is whether it is the role of the separate representative to act on a child's instructions or to act on their own view of what would promote the welfare of the child.[77] The Court argues that the proper role of the separate representative, having regard to the principle of the paramountcy of the child's welfare, is to present to the court not only the child's particular views, but also other relevant evidence which has come into the hands of the separate representative if it conflicts with the child's own view.[78] The Court recommends that separate representation is required in the following cases:

5.93.1 to consult with the child or children, preferably with the assistance of a counsellor or other behavioural science experts;

5.93.2 to consult with behavioural science expert(s) in order to:

---

73 **Representation of Children in Family Law Proceedings**, AGPS, 1989, p 17
74 ibid, p 18
75 ibid, p 19
76 Submission 940, Vol 30, p 5877
77 ibid
78 ibid, p 5879

(a) collate information relevant to the child's needs and attachments;
(b) gain an understanding of professional interpretations of the child's expressed views in terms of his/her family and developmental context;

5.93.3 to consult and obtain reports from such expert witnesses as are thought to be appropriate in order to put the child's case before the Court;

5.93.4 to act as a point of liaison between police and child welfare authorities as well as the parties in child abuse cases, and to co-ordinate arrangements for access, (if appropriate) and arrange for examination or assessment;

5.93.5 to undertake the role of presenting the expert evidence at trial;

5.93.6 to present to the Court the complex family issues and custody/access options from the perspective of the child's needs, and present the meaning of the child's wishes in terms of the family context;

5.93.7 assist the parties and their children by informing them as to the meaning and effect of the orders which have been made, and their implementation, and perform an ongoing role in this regard, with a view to avoiding further litigation.[79]

The circumstances in which a separate representative should be appointed

5.94 The Family Law Council suggested a list of circumstances in which separate representation for children should be provided. The list, which is modelled on suggestions made by Lambert J at the Australasian Conference on Family Law in July 1980, is as follows:

5.94.1 where there is manifest continuing hostility between the parties to the proceedings, and particularly where the children are being used by either or both parties to hurt the other;

5.94.2 where one of the parties to the proceedings is not a natural parent of the children;

---

79 ibid, pp 5880-81

5.94.3 where the children are ordinarily in the possession care and control of a person other than their parents;

5.94.4 where the children are subject to an Order under State children's welfare legislation;

5.94.5 where there are real issues of cultural or religious differences;

5.94.6 where there are issues of exotic sexual or anti-social tendencies on the part of a parent or parents or other persons with whom the children come regularly into contact;

5.94.7 where there are issues of significant mental illness or personality disorder in relation to either party or a child, or to other persons having significant contact with the children;

5.94.8 where there is a history of recurring resort to litigation over custody or access by either or both parents;

5.94.9 where it appears that the children are having difficulty adapting to a new family situation in either parent's household;

5.94.10 where it appears that both parties propose arrangements which will have the effect of separating siblings;

5.94.11 where child abuse is an issue.[80]

5.95 The Family Court argues that the list is too extensive and if adopted would necessitate the appointment of a separate representative in almost every case. In the Court's view this would be unnecessary and a considerable expense.[81] The Court considers that a revision of the existing guidelines for separate representation is all that is required.[82] The Court goes on to list the types of cases in which the appointment of a separate representative is usually made:

(a) Cases involving allegations of child abuse.
(b) Cases where there is an apparent intractable conflict between the parents.
(c) Cases where the child is apparently alienated from one or both parents.

---

80 Family Law Council, **Representation of Children in Family Law Proceedings**, AGPS, Canberra, 1989 p 22-3

81 ibid, p 5881

82 Submission 940, Vol 30, p 5882

(d) Where there are real issues of cultural or religious differences affecting the child.

(e) Where the sexual preferences of either or both parents or some other person having significant contact with the child are alleged to impinge upon the child's welfare.

(f) Where the conduct of either or both parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare.

(g) Where there are issues of significant mental illness or personality disorder in relation to either party or a child or other persons having significant contact with the child.[83]

5.96 The Court adds that, as a broad general rule the court will make such an appointment if it feels the child's interests require independent representation.[84]

Submission comment

5.97 Many submissions to the Committee from individuals and organisations which work with abused children, and children affected by divorce, have strenuously advocated the development of improved systems for the provision of high quality separate representation for children. Several Family Court counsellors who provided a submission to the Committee stated that:

> We are concerned about the seeming reluctance of the Court to appoint a Separate Representative for the children in cases where the intensity of the parents' conflict threatens the possibility of focussing on the best interests of the children.
>
> The quality of service offered by the Separate Representative hinges not only on legal knowledge and advocacy skills, but on the ability to interview children and interpret their best interests. Lawyers taking on the role of Separate Representative of children need to undergo training in interviewing children and to study child development theory. Liaison of the Separate Representative with the Court counsellor involved in writing the Family Report would seem to be to the advantage of the children.[85]

---

83 ibid

84 ibid

85 Submission 894, Vol 27, p 5373

Conclusion

5.98 The Committee believes that a separate representative must be provided for child/ren where it is apparent that the child/ren's best interests require it. The circumstances where this is most likely to be the case include:

5.98.1 where there are allegations of child sexual abuse; and

5.98.2 where, in the opinion of the court, the circumstances of the case are such that the welfare of the child is seriously at risk.

5.99 The Committee is firm in its belief that separate representation for children must be ordered in every case where there are allegations of child sexual abuse. Whether the allegations are malicious or genuine, the consequences are serious and the welfare of the child demands that a separate representative be appointed. There may be other instances where, to enable the court to make a decision in the best interests of the child/ren, it is necessary for the court to appoint a separate representative for the child/ren. For example, in cases where one of the parties has religious beliefs to which the other party does not subscribe, it may be necessary for the court to appoint a separate representative for the children. The Committee feels that, instead of making a definitive list of those circumstances it is better left to the discretion of the court to make a determination on the matter.

5.100 The power to order a separate representative for children already exists in s65 of the *Family Law Act*. The Committee considers that to order a separate representative in each of the circumstances listed by the Family Law Council would necessitate the appointment of a separate representative in almost every contested custody case.

5.101 The Committee also concludes that the role of the separate representative is to assist the court to make a decision in the best interests of the child. The separate representative should not take instructions from the child, who, in any case, is not a party to the proceedings. The separate representative's primary function should be to put information before the court which will facilitate the court to make a decision in the child's best interests.

Recommendations

5.102 The Committee recommends that:

36 a separate representative for a child be appointed where:

36.1 there are allegations of child sexual abuse; or

36.2 **where in the opinion of the Family Court, the circumstances of the case are such that the welfare of the child is seriously at risk; and**

37 **the role of the separate representative be to assist the court in the provision of evidence relevant to the welfare of the child.**

The *Children Act 1989* - UK

5.103 The United Kingdom brought down a major piece of legislation relating to children in 1989, the Act coming into operation on 14 October 1991. A brief description of the Act may be useful as a contrast to our current family law in Australia. However, the UK Act is more comprehensive than comparable legislation in Australia could be, as it also includes much legislation relating to child welfare, a state responsibility in Australia. The following discussion will be largely confined to the Act's comment on family law matters.

5.104 The Act brought together the law relating to the care, protection and upbringing of children and the provision of services to them and their families.[86] The Act rests on the belief that children are generally best looked after within the family, with both parents playing a full part and without resort to legal proceedings,[87] unless such intervention is necessary to protect the child's welfare. A court is obliged to treat the child's welfare as the 'paramount consideration'.[88] One of the fundamental provisions of the Act is the non-intervention principle, or presumption of no order, enshrined in s1(5). Bainham states:

> Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all. This provision reflects a basic philosophy underlying the legislation that the primary responsibility for children rests with the parents and that this should not be necessarily disturbed by court intervention.[89]

5.105 Under the Act, orders for custody, care and control, and access have been abolished and replaced with residence and contact orders. The concept of parental rights has disappeared and the legal status of parenthood has been redefined in terms of 'responsibility' rather than rights. A clear distinction is drawn between parenthood and

---

86 A Bainham, op cit, p 7. Much of the following discussion is based on Bainham's text.

87 J Dewar & R Parry, 'The United Kingdom Children Act', **Australian Family Lawyer**, Vol 7(2), December 1991

88 Section 1(1) of the *Children Act 1989*

89 Bainham, op cit, p 15

guardianship with parents ceasing to be the legal guardians of their children. It should be noted here that, under previous UK law, only the father was the guardian of the child, with both parents, from 1973, having equal parental rights and authority. The UK Act produces a more clear-cut distinction between parents and non-parental guardians. *Guardianship is now a status largely confined to non-parents appointed to assume* parental responsibility on the death of a parent.[90]

5.106 'Parental responsibility' under the Act is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.[91] The Lord Chancellor, in his second reading speech, stated:

> [This concept] emphasises that the days when a child should be regarded as a possession of his parent...are now buried forever. The overwhelming purpose of parenthood is the responsibility for caring for and raising the child to be a properly developed adult both physically and morally.

5.107 Parental responsibility is largely concerned with the power to regulate matters of upbringing. Sections 5 and 6 of the Act govern the legal effects of guardianship. Section 5(6) provides that a guardian has parental responsibility for a child. Parental responsibility seems to equate with the notion of guardianship under the *Family Law Act*, while a residence order states where the child will live. The philosophy behind the concept of parental responsibility is described as follows:

> The idea that the parent without the residence order continues to have parental responsibility despite it is fundamental to the philosophy of the Act. Parents do not cease to be parents where they are no longer primarily responsible for looking after their child. This is a subtle notion for a lawyer to understand, let alone a layman. It probably does not represent the perception of custody orders currently held by the person in the street. Those responsible for advising in practice will bear the heavy burden of getting this across to their clients.[92]

5.108 Bainham goes on to say that in practical terms, parental responsibility means the right to be involved in, and express opinions on, all questions relating to a child's upbringing.

5.109 The new Act also makes provision for a contact order. A contact order means:

---

90 Bainham, op cit, p 17
91 Section 3(1) of the *Children Act 1989*
92 Bainham, op cit, p 36

> An order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.[93]

5.110 The new order embodies in change in emphasis away from the parent's right to have access to the child, to the right of the child to visit or stay with a named individual, usually a parent. Bainham notes, with some concern, that the court's discretion over contact is completely unfettered, there being no statutory presumption of reasonable contact between a child and parent.[94] However, Bainham also notes that courts will probably follow previous decisions on access to the effect that a parent will not be deprived of contact with a child unless there is some risk of harm to the child.[95] Section 8 orders are extremely flexible and Bainham states that it is generally expected that the usual order will be for reasonable contact, leaving it to the parties to work out their own arrangements. However, if the parties cannot agree, the court may define contact in cases of difficulty and may impose conditions or make directions as to how the order is to be put in place.

---

93 Section 8(1) of the *Children Act 1989*
94 Bainham, op cit, p 41
95 ibid

CHAPTER SIX: THE PROPER RESOLUTION OF DISPUTES IN RELATION TO CHILDREN

PART II - OTHER ISSUES

Child agreements and consent orders
Allegations of child sexual abuse
Access and domestic violence
Other significant issues

Child agreements and consent orders

6.1 The *Family Law Act 1975* provides that parents who wish to can register the terms of their agreements for the care of their children may do so, under ss66ZC, 66ZD and 66ZE. Child agreements, which must comply with the *Family Law Act*, can be registered with the Family Court and, once registered, have the force of an order of the court. The Court may vary the child agreement in relation to child welfare matters, if it considers the welfare of the child requires the variation. However, such agreements are registered by parties who settle out of court during the process of litigation, or by parties who have experienced difficulties in negotiating arrangements for their children. Parties may sign such agreements because they can no longer afford to incur the high costs of legal representation or for other reasons. Consent orders are available under Order 31, Rule 8, whereby a party to proceedings may file a written consent of the party to the making of an order in the proceedings.

6.2 The Family Court has advised that research suggests that child agreements tend to break down more frequently than agreements reached on a more informal basis at an early stage of separation.[1] The Family Law Council states that this occurs because:

> Ungraciously compromised ones will break down when the family confronts its first crisis of interpretation or, as Weir (1986) has suggested, the arrangements agreed upon will be rigidly adhered to and take little or no account of changing needs.[2]

6.3 The Committee has also received a number of submissions which express concern that although the Family Court has a duty not to register agreements that do not

---

1 Submission 940, Vol 29, p 5771
2 Family Law Council, **Patterns of Parenting After Separation**, AGPS, 1992, p 21

appear to be in the best interests of the children involved, the Court does not have the resources to scrutinise in any depth agreements that are registered.

6.4 One submission suggested that such arrangements should be checked by welfare officers of the Family Court on an annual basis to ensure that they are operating in the interests of children involved.[3] Others have argued that such scrutiny would in many cases amount to an unwarranted and distressing intrusion on the private lives of separated parties and their families. In response to concerns that some victims of domestic violence may feel pressured to put their signature to inappropriate agreements which place themselves or their children at risk,[4] the Family Court has requested that funds be provided to research the extent of this problem.

The welfare of children

6.5 The Committee notes that in some cases, the Family Court may not be aware that child abuse is a problem when it registers consent orders or child agreements. Under s66ZE of the *Family Law Act*, children dissatisfied with arrangements already have the right to institute proceedings. However, the Attorney-General's Department concedes that:

> It is very difficult practically to provide in legislation for a child in these circumstances to be notified of the agreement and how appropriate proceedings to challenge its contents can be initiated.[5]

6.6 Section 64(5) of the *Family Law Act* already provides that the Family Court may appoint a welfare officer or court counsellor to supervise child agreements. The Court has been reluctant to use the provisions of this section, partly due to resource constraints and partly due to the terminology of the section itself. The term 'supervision' may imply a policing role, and it apparently creates some confusion in the minds of clients. The Court's case management system ensures that the majority of couples who register child agreements or consent orders at Family Court registries have been referred to counselling at least once. The counsellor who has seen the parents involved, and has some appreciation of the relationship dynamics within the family, would be an appropriate person to undertake any supervision deemed necessary by the Family Court.

---

3 J Neville Turner, 'Custody and access: are children's interests being protected?', **Children Australia**, v 1565, December 1990, p 19

4 See, for example, a case history provided by the National Women's Consultative Council, Submission 873, Vol 26, pp 5181-5183; and Submission 870, Vol 26, pp 5111-12

5 Letter to the Committee from Mr John Broome, First Assistant Secretary, Civil Law Division, Attorney-General's Department, dated 26 May 1992

Parenting Plans

6.7 The Family Law Council's **Patterns of Parenting After Separation** report states there should be a requirement that parents attempt to develop a mutually agreed and written 'parenting plan' as soon as possible after separation. Two broad aims of the Council's proposals are:

6.7.1 to promote a wide acceptance of the idea that separating parents have a responsibility to co-operate in making joint decisions about arrangements for the care of their children; and

6.7.2 to encourage the use of alternatives to litigation such as conciliation or mediation.

6.8 A major feature of the proposal is the incorporation into the 'parenting plan' of an agreement between parents as to the means that they will use to resolve any disputes that may arise over arrangements for children in the future. The idea is for parents to agree to a framework for resolving any future disputes which they cannot settle between themselves, and to promote the awareness and use of alternative forms of dispute resolution. It is argued that parents are more likely to feel a sense of commitment to agreements that they reach themselves on a basis of mutual consent than to imposed solutions, and that conflict that may arise as circumstances change is more likely to be resolved if parents have given forethought to the most appropriate means of resolving that conflict.

6.9 The Council's support for the parenting plan concept follows its examination of recent reforms to family law legislation in some US states. The Council points out that following much debate about the relative merits of joint custody and sole custody, many countries, such as the UK, and the states of Washington, Florida and Maine, have all amended legislation to stress children's needs and shared parental responsibilities.[6]

6.10 The Council has expressed its particular support for the legislative direction taken by Washington State, and suggests that it may provide an appropriate model for legislative amendment in this country. The Council notes that Washington's *Parenting Act* requires that each couple must submit a parenting plan where an application for a legal separation or dissolution is made. Parents are able to include as much or as little detail as they wish in the plan, but at minimum, the plan must address the following issues:

(a) allocation of decision making authority;
(b) residential provisions for the child(ren);
(c) financial support for the child(ren); and

---

6 Family Law Council, op cit, p 38

(d) dispute resolution processes to be used in the event that future conflict is unable to be resolved directly.[7]

6.11 The Council suggests that with some amendment, the application forms 4, 5 and 7 could form the basis of parenting plan proposals by being rewritten to remove existing terminology and to include a range of options for the division of responsibilities in relation to specific aspects of parenting. Parents would be required to provide a minimum level of information in such forms, as they are now, but could choose the level of additional detail that they wished to include in their parenting plan, according to their individual needs.

6.12 As research suggests that 'patterns of behaviour established during the first eight weeks after separation are likely to continue throughout the separation', the Council recommends that legal practitioners and Family Court personnel should be required to provide parents who are considering instituting proceedings under the Act with information about parenting plans. It is also recommended that marriage counsellors and other professionals who work with separated couples should provide their clients with information about parenting plans.[8]

6.13 The Family Law Council is careful to stress that there may be cases where it will not be appropriate or possible for parents to devise mutually agreed parenting plans:

> Not all parents are capable of or willing to co-operate or communicate to the extent necessary. Where it is apparent that the dispute will go on to litigation - for example because of allegations of child abuse - parents may be unable to negotiate all aspects of child arrangements on a fair and rational basis.[9]

Submission comment

6.14 The Committee heard some support for the use of parenting plans from organisations which work with separated couples. For example, a representative of the Legal Aid Commission (ACT) stated that:

> We see somewhere around 3,000 Canberrans at that very first moment when they are wondering what their rights are, and they really use the Senator's language. They talk about winning, losing and 'what's in it for me'. At the moment, with the structure of the phraseology used in the Act, it is very difficult - although not impossible - to encourage either parent to

---

7 ibid, p 39
8 ibid, p 40
9 ibid, p 41

> think in terms of paramount importance going to the welfare of the child, and to the fact that neither will win or lose. Certainly the notions of parenting plans, as recommended in the paper, strike us as being very good ideas.[10]

6.15 Similarly, a representative of the Marriage Guidance Council of South Australia told the Committee that:

> We would like to get right away from this concept of access and custody and move to a joint parenting plan. When we talk in that language with parents, despite the distress that they are experiencing by just being in the room together around the marital relationship, it seems to invite them more to co-operate, to look at the best interests of the child, and no matter what is happening with their relationship they are going to continue to be the joint parents of these children throughout their life...We need to be working towards what they can come to an agreement with, even if it is only a small thing in the beginning, if that can be set up successfully and agreed to and then shown to be working, then it is more likely that a next stage could be addressed.[11]

The Family Court

6.16 In contrast to these views, the Family Court's response to the Family Law Council's recommendations in respect of parenting plans has been cautious. The Family Court states that it is opposed to a requirement that a parenting plan should be submitted as a necessary prerequisite to litigation, given that the fact that parties are proceeding to litigation is indicative of the absence of co-operation necessary for a successful parenting plan.[12] The Court also states that parenting plans are currently recognised within the Court and used by counsellors where possible, but that they are an appropriate tool only where both parents are ready and willing and motivated to consider children's issues.[13]

6.17 The Family Court's submission suggests that parenting plans may not offer sufficient protection for children at risk:

> It is important to appreciate that a child needs to know who has responsibility for his/her care. An abused child needs to know there is protection from abuse and have the opportunity to rely upon and trust a

---

10 Transcript, 27 March 1992, pp 1259-60
11 Transcript, 22 October 1991, pp 444-445
12 Submission 940, Vol 30, p 5831
13 ibid, p 5830

caring adult. It is therefore necessary to know who is in charge and/or has control or responsibility for the child.[14]

6.18 The Family Court also argues that there might be difficulties of enforcement if the Court were to make detailed parenting plans part of its orders, as the level of detail included in such a plan 'would be used by some litigants...as an even more potent weapon for harassing their former partner than is the case with present orders'.[15] The Court recommends that parenting plans be included as one of the factors to be considered under s64(1) in proceedings relating to the custody, guardianship or welfare of or access to a child.

Conclusions

6.19 The Committee believes that preparation of parenting plans may help to promote more responsible attitudes to post-separation parenting and reduce reliance on litigation as a means of resolving disputes. Parents need to be made aware of the possibility of developing a parenting plan and the advantages of such agreements to avoid confrontationist litigation. However, the Committee does not believe the development of a parenting plan should be compulsory.

6.20 At present, all Australian parents who file for the dissolution of marriage or for the commencement of proceedings in respect of children's matters, are required to provide basic information about how they intend to share responsibilities for the care of their children with their ex-spouse. Form 4, the application for dissolution of marriage, requires information relating to residential arrangements for the children and other arrangements for the welfare of the children, including housing, supervision, education, health, access, maintenance and financial support. Form 5 is a joint application for dissolution of marriage and requires the same information as Form 4; Form 7 is an application for the initiation of proceedings and requires details relating to each of the children of the marriage, present arrangements for custody, guardianship and access and proposed changes to those arrangements.

6.21 In the Committee's view parenting plans could be integrated with existing case management processes and the forms discussed above. The concept of parenting plans is already implied in the existing requirements of the Family Court for separating parents to provide information to the court on present and proposed arrangements for the child/ren. Currently, the Family Court's case management system aims to reduce the number of issues over which parents litigate by providing that, during the lead up to a contested hearing, the Court may refer couples to counselling or mediation to encourage them to seek co-operative solutions to relatively minor disagreements. This process would not be impeded by the use of parenting plans; on the contrary, the use of standard

---

14 ibid, p 5830
15 Submission 940, Vol 30, p 5831

parenting plan forms in conjunction with the assistance of counsellors or mediators might help parents to isolate and contain areas of disagreement, and may provide parties with a greater sense of involvement in decision-making.

6.22 While the Family Court may be correct in assuming that some parties may make ambit claims, the Committee feels that there may be value in requiring parties to focus on an overall strategy for dividing responsibilities for children when completing parenting plans. A requirement that parties indicate broad areas of agreement would help to place disagreements at issue in context, and reinforce the notion that parents retain joint responsibilities, even though they may disagree on specific issues.

6.23 The Family Court has recommended that the existence of a parenting plan is a factor to be considered under s64(1) of the Act in the adjudication of contested disputes, to include consideration of the parenting plans advanced by each party. The Committee supports such an amendment.

Recommendations

6.24 The Committee recommends that:

38 information on the existence and purpose of parenting plans be made available to separating parents and professionals in the family law area; and

39 the development of a parenting plan should not be a prerequisite to litigation.

Allegations of child sexual abuse

Evidentiary problems

6.25 Submissions made to the Committee provide evidence of widespread concern about the capacity of the Family Court to deal with cases of alleged child sexual abuse. If the allegation is malicious the accused party will be prevented wrongfully from having contact with the child/ren; if the allegation is factual and the result of a real concern on the part of the other parent then the child/ren must be protected. A major concern is that cases often hinge on conflicting evidence and the veracity of either party's evidence is difficult to substantiate in the absence of a criminal conviction. The manner in which allegations are investigated, and the manner in which children are questioned may affect the reliability of the evidence that is obtained and evidence can be frequently called into question. As it is often nearly impossible to assess the facts with absolute certainty, judges often feel that they have no option but to make a tentative finding, precluding or limiting access to children.

6.26 It is important to note that, where allegations of child sexual abuse are made, it is the responsibility of State government organisations to undertake any investigation. Once a complaint is made to state welfare authorities, and if a child is taken into care, any existing orders of the Family Court are suspended until such time as the matters are resolved by the state agencies.

6.27 It is difficult to assess the validity of the many claims about malicious allegations which were made in submissions to the inquiry. This problem was highlighted by the Family Court in its submission:

> The problem is that, in most cases, the alleged perpetrators will deny the allegations, whether they are true or false. It is often very difficult for those assessing such allegations to believe a young child's statements against those made by an adult. Alleged perpetrators will fiercely deny allegations and blame the other parent for 'putting words into the child's mouth'. In a court, such denials can be particularly convincing.[16]

6.28 Dr Kenneth Byrne, a clinical psychologist, gave evidence to the Committee in Melbourne. Dr Byrne outlined some of the evidentiary problems, as he saw them, especially the lack of training 'expert witnesses' have in this area:

> The second point I would like to make is that virtually every day across this country, expert witnesses - psychologists, psychiatrists and others - are asked to form an opinion based on their examination of whether sexual abuse is likely to have taken place or unlikely to have taken place. At the same time, I would suggest, none of those experts, myself included, have had any formal training in how to make that decision.[17]

6.29 The Committee, and the Family Court, are aware that allegations of child sexual abuse and any resulting cancellation or limitations of access may have disastrous consequences for totally innocent parties. At the same time, poor handling of investigations can exacerbate the difficulties intrinsic in this type of case, with the result that the level of danger to the child is not fully appreciated by the Court, and the child is returned to an abusive situation.

6.30 The following comments, from Professor Brent Waters, of the Department of Child and Adolescent Psychiatry within the Prince of Wales Children's Hospital, provided the following evidence to the Committee, bring together many concerns which were raised in other submissions:

> My clinical experience and that of psychiatrists and psychologists practising in similar jurisdictions overseas suggests that substantiation of the child

---

16 ibid, p 5885
17 Transcript, 23 April 1992, p 1696

sexual abuse in family law matters occurs in no more than 50 per cent of cases, and possibly as few as 30 per cent of the remaining majority, it can be established in some cases that sexual abuse has not occurred, and in other cases, there is a likelihood that sexual abuse has occurred but substantiation has not been possible. Thus a significant proportion of parents against whom these allegations are made - possibly a third or more - are not guilty of this misconduct - and yet their relationship with their child(ren) is delivered a fatal blow when the allegation is made but is not investigated thoroughly nor dealt with by the Court promptly.

Currently, the court appropriately errs on the side of the children and uses a very stringent test of unacceptable risk which has been established in recent case law. Moreover in an effort to improve the quality of evaluation of these allegations, I understand that the Family Court of Australia has recently directed that all such allegations are referred to the appropriate State or Territory Department of Child and Family Welfare (in NSW, this is the Department of Family and Community Services). However in my experience these Departments do not provide a sufficiently thorough or unprejudiced investigation. If the investigation is not comprehensive and unprejudiced, then 'unacceptable risk' will unnecessarily exclude a large number of parents.[18]

State authorities

6.31 The Family Court, and a number of other professionals who have made submissions to the Committee, have expressed concern about the varying quality and availability of the various State services responsible for investigation of abuse. Major concerns related to lengthy delays in investigations, inadequate expertise to undertake investigations by state authorities once notified and resulting poor quality evidence coming before the court, the imbalance of resources allocated by state authorities to urban and country areas.

6.32 The Family Court advised the Committee that levels of expertise and systems varied significantly from State to State, with the result that investigations varied in the amount of time taken to conduct them and the quality of the evidence produced by the investigators.[19] The Chief Justice also voiced the Family Court's concern about the inadequate resources provided by State agencies to deal with many complaints in country areas compared with the cities.[20]

---

18 Submission 105, Vol 3, p 559
19 Transcript, 29 May 1992, pp 1898, 1900, 1994
20 ibid, pp 1899-1900

6.33 In its submission to the Committee, the Family Court has expressed inadequate resources provided by State departments in areas investigating allegations of child abuse, put added pressure on the resources of the Court to undertake their own investigations even though it was not really their role. The Court suggested the consideration of a number of options:

6.33.1 the State Departments assume a broader assessment role in these cases once they have been referred from the Family Court. This would involve the incorporation of material in relation to custody and access in any protective assessment made by Departmental officers;

6.33.2 counsellors incorporate investigative assessments in Reports in the case of those families presenting for determinations of issues re custody and access, and where the child's protection might well be ensured by a change in custody or access arrangements.[21]

Protocols

6.34 The Family Court advised that it has developed protocols with relevant State agencies to improve co-ordination and co-operation in the handling of child abuse matters. Currently, the Family Court has no legislative mandate to conduct investigations of allegations of abuse. As noted earlier, the varying quality and availability of State investigation services may considerably delay proceedings in the Family Court, with the result that arrangements for the care of a child may not be determined by the Court for many months after the initial allegation is made. Delays are exacerbated if criminal proceedings are initiated in State courts:

> The time element usually arises if there is a prosecution, or a proposed prosecution. This Court cannot go on to determine issues in relation to child sexual abuse if it is in the hands of prosecuting authorities. When we do have jurisdiction, we give cases of this sort priority and would hope to deal with them as quickly as possible. In fact, our case management guidelines are directed at that end.[22]

Supervised access in cases of alleged child abuse

6.35 The question of contact between a child and the parent accused of abuse during the investigation of the allegations, presents the Family Court with a further

---

21 Submission 940, Vol 30, pp 5893-94
22 Transcript, 29 May 1992, p 1900

dilemma. The Family Court has defended its policy in relation to supervised access in the following terms:

> The Court has at times been criticised for not stopping access in all cases where an allegation of child abuse has been made. On the other hand it has also been criticised by those who take the part of the alleged abusing parent for giving weight to false allegations, and for allowing supervised access or not allowing supervised access, whichever the orientation of the person making the criticism.
>
> These one-sided critics fail to realise that whether the allegation is true or false, the matter has to be given a hearing for each side to be presented. In the interim the Court has three choices; that is no access until the matter is heard, supervised access or access as normal.
>
> If access is suspended or supervised pending a full hearing of the matter then the case is expedited and heard as soon as possible. Even so it might be some time before the case is heard for the reasons previously given. The Court is cognisant of its dilemma. If the allegation is true then the child must be protected from further abuse and it is appropriate that access be stopped. If it is false the relationship between the parent and the child is severed for a period until the allegation can be tested.
>
> Alternatively access can be ordered under supervision. Quite often the person nominated as supervisor by the parent who is the alleged abuser does not believe that abuse could have occurred and hence is not trusted by the other parent to ensure that the child is protected. For this reason the Court will usually require that the supervision be undertaken by some independent person who has agreed to take on this responsibility and who is acceptable to both parties.[23]

6.36 It is not always possible to arrange for supervised access. A potential supervisor may be deemed not suitable by the custodial parent or it may not be possible to arrange a suitable location where access can take place. Also, the lack of available supervision may cause great emotional distress to a parent who is denied all contact with a child, while the lack of subsidised supervision services may pose a threat to the welfare of children in some cases, as relatives, who may not be suitable in all cases, or other unsuitable parties, may be enlisted to supervise access. The Committee has had many complaints which suggest that relatives are often totally unsuited for this responsibility, as they may not believe the allegations, and hence may not maintain adequate supervision.

---

23 Submission 940, Vol 30, p 5887

6.37 The Family Counsellor's Association was one of many organisations which expressed concern about the lack of facilities for supervised access when this is ordered by the Family Court. The Association pointed out that:

> Some voluntary agencies will provide assistance for their own clients by providing premises where supervised access can occur but few agencies will provide staff for this purpose as their own workloads are usually too high. People who are not already clients of an agency face even greater problems.
>
> Given that the number [of cases] is not large and that supervision is essential in some cases, the FCA would argue that this support should be made available through a statutory agency such as the Family Court Counselling Service or the welfare section of the Department of Social Security.[24]

Child welfare law

6.38 The Family Court has recommended that consideration should be given by the Commonwealth and the States to the initiation of negotiations towards the enactment of a unitary body of Australian law relating to child welfare. The Court has also pointed to considerable confusion surrounding the exercise of wardship and *parens patriae* powers by various State and Federal Courts.

6.39 The Family Court notes that delays in the finalisation of arrangements for the alleged victims of abuse could be considerably reduced if the Family Court was given clear jurisdiction to deal with all matters related to the care and welfare of children which arise during divorce cases. This would mean that custody, access, and child protection or welfare matters that arise during divorce proceedings could all be considered together, in context, and relatively quickly, by the one court.

6.40 The Family Court notes that for this to be possible, it would be necessary to amend the Family Law Act, to make it clear that the Court has the power to exercise wardship and *parens patriae* jurisdiction. This course of action has been supported by the Law Council in its submission to the inquiry:

> For the Court to be a truly specialist court dealing with all facets relating to the welfare of children, it is appropriate that the states refer to the Commonwealth their power in respect of adoption of children and in respect of wardship of children.

---

24 Submission 763, Vol 23, p 4435

There is general acceptance of the view that judges of the Court are particularly well equipped and sensitive to the issues involving children's welfare.[25]

Conclusions

6.41 The Committee regards the steps taken by the Family Court in cases involving allegations of child sexual abuse as appropriate. In particular, the development of protocols with the states is a positive step. The Court's options so far as access is concerned are limited and have been exercised so that the child is protected. The use of a separate representative in cases of alleged child abuse has been discussed in Chapter Five. The Committee sees benefit in the proposal of the Family Court for it to be given the jurisdiction to exercise wardship and *parens patriae* powers. However, as the Committee has not considered this issue in sufficient depth, the Committee considers that a detailed review of this area of the law be undertaken, by the Family Law Council.

Recommendations

6.42 The Committee recommends that:

40 a detailed review of the jurisdiction of the Family Court in relation to child welfare be undertaken, with a view to establishing whether the jurisdiction of the Family Court be increased to include wardship and *parens patriae* powers; and

41 the review be undertaken by the Family Law Council.

Domestic violence and children

6.43 A number of submissions to the inquiry have suggested that there is a need for changes to the manner in which some judges of the court, and magistrates with family law jurisdiction, approach the resolution of disputes over children in cases where domestic violence is involved. Some submissions have argued that the courts have not, in the past, paid enough attention to the effects of violence on children, and have therefore granted access in some cases where it is not appropriate. Others have suggested that in some cases, the terms of access orders made by the Family Court have conflicted with the terms of protection orders issued by magistrates courts to protect one party, usually the custodial mother, from further violence.

---

25 Submission 415, Vol 11, p 2331-2

6.44 The National Women's Consultative Council has expressed concern that:

> There appears to be very little appreciation on the part of the Family Court that violence inflicted by a husband on his wife is relevant to custody and access...violence appears to be taken into account for custody and access only where it is directly against the child or children.
>
> It is inappropriate to ignore violence inflicted by a husband upon his wife. Apart from the damage that violence inflicts on its direct recipient, such violence indicates a lack of care and consideration for the children.[26]

6.45 The Committee was disturbed by the number of letters and submissions it received from women who reported that violence during access handovers had caused considerable fear and distress to themselves and their children. The Committee did not have the resources to undertake the detailed investigation of particular cases that would be necessary to establish the extent of inappropriate access orders in domestic violence cases being issued by the Court. However, the Committee has seen some evidence to suggest that many women have experienced violence on court-ordered access visits, and this is of great concern.

6.46 The Family Court, in making decisions about access, must weigh up a set of factors that often conflict:

6.46.1 the potential risk to the custodial parent;

6.46.2 the possible effects, including emotional damage, violence or the threat of violence on children;

6.46.3 the possible emotional damage to the child if he or she is denied contact with the non-custodial parent; and

6.46.4 the desire of the partner who has perpetrated violence to maintain a relationship with their children.

6.47 Relevant case and statute law does not specify the precise circumstances in which it is appropriate for the Family Court to deny access. In its submission, the Court points to case law which provides authority for the view that parents do not have a right to access, and that access is only appropriate if it advances the welfare of the child.[27] It may be that in domestic violence cases, the granting of access would be highly inappropriate. However, the Court has expressed its reluctance to make orders forbidding access.[28] It suggests more intensive counselling as a means of reducing

---

26 Submission 873, Vol 26, pp 5176-7
27 Submission 940, Vol 30, pp 5855-56
28 ibid, p 5858

conflict in some cases, rather than denial of access.[29] The Court states that denial of access will only be an option in those cases where the level of conflict and the potential for ongoing violence continue.[30]

State domestic violence orders

6.48 It has been put to the Committee that many domestic violence victims may be disadvantaged in custody and access matters if they have applied to a state court for an order for personal protection. For example, the Queensland Domestic Violence Council (QDVC) has suggested that in the past, some victims of domestic violence have been forced to negotiate access arrangements before suitable protection orders have been issued:

> Because domestic violence orders can often be obtained rapidly through the Magistrates Court system, women are often involved in obtaining such orders before they have received full legal advice in relation to issues such as custody and access. In particular, in Queensland, women are often encouraged by some groups to act for themselves under our Domestic Violence (Family Protection) Act and are often at court without legal support.
>
> In our experience, Magistrates are requesting information about access arrangements before granting protection orders and this causes some women to negotiate access arrangements with their violent husbands in court corridors, sometimes without the benefit of any legal information. The anecdotal information of members of the Council is that some inappropriate access orders have been made in these circumstances.[31]

6.49 The QDVC provided two photocopied examples of protection orders issued in magistrates courts which included orders in relation to access that clearly contradicted the terms of the protection order. In one of these orders, the violent ex-husband was ordered to stay away from the residence of his ex-wife, with whom the children of the marriage were living. However, the same order specified that the ex-husband should collect and return children to the children's home following access visits.

6.50 However, the Committee also heard from a number of men who had been accused, in their view quite unjustly, of domestic violence and prevented from seeing their children or from gaining custody.[32] Another submission stated:

---

29 ibid, p 5866
30 ibid
31 Submission 870, Vol 26, pp 5111-2
32 See for example, Submission 906, Vol 27

It is not uncommon for such custodial parents to obtain restraining orders in order to make pre-emptive strikes against their unsuspecting ex-spouses, to circumvent access awards made by the Family Court and to hurt the ex-spouse as much as possible - with utter disregard for their children's feelings.[33]

Conclusions

6.51 The Committee believes that improved co-ordination between the Family Court and the Magistrates Court may help to reduce the incidence of inappropriate orders being issued by either court.

Access handover centres

6.52 Another concern raised in submissions was that, while orders for access continue to be made in cases where the potential for violence exists, or where protection orders have been issued, few safe facilities are available for supervising the handover of children.

6.53 Many submissions to the inquiry have argued that, in recognition of the lack of alternatives for ensuring that access handover is safe, the Commonwealth should provide funding for the establishment of centres which are designed specifically to provide this service. The Lone Fathers Association of Australia in Western Australia in particular, based their submission on the need for official centres for supervised child access and managed handover for non-custodial parents who had had a 'no access' order or a restraining order taken out against them. The submission argued for either the provision of special centres, staffed by appropriately qualified people, or the expansion of services offered by existing child-care centres.[34]

6.54 At times the Family Court has ordered that access handover takes place at a police station, and it has been put to the Committee that this practice is generally highly inappropriate. In evidence provided to the Committee, the Police Commissioners' Advisory Group expressed great concern about facilities available for access handover at police stations. The submission outlined the problems:

(a) no prior notification of the arrangement and police are therefore unaware of any possible problems, eg, domestic violence, which may arise;

---

33 Submission 17, Vol 1, p 60
34 ibid, p 59

(b) orders sometimes specify change over of custody/access during periods when the police station is unoccupied;

(c) orders sometimes specify change over at police stations totally unsuitable for such transfers;

(d) the arrangement provides a false sense of security for the custodial parent. Police cannot act until the victim has been assaulted, etc, and there is little to prevent a deranged parent from murdering the other parent at a police station other than an increased probability of being apprehended.[35]

6.55 The Police Commissioner's Advisory Group recommended that police stations not be designated as custody/access handover centres unless properly staffed and equipped to do so, unless the officer in charge of the station has agreed to do so and unless a copy of the order is available to the officer in charge at least 40 hours before the nominated time.[36]

Conclusions

6.56 The Committee takes the view that, if it is considered that police protection is necessary to prevent violence, or to alleviate an overwhelming fear of violence on the part of the custodial parent at access handover, then the granting of access may well be inappropriate until such time as the Family Court is satisfied that the threat of violence no longer remains. In any event, the Committee considers that access/custody handovers should only take place at police stations, an unsuitable environment for children, as a last resort and only then if very stringent requirements are met. These include appropriate staffing and prior notification of any arrangement.

6.57 On the balance of the evidence currently before it, the Committee is not convinced that the further development of access handover centres is the most appropriate response to the problem. Such centres would require significant resources and the Committee is uncertain as to the benefits to be gained from the establishment of such centres for the number of people requiring them.

---

35 Submission 778, Vol 24, p 4679
36 ibid, pp 4679-80

Recommendation

6.58 The Committee accordingly recommends that:

42 no orders be made for the transfer of custody/access to child/ren either inside or outside a police station unless:

42.1 it has been positively ascertained that the police station is suitably staffed to facilitate such a change-over;

42.2 the officer in charge of that police station agrees to the police station being used as a custody exchange point;

42.3 a copy of the order has been made available to the officer in charge of the police station at least 48 hours prior to any custody/access change-over.

Other significant issues

6.59 The Committee considered the situation of grandparents who wish to be able to continue to have contact with their grandchildren but because the custodial parent is reluctant or actively discourages such contact, the grandparents are withdrawn from the child/ren's lives. Another issue of significance to many access parents concerned the relocation of the family, be that relocation from one side of Sydney to the other, interstate or a distance of hundreds of kilometres intrastate. Such relocation can create significant problems for parents who wish to see their children, but because of limited time or financial resources or both are prevented from doing so, either entirely or for longer periods than would be the case if the custodial parent had not moved away with the children.

Grandparents

6.60 The Committee has received a number of submissions which call for greater legislative recognition of the important role that grandparents may play in the care of children following divorce. Evidence before the Committee suggests that there are many concerned grandparents who suffer great anguish at the loss of contact with their grandchildren which can follow an acrimonious separation. The Committee was also disturbed by evidence and letters received from concerned grandparents who believed that their grandchildren were suffering as a result of maltreatment, or acrimony between the parents, but felt powerless to do anything for the children.

6.61 Mrs Leila Freidman, convenor of the Victorian-based Grandparents Support Group, provided oral evidence which summed up the concerns expressed in other submissions and letters to the inquiry:

> We are concerned not so much for the grandparents themselves, who have lived a long time and handled a lot of situations; we are concerned about the children and the effect that being taken away from grandparents has on them...
>
> One of the most distressing calls that I get - and I get them from all over Australia - is from those who live in the same area as the grandchildren, which means they are running up against them more often. They run up to the grandparents, who have been babysitting them for years before the breakdown, in supermarkets and they are dragged screaming away from them. Little children cannot understand...
>
> We have kindergarten aged children running away in their nightclothes to the grandparents, to the one place that has not changed. The grandparents have no legal right to have them at all, and they have to take them straight back again, which is very upsetting for all of them. Slightly older children sneak drawings of themselves into the grandparents' letterboxes. They are frightened that the grandparents will not remember what they look like....[37]

6.62 Currently, although there is nothing in the *Family Law Act* to prevent grandparents filing applications for proceedings for legal access to grandchildren, the cost of proceedings may be prohibitive. In addition, the Family Court is very reluctant to uphold claims by a 'stranger' (ie a person other than a parent) if the custodial parent is hostile to the arrangement.[38]

6.63 Two concerned grandparents who appeared before the Committee were extremely distressed at the fact that there did not appear to be any feasible means of retaining relationships with much loved grandchildren in the face of hostility from the custodial parent:

> When we were seeking access to our grandchildren, the counsellor pointed out to us the high cost that would be involved. The figure quoted at the time, six or seven years ago, was as high as $8,000. The counsellor's advice was that even if the Court should grant an access condition, it was unlikely that it would be enforced. So it was a statement from a counsellor that the

---

37 Transcript, 22 April 1992, pp 1617-8
38 Submission 940, Vol 30, p 5861

cost was exorbitant and that, nevertheless, in all probability, it would not be complied with.[39]

6.64 For its part, the Family Court has admitted that it faces 'a very real dilemma in this area..':

> On the one hand it is apparent that continued relationships with grandparents and other family members are often of benefit to the child. On the other the question must arise as to where this process is to end. Does the community want to open the gates to yet another form of litigation in the family area? Is it not true as Strauss J said in **E and E**, that access orders impose a considerable constraint upon the custodial parent? Is it likely to be in the best interests to impose further constraints in favour of other classes of persons, particularly when the fact that they are imposed by a Court suggests that they are imposed in circumstances of hostility between the parties involved?[40]

6.65 The difficulty faced by judges of the Family Court in determining what will be in the best interests of the child given the particular fact situation of each case is highlighted by the following passage from **E v E** (1979) FLC 90-645, which is cited in the Court's submission to the inquiry:

> For my own sociological part, I would say that the more loving, caring people this child can have contact with, the better for the child. The greater exposure the child can have to its biological links with its paternal grandparents, the better for the child, short and long term...
>
> I express my deep sorrow at the ongoing conflict here, and the inability of the families to at least bury their own antagonism to try to provide for D [the child] an extended relationship. The sociological point of view, however, does not in this case parallel exactly the legal point of view. So long as the mother remains with the hostility that she has in this case, it would be my view that the access sought would only engender difficulties in the mother's relationship with her own child.[41]

6.66 Several submissions suggested that grandparents should be able to participate in counselling or conciliation conferences. One grandfather suggested to the Committee that:

> Grandparents or other relatives should be given the opportunity to be involved in access considerations....near relatives and particularly

---

39 Transcript, 7 February 1992, p 1028
40 Submission 940, Vol 30, pp 5863-64
41 ibid, p 5862

grandparents from either the mother's or the father's side - would be of assistance in resolving these types of situations.

I am not too sure...whether grandparents could be involved in a custody situation or a property settlement. They could perhaps be involved in the counselling along those lines.[42]

6.67 Following its consideration of this issue, the Family Law Council has stated that:

> While Council agrees that such people play a valuable role in a child's life, and ongoing contact with them is important for a child after separation, it does not consider that input by significant others to the parenting plan is desirable or practical. Marriage breakdown is a traumatic personal experience for the parents and child as it is. The necessity to include others in post-separation negotiations would be unworkable and place too much pressure on an already emotional situation. Where provision for ongoing contact with other people is to be made in the parenting plan, Council believes it should rest on the initiative of the parents to consider this in addition to the other elements of the plan. The same considerations would apply with regard to the question of input by step-parents to the parenting plan.[43]

6.68 The Committee notes that in recent years, many US States have passed legislation which formalises the circumstances in which the courts may award grandparents legal rights of 'visitation' (access) or custody following the divorce of the children's parents.[44] Most of the US statutes require that the child's welfare and 'best interests' must be considered before granting access rights to grandparents.[45]

6.69 However, the interpretation of relevant statutes by various US state courts has been the subject of considerable controversy and criticism, particularly in cases where access to children was granted to grandparents despite strong opposition from one or both parents.[46] It has been argued that in such cases, access has been granted on the generalised presumption that the maintenance or re-establishment of the grandparent/grandchild relationship will be in the best interests of the child.[47] Critics

---

42 Transcript, 7 February 1992, p 1029
43 Family Law Council, op cit, p 40
44 Sara S Rorer, 'Grandparent Visitation Rights', **Cincinnati Law Review**, Volume 56, No 1, 1987, p 296
45 ibid, p 298
46 ibid, p 302
47 ibid, pp 301-2

of this presumption argue that there is very little research to support it[48] and that 'grandparent visitation litigation...is characterised by significant inter familial stress'.[49]

6.70 At present in the UK, contact orders are made under the *Children Act 1989*. A contact order is an order requiring the person with whom the child lives to allow the child to visit or stay with the person named in the order, or for that person and the child to otherwise have contact with each other. Grandparents can and do make applications for contact orders.

Conclusions

6.71 The *Family Law Act 1975* already permits parties other than parents to institute proceedings, including those for access, under the Act.[50] The Committee has concluded that no further amendment to the *Family Law Act* is necessary. However, the Committee strongly believes that more should be done to encourage separating parents to consider the beneficial role that grandparents may play in the post-separation care of children.

Relocation of children by the custodial parent

6.72 Over 100 submissions, and a similar number of letters to the Committee raised concerns about the difficulties faced by non-custodial parents in gaining access to their children when the former spouse moves interstate, or many hours away, with the children. (Here the Committee is not talking about abduction, but about the relocation of the family by the custodial spouse, for whatever reason). It would appear that many non-custodial parents find the costs involved in travelling to and from access visits prohibitive; others point to the fact that the number of hours that they must spend travelling to and from access reduces the amount of time that they actually have to spend with the children. In some cases, the parent who seeks court-ordered access has travelled many hundreds of miles to see the children, only to find that the custodial parent denies them access when they get there:

> I am aware of one case in particular where a non-custodial parent travelled for five hours (from the former family home) to exercise access with children, only to be told by the custodial parent that all three children were ill and unavailable that particular weekend. There was nothing this parent could do but return home. Later in the day the so called 'ill' children were photographed playing in a park by sympathetic relatives.[51]

---

48 ibid
49 ibid, p 301
50 Sections 63C(1) and 64(2)
51 Submission 504, Vol 15, p 2934

6.73 Some submissions suggested that in cases where the custodial parent chooses to move interstate, he or she should be required to share the costs and travelling time involved in providing the children with contact with the non-custodial parent. The submission referred to above had this to say:

> It should be remembered that access is a child's right and not that of the parents' and costs associated with access should be shared by both parents to eliminate the practice of making access almost impossible...[52]

6.74 Several submissions have argued that if the custodial parent decides to move a long distance from the residence of the non-custodial parent, then the custodial parent should be made to bear all of the costs associated with travelling to and from access visits. A handful of submissions have suggested that the Court should be able to prevent the custodial parent from moving long distances away from the non-custodial parent.[53] For example, the Lone Fathers Association argued that:

> Under the present system there should be legal constraints instituted which forbids the custodial parent from significantly moving the home of a child subject to an access order without the consent of the access parent. If such a move is unavoidable, the custodian should meet the expenses of having the children returned for access visits.[54]

6.75 The Committee has received submissions which claim that in many cases, it would be totally unjust to prevent a custodial parent moving interstate, or to make that parent share the costs or travelling time of access visits. The Domestic Violence Crisis Service (Inc) stated that:

> We are concerned about the powers of the Court to restrain a custodial parent from moving interstate with the children. Usually the reason for the move is to escape intimidation and violence. The Court's power to restrain the wife from moving can be invoked by husbands in family law proceedings to legitimise their wish for punishment and control of the wife's behaviour.
>
> The Court needs to recognise that the wife's wish to leave can be reasonable and necessary in circumstances of the husband's own making. Her departure may mean less access for the husband, but that may be inevitable and necessary to preserve her well-being and strengthen her capacity to care for the children.[55]

---

52 ibid
53 See also example, Submission 511, Vol 15, p 2967
54 Submission 781, Vol 24, p 4699
55 Submission 351, Vol 8, p 1802

6.76 One woman, who works as a registered nursing sister, advised that she left her alcoholic husband due to his emotional abuse of herself and her son, after several attempts at counselling through marriage guidance and drug and alcohol rehabilitation organisations. She told the Committee that:

> I left the relationship and moved interstate to the support of my family. To ensure emotional safety and security for us I left a house which I had equal financial input into and three years of work input. I have as yet received nothing back from this...the system has no appreciation of the demands placed upon a custodial parent...Examples of this are the fact that that custodial parent is still expected to contribute to travel time....when access happens usually once a fortnight it is more reasonable to expect the non-custodial parent to put in the time when the custodial parent has for the rest of the fortnight been faced with travel arrangements for the rest of the child's needs: school, after school activities, sport and shopping etc.[56]

6.77 The Committee did not receive any comment on this issue from the Family Court in its submission to the inquiry. However, the Committee notes that in contrast to English courts, which have primarily supported the custodian's right of freedom of movement, the Family Court of Australia has taken the approach that in each case where an application is made by the custodial parent seeking leave to move interstate with the children, the facts should be assessed against a number of general criteria.[57] For example, in **Craven v Craven** (1976) FLC 90-049, the Full Court stated that:

> ...in our view an order restricting the freedom of movement of the custodial parent should be made only if the welfare of the child clearly indicates that the other parent should have regular weekly access, rather than less frequent but longer periods of access...However, when alternatives are considered, there is no preponderance in favour of weekly access, provided that it is practical and reasonable to arrange for less frequent but longer period of access...[58]

6.78 In **Holmes v Holmes** (1988) FLC91-918, and following a review of the main authorities in this area, the Court identified a number of matters which should be considered when considering applications for leave to move. These included:

6.78.1 if the application is genuine, can the Court be reasonably satisfied that the custodian will comply with orders for access and other

---

56 Submission 832, Vol 25, p 4913; 4916

57 Andrew Davies, 'Comparative Review of Approaches to Long Range Access in Australia, England and New Zealand', paper presented to the 5th National Family Law Conference, Perth, 8-12 September 1992.

58 ibid, p 376.

orders made to ensure the continuance of the relationship between the children and the non custodial parent? If the Court is not so satisfied, then this would be a weighty, although not decisive matter against the success of the application;

6.78.2 the general effect upon the welfare of the children in granting or refusing the application and, in particular:

- the effect on the children of deprivation of, or diminution of, access and general association with the non-custodial parent and his family;

- any disadvantage to the welfare of the children in the proposed new environment; and

- the effect on the welfare of the children of the unhappiness of the custodian if their genuine wish to move is frustrated especially where the parent wishing to move is the unchallenged custodian of the children.

6.78.3 interstate cases - because of the broad nature of Australian society in which significant numbers of people move from one State or Territory to another, it may be difficult to maintain a position that the welfare of children who are moved from one part of Australia to another will be detrimentally affected by that fact alone. Issues concerning the childrens' welfare will be more important. The Court should keep in mind '...the principle that the custodian parent as, in general, a legitimate right to personal choice of residence in Australia and may have legitimate demand (constituted, for instance, by employment prospects or re-marriage) to move to another part of the country. In each case when such a question arises the proper needs, wishes and requirements of all concerned must be afforded adequate weight'.[59]

Conclusions

6.79 The Committee appreciates the financial and other difficulties which may be involved in the exercise of access rights when the custodial and non-custodial parents live a long distance away from one another. The Committee takes the view that in general, it is fair to expect that the custodial parent who moves a long distance away from the non-custodial parent should be required to contribute to the costs and travelling involved in access. However, the Committee notes that there may be cases in which it

59 ibid, pp 378-9

may be inappropriate to require the custodial parent to expend an equal share of the costs and time involved.

6.80 The Committee believes that as with other types of disputes surrounding access visits, it is important to take the facts of each case into account, rather than imposing rigid requirements that may be inappropriate or unjust in individual cases. For example, in situations where the non-custodial parent is significantly better off financially than the custodial parent, who has moved to be with extended family, either to find employment, or to escape harassment on the part of the non-custodial parent, it may be unfair to impose on the custodial parent a 50 per cent share of the costs and time of travelling to enable access to take place.

Recommendation

6.81 The Committee therefore recommends that:

43 when making access orders, or considering applications for variations of those orders, the Family Court should:

43.1 give consideration to the fairness and capacity of the custodial parent to share the costs and travelling time involved in the exercise of access rights by the non-custodial parent; and

43.2 where appropriate, include a requirement that the custodial parent contribute to such costs and travelling time in its access orders.