

## THE ‘NO CONTACT MOTHER’: RECONSTRUCTIONS OF MOTHERHOOD IN THE ERA OF THE ‘NEW FATHER’†

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### ABSTRACT

This article examines the production of new narratives of ‘selfish motherhood’ in family law, in the context of disputes about parent-child contact after separation. In the first section, I draw on my empirical research of contact enforcement litigation to tease out the contradictions and gaps between the dominant, or ‘stock’, stories of contact disputes, and some ‘counter’ stories that have emerged from the study. The second part of the article looks at the ways in which recent shared parenting reforms have combined with particular features of the Australian family law system to create a new classification of ‘bad’ parent – the ‘no-contact mother’. The analysis focuses on the constraining effects of this reconstruction upon women who raise concerns about a father’s capacity to care for the children.

### 1. INTRODUCTION: A RIGHT OF CONTACT

The past several years have seen the emergence of a number of new discourses of parenthood in family law, discourses that centre on ‘an idealized vision of the symmetrical family where power and roles are equal’.<sup>1</sup> In Australia, this has occurred against a backdrop of legislative reforms that established a new regulatory framework for post-separation parenting.<sup>2</sup> The new laws promote the idea of a co-operative parenting project between separated parents, including providing children with a qualified ‘right to know and be cared for’ by both of their parents after separation.<sup>3</sup> In many ways the changes resemble the private law provisions of the Children Act 1989 (UK),<sup>4</sup> and similar proposals have also recently been considered in Canada<sup>5</sup> and Hong Kong.<sup>6</sup> Indeed it has been suggested that there is a ‘contemporary cultural

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consensus' that the shared parenting model is 'the ideal custodial arrangement' for children.<sup>7</sup>

The Australian reforms comprise two amendments to the Family Law Act 1975 (Cth): the Family Law Reform Act, which has been operating since June 1996 ('the 1996 amendments'), and Schedule 1 of the Family Law Amendment Act, which came into effect in December 2000 ('the 2000 amendments'). The main aim of the 1996 amendments was (said to be) to ensure that parents would continue to 'share' the responsibility for raising their children after separation.<sup>8</sup> Among other things, they provided children with a 'right of contact' with each parent on a regular basis, subject to the child's best interests.<sup>9</sup> Following their implementation, there was a steep rise in litigation about contact in the Family Court (hereafter 'the court'),<sup>10</sup> with applications to enforce contact orders more than doubling since 1996.<sup>11</sup>

Two years after these changes, a Family Law Council inquiry found widespread dissatisfaction with contact orders among non-resident parents, its report noting numerous complaints about contact denial and problems with enforceability of orders.<sup>12</sup> The 2000 amendments responded to these concerns by broadening the Court's compliance powers. Anyone who breaches a contact order without a 'reasonable excuse'<sup>13</sup> can now be required to attend a parent education programme.<sup>14</sup> The Court may also make an order that compensates the non-resident parent for contact forgone as a result of the contravention, or adjourn the proceedings to allow the parties to apply to have the orders varied.<sup>15</sup> Further contraventions, and first offences that show a 'serious disregard' for the parent's obligations under the orders, may be penalized, as they could before the 2000 amendments, by the imposition of a fine, good behaviour bond or a prison sentence.<sup>16</sup>

Although the 1996 amendments are not identical to the private law provisions of the Children Act in all respects<sup>17</sup> – for example, the latter contains no statutory right to contact – both were heavily influenced by the concerns of fathers.<sup>18</sup> The majority of calls for changes to the law in Australia came from men who claimed that the Family Court was biased in favour of mothers in awarding custody, and who were unhappy with their perceived inferior status as access parents.<sup>19</sup> The Australian Government hoped that the shared parenting emphasis would enfranchise men as fathers.<sup>20</sup> The enforcement reforms are essentially an extension of this idea, designed to ensure that non-resident parents (who remain predominantly men) are not denied contact with their children where orders for contact exist.<sup>21</sup>

Joint parenting regimes have attracted a great deal of academic critique as well as journalistic comment in those countries where they have been introduced or mooted. Much of the academic commentary has focused on the emergence of 'participant father' discourses associated with the reform proposals,<sup>22</sup> and examination of the extent to

which these laws owe their existence to the anecdotes of disaffected men, rather than evidence about children's welfare.<sup>23</sup> The impact of the legislative changes has also been the subject of empirical studies in Australia and the UK,<sup>24</sup> and the findings from this research have given rise to critiques of the disjunction between the equality rhetoric underpinning the changes and the continuing gendered realities of contemporary parenting.<sup>25</sup>

Although the Australian parenting reforms were framed in terms of children's welfare, their provisions – especially the right of contact principle and the enforcement changes – might more accurately be described as a code for improving the entitlements of non-custodial fathers.<sup>26</sup> Men's expectations that this was the case is evident from their negative reactions to the first Full Court decision after the 1996 amendments were passed<sup>27</sup> (in which the court permitted a mother to relocate with the children, thus frustrating the father's regular contact with the children)<sup>28</sup>, and from their positive responses to the passage of the enforcement reforms, in which they expressed approval for what they saw as the law finally taking a robust punitive approach to mothers.<sup>29</sup> Alongside all this, and concurrently with the rise of the 'new fatherhood' discourses, new narratives of selfish mothers have emerged.

## 2. THE 'STOCK' STORIES OF CONTACT DISPUTES

As far as my partner's ex was concerned, the girls and her were a package deal. Say goodbye to her, say goodbye to the girls.

James, my partner, saw it differently and, after their relationship broke down, he spent night after night on the telephone to her, begging, pleading with her to let him see his daughters.

'I'll just take them to the park across the road from your house.'

'No.'

'Half an hour. Can I just spend half an hour with them?'

'No.'<sup>30</sup>

Stories about family law, and particularly about disputes over children, have become commonplace in the Australian press in recent years,<sup>31</sup> as they have in the UK<sup>32</sup> and other western countries.<sup>33</sup> Typically they feature hostile and possessive mothers on the one hand, and frustrated men on the other, men who have had to resort to court action in an attempt to see their children and who have found the legal system wanting.<sup>34</sup> A constant theme of these stories, in which gender is a central issue, is 'the power of women to deny contact'.<sup>35</sup> The underpinning assumption is of unidirectional power reposed in the resident parent/mother who controls access to the children and can alienate their affec-

tions. The mother's resistance to contact is invariably unreasonable, a function of her contempt for the father and/or her sense of 'ownership' of the children, rather than an exercise of care.

Just as the advent of fathers' rights groups can be seen as part of a wider 'crisis of masculinity',<sup>36</sup> these tales may be situated within a broader framework of 'crisis of motherhood' discourses. The denial of contact stories reflect more general debates in the print and electronic media about 'selfish mothering', including criticism of women who use paid child care rather than care for their children themselves,<sup>37</sup> concerns about the effects on children of being raised by welfare-dependent lone mothers,<sup>38</sup> and even anxiety about the increasing numbers of women choosing not to become mothers at all<sup>39</sup> (unless the woman is a lesbian or unpartnered, in which case she is selfish for desiring motherhood).<sup>40</sup> While mothers appear to be increasingly blamed for a variety of harms to children – for 'everything from eczema to bedwetting to schizophrenia'<sup>41</sup> – in the family law context they have come to be seen as the cause of 'father absence'. The paradigm 'bad' mother of Australian family law is the 'no-contact mother',<sup>42</sup> a woman who is 'selfishly determined to put her own interests ahead of those of her children' by denying them contact with their father.<sup>43</sup> This construction has become, since the reforms, a regularly used discursive strategy employed on behalf of non-resident parents in family law litigation, even when the caregiver is not seeking to have contact suspended altogether. At its extreme end, the argument is couched in terms of 'parental alienation syndrome', a classification which (purportedly) draws on psychiatric discourses of deviance.<sup>44</sup>

The idea of the selfish mother has apparently gained widespread purchase. The 1998 Family Law Council report indicated that there was a widely held view in the Australian community that the primary caregiver controls the circumstances under which the other parent can have contact with the children.<sup>45</sup> However, recent empirical studies suggest a more complex picture of contact disputes, and that non-resident fathers are not immune from selfishness when it comes to post-separation arrangements for their children.

### 3. OTHER NARRATIVES: THE EMPIRICAL DATA

Rose and Valverde have argued for a 'turning away from' the privileged sites of legal reasoning (such as appeal court judgments) when analysing social problems, in favour of examining 'the mundane, the grey, meticulous and detailed work of regulatory apparatuses . . . [where] . . . laws, rules and standards shape our ways of going on'.<sup>46</sup> In sympathy with this understanding of the 'mutual inter-dependence of law and norm',<sup>47</sup> and conscious of the hybrid of professional 'knowledges' that informs and constitutes the family law complex, studies of the par-

enting reforms' impact have concentrated on their effects on the practices of various 'players' in the system, rather than on shifts in legal principle. Two Australian research projects have explored the ways in which the new laws have been understood and used by counsellors, mediators, lawyers, judges and registrars of the court.<sup>48</sup> In the main, this was done by way of questionnaires and personal interviews, with one study supplementing this information with surveys of parents and a comparative analysis of unreported pre- and post-reform judgments.<sup>49</sup> A third project looked at the ways in which the legal and child welfare systems respond to women and children affected by violence and abuse after separation, focusing predominantly on contact issues.<sup>50</sup> The methodology comprised interviews and focus groups with women affected by domestic violence, and interviews with lawyers, social workers and domestic violence outreach workers in key agencies.

My more recent study of contact enforcement litigation entailed a retrospective analysis of 100 court files in which an enforcement application was listed for hearing in 1999 (ie, prior to the 2000 amendments).<sup>51</sup> The aim was to obtain information about the background to, and effectiveness of, applications to enforce contact orders. All of the relevant material on the files was examined – solicitors' letters, applications, affidavits, court orders, family welfare assessment reports, expert opinions, judgments, domestic violence intervention orders, and reports from the relevant child protection authorities – from the date the file was opened until the final contact-related matter. The research has yielded a rich set of qualitative and quantitative data, and it is primarily this material that is used here to reflect upon the extent to which litigated contact disputes resemble the 'hostile mother' stories popularized in the media. However, where relevant, the findings of the other empirical studies will be referred to.

#### *A. Some 'Counter' Stories of Caring and Control*

Contrary to the 'selfish mother' construction of contact disputes, the enforcement study data reveal a complicated amalgam of underpinning issues. The most common conflict theme in the files centred on the resident parent's concerns about the contact parent's parenting capacity ( $n = 65$ ). These ranged from reservations about the father's care giving skills ( $n = 7$ ) (for example, his impatience with the child's disability, or failing to adequately supervise a young child), to fears associated with his substance abuse and/or mental health problems ( $n = 15$ ) and risks of domestic violence and/or child abuse ( $n = 58$ ), with some constituting a mixture of concerns. Of these sixty-five cases, only five resulted in a finding that the mother had breached the orders. By contrast, the outcome of most was a variation of the orders to provide the children with safer or more appropriate arrangements for contact ( $n = 34$ ). This included orders that the father have no contact ( $n = 6$ ), orders for

supervised contact ( $n = 14$ ), and orders imposing conditions on contact occurring ( $n = 21$ ), such as a requirement that the father complete a parenting course or anger management programme.<sup>52</sup>

Not all files reflected (or solely reflected) this dynamic. Other, sometimes overlapping, triggers for disputes included a misunderstanding of the orders ( $n = 7$ ), logistical or financial difficulties associated with changed circumstances ( $n = 28$ ), and anxieties about a parent's new partner/step-parents ( $n = 15$ ). There were also cases in which the so-called contact dispute was a function of the father's unresolved feelings about the breakdown of the relationship, and in which contact had been used to vent his anger, interrogate the children about the mother's new partner, or plead for a reconciliation ( $n = 17$ ). And there were cases where the difficulties with contact were a manifestation of the parties' mutual hostility, and in which the former spouses had effectively become 'parenting opponents' ( $n = 7$ ). But the one-sided unreasonableness hallmark of the hostile mother stories was noticeably absent.

Only two files arguably fit the 'no-contact mother' stereotype, in the sense that the resident parent continued to refuse contact despite repeated enforcement rulings and attempts by the father to exercise it.<sup>53</sup> In both, the mother was convinced that the father had sexually abused the child(ren), and in each, the court determined that those allegations had no substance. However, in neither case was it found that the mother had deliberately fabricated the allegations – in fact both women were said to be genuinely attempting to protect their child(ren). In one case, the suggestion was that the mother's 'paranoia' about the father was associated with her mental health problems. In the other, it was determined that the child's sexualized conduct, which was the basis for the mother's concern, was simply 'attention seeking behaviour', but that the mother was not able to accept this. The trial judge in each case decided that the effects of the mother's belief constituted emotional abuse of the child(ren), and both files ended with a residence order in the father's favour.

Overall, very few cases resulted in a finding that the resident parent had breached the orders ( $n = 9$ ), and of those that did, only three contraventions were considered serious enough to warrant a penalty. The more common outcome was the making of new contact orders ( $n = 75$ ), not enforcement of the existing ones. It is significant that the most frequently cited concern about contact arrangements related to the issue of domestic violence ( $n = 55$ ), and that the majority of these ultimately resulted in restrictions being imposed on the father's contact ( $n = 32$ ). Abusive conduct included stalking, threats of violence (including death threats), assaults (including sexual assaults), and threats or attempts of suicide in front of the children. Often the 'contact dispute' was found to be a continuation of abuse that had been part of the parties' relationship prior to separation. The study's findings

show that non-resident parents in such cases are able to exert considerable power over the post-separation lives of the resident parent and children. Furthermore, they show that enforcement proceedings, and the threat of them, are used as a way of exerting this control. The image of the self-interested 'no-contact mother' has helped to obscure the extent to which the child's right of contact provides abusive men with litigation-based tools for harassing the child's carer.<sup>54</sup>

To illustrate this, consider one of the cases from the study.<sup>55</sup> The file showed that for a period of three years after separation, the father continually initiated proceedings for court orders. This included ten applications for interim and final orders dealing with contact (some of which involved applications to have the child medically and psychiatrically examined) as well as a series of applications to have his child support payments reduced, and three applications for enforcement of the consent contact orders that had been agreed upon in the early days of separation. In addition to these, the father made several notifications to the child welfare authorities alleging the mother was not a fit parent, each of which was investigated and determined to be unfounded. The father would also regularly tape record the child (who was two years old at the time the original orders were made) during contact visits, as well as recording the contact changeovers. At trial, the court found that he had used contact visits to 'pump' the child for information about the mother and her new partner, and that he had threatened to initiate further proceedings unless the mother agreed to forego the substantial amount of child support that he owed (he had not paid any child support in over a year).

The father's applications were uniformly unsuccessful in this case. The trial judge was critical of the father's conduct, and concluded that his contact would have to be strictly supervised because otherwise he would 'seize upon anything and endeavour to generate criticisms of the mother'. The court also made orders restraining him from making any more notifications to the child welfare authorities, and from submitting the child for further medical examinations. Although the mother ultimately obtained final orders limiting the father's contact, she had in the meantime endured a succession of threats, court hearings and child protection investigations. In other words, the father had effectively used the family law system to control her life for a period of three years, and his child had not enjoyed any meaningful contact in that time.

### *B. The Power of Ambivalence*

It has been pointed out that the penalty-style approach to breaches of parenting orders does not address the concerns of resident parents, such as the problem of parents who fail to exercise contact.<sup>56</sup> Enforcement is a remedy that is effectively only available to the contact parent,

in that the court will not coerce a person into maintaining a relationship with their child.<sup>57</sup> Thus the vast majority of applications to enforce orders are brought by men who allege that they have been denied contact by the resident parent, rather than by women seeking to have a father exercise contact with his child.<sup>58</sup> This profile was reflected in the file sample.<sup>59</sup> But one of the paradoxes of the cases is that the applicant father's contact with his children had often been sporadic and irregular by choice, despite the existence of orders,<sup>60</sup> and in some cases he had exercised no contact for several years prior to the application.

There were a number of ways in which this ambivalence was demonstrated. For example, in one file,<sup>61</sup> the father had shown no interest in seeing his daughter until she was a toddler, even though there were consent orders allowing him to spend time with her. Once he decided to exercise contact, the father pursued the issue (enforcement of the consent orders and an application for unsupervised overnight contact)<sup>62</sup> for two years, before suddenly moving interstate and discontinuing his application. There was nothing further on this file after that point to indicate that he had subsequently seen his daughter, even though by the time of his relocation, a welfare assessment report had suggested that the child would benefit from increased (supervised) contact with him.

In another file,<sup>63</sup> the orders provided for the father to exercise contact with his young son every second weekend, and this arrangement had apparently worked well for three years. The mother's resistance and the father's enforcement application arose after the child returned from a contact visit with third degree burns to his chin, chest and arms, due the father's lack of supervision. It transpired at the hearing that the father had, until recently, spent very little time with his son, and that the child had in fact been cared for primarily by his paternal grandparents during contact visits. A third file<sup>64</sup> contained documentation of forty-three occasions on which the applicant father had 'contravened' the orders by failing to turn up for contact.

Thus it seems that non-resident parents can and do breach the terms of contact orders with impunity, and are permitted a capacity for ambivalence in relation to their parenting that is not equally available to the primary caregiver. Smart and Neale have commented on this double standard. They note that while the English courts have been critical of 'implacably hostile' mothers, there is no such creature as the 'implacably irresponsible' father.<sup>65</sup> Women's relative lack of autonomy has been hidden from view by the new law's removal and demonizing of the 'clean break' philosophy. Former spouses are now required to continue their joint parenting project, despite their separation. But in effect only resident parents are bound by this obligation. A non-resident father's failure to maintain contact with his children attracts no legal sanction, while the mother's failure to encourage contact attracts penalties and

parenting classes to teach her the importance of contact to her child's well-being.

Another theme that was reflected in the enforcement files was the non-resident parent's often self-interested, as opposed to child-centred, approach to contact.<sup>66</sup> This included failure to spend time with the children during contact visits, unwillingness to accommodate changes in the children's weekend activities, and insistence on the children organizing their lives around the contact arrangements. Examples are the father who aborts contact because the children have committed themselves to a social engagement during the weekend, rather than incorporate the engagement into his contact plans, and the father who leaves the children in the care of his partner during contact periods while he works.

The rhetoric of enforcement, which focuses on the non-resident parent's entitlement to contact, marginalizes the child's entitlement to be cared for by that parent during contact periods.<sup>67</sup> The findings of the enforcement study suggest that many non-resident parents, who are unlikely to have been the primary caregiver prior to separation, may have a greater need for parenting education than the resident parent. They suggest too that there remains a wide divergence between contact and parenting, and that some men continue to opt for the former.

### C. *'Debilitative Power'*

As suggested above, many of the contact disputes in the surveyed files were mired in unresolved relationship issues. The data revealed a range of manifestations of this, including hostility towards the other parent's new partner or her/his extended family, and a determined opposition to the other's parenting practices or future plans. Particular triggers for disputes were the obligation to pay child support, and the former spouse re-partnering.<sup>68</sup> Welfare assessment reports and judgments often referred to relationship matters as underpinning themes of the conflict – for example, references to men who objected to the mother's new partner disciplining the children,<sup>69</sup> to non-resident parents who blamed the former spouse for their financial problems,<sup>70</sup> and, in many cases, to the father's inability to come to terms with the separation,<sup>71</sup> and his use of contact to 'interrogate' or 'badger' the children for information about the mother.<sup>72</sup>

In *Family Fragments*,<sup>2</sup> Smart and Neale note that while a relationship is intact, people are prepared to put up with incongruencies in order to sustain their emotional investment in a joint future, but that once a couple separates, the former partners no longer have that incentive to co-operate.<sup>73</sup> As the authors point out, the new law's exhortation to continue co-parenting after separation means that parents actually have to take each other's needs into account much more self-consciously than before, and at a time when the other is most resented.

This is also at a time when they will of necessity be making decisions about the future directions of their separate lives. The effect of the shared parenting obligation and the enforceable right to contact is to create an autonomy differential as between resident and non-resident parent. It also provides fathers with what Griffiths calls 'debilitative power', that is, the power to hamper (in this case) the mother's self-development.<sup>74</sup>

To summarize: the new parenting laws constrain the resident parent (who is usually the mother) in a way that is not applied to the non-resident parent, and provide non-resident parents (usually fathers) with a capacity for self-determination and ambivalence in relation to their parenting that is denied to the child's primary carer. They also provide abusive men with sanctioned avenues for harassing the carer, and obscure the parenting responsibility aspect of the child's right of contact.

#### 4. PRODUCING 'BAD' MOTHERS

In this section of the paper, I draw on the empirical research to explore aspects of incoherence embedded within the Australian family law system, focusing on the ways in which these have contributed to the recent negative reconstructions of motherhood. My suggestion is that the production of the self-interested 'no-contact mother' has occurred through a symphony of factors, including the role played by the current dominant professional 'knowledge' of children's welfare, assumptions about the standard family of family law, and the system's reliance on 'summary' processes for making parenting orders.

##### *A. The Role of Professional Knowledge*

Non-legal forms of knowledge and expertise, including the knowledge claims of the medical, sociological and psychological sciences, have increasingly pervaded the legal complex.<sup>75</sup> Such professions, and particularly psychology and psychiatry, play a large role in the practice of family law relating to children. They affect decision-making in parenting matters in Australia in two ways: directly through observational and expert opinion reports provided to the court to assist judicial determinations, and indirectly by informing judges and legislators about the latest knowledge on children's welfare.<sup>76</sup> In addition, a number of researchers have demonstrated that solicitors practising family law are also influenced by the 'psy-professional' developments.<sup>77</sup>

In Australia, the Family Law Act 1975 has provided since its inception that the child's welfare or (now) 'best interests' is the paramount consideration when deciding what kind of parenting orders should be made.<sup>78</sup> However, the content of that principle has shifted over time. In the early years of the Act's history, the court's decision-making

reflected the views of John Bowlby and Goldstein, Freud, and Solnit.<sup>79</sup> It was thought at that time that the child's welfare was best promoted by ensuring the continuance of a stable emotional attachment to its mother. By the 1980s, research no longer focused on the importance of maternal bonding, but on the effects of maintaining a relationship with both parents.<sup>80</sup> Despite the contested nature of their findings, these studies led to assertions that children who maintained links with both parents after separation fared best psychologically, and father absence became linked to negative outcomes for children.<sup>81</sup> These views have now been consolidated in legal policy through the recent parenting reforms. Fathers' rights groups have used them to support their claims for a presumption of contact, arguing that failure to provide them with contact is child abuse.<sup>82</sup>

The high priority to be accorded to the right of contact becomes peculiarly evident in cases where there are allegations that the father has abused the child or the resident parent. While there is a prevailing view that domestic violence is not a common feature of family law disputes, empirical evidence suggests that the opposite is the case.<sup>83</sup> The chances of the right to contact versus the presence of violence being played off against each other as issues relevant to the child's best interests are thus quite likely. At the same time as the 'father absence' research, studies also documented adverse long-term effects on children of exposure to domestic violence,<sup>84</sup> and this understanding has also found its way into the law. So we now have in our legislation and practice, competing discourses of child harm and a (gendered) tension between them. The tension centres on a debate about which is more damaging for children, exposure to a father who has perpetrated spousal abuse, or lack of contact with that father.

The debate is exemplified in a recent English Court of Appeal decision, *Re L, V, M, and H (Contact: Domestic Violence)*.<sup>85</sup> In this case, the court commissioned a psychiatrist to provide an expert report on the issue of domestic violence and contact.<sup>86</sup> The report notes that the deleterious effects on children of exposure to domestic violence occur even if the children are not directly involved in it, and suggests that there should be 'no automatic assumption' that contact with a previously or currently violent man is in the child's best interests. It goes on to propose that, 'if anything, the assumption should be in the opposite direction', and that the father should be required to show that he can offer something of benefit to the child. After considering the report, Lady Justice Butler-Sloss concluded:

The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting.<sup>87</sup>

In Australia, the domestic violence/right to contact tension is dealt with in particular cases by way of a legal test, referred to as the 'unacceptable risk' test. This essentially provides that contact should not be ordered where it would pose an unacceptable risk of harm to the child, meaning that the potential benefits of contact are outweighed by the likely detriment.<sup>88</sup> The Courts developed this test for determining cases involving allegations of sexual abuse, but its relevance has now been legislatively extended to the issue of domestic violence.<sup>89</sup> The judges of the Australian Family Court took note of the effects on children of sexual abuse and domestic violence in a series of cases decided in the mid-1990's.<sup>90</sup> In these decisions, the court proved sensitive to the wider emotional and psychological effects on children of exposure to a parent who has caused physical harm. This included taking a cautious approach to the use of supervised contact, for example, suggesting that there may still be an unacceptable risk of trauma to the child in having supervised contact with a father who has been abusive in the past. The case law also established that the effects of the non-custodial parent's conduct upon the caregiver (such as where there had been a history of domestic violence) might justify a refusal of access if it is likely to impact adversely on her capacity to care for the child.<sup>91</sup>

The findings of several of the empirical studies suggest that there has been a retreat from this sensitivity in recent years, and that concerns about the effects of domestic violence have been displaced by a desire to maintain contact.<sup>92</sup> Rationalizing the tension now often means making orders for contact that provide a 'neutral changeover' arrangement to reduce the risk of physical harm to the mother.<sup>93</sup> What has been erased by this approach is the link between spousal abuse and child harm, that, as the report for the English Court of Appeal suggested, violence to a partner is poor parenting. Instead, the belief that denial of contact is (more) damaging has become the new orthodoxy. And the 'father absence' research, or perhaps more accurately a *perception* of the findings from this research, is implicated in the transformation.<sup>94</sup> So for example, one Family Court judge has argued, purportedly on the basis of 'the psychological literature', that 'it is almost impossible to overstate the importance to the child of the maintenance of an on-going relationship with their non-custodial parent'.<sup>95</sup> The result of this perception is that the former concerns about the emotional effects of violence have been 'downgraded',<sup>96</sup> and as Adrienne Barnett has claimed, 'the "bad father" seems to have practically disappeared'.<sup>97</sup>

### *B. Family Violence: Still Hidden after all these Years*

A related factor that has contributed to the production of the new selfish mother identity in contact disputes is the lingering assumption that families affected by domestic violence are rare. The recent parenting reforms have provided a norm that is based on an ideal post-

separation family, one that reflects 'strong confidence in the possibility of ending a relationship amicably'.<sup>98</sup> Thus the current Australian vision of family law is dominated by images of separating parents who are all potentially 'co-operative and respectful',<sup>99</sup> despite empirical evidence that issues of spousal violence and child abuse form the 'core' business of the Family Court.<sup>100</sup> The perception of rarity is also reflected in continuing judicial statements that assume contact with the non-resident parent will be beneficial 'in most cases',<sup>101</sup> or as one Australian judge has put it, that 'the Draconian order of refusing access' should only be made 'in exceptional circumstances'.<sup>102</sup> Recent empirical research suggests that legal practitioners and counsellors also advise, and sometimes pressure, clients to abandon claims that fall outside this (ideal) norm,<sup>103</sup> and that the authors of welfare assessment reports are similarly affected.<sup>104</sup>

The expectation of a 'standard' post-separation arrangement in family law seems difficult to shift in Australia.<sup>105</sup> When linked to the perceptions discussed in the previous section, the result of the current model is a construction of children's welfare in which 'father absence' is a greater social problem than domestic violence, and of the 'usual' contact dispute as a hostile mother/thwarted father problem and only exceptionally a protective mother/harmful father problem, and rarely anything more complex than this.

### *C. The Role of 'Summary' Processes*

What has been suggested so far is that a new rule is operating in the practice of family law, namely, that contact with fathers is almost always good for children (or lack of contact harms children). And that this rule has come about, at least in part, through the influence of new professional understandings of child development, and because of the lingering assumption that domestic violence is a rare phenomenon among the family law client population. In this section of the paper I want to show how, in combination with this rule, the kind of family law system we have operates to limit women's ability to voice concerns about a father's care of the children. Smart has argued in the UK context that, associated with the equality-based reforms, 'an erasure' has taken place in which the mother has 'lost her standing', that 'the moral discourse of care' in relation to motherhood has become 'an exhausted script'.<sup>106</sup> It seems to me that a similar dynamic is occurring in Australia. I want to suggest here that to a large extent this erasure has been facilitated by our family law system's dependence on 'summary' processes for the making of parenting orders, and an associated mind-set which sees the reaching of an agreement as a successful (and immovable) conclusion.

The Australian family law system is built on a consent order culture. Fewer than 5 per cent of applications for orders make their way to a

final hearing. Many get to an interim hearing and obtain orders there, but the majority of disputes, even among those that reach an interim hearing, are 'resolved' by consent orders,<sup>107</sup> and such orders will usually be negotiated by solicitors under considerable time pressure. Consent orders about parenting can also arise by parties entering into a private agreement, again normally negotiated between their solicitors, which is forwarded to the court and converted into enforceable orders. It takes a court registrar approximately twelve minutes to scrutinize these arrangements and make the orders.<sup>108</sup> Interim hearings, which are designed to establish some workable temporary arrangements pending trial, are similarly expedient. They are limited to a maximum of two hours, there is no examination of parties or witnesses to test allegations, and there will normally be no welfare or expert opinion report available to the decision-maker. Orders are made on the basis of the parties' affidavit material and submissions to the bench. Because of recent reductions in legal aid funding for family law matters, many parents are self-represented at these hearings.<sup>109</sup> In other words, the vast majority of people who use the family law system to obtain orders about their children do not get orders that are based on an informed consideration of the children's interests. Indeed, the 1996 amendments discourage parents from using the court to resolve disputes, exhorting them to reach a private agreement about their children instead.<sup>110</sup>

As discussed in the previous sections, the standard family of family law is a potentially co-operative one, and the standard rule that contact is good for children. The rule could be displaced or modified to fit individual children's circumstances if the parties' stories were subjected to scrutiny, but this is highly unlikely in the present system. The result is that it is being applied without consideration, and the woman who resists contact is necessarily a 'bad' mother. As Dewar has suggested, family law is increasingly concerned with giving effect to rights irrespective of consequences, and decreasingly concerned with searching for the welfare-maximizing outcome.<sup>111</sup>

The various empirical studies have provided evidence that a major shift has taken place in the making of contact orders since the 1996 amendments. They show that a 'pro-contact culture'<sup>112</sup> has pervaded interim court hearings and the professional advice given to family law clients,<sup>113</sup> creating new pressures on women to agree to contact regardless of their concerns about the father.<sup>114</sup> The enforcement files indicate that the emphasis on expediency in the family law system is implicated in the creation of unsafe contact arrangements. First of all, the findings suggest that the claims that women are flouting court rulings are inaccurate – the overwhelming majority of the surveyed files involved applications to enforce *consent* orders ( $n = 88$ ), not judicially determined arrangements. Only two files related to enforcement of orders that had been made after a contested final hearing, with the remainder having

been made in interim hearings. As noted earlier, the most common source of conflict in the enforcement study centred on the care giver's concerns about domestic violence ( $n = 55$ ). In most of these cases, the contact orders had been made by consent ( $n = 50$ ), and in many, the orders were ultimately varied to impose more restrictive contact arrangements on the father ( $n = 32$ ). But to illustrate the problems for women that I have identified with the system's decision-making processes, I want to use two case studies.

(i) *Case study 1*

This case<sup>115</sup> centred on a conflict between the parents of two children, one of whom was aged five years and the other was six-months-old at the time the parents separated. There had been an eight-year relationship prior to separation, two of which involved cohabitation. The father initiated proceedings in the local court seeking orders for contact with the boys every alternate weekend from Friday night until Sunday afternoon. The mother failed to appear at the hearing or file any answering material, and the magistrate made *ex parte* orders in accordance with the father's application. When the mother refused to comply with those orders, the father applied to have them enforced. She filed an application with the court to have the orders discharged and replaced by orders for limited supervised contact. In support of that request she alleged that the father had an alcohol abuse problem, and that she had serious concerns about his ability to care for the children as a result, particularly as the five year old was fearful of him. In the meantime, she continued to refuse the father contact in terms of the orders that had been made, and he continued to file enforcement applications. There followed over the next twelve months a series of interim hearings dealing with the enforcement applications and temporary variations to the contact arrangements, at each of which the mother represented herself because of lack of funds.<sup>116</sup>

At the end of that twelve-month period, an expert report was prepared for the court. The report validated the mother's concerns. Its author (a psychologist) found that although the father denied having a problem, his own description of his alcohol intake placed him in the 'harmful' category, and noted that the father exhibited behaviours associated with alcohol dependence, as well as suffering from 'impulse control problems'. The report also suggested that an alcohol dependent person 'cannot effectively meet a child's emotional and intellectual needs and cannot be relied on to responsibly ensure a child's safety'. As a result of this report, new orders were made by a judge providing for contact to be supervised as the mother had requested. It also required the father to participate in an alcohol use assessment and to undertake counselling. Nine months later a follow-up report was commissioned by the court to see if supervision was still warranted. It

noted that the father had not complied with either of the assessment or counselling requirements, and described him as having 'an explosive personality' and 'not prepared to accept any responsibility for difficulties' in his relationship with his children. It also noted that he was frustrated with the court system for having thwarted what he saw as his 'entitlement to contact'. The requirement for supervision was continued.

(ii) *Case study 2*

In another case,<sup>117</sup> the mother left the parties' home following a particularly brutal assault upon her by the father. She did not take the two children with her at the time, but went to stay with her parents. She immediately applied for and obtained an *ex parte* intervention order for her personal protection, and applied for an order for residence of the children. Her affidavit in support of her residence application referred to the father's frequent physical and verbal abuse of her, including accounts of being raped by the father's friends at his instigation and being subjected to the father's constant mood swings and jealous rages. She also cited the father's extensive history of convictions for firearm offences, and described being afraid for her life because of his rage at her leaving the home. Her affidavit noted that the father was 'usually remorseful' after his assaults on her, and that he would often buy her gifts of jewellery afterwards. She said: 'I have thirty to forty pieces of jewellery'. The father responded by denying the allegations, alleging the mother had been 'unfaithful' to him with 'many men', and ascribed the mother's visits to hospital (which her affidavit had linked to the father's assaults) to 'hypochondria'. Two days after his material was filed with the court, consent orders were made leaving the children with the father and providing the mother with fortnightly contact. The parties' solicitors negotiated these orders.

Some time later the father suffered a heart attack and was hospitalized. At this time the children went to live with the mother and new orders were made to give legal effect to that situation. Following his recovery, the father filed an application for the orders to be changed again to return the children to him. He also made a notification to the child protection authorities alleging the mother had failed to properly care for the children. The department investigated and reported that the allegations were unfounded.

As in the previous case, a welfare assessment report was prepared to assist the court determine the residence dispute. It concluded that the mother had clearly endured a relationship 'characterized by extensive abuse and violence', that her fear of the father was 'all pervading', and that the children were also clearly 'afraid of their father'. Following this report being made available to the parties' legal advisers, new consent orders were made (again negotiated by the solicitors) leaving the

children with their mother and providing the father with supervised contact for several hours each weekend at a supervised contact service.

A month later the father filed an application for enforcement of the orders. The mother had failed to deliver the children for contact, finding that she was too afraid to allow them to see their father despite the orders she had agreed to on her solicitor's advice. Instead, she filed an application seeking to have the consent orders varied so that the father would have no contact at all with the children. A further report, by a psychiatrist, was prepared for the hearing. It concluded that the mother was suffering from a 'panic disorder' and an 'anxiety depressive condition' consistent with years of severe physical and emotional abuse. The father's enforcement application was heard together with the mother's application for a 'no contact' order. The mother pleaded guilty to the breaches of the consent orders and received a penalty (a good behaviour bond). This was effectively displaced by the outcome of the mother's application. On the basis of the report provided to the court, the judge found that contact posed 'too many risks' to the children's welfare and suspended all contact (save that the father was permitted to send cards and letters to the children).

These case studies demonstrate that women who have concerns about (or are even afraid of) the child's father, do agree to contact taking place.<sup>118</sup> They also suggest that the family law system's reliance on 'summary' processes for making orders about children is contributing to the existence of inappropriate and unsafe contact arrangements. The paradox of the reforms is that while they promote an ongoing co-operative project between parents, as opposed to the former 'clean break' philosophy, they imagine this project in static terms. The policy of enforcing contact orders pre-supposes a final hearing of the disputed issues and a court ruling, and that the arrangements arrived at should be adhered to. The failure to recognize the rarity of final hearings in the system disregards the pressures on women to agree to contact, and renders invisible their struggles to co-operate with 'unsafe' men. Instead, women appear to be selfish – the 'site of the problem'<sup>119</sup> – when they seek to alter the contact arrangements they have apparently agreed to. The findings suggest that the combination of the unmodified contact rule with a system organized around consent arrangements has effectively prevented women's concerns about a man's parenting capacity from being heard. But they also suggest that more welfare-oriented and safer outcomes can occur if an informed consideration of the allegations takes place.

## 5. CONCLUSION

The enforcement study findings suggest that the reasons for the breakdown of contact orders are far more complex than has been presumed

by recent policy directions and by the stock stories of selfish mothers. Moreover, they indicate that assumptions about exclusive power being wielded by resident parents obscure other kinds of power and control that operate against the primary caregiver's interests. Bauman has suggested that the most conspicuous social division under post-modern conditions is between the capacity for self-constitution and the denial of such capacity.<sup>120</sup> In the present Australian family law culture, women who raise concerns about a father's contact with the child are subject to an imposed categorization that constrains them as parents. The idea of the 'no-contact mother' – the woman who puts her own interests ahead of her child's – has been brought into existence and shaped by a number of social and legal events, and central to these are the new ideas about child welfare/harm that the legislative reforms have given effect to. Many women thus labelled are indistinguishable from the former 'good' mother of the 1990s Australian case law, who was supported in her protective stance and her reservations about the father's parenting. But the combination of the new pro-contact rule, the expectation of co-operative families, and the system's reliance on summary processes for 'finalizing' parenting arrangements, means that many women's concerns are now falling on deaf ears.

One commentator has mooted the idea of having different 'messages' for different parts of the family law system, for example, leaving a flexible 'welfare of the child'–based discretion for judges to work with in contested hearings, and providing more 'efficiency-promoting' rules for parents negotiating in private.<sup>121</sup> The problem I have with this proposal is that this is essentially what already happens in practice, and it is working to the detriment of some children's well-being. I recognize that judicial determinations cannot be counted on for sensitivity to the vulnerabilities of women who suffer abuse,<sup>122</sup> but I fear that we might be constructing a whole new mode of harming children if we entrench a system whereby only parents with financial resources and endurance get the opportunity to have their protective concerns considered. In view of the British Government's interest in reforming the area of contact enforcement,<sup>123</sup> the evidence of this constraining trend in the Australian family law system provides an important warning note.

#### NOTES

<sup>1</sup> C. Smart and B. Neale (1997) 'Arguments against virtue: must contact be enforced?' *Family Law* 332 at 336.

<sup>2</sup> The Family Law Reform Act 1995 (Cth), which came into effect in June 1996.

<sup>3</sup> This right is subject to the child's 'best interests': Family Law Act 1975 (Cth), s 60B(2)(a).

<sup>4</sup> Which came into effect in October 1991.

<sup>5</sup> Canada, *For the Sake of the Children*, Report of the Special Joint Committee on Child Custody and Access (December 1998); Canada, *Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access: Strategy for Reform* (May 1999); Canada, *Putting Children's Interests First: Custody, Access and Child Support in Canada* (March 2001).

<sup>6</sup> Law Reform Commission of Hong Kong (December 1998) *Subcommittee on Guardianship and Custody Consultation Paper*.

<sup>7</sup> K. Kurki-Suonio (2000) 'Joint custody as an interpretation of the best interests of the child in critical and comparative perspective', 14 *IJLPF* 183 at 184.

<sup>8</sup> Australia, Senate, Family Law Reform Bill 1994, *Explanatory Memorandum* (November 1994) at para 5.

<sup>9</sup> Family Law Act 1975 (Cth), s 60B(2)(b).

<sup>10</sup> The Family Court of Australia is a national court that specializes in family law matters, including determining parenting orders under the Family Law Act for both nuptial and ex-nuptial children throughout Australia.

<sup>11</sup> There were 1,976 contravention applications filed with the Family Court of Australia in 1999/2000, an increase from 786 in 1995/96: <http://www.familycourt.gov.au/court/html/statistics.html>.

<sup>12</sup> Family Law Council (1998) *Child Contact Orders: Enforcement and Penalties*.

<sup>13</sup> A person will have a reasonable excuse for breaching an order if they did not understand the obligations imposed by the order, or, as was the case prior to the reforms, they 'believed on reasonable grounds that the deprivation of contact was necessary to protect the health or safety of a person': Family Law Act 1975 (Cth), s 70NE.

<sup>14</sup> Family Law Act 1975 (Cth), s 70NG.

<sup>15</sup> *Ibid* s 70NG(1).

<sup>16</sup> *Ibid* s 70NJ.

<sup>17</sup> See, for discussion of the differences between the UK and Australian statutes, J. Dewar (1996) 'The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) compared: twins or distant cousins?', 10 *Australian Journal of Family Law* 18.

<sup>18</sup> Kurki-Suonio, above n 7, at 189. This is also true of the recent proposals for custody reform in Canada: see N. Bala (1999) 'A report from Canada's 'gender war zone': reforming the child-related provisions of the Divorce Act', 16 *Canadian Journal of Family Law* 163.

<sup>19</sup> M. Kaye and J. Tolmie (1998) 'Fathers' rights groups in Australia', 12 *Australian Journal of Family Law* 19 at 33; R. Graycar, 'Equal rights versus fathers' rights: the child custody debate in Australia', in C. Smart and S. Sevenhuijsen (eds, 1989) *Child Custody and the Politics of Gender*, Routledge.

<sup>20</sup> R. Kaspiew (1998) 'B and B and the Family Law Reform Act', 12 *Australian Journal of Family Law* 69 at 70.

<sup>21</sup> Family Law Council, above n 12, at 20, 49, and 52-4; J. Tolmie (1998) 'Child contact orders: enforcement and penalties: the Final Report of the Family Law Council', 12 *Australian Journal of Family Law* 305 at 312.

<sup>22</sup> R. Collier (2001) 'In search of the "good father": law, family practices and the normative reconstruction of parenthood' 22 *Studies in Law, Politics and Society* 133; J. Drakich, 'In whose best interest? The politics of joint custody' in B. J. Fox (ed, 1993) *Family Patterns, Gender Relations*, Oxford University Press, 331.

<sup>23</sup> R. Graycar (2000) 'Law reform by frozen chook: family law reform for the new millennium?' 24 *Melbourne University Law Review* 737; H. Rhoades (2000) 'Posing as reform: the case of the Family Law Reform Act', 14 *Australian Journal of Family Law* 142; S. B. Boyd (2000) 'Can child custody law move beyond the politics of gender?', 49 *University of New Brunswick Law Journal* 157; M. Laing (1999) 'For the sake of the children: preventing reckless new laws', 16 *Canadian Journal of Family Law* 229.

<sup>24</sup> J. Dewar and S. Parker (1999) *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975 (Cth)*, Family Law Research Unit Working Paper No 3, Griffith University; H. Rhoades, R. Graycar and M. Harrison (2000) *The Family Law Reform Act 1995: The First Three Years*, Final Report, University of Sydney and Family Court of Australia; C. Smart and B. Neale (1999) *Family Fragments?*, Polity.

<sup>25</sup> Collier, 'In search of the "good father"', above n 22; S. Sevenhuijsen (1998) *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics*, Routledge, at ch 4.

<sup>26</sup> J. Dewar (1997) 'Reducing discretion in family law' 11 *Australian Journal of Family Law* 309 at 323-4; M. Troup (1995) 'The Family Law Reform Bill No 2 and its ramifications for women and children', 5 *Australian Feminist Law Journal* 111; Tolmie, 'Child contact orders' etc, above n 21 at 312.

<sup>27</sup> B. Muehlenberg (1997) 'Fatherhood under siege', *The Age*, 11 July 1997.

<sup>28</sup> *B and B (Family Law Reform Act 1995)* (1997) 21 Family LR 676.

<sup>29</sup> C. Prior (2000) 'Men welcome prison option in child access battles', *The Australian*, 29 December 2000.

- <sup>30</sup> 'Family feud', *SundayLife Magazine*, *The Sunday Age*, 1 October 2000.
- <sup>31</sup> For example M. Gliksman (1997) 'The real dangers of placing children second', *The Australian*, December 1997; M. Cosic (1999) 'Uncivil war', *The Australian Magazine*, 21–22 August 1999; G. Linnell (2000) 'The child's sacrifice', *The Bulletin*, 30 May 2000; 'Parents may face jail over child contact', *The Courier-Mail*, 29 December 2000; A. Horin (2001) 'Law can't turn bad fathers into good parents', *Sydney Morning Herald*, 24 February 2001.
- <sup>32</sup> Collier, 'In search of the "good father"', above n 22.
- <sup>33</sup> See Sevenhuijsen, above n 25, at 90.
- <sup>34</sup> C. Prior (1998) 'System cuts us out, say fathers', *The Australian*, 1 October 1998; 'Court out: one man's battle for his kids', *The Australian*, 24 December 1999; 'Father's lonely hunt for children', *The Australian*, 23 July 2001.
- <sup>35</sup> B. Arndt (2001) 'Whose baby?', *The Sunday Age*, 18 February 2001; B. Arndt (2001) 'How to make family law fairer for men', *The Age*, 30 August 2001. See for a UK example, R. Verkaik (2001) 'Ex-husband, not ex-father', *The Independent*, 3 April 2001.
- <sup>36</sup> R. Collier (1996) ' "Coming together?": post-heterosexuality, masculine crisis and the new men's movement' 4 *Feminist Legal Studies* 3; R. Collier (1995) *Masculinity, Law and the Family*, Routledge.
- <sup>37</sup> C. Milburn (2001) 'The stark choice for two women: a career or caring', *The Age*, 5 May 2001; P. Ellingsen (2000) 'A love that lasts a lifetime', *Sydney Morning Herald*, 8 May 2000; 'Attitudes of the '50s still dog working mothers', *Sydney Morning Herald*, 3 August 2001.
- <sup>38</sup> B. Arndt (2000), 'Are lone mothers being encouraged out of jobs?', *The Age*, 16 June 2000; A. Horin (2000) 'Beware of gurus bearing jobs', *Sydney Morning Herald*, 5 August 2000.
- <sup>39</sup> T. Colebatch (2000) 'The decline and fall of motherhood', *The Age*, 28 March 2000; 'The mother of all ills', *Sydney Morning Herald*, 9 December 2000; L. Hamilton (2000) 'A motherhood statement', *The Age*, 23 March 2000; M. Sayer (2001) 'Don't we want kids any more?', *The Sunday Age*, 17 June 2001.
- <sup>40</sup> F. Devine (2001) 'Love of the father is crucial', *The Australian*, 7 May 2001; M. Gordon and D. Farrant (2000) 'Howard sparks IVF storm', *The Age*, 2 August 2000.
- <sup>41</sup> L. Hamilton (2001) 'Don't blame bad kids on their poor mums', *The Age*, 25 May 2001.
- <sup>42</sup> This term comes from a conversation between two family law solicitors that took place during interviews conducted by the author for a previous family law research project.
- <sup>43</sup> Kaspiew, above n 20, at 82. As such she resembles the 'implacably hostile' mother of English family law: see Smart and Neale, 'Arguments against virtue', above n 1.
- <sup>44</sup> *In the Marriage of Johnson* (1997) 22 Fam LR 141; J. C. Sturge and D. Glaser (2000) 'Contact and domestic violence: the experts' Court report' [2000] *Fam Law* 615; Bala, above n 18, at 194.
- <sup>45</sup> Family Law Council, above n 12, at xi.
- <sup>46</sup> N. Rose and M. Valverde (1998) 'Governed by law?' 7 *Social and Legal Studies* 541, at 546.
- <sup>47</sup> *Ibid* at 542.
- <sup>48</sup> Dewar and Parker, *Parenting, Planning and Partnership*, above n 24; Rhoades, Graycar and Harrison, *The Family Law Reform Act*, above n 24.
- <sup>49</sup> Rhoades, Graycar and Harrison, above n 24.
- <sup>50</sup> K. Rendell, Z. Rathus and A. Lynch (2000) *An Unacceptable Risk: A Report on Child Contact Arrangements Where there is Violence in the Family*, Queensland Women's Legal Service Inc.
- <sup>51</sup> The sample comprises forty-nine files taken from the Brisbane registry of the Family Court and fifty-one files taken from the Melbourne registry. These registries were selected because they received approximately equal numbers of enforcement applications in the relevant year as well as the largest numbers of enforcement applications nationally. Every file in which an enforcement application was listed for hearing in these registries after 1 January 1999 was examined until the sample size was met. The sample represents approximately 14 per cent of the enforcement applications lodged in these registries in 1999.
- <sup>52</sup> Several cases resulted in orders with a combination of supervised contact and conditions.
- <sup>53</sup> Coded file M36 and Coded file B19.
- <sup>54</sup> Rendell, Rathus and Lynch, above n 50, at 37–8; J. Dewar and S. Parker (1999) 'The impact of the new Part VII Family Law Act 1975', 13 *Australian Journal of Family Law* 96, at 109; Rhoades, Graycar and Harrison, above n 24, at paras 5.110 and 6.31. See for similar findings in UK studies, M. Hester and L. Radford (1996) *Domestic Violence and Child Contact Arrangements in England and Denmark*, Policy Press, at 4; Smart and Neale, 'Arguments Against Virtue', above n 1; B. Neale and C. Smart (1997) ' "Good" and "bad" lawyers? Struggling in the shadow of the new law', 19 *Journal of Social Welfare and Family Law* 377.
- <sup>55</sup> Coded file B16.

<sup>56</sup> Tolmie, above n 21, at 312.

<sup>57</sup> Family Law Council, above n 12, at 20.

<sup>58</sup> Ibid at 3; Rhoades, Graycar and Harrison, above n 24, at para 5.88.

<sup>59</sup> The applicant in most cases was the non-resident parent ( $n = 92$ ), and most were men ( $n = 83$ ). There were only three resident parent applications (two women and one man), and none of these sought to compel the non-resident parent to exercise contact. The remaining five applications were brought by members of the child's extended family.

<sup>60</sup> This issue was noted in 22 files.

<sup>61</sup> Coded file B17.

<sup>62</sup> The mother resisted unsupervised overnight contact because of concerns about the father's violence.

<sup>63</sup> Coded file M23.

<sup>64</sup> Coded file B45.

<sup>65</sup> Smart and Neale, 'Arguments Against Virtue', above n 1, at 336.

<sup>66</sup> This theme was identified in thirty-three files.

<sup>67</sup> This marginalization resonates with Carol Smart's comments about courts not requiring fathers to demonstrate an ability to 'care for' children, but only that they 'care about' them: see C. Smart (1995) 'Losing the Struggle for another voice: the case of family law' 18 *Dalhousie Law Journal* 173 at 177.

<sup>68</sup> See also Smart and Neale, who found that one of the most difficult things for fathers to adjust to was the introduction of a new adult into the child's life: *Family Fragments*, above n 24, at 74.

<sup>69</sup> For example, Coded file M50.

<sup>70</sup> For example, Coded files B16, B30 and M41.

<sup>71</sup> For example, Coded files B1, B4, B27, M24 and M25.

<sup>72</sup> For example, Coded files B1, B10, B13, B35, M9, M16, M22, M31, M35, M39, M44.

<sup>73</sup> Smart and Neale, *Family Fragments*, above n 24, at 70–1.

<sup>74</sup> Ibid at 138–9; M. Griffiths (1995) *Feminisms and the Self: The Web of Identity*, Routledge, at 142–3.

<sup>75</sup> Rose and Valverde, above n 46, at 543.

<sup>76</sup> See L. Neilson (1997) 'Spousal abuse, children and the courts: the case for social rather than legal change', 12 *Canadian Journal of Law and Society* 101, at 116; M. Fineman (1988) 'Dominant discourse, professional language and legal change in child custody decision-making', 101 *Harvard Law Review* 727.

<sup>77</sup> A. Diduck (2000) 'Solicitors and legal subjects' in J. Bridgeman and D. Monk (eds) *Feminist Perspectives on Child Law*, Cavendish, ch 13, 251 at 257–8; Neale and Smart, '“Good” and “bad” lawyers?', above n 54.

<sup>78</sup> Family Law Act 1975 (Cth), s 65E.

<sup>79</sup> J. Goldstein, A. Freud and A. J. Solnit (1973) *Beyond the Best Interests of the Child*, especially at ch 3; J. Bowlby (1969) *Attachment*, Penguin; and J. Bowlby (1973) *Separation: Anxiety and Anger*, Basic Books.

<sup>80</sup> For a review of the various studies see B. Rodgers and J. Pryor (1998) *Divorce and Separation: The Outcome for Children*, Joseph Rowntree Foundation.

<sup>81</sup> A. Barnett (2000) 'Contact and domestic violence: the ideological divide' in J. Bridgeman and D. Monk (eds) *Feminist Perspectives on Child Law*, Cavendish, ch 7, at 129; F. F. Furstenberg, S. Morgan and P. Allison (1987) 'Paternal participation and children's well-being after marital dissolution', 52 *American Sociological Review* 695; W. C. Mackey and N. S. Coney (2000) 'The enigma of father presence in relationship to sons' violence and daughters' mating strategies: empiricism in search of a theory', 8 *Journal of Men's Studies* 349.

<sup>82</sup> Kaye and Tolmie, 'Fathers' rights groups in Australia', above n 19, at 57.

<sup>83</sup> G. Sheehan and B. Smyth (2000) 'Spousal violence and post-separation financial outcomes', *Australian Journal of Family Law* 102.

<sup>84</sup> J. Johnston, R. Gonzales and L. Campbell (1987) 'Ongoing post-divorce conflict and child disturbance', 15 *Journal of Child Psychology* 493; J. Peterson and N. Zill (1986) 'Marital disruption, parent-child relationships, and behaviour problems in children', 48 *Journal of Marriage and the Family* 295.

<sup>85</sup> [2000] 2 FLR 334.

<sup>86</sup> The report is reprinted in Sturge and Glaser, above n 44.

<sup>87</sup> *Re L, V, M, and H (Contact: Domestic Violence)* [2000] 2 FLR 334 at 341, per Butler-Sloss P.

<sup>88</sup> *M v M* (1988) 166 CLR 69; *In the Marriage of Bieganski* (1993) 16 Fam LR 353.

<sup>89</sup> Family Law Act 1975 (Cth), s 68K.

<sup>90</sup> *In the Marriage of Bieganski* (1993) 16 Fam LR 353; *In the Marriage of JG and BG* (1994) 18 Fam

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

<sup>91</sup> See especially *In the Marriage of Bieganski* (1993) 16 Fam LR 353.

<sup>92</sup> Rhoades, Graycar and Harrison, above n 24; Rendell, Rathus and Lynch, above n 50.

<sup>93</sup> Rhoades, Graycar and Harrison, above n 24, at para 5.67.

<sup>94</sup> A. Barnett, 'Child contact and domestic violence: the ideological divide (or, searching for the "bad father" in family law)', Paper presented to the 'Gender, Sexuality and Law' Conference, Keele University, 19–21 June 1998. Barnett's study of family law barristers found that their belief that contact benefits the child regardless of the father's violence towards the mother was generally justified by a reference to 'the psychological literature', although none of the barristers interviewed was able to identify the literature upon which their view was based.

<sup>95</sup> *In the Marriage of Koutalis and Bartlett* (1993) 17 Fam LR 722 at 744.

<sup>96</sup> F. Kaganas and S. D. Sclater, 'Contact and domestic violence: the winds of change?' [2000] *Family Law* 630 at 631.

<sup>97</sup> Barnett, above n 81, at 129.

<sup>98</sup> Kurki-Suonio, above n 7, at 194.

<sup>99</sup> The Hon Daryl Williams (1999) 'Shaping family law for the future', National Press Club Telstra Address, 27 October 1999, especially at para 10.

<sup>100</sup> T. Brown, M. Frederico, L. Hewitt and R. Sheehan, *Violence in Families: Report Number One – The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia* (1998, Monash University).

<sup>101</sup> *B and B (Family Law Reform Act 1995)* (1997) 21 Family LR 676 at 728.

<sup>102</sup> *In the Marriage of Koutalis and Bartlett* (1993) 17 Fam LR 722, at 743 and 746.

<sup>103</sup> Rhoades, Graycar and Harrison, above n 24, at paras 4.29, 4.32 and 4.33. See also Kurki-Suonio, above n 7, at 194; and Linda C. Neilson (2001) *Spousal Abuse, Children and the Legal System*, Final Report, <http://www.unb.ca/web/arts/CFVR/spousal—abuse.pdf>, Executive Summary.

<sup>104</sup> Rendell, Rathus and Lynch, above n 50, at 92.

<sup>105</sup> Note however that some respondents to the empirical surveys believed that domestic violence is extremely common in Family Court litigation: H. Rhoades, R. Graycar and M. Harrison (1999) *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report* (1999, University of Sydney and Family Court of Australia).

<sup>106</sup> C. Smart (1991) 'The legal and moral ordering of child custody', 18 *Journal of Law and Society* 395, at 396–7. See also S. Boyd (1996) 'Is there an ideology of motherhood in (post)modern child custody law?', 5 *Social and Legal Studies* 495.

<sup>107</sup> R. Hunter (1999) *Family Law Case Profiles*, Justice Research Centre, at xiii.

<sup>108</sup> <http://www.familycourt.gov.au/court/html/statistics.html>.

<sup>109</sup> J. Dewar, B. Smith and C. Banks (2000) *Litigants in Person in the Family Court of Australia*, Family Court of Australia.

<sup>110</sup> Family Law Act 1975 (Cth), s 63B.

<sup>111</sup> Dewar, 'Reducing discretion', above n 26, at 320. See also Kurki-Suonio, above n 7, at 188.

<sup>112</sup> Rendell, Rathus and Lynch, above n 50, at 20.

<sup>113</sup> Rhoades, Graycar and Harrison, above n 24, at para 5.109; R. Hunter (2000) *Legal Services in Family Law*, Justice Research Centre at 173.

<sup>114</sup> These are similar to the findings of research conducted in the UK on the impact of the Children Act: see Hester and Radford, above n 54; Smart and Neale, 'Arguments Against Virtue', above n 1; R. Bailey-Harris, J. Barron and J. Pearce (1999) 'Settlement culture and the use of the "no order" principle under the Children Act 1989' [1999] *Child and Family Law Quarterly* 53.

<sup>115</sup> Coded file B12.

<sup>116</sup> The empirical studies suggest that legal aid funds will not generally be made available to a parent to oppose contact unless, for example, there is medical evidence to support allegations of child abuse: see Rhoades, Graycar and Harrison, *Can Changing Legislation Change Legal Culture*, above n 105.

<sup>117</sup> Coded file M42.

<sup>118</sup> See also B. Smyth, G. Sheehan and B. Fehlberg (2001) 'Patterns of parenting after divorce: A pre-Reform Act benchmark study', *Australian Journal of Family Law* 114; Rhoades, Graycar and Harrison, above n 24, at para 5.25; Rendell, Rathus and Lynch, above n 50; H. Katzen (2000) 'It's a family matter, not a police matter: the enforcement of protection orders', *Australian Journal of Family Law* 119.

<sup>119</sup> C. Smart (1995) 'Losing the struggle for another voice: the case of family law', 18 *Dalhousie Law Journal* 173 at 185.

<sup>120</sup> Z. Bauman (1992) *Intimations of Postmodernity*, Routledge, at 198.

<sup>121</sup> Dewar, 'Reducing discretion', above n 26, at 326. See for discussion of one possible rule, S. B. Boyd, H. Rhoades and K. Burns (1999) 'The politics of the primary caregiver presumption: a conversation', 13 *Australian Journal of Family Law* 233.

<sup>122</sup> Neilson, above n 76; The Hon Justice K. A. Murray (1995) ' "Domestic violence and the judicial process": a review of the past 18 years – should it change direction?', 9 *Australian Journal of Family Law* 26.

<sup>123</sup> Lord Chancellor's Advisory Board on Family law, Children Act Subcommittee (2001) *Making Contact Work: The Facilitation of Arrangements for Contact between Children and their Non-Residential Parents; and the Enforcement of Court Orders for Contact*.

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