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Child Abuse and the Family Court

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Australia's Family Court has a strong tradition of innovation in its handling of family matters, but family law is a federal issue; child protection is a State issue. Is the Family Court equipped to manage those cases that come before it where child abuse allegations have been made?

This Trends and Issues paper looks at the problems surrounding this particular issue and reports on a recent research study which found that these families have many difficulties, including a history of family violence. The study challenges the community belief that false allegations of child abuse are more common in Family Court cases than in other situations. However, the research found that despite the fact that child abuse was severe in 70 per cent of the cases where family breakdown involved child abuse allegations, the families were not generally known to State child protection services.

The proposals to better manage child abuse allegations in residence and contact cases coming before the Family Court which are canvassed here need careful consideration by all agencies and governments concerned.

Adam Graycar
Director

In recent decades child abuse has become a public concern internationally. Yet little attention has been paid to child abuse issues in custody and access (now known as residence and contact), disputes that come before family courts, either in Australia or overseas. Research focusing on child abuse has not touched on family courts at all. Research focusing on family courts has rarely touched on child abuse, even when other family violence has been considered (Hewitt, Brown, Frederico & Sheehan 1996).

However, in recent years, the Family Court of Australia has become concerned (Harrison 1989, Norris 1993) about the Court's management of child abuse allegations in custody and access disputes. Their concern has centred on the inherent difficulties in resolving these cases. The disputes represent serious human problems for which there are no clear cut solutions. Furthermore, these cases consume considerable court resources and are further complicated by the fact that responsibility for them is split between federal and State authorities.

Consequently, when the research team approached the Family Court of Australia to undertake an investigation into the management of child abuse allegations in the Family Court of Australia, the Chief Justice, Alastair Nicholson, and the Judge Administrator of the Southern Region, Justice H. Frederico, provided generous support.

History of the Family Court of Australia

Just over twenty years ago, the Family Court of Australia was established as a federal court for the dissolution of marriages and

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consequent decisions about property and child custody and access. Subsequently, it assumed responsibility for custody and access matters for those children whose parents are not legally married, and also for various unrelated other matters. It has been a pioneering court, introducing no fault divorce, informal court procedures, and conciliation and mediation services. It now shares these features with other family courts, such as those found in the USA, the UK and New Zealand.

During the study described here, the *Family Law Reform Act* of 1995 was implemented. It did not affect the study but its changes should be noted. It sought to improve the position of children by encouraging parents to care cooperatively for their children after divorce by jointly making parenting plans. It changed old notions of custody and access to new ones of residence and contact. It assisted in removing jurisdictional conflicts between magistrates' court orders on domestic violence and family court orders regarding contact. Finally, the court was influential in making partner to partner violence a factor to be considered in residence and contact decisions.

Study Questions and Methods

Considering the paucity of previous knowledge, the study aimed to answer three broad questions: Who were the families involved in custody and access disputes where allegations of child abuse had been made and what were the problems they brought to the Court? What did the Court do with the problems? What was the outcome for the children?

To answer the questions, data were collected from the case records of one-third (n=149) of the tagged child abuse cases in the Melbourne Registry of the Family Court, randomly selected, and all (n=39) of the child abuse cases in the Canberra Registry of

the Family Court active from January 1994 to June 1995. In addition, staff from both registries — judicial, counselling and registrars — were interviewed. A small observational sub-study was completed on Pre-Hearing Conferences as an Australian complement to a UK study, directed by Professor Christine Hallett from Stirling University, Scotland.

Furthermore, related agencies contributed data, primarily the Victorian and ACT State child protection services. Potocols determined between the Family Court in each of its Regions and the various State child protection services have established that, once the Family Court is aware of child abuse allegations, the allegations must be referred to the State child protection services for investigation. The Family Court, usually, then delays action until a response is received.

Child Abuse Cases in the Family Court

As anticipated, the study found that the proportion of child abuse cases within the total of children's matters cases in the Family Court was small, some 5 per cent. The incidence showed little increase over recent years. However, increases are anticipated in the future. Firstly, an increase is expected due to the practice detected by the study whereby State protection authorities refer child abuse issues relating to certain categories of families, namely grandparents, foster parents and non-cohabiting parents, to the Family Court for resolution. Secondly, an increase is expected due to the growing number of cases with child abuse concerns identified by the staff of the Family Court.

Thirdly, an increase is expected due to the growing public recognition of what constitutes child abuse. In the

analysis of a comparison group of 100 cases of residence and contact disputes without child abuse allegations, abuse of children was described in 80 per cent of the cases. However, it was not presented as an issue to the court. The abuse was not recognised by the parents or professionals as abuse. As time goes by, it is anticipated that recognition will grow among parents and professionals and more cases will be presented as child abuse to the court.

Significance of Child Abuse Cases in the Family Court

While the incidence of child abuse cases was low at the beginning of Family Court proceedings when the cases were only a small proportion of the total, by the time the mid-point of possible court proceedings was reached, the study found that they had become half of the total cases. That is, they were not resolved with the same frequency as other custody and access cases and they remained within the Court's concern. At trial, at the end-point of proceedings, they were discovered to be one-quarter of the total. In addition, when one compared the numbers of cases proceeding in the Melbourne Children's Court for sexual and physical abuse with the numbers of cases proceeding in the Melbourne Registry of the Family Court in the same period, there was little difference, both in the numbers and in the severity of the abuse (Sheehan 1997).

Thus, without public or professional awareness, child abuse had become a core element of the load of the Family Court and the Family Court had become a significant part of the child protection system, almost as significant as the State Children's Court.

Study Findings

The study findings challenged beliefs held about child abuse

allegations in the context of partnership breakdown in the setting of the Family Court. The study showed:

- child abuse allegations made in the Family Court were no more frequently false than abuse allegations made in other circumstances, with false allegation being found to be 9 per cent;
- child abuse in Family Court cases was generally not mild abuse, with severe abuse (that is physical or sexual abuse or combinations of both) being found in 70 per cent of cases;
- the families were not usually families known to State child protection's services, with only 22.5 per cent being previously known, but families where various forms of violence had lead to family breakdown and to the Family Court.

Problems

A number of problems were found that contributed to difficulties in the management of these cases.

Family Difficulties. Despite the fact that the families were similar to the general population of their respective Registry regions in terms of physical and mental health, ethnicity and race, and socioeconomic class, they displayed some notable differences, suggesting they were families in considerable difficulties. Their circumstances had implications for court interventions.

Table 1: Percentage Unemployment and Non Employment Among Families at Melbourne and Canberra Registries

<i>Non-Employment/ Unemployment</i>	<i>Males: Melb.</i>	<i>Males: Canberra</i>	<i>Females: Melb.</i>	<i>Females: Canberra</i>
Unemployed	32.9	20	8.8	nil
Pension	9.1	nil	nil	nil
Non- Employed, including Supporting Parent benefit	1.8	nil	61.9	51
Total	43.8	20	70.7	51

Table 2: Percentage Incidence of Criminal Convictions Among Families at Melbourne and Canberra Registries

	<i>Males: Melb.</i>	<i>Males: Canberra</i>	<i>Females: Melb.</i>	<i>Females: Canberra</i>
Convictions	23.5	48	9.7	12.5

Firstly, unemployment and non-employment levels, especially among the Melbourne families, were high. It is unknown whether the unemployment occurred before the partnership breakdown and therefore contributed to it, or whether it occurred as a consequence afterwards.

A recent study (Gregory 1996) has pointed to the unemployment vulnerability of families with dependent children over the last two decades. Gregory identified males with dependent children as the group which has suffered the greatest employment losses in this period. He has also pointed to the fact that these men are likely to be partnering non-employed women, further increasing family vulnerability. Gregory's research suggests unemployment is a problem prior to partnership collapse.

A different point of view has been advanced in several other research studies which have concluded that men's employment is seriously affected by separation and divorce. One study, covering middle-class men and women, showed women developing an increased career commitment and success after marital breakdown and men going "off the rails" career wise (Arndt 1998). A study of working-class men showed them losing work attachment after marital

breakdown (Gerson 1993). An Australian study covering a cross-section of men found they suffered major unemployment for very long periods after marital breakdown (Jordan 1996). These views, while different in some respects, underline particular problems for males with work and partnership breakdown that are likely to flow into residence and contact disputes.

Secondly, members of the families had high rates of criminal convictions (see Table 2).

Both in Melbourne and Canberra half of the males involved in abuse had more than one criminal conviction, as did half of the Melbourne females, but not the Canberra females. The males in both cities had a wide range of convictions, for property crimes, alcohol and drug offences, and assault, commonly in conjunction with another offence. Females had a narrower range of offences, mostly drugs and social security offences. Their crimes against persons were limited to child abuse, whereas males had convictions for a variety of such offences including child abuse.

Thirdly, considering the convictions for alcohol and drug offences, it was not surprising to discover that rates of substance abuse were high. In both registries an average 41.6 per cent of males had substance abuse problems, half with both drugs and alcohol. Of the females, 26.4 per cent had substance abuse, with only one-third suffering from drug and alcohol abuse. The problems of these families, particularly men, concerning offences against the law and alcohol and drug abuse, may, like the issues around employment, flow into residence and contact disputes.

Fourthly, partner to partner violence was high (see Table 3).

Table 3: Percentage Incidence of Partner to Partner Violence Among Families at Melbourne and Canberra Registries

Violence	Males: Melb.	Males: Canberra	Females: Melb.	Females: Canberra
Allegations Against	47	unknown	9.3	unknown
Confirmed Allegations Against	17	unknown	2.8	unknown
DVO's Against	40	33	7.3	7

Bearing in mind the above pattern of violence, especially father to mother violence, it is not surprising that the second most common cause given by the parties themselves for separation was family violence. This was a different pattern of breakdown from that reported in other separation and divorce studies (Wallerstein & Kelly 1996).

An attempt was made to categorise the nature of the family violence using the well known Johnston and Campbell typology of family violence (Johnston & Campbell 1993). Some 30.9 per cent of all partner to partner violence could be categorised as “episodic battering by males”, the most serious type which Johnston and Campbell describe, but the rest did not fit the typology. The typology was found to omit any reference to violence spreading through several generations, to multiple sources of violence within the one family, and to violence spreading out into the community, for example to bystanders, to related service professionals or to court staff. All these forms of violence were found among these families.

Agency Relationships. Serious problems were found with the relationship between the State child protection services and the Family Court. The problems were a result of the inherent difficulties of interagency coordination, described so clearly in Hallett’s studies of interagency relationships in the UK child protection services (Hallett 1995).

In the case of the Family Court and the state child protection services in Australia, there

are critical differences, in terms of legislation, organisational goals, organisational procedures, organisational clientele, the professionals each employs, the staff training provided, the gender of staff and in the prestige accorded to the professional groups in each organisation. Justice Faulks has detailed how these differences are embodied in the language of the two types of organisation, thereby demonstrating that even the most basic communication between them may be fraught with misunderstanding (Faulks 1997).

The problems between the two types of organisation were found to start right at the beginning of the notification to the state services by the Court. The state services were found to fully investigate only half of such notifications, the others being classified as not requiring further investigation (Armytage 1997, Hume 1997).

That information was not sent to the Court. For, the format for reporting back to the Court, prescribed in part by the State service’s desire to protect the family through keeping the data confidential to itself, produces a circumscribed and cryptic response. It allows only one of the following four replies:

1. State services to take action themselves in the Children’s Court,
2. State services to be a party to the Family Court action,
3. State services to take no action but possess information available to Court only following a subpoena,

4. State services to take no action.

Since most responses, some 77.6 per cent, fall into the last two categories, which effectively provide no information to the Court, the Court is left in ignorance about the actuality of the abuse, and with an ongoing need for further investigation.

Despite the fact that the State services did not substantiate many cases (22.5 per cent in Melbourne were substantiated), the time taken for investigation was long. The shortest was a day, the longest 180 days, and the average 42 days. The average delay was a real issue because the ages of the children in the study were very young, with the modal ages being four and five years. Substantiation rates were found to vary between States, with the Victorian rate being half of the South Australian rate (Hume 1997). In both cases, the Family Court substantiation rates were the same as for the other sources of notifications to the State child protection services.

Finally, different definitions of child abuse were found to be used by the State services and the Family Court. The legislation underpinning the various State services sets out state definitions which are usually four single categories of abuse, physical, sexual, emotional and neglect. However, the Family Court takes its definitions from the descriptions of the abuse presented to the Court. Thus it may reflect more accurately the reality of the abuse, which was identified as mostly multiple forms of abuse, primarily physical and sexual abuse. In addition, the Family Court accepts witnessing violence as abuse whereas the State services do not.

Family Court Procedures. Many problems were found with the way the Family Court proceeded. The cases took a long time. On average they took seventeen and a half months from the time the

allegation was made to the time of resolution. However, the average time taken increased as the average age of the child decreased. Some cases stayed in the Court until the child was old enough to take control. The adversarial nature of the dispute resolution and the ability of a parent to bring the case back to Court repeatedly, despite the situation of the child, assisted in prolonging proceedings.

Thus, each case had many hearings, with an average of five hearings per case. New simplified procedures were introduced into the Court during the study in order to reduce the number of hearings in all cases, but no impact was discerned.

Outcomes. The outcome for the children was poor in a number of respects. The process took a very long time and involved many hearings. With each hearing came the possibility that access and particularly custody arrangements might change. In fact, they did change frequently. Some 37.2 per cent of children had custody changes and almost all had access changes. At the same time, the children suffered a high incidence of confirmed emotional problems in relation to children in general; some 29 per cent of children were affected in this way. The study could not say whether this was due to separation, abuse, abuse allegations, or court proceedings and their consequences.

Nor could the study determine the significance of the incidence of emotional problems in relation to all children of separating and divorcing parents. This was because the extent to which children are believed to be affected remains contentious. Most recent conclusions (Lamb, Sternberg & Thompson 1997) are that such research is not yet reliable because it is limited in types and numbers of families studied. Yet it is clear that for these children, whether more of them were affected or not, the impact was different. The

children suffered not just from the anxiety and depression typical of the more profound effects of divorce and separation (Hoyt, Cowen, Pedre-Carroll & Alpert-Gillis 1990), but also from feelings of great anger, depression and suicide.

Effective Strategies

The study was able to identify current strategies which were effective in bringing the dispute to an end. These could be described as proactive Court practices covering interventions where the Court took the initiative and the responsibility for problem resolution.

These were:

- reports from the State child protection services clearly substantiating the abuse; when the State services made such a report it resolved 18 per cent of the total cases,
- reports from Court Counselling; when a Court ordered Family Welfare Report was prepared by Court Counselling, this report resolved 17 per cent of the total cases immediately and it was specifically cited as being influential by the judge at trial in a further 25 per cent of total cases.

Reviewing the resolution issue somewhat differently, that is through the separate sub-study of Pre-Hearing Conferences, it was found that the use of a multi-disciplinary Pre-Hearing Conference, combined with a Court ordered Family Welfare Report and the use of a separate legal representative for the child brought 50 per cent of cases to a resolution.

Future Implications

The study found that the families involved in residence and contact disputes, where child abuse allegations had been made, had

many difficulties. Family violence, of different forms, was a prominent one. However, when these issues were brought to the Court, the Court took them into a system which gave no explicit recognition to these particular problems. Instead, the Court assumed the families could proceed through a normal legal process, one which would occur through a series of formal hearings, involve many delays, and not necessarily focus on the issue presented — the issue of possible violence to children.

Considering the success of more proactive Court interventions, it is clear that, if the Court were to pursue this approach in a planned fashion, it may achieve more for the children. How could the Court do this? Possibly, the Court could develop a specialised service for children where abuse allegations are involved that was Court lead and managed. A new specialised case management system could include a designated case manager, a pre-determined set of steps with tight time lines, the appointment of a child representative to identify and present the child's position, and the undertaking of a Family Welfare Report to present the broader family dynamics and picture surrounding the child.

Such a new service would not affect the vexed issue of coordination between the Family Court and the State child protection services, but other possible solutions could be contentious. Two solutions are immediately obvious, but both are currently politically impossible. The first, recently proposed in the Australian Law Reform Report, *Seen and Heard*, is the creation of a national unified children's and family court, with a simultaneous merger of State child protection services and the Family Court. This solution is in use overseas, but not in countries which have allocated family law to the federal jurisdiction and

child welfare to the state one, as is the case in Australia. The second is the use of Family Court Counselling as an investigative arm of the State child protection services. While Court Counselling does not have that responsibility now, it has experience and expertise in similar duties arising from its function in preparing Family Welfare Reports. Considering the changes to the Victorian State child protection services, where outside agencies are to be encouraged to become specialised investigation and assessment centres, referring to the State services primarily when a legal intervention is required, this may eventually become a national possibility.

In the meantime, to assist the collaboration, more information could be spread among the State services about the profile of child abuse presented to family courts. At the same time, more could be undertaken to consider where family court families fit into the workload of the State protective worker, that is, what are the similarities and differences between the Family Court and the other State child protection families. More could be done to investigate the special issues these families raise for the protection worker, many of whom reported great difficulties with the families and the procedures associated with them. Similarly, more work could be undertaken on the interagency protocols to make them more informative and useful; in fact they need to be kept under constant scrutiny because of the great significance in the tasks of the court.

Conclusions

When family courts were first established, in Australia and overseas, problems and issues arising from family violence were not considered likely to affect them. Yet the research reported

here showed that the Family Court of Australia has become a major arena for the resolution of family violence involving children. Although the research identified serious problems and obstacles in the way the Family Court managed child abuse, it identified some successful strategies the Court had developed that are of relevance to the way all social institutions manage family violence. Based on the problems identified in the study, and also on the successful intervention strategies similarly revealed, the research suggests consideration of a new specialised model for managing child abuse allegations in residence and contact cases before family courts.

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NOTE: The full report of this study is contained in Criminology Research Council report No. CRC 32/94-5, a copy of which is held in the Institute's JV Barry Library.

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