
She Gave as Good as She Got? Family Violence, Interim Custody/Residence and the Family Court

Toni Dick*

1. Introduction

In 1995 the Chief Justice of the Family Court of Australia, the Honourable Justice Alastair Nicholson recognised that “spousal violence” was rarely regarded as relevant in decisions of the Family Court. It was his Honour’s view that practitioners did not believe spousal violence was relevant under the *Family Law Act* 1975 and this was reflected in the lack of arguments involving spousal violence. His Honour acknowledged the not surprising result was criticism of the Court, but argued such criticism should lie with the Legislature rather than the Court.¹ His Honour further stated cases involving family violence had not been reported “due apparently to a belief they do not involve significant issues of law”.²

Since 1995, the Legislature have purported to answer this concern via the introduction of the *Family Law Reform Act* 1995 (“the Act”). We now see “family violence” as a mandatory factor the Family Court of Australia (“the Court”) is to take into account when determining what is in the ‘best interests of the child’ in custody (now residence/specific issues orders) and access (now contact) hearings.³ The Court has subsequently taken a number of steps to inform them of the existence of family violence. For example, the Courts Form 12A application for Consent Orders requires disclosure of pending or current family Violence Orders. The pro forma affidavits used in the Brisbane Registry for interim hearings require disclosure of the existence of family violence. This is noteworthy and consistent with

* LLB, GradDipLegPrac, ASDA, ATCL, Solicitor (Qld), Accredited Specialist in Family Law and part-time tutor in law, QUT. Warm thanks to Associate Professor P Tahmindjis of the QUT Law School for his guidance with respect to publication of this paper.

1 A Nicholson “Foreword” (1995) 9 AJFL 1 at 1-2.

2 Ibid at 3.

3 See particularly s68F (i) and (j).

attempts by the Court to address this difficult issue.

However, without doubt there is a paucity of reported cases dealing with domestic violence (named “family violence” throughout the Act and for the purposes of this paper), particularly in custody /residence decisions.⁴ The “silence” is even more pronounced in interim residence decisions.⁵ It is the writer’s experience⁶ that prior to the Act’s commencement the Court rarely regarded family violence as significant when determining the welfare or “best interests” of the child on an interim custody hearing. It is my view that women leaving the family home with the children are at risk of losing the interim care and control of their children despite their reason for flight being a violent partner. This seems to be attributable to the interpretation of the principles laid down *In the marriage of Cilento*⁷ and later approved *In the marriage of Griffiths*⁸ and a lack of appreciation by some members of the judiciary of the impact upon children living with a violent parent.

The interests of children will best be met by ensuring a degree of stability in their lives until a matter can be fully investigated by the Court and full hearing of the issues within a reasonable time. Unnecessary disruption to the life of the children should therefore be avoided. If the child has remained in the matrimonial home after separation with one party this stability will usually be ensured by continuing that arrangement, unless convincing proof that the child’s physical or mental health or moral welfare will be really endangered by the children remaining in that home with that party until a contested application is heard.⁹

Experience has shown that family violence directed at one’s partner, is rarely regarded by the Court as a disqualifying factor to argue against a perpetrator equating himself and the family home as “stability”, nor as “convincing proof” that the

4 The term “custody” will be used for those decisions and period referred to by me, pre the Act. The term “residence” will be used for decisions and periods post the Act. Given the infancy of this legislation, no reported decisions specifically dealing with the Court’s consideration of family violence and interim residence could be located. Concern over the Court’s approach to family violence was highlighted in the Australian Law Reform Commission Report Equality Before the Law - Justice for Women Report No 69 Part I AGPS, Canberra, 1994, p167. It was noted therein “evidence of violence against a spouse is often excluded or discounted at different stages of the legal system and the Family Court often does not give proper weight to the existence and the affect of violence”.

5 The “silence” with respect to family violence and the new Act is identified by J Behrens in “Ending the Silence, But ... Family Violence Under the Family Law Reform Act 1995” (1996) 10 AJFL 35. It is acknowledged the frequency and nature of interim hearings make it economically impossible for regular reporting, however the writer could only locate one reported decision, *In the marriage of Merriman* (1994) FLC 92-497 to reflect the Court’s attitude towards family violence when considering interim custody decisions.

6 The writer is a former member (1995-1997) of the Queensland Domestic Violence Council and has specialised exclusively in family law from 1987. The writer is currently a consultant practising in the area.

7 (1980) FLC 90-847.

8 (1981) FLC 91-064.

9 *In the marriage of Cilento* (1980) FLC 90-847 at 75-346.

child's "physical or mental health or moral welfare would be really endangered" remaining with the perpetrator, unless one can prove to the Court the child has, for example, been physically or severely emotionally abused by the perpetrator. It is thus the writer's view that a "stability facade" is created. Once interim custody/residence is lost, if trial dates are not expedited the chance of the children being returned to the care of their mother, who often is their primary caregiver, is remote. This article explores the impact of family violence in the Family Court and, to a limited extent, overseas, its impact on interim custody/residence decision making, the stability facade and the possibility of reform.

2. Family Violence - What Is It And Why Should We Care?

What do we mean by "family violence?" Section 60D of the Act defines it as "conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about his or her personal well-being or safety."¹⁰

A concern with respect to this definition is its focus as a "family" or "mutual" problem, rather than seeing it for what it is, the problem of the perpetrator.¹¹ The concept of mutuality of violence lends itself to a label of "communication difficulties", enabling decision makers to discount, avoid or ignore the violence. Further, the requirement to establish "fear" and apprehension" seems to require physical threat and on some interpretations exclude psychological and emotional abuses that may be inflicted on the victim.¹²

10 This definition is a variation of the definition contained in a Practice Direction issued by the Chief Justice. "Direction as to the Management of Cases Involving Family Violence", 15 January 1993: "For the purpose of the Family Court of Australia, family violence may be defined as conduct by one immediate or extended family member which causes harm to another member to an extent which creates apprehension or fear for that member's personal well-being or safety. This conduct may be threatened. It may take the form of physical or emotional abuse or a combination of both. Family members include spouses, defacto spouses, separated spouses, children and close relatives."

11 For a discussion of this point, see National Committee of Violence Against Women Position Paper on Domestic Violence AGPS, Canberra, 1991.

12 It is noted that most State definitions of "domestic violence" are based on past violent and/or intimidating conduct. For example, see Domestic Violence (Family Protection) Act 1989 (Qld), s11(1).

J Behrens, supra n5 at 37 is of the view the term "family violence" is even less acceptable than the more commonly used "domestic violence." She states "domestic" with all its implications of "just a domestic" at least cannot be taken to qualify the violence by reference to the engendered perpetrator." It is suggested that the definition proposed by the National Committee on Violence Against Women supra n11 at 4 is an appropriate definition: "Male violence against women is - behaviour by the man adopted to control his victim which results in physical, sexual and/or psychological damage for social isolation or economic deprivation or behaviour which leaves a woman living in fear; physical violence generally includes all types assault and torture ... severity of injuries ranges from no visible signs to permanent injury and/or death; fear instilled in victims adds another dimension to the dynamic of violence against women. The fear of future violence often becomes the most powerful weapon in the impression of women; threats are another common controlling mechanism used by the perpetrator; psychological abuse includes emotional and verbal

One definition of "family violence" embodies all forms of violence against women, including physical, emotional and psychological abuse, threats and denigration.¹³ This is gender specific, perpetrated by the male against the female.¹⁴ This article will approach "family violence" from this perspective.

The incidence of violence in the home must be a concern for all of us. Statistics support this view. A Queensland phone-in survey revealed that 54% of victims described the abuse as causing permanent damage to their health; 88% included physical and emotional abuse; 29% sexual abuse; all abuse 25%; 36% indicated the abuse occurred daily to weekly; 31% it occurred weekly to monthly.¹⁵ Eighty-eight percent of violent households contained children and 68% of those children were abused by the violent partner.¹⁶ The number of applications in Queensland for a Domestic

abuse and is usually experienced by victims as damaged to their self-concept and mental well-being. Over time a woman's belief in her worth, her self-concept and her sense of having rights or choices, becomes eroded by the incessant condemnatory abuse from the perpetrator; social abuse is behaviour which aims to isolate the woman from friends and family and is another method employed to control the woman. It includes public insults and denigration, forbidding any contact with family and friends, imprisoning the woman in the home and disconnecting the telephone; economic abuse refers to the inequitable control over access to shared resources. In family context for example this may mean a man is in a position to allocate insufficient funds for household purchases and/or control the woman's income, assets and expenditure; sexual violence encompasses all sexual acts, including any sexual behaviour that has been imposed or forced upon a woman without her freely giving consent".

13 This definition is supported by the United Nations Declaration of Violence Against Women. The writer agrees with this definition.

14 Empirical data (as quoted, Domestic Violence Resource Centre Fact Sheet 1992) supports the gendered definition view:

- 1 in 3 marriages will experience at least 1 violent episode (Strauss 1978);
- 97% of offenders are male (Stannard 1987);
- 22% of all Queensland homicides between 1982 and 1987 were spousal murders (Qld Police Department 1987);
- 46% of female victims were killed following separation or in the process of separating (Wallace 1986);
- 1 in 5 women presenting at the Accident and Emergency Department of the Royal Brisbane Hospital are survivors of domestic violence (Roberts 1981).

It is acknowledged however that some women are perpetrators of family violence. It is submitted however that statistically these are in the minority of cases. Female perpetrators as a genre are described in some detail in JR Johnston "Domestic Violence and Parent-Child Relationships in Families Disputing Custody" (1995) 9 AJFL 12.

15 Queensland Domestic Violence Taskforce, *Beyond These Walls* Department of Family Services, Brisbane, 1988, inter alia, the incidence of domestic violence in Queensland.

16 The Taskforce Report supra n15, also indicated 22% of the victims had suffered broken bones and 1 in 4 battered women are pregnant. In H Macdonald "Women's Safety in Australia: An ABS Survey" Issue No 2, May 1997 at 7 it was indicated that 67.6% of physical violence experienced perpetrated by a male comprised "a threat or attempt to physically assault (which included the threat/attempt to hit with a fist or anything else, to stab with a knife, to shoot with a gun)"; 62.9% comprised pushing, grabbing and/or shoving; 25.4% comprised slapping; 21.3% comprised kicking, biting, punching; 20.9% comprised throwing anything that could hurt; .16% comprised beating, 10.7% comprised hitting with something; 10.6% comprised choking; 1.3% comprised stabbing, shooting; 49% were listed as other (ABS 1996 A:26). For limitations with respect to this survey see H Macdonald at 5 which include objectivity of information and failure to include information with respect to emotional abuse.

Violence Protection Order has increased by 400% from 1989/90 to 1994/95.¹⁷

Experts also support this view and suggest that spouse abuse and physical and sexual abuse of children is often linked in families, with each being a predictor of the other.¹⁸

Profound emotional abuse is the unacknowledged experience of children in these families; exposure to the extreme conflict, coercive control and psychological abuse which characterises violent situations raises questions about our handling of these cases in other than the child protection framework. Witnessing violence may be the worst form of psychological and emotional abuse that children can be exposed to.

The desensitising experience of being exposed to violence, often over years, is summed up in the following quote:

These children have witnessed their mothers being beaten, thrown into walls, pushed through windows and having their eyes blackened and teeth knocked out. They have often lived through years of brutality which becomes so much a part of their home lives that they have little appreciation of what normal should be (Josse Wolf and Wilson 1990).¹⁹

Purvis argues that a systems response is required by the Court if family violence is to be handled to the benefit of children.²⁰ She notes "research findings are establishing that a child's social and emotional functioning is significantly altered by exposure to violence. Problems have been identified in children's socio-emotional development, behaviour with peers, parents and teachers, academic performance, school related problems such as poor attendance, distractibility and school phobias, and disturbed behaviours such as extreme withdrawal and passivity or aggressiveness and conduct disorders (Butterworth and Fulmer, 1991).²¹

17 See J Putt and K Higgins "Violence Against Women in Australia" Australian Institute of Criminology, Research & Public Policy Series No 6, 1996 at 30 which cites figures from the Statistical Services Branch, Department of Families Youth & Community Care, Queensland. Orders issued increased from 2017 to 7804 per annum in those years.

18 See R Purvis "All Domestic Violence is Not Equal", paper presented at the Continuing Legal Education, Family Law Practitioners' Association, Family Law Residential, 21-23 July 1995. Research indicates that child abuse is at least 15 times more likely to occur in families where family violence is present.

19 Ibid at 4.

20 See R Purvis "The Effects of Violence on Children: The Need for a Family Court Response" (1995) 2(3) Family Law Practitioners' Newsletter at 1 and supra n18.

21 Purvis further indicates that exposure to violence results in the child experiencing trauma, impacting in an external way by either mal-adaptive coping, disturbance in learning development and behaviour or internalised, by fear, impotence, powerlessness, anxiety and anger. These "internalised feelings can be carried through childhood, adolescence and even into adulthood and leave children vulnerable to modelling dysfunctional behaviour as a means of feeling stronger, more powerful and in control" (Ibid at 2).

Other research indicates "Behavioural and emotional problems in child witnesses of spousal violence as similar to those evidenced by victims of child abuse and include: psychosomatic illnesses, including headaches, abdominal complaints, asthma, peptic ulcers, rheumatoid arthritis, stuttering and enuresis" (E Hilberman "Overview: The Wife Beater's Wife Reconsidered" (1980) 137 The Medical Journal of Psychiatry 1336) adjustment problems, few interests, few social activities

Recognition by the Court of the impact of violence on children is thus crucial.²²

Some experts are of the view that to deal appropriately with family violence (and obviously for the Court to do so), an understanding of the various types of violent perpetrators is essential.²³

Johnston²⁴ categorises these as follows:

- A. Ongoing Episodic Male Batterers. These men are always initiators of violence, exercising their “proprietary male rights” over their partner, can be homicidal/suicidal at separation, perpetrate long-term abuse upon their partner, deny or minimise their violence and project the blame onto the victim woman;
- B. Female initiated violence. Here the woman always initiates the attack due to either stress or uncontrollable state of tension internally. These women “admit their violent acts but blame the frustrating behaviour of their partners”.²⁵
- C. Male controlling interactive violence. This is where the violence can be perpetrated by either the man or the woman, however, the overriding response was the man trying to control and prevail upon the situation by the overpowerment and domination of the woman. It usually commences as a disagreement between the spouse which becomes verbal attack and then physical assaults. “Physical coercion is an accepted way of resolving interpersonal conflict in these families and it is rationalised as an expectable response.”²⁶
- D. Separation engendered and post-divorce trauma. This group, Johnston argues, has uncharacteristic acts of violence with no history of abuse. The perpetrator is usually frank about the incident and repentant and the violence is unlikely to continue.

and low school performance (see A Wolfe L Zak S Wilson and P Jaffe “Child Witnesses to Violence Between Parents: Critically Seeking Behavioural and Social Adjustment” (1986) 14(1) *Journal of Abnormal Child Psychology* 95) and inability to form stable relationships when older (S Hatty and J Sutton “Children of Battered Women: The Attitude of Intervening Police Officers” *International Congress on Child Abuse and Neglect*, University of New South Wales, Sydney, 1986).

22 For a further discussion see R Purvis *supra* n20 at 1-2. Purvis states a study conducted by the Lismore Family Court Counselling Section suggested that 74% of females and 44% of males regarded physical and emotional abuse as a significant issue. An analysis of Purvis’ caseload over 10 years found a consistent average of 60-70% of cases presenting with some aspect of family violence. In a Family Court study reviewing 292 judgements in defended cases from all over Australian which identified family domestic violence as an issue and found allegations of family violence towards the wife in 22% of all cases. This comprised the largest category of all allegations made. For further discussion with respect to the issue of defended custody cases see S Bordow “Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome (1994) 8 *AJFL* 252.

23 For a discussion see JR Johnston *supra* n14 and R Purvis *supra* n18.

24 JR Johnston *supra* n14.

25 *Ibid* at 18.

26 *Ibid* at 19. Johnston also notes that physical aggression tends to be repetitive over the duration of the marriage, however, once separated and no longer able to provoke on another there is a “good prognosis for the inter-parental violence to cease”.

- E. Psychotic and paranoid reactions. This is for a smaller group of men and women with violence being as a result of impaired and seriously distorted views of reality and paranoid conspiracy theories. Here family members can also be at risk.

Johnston argues that groups A and E were the most likely to be unable to separate their own needs from their children.

After the separation these abusive men depend upon their children for validation and caretaking or blatantly try to use their children as a way of reconciling with or punishing their separating spouse ... As a group, these children have the most serious, emotional and behavioural problems. They are both frightened of and attracted to the more powerful, dangerous father. They are susceptible to being courted by him and often become behaviourally difficult and disrespectful towards the victims mother. It is very common for these children, especially the boys, to become physically aggressive with their mothers, in behaviour reminiscent of what they witnessed with their father. Other factors being equal, sole of joint residential arrangements for children are contra-indicated with a father who has engaged in on-going or episodic battering, as they are with any parent who is psychotic or has paranoid delusions. In fact, in these cases, visitation with a violent parent may need to be supervised or even suspended, especially if the threat of violence is current. Furthermore, tremendous care needs to be taken so as not to jeopardise the victim parent's safety as a consequence of the children's access plan.²⁷

Johnston is of the view that the parents who have no history of violence in the marriage but rather the violence is limited to only brief occurrences at the time of a stressful separation or divorce (type D) are those that have the best prognosis to more rapidly restore their relationship with their children and to cooperatively co-parent their children with the ex-spouse.

Other factors being equal, a range of custody plans including joint physical custody are appropriate. Although children in these situation are likely to be acutely traumatised by these unexpected scenes of violence and both parents profoundly shaken by the incidents, brief crisis oriented family therapy can help resolve their mutual anxieties, fears and guilt.²⁸

Research thus suggests there are serious concerns about children being placed in the care of a violent parent. The writer submits these concerns are just as valid for those perpetrators described in the B to D categories by Johnston, particularly

27 Ibid at 21.

28 Ibid at 22. Johnston also noted a California state-wide study found family violence alleged by 65% of all families who participated in mediation sessions.

as short-term (interim) custodians.²⁹

Given the obvious impact of violence on women and the body of research highlighting its impact on children, the silence in reported decisions is horrifying. The incidence of family violence is not reflected in statistics published in the Court's Annual Report.³⁰ The only data mentioning "family violence" can be found in Court counselling statistics involving "family violence separate interview interventions". Interestingly, Australia-wide, 5,191 separate interviews were conducted, purportedly as a result of family violence being raised as an issue (there were no separate interviews as a result of family violence reported for the Family Court of Western Australia). Separate interviews accounted for approximately 15% of all interviews held.³¹ Given counselling is pre-requisite to Court intervention, it would appear the number of cases before the Court involving family violence, even on these limited figures, is significant.

3. Family Violence And The Family Court - Past And Present

(a) An Overseas Perspective?

When you see your wife commit an offence, don't rush at her with insults and violent blows ... scold her sharply, bully and terrify her. And if this doesn't work ... take up a stick and beat her soundly for it is better to punish the body and correct the soul than to damage the soul and spare the body ... then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good.³²

Times have changed since 15AD. However, whilst society condemns violence, per se, violence in the "family" remains an unspoken crime. It's "only a domestic" attitude continues.

In the USA many States have amended their statutes to reflect the fact that

29 For example, see Purvis supra n20 at 8 where she states "Serious consideration needs to be given to the implications of placing children in the care of the violent parent ... [This] ... needs to be viewed with a sound understanding of child experience of violence and with recognition of child "accommodation" of an abusive and frightening parent. Child behaviour and expressed wishes on presentation may have little connection with their real need or feelings ... Removal from the source of trauma, allowing for time-out to enable personal reconstruction and integration in the context of a safe and secure environment with the caregiving parent may be the primary task in making determinations at this point."

30 The Family Court of Australia Annual Report 1995-1996, Table 6A.

31 Ibid. Table 6A indicated 64,785 interviews were conducted with the Court Counselling Section in the year 1995-1996.

32 As quoted N Cahn "Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions" (1991) 44 Vanderbilt Law Review 1041. This was a rule of marriage in the late 15th Century, by a Medieval Christian Scholar. The limitation on the husband's "right/duty" to beat upon his wife was known as the "Rule of Thumb". This rule specified beatings were to be restricted to a stick no larger than the right thumb.

family violence is an important factor in custody and access decisions.³³

The US Courts, as in Australia, seem to vary in their approach to domestic violence, some giving significant weight to the matter and others discounting it.³⁴

One commentator suggests the Judiciary in the United States is still uninformed about family violence and the danger it poses to adult and child victims and “consider the abuse of wives or mothers by male partners is largely irrelevant to parenting, concluding either that the men who are violent towards their partners may nonetheless be very good fathers and that domestic violence has little effect on the children or even if the father was violent during cohabitation he will cease beating and terrorising the mother upon separation.”³⁵

The view that the victim is somehow to blame for the violence and thus the violence can be discounted as an “acrimonious relationship” appears to be widespread. Ruth Busch³⁶ describes it as a “two to tango analysis” of domestic violence. Busch, in her article, described interviews with nine Family Court and District Court Judges in New Zealand under research undertaken into repeated breaches of domestic protection orders.³⁷ The Judiciary’s attitude was highlighted by Busch in the view expressed in the following quote from a Family Court Judge interviewed:

33 As cited in M Hofford C Bailey J Davis and B Hart “Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice” (1995) 29(2) Family Law Quarterly 197 at 200-201. Most statutes require the Court to take family violence into account when determining what is in the best interests of the child. Some States go even further, stipulating that a Court either consider family violence as contrary to the best interests of a child or to a stated preference to joint custody or expressly prohibit an award of joint custody when a Court makes a finding of the existence of family violence.

34 For a discussion with case examples, see cases cited by N Cahn *supra* n32 at 166. Cahn cites as an example the ruling of a Florida Court in the case of *Collingsworth v O’Connell* 508so2d 744. In that case the Court ruled that an abusive husband did not pose a danger to his child although his behaviour included throwing his wife to the ground, beating her when she was four months pregnant and threatening to kill her, her father and himself. The Court accepted a psychologist’s conclusion that the man’s “past violence was related to the deterioration of his relationship with his wife” and was presumably unrelated to his fitness as a parent. Cahn also cites another case of *Hielmann v Novak* 771p2d 948. Testimony was provided that the defendant actually hired someone for \$5,000 to kill his wife. In this case the Court acknowledged that the father beat and repeatedly threatened to kill the mother, yet considered the abuse as only part of the evidence that the parties had an “acrimonious and contentious relationship”. Cahn makes the point that “rather than concluding it was not in the best interest of the child to award joint custody because of the father’s behaviour, the Court held that in light of the parent’s relationship joint custody was ‘impractical’.”

35 See BJ Hart “Parental Abduction and Domestic Violence” as cited in NKD Lemon (ed) *Domestic Violence Law, A Comprehensive Overview of Cases and Sources* (1996) Austin & Winfield, San Francisco, 1996, p322.

36 See R Busch “Was Mrs Masino Really Lost? An Analysis of New Zealand Judges’ Attitudes Towards Domestic Violence” (1993) 8 *Otago Law Review* 17 at 20.

37 Unlike Australia where domestic violence applications are dealt with by individual State Courts, the Family Court and District Court have jurisdiction in New Zealand to not only entertain applications with respect to custody/residence but also applications with respect to breaches of protection orders.

Except in the most unusual circumstances it isn't helpful to apportion blame (between the parties). I don't see it as a black and white situation where the aggressor is totally responsible and the victim is totally exculpated from any responsibility because I don't think it is commonsense or human nature for one party for no reason whatsoever to up and knock someone else on the nose. If someone was mentally disordered or - I can't really think of any other reason why someone just gets up and hits another person. I think that in the context of a relationship or marriage of two people what goes through my mind - I will express it but it is totally inadequate and probably not helpful - but "it takes two to tango". The two are entwined to the degree that I don't accept that one person alone is responsible for violence. If the violence is repeated over and over again until it gets to the stage that the victim is just a punchbag then I suppose at that stage there is just one person who is totally responsible, but I don't think those cases are very numerous. Hopefully they're not. I think that the vast number of cases fall within the middle range. Not someone mentally deranged who just up and hit someone for absolutely no reason whatsoever, not are they cases where the victim is just being used as a punchbag willy nilly. The vast number of cases is in the mental category. This is where there is interplay and there is not necessarily a taunting, but to put it at its best there is a lack of sensitivity on the part of both parties.³⁸

Subsequent to these interviews being undertaken, the *Domestic Violence Act* 1995 was introduced, together with amendments to the *New Zealand Guardianship Act* 1968. A rebuttable presumption against a perpetrator of violence being awarded custody or unsupervised access unless the children's safety can be assured³⁹ was created. Psychological abuse is defined as domestic violence under the *Domestic Violence Act*,⁴⁰ however, it is not included in the definition of violence in the *Principle Act*. One Commentator argues, that this is a significant omission, in that a protection order can be granted for example if a child has witnessed abuse but it does not follow that a supervised access order would be made.⁴¹ Busch and Robertson believe these and the other amendments have moved to "close the gap".⁴² They comment, "violence against one's spouse, is no longer seen as irrelevant to one's abilities to be a suitable custodial or access parent" however "less positively, we have noted the persistence of discourses about violence reflecting a communication

38 R Busch N Robinson and H Latsley "Protection from Family Violence: A Study of Protection Orders Under the Domestic Protection Act", Wellington Victim's Taskforce (1992) as cited in R Busch supra n36 at 191. Busch believes this view that is not atypical. She cites as an example the case of *PW v PW* (unreported, Family Court, Napier, 16 May 1990) where the Court refused to grant a protection order "The difficulty in the present case is that the wife does not need the kind of permanent protection which a final non-molestation order provides. What she needs is a temporary respite from the husband's persistent overtures so that the real problems in the marriage can be addressed and if possible put right."

39 See *Guardianship Act* 1968 (NZ), s16B.

40 See s3(2)(c). Causing or allowing children to see or hear physical, sexual, or psychological abuse is also included: s3(3). This can be contrasted with our s60D definition of family violence.

41 See A Rawlings "Guardianship Amendment Act 1995" (1996) *Auck Uni Law Rev* 245.

42 See R Busch and N Robertson "The Gap Goes on: An Analysis of Issues under the Domestic Violence Act 1995" (1997) *17 NZ Uni Law Rev* 337. The "gap" is the pitfalls in the legislation in the protection from family violence.

problem, about women acting provocatively and about women who are deemed unworthy of protection."⁴³

It is the writer's view that in Australia this "two to tango" or "she gave as good as she got" rationale is very real and is significant as to what plays upon some Judicial Officer's minds when they entertain applications which deal with family violence.

(b) The Australian Position - Pre-11 June 1996?

In Australia, the Court's approach to family violence has in my view in the past been reflective of Society's view of family violence as a private matter, one which "the public" should not interfere in. It was a matter between "consenting adults" with little effect on children in the household (assuming violence was not directed at the children). For example, *In the marriage of Heidt*,⁴⁴ Murray J "largely disregarded" the husband's violent behaviour to the wife as "there is no suggestion that Mr Heidt has ever treated his children with the violence with which he treated his wife". Thus, "in assessing his potential as a custodial parent" the violence was largely immaterial.⁴⁵

In 1981, *In the marriage of Chandler*,⁴⁶ Nygh J stated:

... whatever may or may not have been the relationship between the parties themselves, as I have indicated during the course of the hearing, I am only concerned with the acts and conducts of the parties in so far as these directly affect the welfare of the children. There was no evidence of violence directly affecting the children even if the wife's allegations were accepted as true.⁴⁷

Again, the Court appeared to explain away the violence as being a consequence of the "relationship between the parties" and irrelevant to the decision making process.⁴⁸

The end of "the silence" in reported decisions came about in 1994. It would appear at that time the Court, seemingly directed by the Chief Justice, had

43 Ibid at 367-368. Case examples are discussed at length to support these conclusions.

44 (1976) 1 Fam LR 11,576.

45 KA Murray "Domestic Violence and the Judicial Process - a Review of the Past 18 Years" (1995) 9 AJFL 26 at 37, however does state that family violence is relevant and explains to a certain degree the rationale for his earlier statement. The article provides an excellent summary of those cases where the Family Court considered family violence.

46 (1981) 6 Fam LR 736 at 737.

47 Since this decision, Nygh J, in considering the new Part VII of the Act, is now of the view "it is difficult to see how any act of violence against any person involved with the child, whether observed by the child or not, can be ruled out as irrelevant". See P Nygh "The New Part VII - An Overview" (1996) 10 AJFL 4 at 13.

48 J Behrens supra n5 at 38, states "the problem with the term "family violence" is not even its gender neutrality but the picture it paints that violence in the family is something in which all members are complicit and which is just to do with difficulties in relationships between family members and problems in handling conflict in non-violent ways."

commenced to recognised the importance of family violence in the Court's decision making process.⁴⁹

The line of 1994 cases relating to the impact of family violence in custody decision making are reflective of the Court taking positive steps in ensuring family violence is taken into account in their decisions. It is my experience however, many unreported cases reflect the contrary view.

A summary of the relevant reported decisions are as follows.

In the marriage of Merriman,⁵⁰ Malay J found "the husband's violence represents a threat to the children, not just in the direct physical sense but also as an inappropriate role model". This was the first reported decision which recorded concerns as to family violence impacting on the suitability of the perpetrator as a role model for the children.

In the marriage of Jaeger,⁵¹ the trial Judge said the following: "I am not really interested in whether the home is a peaceful haven or a bit of a ... or a bit rougher than that, I might put it that way. I do not think that that is what affects children or is likely to affect these children ... The relationship between the wife and her current de facto husband does not really interfere in this child's needs."⁵²

The trial Judge went further and made the following findings about the de facto husband:

He appears to be committed to the wife in their relationship, well disposed towards A and of unexceptional character. The attitude he has towards the prospect of A being part of his family appears to be appropriate. In my view he will make a suitable surrogate father. I am not satisfied that there is any instability or violence in his relationship with

49 See, for example, the comments of the Chief Justice in "Foreword" (1995) 9 AJFL 1. See further, The Family Court of Australia Annual Report 1994-1995 at 67, where, in the Chief Justice's Report a special category was devoted to the issue of family violence. His Honour indicated "that cases involving family violence - both spousal and child abuse - present particular challenges to Judges, other judicial officers and all Court staff". He stated that a day long seminar was conducted at the Judges' Conference in October 1994 "to raise awareness in the judiciary of the causes and consequences of family violence and major plenary session at the Court's national conference which focuses on children who witness domestic violence" was anticipated. His Honour noted "the connections between child and spouse abuse has too often been overlooked in the literature and improperly treated as split issues". In the same Annual Report, "domestic violence" in the cases of Merriman (1994) FLC 92-497, Jaeger (1994) FLC 92-492 and In the marriage of JG and BG (1994) FLC 92-515 found recognition as "significant judgment/s".

50 (1994) FLC 92-497. This is the only reported decision with respect to interim custody and family violence I could locate. The case involved interim custody and exclusive occupation of the matrimonial home for two children of the marriage. During those proceedings the wife raised allegations regarding a long history of violence by the husband towards the wife.

51 (1994) FLC 92-492. This was a Full Court appeal on 21 March, 1994. The trial related to custody of a male child 7 years of age who had been in the custody of the husband until trial. The husband was unsuccessful and appealed. One of the grounds of appeal was that the trial Judge, in refusing to admit into evidence an affidavit sworn by the sister of the wife as to violence perpetrated upon the wife by her de facto husband, should have been admitted into evidence and its failure to do so meant there was a mistrial of the proceedings and thus the Court should order a further trial.

52 Ibid at 129.

the wife which has already lasted for more than 3 years.⁵³

The Full Court were of the view that his Honour was wrong in rejecting the affidavit and ordered a new trial. The Full Court held it was relevant the child may be going to a household "where violence may be occurring towards an important figure in his life, namely his mother".⁵⁴

One wonders how the trial Judge arrived at the finding violence did not occur "in his relationship with the wife"? Again, the rationale of "mutuality" of violence seems apparent in his reasonings.⁵⁵

In the marriage of JG and BG,⁵⁶ Chisholm CJ felt it opportune to review previous decisions that had been made by the Court which directly or indirectly dealt with family violence or "conduct" of one of the parties.⁵⁷

53 Ibid at 130.

54 Ibid.

55 The Judge's findings should not be surprising. Dr Astor in "Violence and Family Mediation: Policy" (1984) 8 AJFL 3 explains that violent men often present as likeable characters and articulate which can often mask a controlling and abusive personality. It is thus extremely dangerous to discount the fact violence could be being perpetrated upon the spouse on a quick assessment of a person's presentation in the witness box (if indeed this is what occurred).

56 (1994) FLC 92-515 at 81,318. This was a custody application involving two children aged two and four years of age. The wife alleged the husband had been violent towards her on a number of occasions and the Court considered the relevance of family violence. The husband's Counsel had argued that some of the passages in the wife's affidavit dealing with violence were inadmissible as they were irrelevant.

57 For example, his Honour referred to *In the marriage of Kress* (1976) 2 Fam LR 11,230, which did not deal specifically with family violence, however, the trial Judge indicated that "the Court must consider the conduct of the parties, not with a view to revealing one or punishing the other but to ascertain from such conduct whether the welfare of the child would be better served in the custody of one or the other". He further cited *In the marriage of Smyth* (1983) Fam LR 1029 where the Court held "if there are facts relating to the causes of separation or to marital misconduct which have a real bearing on the fitness of the parent or otherwise affects the child's welfare, these will be considered and given appropriate weight". His Honour also took the opportunity to refer to both decisions of *Chandler* and *Heidt*. His Honour stated with respect to these cases "Each was concerned to emphasis the important point that the Family Law Act strictly limits the relevance of marital misconduct. In the context of custody cases the Court has always been properly concerned to prevent parties from engaging in general attacks or smear campaigns that are unrelated to the children's welfare. The Court no doubt felt that it was important to emphasis this in the early years of the Act's operation. This is clearly correct: the principal of the child's welfare is paramount, has exclusionary aspect, excluding material that has no relevance to the welfare of the children, but it also has an inclusionary aspect, by which I mean that admissible evidence that is relevant to the children's welfare should be taken into account. It may be that in their concern to discourage from using custody proceedings as an occasion to engage in a general criticism of each other's behaviour unrelated to the children's welfare, Murray J and Nygh J somewhat over-emphasised the exclusionary aspects of the principles. If so, then I must respectfully differ. I believe it is clear law that matters truly relevant to the child's welfare, whether indirectly or directly relevant, should be taken into account." (at 259) The latter two decisions were criticised by R Graycar "The Relevance of Violence in Family Law Decision Making" (1995) 9 AJFL 58 at 60 and Z Ratus "Domestic Violence Update - Family Law Seminar - Kooralbyn", unpublished paper, CLE FLPA, Family Law Residential, 1993.

His Honour discussed when family violence should be relevant to the child's welfare (best interest). His Honour endorsed the relevance of violence, for example:

- (a) where violence is directed at the children themselves;
- (b) where it is committed in the presence of children ("it will obviously have the potential to frighten and distress them");⁵⁸ and
- (c) "Violence occurring between household members, even though occurring away from the children may have the potential to cause them distress and harm, eg where it affects the parenting of custodial parents. Similarly, threats of violence may have an impact on the welfare of the children."⁵⁹

In summary, his Honour was of the view that "in proceedings with respect to custody, guardianship and access whether it is with respect to family violence would be relevant to the extent it provided assistance to the Court to determine what would promote best the welfare of children".

The issue of what evidence is allowed was discussed in *In the marriage of Patsalou*.⁶⁰

The Full Court upheld the trial Judge's reasons for holding that allegations of domestic violence were relevant. The trial Judge had made a finding that the derogatory and denigrating remarks and inflicting of physical violence "reflects poorly upon the assailant's capacity to provide the children with a positive role model for

58 (1994) FLC 92-515 at 81,260.

59 Ibid at 81,261. His Honour further stated "The nature and extent of such harm must be assessed in the light of the evidence and findings in each case. In some cases the Court may be assisted by expert evidence on the impact of violence on the children. Violence may take many forms and have quite a different significance in different cases. It might be, eg. a single outburst out of character caused by a stressful situation for which the violent persons feel immediately regretful and apologetic. It might be the result of mental instability or disease. It might stem from a person's inability to control his or her temper ... The Court's ability to make this determination will be course depend on the evidence available to it. Violence associated with a pattern of dominance for example may be particularly serious. For children to grow up in a climate of a potentially violent and dominating relationship between their parents seems to be to be an unacceptable model of family relationships and would be very likely to create a situation of stress and fear that may well be damaging over a period. It is quite wrong in my opinion that violence can only be relevant if it is directed at the children or takes place in their presence. It is equally wrong to assume that violent behaviour will necessarily be repeated or to assume too readily that it will harm children or to give it excessive importance. It is of course only one factor relevant to the assessment of what the child's welfare requires and it will be more important in some cases than others."

60 (1994) 18 Fam LR 426. This case was a Full Court decision of the Family Court on 27 October 1994. It was an appeal from the trial Judge, Moore J, of an application in relation to the custody, guardianship and access what at trial were 4 and 6 years of age. The wife was granted custody of the children. Evidence was led at trial as to restraining orders taken out by the wife to restrain the husband. The wife alleged the husband was abusive and harassing in continually ringing her and had made threats to kill her. The appeal was based that the manner in which the trial Judge considered violence inflicted upon the wife by the husband was inappropriate and, inter alia, that it was not open to the trial Judge to refer to the body of research referred to by her in her reasons for judgment as this was not the subject of evidence.

their own behaviour and methods of resolving disputes and dealing with tensions and stress".⁶¹

The trial Judge went on further to say:

Yet, while there is much evidence of a positive nature of Mr Patsalou's interaction with the children as a parent and his devotion as a father, his conduct towards the children's mother in physically assaulting her and making derogatory and denigrating remarks, either to her or about her to the children or to others within her circle of friends and acquaintances does not establish him as a consistently desirable role model for the children and leads to questions about his capacity to promote the children's relationship with their mother in the future and his capacity to contribute positively to their balanced development. This has important implications in an assessment of his capacity to effectively parent these children in a positive way in the future.⁶²

The Full Court upheld the appropriateness of the trial Judge's comments.

These decisions, particularly the comments of Moore J, are considered, sensible and consistent with promoting the best interest of children. It appeared the Court was now recognising the impact of violence on children can take many forms and more than a cursory look at the issue was necessary.

However, a disturbing trend with respect to the Court's approach to family violence can be found in two cases dealing with applications under the Hague Convention. It is acknowledged these cases must be considered in light of the particular restrictions of these Regulations and the Court's approach to such applications being of a procedural rather than substantive nature. Nevertheless, interpretations based on "severity of violence" are disturbing.

In the marriage of Murray and Tam: Director, Family Services (ACT) Intervener,⁶³ the wife had left New Zealand with three children to live in Australia. The wife alleged very serious allegations of family violence by the husband towards her and towards the children.⁶⁴ The wife attempted to rely upon the fact the children had been detrimentally affected by the husband's violent behaviour in the past and as such there was "a grave risk that they would be subjected to an intolerable situation and psychological harm if they returned to New Zealand."

The Full Court, despite the very serious nature of the allegations, relied on the facts the evidence was "untested" and as the principle purpose of the Hague Convention was to "discourage child abduction and where such abduction was occurred

61 Ibid at 428.

62 Ibid at 429.

63 (1993) 16 Fam LR 982.

64 Ibid at 984. The wife swore her reasons for leaving New Zealand was "not to gain an advantage over the husband in custody proceedings, but to remove herself and the children from a situation of violence, fear and terror and that she had her further and extended family to call upon for assistance in Australia ... The relationship was characterised by many acts of violence on the part of the husband, which culminated in violent attacks over some days in April 1993, which included headbutting, punching, kneeling her at the base of the spine and death threats ... The husband was also a member of a gang called 'the mongrel mob'."

to return such children to their country of habitual residence”, the Court refused to set aside the order of the trial Judge ordering the return of the children.⁶⁵ The Full Court appeared to take comfort in the fact the applicant was the New Zealand Department of Justice and as such the notion was the children would be returned into the Department’s care rather than to the husband. The Court, in the writer’s view, has taken the “soft option” approach and failed to make the tough decision required which would ensure these children’s protection.

How can an applicant, in attempting to rely on the “grave risk” exception place “tested” evidence before the Court? If an applicant could, for example, produce a transcript of trial of psychologist’s evidence which indicated concerns as to the child’s safety, this would suffice. How often in reality will this occur? An almost impossible onus of proof is thus placed on the woman fleeing a violent partner to fall within this “exception”.⁶⁶ What harm must children suffer before the Court will exercise their discretion as provided for in the Regulations and refrain from returning children to a violent man?

A similar concerning authority was the decision of *Re Bassi; Bassi and Director-General, Department of Community Services*.⁶⁷ Again, one of the grounds of the appeal from the trial Judge’s decision to return the children was they were at grave risk of physical or psychological harm should they be so.⁶⁸

The allegations raised by the wife were serious indeed, including:

... that the husband drinks alcohol to excess, he has a violent disposition and has frequently been violent, that he has actually physically injured the children in the course of physical attacks on the wife, that he has threatened to kill the children, that by reason of his cultural and social background his threats should be taken seriously ... that on two occasions when the husband was threatening her with a large kitchen knife the child L intervened to prevent the husband causing the wife harm and the child’s hands were cut by the knife ... on many occasions after October 1992 the husband threatened that he would kill her, kill the children and kill himself and that some of these threats were made in the presence of the children who became very upset.⁶⁹

Again the Full Court noted that the allegations:

65 Ibid at 986.

66 N Lemon supra at n35, is of the view that family violence may be argued as a “grave risk” exception avoiding the mandatory return of a child to its place of habitual residence. I agree that theoretically this is the case, but in practice it is not.

67 (1995) FLC 92-465.

68 Fortunately the children were not returned. However, on the exception set out in reg 16(3)(c) which states “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child’s views.” The child in this case was 13 years of age and the Court had the benefit of a family report upon which to base their decision as to her level of maturity.

69 (1995) FLC 92-465 at 826. Further evidence was placed before the Court through an affidavit of a witness that the husband had told the witness “if he can’t have us nobody will and he will do us all in.”

... have not been tested by cross-examination. However, unlike Tam's case, this was not a basis of itself for refusing to exercise the discretion. In fact, the Court held "in my view there is sufficient material for the Court to reach the view that the husband has engaged in violent, drunken, excessive behaviour in the presence of the children and that he has made threats to the life of the mother, the children and himself in the children's presence. In this context in my view there is a basis for L to be frightened about being returned to the husband's care. I also have the view that it would be surprising if the young child N did not also have such a fear. Are these circumstances such that the children would be placed in an intolerable situation by being required to return to their father's care?"⁷⁰

Despite this, *accepted* evidence, the Court held that "grave risk" of harm had not been established as it would not be "intolerable" for the children to be returned to their father.

Whilst reported decisions indicate the Court has moved significantly to take into account family violence with respect to custody proceedings, the Court appears to hold a strange view of what amounts to an "intolerable situation" when applying the provisions of the Hague Convention. Fortunately, in the case of *Bassi* the child was old enough to express a view. However, what of the many children who are not old enough to tell an independent person about the fear they have suffered in the care of their perpetrator? What of the children who cannot express themselves clearly enough for their view to be heard?

And what of the unreported decisions? Graycar⁷¹ cites a number of cases that had been placed before the Australian Law Reform Commission⁷² (where many women attached judgements of their cases in support of their submissions) and where family violence was not taken into account by the Court. To give on example only, where allegedly serious allegations of violence and sexual abuse had been made against the husband in a trial heard in 1993, the judgment stated:

I do not intend to make findings relating to the wife's allegations of violence and sexual abuse, except in so far as it relates to the parties' capacity as parents and to credit. To embark upon such an investigation would have been lengthy and in my opinion irrelevant to the issues before me relating to custody.⁷³

70 Ibid at 828. The Court went on to compare the case of *Director-General of Family & Community Services v Davis* (1990) FLC 92-182 with the case of where the Court held "that the degree of harm referred to in reg 16(3) must be substantial and to a level comparable to an intolerable situation." The Court held that the case was comparable with Davis' case and held "In these circumstances, in the absence of other evidence from which one could infer that in relation to the children in the present case their return to the husband would involve a grave risk of psychological harm of the severe degree required, the Court is bound by the decision of the Court in Davis ... I find that the grave risk of psychological harm has not been established."

71 R Graycar "The Relevance of Violence in Family Law Decision Making", unpublished paper presented at CLE/FLPA Family Law Residential, 21-23 July 1995.

72 In their inquiry into Equality Before the Law – Justice for Women supra n4.

73 Supra n71 at 2, included in confidential submission (on file with ALRC and Ms Graycar).

This view appears to go back to the days of the *Heidt* and *Chandler* decisions and is consistent with the writer's view of how many judges on a daily basis treat the issue.

(c) The Australian Position - Post 11 June 1996?

Section 68F now requires that the Court must take family violence into account when determining what is in the best interests of a child. On its face this is to be applauded, as it firmly directs the Court to be aware of the issue when making child-related decisions. Behrens argues it may however only be a "new rhetoric" and can "disguise value-laden decision making and to allow other interests to be silenced".⁷⁴

If in a judge's opinion a child's best interests require it, he or she may make an order that is inconsistent with a family violence order and exposes their mother to an (even in his or her opinion) unacceptable risk of family violence ... I would contend however that a woman should not have to argue for her safety based solely on the interests of the child.⁷⁵

How then has the Court taken family violence into account since the Act's commencement? There appear to be no reported decisions specifically on point to test whether violence was being considered in the Court's decisions. However, the Court's approach to matters dealing with family violence has not altered, despite the new provisions. This view, it is submitted, is supported by the recent Full Court decision of the *B and B: Family Law Reform Act* case.⁷⁶ The case is an important one for many reasons, most significantly with respect to the issue of whether the child's "rights"⁷⁷ have such priority so as to predominate over all other matters the

74 *Supra* n5 at 42.

75 *Ibid* at 43. For a further discussion of this point see J Harrison and J Behrens, "Inequality, Power and Control: Relevance to Domestic Violence, Responses in the ACT and to the Family Law Reform Bill", paper presented to the First Annual Forum on Justice for Women, National Women's Justice Coalition, Canberra, March 1993, 12 at 16 where they state "while the best interests of the child must be a child-centred tests it is submitted that the inextricable link between the well-being of the child and the custodial mother requires a recognition of the realities and interests of the custodial mother. Promoting women's substantive equality is fundamental to the well-being of women and children in their care. Accordingly, it is submitted that the concept of the best interests of the children should be interpreted in a manner consistent with the constitutional goal of promoting women's substantive equality".

76 *B and B: Family Law Reform Act* (1997) 21 FAM LR 676; FLC 92-755.

77 Section 60B of the Act states:

(1) The object of this part is to ensure that children receive adequate parenting to help them achieve their full potential and ensure that parent's fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that except when it is or would be contrary to a child's best interests:-

(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;

Court may have historically considered as relevant to a child's best interests.

In its judgment, the Court considered the provisions of ss60B, 65E⁷⁸ and 68F.⁷⁹ The Court held that the best interests of the child is the paramount consideration and in deciding what is in the best interests of the child, the Court then has to regard to ss68F and 60B.

With respect to s68F, the weight "which is attached to any one consideration will depend upon the circumstances of the individual case and is a discretionary exercise by the trial Judge".⁸⁰

As to the "rights" of the child, the Court found s60B would provide guidance to the Court's consideration of the matters and the overall requirement of s65E. "The matters in s68F(2) are to be considered in the context of the matters in s60B which are relevant in that case. Section 65E defines the essential issue."⁸¹

Thus, whilst the Court is obliged to take into account family violence (as provided for in s68F (2)), it is only one of many factors the Court must consider in its discretion and must be considered in the context of s60B so far as it is relevant.⁸²

The degree of relevance of s68F will largely rest on the expertise and interest of the Judicial Officer in issues of family violence, the skill of the practitioner in drafting the material to identify it as an issue and the skill of the advocate in stressing to ensure its importance to the Court, as to how far it will impact on the decision making process. It is the writer's submission that s68F will not significantly change the Court's approach to the weight attached to family violence.

However, the decision of *B and B* is of some comfort to women fleeing violent partners as it confirms they are not required to "jointly" co-parent with their abusive

(b) children have the right of contact, on a regular basis, to both their parents and with other people significant to their care, welfare and development;

(c) parents share duties and responsibilities concerning the care, welfare and development of their children;

(d) parents should agree about the future parenting of their children.

78 Section 65E specifies the Court is required to determine what is in the best interests of the particular child as the paramount consideration.

79 Section 68F sets out a list of matters the Court "must consider" when determining what is in the best interests of the child.

80 *B and B*: Family Law Reform Act 1995, supra n76 at 132.

81 *Ibid* at 133.

82 A Dickie in Family Law 3rd ed, LBC Information Services, Sydney, 1997, p403 talks of how violence will be relevant. "Acts of violence by a party to proceedings for a parenting order are relevant to the proceedings only to the extent that they have a bearing upon where the best interests of the child lie. Such acts may for example indicate a propensity to violence by the party concerned and this may in turn indicate potential physical or psychological danger to the child. On the other hand, the acts concerned may represent an explosion of otherwise justifiable anger and represent no real danger to the child. Relevant acts of violence are not limited to those against the child personally." Dickie cites *In the marriage of JG and BG* (1994) FLC 92-515 as authority for the above. He goes on further to say that "at the very least a propensity to commit acts of domestic violence may indicate that a person is likely to be a poor role model for the child." Does it follow an act of violence if "it was for good cause" is then discounted? This view appears to be consistent with the view of some members of the Bench. The writer does not believe s68F(2) will change this view.

ex-partner and confirms freedom of movement of the custodial parent (subject to certain limitations).⁸³ In this regard the decision is reflective of the best interests of the child and ensures that a skewed view of the child's "rights" having priority over what is in their best interests, does not occur.⁸⁴

This hypothesis of the Court's approach to family violence on interim custody/residence hearings and at trial was tested by a survey of practitioners' experiences. Surveys were sent by the writer to the 55 Accredited Family Law Specialists in Queensland to try to illicit data with respect to unreported decisions covering these issues. Fifteen responses were received. It is acknowledged the survey has its limitations.⁸⁵ The questionnaire sought data pre and post the Act's commencement.

83 The case was an appeal against Jordan J's decision to allow the wife to leave Cairns to move to Victoria with the two children of the marriage. The husband opposed the wife's move with the children. The parties had been separated for approximately five years and whilst there were difficulties between them the children had regular and meaningful contact and a good relationship with their father. The wife wished to remarry and this was her primary reason for moving to Victoria. A family report was prepared which indicated the children had a good relationship with both parents, but appeared to be very attached to their mother, and wished to be where their mother resided. A concern raised by Jordan J (trial judge) was the impact upon the mother should the judge restrain her from removing the children from Cairns. He was of the view this could have possibly impacted on her ability to parent the children in the manner she had parented so effectively to date and could affect the relationship between the parents, such that problems could occur with respect to contact which would flow on to the children. For a discussion of cases on point and the position pre and post the Act, see L Young "Will Primary Residence Parents be as Free to Move as Custodial Parents Were?" (1996) 11 AJFL 31.

84 J Dewar in "The Family Law Reform Act 1995 (Cth) and the Children's Act 1989 (UK) - Twins or Distant Cousins?" (1996) 10 AJFL 18 compares the two Acts and identifies the issue of independent or cooperative joint parenting model with respect to parental responsibility in both Acts (and s60B). It was the view of Dewar that as the Reform Act was silent in providing "that either parent may discharge their parental responsibility independently of the other" (at 26), this was one indicator that cooperative parenting was required by the Act. Dewar indicated "Neither, however, is there an explicit requirement that one parent consults the other before making a major decision". This appears to have been resolved in the decision of B and B subsequent to this article, in that the Court held: "In the absence of a specific issues order, we think it unlikely that the parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day to day matters and the impracticability of such a requirement when they are living separately only has to be stated to be appreciated. As a matter of practical necessity, either the resident parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children, such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation". (Unreported, Full Court, 9 July 1997 at 123-124).

85 The criticisms which could be mounted of the survey include as follows:
 (a) a definition of domestic violence ("family violence" in this paper) was not given with the questionnaire. Thus answers from Practitioners may reflect their own values as to what constitutes "violence".
 (b) Reference was made to the "wife" interchanged with use of the "woman". It was the intention of the writer that all custody/residence cases litigated by the practitioners in the Family Court would be considered not limited to married couples. It is unknown whether practitioners answering

With respect to case pre-11 June 1996. Practitioners were asked:

1. Approximately how many custody cases had been litigated by them over the past four years? Answers ranged between six to 100, with some "unable to say". An average of 38 cases per practitioner.
2. Of those cases, how many:
 - (a) involved allegations of domestic violence? Answers ranged from two to "almost 100". Average of 19 per practitioner;
 - (b) the wife sought sole use of the home? Answers ranged from two to 15. Average of 3.4;
 - (c) resulted in the woman being successful? Answers ranged from two to 49. Average of 15.20.
3. Involved domestic violence and the wife removed the children from the family home? Answers ranged from one to 95. Average of 12.⁸⁶
4. Involved domestic violence and the wife lost interim custody? Answers ranged from nil to 17. Average of 2.73.
5. In those cases, in approximately how many were the wives the primary caregivers?⁸⁷ Answers ranged from two (which is that particular case represented two of nine cases involving domestic violence, as opposed to two out of 20 cases in all litigated) to 95. In any event, the average was 23.
6. How many cases was domestic violence acknowledged by the Court as being relevant to the determination of the best interest of the children? Some practitioners found this impossible to answer. Answers ranged from "not known" to a "few", the highest being 95. Average of 11.8. This is *not* precise, given the answers.⁸⁸
7. How many cases where the wife lost interim custody was the status quo confirmed on final trial? The answers ranged from nil to 17. Average of 2.3
8. How many cases where the wife lost interim custody did the matter:
 - (a) settle on a joint custody arrangement? The answers ranged from nil to two.

the questionnaire interpreted it in the same way.

(c) The survey is limited in the number of persons who responded. Thus, it is of some assistance only to the writer in support of the hypothesis rather than evidence of firm empirical statistical evidence to support my contentions.

(d) Given the survey sought information on custody cases over the last four years, the information provided by practitioners may be by necessity from memory rather than exact.

(e) The survey did not record the effects of other contra-indicators such as psychiatric problems or child abuse which may impact on why the mother may have been unsuccessful on an interim hearing or at trial.

86 The writer queries some of the responses as for example the potential for the practitioner responding with "95 cases", may be an over-estimate in the circumstances.

87 The question may not have been specific enough as some practitioners linked this question with question 2 (all those cases involving domestic violence) and other practitioners linked it with question 1 (of all cases litigated).

88 There are some concerns with respect to some of the answers received, which appeared not to correlate with previous figures provided by them. For example, one practitioner had answered that nine of their cases involved domestic violence and yet the response to this question was 47.

Average of 0.2;

(b) settle prior to trial? The answers ranged from nil to 19. Average of 4.13.

9. How many cases was the wife successful on final trial? Some practitioners did not answer this question. Answers ranged from "not applicable" to 50. Average of 4.8.⁸⁹
10. In those cases, was domestic violence a factor the Court took into account which weighed against the husband? The answers predominantly were no, with isolated yes's. Average of 6.7 cases.

Despite the limitations of the survey, the results are still of interest in that:

- In only approximately 60% of cases where family violence was alleged, the Court acknowledged family violence was being relevant to the best interest of the children;
- In approximately 85% of cases where family violence was involved and the mother lost interim custody, the status quo was confirmed at final trial;⁹⁰
- An average of 50% of cases litigated involved allegations of family violence, of those only 17% sought sole use and occupation of the matrimonial home;
- Interestingly, in only 66% of the cases litigated where domestic violence was involved were the mothers primary caregivers;⁹¹ and
- Approximately 14% of cases where family violence was involved the mothers lost interim custody.

With respect to cases post 11 June 1996?⁹² Practitioners were asked:

1. Approximately how many cases have you litigated which sought interim residence orders? Average was 13.6;
2. Of those cases, how many involved:-
 - (a) allegations of domestic violence? Average 8.7;
 - (b) and the wife was unsuccessful? Average 1.2;
 - (c) the wife sought sole use of the home? Average 1.2;
 - (d) allegations of domestic violence and the wife removed the children from the home? Average 3.8;
 - (e) allegations of domestic violence and the wife lost interim residence? Average 0.67.
3. In those cases, how many were the wives primary caregivers? Average 9.27;

89 This average may be inflated as a result of one answer of "50" to this question. Other answers appeared to reflect the question intended, ie, how many cases where domestic violence was an issue was the wife successful on final trial?

90 These figures are higher than the 68% in 1990 assessed by S Bordow supra n22.

91 These statistics may be incorrect, bearing in mind the interpretation may have been that an estimate of the number of cases of total litigated were the wives primary caregivers was sought rather than the number of cases where there was domestic violence in existence.

92 Results indicated that final results at trial have not yet been determined in numerous cases.

4. In how many cases where domestic violence was an issue did the Court take domestic violence into account on an interim basis as a matter affecting the bests interest of the children. Average 5.4;
5. How many of those cases have reached final trial? Average 0.3;
6. How many cases settled since the interim decision as a "mutual residence" (joint "custody" order)? Average 0.27.

Many practitioners, with respect to the latter three scenarios, answered nil. The figures may be inflated as one practitioner indicated quite significant applications (50 in total) which may have skewed the figures slightly. These results indicate (again in light of the limitations):

- Approximately 64% of cases which sought interim residence orders involved allegations of family violence;⁹³
- Of the cases involving allegations of family violence, in approximately 13% of cases the mother was unsuccessful in obtaining interim residence;⁹⁴
- 41% of those cases involved the wife removing the children from the home;
- In 68% of cases the wife was primary caregiver;⁹⁵ and
- The average number of cases where the Court took family violence into account on an interim basis was interestingly, in only 63% of those cases where family violence was alleged.

Despite the survey's limitations, it is suggested the following may be argued with respect to the Court's current approach to family violence:

- Family violence is an issue in 64% of cases presenting to the Court for interim residence decisions;
- Despite the mandatory factors set out in s68F, the Court only takes family violence into account in approximately 63% of cases where family violence is an issue; and
- Women lose interim residence in approximately 13% of those cases where violence is an issue.

It is my view the survey results lend some support to the hypotheses:

- Family violence is an issue in the many cases appearing before the Family Court;
- Section 68F requirements have not significantly altered the Court's approach to family violence and particularly the result of interim residence decisions.

93 An increase of 14% of cases pre 11 June 1996.

94 This represented a reduction of only 1% from those cases prior to the commencement of the Act.

95 An increase of 3% on pre-11 June 1996 figures.

4. Interim Custody/Residence

(a) The “Facade of Stability”

Numerous cases present to the Court where a woman has, in flight from violence, removed children from the matrimonial home and then has been faced with either an ex-parte custody order and warrant for the delivery up of the children to the husband’s care or the prospects of an interim custody/residence hearing. These women are often labelled “child abductors”. On an interim basis, women have been at risk of losing custody/residence of their children under the facade of the father and home providing “stability” for the children. This is particularly so if it has been some months from the date of separation when the children and mother are eventually located by the Federal Police attempting to enforce a warrant. These women face a difficult battle to retain care of their children, notwithstanding the fact many of these women acted in what they believed was the best interests of the child in removing the child from a violent household.

Apart from the concern that until fairly recently ex-parte custody orders appeared to be readily given by the Court, the concern is as to how the Court treats family violence, if at all, on an interim hearing. It is a rare case indeed that a perpetrator would, on material placed before the Court, admit he has perpetrated violence upon his wife. Women often hide the abuse from family, friends and the medical profession. Thus they have no witnesses, often save the children, to support their story. If no-one will come forward on their behalf, why should the Court believe them? How can the Court take into account “untested” evidence on an interim basis? Unfortunately for the women involved this is compounded further as by the time the matter comes to the Court for interim hearing, particularly if the perpetrator has been required to attend the Court on numerous repeated occasions to obtain, for example recovery and location orders, the Court has developed a sympathy for the perpetrator. Allegations then raised by the mother as to family violence may fall on deaf ears. The children are returned to the perpetrator’s household and “stability” is assured? By the time of trial, sometimes more than 12 months later,⁹⁶ “status quo” has been established.⁹⁷ Unless a very negative recommendation is made against

96 These statistics are cited by P Doolan “Cilento and Cilento Revisited - In the Best Interests of the Child?” (1996) Vol 11 AJFL 86 at 103.

97 A Dickie *supra* n82, p 392, discusses “status quo”. “It raises for consideration the desirability of a child remaining with the person who is currently looking after him or her on the basis that this will involve no disruption to the child’s established life with all that this entails in respect of settled schooling, continued contact with friends, familiarity with the neighbourhood and settled home routine ... In case there be any doubt on the matter it should be emphasised that the status quo concerns the present situation and not simply the present place where the child is located”. He cites for example *In the marriage of Rayner* [1982] FLC91-239 at 77,313-77,314. The writer agrees with the learned author in theory, but in practice the experience is very much different, particularly when interim hearings are concerned. One of the primary texts in family law, *Australian Family Law Guide*, CCH, Sydney, 1996 p13074, para 14277), for example, states as follows: “By virtue of s65E in deciding whether to make an interim residence order, the Court must regard the best interests of the child as the paramount consideration.” However, as the Court may not

the father via a family report (the issue of family reports will not be explored in this article, although there are concerns that some counsellors fail to appreciate the impact of family violence on children and this is reflected in sometimes ill-conceived recommendations), the prospects of the mother, who has in many cases been primary caregiver, of retaining the children is negligible.

The assumption that the interests of the child are best protected on an interim basis if the *status quo* is preserved is based on an underlying presumption that it is ordinarily better for a child to continue to live in his or her established environment than to undergo disruption to his or her life by changing residence on an interim basis. Any inconvenience or problems caused by such disruption would of course only be compounded if the Judge at the final hearing was to order that the child return to live with the parent who was originally looking after him or her.⁹⁸

This is where the difficulty lies for many women. Stay and suffer abuse or leave with or without the children and risk losing their custody.⁹⁹

This difficulty is highlighted in another unreported case cited by Graycar in a submission before the Law Reform Commission.¹⁰⁰ The woman lost custody on the premise of "status quo", the Court having awarded the father interim custody. Graycar states:

The Family Court gives no weight to the existence of violence. It adopts an ostrich like attitude of the paramountcy of the interests of the child as the situation exists at the time of the Court hearing completely ignores how the situation has evolved ... It is very convenient for (the Judge) totally to ignore the history of violence in the marriage. There is no mention of it any where in the judgment ... It seems that the message of my case is that a woman must not leave a dreadful and revolting relationship unless she can get the children out with her. If she leaves without the children then she will effectively

have all the relevant facts before it or may not in any event have an opportunity to conduct a thorough enquiry into the facts before making its decision, the Court may reasonably assume that the interests of the child are best protected on an interim basis if the "status quo" is preserved; in other words, if the child continues to live in his or her established environment for the time being. The assumption of where the best interests of the child lie can be displaced by evidence to the contrary.

98 Australian Family Law Guide supra n97, para 14277.

99 For a discussion of why "women stay", see RP Dobasch and RE Dobasch "Violence Against Wives: A Case Against the Patriarchy" Free Press New York, 1979 and "Queensland Domestic Violence Taskforce Report", supra n15 at 68. "To ask why women stay with violent men is to pre-suppose that women simply stay or leave, when in fact most make repeated attempts to escape the violence, leaving and staying for different periods of time until eventually they leave permanently. Each time a women leaves, even though she may return to the relationship, she is developing the resources she needs to separate finally ... Many women succeed in leaving sometimes immediately after the first beating and sometimes after years of violence." (as quoted, Family Violence Professional Education Taskforce Family Violence - Everybody's Business Somebody's Life (1994) at 81.

100 Supra n71 at 9 (confidential submission on file with Graycar and ALRC).

lose them. As status quo is established by fair means or foul and the status quo will then prevail ...¹⁰¹

This is certainly the experience of the writer of the difficulties women face to overturn a custody decision at trial once they have lost interim custody. In one case in 1992,¹⁰² at the interim hearing in Sydney, the Judicial Registrar indicated that he would be ordering the return of the children to their familiar environment (ensuring “stability”) and the husband’s care.¹⁰³

During the course of a break in the hearing, the parties effected a reconciliation. Not surprisingly, as is the case for many women who return to violent homes, the reconciliation did not last and a few months later the wife left again with the children. The husband filed again seeking ex-parte custody orders. One wonders whether the wife was eventually located and the children returned to the husband. As the Court did not give weight to the impact of violence on the children previously and based its decision on the issue of “stability”, the likelihood of the Court giving any weight to the violence when she fled a second time would probably be remote.

In another 1992 case,¹⁰⁴ at the interim hearing his Honour heard submissions from the bar table and had read material from the wife as to a history of violence. The wife admitted to hitting the husband on one occasion, in retaliation, whilst he was beating her. The wife lost clumps of hair during the incident and received bruising. The husband was unmarked. This incident led the Court to make a finding that, despite numerous allegations by the wife of repeated physical attacks upon her by the husband and emotional and controlling behaviour that “she gave as good as she got”. In one sentence, the Court discounted the impact of family violence upon her and the children, imposing “mutuality” of violence. Fortunately for the wife, the Court considered that as the wife proposed to return to the home and to return the children to their former school, then “stability” would be satisfied in leaving the children with the wife.¹⁰⁵

101 Ibid.

102 There were three children of the marriage, the mother had suffered serious violence, including not only repeated physical abuse but psychological and emotional abuse. The wife removed the children to Queensland from interstate and moved into a shelter. The husband obtained an urgent hearing date and an ex-parte order for “continuous access”.

103 This was despite lengthy affidavit material filed on behalf of the wife setting out concerning allegations of violence perpetrated by the husband against the wife, often in the presence of the children (from two-seven years), The wife was the “primary caregiver”, the husband working on a full-time basis and the wife not working.

104 In this case there were two children of the marriage and the wife left the family home with the school-age children and moved into a women’s shelter. On the advice of the writer the wife sought exclusive use and occupation of the home as without such application on an interim basis the wife’s prospects of success of retaining the children may have been remote given she had removed the children from the home and their local school.

105 If, however, the wife had been so fearful she would not have mounted an application for exclusive use of the former matrimonial home, one wonders if a different result would have occurred.

In a 1995 case, the issue of violence on an interim basis was again raised.¹⁰⁶ The husband in his material alleged the wife was suffering from psychiatric disturbances and was alcohol dependent. As a result of the decision in *Re K*,¹⁰⁷ the appointment of a separate representative (now called "Child Representative") was ordered. An adjourned date eight weeks later was given. At the next return date the Separate Representative informed the Court that a family report was being arranged for the assistance of the Court at interim hearing. Whilst this was probably a perfectly correct course, the obvious result was that by the time the report was prepared and the interim hearing took place (which turned out to be nearly four months from the initial application) a "status quo" had been established. Despite the fact very concerning allegations of repeated physical abuse upon the wife by the husband (which was in part admitted to by the husband, but a "she made me do it" and "she gave as good as she got" defence was mounted by him), the violence was discounted. The Court felt bound by the principles in *Cilento* - the violence was not "convincing proof" the child was in physical or moral danger in the husband's care. (Did not the husband allege the violence was mutual?) Eighteen months passed from the interim hearing to date of trial. The wife ultimately conceded custody to the husband as the prospects of success after such an interval of time was questionable.¹⁰⁸

These unreported decisions suggest that the Court often equates "stability" on an interim basis as synonymous with the home in which the child had been living in and school the child attended - violence to the mother, if not discounted as "mutual", is avoided or ignored.¹⁰⁹

This is not, it is respectfully submitted, a correct interpretation of the principles in *Cilento* - it is the *situation* rather than the home/school that the Court must

106 This was a case involving interim custody of a child who was approximately 18 months of age. The wife was the caregiver and the husband unemployed. The wife left the home with the child and moved into a women's shelter as a result of repeated physical abuse upon her by the husband. The wife arranged for the husband, despite his violence, to have contact with the child. During the second contact, the husband retained the child and refused to return her to the wife. This was a typical case of where the wife was unsuccessful in obtaining an urgent grant of legal assistance. It is Legal Aid Office (Qld) policy that prior to a grant of legal assistance, the parties had to have attempted either counselling or mediation, in practice often notwithstanding the fact violence was an issue. The husband had been granted legal assistance to file an application for interim custody and unfortunately for the wife, as legal assistance was not granted on that day, the Court, given number of matters, adjourned the application for eight weeks. At the next return date an application was made by the husband's solicitor for a separate representative to be appointed.

107 (1994) FLC 90 461.

108 Criticism cannot be levelled at the Court entirely for this unfortunate result. Delays in the Court and clever delaying tactics by practitioners can affect the results of custody decisions.

109 It was held in the case of *In the marriage of Rainer* (1982) FLC 91-293 at 77,313-77,314, "even though the Court is guided by the paramount concern for the welfare of the child, that welfare is unlikely to be promoted if the child's established situation is disrupted pending full hearing of the matter unless there are cogent reasons requiring a change ... The establishment of a status quo is not dependent upon one or the other party continuing to occupy the matrimonial home and nothing in *Cilento's* case can be taken as authority for such a proposition". The writer does not believe this view, however, it accords with what regularly occurs in practice.

consider when addressing the issue of stability. Surely a violent man cannot provide a *stable* environment/situation for children?

Where a mother who has left the family home as a result of violence and arranges suitable and certain living arrangements for the child on an interim basis, this must equate with “stability” for that child (assuming the mother is otherwise an appropriate caregiver)? To award interim custody to a perpetrator does nothing more than create a “facade of stability” which often rewards a perpetrator with “status quo” and success at trial.

It is the view of the writer that the existence of family violence must be “convincing proof” the child’s physical or mental health or moral welfare will be really endangered by the child remaining where he/she is until a contested application is heard”.¹¹⁰

These difficulties women face on interim hearings are further compounded as a result of the very strict time limits including the “two hour rule”, the limit on affidavit material that can be relied upon (at least in the Brisbane Registry)¹¹¹ and the inability to cross examine witnesses.

Doolan is of the view¹¹² this practice has a significant impact, eg in cases such as *C and C*¹¹³ where the Court refused to grant an adjournment to respond to a lengthy affidavit filed on behalf of the husband seeking custody of the two children of the marriage. The wife was ultimately unsuccessful on an interim basis and an order was made that the children be returned to the matrimonial home and prior schooling arrangements.¹¹⁴

Once interim custody is lost, time runs against many women. Each day without

110 In the marriage of Cilento (1980) FLC 90-847 at 75,346. The difficulty with respect to establishing the criteria “convincing proof” is that it is only in “serious” cases where, for example, a wife is hospitalised or there is medical evidence to support physical abuse, the Court may be convinced the violence has occurred. Otherwise the Court is faced with allegations raised by the wife which are usually denied by the perpetrator on material. Given these difficulties it may be said is it any wonder that the Court has historically not taken family violence into account on an interim basis. Some solace can be obtained in the decision of In the marriage of Merryman (1994) FLC 92-497 at 81,171 where the Court awarded interim custody (and exclusive use of the matrimonial home) to the wife specifically taking into account the husband’s violence as a danger to the wife and children and what was required by the Court so as to ensure stability in the child’s lives. Weight was also given to the fact the mother was the children’s primary caregiver.

111 See Practice Note published by the Brisbane Registry Family Court “Guidelines to the Conduct of Proceedings in the Duty List” June 1995. The “two hour rule” applies to all contested duty list matters which includes time for reading of material and for the judgment. There is no longer the provision for the matter to be transferred from the Duty List to the Pending Cases List to be heard as a short defended matter.

112 For a discussion of interim custody practice directions and the impact upon interim hearings of the practice direction, see P Doolan *supra* n96.

113 (1995) 20 Fam LR 20.

114 Jordan J found that the parents had shared caregiving for the children prior to separation and the husband had the benefit of assistance from his parents who resided next door. The wife appealed on the basis she was denied justice as she was refused the adjournment and was unable to cross-examine the husband.

the children in her care builds a “status quo” for the perpetrator at trial.¹¹⁵ Doolan is of the view, given lengthy delays, “which plague the contested hearing list” and in particular the weight given to the status quo, the principles in *Cilento* are in need of “revisiting”.¹¹⁶

A recent Family Court study¹¹⁷ confirmed “status quo was maintained in 68% of the cases”. The study established “status quo directly affected custody decisions with 86% of the cases where the children were living with the mother at the time of trial resulted in the mother having custody and 64% of the cases where the children were living with the father at the time of the trial ending up in the father having custody.”¹¹⁸

Empirical evidence thus confirms that in the far majority of cases a father who has been awarded custody on an interim basis can successfully argue “status quo” (if the trial is up to 12 months later, which is often the case) and will be successful in retaining custody of the children. Thus, the existence of “status quo” at trial may reign supreme over the impact of violence in the household (particular given the writer’s view of the Court’s historical approach to the impact of family violence.)

The issue of the effectiveness and “justice” of interim hearings is a vexing one. For many women the interim hearing system is an ineffective and unjust one. The decisions of *C and C* and *D and Y*¹¹⁹ highlighted the difficulties the Court faces on these hearings, time and resources of the Court being major factors. The full court remarked:

This Court has finite resources and a limited number of judicial officers coupled with an ever increasing workload. If it was required to embark upon lengthy examinations of interlocutory issues such as interim custody, important though they may be to the parties, this would inevitably lead to an inability to provide hearings of final determinations of issues of custody and property within a reasonable time.¹²⁰

115 It should be noted however even in the case of *H and H* (interim custody) (1981) FLC 91-062 at 72,474, the Simpson J commented “although reference is often glibly made in custody cases to the ‘matrimonial home’ it is after all only a physical environment made a real home for children by the presence of two caring parents. When one parent leaves the home its character changes”. His Honour also stated, “The quality of the status quo, rather than its duration, must be the significant factor, even in relation to an interim decision and an alternative arrangement would better promote the children’s welfare and need to be preferred to an existing arrangement which is causing no harm to the children.” (at 76,494).

116 *Supra* n96 at 111. The writer agrees. It is of interest Doolan notes that the principles in *Cilento* were elucidated prior to the time when lengthy delays of up to 12 months between interim and final hearings took place.

117 S Bordow “Defended Custody Cases in the Family Court: Factors Influencing the Outcome”(1994) 8 AJFL 252 at 290.

118 S Bordow “Defended Custody Cases in the Family Court: Factors Influencing the Outcome”(1994) 8 AJFL 252 at 290.

119 *C and C* (1995) 20 Fam LR 20 and *D and Y* (1995) 18 Fam LR 662.

120 (1995) 20 Fam LR 20 at 32.

The injustice of this rationale is exemplified in the case studies highlighted as by the time of trial status quo often appears insurmountable.¹²¹

In the case of *Tate*,¹²² Rowland J bravely suggests *Cilento* is indeed in need of re-visiting. His Honour attributes this to the present Court delays in that at least 12 months elapse from interim hearing to final trial and “the consequential likelihood that the interim decision will very often be accepted as the final decision by the parties.”¹²³ His Honour suggests that to ensure the best interests of the child is assured an examination of the merits of the case should be undertaken on *interim* not final hearing. A methodology to the approach is suggested. His Honour believes the “evils” of *Cilento*¹²⁴ can thus be avoided by ensuring status quo is not the paramount consideration.

The Court was given the opportunity to reconsider the law on interim hearings in the case of *In the Marriage of C*,¹²⁵ a Full Court decision in March 1998. Possibly because the correctness of *Cilento* was not challenged by Counsel it is unfortunate the option explored by Rowland J was not explored. The failure of submissions to address the issue does not fetter the Court however in changing the law when it is required. This case provided a perfect opportunity to try to rectify the facade of stability, but the Court failed to do so. The potential for the façade was largely ignored. In fact the Court commented, “notwithstanding the passage of time since the delivery of (*Cilento* and those other relevant judgments) the increase in the number of applications before the Court since then and the subsequent enactment of the 1995 Act, the criteria referred to therein remain relevant in relation to an application for an interim residence order.”¹²⁶

The facts of that case were briefly as follows. The parties separated on 17 April 1997, the wife leaving the home with a ten year old son, her 15 and 17 year old children remaining with the husband in the home. The matter came before Underhill J at first instance, four months after the date of separation. His Honour held that the child should be returned to his father, holding *Cilento*'s principle was that “each case depended on its own facts and the overriding decision was the best “interests of the child”.

There were 11 grounds of appeal, ground four alleging his Honour had placed inappropriate weight to:

- (a) the allegation the wife was violent to the husband and the child and had acted inappropriately in front of the children;
- (b) the child's need to reside in the former matrimonial home; and

121 Difficulties and pressures upon the court in dealing with interim hearings is also canvassed in a paper by Judicial Registrar Smith “*Cilento* Re-visited” Family Law Residential, 1998.

122 (1997) FLC 92-724.

123 Ibid at 92,734.

124 Ibid at 92,732. “Evils” equally appear to include a parent secretly leaving and “setting up camp” elsewhere and the parent fleeing from abuse and taking some time to re-establish a new home.

125 (1997–1998) 22 FAM LR 776.

126 Ibid at 780.

(c) the fact the child had lived with the wife since separation, without complaint.

A final point was his Honour erred in law in distinguishing the principles of *Cilento*.¹²⁷

In the course of their decision, the Full Court referred to and upheld the previous relevant decisions on point.¹²⁸ The Court premaced the decision by confirming the best interests of the child was paramount¹²⁹ and then proceeded to set out guidelines to follow on an interim residence hearing.¹³⁰ The Court held:

given the mode by which interlocutory proceedings are conducted those interests (of the child) will normally best be met by ensuring stability in the life of the child pending a full hearing of all relevant issues. Accordingly as a general rule, any interlocutory order made should promote that stability.¹³¹ ... Where the evidence clearly establishes that, at the date of the hearing, the child is living in an environment in which he or she is well settled the child's stability will usually best be promoted by the making of an order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong overriding indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's welfare would really be endangered by remaining in that environment. The Court is entitled to place such weight on the child's current living arrangement as it deems appropriate in all the circumstances.

The Court considered it could place such weight as it deemed appropriate on the importance of retaining the living arrangements and in doing so, take into account how the status quo came about. It is of note that flight from abuse is not specified as a factor with respect to status quo, however, unilateral imposition is. One could suggest a father who denies the abuse (in the absence of independent evidence by the mother to prove same) could successfully defend a status quo argument, by maintaining the settled environment was unilaterally imposed by the mother?

Again when discussing how to determine if a child is living in a settled environment there is no mention in the judgment of the impact of family violence.¹³²

The Court held, the basis of the wife's submission was that at the hearing, the child was living in a well settled environment and as such should have remained with the wife. The Full Court held that as the trial judge did not make a finding the child was living in a settled environment, he must not have been satisfied the child was so living. The trial judge was then within his rights to undertake a limited evaluation of those matters in s68F. As "status quo" was only one of many

127 Ibid at 779.

128 *Cilento* (1980) FLC 90-847; *Griffiths* (1981) FLC 91-064; and *C and C* (1995) 20 Fam LR 20.

129 The Court referred to ss60B, 65E and 68F.

130 At 780. The Court also confirmed the procedures adopted in *C and C* and *D and Y*.

131 Ibid at 781.

132 Ibid at 782. Factors such as the wishes, age and maturity of the child etc are addressed.

discretionary factors the Court may take into account in determining orders to be made in the instant case it was open to the Court to not wish to separate the children.¹³³ Thus the trial judge's decision to return the child to the husband was upheld.

What does this decision mean? Does it provide any assistance to a woman fleeing her home from abuse when conducting her interim residence hearing? We now have to show a "well settled environment" to establish stability but *stability* remains the significant factor in these decisions. The Court has confirmed the previous decisions although emphasising the trial judges' discretion. Family Violence is not, on the face of the decision, a contra-indicator of a "well settled environment". It would appear the facade of stability continues.

5. The Need For Reform?

There needs to be legislative reform so as to ensure the existence of family violence has the significance it deserves, particularly when considering interim custody/residence decisions. It is suggested that legislation could go as far as to make it a rebuttable presumption, that where children live in a home where violence is being perpetrated, it is not in the child's best interests and/or it does not promote stability for the child to remain in the care of the perpetrator. It may even be necessary to go so far as to say the child is not living in a well settled environment when living with a perpetrator.

Some investigation of the "rebuttable presumption" option, has also taken place in the United States. As a result of a three year study project in the United States, a model code on domestic and family violence was prepared which stated, "in every proceeding where there is at issue a dispute as to the custody of a child a determination by the Court that domestic (family) violence has occurred raises a rebuttal presumption that it is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody or joint physical custody with the perpetrator of the violence."¹³⁴

There are currently no existing provisions in any custody statutes in the United States where there is a presumption that the existence of family violence is not in the best interests of the child.¹³⁵

To ensure appropriate legislative change a broad definition of family violence

133 Ibid at 784.

134 As quoted in NKD Lemon (ed) supra n35. Section 401 of the Model Code on Domestic and Family Violence, drafted by the National Council of Juvenile and Family Court Judges, USA.

135 As quoted, N Cahn supra n32 at 371. Cahn argues that change "requires a broader appreciation of the impact of domestic violence on children. This will entail using a parent's past behaviour as a basis for making custody decisions and recognising that past abuse demonstrates at the least insensitivity to the child and an indication of future actions. Secondly, and more importantly, we need to re-examine and re-formulate our images of the battered woman in an effort both to understand and accept her and to question our bizarre tolerance of the abuser's behaviour". Cahn also argues, with which the writer agrees, that acts of domestic (family) violence should query the fitness of a parent to care for the child and regular judicial training in all issues of family violence is essential to understand the psychological affects of violence.

needs to be reflected in the legislation, amending s60D to at least acknowledge psychological abuse and intimidation as family violence and to reject the notion of "mutuality" of violence.¹³⁶ Secondly, provisions similar to that in the Model Code or the New Zealand statute referred to, should be enacted.¹³⁷ Thirdly, s60B should be amended to reflect the child's rights as including the right to live in an environment free from violence. Finally, provisions must be enacted to acknowledge stability for children are not promoted in the care of a violent parent, be it on a short or long term basis. This may appear to be stating the obvious, but given the concerns as to the approach to the issue by some members of the Court, legislative change to this degree it is submitted is essential.

Another option is a re-thinking of the entire practice on interim hearings. This would require a commitment by the government to increased funding to both the Court and the litigants via Legal Aid. In fairness to the Court, given the huge number of cases before it and limited resources, is it any wonder the Court took the conservative approach it did in *The Marriage of C* case? If funding was provided some detailed albeit limited investigation of the merits, with cross-examination could be undertaken at the interim stage. It is suggested that this coupled with the amendments suggested may lead to a more just result for some women fleeing violence. Unfortunately it will not necessarily lead to a diminution of the "she gave as good as she got" rationale. One can only hope, as some members of the profession and some members of the Court take the time to understand the dynamics of family violence, it will be understood that to serve a child's best interests is to ensure they do not live with a perpetrator of family violence, even if such violence is "only" directed at the mother.

136 It is acknowledged the legislation will not go so far as to make the definition gender specific or as broad as that proposed in National Committee of Violence Against Women Position Paper on Domestic Violence, 1991. At the very least a definition akin to that in s11(1) of the Domestic Violence (Family Protection) Act 1989 (Qld) is required.

137 It was not the object of this paper to discuss family violence with respect to contact cases. However, any reform must consider family violence and its relationship to child contact.