**An Extract from the Men’s Rights Agency submission No 603 to the Joint Select Committee on Australia’s Family Law System**

**Feb 2020**

**TOR b. the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court make orders for non-compliance and the efficacy of the enforcement of such orders**

Recently retired barrister, Anthony Smith, who is experienced in family law and criminal matters, has an exceptional understanding of the difficulties faced by participants in family court cases.

Mr Smith has supplied a submission for inclusion in this discussion.

We are pleased and extremely grateful for Mr Smith’s insight into one of the major problems that has been allowed to develop and is causing devastating harm to parents because judges no longer use the ability they have to gather the evidence they need to make a reasoned decision in the first instance.

**Fixing the Family Law Mess**

The Oxford Don, author and philosopher C.S. Lewis wrote:-

*We all want progress, but if you're on the wrong road, progress means doing an about-turn and walking back to the right road; in that case, the man who turns back soonest is the most progressive.*

The decision of Cowling v Cowling in 1995[[1]](#footnote-1) put paid to the hitherto existing practice of interim hearings with cross-examination in the Family Court. Since that "progressive" decision, the welfare of children has suffered and the cost of litigation skyrocketed.

The impetus for the decision was not the inefficacy, faultiness or justiciability of the existing practice but that the then resources of the court, viz. judges, availability and court time, simply wasn't there.

For those who practised between the commencement of the Family Court's sole federal jurisdiction from 1976 and up until 1995, few would disagree that interim hearings became a type of "clearing house." The system allowed justice to flourish.

Thus, spurious, frivolous, vexatious, piffling and even false claims usually by one parent against the other in respect of the care or lack of capacity to care, guide and nurture in a proper and responsible manner for the children of the marriage, would be dealt with in a quasi-summary fashion. These hearings would normally be over in half a day, sometimes less.

What happened therein, more often than not, was that a judicial determination was pronounced about the credit of the maker of the allegations and/or the denier. Absurd and preposterous contentions were given short shrift by the judge. An adverse finding of credit against a parent resisting the other's application for access, as it was then called, invariably resulted in an order for access and more often than not put an end there and then to costly litigation.

In many cases, such hearings led to final orders being made on or just after the interim stage following such findings. Often the experienced judges would issue veiled warnings to parents, more often than not in those days, mothers, who were the subject of an adverse interim finding of credit that the custodial arrangements may be looked at should the matter go to trial. In some cases, this applied to non-custodial fathers who weren't 'playing the game' either.

When a superior court justice made a ruling on credit like this and/or issued warnings, they had a salutary effect upon the miscreant party and hastened resolution of the dispute. This procedure was fundamentally one carried out in the interests of justice.

I recall speaking to the late District Court of Qld judge, B.M. McLoughlin who before being elevated to the bench, used to practise as a barrister under the *Matrimonial Causes Act* (the precursor to the Family Law Act).

The practice of having an interim hearing was one to which he was well used and commended it in respect of contested divorces. He said once a ruling was made on credit, invariably the parenting matters and often property, too, settled thereafter.

I hasten to add that I'm not suggesting a return to bunfights over who committed adultery with whomever. But the position with interim parenting hearings is analogous.

Within four years of Cowling, the Federal Magistrates Act was promulgated and the FMC became operational. This court (these days called the Federal Circuit Court) was created to ameliorate the workload of the Family Court. For practical purposes, it dealt with interim hearings in parenting matters but did so on the papers despite the fact that the Cowling impetus no longer existed. It became a "convenient" practice to follow in order to free up ever more court time for final hearings. But of course, it didn't work that way as parenting matters assumed ever greater complexity of what might be respectfully called the "bureaucratic" kind.

Thus where allegations of the type referred to above were made, that often meant no contact or supervised contact in the meantime and the commencement of an attenuated process of family reports, psychiatric and/or psychological expert reports. And to complicate the process further came the proliferation of the Independent Children's Lawyer, a well-meaning, but yet another stumbling block to speedy resolution of the parenting list of cases.

In my opinion part of the problem of Family Court and Federal Circuit Court jurisdiction lies in the prism of its creation. Certainly, the Federal Circuit Court has a wider jurisdictional remit than the Family Court given that the former deals with immigration, social security, employment and union issues, bankruptcy and other areas whereas the latter is the exclusive creature of the Family Law Act.

At least with any change, the Federal Circuit Court could be stripped of its family law jurisdiction and function in the other areas for which it is already mandated. However, it must necessarily follow that without family law, the Family Court would become otiose.

In my opinion, in shaping a future direction for the determination of the sensitive and difficult issues surrounding parenting disputes in particular, that future lies with the return of family law justiciability to the State Courts as was the case prior to 1976.

Judges of the Supreme Courts of the various States and territories could, as part of their jurisdictional remit, handle these cases. In my opinion, their broad experience of the general law and not being confined to just one area such as family, would be in the interests of justice. Existing Family Court judges could be recruited to the State Supreme Courts if they so choose. However, importantly and vitally to the litigants and the judges themselves, they would float between the various legal jurisdictions comprising State Supreme Courts. I note that Western Australia has its own Family Court exercising federal jurisdiction.

One has to be cautious of anecdotal references as much as one has to be careful to appraise so-called 'research'. But I speak as someone who has appeared in a number of cases in the Supreme Court in the 1980's involving *ex nuptial* children, including access and custody of these. Such experience must count for something.

The one thing that distinguished how these cases were dealt with from how the same or similar cases were dealt with under the federal courts was the speed and efficiency of the State Courts. To put it bluntly, if an Order was in place with the custodial parent non-compliant or even defiant, it wasn't a happy place for the contemnor to be when trying to justify his or her position before a Supreme Court judge.

Cowling marked the start of the rut into which family court and subsequent courts fell. An untenable situation has now arisen where a parent's relationship with his or her child[ren] can be permanently damaged by delay in getting the matter to court for hearing and final determination.

Delay is a deadening experience for the parties but can be devastating for the children. A malevolent parent can even use delay to improve his or her position at trial especially if the child[ren] have been subjected to alienating predations by the parent with whom the child resides. The psychological damage can be irreversible to the child[ren] and a formerly sound parent/child relationship may be permanently severed.

Only in exceptional cases do allegations by the custodial parent against the non-custodial parent of physical/sexual abuse made at an early stage of proceedings, lead to judicial findings of actual abuse by a court at trial.

Furthermore, it remains rare for a finding of "unacceptable risk" of physical/sexual abuse to be made against one parent in a parenting matter, the more so in both examples with respect to sexual abuse.

In my opinion Cowling sent the wrong message. It was a case of court adopting pragmatic means to better manage its workload with limited judges and resources after years of pleading to the politicians that more judges were needed to cope with ever burgeoning lists.

The Federal Magistrates Court's creation didn't solve the problem and Cowling became the convenient adjunct to further entrench the process whereby cases that should have been culled very early and separated parents sent home to co-operatively parent their children, were lined up against each other for bitter and costly battle with the prominent casualties being the child[ren].

How can that fulfill the fundamental object of the Family Law Act namely, furthering, *the best interests of the child?*

Time, way past it in fact, for "turning back soonest" than any later, in order to make "progress" in family law.

**Anthony C. Smith**

The result of a decision in an interim hearing (2 hours allowed) made purely on the affidavits depends entirely on the ability of the writer/parties to paint a compelling picture of their client’s/or their circumstances. The prize goes to the best description of events. It may not disclose the truth and without cross examination and subpoenaed witnesses/evidence, the judge has no way to confirm just who is telling the truth.

A wrong decision effectively removes a parent, usually the father from their children’s lives. It may take several months, if not years to bring the matter before a trial hearing, that is if the father can afford the cost. Just over 1 million children live without one of their parents, usually their father. [[2]](#footnote-2)

**Contravention Applications:**

The remedy to deal with a person who does not abide by court orders is via a contravention application. However, the court (judiciary) seem to be particularly reluctant to deal with contravention orders where the mother is the alleged offender. The applicant and the respondent will be sent out of the court to discuss amending the orders for contact to a timetable that is more amenable to the offender and any other part of the order causing concern and the contravention is then dismissed. A good talking to might result, but most often an offender, particularly female will leave the court without any penalty being applied. The courts must overcome their reluctance to punish a female offender, then the orders made will have meaning and respect. There appears to be no reluctance on the court’s behalf to punish a male offender with heavy fines and in some instances goal.

Telling lies in family court has become an art form. Everyone knows no women will ever be charged for perjury and this was confirmed to me and the rest of the committee by the Attorney General’s representative at the Senate inquiry into Family Violence held at Parliament House, 2009, Canberra.

14 Queensland Government Department of Communities (2009, October 9). Domestic and family violence orders: Number and type of order by gender, Queensland, 2004-05 to 2008-09. [Letter]. Retrieved October 31, 2009, from <http://www.menshealthaustralia.net/files/Magistrates_Court_data_on_QLD_DVOs.pdf>

The Queensland Government Department of Communities (2009)[14](http://www.oneinthree.com.au/overview/#14) reported that 40% (more than one in three) domestic and family violence protection orders issued by the Magistrate Court were issued to protect males.

1. C and C [1995] FamCA 156; “We would add that in Australia at least, while a judge always retains the discretion to permit the calling of evidence and cross examination on interlocutory hearing, as a general rule this should not be permitted.
This Court has finite resources and a limited number of judicial officers coupled with an ever increasing work load. 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 on issues of custody and property within a reasonable time. In addition, other persons requiring a determination of these and similar issues would be impossibly inconvenienced. Indeed, as his Honour pointed out, there were two cases awaiting hearing in the list before him on the day in question apart from this one. It is true that an adjournment of this case would have enabled his Honour to proceed with the others, but it would have further delayed the lists at a later stage.” [↑](#footnote-ref-1)
2. 4102.0 - Australian Social Trends, March Quarter 2012 ABS Divorce and Children [↑](#footnote-ref-2)