I Want My Daddy

Part three of a three part series on Family Law

They are the forgotten parents. The divorced fathers who have to fight just to see their own children. Often they lose. Now, after decades of frustration, they are beginning to fight back.

“THERE’S no doubt injustice has been done to men. The classic situation is the good father who sees his children every day and then Bang! The couple separate and the court gives him every second weekend. Well that’s a slap in the face for the man. To have a dear little child that you love and suddenly your contact to him is so restricted. It’s a basic cause for the anger so many men feel about the Family Court.”

Familiar words? The bitterness and sense of injustice experienced by fathers over their treatment in the Family Court is a constant theme in our society. Yet this time the complaint comes from the heart of the Family Court – an exclusive interview with Geoffrey Walsh, recently retired after 18 years as a judge in the Victorian Family Court.

Justice Walsh is just settling into his new role in a family law mediation and advice practice on the Victorian Mornington Peninsula. After years of judicial discretion, he has agreed to speak to me about an issue that has long caused him concern.

The judge doesn’t mince words describing the problem: “The woman has had all the power, the man almost none.” In Walsh’s view the Family Court’s decision to award sole custody of children to the primary carer, almost invariably a woman, has meant many children miss out on vital contact with both parents.

“The custodial parent has been all-powerful. She – it’s usually she – has had the power to regulate access, sometimes regardless of court orders. She’s had complete authority to live anywhere, with the child, that she desires. The power to determine the child’s school, church, decisions about day-to-day living and the power to get a greater slice of the matrimonial cake. More often than not that power is exercised unreasonably,” the judge adds, as he reflects on his lengthy history of passing judgment in such cases.

There is overwhelming evidence of that unreasonable exercise of power. Most divorced men in Australia end up virtually estranged from their children – sometimes by choice but very often as the end result of deliberate obstruction by custodial mothers. Says Anne Prior, director of services at Relationships Australia in South Australia: “It appalls me what’s been done to children. Many women I’ve seen in mediation have been quite dreadful about not bearing in mind their children’s need to see their fathers. You see over and over again women who have viciously and deliberately cut out a perfectly good parent from their children’s lives.”

A series of research studies by the Family Court show that, within a few years of the divorce, less than a quarter of fathers have regular contact with their children and more than half have contact only twice a year or not at all. A study of access fathers by a Family Court researcher, Janne Gibson, found that most men wanted to see their children more often, but almost half the men reported that their wives were frequently opposed to access visits. Overall, the men presented a very bleak view of the role of the non-custodial father. Many found it painful and unrewarding. “It is totally devastating,” said one man. Another said: “The child cannot understand how I am forced to see so little of him. He breaks my heart.”

Gibson showed that the main factors determining the amount of contact by fathers were the attitude of the mother and the distance between the homes of the man and the custodial mother. A third of the men lived more than 50 kilometres from their children's home. As Geoffrey Walsh explained, the "freedom to move" has long been part of the powerful package bestowed on the custodial parent. "The right of the custodial parent to establish a new life has been regarded as all important," he says.

Yael Jimenez , a Sydney family law practitioner, says: "It's extremely common for women to just take off and set up home as far away as possible. They want to alienate the children from the father. The result is the man spends a fortune to keep in touch, and by the time he can attempt in court to get her to move back, it's usually decided it's in the best interests of the children not to upset the status quo."

Jimenez believes the court's actions over this issue have given a clear message to women that they can do what they like. "It's an outrage. Children are not only ripped away from fathers but they often lose contact with many other significant people, including their grandparents, cousins, aunts, uncles, friends."

John (not his real name) is a mid-forties Canberra public servant who was stunned when his wife suddenly announced last year that she no longer loved him. One week later, he came home from work to discover his wife and children gone. "Everything was gone. Their toys, clothes, books. Nothing was left."

She had moved interstate, where her mother was living. John talked to lawyers, who advised him to fight for custody – he had been very involved in the care of his two children since infancy. But faced with the prospect of legal costs of more than $30,000, and knowing his wife would face similar costs, he has decided against legal action. "I didn't feel I could take $60,000 out of the children's future."He is now struggling to pay his bills while facing a serious loss selling the family home in Canberra's declining post-Budget property market. He has access to his two children during school holidays, provided he can find the $600 air fares for their visits.

The freedom of movement cases are only part of the story. Throughout its history, the Family Court has provided custodial parents with numerous other tactics to use to deny noncustodial parents contact with their children. (It has to be said that when men end up in this powerful position, they, too, sometimes behave extremely badly. But, in the main, women have the power, and hence are the main offenders.)

Another well-used strategy is the accusation of child sexual abuse. "The malicious use of false child sexual abuse accusations is a very common weapon used by women to limit or prohibit access to the father," says Michael Green, a Sydney barrister.

Family Court rulings have given this weapon enormous clout by prohibiting any contact, even supervised access, with the accused man until accusations are examined in court – which often takes more than a year. Even when the court finds such accusations to be false, the mother's belief in the abuse has been ruled by the court as sufficient reason to continue to deny men contact with the child.

GEOFFREY Walsh describes one such case that appeared before him involving a woman who had hounded her husband for more than two years with accusations of child sexual abuse. On the fourth day of the hearing, she stood up in court and withdrew the accusations, saying, "I realise I was wrong."

The court's handling of these cases rarely shows sympathy for the man's position. A recent example involved an appeal to the Full Court over Justice Kay's decision to give custody of two children to a mother who was so convinced the father had sexually abused them that she subjected them to medical examinations before and after access visits. Justice Kay found the mother was not a believable witness, that the abuse accusations were false, and that her behaviour was positively destructive of the emotional needs of the children and would psychologically harm them.

Yet the judge still awarded the mother custody – citing the father's lack of child-rearing experience. In his Full Court judgment Chief Justice Alistair Nicholson described this decision as "positively perverse" – pointing out the man lacked the opportunity to gain this experience due to his wife's obstruction of access. Nicholson was overruled by his two fellow judges, who dismissed the appeal on narrow technical grounds.

And now there's a powerful new weapon – domestic violence.

Yael Jimenez says women are often advised by lawyers to seek restraining orders as a tactic to prevent fathers having contact with their children. "It works very well … a few minutes in magistrates' court, you don't need any proof, and the man won't be allowed near you nor, sadly, near the children."New amendments to the Family Law Act require judges to consider domestic violence as a potential reason to deny men contact with children. The result is that restraining orders are now a powerful component in the divorce arsenal.

Like child sexual abuse, restraining orders can be used to break down regular contact with the father until it can be argued it is against the children's interests to disturb the status quo.(Of course, the status quo argument tends not to work when men are the custodial parents. For instance, in 1987 the Full Court considered a case that involved a man who, for three years, had had custody of his four-year-old son. His ex-wife had recently remarried, and had applied for and been granted custody of the child. Even though the father was found to have cared well for his child, the trial judge had decided to reverse custody because of the "creativity of the wife and the broader warmth that her new family situation offered". The father's appeal was dismissed.)

Throughout the history of the Family Court, complaints about the behaviour of women in relation to access to children have met with counter-claims regarding the delinquent behaviour of men when it comes to financial responsibilities towards their offspring.But eight years ago, the Government tackled the latter problem through the establishment of the Child Support Scheme, linked to the Taxation Office with the power to garnishee wages and intercept tax refunds.Men are now forced to pay and pay well, under a formula seen by many as unduly harsh and inflexible. But women's irresponsible behaviour has continued to find support in the court, contributing to the court's reputation for injustice and inequity.

FINALLY, the tide may be turning. Late last year the Australian Parliament took steps to promote children's contact with fathers through amendments to the Family Law Act. In doing so, it admonished the court for the way it has handled the issue of post-divorce parenting.

The Family Court got it wrong, was the message from Peter Duncan, the then parliamentary secretary to the Attorney-General, late last year as he moved the amendments. He made clear that, in Parliament's view, the court had handled the issue inappropriately: "The original intention of the late Senator Murphy was that the Family Law Act would create a rebuttable presumption of shared parenting, but over the years the Family Court has chosen to ignore that. It is hoped that these

reforms will now call for much closer attention to this presumption and that the Family Court will give full and proper effect to the intention of the Parliament."

Under the new amendments, which became law in early June this year, children have a right of regular contact with both parents, who share duties and responsibilities concerning the care, welfare and development of their offspring.The changes are a response to the accumulating evidence that contact with both parents is a critical factor in children's well-being after divorce. The new bill has thrown out the concepts of custody and access, "which may lead to the belief that the child is a possession of the parent who is granted custody", says the explanatory memo that accompanied the new bill. Instead there are residence and contact orders, ideally with parents negotiating a parenting plan, alone or with the help of a mediator, to decide on short- and long-term parenting issues.

"The aim of the new amendments is to water down the power of the custodial parent. To cut out the power game over children," says former justice Walsh, who says he is 100 per cent behind the change in philosophy. He warns it will take time for the amendments to have an effect, but he believes they will ultimately alter attitudes.

THERE is heated debate within the legal profession as to whether the new amendments will have any effect. Judges have commented publicly that since Parliament has failed to suggest a specific reform program based on previous case law, the judiciary has not been shown the error of its ways and is unlikely to change its approach.

There certainly are lawyers who think nothing is likely to change. Professor John Wade, from Bond University, is one of many lawyers I spoke to who reports he is essentially translating old concepts of custody and access into the new language. Wade argues that for people in conflict, the notion of joint parenting responsibilities is "ideological gobbledegook".

But whereas Wade seems to feel that most people who end up in the hands of lawyers are unwilling to negotiate more co-operative parenting due to their high level of conflict, other family law practitioners are more hopeful. Ian Kennedy, a Melbourne practitioner and the editor of Australian Family Lawyer, reports that when women tell him they want custody, he tells them: "We're not selling that any more. It's not on the market." He finds the new language very helpful in educating clients to put their child's needs first in negotiations.

Michael Foster, a Tasmanian family law practitioner, makes the point that it is much harder to deliver women the package they used to get with custody. "Before it was simply a question of who will be custodial parent. Now Johnny may reside with Mum, but Dad may want to negotiate over the list of matters that could be additional components of her rights. And she'll only get what Dad will agree to." So Dad's new responsibilities limit Mum's power.

Some lawyers are producing lists of hundreds of "specific interests orders" for use in negotiations – often in a desperate attempt to still provide the custodial parent with that all-powerful package. So the woman may put in orders to retain the right to make decisions on everything from whether the child is allowed to have his ears pierced or a crew cut to the rights of the contact parent to school reports.

It remains to be seen how judges will react to this approach. Some, like Justice Faulks in the ACT, have made clear their opposition to such a tactic. As chairman of the Family Law Council, which recommended the new amendments, Faulks argues this strategy is "contrary to the spirit and intendment of the act" as it reduces opportunities for co-operative parenting patterns.

There are splits in the legal profession between practitioners who embrace the new philosophy and the old adversarial school who exploit children as a battleground between warring parents. Michael Taussig, a Melbourne family lawyer, points out that responsible family law practitioners have long been trying to teach clients that children's needs should come first. But he acknowledges there are also many keen on making trouble: "There's a lot of cowboys out there."

If you are trying to reach an amicable parenting plan it certainly pays to avoid the cowboys. I talked to one man who was determined to strike a deal that gave him equal time with his children. He had considerable financial resources and used them to seek out and interview many of Sydney's most aggressive, litigious family lawyers. He put them all on retainer – to keep them from acting for his wife.

The result was she ended up in the hands of a more reasonable practitioner and they negotiated sharing the children week about. "If they just came at weekends, hell, I wouldn't be anything more to them than a paid baby-sitter. I wasn't going to settle for that. I wanted to be part of the humdrum of their lives," he said.

Even now many men may find themselves settling for playing weekend dad, an occasional babysitter. The trouble is that fortnightly access has emerged as the recommended contact for fathers from rulings made by the Family Court in relation to acrimonious access cases. Now even the most amicable discussions about contact for fathers take place in the shadow of that law.

"The woman will say, 'If you go to court you'll only get once a fortnight. I don't have to give you more than that'," says Anne Prior.

Joseph (not his real name) is a Brisbane man who recently sought counselling to help him sort out a property settlement. He and his ex-wife had an amicable agreement regarding the children: "Everything was pretty easygoing with us. I see the children whenever I want to, or whenever they want to see me. My wife was quite happy with that."

But the counsellor didn't approve of this flexible arrangement. "They told me, 'You've got to have it stipulated when you see the children. Like every second weekend. I wasn't having a bar of that and luckily my wife realised it was all a bit of a farce. But they almost caused a real problem between us."

Family counsellors, lawyers and judges often recommend fortnightly contact because they have little experience with more flexible, creative parenting arrangements where there is greater involvement of both parents. Geoffrey Walsh mentions that he, too, often recommended fortnightly access. "It comes down to practicalities," he told me. Yet he acknowledges his experience with alternative arrangements has been entirely with those which failed and ended up in his court.

Fortnightly contact is far from a reasonable deal for many men or their children. The evidence is clear that, particularly for young children, the distance created by the weekend dad role means the bond between father and child often withers and dies. And both fathers and children are the losers. (There certainly are workable alternatives to the fortnightly pattern – as will be shown in part three of this series.)

But there are still big obstacles in moving parents towards the more flexible shared parenting proposed by the new legislation. For a start, fortnightly access is enshrined in the rules involving the payment of child support. When a man reaches 110 nights' overnight contact he is entitled to apply for a reduction in child support, due to the costs of caring for the children.

It’S a fair enough rule, but it means many women and their lawyers feverishly monitor contact nights and deny men more time with their children for fear child support will be reduced. This issue must be tackled.

Given the strong impact of the shadow cast by judicial decisions, many eagerly await judgments within the Family Court, particularly the Full Court, which may indicate how the judiciary will respond to the Government’s new directives. Already there is some sign of movement. In Adelaide two months ago, Justice Burton refused permission for a woman to move interstate to take up a job offer. The move would have meant the father, who had regular access to their one-year-old child, would be reduced to twice-yearly contact with the infant.The judge ruled that, in the light of the new amendments promoting regular contact with both parents, it was inappropriate, as the child would miss out on early childhood bonding with his father. The support and love of the two Adelaide-based extended families was cited as an additional factor against the move.

Recent judgments giving more men custody of children are having an effect in the negotiations taking place over parenting plans. Jennifer Boulton, a Brisbane lawyer, reports some women are now willing to consider more equal sharing of children because they are aware the children may end up living with Dad. She mentions one woman who started off saying the kids would be with her, full stop. “Now we are talking about Mum and Dad both having residence (custody), sharing equal time with the children. She’s fearful that he has a reasonable chance of contesting where the children live.”

There are hopeful signs that some judges are finally starting to tackle perhaps the most critical issue underlying much of the previous discontent regarding contact with children – denial of access. Now more than ever, it will be critical for judges to be seen as enforcing orders that allow men contact with their children. The Family Court has in the past had an appalling record for sidestepping this issue, as will be discussed in part two of this series. But recent evidence suggests more judges are willing to crack heads to enforce their laws. It’s a welcome change.protect children’s interests.