

Court Of Injustice

Published in June 2001 *North & South*

By 2010 it's expected that three quarters of all Maori infants and half of all Pakeha infants will be growing up in households with no fathers. A growing movement of angry men suggests the legal pendulum in the Family Court has swung too far against fathers who want an equal role in raising children after relationships go wrong.

LAUREN QUAINANCE investigates.

Lauren Quaintance is a *North & South* senior writer

NOBODY AT LAW school ever told Rob the law could be unfair. He was destined to be a commercial lawyer in a small firm dealing with the dry, minutiae of legal contracts but he still subscribed to the high-minded principles he was taught as a student in the mid-1970s. His was a worthy profession. Something to be proud of.

So nothing prepared him for what happened when his marriage to his wife broke up in the mid-1990s and custody of their two primary school age children came before the courts. For the first year the estranged couple had a private agreement that meant the children saw their father three weekends out of four and one night during the week. Then, for reasons Rob describes as "vague", the most valid of which was that the children were tired, his ex-wife limited his contact to alternate weekends.

The Family Court would not recognise the agreement his wife signed a year earlier so he formally applied for access. After spending \$8500 on lawyers' bills "without seeing the inside of a courtroom" at a time when he was worst-off financially as he tried to set up a new household, he reluctantly agreed to one weekend per fortnight and school holidays. "I could see it was pitching toward a common result. Whether I was a good father or an indifferent father I was going to get once a fortnight.

"My wife and I were both professionals. We'd both worked and had nannies. I'd bought into the whole message of the 80s so I wiped as many bums and chins as my wife but when it came to the break up I was regarded as a spare parent. The message to fathers has been 'Get involved'. You can't just turn that off when you want to."

Although Rob's own case has been resolved amicably enough — his ex-wife has followed the new agreement reached in the court and he has nothing to gain personally by speaking out (and a great deal to lose professionally because he is seen to be "breaking ranks") — he was left with an uneasy feeling about how the Family Court treats fathers when relationships involving children go wrong.

"I have the dual perspective. I'm a lawyer and I've also experienced it at the coal face. It was a shock to see the systematic bias against fathers there at every turn. When I was lectured in family law in the 1970s we were taught about the 'mother principle', the idea that the mother was best suited to the parenting role. In the mid-70s that was probably right but there's been this sea change in social development. If you see families on the weekends it's the dad that takes the child to the changing room as much as the mother. Yet somehow that's been bypassed by the Family Court. They haven't woken up to the fact we've had this enormous shift in social attitude."

Worse, he has been shocked by how the principles of “beyond reasonable doubt” and “innocent until proven guilty” he held so dear are totally disregarded in cases where allegations of physical or sexual abuse are levelled against fathers in acrimonious break-ups where the mother may be attempting to punish her partner or win sole custody.

“For whatever reason all that we learned at law school about justice and due process and justice being seen to be done... that’s all sacrificed for what’s in the best interest of the child. They justify suspending all these important principles on the basis that the welfare of the child is paramount but my argument is they’re not achieving the outcome which is best for the child because a child needs a father. People go into the Family Court as a family and come out with the father detached from the kids.”

Is the Family Court really preventing Dads from having a meaningful relationship with their children? Is all the rhetoric about the importance of fathers meaningless when faced with the powerful, politically correct feminist and child protection movements? And can fathers ever really compete against the mystical “mother-child bond”?

IT’S NOW MORE than 30 years since politicians drafted the Guardianship Act, the law that’s meant to determine how children will be cared for after a relationship breaks down. It basically says both parents are responsible for children (unless the father isn’t living with the mother at the time of the child’s birth in which case he has virtually no rights) and introduced the all-important principle that the welfare of the child should be paramount. Since that time, in the late 1960s, divorce and de facto relationships have become commonplace and women have joined the workforce in large numbers. So it’s surprising, then, that with a little tweaking over the years the Guardianship Act has largely remained workable in a time of great social change.

When the Family Court was established in 1980 to hear disputes about matrimonial property, custody and access previously heard in public in the District Court, new laws made it easier to obtain a divorce on the grounds of “irreconcilable differences” proved by a couple living apart for two years. The Guardianship Act was amended at the same time to stipulate that children of a failed relationship should be placed with the most suitable parent regardless of that parent’s sex or the age of that child.

Last year 9912 marriages in New Zealand ended in divorce and although many de facto and married couples who separate agree on custody and access arrangements for any children of the relationship, last year the Family Court heard more than 14,000 applications for custody and access. (13,517 applications are recorded on the Family Court database but that doesn’t include some smaller courts in rural towns).

Because the court’s philosophy is to try, where possible, to resolve disputes without resorting to a traditional, adversarial court hearing with expert witnesses and lawyers arguing for both sides, less than 10 per cent of cases proceed to a full defended hearing. Most are resolved in a mediation conference chaired by a judge who is supposed to “mediate” but in practice often actively persuades couples to come to an agreement.

Because so few cases end in full-blown hearings supporters of the Family Court can claim most cases are settled by “mutual agreement” and that the disaffected men represent a tiny proportion of cases dealt with every year. What that doesn’t account for is the many men like Rob who give up before a defended hearing because of mounting legal costs or because they believe the outcome is a *fait accompli*.

It’s impossible to say how often the mother walks away with custody of the children because the Department for Courts stopped recording the gender of parents awarded custody in 1990. But at that time, a decade after Parliament passed unambiguous law that the Family Court should be gender blind, mothers were awarded sole custody in 74 per cent of cases where custody was disputed. Fathers won sole custody in 13 per cent of cases. In the remainder children were split up or parents had joint custody.

That probably reflects the prevailing view encapsulated by a 1994 report on the Family Court written by Department of Justice staffers Georgie Hall and Angie Lee. The pair defended sole maternal custody arguing that local and overseas research suggested children who lived with solo mums had emotional, behavioural and educational difficulties not simply because they only had one full-time parent but because of more “complex reasons” including conflict between parents and the fact the mother was likely to be worse off financially after a separation from a partner.

The report said the “sustained attack” on sole maternal custody was not justified and the “growing enthusiasm” for joint custody in the United States was misplaced because children were no better off than those in the sole custody of one parent and only worked where there was a high degree of co-operation between parents.

The same report suggested fathers may pursue custody as a “sinister bargaining tool” to pressure mothers into reducing their matrimonial property or maintenance claims, suggested unemployed fathers were motivated to apply for custody to get the DPB and said some men pursue custody to punish an ex-partner who broke up with them. Nowhere was any mention made of mothers who pursued custody for financial reasons (to qualify for the DPB, maintenance or matrimonial property) or mothers who pursue custody or control access to punish a man who broke up with them. The underlying assumption seemed to be the women were blameless victims in such disputes and they had to fight off “sinister” attacks on their natural caregiving role.

Christchurch civic creche worker Peter Ellis had been convicted the previous year and hysteria about sexual abuse and particularly “recovered memories” of abuse was at its height. The report acknowledged that while false allegations of sexual abuse may happen from time to time sexual abuse in families was “endemic to our society at a disturbingly high level” — a statement made without reference to any statistics and that appears to unquestioningly accept the now discredited claims made by lesbian-feminist psychologist Miriam Saphira that led to a Telethon in the 1980s based on the idea that “one in four girls will be abused by age 18, half by a member of her own family”.

The views of lawyers who said the standard of proof was too low in sexual abuse cases were dismissed. The report’s authors acknowledged false allegations probably occur, but argued that because a man accused of sexual abuse in custody proceedings would

not be sent to jail (but would all but lose access to his children) it was best to err on the side of caution because of the danger to children if he were guilty.

Several years had passed since sweeping law changes were made because of the growing realisation that victims of male violence and sexual assault weren't getting a fair deal. The law was changed to allow men to be convicted of rape and child molestation on the uncorroborated word of women and children. The police stopped treating domestic violence as "just a domestic" and adopted a "believe the victim" approach and began arresting and prosecuting men accused of assaulting their partners.

It's in this climate that the 1995 Domestic Violence Act (DVA) was passed into law. If fathers found it difficult to get joint or sole custody of their children before, the DVA made things considerably more difficult. That's because the radical piece of legislation with the laudable goal of protecting women and children from violence is preventing ordinary, loving fathers from having a meaningful relationship with their children.

Before the law was changed women who were battered by their husbands or partners could apply for a non-violence order or a non-molestation order under the 1982 Domestic Protection Act. These were difficult to get and well under half the applications for final orders made in the Family Court in 1990 were actually granted. And just because a man had hit his wife (or vice versa) the prevailing view was that didn't necessarily mean they were a bad parent who was likely to abuse their kids.

That all changed after Wanganui man Alan Bristol joined his three daughters Tiffany, seven, Holly, three and Claudia, 18 months in the backseat of the family car in his garage in February 1994, connected a hose from the exhaust to a partially open window and started the engine. Bristol and all three girls died of carbon monoxide poisoning but not before he apparently changed his mind; he was found with an arm outstretched towards the ignition and the key was switched off.

Bristol and his estranged wife were involved in an acrimonious Family Court custody dispute, and despite the fact there was a long history of domestic violence between the pair, he was considered "a loving father" and had interim custody. The day before the killings Bristol was charged with indecent assault and assault on a female after an altercation with his estranged wife when the girls were handed over for access.

The Minister of Justice ordered an independent inquiry by [High Court Judge] Sir Ronald Davison into the Bristol case which was ultimately the catalyst for the DVA. In his report Davison argued that if someone had been violent toward a spouse then there was "good cause to suspect" when the relationship broke down the violence would be redirected toward any children even if they were previously a model parent.

He proposed domestic violence be treated equally to other forms of violence, penalties for breaching non-molestation orders beefed up, stricter enforcement, better mechanisms to protect victims when children were handed over and, crucially, that when a person has been shown to be violent to *either* a child or spouse in a domestic situation then that person must automatically be assumed to be unfit to have custody or unsupervised access until such time as they can prove they are a fit parent.

IN THE EVENT the government went even further than Davison proposed and overhauled our domestic violence laws in several fundamental respects. First, the definition of domestic violence was broadened to include not only physical and sexual abuse but also psychological abuse. Most countries have laws banning “harassment” or “molestation” but no others have quite such a woolly term as psychological abuse.

The DVA’s definition of psychological abuse is open-ended: it says it includes but is *not confined to* intimidation, harassment, damage to property, threats of physical abuse, sexual abuse or psychological abuse or allowing children to witness any kind of abuse.

The meaning of the term is widely debated although a Department of Justice/AGB McNair report titled *Hitting Home* released at the same time as the new Domestic Violence Bill was before Parliament in 1995 identified 11 types of psychological abuse. They included smashing or throwing objects, humiliating and threatening a partner and simply putting down family and friends or swearing at or insulting a partner.

Given that it was the same Department of Justice officials advising the government on the new DVA it has to be assumed they, at least, meant for swearing and name calling to be cause enough for a protection order to be granted. This is despite the fact that in the same report the authors admit that the “study of psychological abuse is in its infancy” and there was no evidence to link psychological abuse to physical abuse.

Secondly, the DVA established a single act of violence or a number of acts that form a pattern of abuse even if “when viewed in isolation may be minor or trivial” would constitute domestic violence. In other words there was no longer any need to establish a person had a violent history. Under the law a slap delivered after discovering a partner in bed with a lover — or a series of insults — would be treated the same as repeated, sustained beatings leading to hospitalisation of the victim.

The DVA says domestic violence *in all its forms* is unacceptable and legal manuals on the act interpret that as a clear signal “there is no room to argue that any form of domestic violence is morally defensible and the scope for arguing mitigating factors must likewise be reduced”. That means arguing that the abuse — psychological or physical — was provoked or was a one-off lapse is much less likely to succeed. The act also made it compulsory for spousal abusers to attend an anger management course.

In keeping with Davison’s advice, the third most important way the 1995 legislation shifted the goal posts was by stating that violence to a spouse observed by a child counts as violence towards a child and by *automatically* extending a protection order to any children of an applicant regardless of whether they’d suffered any abuse.

The Guardianship Act was amended to accommodate the new DVA so when an allegation of violence made under the act or raised in custody proceedings is “proved” (and we’ll get to the standard of proof shortly) the court must not award custody or unsupervised access to the violent parent unless it is satisfied the child will be safe. That reversed the presumption existing before the Bristol murders that someone who is a wife beater (or an alleged wife beater) won’t necessarily harm a child.

What has this meant in practice? As well as being easier to get a protection order under the DVA in 89 per cent of the 28,755 applications for protection orders since 1996 (of which nine out of 10 were applied for by women) an order was issued “ex parte” without informing the alleged abuser or holding a hearing where the allegations could be defended. The accused may demand a hearing to challenge the order after being served with it but must do so within three months or it becomes permanent.

Lawyers have told *North & South* that in almost all cases the only evidence provided to the court to support an application for an ex-parte order was the complainant’s sworn affidavit outlining claims of physical, sexual and/or psychological abuse. Lawyers who apply for ex-parte orders are required to sign a certificate essentially saying the application is a “proper case”, a declaration usually based entirely on the lawyer’s impression of the applicant’s veracity -- something some feel uncomfortable about.

Corroborating evidence such as medical certificates, police reports, criminal records or witnesses was rarely available quickly enough to be considered or did not exist. Most protection orders are issued without the judge who signs them off so much as laying eyes on the applicant or her lawyer. Most applications are dealt with by fax or email.

“One of the difficulties with the Domestic Violence Act is the speed someone can get a protection order. It’s seen to be like Dial A Pizza,” says Hutt Valley family lawyer Paul Paino. “You get one in two hours and the police or bailiff serve it within 24 hours and if you want to get that order lifted or changed — or you don’t think it should have been made in the first place — it can often take a month or two to get a hearing and in the meantime the person is not allowed to see his kids.”

Few men defend protection orders before the three-month deadline when they automatically become permanent, a fact that’s been used to suggest most orders are justified and domestic violence is rife. However, the fact that less than 20 per cent of orders are defended may not necessarily mean most men don’t bother to front up in court because they’re guilty. To be sure, many protection orders will be justified — and indefensible — but many more defences are initiated than proceed to a hearing.

That suggests many simply can’t afford the legal bills. One of two companion 1999 Ministry of Justice (MOJ) studies found 61 per cent of non-custodial parents were refused state-sponsored legal aid in DVA cases (compared with 15 per cent of usually female custodial parents). Even if legal aid is awarded defendants may be required to make a contribution toward their legal aid bill whereas applicants aren’t. This has made it easier for housewives financially dependant on their husbands to escape violent relationships, but it also means men of limited means feel as though their ex-partner has an “unlimited” legal budget while they spend \$8382 on average on lawyer’s bills.

That this comes at a time when matrimonial property is being divided up and men face child support payments as well as the cost of establishing a new household for themselves, severely restricts their ability to defend protection orders. (That court delays meant three out of five cases in the 1999 MOJ study dragged on beyond the 42-day period in which a hearing is supposed to be held probably didn’t help.)

North & South has learned many lawyers also advise men to think twice about defending the orders. Wellington lawyer David Howman has spent most of his 30 year career practising family law and says while he would always stress to a client that it was his decision, he suggests they carefully consider defending a protection order because of the not insignificant cost and the fact they're "not easy to defend" because the onus is on the respondent to disprove the allegations made.

Like many cases in the Family Court there was often little evidence except the word of the couple in dispute unless the alleged victims had visited a doctor or a refuge. Often violence happened behind closed doors, or was kept quiet, so the court's decision often came down to a matter of which party was most credible.

"It used to be more difficult to prove there had been domestic violence but the emphasis under this new act has been to believe those people who make the allegations and the onus is [on the respondent] to refute them which is difficult to do. A lot of it is in the mind of the beholder. If the victim perceives there is a threat or erratic behaviour then that counts. Judges can take account of that perception."

ONCE AN ORDER is served, the man who is alleged to be violent is automatically banned from seeing his children until the court can assess the risk. Lest this be considered a rare occurrence consider that three quarters of applicants for protection orders have children and, in the first three years the DVA was in force, 42,959 children were named on protection orders sought by one of their parents.

When an allegation of violence is made against a father it's likely he won't see his children for months. In the 1999 MOJ survey of 558 cases a third of violent parents had not seen their children six months later. The average period of no access was 15 weeks. (The court says this "hiatus" is partly due to the fact fathers are slow to apply to the court for access after they've been served with a protection order.)

Most of the time there's no suggestion children have been harmed by the "abusive" parent nor is there any suggestion from their mother she fears for their safety. Of the affidavits examined by the MOJ 76 per cent included claims children had witnessed physical or psychological violence toward the mother. In only 24 per cent of cases was it even *alleged* children were abused, neglected or somehow put at risk.

When deciding if allegations are true — and assessing the risk posed to any children — the rules applied in criminal trials don't apply. The Family Court can admit any evidence it sees fit whether or not it would stand up in any other court of law and uses the civil standard of "on the balance of probabilities" rather than the criminal standard of "beyond reasonable doubt". That leads to cases [see *John's Story*] where the police have insufficient evidence to lay charges — or refuse to even investigate — but the Family Court will accept the allegations as true when ruling on custody.

In some cases the court will judge the allegation true *before* criminal proceedings are held and a man found "guilty" in the Family Court might be found not guilty of the same offence in a criminal court. This is despite three American studies showing up to 50 per cent of sexual abuse claims made during custody proceedings were false.

If the court finds that abuse is “proven” then it cannot award custody to the abusive parent or order anything but supervised access unless it thinks the child will be safe. Judges frequently base their decisions about how safe a child will be in a parent’s care on “little information” according to the 1999 MOJ report. It’s reasonably common to refer parties to counselling and appoint a lawyer to represent the child but the report found a social worker’s opinion about the child’s safety was called for only five per cent of the time and a psychologist’s report just two per cent of the time.

When deciding that question the scales are weighted further against men because the court must consider whether the custodial parent *thinks* the child will be safe with the non-custodial parent. This shifts the power back into the hands of a mother who may have fabricated the allegations, is paranoid or mistakenly believes abuse occurred.

Even in cases where the court concedes an allegation has not been proven, the law allows it to err on the side of caution. If the court decides there isn’t enough evidence (even by its own looser standards) and believes there is a risk to the child it can impose any order it likes. Usually it will order two hours supervised access per fortnight — equivalent to just over two days a year — and father is only permitted to see his children in a court-approved centre where he is closely supervised by staff.

Although meant as a temporary measure until the father can prove the child would be safe with him (and many question how it’s possible to prove such a thing especially when the mother’s perception of the child’s safety is given weight) *North & South* has learned of cases where fathers have not seen their children outside a supervised access centre for several years because the mother won’t agree to have a relative (even one of her own) supervise him. Some men refuse to see their children altogether rather than submit to the “false and unnatural” environment of the centres they say is akin to being visited in jail. Some fight the order in the courts; others walk away entirely.

When women fail to deliver children to see their fathers as agreed the system is apparently inept at forcing them to comply with court orders. It’s possible to apply to the court for a warrant to have the children uplifted by force but, as well as not wanting to put children through such a traumatic experience, the police are often reluctant to get involved. One man has gone to court 17 times to get a warrant to have his children delivered as per the court’s agreement [see *Duncan’s Story*.]

Meanwhile, police will not hesitate to lay charges if a protection order is breached. Recent cases include:

Wellington computer engineer William Donachie pleaded guilty to a charge of breaching a protection order after sending his then 12-year-old daughter an “inoffensive” Christmas present of a leather vest, key ring and wallet. He had not seen his daughter for more than two years. [He was given a suspended sentence].

A man (whose name is suppressed) was given a discharge without conviction in the Invercargill District Court after sending his daughter a Christmas card from jail.

AS A LAWYER Rob — who was never accused of any violence himself — is troubled by how far the pendulum has swung against men. As a father he is outraged.

He suggests the following is a common scenario: “A wife has decided to leave her husband to take up with somebody else. Most people will have a response which, for that moment in time, is possibly threatening to the other party. She goes off and gets a protection order which immediately covers the children. He might be a totally loving father but he is immediately injuncted from being a father to his children.

“Most orders are issued ex-parte and that runs against the due process of law; a decision shouldn’t be made against you without you being heard. That fundamental principle is not working in the Family Court. I wouldn’t have an objection to that if there’s a threat of real violence as long as within a week you could be heard but sometimes this goes on for months and months and sometimes years before there’s a full hearing and in the meantime you’re ordered to do an anger management course.

“Judges are terrified of getting it wrong. We’ve had cases like the Bristol case in Wanganui and the Perkin case in Nelson where children have been murdered by their parents (the father in the first case, the mother in the second) after a Family Court decision. The legal profession is by its nature very conservative and cautious so judges and lawyers will kick for touch every time.

“If you’re lucky you’ll get to see [your children] in a church hall with somebody from Barnados listening to your every question, censoring you in case you’re trying to get information about their mother. You’ll probably get two hours at the most once a fortnight and you’ll likely pay \$50 a time for the privilege. If you’re not truly a violent man that’s an outrageous disruption of your relationship with your kids. Your kids think there’s something wrong with dad because it’s like visiting him in jail.”

Separated Fathers’ Support Trust secretary Bevan Berg left the police force in the mid-1980s and now runs his own freight business in Auckland. We are not permitted to publish the particulars of his case except to say he was “stunned” by his own experience after he left his wife in 1995 and he has spent considerable time analysing the DVA in the sober, measured manner that an ex-cop can bring to the task.

Having visited enough “domestics” in his time as a beat cop he accepts there is a genuine need for a law to protect against men (and women) who beat their partners and says his comments are not an attempt to excuse or in anyway condone violence. However, he’s concerned that where children are involved the law errs too heavily on the side of caution, doesn’t properly examine claims and appears to take the view that women are beyond reproach, that women don’t lie and they’re certainly not violent.

“There’s a pretty wide interpretation of domestic violence which can come down to waving a finger at someone or slamming the door. It doesn’t take much to make that finding. Judges tend toward a convenient safety point. If you look at the outcome of [custody cases involving the DVA] the default position is always supervised access.”

Berg suggests the DVA has been used cynically by lawyers who employ it as a “tactic” to win custody because a man accused of violence will be tarnished in custody proceedings. And he wonders why when the safety of the child is paramount older children are not asked whether they think they will be “safe” with their fathers.

The crux of the men's complaint about the Family Court is this: it appears to operate under entirely different rules than any other court and in the name of "child welfare" — a principle they claim to support — runs roughshod over their right to a fair hearing. The court already assumes men are capable only of being "weekend dads" so it is seen as no great loss to limit them to two hours supervised access a fortnight.

Underpinning all this seems to be the quaint assumption that women are nurturers and aren't violent. It's the kind of thinking that means we still have a criminal charge of male assaults female but no equivalent charge of female assaults male. Studies on domestic violence in this country paid for by government departments make scant or no mention of the problem of women's violence toward men. And we only need look at the high-profile child abuse killings in the last year or so, and note that females were the sole perpetrators in at least three cases, to know women kill children.

And it's not just the occasional crusader expressing concern about the brand of justice delivered in the Family Court. The fledgling men's movement is comprised of about a dozen organisations across the country with names such as Caring Fathers, Men and their Children, Separated Fathers Support Trust and FARE (Fathers Apart Require Equality.) Some organisations were formed in the 1980s but the movement was given impetus by the passing of the 1993 Child Support Act which, among other problems, badly disadvantaged non-custodial parents who started a second family. Exact numbers of men involved is difficult to gauge but the Men's Centre North Shore has 370 subscribers to its monthly newsletter *Men's Issues* around the country and another 170 hits per week on its website from which the newsletter can be downloaded.

Alliance MP Liz Gordon described the disaffected men to the *Assignment* television programme last year as the "knit sweater brigade" rather than "sharp suits" who possibly blamed their lack of success in life on their marriage break-up. During research for this story *North & South* spoke with architects, lawyers, policeman, ex-journalists, small businessmen as well as beneficiaries concerned with the status quo.

Some are undoubtedly obsessed with getting better access to their children even going so far as quitting jobs, shifting to smaller homes and spending all their capital to "get justice". And the disparate movement is split over how to best achieve its goals: some have targeted "menophobe" Family Court employees by pasting signs outside their homes, others have threatened the lives of judges or police and some favour a campaign of "civil disobedience" including refusing to pay child support.

Whether they can become a serious political force will largely depend on whether it evolves into a coherent national movement and if the sometimes intemperate men on its fringe who do themselves a disservice by downplaying the effects of domestic violence — or attacking the women's refuge movement — can be brought into line.

Bruce Tichbon, the Wellington telecommunications consultant who spearheaded the campaign that led to a government review of the 1993 Child Support Act, knows that what he prefers to call the "families movement" needs a strong and credible leader. Although he's willing to do the job his body isn't: he developed chronic fatigue syndrome about two years ago and is simply unable to get out of bed some days.

“The women’s movement has grossly out-performed the men’s movement,” he says bluntly. “I think the women’s movement is too militant, I think they do a tremendous amount of damage to society but they’re a brilliant political movement. Basically the problem with the men’s movement is they’ve been out organised and until they get their act together, and show the politicians they can match the women’s movement at the ballot box, then men are going to continue to get a rough deal.”

WHEN THE Family Court opened for business in 1981 Patrick Mahony was one of the first judges sworn in and in 1985 he was appointed the court’s chief judge. Entry to his offices on the eighth floor of an office tower on The Terrace is controlled by swipe card and the atmosphere is sterile and hushed except for the sound of air conditioning. On his bookshelf a copy of *Fathers After Divorce* by Michael Green QC — one of the most trenchant critics of the Australian Family Court — is prominently displayed.

The silver-haired, patrician Mahony is flanked by a young lawyer who introduces himself as the judge’s assistant and judicial communication’s adviser and former journalist Neil Billington. Although interviews with judges are rare, Mahony agreed to an interview that ran well over the 45 minutes allocated because he’s anxious to defend the court against what he says are “misleading” claims made by fathers’ groups.

Mahony denies the court is biased against fathers and says judges heed the law’s direction to award custody to the most able parent regardless of their gender. He’s adamant the court is not stuck in a time warp but is reflecting social change that means men are now more involved in the day-to-day parenting of children. Shared parenting is an idea that first emerged in the 1970s and 1980s and he claims the “vast majority” of arrangements made by parents could be described as shared parenting or shared custody. However, this claim turns on a question of definition: Mahony certainly isn’t saying most children split their time equally between separated parents.

“Some people think of shared parenting or shared custody as the amount of time each parent spends with a child and a lot of people that come to court are looking at balancing up so many hours of the week with one parent and so many with the other. What we try and do is look at it from the child’s point of view. Very often you will get a situation where children will live during the week with one parent but spend the weekends with the other parent and will often spend half the school holidays with each parent and there will be special arrangements for Christmas and birthdays.”

Where the court becomes less flexible, however, is in cases where there is a high degree of acrimony between the separating couple. In those cases the court is unwilling to have children moving between the two parents too regularly because children are unsettled if parents can’t agree on common routines and rules. On the face of it that sounds like a gift to a parent who doesn’t want anything to do with their ex-partner; if they’re difficult the court will limit access for the children’s sake.

In a landmark case last June, Judge Inglis awarded shared custody to a Tauranga man and said the mother’s “personal reluctance” or “personal agenda” about access shouldn’t be enough to prevent both parents fulfilling their obligations as guardians.

Of the decision Mahony says: “That’s a fair enough statement but generally speaking if a child is to flourish in an arrangement where there is frequent movement from one home to the other parents do have to get on reasonably well in that they have to support one another. Those arrangements don’t work well if a child is aware of acrimony in the background or if a child is aware one parent is trying to derail the other parent.” He says if one parent is obstructive the court may give custody to the most flexible parent, the one most likely to accommodate the other parent.

Mahony concedes the court doesn’t do a very good job at enforcing its own court orders when a parent persistently fails to deliver children to the other parent. It can issue a warrant to have children collected by police but Mahony wants law similar to that recently introduced in Australia where the court can force a recalcitrant parent to undergo counselling and, failing that, be fined or jailed for flouting its orders.

And what about the question of allegations levelled by one parent against the other in custody disputes? Is justice being denied to men in the name of the child’s welfare? Mahony denies the definition of violence is too loose and is particularly adamant that despite being possible under the legislation, protection orders are not awarded for “slamming doors” alone although such a claim might be part of a series of allegations.

Because the welfare of children was paramount there were likely to be cases where the police won’t lay charges but an allegation is found to be “true” in the Family Court, he says. “There is a completely different process for gathering evidence and there is a much higher test of beyond reasonable doubt [in the criminal courts]. And there are no doubt cases where the police don’t have enough evidence to bring a charge of male assaults female but it would nevertheless be imperative for the Family Court to make an order to provide protection for that person and the children of the family.”

As for whether there is an inherent assumption women aren’t violent — *North & South* knows of two cases where a woman admitted she hit her partner or, in one case, struck her partner in front of a court counsellor but escaped without any punishment — Mahony says the court only reacts when allegations are formally presented to it. If men are abused by women then, he suggests, they need to overcome any shame or embarrassment and themselves apply for protection orders under the DVA.

Mahony has said Parliament has put “such a premium” on cases of domestic violence it has given the court no discretion at all to distinguish between different types of violence (such as the difference between a slap delivered after discovering infidelity and life-threatening violence) or to impose anything but supervised access unless it can be satisfied the child will be safe with a parent proved to be violent.

OF COURSE our morass of family law is the creation of Parliament and Mahony only interprets the will of our politicians. There has been spasmodic debate about these issues during this term of Parliament as two private members’ bills sponsored by ACT MP Muriel Newman have been drawn from the parliamentary ballot. Her bill to open the Family Court to public scrutiny and limited media coverage, except in special circumstances where the judge opts to close the court, was thrown out by Parliament in February but it was Newman’s failed Shared Parenting Bill, defeated in the House in mid 2000, that would have brought about the most substantive change.

Had the bill become law it would have made shared custody the norm, required corroboration for allegations and reversed the assumption introduced after the Bristol murders in Wanganui that a violent partner is probably a violent parent.

Motivated by the view that fatherlessness is the “most serious social syndrome we’ll face this century” Newman wants the Family Court’s default position to be shared parenting unless one parent can be proved unfit (using legal rules that better resemble those in the criminal court) or is somehow unable to fulfil their obligations. It’s not, as some critics portrayed it, a loony right-wing fad but is, in fact, the law in 48 American states and there is a well-organised and researched global shared parenting movement.

Newman argues that when one parent can’t threaten the other with “taking away the kids” disputes are much less acrimonious and optimistically suggests both parents are able to put differences aside and start to work together for the good of the children. Although it might be assumed children are “shunted from pillar to post” under shared parenting, Newman says parents make dozens of different arrangements.

“I met a Dad who spent three years battling in the courts to get shared parenting. He employed three QCs, had seven court cases, spent over \$120,000 and now has the children for three days a week and lives just around the road from his ex-wife. And you just say shouldn’t that have happened of right? And what if he didn’t have the money? He would have just been another of the walking wounded. It shouldn’t be about resources, it should be about the right of a child to have a mum and dad.”

What was so wrong with the bill that the government wouldn’t even send it to select committee? After all, the idea that both parents should automatically be considered equal custodians seems like a perfectly reasonable one? Attorney General Margaret Wilson told the House during the debate in May 2000 that the bill assumed separating parents could reach agreement when, clearly, that hadn’t been the case in the past. In other words she disagreed with Newman’s idea that when the law said a 50/50 split was the starting point for negotiation, couples would calmly and rationally make agreements that involved both parents playing a significant role in a child’s life.

There was also concern the bill focussed too much on parents’ rights when the whole thrust of family law internationally over the past few decades has been on the importance of children’s rights. There is also, it must be said, a degree of cynicism on the government benches and among National Party opposition MPs about Muriel Newman’s ability to turn the heart-tugging stories of the men’s groups into coherent legislation. “Muriel has been captured by the men’s groups,” says one opposition MP.

Margaret Wilson said the government supported the bill’s principle — to improve the welfare of children — but said it believed it was time there was a comprehensive review of the 30-year-old Guardianship Act and practices of the Family Court. Adamant that this is a genuine review rather than a smokescreen designed to justify legislation already “in the bottom draw”, the government is expected to signal any law changes it will introduce later this year.

Meanwhile, Muriel Newman is redrafting her Shared Parenting Bill so it can be resubmitted to this year's parliamentary ballot. She is considering an amendment to the Guardianship Act instead of a stand-alone bill.

All of which is unlikely to change much for fathers like Rob. He's acutely aware he enjoys comparatively generous access to his two children compared with men subject to DVA protection orders — he meets their teachers, has access to school reports and photographs of milestones he's unable to share — but still he knows as each fortnight passes his impact on their character and values fades a little more. He says he mostly feels he's still a father, not “a visitor in their lives” — but only just.

*** John's Story

For the first five months after John, a 45-year-old North Shore computer technician, left his wife in 1995, he visited her and his three-and-a-half year old daughter every day. “I was quite happy for our relationship and my support to the family to continue after I left, so I visited every day and supplied them with as much money as they needed. There were no substantial arguments of any sort I can remember in the six months after I left and in many ways I thought I'd done the right thing.”

Then in early 1996 his wife, who was seeking custody of their daughter Angela, accused her former husband of sexually abusing their daughter and applied for a non-molestation order (now called a protection order). His wife claimed Angela had told her “Daddy touches me on the wee wees” and “I don't want Daddy to come here anymore.”

“My wife had a psychological history, had attempted suicide and been in institutions for months on end. I never held that against her but I think that was combined with the kind of books she was reading about children being sexually abused by their fathers all that stuff that was raging in the 80s. I remember seeing [the books] lying on the bed but I didn't really pay any attention to them.” His wife had also loaned children's books with titles such as *What's Wrong With Bottoms* and was reading them to their daughter.

Doctors at Starship Hospital found no physical evidence of abuse and a 25-minute video interview with a specialist sexual abuse investigator yielded no allegations from Angela. A second 40-minute interview with a different interviewer a few weeks later, however, resulted in Angela giving an “accurate description of alleged oral sex by her father”.

John says there are either innocent explanations for things described by his daughter or they must be scenarios gleaned from the books her mother was reading to her. When Angela said he touched her “wee wees” he believes she was referring to him checking if her nappies were wet and references she made to seeing her father's bottom may be explained by her seeing him injecting insulin he required for his diabetes into his buttocks.

Despite disagreement between psychologists about the reliability of the video evidence — and the fact the use of evidence from children as young as Angela is now largely

considered inadmissible — and the police decision not to lay criminal charges, the Family Court ruled John could only see his daughter with professional supervision.

A transcript of the judge's decision reveals he believed it was a case in which “no confident conclusion” could be reached but decided there was a “moderate element of risk” John had abused Angela and that she would be at risk in his care.

Repeated attempts to have the court order lifted so John might have something approaching a “normal relationship” with his daughter have been rebuffed.

“I went to court seven times, I even had an expert witness from America who specialised in my wife's disorder testify on my behalf. I did everything legally possible but no matter what I did I was shot down. My legal expenses have reached \$40,000 and I've got nothing for that \$40,000. I was no further ahead after two years of fighting than if I'd never bothered to defend it in the first place. I've got two hours supervised access a week.”

John hasn't seen his daughter outside the confines of a supervised access centre for more than five years. He believes he's being punished for his ex-wife's “delicate psychological state” because in a 1997 decision the judge said if access was unsupervised that would so distress his ex-wife she would be unable to be an effective caregiver to the daughter.

“The impact on my relationship with my daughter has been substantial. We had a very close relationship, she was my first child and I was very interactive with her. Pretty much all of that is gone now. Parental alienation has set in and I think it's got worse as time has gone on. I believe my daughter has been severely damaged, not only because she now believes she was sexually abused, but by not having access to both parents.”

Brian's Story

When Brian was served with a protection order under the Domestic Violence Act for “emotionally and verbally” abusing his ex-girlfriend in 1997 he couldn't believe any judge would really prevent him from seeing their 18-month-old daughter because of it. So he ignored it. It's a decision he sorely regrets; he's seen his daughter for six hours in four years and she now probably calls his ex-girlfriend's new husband “Daddy”.

A Wellington salesman turned consultant to men and women embroiled in Family Court cases, Brian began a relationship with Diane in 1993 although they lived separately. Their daughter was born two years later and although she spent time with both parents, and was given her father's surname, the couple continued to live apart.

When he ended the relationship in 1997 Diane filed an application for a protection order. In her affidavit sighted by *North & South* she alleged there was “physical violence from time to time” but makes it clear her main reason for applying for the order was the “emotional and verbal abuse” she alleges she suffered at his hands.

In her affidavit she claimed Brian had “mood swings and can be very manipulative. I believe he plays mind games with me. He also swings between being very angry and aggressive and turning to being romantic. The changes can happen very quickly.”

Included in the affidavit were claims Brian kicked, punched and broke a chair over his then 13-year-old son from a previous relationship and the partner he had before Diane. Neither of these claims were backed up with statements by his son and former partner and both later told the court those claims were entirely untrue. The fact Brian had volunteered to do a Living Without Violence programme after it was suggested by a counsellor, was cited as proof he had in fact been violent.

“I entered into the Living Without Violence programme because I agreed I had been [psychologically] abusive as the relationship broke down. I became frantic when I was told she was seeing someone else and I thought I’d lose contact with my daughter. But I absolutely wasn’t violent. I never hit her. I never did any violent act against her.”

Because the protection order was not defended within three months it automatically became permanent. In the first few months it was in place Brian was arrested and charged with breaching a protection order by driving past Diane’s house. He spent a night in the Porirua police cells and, despite the advice of his lawyer, pleaded not guilty to the charge in court. Eight months later, after providing irrefutable records he was at work at the time of the alleged incident he was found not guilty.

Brian says his solicitor advised him not to apply for access while his daughter was so young as it would “do no good” but when his daughter was four in 1999 he filed an application for access and was awarded 90 minutes a fortnight supervised by Barnados.

“Diane decided on some weekends she was busy or going away so the access wouldn’t happen and gradually it ended up being months between visits. That’s when I realised it was futile. I said ‘this is not doing my daughter any good to be reintroduced to me and then torn apart again.’ I said ‘this isn’t working’.”

He quit the supervised access programme after four months having seen his daughter three times. Brian’s case is complicated by the fact he was not living with Diane when their daughter was born so he has no rights as a legal guardian despite the fact he is listed on her birth certificate as the father and his daughter legally has his surname.

That means since Brian last saw his daughter, and decided to concentrate on having the protection order withdrawn, Diane has remarried and moved to the South Island. He has no idea where she is, has no contact by phone, is unable to send birthday or Christmas presents and has no input into her schooling, diet or religious affiliation. His three children from his previous marriage aged 10 to 20 have been denied a relationship with their half-sister and she doesn’t know his family.

With the support of his new partner Katharine, a registered nurse who says Brian is a “hands-on, loving father” to his children and role model to her own nine-year-old son, he has filed an application for unsupervised access during school holidays. The Domestic Violence Act is, Brian says, a “fine piece of legislation” and he accepts there

should be some means for psychological abuse to be recognised, but there needs to be more careful scrutiny of such claims especially where custody of children is at issue.

Duncan's Story

In the seven years since Duncan split up with his first wife in 1994 it has been a battle of wills: he has been to court a staggering 50 times and has had warrants issued for the police to collect his two sons — and deliver them to him for scheduled access — 17 times.

Accused of sexually abusing their sons then aged 18 months and three-and-a-half when the marriage soured, it took police only a cursory examination of the allegations to decide there was nothing solid enough to put the 37-year-old Auckland engineer before a jury. But six years and \$80,000 later, Duncan is only beginning to have something resembling normal access to his sons.

“We'd been having marriage problems and seeing a marriage guidance counsellor when my wife decided she didn't want to share custody of the children. She made these allegations and was completely supported by CYFS and counsellors. The whole industry thrives on it.”

Duncan defended the non-molestation order taken out against him and made a counter application for custody of his sons. Despite having no evidence except the word of his ex-wife — and fantastic sexual allegations against no fewer than eight male and female members of his family — Duncan was found to present an “unacceptable risk”.

For two years Duncan was only permitted to see his sons once a fortnight in a supervised access centre. His ex-wife repeatedly ignored the court's order to deliver the boys for scheduled supervised access. The police were reluctant to get involved and Duncan went back to court 17 times in 12 months to apply for warrants for the children to be collected by force. His ex-wife was eventually charged with obstruction but was discharged without conviction.

Two years after the allegations were made the court finally ruled the boys should be in Duncan's care from Friday until Sunday once a fortnight but he must be supervised by a member of his family and they're not permitted to stay overnight with his new family. Just toddlers when he last spent more than a few hours with them, his sons are now nine and 10. He has struggled to pay \$80,000 in costs (a sum that could have been much higher; he has represented himself in many of his 50 court appearances.) Fortunately he says his boys are “very adaptable” and have accepted they have “two different lives”.

Despite his so-called rights as his sons' legal guardian under the Guardianship Act (a “worthless piece of paper”) it rankles he has no say in decisions about their lives including where they go to school, what they eat and what sports they play.

“It's too easy to benefit from false allegations,” says Duncan, “I think the domestic violence legislation has thrown up a situation where allegations that would normally

have been made to the police — and subject to a proper investigation — are now made under the Domestic Violence Act because it's much easier to make allegations, they're not examined and the wife gets custody of the children. Any woman who has reasonable intelligence can hold the court to ransom. A woman has to really stuff up — or get bad legal advice — for custody not to go in her favour.”
