PAPER PRESENTED AT "VIOLENCE AND CULTURE IN FAMILY LAW: TOWARDS THE YEAR 2000" LEGAL AID QUEENSLAND CONFERENCE

Saturday 9 October 1999

"SETTING THE SCENE"

By

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I understand that the purpose of this conference today, addressed as it is at workers in the area of Family Law dealing with the realities of family breakdown on a daily basis, is to stand back and look at where the issue of domestic violence (or family violence) impacts upon the work of child representatives, Family Court counsellors compiling family reports, LAO conference chairpersons, advice solicitors and others.

The report of the "Taskforce on Women and the Criminal Code Discussion Paper" describes domestic violence as a "manifestation of power and control which may involve physical, emotional, sexual, social, psychological and financial abuse. It is usually directed by a man at his female partner and sometimes his children, but also occurs in gay and lesbian relationships.

Despite increasing public discussion about domestic violence, it still remains a largely hidden and misunderstood crime. It is concealed by both the victims and perpetrators."

The Taskforce report also reported on a recent phone-in conducted by the Queensland Domestic Violence Task Force which showed that 144 persons calling in reported broken bones as a result of the violence which they had experienced, 229 reported facial injuries and

63 reported loss of consciousness. Other violence included kicking, biting, hitting and choking and 126 women reported threats with a knife or gun. This reflects the facts alleged daily in applications for protection orders which come before our courts.

Domestic violence is a daily reality for magistrates throughout Queensland. Figures collated in relation to the 10 major magistrates court centres, e.g., Beenleigh, Brisbane, Cairns, Ipswich, Mackay, Maroochydore, Rockhampton, Southport, Toowomba and Townsvile, show that in the 1998-1999 year, over 7,000 applications for Domestic Violence (Family Protection) orders were lodged in those centres. Of these, approximately 900 were applications to revoke or vary and 40 were for the registration of an interstate order. As a result, 4,300 protection orders were made, just under 4,000 temporary orders were made and 1,900 applications were withdrawn, struck out or dismissed.

I was recently at a domestic violence conference where I was made aware of the issues in relation to which persons working within the courts and applicants themselves, felt the magistrates courts to be potentially recalcitrant in the interpretation and administration of the D.V. Act. These included:

> Reluctance by magistrates to make temporary and final orders based on a perceived misunderstanding or lack of understanding of the nature of domestic violence, e.g., a refusal to make a temporary order without proof of physical injury; lack of consistency as to what constitutes a likelihood to commit an act of domestic violence again;

Reluctance by magistrates to make "ouster" orders, i.e., order perpetrators to leave their homes, as part of the "no contact" part of the orders;

Propensity of magistrates to grant orders in relation to cross-applications where little or no proof of violence exists in relation to the cross-applicant.

Reluctance by magistrates to make mandated orders for perpetrators to attend perpetrator programs;

Reluctance by magistrates to liaise with local d.v. groups, police and support workers in the area of d.v.

Rudeness to parties in court.

I accept there may be issues in and surrounding these areas, which require addressing by Queensland magistrates. I also accept that the majority of those magistrates are decent, aware and compassionate people. However, the issue of domestic violence is one which can bring out attitudes about which persons were unaware. I am currently in the process of planning a training session at the forthcoming special magistrates conference, where I hope to address some of these issues, in a general way, to hopefully lead magistrates to an examination of their work practices in this area. This is the best I can hope to achieve, given my limitations as Chief Magistrate in relation to the judicial independence which magistrates enjoy, along with other judicial officers. As to courtesy in the courts, I can do something. I am in the process of setting a standard for courtesy and good manners in magistrates court on behalf of magistrates, which I hope will be adopted. It is the least we

can do, especially in a jurisdiction which brings people to the court as the result of alleged abuse by another.

Another area I hope to address with magistrates is the potential for cynicism in relation to thearea of family violence - the perception, sometimes inevitably felt by judicial officers and lawyers working in the Family Law area, that domestic violence protection order applications are sometimes misused or abused, or reduced to a tactic in family law disputes as to residence or contact of a child or children.

I am no saint, but I must say that I have never held that perception. However, I know of many dedicated lawyers and judicial officers who do. And, of course, there are some people who do abuse the system. However, my suggestion to magistrates is quite simple. If, on the application for a temporary or final order, the evidence as to violence is not sufficiently present, do not make the order. If the suspicion that the application is a ploy to make life difficult for the respondent/applicant for residence/contact, don't make the order, or question the applicant as to his/her basis for the application, in relation to the existence or otherwise of the violence necessary to base an order being made.

I believe this potential for cynicism may also be an issue with lawyers and counsellors working in this area. This is of concern, given the Act's potential now, to give serious consideration to the effects of family violence on the children of the relationship in considering residence and contact issues. There is a suggestion that family lawyers can underplay the issue of domestic violence in material being relied upon for interim orders, for example. And if it not brought to the attention of counsellors, it will not raise its head again, possibly. It is said that unless the violence is severe and physical in nature that it will be

downplayed in affidavit material; that it is perceived that a judicial officer will merely consider, say, intimidation or harassment of one of the partners by another, merely a bit of"argie-bargie" part of the separation process. In an affidavit to be limited to ten pages or so for an interim hearing, other issues will gain paramountcy over violence issues, or they will be minimised. Of course, the existence of a d.v. order will be brought to the court's attention by way of the application form, but it is, it has been suggested to me, not sufficiently expanded upon to be of use to the judicial officer. And we all know the force and effect of interim residence/contact orders - perhaps if domestic violence is not made an issue at that point - it is too late.

One would consider it basic, for instance, that where a child or children are listed as "aggrieved persons", i.e., as having been considered to have been the subject of domestic violence themselves, should rate a mention in an affidavit!! Similarly, alleged breaches of domestic violence should rate a mention? Convictions, as stated, will be brought to the court's attention, but allegations of breaches, not at that point in time decided upon by the magistrates court, should be mentioned surely? They rate along with other allegations about the respondent's behaviour, at least. Again, reference to such orders and breaches of them may be abused, but making decisions as to credibility and likelihood of something having occurred, is what judicial officers do after all. It should be remembered that domestic violence is underreported by victims, as is the reporting of breaches, as is sexual assault, by women - this has been clearly documented and I have referred to such research earlier. A history of domestic violence and breaches of same should be taken seriously.

The issue of the violence by one party to another in relation to property settlements, is still not settled, but can at least be raised, I would suggest, in relation to a spouse's future

chances of finding employment, for instance.

One wonders if perhaps there is an attitude in the Family Court area as a whole that d.v.o.'s are "too easily" granted by magistrates. It has been found, for instance, in research carried out by Ms Helen Rhoades, of the University of Sydney Law Faculty that, since the 1996 amendments, in fact the number of "no contact" orders has dropped from 26% to 3%. This reflects a belief that a person can be a violent partner but still a good parent; in most cases, a violent husband/partner but a "good Dad".

I am indebted to a paper by Graham Quinlivan, part of the National Training Program material for child representatives - "A child's voice" - where he refers to an article by Patrick Parkinson - "Public Policy on Domestic Violence", where Parkinson asserts that -

"Public policy must be inspired by both anger and wisdom - proper anger to demonstrate the unacceptability of domestic violence and wisdom to realise that children bond with the most unfit and inadequate parents."

This states a reality and is the reasoning behind, I would suggest, the current interpretation of "the best interests of the child" which allows contact by perpetrators, ranging from supervised throughout contact or at changeover to unsupervised contact. In their most formative years, children may be subjected to attitudes to their mother and women in general which will affect them forever. It takes the wisdom of Solomon to report and make decisions on individual cases. However, as we heard recently at the domestic violence conference on the Gold Coast. New Zealand have grappled with the problem and come up with a radical solution.

Ms Ruth Busch, an Associate Professor in the Law School at the University of Waikato, Hamilton, New Zealand, was involved in the amendments to that country's Guardianship Act in relation to the introduction of a rebuttable presumption that a person against whom a domestic violence order was in existence, should not be granted contact, unless it is supervised. This amendment arose out of an inquiry following a tragic incident where a father had been awarded residence of the three children of the relationship and had killed himself and the three children. He was the subject of a domestic violence order against the mother of the children. I am informed that family court judges and policy makers in Australia are considering this approach at the present time. It will be interesting to observe any outcome.

The Magistrates Court is able to vary contact orders on proof of domestic violence at the time orders are made under S.68T of the Family Law Act. What happened to this section? Seldom is one asked to make an order under it. Seldom does one pro-actively make the orders. What went wrong? Was it the drafting? Is it lack of will on behalf of lawyers, police prosecutors, magistrates? I don't know - there was a lot of heat at the time of the introduction of the relevant section - it seems to have dissipated.

There is a current debate in law reform circles as to whether the issue of domestic violence should be taken out of the civil law arena and placed where some believe it belongs - as a criminal offence. Of course, sometimes, a perpetrator is also charged with assault of the victim, but not commonly. This is, perhaps, because of the firm belief by many victims that they do not wish their partners to go through the criminal courts, especially Aboriginal women, that a protection order will allow their relationship to survive, but provide the

protection from further abuse that they need. The debate in that area continues and will be watched by the magistrates court, for obvious reasons, with keen interest.

The report of the Taskforce bears reading in relation to women and their relationship with the criminal law and is especially interesting in its discussion in relation to women suffering a history of domestic violence who kill their partners and the insufficiency of the current Criminal Code to offer adequate defences to their actions. I recommend you to read the report.

Thank you for having me to speak today. I have recently referred to my aim as Chief Magistrate in Queensland to take the thinking of some Queensland magistrates out of a box and place into a circle. By that I mean to be open to new ideas, reevaluate old perceptions, acknowledge where they may be wrong in their attitudes to certain laws and in sentencing habits and mostly, listen to others - the community, the stakeholders in the courts, the researchers and, of course, their Chief Magistrate!!

Thank you for inviting me into your circle today. Have a good and productive day and sit in circles!!