The changing face of litigation:

unrepresented litigants in the Family Court of Australia

Rosemary Hunter
Ann Genovese
April Chrzanowski
Carolyn Morris

THE CHANGING FACE OF LITIGATION:

UNREPRESENTED LITIGANTS IN THE FAMILY COURT OF AUSTRALIA

Rosemary Hunter, Ann Genovese,
April Chrzanowski, Carolyn Morris

August 2002

LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES

© Law and Justice Foundation of New South Wales August 2002

Any opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the Law and Justice Foundation Board of Governors.

This publication is copyright. It may be reproduced in part or in whole for educational purposes as long as proper credit is given to the Law and Justice Foundation of New South Wales.

National Library Cataloguing-in-Publication data:

The changing face of litigation : unrepresented litigants in the Family Court of Australia.

Bibliography.
Includes index.

ISBN 0 909136 81 5.

1. Australia. Family Court. 2. Pro se representation - Australia. 3. Parties to actions - Australia. I. Hunter, Rosemary.

346.94015

Law and Justice Foundation of New South Wales
<http://www.lawfoundation.net.au>
L14, 130 Pitt Street, Sydney NSW 2000
GPO Box 4264, Sydney NSW 2001
Phone: (02) 9221 3900
Fax: (02) 9221 6280
Email: lf@lawfoundation.net.au

Participants

Project Manager

Dr. Ann Genovese

Research design, data collection and analysis

April Chrzanowski

Carolyn Morris

Project Consultant

Professor Rosemary Hunter

Research Assistants

Kim Beerling
Patricia Brennan
Jennifer Denton
Lisa Duong
Megan Finch
Justina Legoe
Elizabeth Wilson

External Reviewers

Professor John Dewar, Dean, Faculty of Law, Griffith University

Mr Richard Moorhead, Senior Research Fellow, Cardiff Law School, Cardiff University

This research was supported by a grant from the Australian Law Council Foundation.

The Law and Justice Foundation thanks the following people who assisted significantly with the research:

Mr. Bruce Timbs, Australian Law Council Foundation

Ms Cathy Caust, former Registry Manager, Mr Bob Gregory, Registry Manager, Mr Ashley Flavel and Registry staff, Family Court of Australia, Adelaide Registry

Ms Denise Deane, Registry Manager, and Registry staff, Family Court of Australia, Brisbane Registry

Mr Gary Bowden, Registry Manager, and Ms Pia Marrone, Appeals Registrar, Family Court of Australia, Melbourne Registry

Mr Keith Parker, Deputy Registry Manager, Mr Frank Fitzpatrick, Registry Manager, and Registry staff, Family Court of Australia, Parramatta Registry

Ms Cathy Lam, Deputy Registry Manager, Mr Brian Robertson, Registry Manager, and Registry staff, Family Court of Australia, Sydney Registry

Ms Margaret Harrison, Senior Legal Advisor to Chief Justice Nicholson, Family Court of Australia

Dr Grania Sheehan, Senior Research Fellow, Faculty of Law, Griffith University

Table of Contents

Executive Summary		vi
1.	Introduction	1
PART I:	**The Dimensions of Self-Representation**	9
2.	Methodology	11
3.	The Incidence of Unrepresented Litigants	21
4.	Characteristics of Unrepresented Litigants	49
5.	Characteristics of Cases Involving Unrepresented Litigants	61
6.	The Nature of Partial Representation	75
7.	Conclusion	87
PART II:	**The Impact and Experiences of Unrepresented Litigants on Appeal**	
8.	Methodology	93
9.	Characteristics and Categories of Unrepresented Litigants	101
10.	Categories of Appeal	107
11.	Nature of the Appeal Application	119
12.	Procedural Aspects	139
13.	The Jurisprudence of Appeals	157
14.	Conclusion	187
Appendices		
1.	Definitions	193
2.	Coding Forms	199
3.	Statistical Tables	213
4.	References	239

Executive Summary

Unrepresented litigants have become an increasingly prominent phenomenon in contested cases in the Family Court of Australia since the mid-1990s. The research project on which this report is based set out to answer the following questions about this group of litigants:

1 What were the numbers and proportions of unrepresented litigants appearing in contested cases in the Family Court during the five years 1995-1999, at both trial and appellate levels?

2 What internal or external changes may have contributed to or been associated with any increases?

3 Did unrepresented litigants at both trial and appeal levels display any particular demographic patterns or differ in any significant ways from litigants who were legally represented (for example in terms of their sex, ethnicity, or income status)?

4 Did the cases involving unrepresented litigants at both trial and appeal levels display any particular patterns or differ in any significant ways from cases in which all litigants were represented (for example in terms of the issues involved, or the stages at which cases were finalised)?

5 What difficulties (if any) have unrepresented litigants experienced, and what impact have they had on the Family Court's processes at appeal level?

6 To what extent and in what ways has the appearance of unrepresented litigants at appeal level hindered the development of the Family Court's jurisprudence?

7 What model or models of intervention are most appropriate to avoid any problems identified in relation to the appearance of unrepresented litigants at appeal level?

The first four questions were investigated via a quantitative study of Family Court files from the years 1995-99, the results of which are reported in Part I. The last three questions were investigated via a qualitative study of Family Court appeal files from the year 1998-99, the results of which are reported in Part II.

Part I: The Dimensions of Self-Representation

The quantitative study involved a sample of first instance and appeal files taken from each of the five years of the study, from three Registries of the Family Court: Sydney, Parramatta and Adelaide. Data on litigant and case characteristics were extracted from the files and statistically analysed.

Unrepresented Litigants

In response to the first research question, the data showed that approximately 31 per cent of litigants at first instance, and 18 per cent of litigants on appeal were unrepresented at some stage during their case. At first instance, unrepresented litigants were more likely to be partially represented rather than fully unrepresented, while the opposite was true on appeal.

In response to the second research question, there was a steady increase in the proportion of fully unrepresented litigants at first instance between 1995 and 1999, beginning at 4.6 per cent and doubling to 9.0 per cent by the end of the period. Since there was an increase in applications to the Court over the same period, the increase in the proportion of fully unrepresented litigants meant an increase in the actual numbers of fully unrepresented litigants appearing in the Court.

The proportion of partially represented litigants peaked in cases in which an application was filed in 1996. This peak corresponded with the introduction of Simplified Procedures in the Family Court in January 1996, together with background economic factors that may have made legal representation more difficult to afford. Neither the introduction of the Family Law Reform Act in mid-1996, nor cuts to family law legal aid in July 1997, had a significant impact on the proportion of unrepresented litigants in the registries studied. The effect of the legal aid cuts may have

been mitigated by background economic factors (particularly falling unemployment), plus the fact that in NSW, where two of our three registries were located, the impact of the cuts was somewhat delayed.

There was no significant change in the proportion of unrepresented litigants in appeal cases across the five years of the study.

In response to the third research question, fully unrepresented litigants at both first instance and on appeal were more likely than fully represented litigants to be male, and more likely to be reliant on welfare payments. They were also somewhat more likely to have been born in a non-English speaking country (especially fully unrepresented respondents at first instance).

Partially represented litigants fell quite literally between the fully represented and fully unrepresented groups. In relation to sex, they were more like fully unrepresented litigants. In relation to country of origin and income status on appeal, they were more like fully represented litigants. In relation to income status at first instance, they shared characteristics with both other groups: more likely than fully represented litigants to have welfare payments as their main source of income, but when this was not the case, likely to have incomes similar to those of fully represented litigants.

Regression modelling indicated that the significant predictors of representation status at first instance were registry, sex and income source. The odds of being fully unrepresented rather than fully represented were twice as high for litigants from the Adelaide Registry as for those from the Sydney Registry, three times as high for men as for women, and almost three times as high for those for whom welfare benefits were their main source of income. The odds of being partially represented rather than fully represented were 1.5 times higher for litigants from the Adelaide and Parramatta Registry than for litigants from the Sydney Registry, almost twice as high for men as for women, and 1.7 times higher for those whose main source of income was welfare benefits.

In appeal cases, the significant predictors of representation status were

litigant role, sex and income source. The odds of being fully unrepresented rather than fully represented were nearly eight and a half times greater for appellants than for respondents, nearly 12 times higher for men than for women, and over 21 times higher for those whose main source of income was welfare benefits. The odds of being partially represented rather than fully represented were over six times higher for appellants than for respondents.

Cases Involving Unrepresented Litigants

Almost half of the cases at first instance and 30 per cent of appeal cases involved at least one litigant who was unrepresented at some stage during their case. In Adelaide more than 50 per cent of cases involved a partially or fully unrepresented litigant throughout the entire survey period. While the proportion of cases involving a partially represented litigant fluctuated, the proportion of cases involving a fully unrepresented litigant doubled from 7.5 per cent in 1995 to 15.0 per cent in 1999.

In response to the fourth research question, cases involving unrepresented litigants at both trial and appeal levels did differ in significant ways from cases in which all litigants were represented. At both first instance and on appeal, cases involving a fully unrepresented litigant were much more likely to involve only children's matters, to be of shorter than average duration, to finalise in the early stages of the case, and to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than by agreement between the parties or by judgment following a trial or appeal hearing.

Cases involving a partially represented litigant at both first instance and on appeal were also more likely than cases involving only fully represented litigants to concern children's matters. By contrast to cases involving a fully unrepresented litigant however, cases involving a partially represented litigant at both first instance and on appeal were of longer than average duration, and correspondingly more likely to finalise at or close to final hearing or appeal judgment. At first instance this pattern was associated with a greater likelihood that these cases would include evidence of family violence and child abuse, the appointment of a child

representative, and enforcement proceedings.

These findings suggest that fully unrepresented litigants may be disadvantaged by their inability to negotiate with the other party and to understand and comply with court processes. At the other end of the spectrum, children's matters at first instance, which are particularly difficult, and involve allegations of family violence and the appointment of a child representative, may be most likely to generate partially represented litigants, who doggedly pursue their cases beyond their ability or their willingness to pay for a lawyer, or beyond any legal aid assessment of the merits of their case.

Further exploration of the nature of partial representation suggested that patterns of partial representation are varied and complex. Some partially represented litigants may be making use of 'unbundled' legal services, under which they take some responsibility for the preparation and/or presentation of their case. Different kinds of partial representation over time were also identified, including litigants beginning their cases unrepresented and subsequently gaining representation, litigants beginning their cases represented but their solicitor ceasing to act for them, litigants experiencing a hiatus in their case after which they lost or rejected representation, and one-off changes of representation status. These patterns frequently overlapped, and appeared to apply equally to litigants who could afford to pay for legal representation and to litigants whose only access to a lawyer would be through a grant of legal aid. The different patterns of partial representation do, however, suggest possible interventions that the Court might adopt to encourage parties to obtain and retain legal representation.

Part II: The Impact and Experiences of Unrepresented Litigants on Appeal

The qualitative study involved an in-depth analysis of all available appeal and application for leave to appeal files opened in the 1998-99 financial year. Documentation examined as part of the study included grounds for appeal, outlines of argument, appeal books, correspondence with Appeals Registrars, transcripts of the hearing at first instance, and judgments of the trial judge and the Full Court.

The appeal materials yielded three categories of unrepresented litigants on appeal, defined by their experiences of and behaviour within the appeal process. 'Vanquished' litigants were those who could not afford legal representation, were not eligible to receive legal aid, and were in general overwhelmed by the family law system itself. Several were from a non-English speaking background, or suffered from a psychiatric or intellectual disability. The particular difficulties experienced by this group in fulfilling procedural requirements prior to hearing resulted in a relatively high rate of abandoned appeals. 'Serial appellants' were parties who brought multiple appeal applications before the Court. They created significant difficulties for the Court, as they had a tendency to appeal every decision (including interim orders and procedural directions), abused the assistance of Appeals Registrars, and often based their multiple grounds for appeal on a belief that their personal rights had been infringed. 'Procedurally challenged' litigants in person fell between these two extremes. Litigants in this group were not as enmeshed in the process of litigation as 'serial appellants', and exhibited a wide array of characteristics, but were clearly identifiable as having suffered because of procedural difficulties and lack of procedural knowledge and experience in their time at the Family Court.

In response to the fifth research question 'vanquished' and 'procedurally challenged' litigants were disadvantaged by their inability to comply with appeal procedures, particularly the preparation of appeal books. Serial appellants, on the other hand, created problems for the Court with lengthy, unfocused and legally irrelevant grounds for appeal and outlines of

argument, and created considerable work for Appeals Registrars in responding to their requests and demands for assistance.

In response to the sixth research question, our analysis of appeal files suggests that the appearance of unrepresented litigants at appeal level has not hindered the development of the Family Court's jurisprudence. This is primarily because, in a discretionary jurisdiction, the majority of appeals concern factual matters in the exercise of the trial judge's discretion, and the Full Court most often upholds the trial judge's exercise of discretion. Secondly, the Court does identify cases for the development of legal principles, but it tends to do so regardless of how the case has been presented by the parties: it may ignore parties' invitation to develop or clarify the law on a particular point, or it may find jurisprudential merit in a case that the parties have not presented as such. Unrepresented litigants, have, however, had an impact on the development of a new strand of jurisprudence dealing specifically with the way in which trial judges should ensure a fair trial for litigants appearing in person.

In response to the last research question, we suggest that in order to assist potentially 'vanquished' and 'procedurally challenged' litigants in person, and to ease the burden now carried by Appeals Registrars, attention should be focused on the appeal process prior to hearing. There could be a greater level of educative support given to unrepresented appellants to assist them in understanding what the appeal process entails. Arrangements could be made for the provision of duty solicitors or pro bono legal assistance for unrepresented appellants in framing grounds for appeal, and/or at the settlement of the Appeal Book index. Steps could be taken to reduce the cost of obtaining the transcript of first instance proceedings, which represents a considerable stumbling block for many unrepresented appellants. Guidelines for the treatment of unrepresented parties at trial could be extended and applied to the appeal process.

Serial appellants, by contrast, create distinct problems for the Court which may not be alleviated by assistance at pre-hearing. There would be some benefit in dealing with this group distinctly, for example by requiring that parties seek leave to appeal for any but the first appeal arising from the

same first instance proceedings or associated appeal process, or by the Court more aggressively imposing s 118 orders. As with unrepresented litigants at first instance, the diversity of unrepresented litigants on appeal suggests targeted strategies and a balancing of objectives rather than any simple or singular approach.

1

Introduction

Background to the Research

The Family Court has experienced a noticeable influx of unrepresented litigants in the past few years. While self-representation in divorce proceedings is very common, and is a logical consequence of the fact that modern divorce is a largely administrative procedure, the presence of unrepresented parties in uncontested divorce cases has not been seen as a problem. Rather, discussions of unrepresented litigants in the Family Court tend to concentrate on litigants appearing in person in contested proceedings concerning the residence and welfare of children, and/or the division of marital property after divorce. This is the group of litigants on which this report will focus.

A survey conducted within the Family Court found that in a two week period during 1998, 34.6 per cent of cases coming before a registrar, judicial registrar or judge had at least one party unrepresented.[1] The Australian Law Reform Commission (ALRC) conducted a study of Family Court files finalised in May-June 1998 as part of its reference on the federal civil justice system, and found that 41 per cent of the cases involved at least one party who was unrepresented or partially represented.[2] Moreover, the Full Court of the Family Court has also seen a growth in unrepresented appellants, who for several years have appeared in similar proportions to the level of unrepresented litigants at trial level.[3]

---

1 Family Court of Australia (1998b), table 8.3.

2 Australian Law Reform Commission (1999), 375.

3 Family Court of Australia (1998a), 40 (36% of appellants and 37% of applicants for leave to appeal during 1997-98 were in person).

In 1999, the Chief Justice raised concerns about the implications of this trend for the development of family law jurisprudence.[4] In February 2002, ABC Television screened a documentary as part of its series on 'DIY Law', which dramatised the difficulties faced as a result of lack of legal representation in Family Court trials, for everyone concerned: the unrepresented party, the judge, and the opposing party and their lawyer.[5]

There are a number of factors which may have contributed to the increase of unrepresented litigants in the Family Court. Most notably, the Commonwealth government made significant cuts to the legal aid budget for family law from July 1997. Prior to that date, the Commonwealth and State and Territory governments shared a funding partnership in which the Commonwealth provided approximately 55 per cent of legal aid funding, and the States and Territories 45 per cent. The State and Territory Legal Aid Commissions then determined their own funding priorities and the distribution of legal aid funds between criminal, civil and family law. From 1 July 1997, the Commonwealth withdrew from the funding partnership, and instead assumed exclusive responsibility for funding matters under Commonwealth law, primarily family law. At the same time, it reduced its total legal aid budget by around 20 per cent. It also introduced a set of guidelines for the disbursement of family law legal aid funds, which included a more stringent merits test, restrictions on the types of matters that would be funded, and a cap on funding for any individual case.[6] These changes are thought to have led to a significant escalation in the number of litigants compelled to represent themselves because they do not qualify for legal aid, or because their legal aid funding has run out.

The legal aid situation may not be the only operative factor, however. For example, in January 1996, the Family Court introduced Simplified Procedures governing applications for orders relating to children and property. These procedures were implemented as a result of recommendations for change to provide access to the Family Court with as

4 Nicholson (1999), 3. See also Johnson and Johnson (1998) Fam LR 21.

5 Reality Bites - Do-It-Yourself Law, Episode One: Private Lives, Hilton Cordell Productions for the Australian Broadcasting Corporation, ABC TV, 26 February 2002.

6 See Hunter et al. (2000), 6-7; Fleming (2000); Noone (2001).

little cost and complexity as possible. The reform recognised that the great majority of applications filed in the Family Court result in agreement between the parties and consent orders, rather than a full trial before a judge. Thus, it did not make sense to require all applications to comply with procedures designed to prepare cases for trial, when most of them would never go to trial.[7] It was consequently made simpler to file an application and to move through the early stages of Family Court proceedings. Initiating applications only have to contain minimal information, such as the parties' details and the orders sought. In turn, this made it easier for litigants to bring their cases in person rather than requiring a lawyer to negotiate complex court processes. This reform may also have had some impact on the number of unrepresented litigants appearing in the Court.

Thirdly, amendments to the Family Law Act 1975 contained in the Family Law Reform Act 1995 came into force in July 1996. Among other things, the Reform Act introduced principles into the part of the Act dealing with child welfare, which state that children have a right of contact on a regular basis with both their parents and with other people significant to their care, welfare and development, unless such contact would be contrary to the children's best interests.[8] The Family Court's statistics show that there was a steep rise in the number of residence/contact applications made to the Court following the introduction of the Family Law Reform Act,[9] which subsequently increased pressure on the shrinking legal aid budget. A further issue intersecting with the Family Law Reform Act has been the rise of the organised fathers' rights movement, which has placed reliance on the Reform Act's principle of shared parenting,[10] has criticised both the

7 See for example Australian Law Reform Commission (1997), paras 8.11-8.12; Australian Law Reform Commission (1999), 337-57; Brown (1998), 4-5.

8 Family Law Act 1975 (Cth), s 60B(2).

9 Family Court of Australia (1998a), figures 3.5, 3.6 (files opened and applications 1989-90 to 1997-98, orders sought 1989-90 to 1997-98); Family Law Council (1997), 45-46; Women's Legal Service (1998), 10-11.

10 Family Law Act s.60B. Popular interpretations of this section are at least as important in this context as the actual words used and the Court's expressed views on the section. See in particular Rhoades et al. (1999); Dewar et al. (1999b); Rhoades et al. (2000).

Family Court and legal aid for failing to support fathers' claims in this respect, and in some cases encourages men to self-represent in pursuing their claims.[11] It is notable that of the unrepresented family law litigants surveyed by the ALRC, 17 per cent responded that they either did not obtain or ceased to have legal representation because they did not want a lawyer. In the Family Court's study, 31 per cent of unrepresented parties who responded to the survey said they did not need legal representation.[12] For at least some of these, lack of representation may have been a strategic choice.

A considerable amount of research has now been undertaken in response to the emerging phenomenon of unrepresented litigants in the Family Court. This research has focused on three main issues. First, the Court's research noted above, and some other studies, have been concerned specifically with the impact of legal aid cuts.[13] Secondly, some studies have been concerned to document the experiences of unrepresented litigants in the Court, and of the Court and opposing lawyers with unrepresented litigants.[14] Thirdly, research has examined the ways in which the Court might better accommodate unrepresented litigants.[15] Among the latter is the Family Court's current 'Self representing litigants project', which, among other things, is holding consultation meetings with self-represented litigants in the Court, in order to better understand and respond to their support needs. The aim of the project is 'to develop a coordinated national approach to provide services that are fair, open, consistent and

11 See for example Kaye and Tolmie (1998); Springvale Legal Service (1998), 16; Women's Legal Service (1998), 55-56.

12 Family Court of Australia (1998b), 10.

13 For example Family Court of Australia (1998b) (the Family Court also conducted a similar survey in 1996 in order to generate data for its submission to the Senate Inquiry into the Australian Legal Aid System); Springvale Legal Service (1998); Dewar et al. (1998).

14 For example Dewar et al. (1998); Matruglio (1999), 35-53, 97-100; Family Law Council (2000); Dewar et al. (2000).

15 In particular Australian Law Reform Commission (1999), 375-80; Australian Law Reform Commission (2000), 359-64. See also Coleman (1998); Hunter (1998); Dewar et al. (2000); Australian Institute of Judicial Administration (2001); Faulks (2001).

understandable to all and conscious of the needs of self-represented litigants.'[16]

In addition, some data on the characteristics of unrepresented litigants, the characteristics of cases involving unrepresented litigants, and dispute resolution in those cases, is available from the ALRC's study,[17] and from the Justice Research Centre's research into the profiles of family law cases.[18] However, this data provides only a snapshot of the position as at mid-1998. It does not identify any changes over time or any trends in the profile of cases involving unrepresented litigants. Neither have changes over time in the level of unrepresented litigants been able to be identified using the Family Court's record system, Blackstone, since this contains only limited historical data on the filing of applications, and has only relatively recently begun to record the representation status of litigants in the Court.

The research reported here, therefore, was designed to gather information on the dimensions of the increase in unrepresented litigants over time, and to gain a better understanding of the possible influences on that increase. It was also designed to test the concerns raised about the impact of unrepresented appellants at appeal level in the Family Court. It began with the premise drawn from previous studies,[19] that unrepresented litigants are not a homogeneous group, that there are a range of reasons why parties might appear in the Family Court without a lawyer, and that policy responses to unrepresented litigants should therefore be differentiated to take account of these differences.

16 Self represented litigants project website: <http://www.familycourt.gov.au/litigants> (Accessed 30 October 2001).

17 Matruglio and McAllister (1999), part 10.

18 Hunter (1999), 53-54, 99-100, 133, 171-72, 206-207.

19 Hunter (1998); Australian Law Reform Commission (1999); Dewar et al. (2000).

Research Questions

The questions the research sought to address were as follows:

1 What were the numbers and proportions of unrepresented litigants appearing in contested cases in the Family Court during the five years 1995-1999, at both trial and appellate levels?

2 What internal or external changes may have contributed to or been associated with any increases?

3 Did unrepresented litigants at both trial and appeal levels display any particular demographic patterns or differ in any significant ways from litigants who were legally represented (for example in terms of their sex, ethnicity, or income status)?

4 Did the cases involving unrepresented litigants at both trial and appeal levels display any particular patterns or differ in any significant ways from cases in which all litigants were represented (for example in terms of the issues involved, or the stages at which cases were finalised)?

5 What difficulties (if any) have unrepresented litigants experienced, and what impact have they had on the Family Court's processes at appeal level?

6 To what extent and in what ways has the appearance of unrepresented litigants at appeal level hindered the development of the Family Court's jurisprudence?

7 What model or models of intervention are most appropriate to avoid any problems identified in relation to the appearance of unrepresented litigants at appeal level?

The methodologies employed to address these research questions are described in chapters 2 and 8 of this report. The report is divided into two main parts. Part I (the quantitative study) deals with questions 1-4, while Part II (the qualitative study) deals with questions 5-7.

Terminology

The terms 'litigant in person', 'self represented litigant' and 'unrepresented litigant' are generally treated as synonymous in the literature,[20] and in this report are used interchangeably to refer to a party to a contested case who conducts their case on their own behalf, without legal representation. However there are subtle differences of meaning between the three terms. 'Self-represented litigant' implies some element of choice or activity on the part of the litigant in representing themselves. 'Unrepresented litigant' focuses on the fact that the person is lacking legal representation, and implies that this is a disadvantage. 'Litigant in person' is more neutral, simply describing the fact that the party is appearing in person. The report also uses these terms to collectively describe both fully unrepresented litigants and partially represented litigants.

As will be explained in the following chapters, many litigants in fact do not spend the whole of their case either represented by a lawyer or unrepresented, but rather might be represented at some stages, but unrepresented at others. For example, a person might commence their case unrepresented, but then obtain a lawyer in the course of the proceedings. Conversely, a person might commence their case with a lawyer, but their lawyer might cease to act for them at some stage in the case, and they may then continue on their own. Alternatively, a party might make the occasional court appearance in person, but be otherwise represented. There are a number of different patterns of partial representation (as discussed in Chapter 6), but the common feature is that the litigant is neither fully unrepresented, nor legally represented throughout. As just noted, partially represented litigants are discussed in this report alongside fully unrepresented litigants, although differences between the two groups are also observed.

20 In the United States, the term used is '*pro se* litigant'.

The report uses a number of specialist terms which will be familiar to family lawyers and academics, but may not be familiar to other readers. Definitions of these terms are provided in Appendix 1. Terms defined in Appendix 1 are indicated in **bold** type the first time they appear in the text of the report.

PART 1

The Dimensions of Self-Representation

2

Methodology

As noted in the previous chapter, the quantitative questions the research sought to address were as follows:

1 What were the numbers and proportions of unrepresented litigants appearing **in contested cases** in the Family Court during the five years 1995-1999, at both trial and appellate levels?

2 What internal or external changes may have contributed to or been associated with any increases?

3 Did unrepresented litigants at both trial and appeal levels display any particular demographic patterns or differ in any significant ways from litigants who were legally represented (for example in terms of their sex, ethnicity, or income status)?

4 Did the cases involving unrepresented litigants at both trial and appeal levels display any particular patterns or differ in any significant ways from cases in which all litigants were represented (for example in terms of the issues involved, or the stages at which cases were finalised)?

In relation to question 2, we were particularly concerned to assess the impact on the level of unrepresented litigants of:

- the introduction of Simplified Procedures in the Family Court, on 8 January 1996
- the introduction of the Family Law Reform Act, on 11 June 1996, and
- cuts in legal aid for family law, and the introduction of new Commonwealth legal aid guidelines affecting family law, on 1 July 1997.

Each of these changes was discussed in the previous chapter.

The methodology used to answer the quantitative questions was an examination of Family Court files from the five years 1995-1999.

Sampling

Rather than taking cases from only one registry, or from all registries of the Family Court, it was decided to focus on three, namely, Sydney, Parramatta and Adelaide. Taking cases from only one registry may have given misleading results, because we knew from previous research that there are substantial variations in the demographics of parties appearing in different registries, the types of cases handled by different registries, and the resolution patterns in different registries.[21] On the other hand, it would have been impractical to gather case files from each of the 11 registries of the Family Court of Australia.

The Sydney, Parramatta and Adelaide Registries were chosen because they each handle sizeable caseloads, and, from previous snapshot data collected by the Family Court and the ALRC, they appeared to represent a range of experience with unrepresented litigants. For example, the Sydney Registry generally deals with wealthier parties and a high proportion of **property matters**.[22] The existing data suggested that it would have a relatively low proportion of unrepresented litigants. By contrast, the Parramatta Registry generally deals with parties of lower socio-economic status, with a high proportion from non-English speaking backgrounds, and a high proportion of **children's matters**.[23] The data suggested that Parramatta would have a relatively high proportion of unrepresented litigants. Adelaide has a similar profile to Parramatta, although its clientele are much more likely to be from English speaking backgrounds.[24] The data suggested that Adelaide might fall into the mid-range in the level of

21 Hunter (1999), chap 5.

22 Hunter (1999), 145, 148.

23 ibid., 19, 26, 141, 148.

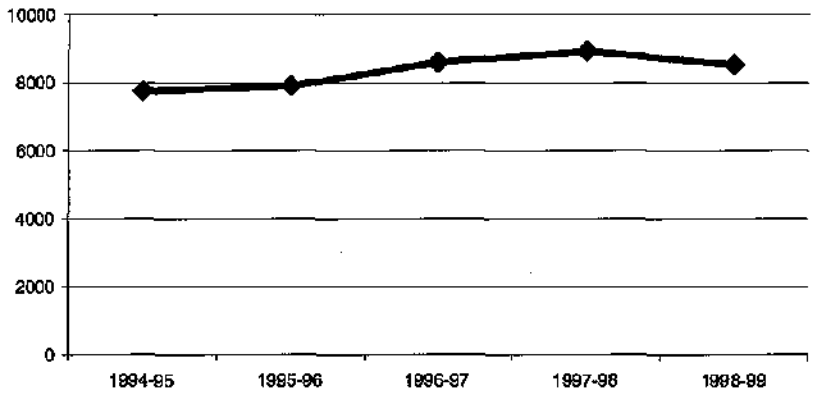
24 ibid.

unrepresented litigants. The Melbourne and Dandenong Registries were not included because cuts to legal aid occurred earlier in Victoria than in other States, in anticipation of the Commonwealth's cutbacks from July 1997, therefore making it difficult to isolate the effect of legal aid cuts from other potentially influencing factors.

First Instance Cases

A random sample was taken from each of the selected registries, of files in which a **Form 7** application for children or property orders, or a **Form 12** application for maintenance orders was filed, in the years 1994-95, 1995-96, 1996-97, 1997-98 and 1998-99. The total number of Forms 7 and 12 applications filed in the three registries in each of those years is shown in the following graph (the corresponding figures can be found in Table 2.1 in Appendix 3). It can be seen that the number of applications filed increased between 1994-95 and 1997-98, before falling slightly in 1998-99.

Figure 2.1: Total number of Form 7 and Form 12 applications filed in the three registries



The sample consisted of a consecutive, two week run of files in which a relevant form was filed in the month of May in each year. The sample therefore consisted of numerical sequences of files, to assist the task of file retrieval. The month of May was chosen in order to be able to isolate the effects of the various changes outlined above. Thus, the May 1995 cases would have commenced before any of the changes occurred. May 1996 cases would have felt the effect of Simplified Procedures, but preceded the introduction of the Family Law Reform Act. May 1997 cases would have been affected by the Family Law Reform Act, but not by the legal aid cuts. May 1998 cases would have experienced the effect of the legal aid cuts, while May 1999 cases would give some indication of continuing trends.

The IT Unit of the Family Court provided us with a comprehensive list of file numbers that met our sampling specifications in the three registries, that is, cases in which either a Form 7 or a Form 12 (the 'identifying document') was filed during the two week sample period in each year. It should be noted that although in most of the cases the identifying document was the first (initiating) document on the file, in some cases, the file had already been open for a period of time, and the identifying document had been filed by one of the parties subsequent to previous proceedings in the case.

Based on the full year figures from the Family Court's *Annual Reports* for the number of Forms 7 and 12 filed in each registry in each of the sample years, it was estimated that the sample would yield total numbers of 550 files from Sydney, 500 files from Parramatta, and 600 files from Adelaide. However, some of the files on the list provided were unable to be located or viewed, or could not be coded since the identifying document was missing from the file. In addition, due to the cost and time required to retrieve files older than 1995, the list was culled to exclude files that had been opened more than two years prior to the filing of the identifying document. Although this tended to reduce the number of very long running cases in the sample, it did not impact on the number of files from any particular year, and there was no reason to believe that any other group of files was underrepresented in the sample. It also became clear that the list provided by the Court included cases in which a **Form 7A** (response to a Form 7)

had been filed during the sample period, and we included these in the sample as well.

In all, 1470 cases were included in the final sample: 495 from the Sydney Registry, 497 from Parramatta, and 478 from Adelaide – roughly an equal distribution of cases from each of the three registries. The distribution of cases broken down by year and registry is shown in Table 2.2 in Appendix 3.

Overall, 106 (7.2 per cent) of the files were recorded as being still active at the time the coding was conducted, the majority dating from the later years of the sample. The remaining 1364 cases were finalised, including 27 cases in which the matter appeared to have been finalised but there was no record of it being removed from the active pending cases list.

A total of 3027 individual parties appeared in the cases in the sample: 50.6 per cent were women (n=1531), 49.3 per cent were men (n=1492), and four were organisations such as banks or government agencies. The proportions of men and women appearing as applicants and respondents in the cases are shown in Table 2.3 in Appendix 3.

Appeal Cases

For the appeal file analysis our aim was to obtain all files originating in the Parramatta, Sydney or Adelaide Registries in which a **Form 42** Notice of Appeal or **Form 67** Application for Leave to Appeal was lodged in the five year period 1995-1999. For appeal purposes, the various registries of the Family Court are grouped into three Appeals Registries: Northern (based in Brisbane), Eastern (based in Sydney), and Southern (based in Melbourne). The Parramatta and Sydney files were therefore located in the Eastern Appeals Registry, while the Adelaide files were located in the Southern Appeals Registry.

While the Court keeps electronic records of first instance cases, for appeal files, only manual registers are available, containing only limited information. Based on the manual appeal registers, we expected to view 526 files from the Eastern Appeals Registry, and 107 files from the

Southern Appeals Registry. In both registries (and also in the Northern Registry, as discussed in relation to the qualitative study), the file retrieval process was hindered by the Court's filing systems. Generally the appeal files were kept in a common area. However in all registries some files were missing and were not able to be located, particularly within the time constraints that we had. In particular, **appeal books** and files had sometimes become separated, so that one was available but not the other.

For the Eastern Appeals Registry in particular, appeal files from the earlier years (especially 1995 and 1996) were not easily accessible as most had already been archived, and retrieval was expensive and difficult, so only those files that were available in the Court were coded. Furthermore, as the appeal register is not centrally computerised, there were found to be a number of inconsistencies in file management between registries, and even within registries, for example in the allocation of file numbers to cross-appeals and to fresh appeals by the same **appellant**, and in the numbering and handling of applications for leave to appeal.

One consequence was that in coding the files, it became obvious that in some instances there were multiple files relating to the same litigants, which (in most instances) the Court had dealt with together. We therefore decided to classify multiple files relating to the same parties as an individual 'case', and to examine representation status primarily at that level. This also has the effect of not over-inflating the number of unrepresented litigants appearing in appeals, which would tend to occur if the figures for files alone were examined, when one unrepresented litigant may have filed several related Notices of Appeal and Applications for Leave to Appeal.

On the other hand, where files that involved the same parties had been dealt with by the Court at separate times, and were not related directly to each other (for instance where there was an appeal on one matter in 1997, and then a subsequent appeal on a separate issue in 1999), we have treated these files as separate cases.

In total we were able to examine 473 individual appeal files, relating to 409 separate appeal cases: 216 from Sydney, 105 from Parramatta, and 88

from Adelaide. The samples from the Eastern Appeals Registry (Sydney and Parramatta) were skewed towards the later years of the sample period, due to the difficulties of retrieving files from the earlier years. The figures from each registry by year are shown in Table 2.4 in Appendix 3.

Overall, 394 of the appeal cases examined (96.3 per cent) were recorded as being finalised, with only 13 cases still active at the time the coding was conducted, and two cases in which it was unclear whether the case had been finalised.

In total there were 896 individual parties appearing in the appeals examined: 791 were former spouses or de factos, 93 were other parties (including other individuals and family members, child representatives, companies, and government departments), while 12 were unknown. Among the former spouses or de factos, the majority of appellants (60.9 per cent) were male. The breakdown of former spousal parties by sex and role is shown in Table 2.5 in Appendix 3.

Measures

Information from each file was recorded on a coding sheet (see Appendix 2).

The information recorded for each case included:

- parties' representation status at various stages, and dates at which those stages occurred
- parties' sex, country of origin, occupation, source of income and level of income where available, and whether they were the **applicant**/appellant or **respondent**
- the matter/s involved in the case
- how and at what stage the case was disposed of (or what stage had been reached in cases not yet finalised), and the date of finalisation.

Information on parties' representation status at various stages enabled us to determine whether parties should be classified overall as 'fully

represented', 'partially represented', or 'fully unrepresented'. Thus, for instance, a litigant represented at one court appearance but not at another was noted as being partially represented. This information came from documents filed by the parties, and court records concerning appearances at various kinds of hearings. If a party was represented at the time a particular document was filed by them, the document should have included the name of the party's solicitor. If a party was represented for a particular hearing, the court record should have noted who appeared on the party's behalf. The indications of representation for hearings clearly depended upon accurate recording by court staff, and may not always have provided a true record, but overall they may be considered quite reliable. Since our definition of representation was based solely on what could be observed from the court file, we were unable to discern whether, for example, an apparently unrepresented litigant had received advice or assistance in preparing their case, such as from a community legal centre.

We also observed that in the Parramatta Registry, litigants at first instance were required to attend a Case Conference in the initial stages of the case, and they usually attended this conference on their own. Since this was such a common occurrence, it has been discounted from the determination of litigants' overall representation status.

Some demographic information was more readily available than others. For example, the party's sex, and whether they were the applicant or respondent, were always recorded. However information on country of origin, occupation and income was not always available. Information on country of origin and occupation might be included on court forms, or in affidavits (written evidence) submitted by the parties. Information on income was most often available in cases concerning property matters, in which parties were required to provide detailed information about their income and expenditures, but was often missing in cases concerning children only.

The demographic information was gathered in order to be able to determine whether unrepresented or partially represented litigants had a different profile from fully represented litigants. For example, were

unrepresented litigants more likely to be male than female? Were they more likely to come from English speaking backgrounds, or to have low incomes?

Information on the matters involved in the case, and how and when the case was finalised were readily available from the court files. So too was case duration, calculated as the period between the date of the first and last documents on the file. At first instance, this included cases in which the substantive issues on Form 7 or Form 12 may have been dealt with relatively quickly, but there may have been an earlier, or subsequent, divorce application (e.g. divorced 1995, but filed Form 7 in 1997). It is therefore important to note that our calculation of the length of cases is longer on average than that shown by previous ALRC and Justice Research Centre studies, which considered only the time taken in relation to the substantive issues.[25] This difference had no impact on our measures of representation status, however. Since a substantial majority of people now handle their own divorce without legal representation,[26] the inclusion of parties' representation for their divorce application as part of their overall representation status would have given a skewed picture of the level of unrepresented litigants in contested proceedings in the Family Court. Accordingly parties' representation status for their divorce application was not included in the assessment of their overall representation status.

The information on matters involved, duration and resolution enabled us to determine whether cases involving fully unrepresented or partially represented litigants had a different profile from cases involving fully represented litigants. For example, were unrepresented litigants more likely to appear in children's matters than in property matters? Did cases involving fully unrepresented litigants take longer or shorter to finalise than the average?

25 Australian Law Reform Commission (1999), 325; Hunter (1999), 162.

26 For example in the year 1998-99, of the 47,996 divorce applications filed in the Family Court of Australia, 33,378 (69.5%) were filed in person: Family Court of Australia (1999), 73.

Analysis

The coded data was entered into a database and subjected to statistical tests to determine whether there were any associations between representation status and the date of the initiating document (and hence the various changes to the family law system mentioned earlier), demographic factors, or case characteristics. It should be noted that the study design provides the ability to detect statistical associations, but not to determine the direction of the associations. Thus it is not possible to say that certain factors are either a cause or an effect of representation status, although we do speculate as to the reasons why particular associations might occur. Where several factors proved to be statistically associated with representation status, we then undertook a multivariate (logistic regression) analysis to determine the relative size of the associations between variables, and the nature of the association with the variables in combination.

3

The Incidence of Unrepresented Litigants

The research questions addressed in this chapter are:

1 What were the numbers and proportions of unrepresented litigants appearing in contested cases in the Family Court during the five years 1995-1999, at both trial and appellate levels? and

2 What internal or external changes may have contributed to or been associated with any increases?

We were interested to determine, first of all, the overall level of unrepresented litigants appearing in the Court at first instance and on appeal during the study period. Previous studies also suggested that respondents were more likely than applicants to appear unrepresented, and that there would be variations in the proportion of unrepresented litigants between registries, and we sought to determine whether our figures were consistent with these previous observations.

Second, we were interested in whether there had been any increase in the proportion of unrepresented litigants appearing at trial level and appeal level during the study period, and if so, the size of the increase. We were also particularly interested to determine the impact, if any, that the July 1997 legal aid cuts had had on the proportion of unrepresented litigants in the Family Court.

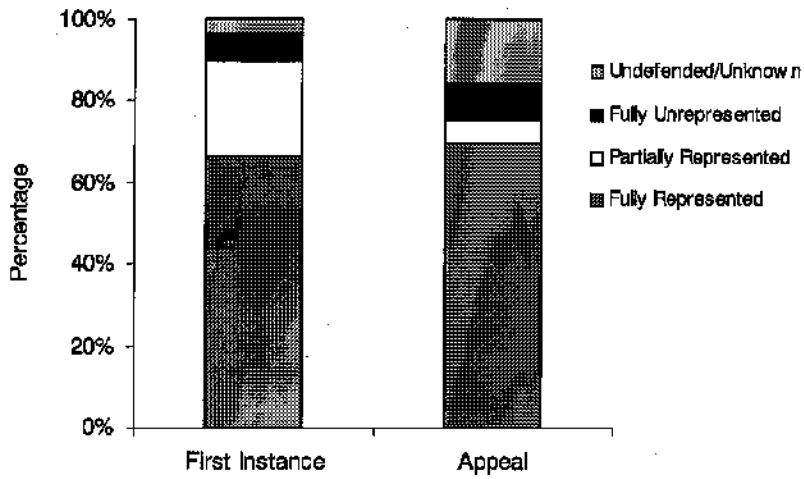
Overall Incidence of Unrepresented Litigants

Of the 3027 litigants involved in the study at first instance, 66.4 per cent were fully represented for the entire duration of their case, 23.4 per cent (n=708) were unrepresented at some point in the matter but represented for other parts of the case, and 6.9 per cent (n=208) were fully

unrepresented for the entire duration of their case. The remaining 3.3 per cent of litigants (n=101) did not appear (usually respondents who did not bother to defend against their former partner's application), or their representation status was unable to be determined. For the remainder of this section, these 'unknown' litigants have been excluded.

It is notable, then, that the majority of 'unrepresented' litigants at first instance (77.3 per cent) were partially rather than fully unrepresented throughout the course of their case.[27]

Figure 3.1: Representation status of litigants at first instance and in appeal



Of the 896 litigants involved in the appeal study, 69.6 per cent (n=624) were fully represented throughout the entire duration of the appeal, 9.2 per cent (n=82) were fully unrepresented throughout the appeal, and 5.5 per cent (n=49) were partially represented during the appeal proceedings. The remaining 141 litigants (15.7 per cent) – mostly respondents – either did

27 In a conference paper delivered in March 2001, Justice Faulks adverted to the difficulty in counting the number of litigants in person in the Family Court because they could be represented at one time and not at another: Faulks (2001). Ours is the first report to quantify the numbers and relative proportions of fully and partially unrepresented litigants.

not appear, or their representation status was unable to be determined. For the remainder of this chapter, these 'unknown' litigants have also been excluded from the analysis.

Of the 755 litigants in the appeal study for whom representation details were available, the percentages can therefore be adjusted to 82.5 per cent fully represented, 10.9 per cent fully unrepresented, and 6.6 per cent partially represented. Compared to litigants at first instance then, litigants on appeal were more likely to be fully represented, but also more likely to be fully unrepresented, with partial representation not the prominent feature on appeal that it was at first instance.

Incidence of Unrepresented Litigants by Role

The earlier findings of the ALRC and the Justice Research Centre suggested that there are more unrepresented respondents than applicants.[28] The findings of the current study in relation to litigants at first instance were consistent with these results. Twenty-six per cent of applicants and 37 per cent of respondents were unrepresented at some point in time during their matter (ie. combining partially represented and fully unrepresented litigants). For litigants who were unrepresented for the entire duration of their case, the proportions were reduced to 4.7 per cent of applicants and 9.7 per cent of respondents. Respondents were significantly more likely than applicants to be unrepresented.[29]

On appeal, however, the opposite pattern occurred. It was found that appellants were significantly more likely than respondents to be fully unrepresented or partially represented, and less likely than respondents to be fully represented.[30] While over one quarter of appellants were fully or partially unrepresented, less than 10 per cent of respondents were in this position.

---

28 Matruglio and McAllister (1999), 10.1; Hunter (1999), 171.

29 χ^2=48.699, df=2, n=2926, p=0.000.

30 χ^2=53.936, df=2, n=755, p=0.000.

The contrast between the position at first instance and on appeal is shown in the following two graphs. The accompanying Tables 3.1 and 3.2 may be found in Appendix 3.

Figure 3.2: Representation status at first instance by litigant role

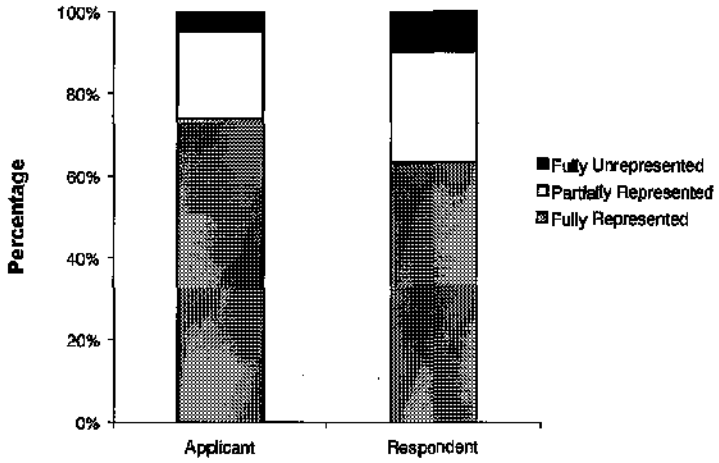
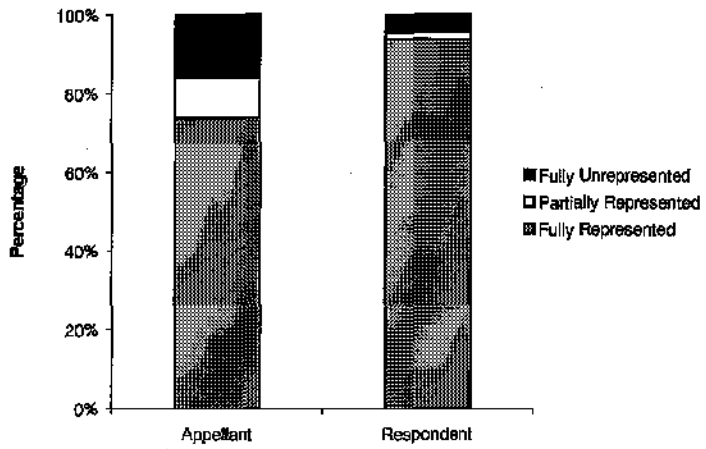


Figure 3.3: Representation status on appeal by litigant role



One of the reasons for the reversal between first instance and appeals may be that unsuccessful unrepresented or partially represented respondents at first instance become unrepresented appellants on appeal. We were unable to test this hypothesis since our coding form did not record the role of appellants and respondents at first instance, but such a pattern was certainly evident in a number of the appeal files we analysed for the qualitative study discussed in Part II of this report.

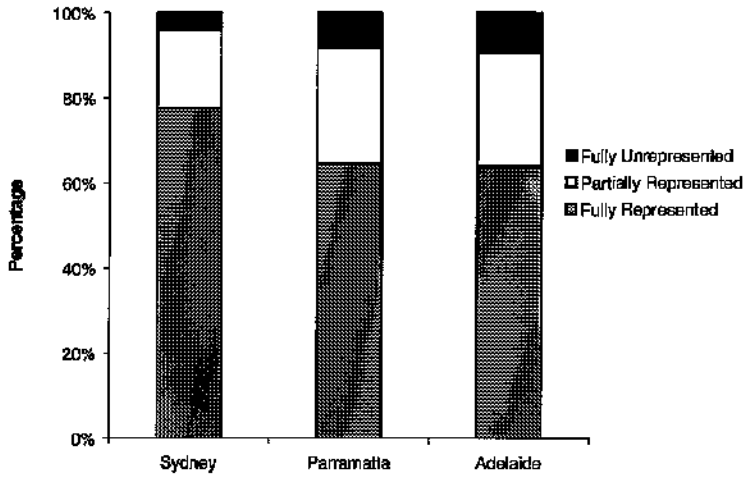
Incidence of Unrepresented Litigants by Registry

We expected on the basis of previous data that there would be a lower proportion of unrepresented litigants in the Sydney Registry, and higher proportions in the Parramatta and Adelaide Registries. These expectations were also borne out in the current study; there was indeed found to be a significant difference in the distribution of representation status across the three registries considered.[31] In the Sydney Registry, over 77.6 per cent of litigants were fully represented, with significantly fewer partially and fully unrepresented litigants than in the other two registries. The overall experiences of Parramatta and Adelaide were similar, however litigants in Adelaide were slightly more likely to be fully unrepresented.[32] The following graph displays these results (see also Table 3.3 in Appendix 3).

31 χ^2=57.972, df=4, n=2926, p=0.000.

32 See Hunter (1999), chap 5, in relation to the various differences between registries.

Figure 3.4: Representation status at first instance by registry



When broken down by litigant role, the significant difference between registries was maintained for both applicants[33] and respondents,[34] however the distributions changed. In Sydney, both applicants and respondents were still more likely to be fully represented than in the other two registries. At the Parramatta Registry, however, significantly more applicants than average were partially or fully unrepresented, whilst in Adelaide, significantly more respondents than average were partially or fully unrepresented. The following graphs display these results.

33 χ^2=26.884, df=4, n=1502, p=0.000.

34 χ^2=43.815, df=4, n=1424, p=0.000.

Figure 3.5: Representation status of applicants at first instance by registry

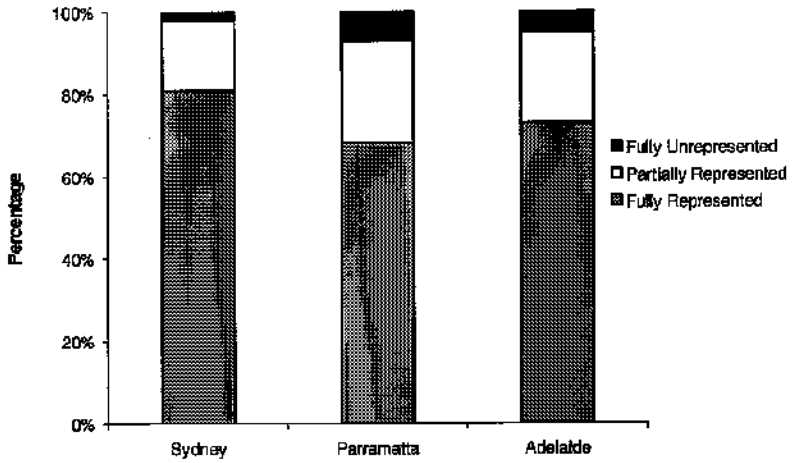
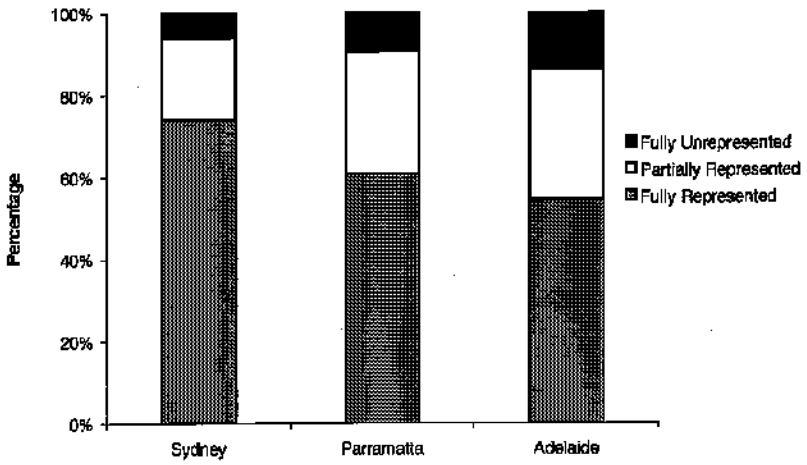
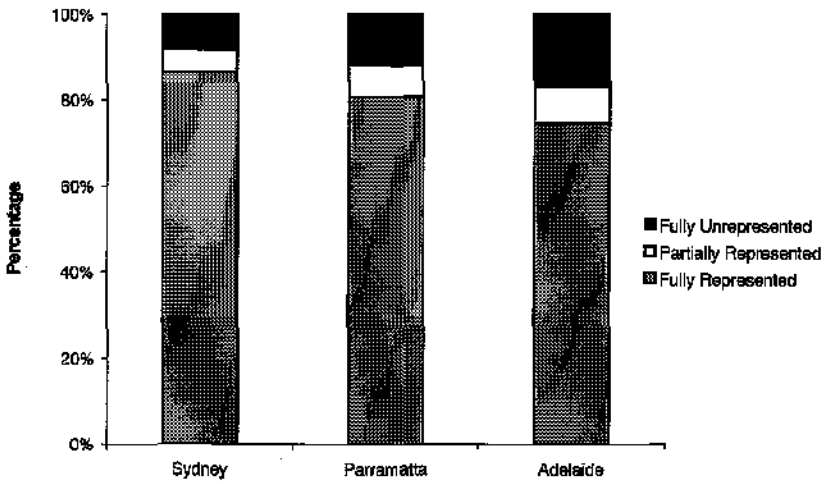


Figure 3.6: Representation status of respondents at first instance by registry



Representation patterns on appeal were also related to registry.[35] In particular, litigants in appeal cases originating in Adelaide were significantly more likely to be fully unrepresented than were litigants in cases originating in Parramatta or Sydney. The following graph illustrates this point (see also Table 3.4 in Appendix 3).

Figure 3.7: Representation status on appeal by originating registry



Logistic regression enables us to determine the combined effects of factors found to be associated with representation status, and to quantify the odds of being fully unrepresented or partially represented as opposed to fully represented by reference to those factors. In a logistic regression model involving litigant role and registry, both factors remained significant predictors of representation status at first instance, as did the model combining the two factors (see Table 3.5 in Appendix 3). The odds of being fully unrepresented rather than fully represented were almost three times higher for litigants from the Adelaide Registry than for litigants from the Sydney Registry, two and a half times higher for litigants from the Parramatta Registry than for litigants from the Sydney Registry, and two and a half times higher for respondents than for applicants. The odds of

35 χ^2=12.028, df=4, n=755, p=0.017.

being partially represented were almost twice as high for litigants from the Adelaide and Parramatta Registries as for litigants from the Sydney Registry, and one and a half times higher for respondents than for applicants. However, the model combining these two factors left much of the variance in representation status unexplained, indicating that other factors as well as registry and litigant role are significantly involved in predicting representation status at first instance.

For appeal cases, however, the logistic regression model involving litigant role and registry was both significant and reasonably predictive (see Table 3.6 in Appendix 3). The odds of being fully unrepresented rather than fully represented were almost two and a half times higher for litigants from the Adelaide Registry than for litigants from the Sydney Registry, and more than four and a half times higher for appellants than for respondents. The odds of being partially represented were over seven times higher for appellants than for respondents.

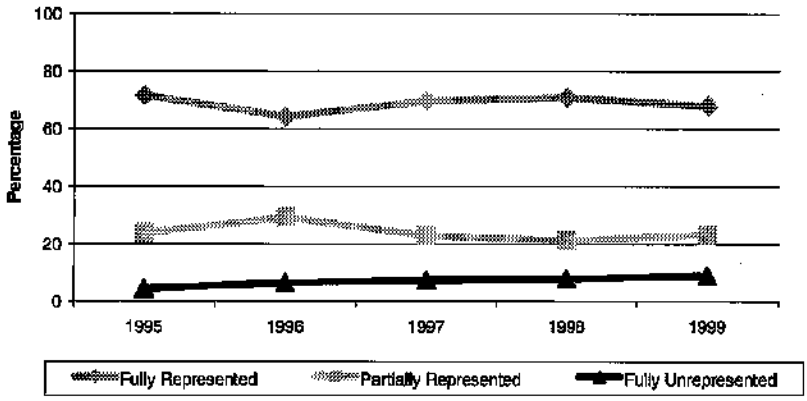
The Incidence of Unrepresented Litigants over Time

The task of understanding representation status by time was a difficult one. The information available from the court files did not enable us to determine each litigant's representation status at fixed points in time. Rather, we were dependent on when documents had been filed and court appearances held.

First Instance Cases

The only fixed point common to all first instance cases was the date of the identifying document in May of one of the five years of the study. From that date, each case stretched forward (and sometimes backward) for a variable length of time. The following graph plots litigants' overall representation status by the year of the identifying document (for the precise figures, see Table 3.7 in Appendix 3). It gives a simplified, but nonetheless indicative, picture of changes over time in levels of representation at first instance in the Family Court.

Figure 3.8: Representation status at first instance by year of identifying document



There was a statistically significant relationship between representation status and the year in which the identifying document was filed.[36] The notable trends were a steady increase in the proportion of fully unrepresented litigants, and a peak in the proportion of partially represented litigants in cases in which the identifying document was filed in May 1996. The steady increase in fully unrepresented litigants occurred in the context, as noted in Chapter 2, of increasing numbers of Form 7 and 12 applications filed in the Family Court, resulting in an estimated increase in the real numbers of fully unrepresented litigants appearing in the Court in each year of the study.

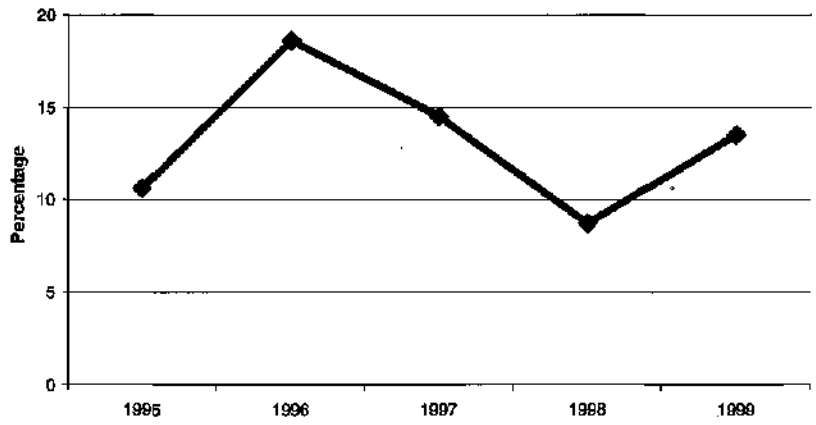
The different levels and curves for partially and fully unrepresented litigants suggest that these two groups may differ substantially from each other. The similarities and differences between them, and between these groups and the group of fully represented litigants, will be explored further in Chapter 4.

As indicated above, however, the time when the identifying document was filed does not precisely reflect the time that the file was opened. Neither

36 χ^2=20.873, df=8, n=2926, p=0.007.

does it precisely reflect the litigant's representation status during the relevant year. For example, a litigant classified as 'partially represented' in a case in which the identifying document was filed in May 1996 may not in fact have lost their legal representation until some time after May 1997. In order to control for these factors, we looked at the proportion of applicants who commenced their cases without representation in each of the years of the study. The following graph, therefore, excludes respondents, and includes only applicants who filed their first document (which was also the identifying document) in person. (The corresponding Table 3.8 can be found in Appendix 3).

Figure 3.9: Percentage of applicants at first instance filing identifying document unrepresented by year



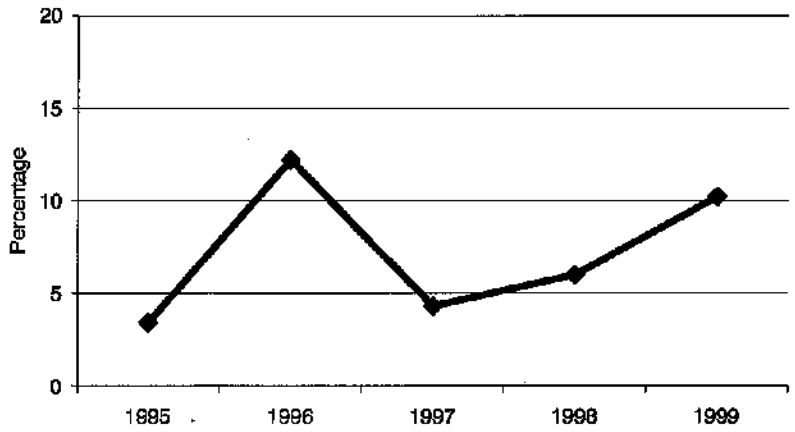
Again, there was a statistically significant relationship between representation status for the first document and year,[37] with a clear peak in the proportion of applicants filing without representation in May 1996, and the lowest proportion occurring in May 1998.

The same analysis was also undertaken in relation to respondents who had filed their response to the application (Form 7A) as their first document, and had done so unrepresented, in each of the years covered by the study.

37 χ^2=10.559, df=4, n=1008, p=0.032.

In accordance with the Family Court rules, a response should be filed within at most five weeks of the application,[38] so the date of the respondent's response would have been reasonably close to the original May filing date. The analysis excludes cases in which the respondent did not file a Form 7A (see Table 3.10 in Appendix 3)

Figure 3.10: Percentage of respondents at first instance filing response to identifying document unrepresented by year



The relationship between year of filing and representation status for response to identifying document was significant,[39] and again shows that a considerably higher proportion of respondents filed responses to the identifying document unrepresented in May 1996 than in any other year. The figures also show that overall, the percentage of respondents filing their initial response without representation increased over time. There was a small increase in May 1998, and a larger increase in May 1999.

The peak in partially represented litigants, and in both applicants and respondents filing unrepresented, occurred in 1996, as did the largest increase in the proportion of fully unrepresented litigants (1.9 per cent). This date corresponds with the introduction of Simplified Procedures in the Family Court. It appears that litigants may have been encouraged by

38 Order 8 rule 9: first hearing date should be set within six weeks of the date of filing the application; Order 8 rule 16: response should be filed at least seven days before first hearing date.

39 χ^2=10.925, df=4, n=649, p=0.027.

the publicity surrounding the introduction of Simplified Procedures to attempt to run their own cases without legal representation. Some of these litigants would have remained unrepresented throughout their case, but others perhaps discovered that self-representation was too difficult, and subsequently obtained legal representation, thus rendering them partially represented overall. (The various patterns of partial representation are discussed further in Chapter 6 below.)

On the other hand, the July 1997 legal aid cuts appear to have had little impact on the levels of fully and partially unrepresented litigants in the Family Court. Although we do not have the precise figures, it may be assumed that the legal aid cuts resulted in both fewer new grants of aid, and more terminations of existing grants, after 1 July 1997.[40] All other things being equal, we would thus expect to see a reduction in the number of Form 7 and Form 12 applications to the Family Court, and/or an increase in the proportion of fully unrepresented litigants filing cases after 1 July 1997, together with an increase in the proportion of partially represented litigants in cases commenced before 1 July 1997.

In fact, none of these changes are observed in the data. In the three registries included in the study, as noted earlier, there was an increase rather than a reduction in the number of applications to the Family Court between 1996-97 and 1997-98.[41] The lowest proportion of applicants filing without representation occurred in May 1998, following the legal aid cuts, and the proportion of respondents filing unrepresented in May 1998 was only slightly higher than the low point reached in May 1997. The period between May 1997 and May 1998 also saw the lowest increase in the proportion of fully unrepresented litigants (0.4 per cent). And the May 1997 cases, in which the identifying document was filed just prior to 1 July 1997, included a relatively low proportion of partially represented litigants.

40 See e.g. Hunter et al. (2000), 209-48.

41 There was actually a small reduction in the number of Forms 7 and 12 applications to the Family Court of Australia as a whole between these two years, from 25086 to 24281 (a decrease of 3.2%), but not in the three registries from which the sample was drawn.

Several factors may help to explain the apparently limited impact of the legal aid cuts. First, although the cuts took immediate effect in South Australia, their full effect was somewhat delayed in NSW. The NSW Legal Aid Commission exceeded its budgeted expenditure for family law in 1997-98, but began to rein in its family law spending in 1998-99, before imposing severe restrictions from the beginning of 1999-2000 (after the period of our study). Since NSW cases constituted a substantial proportion of our sample, we might, in fact, expect to see some delayed effect of legal aid cuts, such as the larger increase in the proportion of fully unrepresented litigants and the increase in the proportion of partially represented litigants in the May 1999 cases, and the rise in both applicants and respondents filing without representation in May 1999.

Variation between registries was also evident in the time series data. The Sydney and Parramatta curves reflect the same overall trends, with increases in both partially represented and fully unrepresented litigants in 1999 rather than 1998, while the trend in Adelaide was quite different (see also Tables 3.13, 3.14 and 3.15 in Appendix 3). The Adelaide curves do not show a clear impact of the legal aid cuts, however. The proportion of fully unrepresented litigants in the Adelaide Registry actually fell slightly in 1998, and fell further in 1999, while there was a slight rise in the proportion of partially represented litigants in those two years.

Figure 3.11: Representation status in the Sydney Registry at first instance by year of identifying document

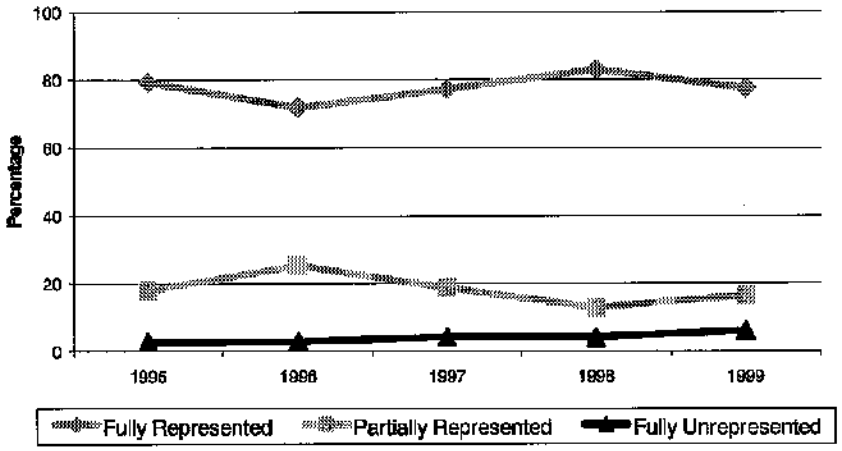


Figure 3.12: Representation status in the Parramatta Registry at first instance by year of identifying document

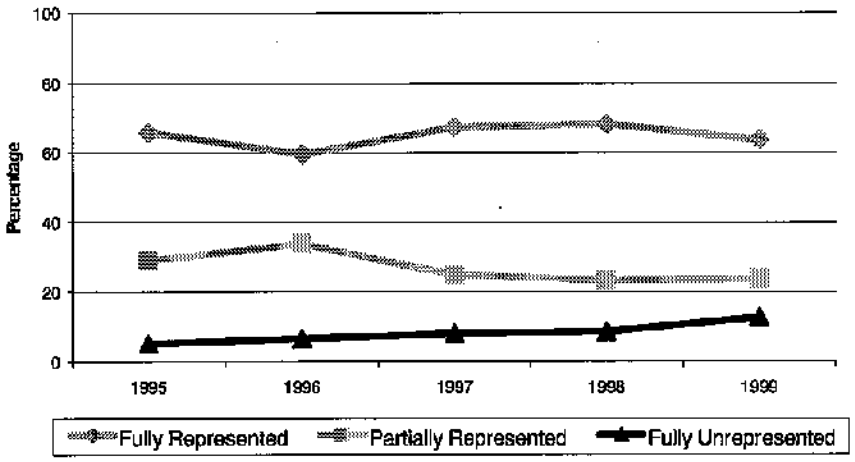
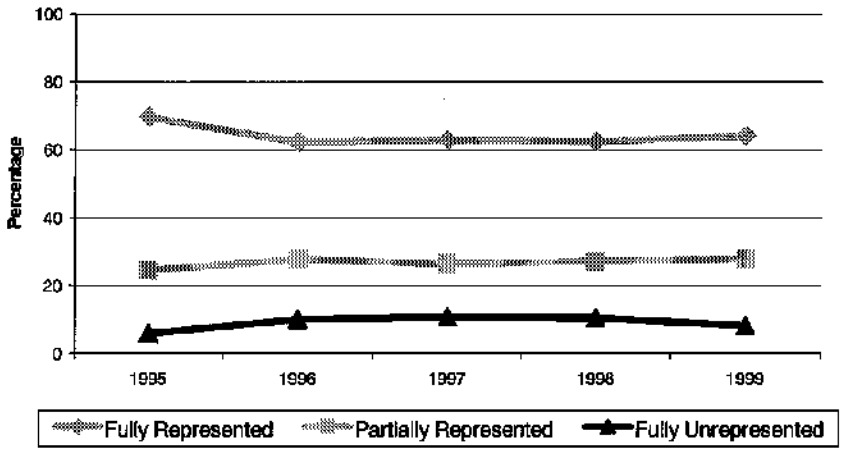


Figure 3.13: Representation status in the Adelaide Registry at first instance by year of identifying document



The second set of factors that may have confounded the impact of legal aid cuts, and which may provide a better explanation for the Adelaide data, are background economic changes. In the year 1995-96, unemployment was rising, and there was also a sharp increase in the consumer price index.[42] These factors may have combined or interacted with the introduction of Simplified Procedures to produce the peaks in partial representation and filing without representation, and the relatively large increase in the proportion of fully unrepresented litigants, in that year. In 1997-98 and 1998-99, by contrast, the unemployment rate was falling.[43] This may help to account for the reduction in the proportion of fully unrepresented litigants in Adelaide despite the legal aid cuts, and may more generally have mitigated the impact of legal aid cuts by reducing the number of people excluded from legal aid but unable to afford legal representation.

42 Australian Bureau of Statistics (2002a); Australian Bureau of Statistics (2002b).

43 Australian Bureau of Statistics (2002b).

Taking these factors into account enables us to speculate on possible changes in the proportion of unrepresented litigants in the Family Court after the period of the study. On the one hand, the legal aid cuts impacted most severely in NSW in the year 1999-2000. On the other hand, unemployment continued to fall until September 2000, and the Commonwealth injected additional funding into legal aid from July 2000. At the same time, the Family Court, Legal Aid Commissions and other service providers have introduced a range of measures to assist self-representing litigants, which are publicised through websites and other information sources, and which may have had the effect of encouraging people to represent themselves. There is some overseas research evidence to suggest that assistance programs may facilitate an increase in self-representing litigants.[44] These sets of countervailing factors make prediction difficult, but suggest at most a continuing gradual rise in the proportion of unrepresented litigants rather than any dramatic changes. Any changes in the proportion of unrepresented litigants post-1999 are also likely to have varied between registries.

Further, as with the overall incidence of unrepresented litigants, the incidence of unrepresented litigants by time was also influenced by litigant role. The same pattern of a steady rise for fully unrepresented litigants and a 1996 peak for partially represented litigants held true for both applicants and respondents, but in the case of respondents, the increase in fully unrepresented litigants was steeper, and there appeared to be a transfer between fully represented and fully unrepresented respondents (rather than between fully and partially represented respondents) towards the end of the time series (see Figures 3.14 and 3.15, and Tables 3.11 and 3.12 in Appendix 3).

44 Sales et al. (1993), 594-97. The Maricopa County (Phoenix Arizona) Superior Court introduced a range of initiatives to assist self-representing litigants after 1985. The proportion of divorce cases involving at least one self-represented litigant had increased from 24% in 1980 to 47% in 1985, prior to the introduction of the program, but the proportion subsequently increased to 88% in 1990.

Figure 3.14: Applicants' representation status at first instance by year of identifying document

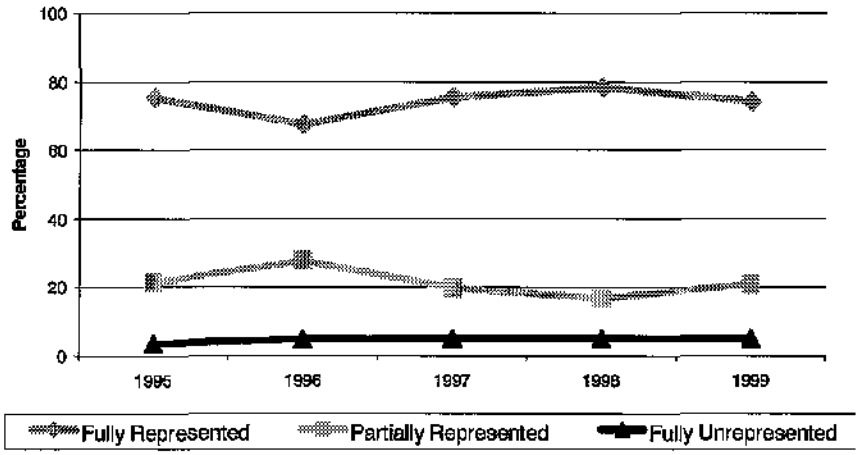
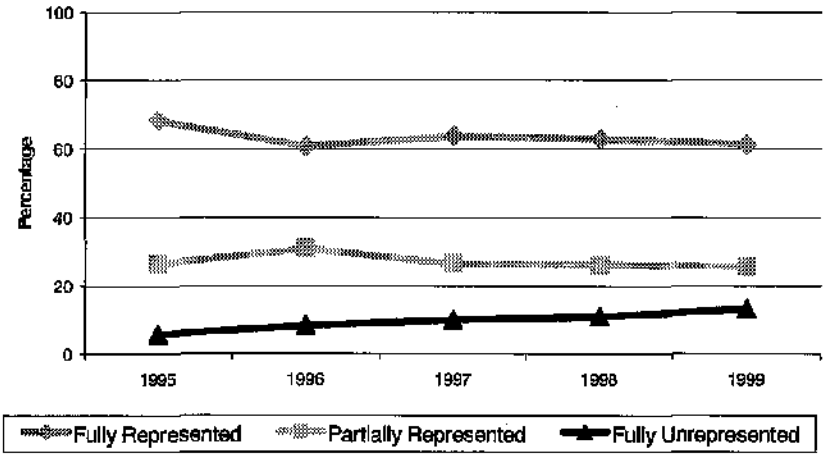


Figure 3.15: Respondents' representation status at first instance by year of identifying document



When year of identifying document was added to the logistic regression model discussed in the previous section, the resulting model incorporating role of litigant, registry and year was significant, and each of the individual factors remained significant (see Table 3.16 in Appendix 3). In addition to the effects mentioned previously, the odds of being fully unrepresented rather than fully represented were twice as high for litigants in 1999 cases than for those in 1995 cases, while the odds of being partially represented were almost one and a half times higher for litigants in 1996 cases than for those in 1999 cases.

Appeal Cases

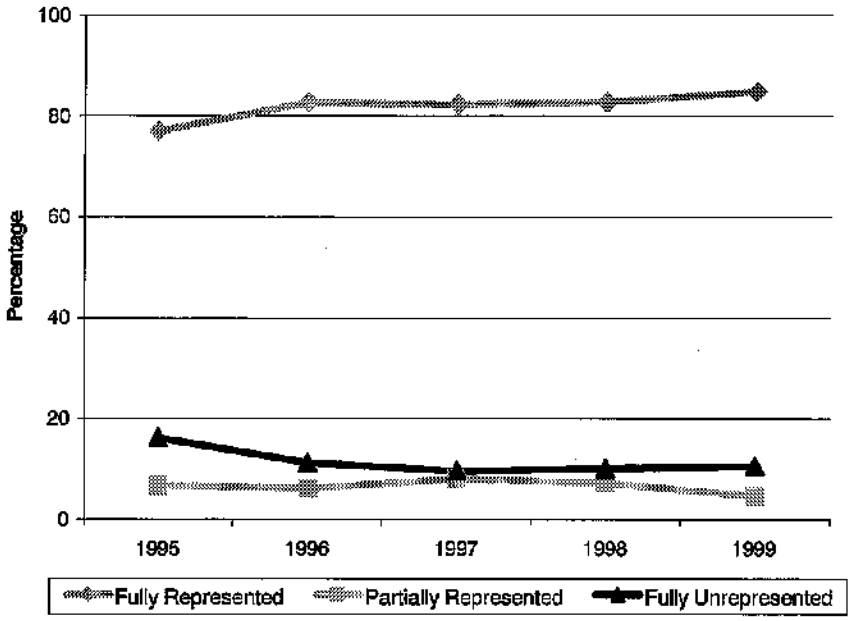
The ALRC reported an increase in the proportion of unrepresented parties in appeals over recent years, from 19 per cent in 1995-96 to 26 per cent in 1996-97 and to 36 per cent in 1997-98. Similarly, the proportion of unrepresented parties in applications for leave to appeal increased from 17 per cent in 1995-96 to 40 per cent in 1996-97.[45] In our data, however, we found no significant relationship between year of filing the appeal or application for leave to appeal and litigants' representation status. This discrepancy may possibly be due to the fact that we have counted 'cases' rather than individual files. If there was an increase in the number of notices of appeal and applications for leave to appeal filed in a short space of time by serial unrepresented appellants, this would appear in the ALRC data as an increase in the proportion of unrepresented parties. Our definition of a 'case', however, would remove the effect of individual appellants appearing several times in the figures for a single year by counting multiple related applications as only one.

The following graph plots litigants' representation status over the course of their appeal case by the year the appeal or application for leave to appeal

45 Australian Law Reform Commission (1999), 389.

was filed (see Table 3.17 in Appendix 3). Again, it gives a simplified, but nonetheless indicative, picture of the limited changes over time in levels of representation on appeal in the Family Court.

Figure 3.16: Representation status by year appeal filed



It is possible that the higher proportion of unrepresented litigants at the beginning of the time series is an effect of the higher proportion of Adelaide cases in the 1995 data (since few Sydney or Parramatta cases were available for that year), recalling that Adelaide litigants were more likely than those from Sydney and Parramatta to be unrepresented on appeal.

Incidence of Cases Involving Unrepresented Litigants

Previous 'snapshot' data on unrepresented litigants has tended to report the proportion of cases involving an unrepresented litigant, rather than the proportion of unrepresented litigants appearing in the cases.[46] For the sake of comparison, this section therefore presents information on the proportions of cases in the first instance and appeal samples that involved an unrepresented litigant. The comparison is not exact, however, since our data represents cases in which an application was filed over a five year period, whereas previous studies have looked at cases that were current or finalised at a particular point in time.

Overall

At first instance, 47.1 per cent (n=692) – almost half – of the cases in our sample involved a litigant who was unrepresented at some stage during their case. This is much higher than the previous Family Court and ALRC 'snapshot' figures taken in mid-1998, which showed 35 per cent and 41 per cent of cases involved an unrepresented litigant respectively. In general, measures of representation status over the entire course of a case (as in our own and the ALRC studies) will produce a higher proportion of unrepresented litigants than measures of representation on a particular day or week in court (as in the Family Court study), because people who would be classified as partially represented overall may have appeared in court with a legal representative on any given day. This helps to explain why the Family Court figure is lower than the ALRC or our own figure. The fact that our figure is higher than the ALRC's may be explained by the fact that our cases were open over a different time period, and relate only to three registries of the Court rather than all registries.

Because the majority of cases in our sample involving an unrepresented litigant included only one rather than two unrepresented parties, the proportion of cases involving an unrepresented litigant was considerably

46 e.g. Family Court of Australia (1998b); Australian Law Reform Commission (1999).

higher than the overall proportion of unrepresented litigants. However, fully unrepresented litigants appeared in only 11.7 per cent of our cases (n=172), and only 1.3 per cent of cases in the entire sample (n=19) had both applicant(s) and respondent(s) fully unrepresented.

Of the 409 appeal cases analysed, 29.8 per cent (n=122) involved an unrepresented litigant at some point in the case, with 18.8 per cent (n=77) involving at least one fully unrepresented litigant. Thus, as would be expected from the individual litigant figures, the proportion of appeal cases involving a partially or unrepresented litigant was much lower than the proportion of first instance cases, but the proportion of appeal cases involving fully unrepresented litigants was higher than the proportion of first instance cases.

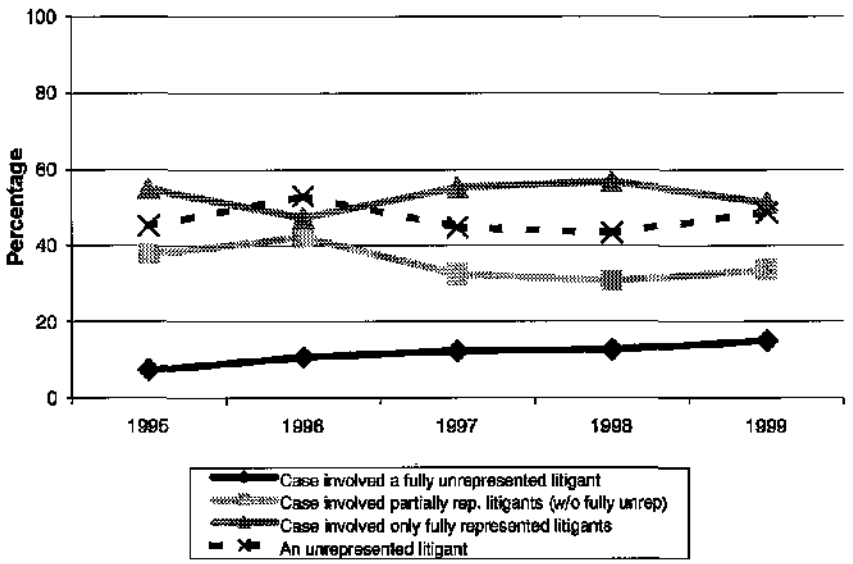
Over Time

The following graph displays the percentage of first instance cases involving an unrepresented litigant in each of the five years considered (see Table 3.18 in Appendix 3). Because cases involve at least two parties, the representation status of a case cannot be attributed in the same way as the representation status of an individual litigant. Cases have therefore been divided into three representation categories: those that involved at least one fully unrepresented litigant (where the other party may have been fully unrepresented or partially or fully represented); cases that involved at least one partially represented litigant (but no fully unrepresented litigant, the other party may have been partially or fully represented); and cases that involved only fully represented litigants. Again, there was a significant relationship between case representation category and the year in which the identifying document was filed.[47] The dotted line also shows the overall percentage of cases involving an unrepresented litigant at some point in the case (i.e. the sum of cases involving either a fully or partially unrepresented litigant, and the inverse of cases involving only fully represented litigants).

47 χ^2 =18.261, df=8, p=0.019.

The dotted line reflects the overall trend line for unrepresented litigants examined previously, with again the highest proportion of cases involving unrepresented litigants occurring in 1996, following the introduction of

Figure 3.17: Case representation category at first instance by year of identifying document

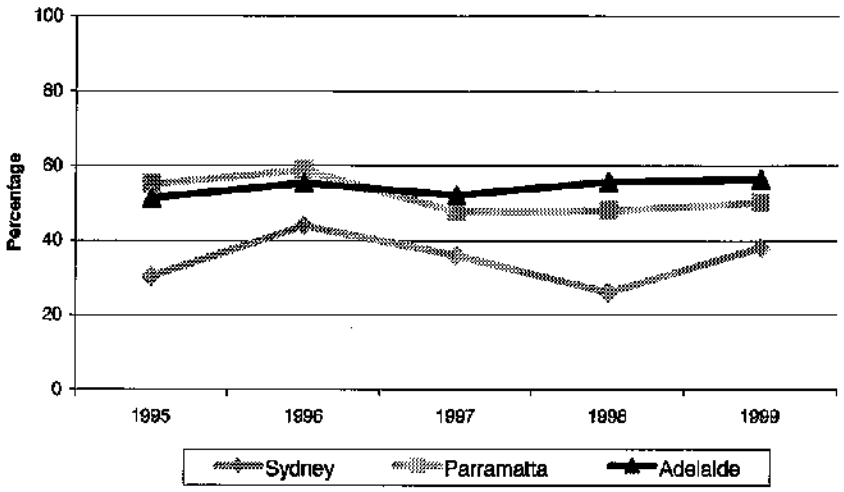


Simplified Procedures. It is notable that more than half of the cases in which the identifying document was filed in May 1996 involved a litigant who was unrepresented at some stage. The May 1999 data point is also approaching 50 per cent of cases involving an unrepresented litigant. The bottom line of the graph reflects the steady, and significant,[48] increase in the proportion of fully unrepresented litigants across the survey period, with the proportion of cases involving a fully unrepresented litigant doubling from 7.5 per cent in 1995 to 15.0 per cent in 1999.

The following graph displays the percentage of first instance cases in each of the three registries that involved an unrepresented litigant at some point in the case, across each of the five years considered (see Table 3.19 in Appendix 3).

48 Linear-by-Linear χ^2 =7.455, df=1, p=0.006; Pearsons correlation coefficient: r=0.071, n=1470, p=0.006.

Figure 3.18: Cases involving an unrepresented litigant at first instance by registry and year of identifying document



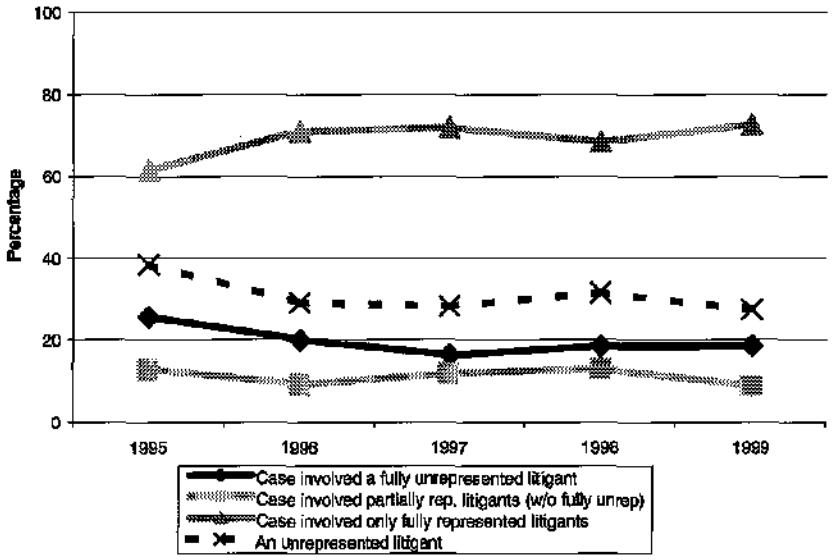
In Sydney, there was a considerable drop in the proportion of cases involving a partially or fully unrepresented litigant between May 1996 and May 1998, followed by a sharp increase in May 1999. In Parramatta, on the other hand, after a drop between May 1996 and May 1997, the proportion of cases involving a partially or fully unrepresented litigant remained relatively stable. In Adelaide it is notable that more than 50 per cent of cases involved a partially or fully unrepresented litigant throughout the entire survey period, although the increase in May 1998, to a point slightly higher than that in May 1996, does appear to reflect the impact of legal aid cuts.

The new Commonwealth guidelines for family law matters introduced in July 1997 made legal aid effectively available only for children's matters and not for property matters. It might be expected, then, that the impact of the legal aid cuts would be particularly evident in cases involving children rather than property. When we isolated children's matters, however, no such picture emerged. Rather, the same overall pattern was observed of a gradual rise in cases involving a fully unrepresented litigant, and a peak in

1996 of cases involving a partially represented litigant (see Tables 3.20 and 3.21 in Appendix 3).[49]

The following graph displays the overall percentage of appeal cases involving a fully unrepresented litigant, a partially represented litigant (with no fully unrepresented litigant) and only fully represented litigants over each of the five years considered (see Table 3.22 in Appendix 3). The dotted line shows the overall percentage of appeal cases involving an unrepresented litigant at some point.

Figure 3.19: Case representation category by year appeal filed



49 In children-only cases, there was no statistically significant relationship between case representation category and year, but in children-only and children+property cases (excluding property-only cases) there was a significant relationship, with the significant effects being a low proportion of cases involving a fully unrepresented litigant in 1995, and a high proportion of cases involving a partially represented litigant in 1996: χ^2 =16.569, df=8, p=0.035.

Once again, there was no statistically significant relationship between case representation category at appellate level and time, with the percentage of cases involving unrepresented litigants not varying considerably across the five year period. The same held true in appeal cases relating only to children's matters.

The breakdown of appeal cases by registry mirrored that of litigants. Forty two per cent of cases originating in the Adelaide Registry involved an unrepresented litigant, and 27.3 per cent involved a fully unrepresented litigant. By contrast, 33.3 per cent of cases originating in Parramatta and 23.1 per cent of cases originating in Sydney involved an unrepresented litigant, with 21.0 per cent and 14.4 per cent respectively involving a fully unrepresented litigant.

Conclusions

In response to the first research question, the data shows that approximately 31 per cent of litigants at first instance, and 18 per cent of litigants on appeal were unrepresented at some stage during their case. Partially represented litigants outweighed fully unrepresented litigants at first instance, while the opposite was true on appeal. Almost half of the cases at first instance and 30 per cent of appeal cases involved at least one litigant who was unrepresented at some stage during their case.

In response to the second research question, there was a steady increase in the proportion of fully unrepresented litigants in first instance cases between May 1995 and May 1999, beginning at 4.6 per cent and doubling to 9.0 per cent by the end of the period. Since there was an increase in Form 7 and Form 12 applications to the Court over the same period, the increase in the proportion of fully unrepresented litigants represented an increase in the actual numbers of fully unrepresented litigants appearing in the Court. There was also a peak in the proportion of partially represented litigants in cases in which the identifying document was filed in May 1996, corresponding with the introduction of Simplified Procedures in the Family Court, at the same time as both unemployment and the cost of

living were rising. Neither the introduction of the Family Law Reform Act nor the cuts to family law legal aid had a significant impact on the proportion of unrepresented litigants in the registries studied. In the case of the legal aid cuts, the limited impact may have been due to the delayed effect of the cuts in NSW, together with the confounding effect of employment growth. In appeal cases, there was no significant change in the proportion of unrepresented litigants during the period of the study.

The data also confirms that representation status varies by role and by registry. Respondents at first instance were more likely to be unrepresented than applicants, but the opposite was true on appeal. Both first instance and appeal cases showed a consistent pattern of fewer unrepresented litigants in Sydney and Parramatta, and more in Adelaide.

4

Characteristics of Unrepresented Litigants

The research question addressed in this chapter is:

> 3 Did unrepresented litigants at both trial and appeal levels display any particular demographic patterns or differ in any significant ways from litigants who were legally represented (for example in terms of their sex, ethnicity, or income status)?

Previous research suggested that unrepresented litigants are more likely to be male than female,[50] and we were interested to see whether our data would confirm this pattern. We were also interested to test arguments about the socio-economic status of unrepresented litigants. One of the major reasons given by commentators for self-representation is that the litigants cannot afford legal representation. However, it has also been noted that there are a number of litigants who choose to be self-represented, whether because they feel they do not need legal representation, or because they do not want to be represented by a lawyer.[51] Is it the case, then, that unrepresented litigants would generally be unable to afford a lawyer? Are they people who would pass the legal aid means test, but are now excluded from legal aid funding because of tighter 'merits' guidelines?

The previous chapter also raised the issue of the demographic characteristics of partially represented litigants. Do partially represented litigants largely resemble fully represented litigants, or are they more like their fully unrepresented counterparts?

---

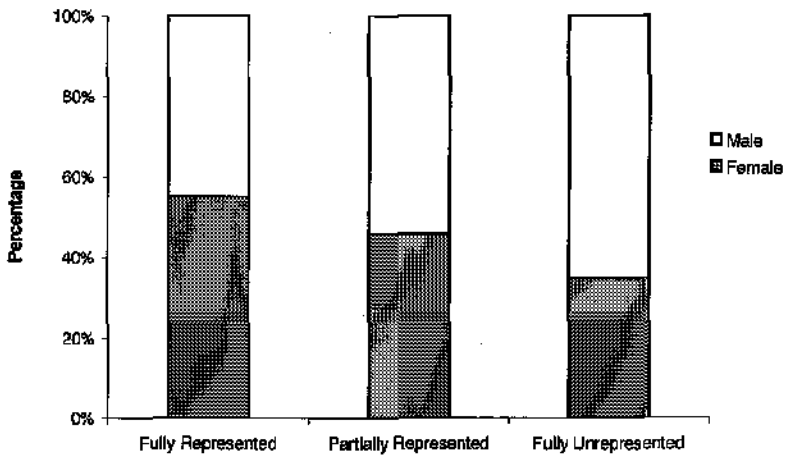
50 Hunter (1999), 172; Dewar et al. (2000), 29.

51 Coleman (1998), 41; Australian Law Reform Commission (1999), 376; Dewar et al. (2000), 25; Australian Institute of Judicial Administration (2001) (point made by Victorian Community Legal Centres).

Sex

As the following graph demonstrates, fully represented litigants at first instance were significantly more likely to be female, while partially represented and fully unrepresented litigants were significantly more likely to be male (see also Table 4.1 in Appendix 3).[52]

Figure 4.1: Representation status at first instance by sex



There was no difference in the ratio of women to men in the three groups across the five years considered, or across the three registries. However, as applicants are significantly more likely to be fully represented than respondents, and applicants are significantly more likely to be women, and respondents more likely to be men, we considered the data for applicants and respondents separately. It emerged that the relationship was the same for both applicants[53] and respondents,[54] with significantly more fully unrepresented or partially represented applicants and respondents being men (see Table 4.2 in Appendix 3).

52 χ^2=42.908, df=2, n=2923, p=0.000.

53 χ^2=20.092, df=2, n=1500, p=0.000.

54 χ^2=10.671, df=2, n=1423, p=0.000.

Figure 4.2: Applicants' representation status at first instance by sex

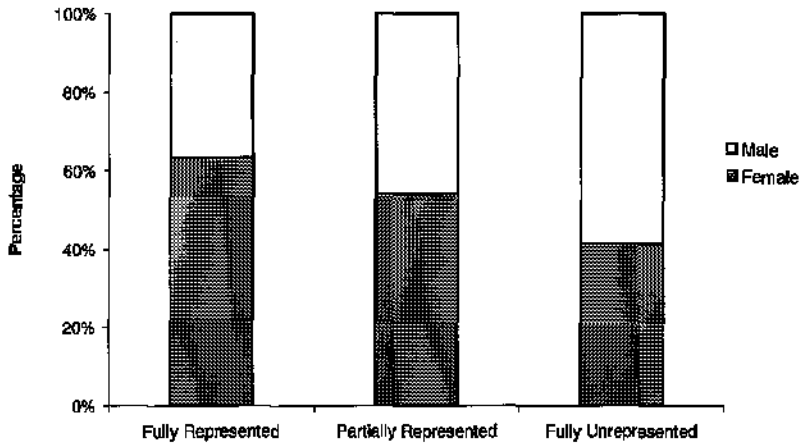
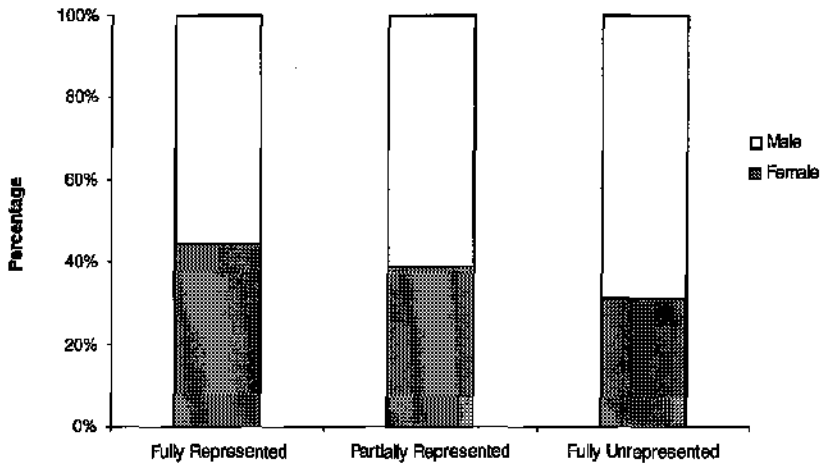
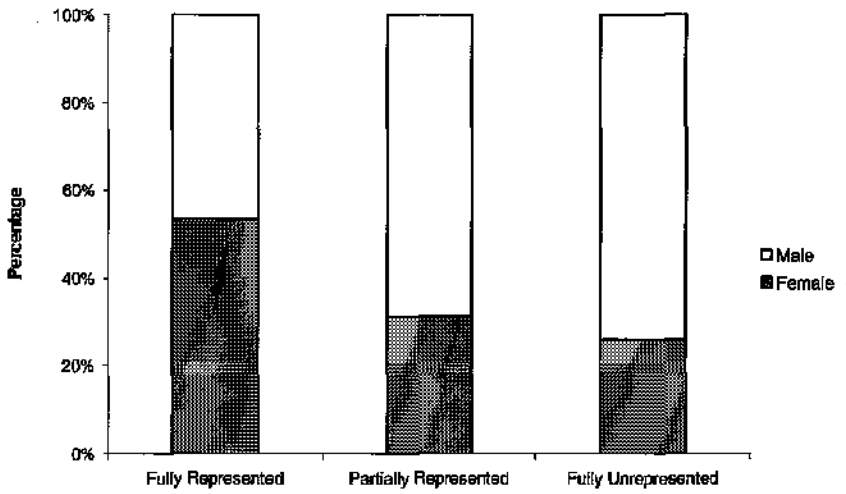


Figure 4.3: Respondents' representation status at first instance by sex



The same pattern of fully unrepresented and partially represented litigants being more likely to be male, and fully represented litigants being more likely to be female occurred on appeal (see also Table 4.3 in Appendix 3),[55] and was consistent between appellants and respondents on appeal.

Figure 4.4: Representation status on appeal by sex



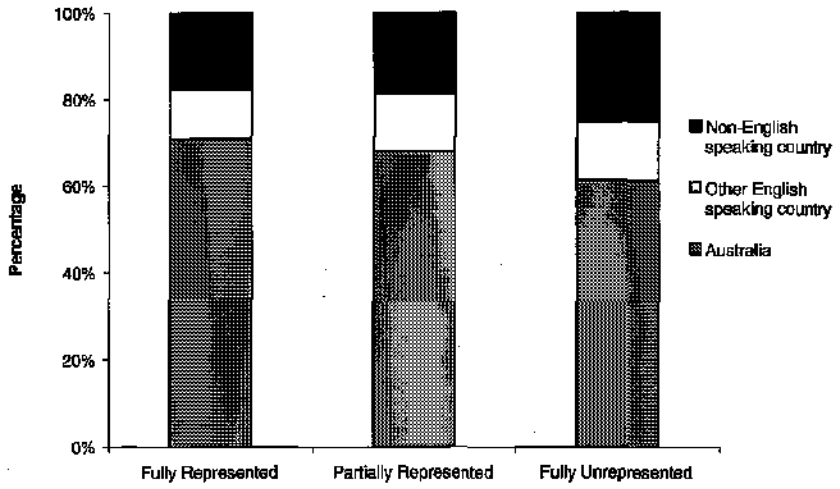
In relation to sex, then, it is clear that unrepresented litigants are more likely to be male than female, and in this respect, partially represented litigants resemble fully unrepresented litigants more than fully represented litigants.

55 χ^2=27.440, df=2, n=682, p=0.000. This analysis includes only parties who were the mother/wife or husband/father at first instance, and excludes other parties to the appeals, whose sex was not recorded on the coding form.

Country of Origin

In first instance cases, information on country of origin was available for around three quarters of fully represented and partially unrepresented litigants, but only two thirds of fully unrepresented litigants. There was a trend towards fully unrepresented litigants (respondents in particular) being from non-English speaking countries, although the difference failed to reach statistical significance (see Table 4.4 in Appendix 3). It is possible that with less missing data on fully unrepresented litigants, the difference may have become significant.

Figure 4.5: Representation status at first instance by country of origin



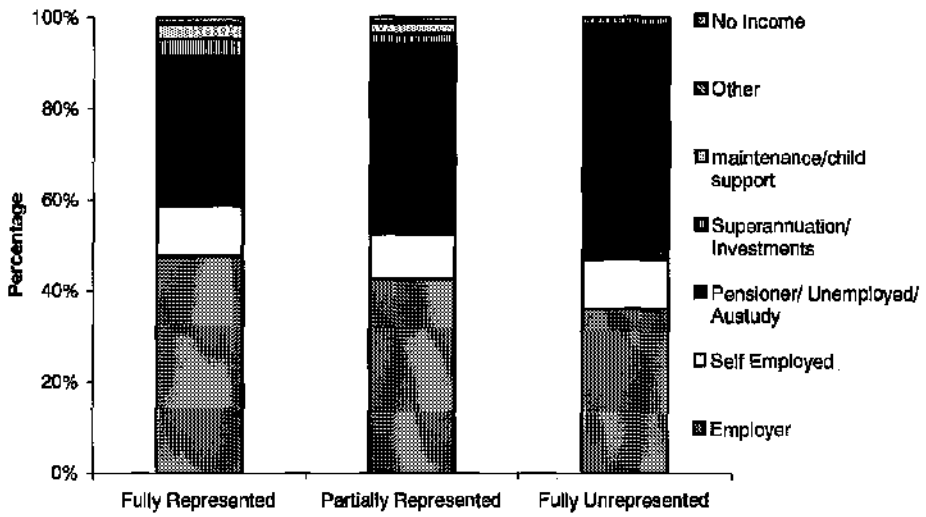
The same pattern occurred in appeal cases (see Table 4.5 in Appendix 3). In relation to country of origin, then, partially unrepresented litigants resembled fully represented litigants more than fully unrepresented litigants.

Socio-Economic Status

We attempted to record information about litigants' occupation, source of income, and amount of weekly income, however many files did not contain the full set of information. For example, information on occupation was unavailable for over 20 per cent of litigants at first instance, and a considerable proportion of these were partially represented or fully unrepresented. In appeal cases, information on litigants' occupations was only available, if at all, from the appeal book, and hence was missing in a substantial number of cases. Further, weekly income details were available for only 32 of the 208 fully unrepresented litigants at first instance. Information on source of income was also missing in a substantial proportion of cases, particularly for fully unrepresented litigants at first instance. In first instance cases however, information on source of income was available for twice as many fully unrepresented litigants as was information on amount of income. And in appeal cases, information on source of income was available for around half of the litigants in all three groups. Accordingly, source of income proved to be the most reliable indicator of socio-economic status.

The sources of income recorded were: employer; self employed; welfare payments (pension, unemployment benefits, youth allowance); superannuation/investments; maintenance/child support; other; and no income. Litigants may have had more than one source of income, in which case the main source of income was recorded. The distribution of income sources among the three categories of litigants at first instance is shown in the following graph.

Figure 4.6: Representation status at first instance by main source of income



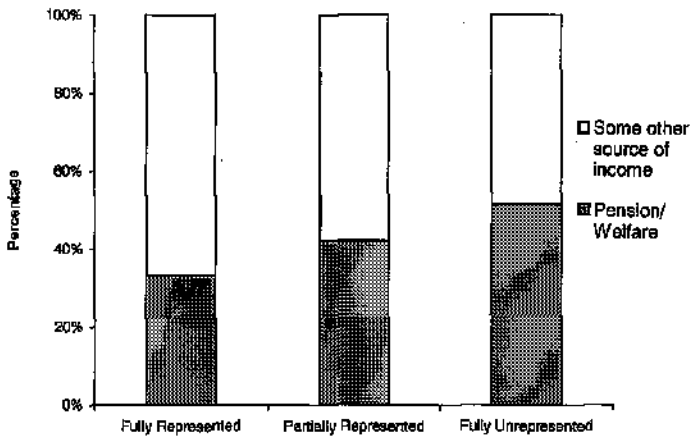
It can be seen that fully represented litigants were significantly more likely to be employed, while litigants who were fully unrepresented were significantly more likely to have welfare payments as their main source of income.[56] Those who were partially represented fell in between. The proportion of self-employed in each group was roughly the same.

The prominence of welfare income in the fully unrepresented group is highlighted by the following graph, which simply contrasts welfare income with any other source of income (including no income). Both fully unrepresented litigants and partially represented litigants were significantly more likely to be reliant on welfare income than were fully represented litigants (see also Table 4.6 in Appendix 3).[57]

56 χ^2=21.558, df=8, n=1880, p=0.006. This calculation excludes litigants with no income or with an 'other' source of income, due to small numbers.

57 Kruskal Wallis χ^2=17.809, df=2, n=1886, p=0.000.

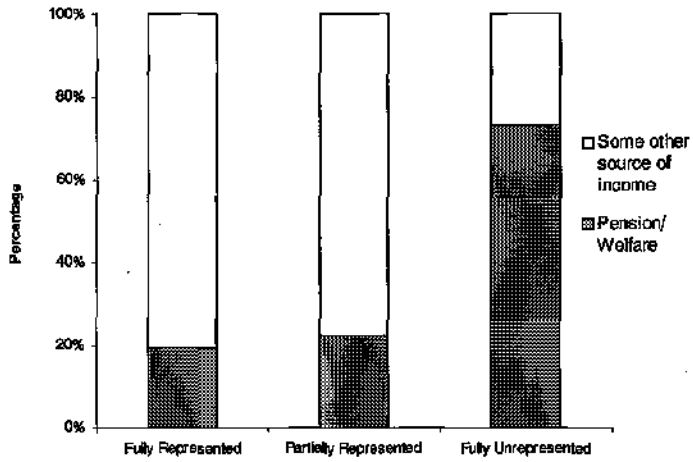
Figure 4.7: Representation status at first instance by welfare/other source of income



The same pattern was evident on appeal. Fully represented litigants were significantly more likely to have employment or some other source as their main source of income, while fully unrepresented litigants were significantly more likely to be reliant on welfare payments. However, partially represented litigants on appeal were more likely to have a source of income other than welfare payments (see Tables 4.7 and 4.8 in Appendix 3).[58]

58 Three way (employer, self employed/investments/other, pension/welfare benefit): χ^2=55.780, df=4, n=373, p=0.000; two way: (pension/welfare benefit, other): χ^2=55.325, df=2, n=373, p=0.000. Analysis excludes non-individual and non-spousal/parental litigants.

Figure 4.8: Representation status on appeal by welfare/other source of income



It is evident, then, that fully unrepresented litigants on appeal, and both fully unrepresented and partially represented litigants at first instance are far more likely than other litigants to be reliant on welfare payments, which may be taken as a proxy for low income. At both first instance and on appeal, the majority of fully unrepresented litigants had pension or benefit payments as their main source of income. It would appear that in the case of fully unrepresented litigants at least, the majority would meet the legal aid means test, but either have not applied for legal aid, or have been excluded on merits grounds. They then come to court in person because they cannot afford legal representation.

Partially represented litigants at first instance present a more complex picture. They were equally likely to be reliant on employment as on welfare income. The income information available enabled a comparison between the average weekly income of fully and partially represented litigants who were employed, which revealed no significant difference in income levels between the two groups. This suggests that while a substantial minority of partially represented litigants are reliant on welfare and therefore presumably unable to afford a lawyer, an equally substantial

minority have similar incomes to fully represented litigants who are also in employment, and therefore may be unrepresented for some reason other than poverty.

Multivariate Analysis

Since sex and source of income were the only demographic factors significantly associated with representation status, logistic regression models incorporating these two factors were fitted for both first instance and appeal cases, with source of income represented by the dichotomous variable welfare/other. In both models the individual factors remained significant and the model combining the two was significant (see Tables 4.9 and 4.10 in Appendix 3).[59]

At first instance, the odds of being fully unrepresented rather than fully represented were over three times higher for men than for women, and three times higher for those whose main source of income was welfare benefits than for those who had some other main source of income. The odds of being partially represented rather than fully represented were twice as high for men than for women, and over one and a half times as high for welfare recipients than for those reliant on other income sources.

On appeal, the odds of being fully unrepresented rather than fully represented were over nine times higher for men than for women, and the odds of being partially rather than fully represented were almost three times higher for men than for women.

Further regression models were then fitted incorporating the variables discussed in the previous chapter – registry, litigant role, and year the identifying document was filed – together with the two factors found significant in this chapter. At first instance, the overall model was significant, but only three of the variables – registry, sex and income

59 It must be noted, however, that the high level of missing data concerning income source, particularly on appeal, limited the groups of cases to which the models were applied.

source – remained significant. Litigant role and year of identifying document did not make a significant contribution. Nevertheless, the model incorporating all five variables fitted the data better than the model incorporating only the three variables of registry, sex and income source. (See Table 4.11 in Appendix 3.)

Once the effects of all variables were taken together, the odds of being fully unrepresented rather than fully represented were twice as high for litigants from the Adelaide Registry as for those from the Sydney Registry, three times as high for men than for women, and almost three times as high for those for whom welfare benefits were their main source of income. The odds of being partially represented rather than fully represented were 1.5 times higher for litigants from the Adelaide and Parramatta Registry than for litigants from the Sydney Registry, 1.3 times higher for respondents than for applicants, almost twice as high for men than for women, and 1.7 times higher for those whose main source of income was welfare benefits.

A similar result occurred in appeal cases. The overall model incorporating the four variables sex, welfare/other source of income, litigant role, and originating registry (minus year of identifying document, which was not associated with representation status on appeal) was significant, however the originating registry variable by itself was not significant. Nevertheless, the model including all four variables fitted the data better than the model excluding the registry variable. (See Table 4.12 in Appendix 3.) In this final model, the odds of being fully unrepresented rather than fully represented were nearly eight and a half times greater for appellants than for respondents, nearly 12 times higher for men than for women, and over 21 times higher for those whose main source of income was welfare benefits. The odds of being partially represented rather than fully represented were over six times higher for appellants than for respondents.

Conclusion

In response to the research question posed in this chapter, fully unrepresented litigants differed significantly from fully represented litigants at both first instance and on appeal by sex, and main source of income. Fully unrepresented litigants were more likely to be male, and more likely to be reliant on welfare payments. They were also somewhat more likely to have been born in a non-English speaking country (especially fully unrepresented respondents at first instance).

Partially represented litigants fell quite literally between the fully represented and fully unrepresented groups. In relation to sex, they were more like fully unrepresented litigants. In relation to country of origin and income status on appeal, they were more like fully represented litigants. In relation to income status at first instance, they shared characteristics with both other groups: more likely than fully represented litigants to have welfare payments as their main source of income, but when this was not the case, likely to have incomes similar to those of fully represented litigants. This points to the complexity of the phenomenon of partial representation, which will be explored further in Chapter 6.

Regression modelling indicated that sex and income status were highly predictive of representation status. In first instance cases, registry was also a prominent predictor of representation status, while in appeal cases, litigant role (appellant/respondent) was also a strong predictor of representation status.

5

Characteristics of Cases Involving Unrepresented Litigants

The research question addressed in this chapter is:

> 4 Did the cases involving unrepresented litigants at both trial and appeal levels display any particular patterns or differ in any significant ways from cases in which all litigants were represented (for example in terms of the issues involved, or the stages at which cases were finalised)?

Previous research indicated that unrepresented litigants were more likely to appear in children's matters than in property matters, and we wanted to test whether this observation held true for our data.

There has also been some contradiction between quantitative data and anecdotal claims in previous studies as to whether cases involving unrepresented litigants take a longer or shorter time to finalise than those involving represented parties.[60] Some have argued that unrepresented litigants are less capable of settling their cases by negotiation and are therefore more likely to remain in the court system for a longer period, or that unrepresented litigants sometimes choose to prolong their cases, which they can do without incurring legal costs, in order to harass their former partners. On the other hand, unrepresented litigants may be less capable of looking after their own interests, and more easily overborne by an opposing lawyer, and hence may settle their cases earlier. Or they may be less able to comply with court procedures and more likely to have their cases struck out or dismissed on technical grounds. We were interested to test these competing claims in our analysis of file data.

---

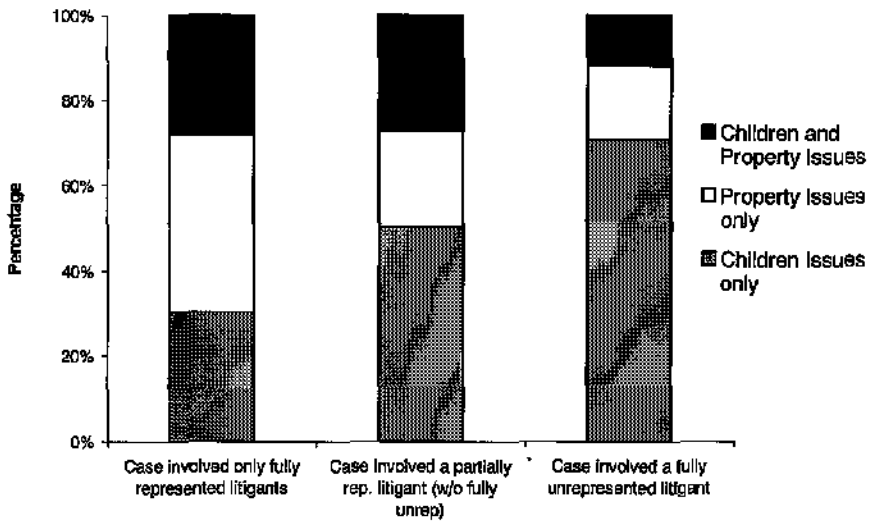
60 Australian Law Reform Commission (1999), 328; Hunter (1999), 165, 167, 207; Dewar et al. (2000), 37-39; Hunter et al. (2000), 149.

For the purposes of analysis, this chapter uses the three case representation categories introduced in Chapter 3.

Issues in Dispute

Cases involving a fully unrepresented litigant or a partially represented litigant at first instance were significantly more likely to concern children only, while cases involving a fully represented litigant were significantly more likely to concern either property only, or both children and property (see Table 5.1 in Appendix 3).[61]

Figure 5.1: Case representation category at first instance by issues in dispute



61 χ^2=131.026, df=4, n=1461, p=0.000.

Dewar et al. propose several possible explanations for this tendency for unrepresented litigants to appear in children's matters and for represented parties to appear in property matters. They argue that 'litigants may more readily employ a lawyer in property matters because the benefits of doing so are more obviously apparent when money is at stake. It may also be possible to fund the cost from the proceeds of an eventual settlement. Alternatively, parties who cannot afford a lawyer may more readily settle or abandon property claims than applications relating to children.'[62] Some combination of the last two explanations seems most likely. Litigants in property matters were more likely to have a source of income other than welfare payments, and therefore may be more likely to have accumulated property during the marriage. On the other hand, litigants in children-only matters were more likely to be reliant on welfare, and therefore are both less likely to have accumulated matrimonial property to be divided, and less likely to be able to afford a lawyer.[63] (See also Tables 5.2 and 5.3 in Appendix 3.)

The same pattern of association between cases involving a fully unrepresented or partially represented litigant and children's matters, and cases involving a fully represented litigant and property matters, was evident on appeal (see Table 5.4 in Appendix 3).

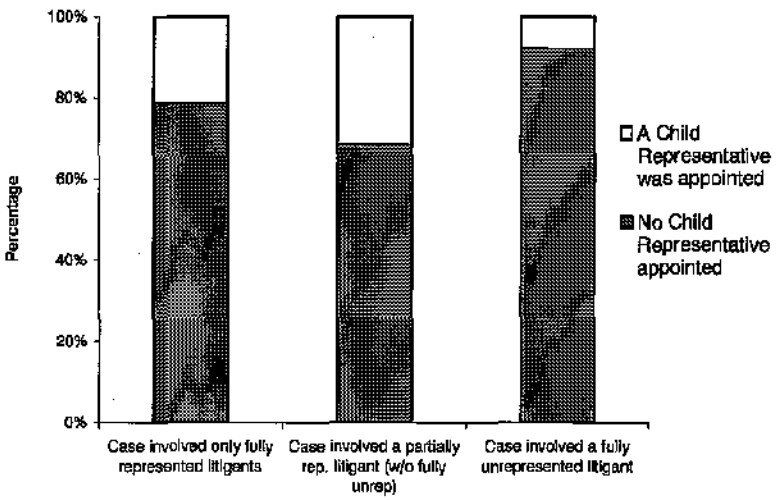
The association between cases involving fully unrepresented or partially represented litigants at first instance and children-only matters leads to the question of whether a child representative is more likely to be appointed in cases involving an unrepresented litigant. The Court might have a tendency to appoint child representatives in such cases on the basis that the material put to the Court by an unrepresented party or parties may not be adequate to enable it to determine the best interests of the child. Accordingly the relationship between case representation category and the

62 Dewar et al. (2000), 31.

63 Income source by types of matters - applicants: χ^2=62.648, df=2, n=1045, p=0.000; respondents: χ^2=140.780, df=2, n=852, p=0.000.

appointment of a child representative was explored. It emerged that cases involving a fully unrepresented litigant were significantly less likely to include a child representative, but cases involving a partially unrepresented litigant were significantly more likely to include a child representative (see Table 5.5 in Appendix 3).[64]

Figure 5.2: Case representation category at first instance by presence of a child representative



Similarly, cases involving a partially represented litigant were significantly more likely to include evidence of a family violence order, or a notification of child abuse, while cases involving fully unrepresented and fully represented litigants were significantly less likely to contain such evidence.[65] In turn, child representatives are highly likely to be appointed in cases involving family violence or a notification of child abuse. Cases involving a partially represented litigant were also significantly more likely than cases involving either a fully unrepresented or fully represented litigants to involve enforcement proceedings.[66]

64 χ^2=34.399, df=2, n=990, p=0.000.

65 Family Violence Order: χ^2=24.421, df=2, n=1470, p= 0.000. Notification of child abuse: χ^2=12.575, df=2, n=1470, p=0.002.

66 χ^2= 47.105, df=2, n=1470, p=0.000.

One hypothesis that may explain the association between these case features and partial representation is that cases involving family violence orders, notifications of child abuse, child representatives and enforcement proceedings are likely to be cases of longer duration than average. It is possible that partial representation is associated with case duration, in that some litigants may find it difficult to continue to pay for legal representation in longer cases, or a grant of legal aid may terminate at some point and the litigant may continue unrepresented. For example, legal aid is not available for enforcement proceedings, so a litigant may have a grant of aid for the initial proceedings, and then run the enforcement action unrepresented, rendering them partially represented overall.

A logistic regression model was fitted incorporating registry, issue(s) in dispute, presence of a child representative, presence of a notification of child abuse, and presence of a family violence order. In combination, all of the variables remained significant other than notification of child abuse. A new model excluding the notification of child abuse variable remained significant, although did not account for much of the variance in the data, indicating that other factors are affecting the case representation categories (see Table 5.6 in Appendix 3).

The main effects observed in the final model were that: the odds of a case involving a fully unrepresented litigant rather than fully represented litigants were almost seven times higher for children-only cases than for property-only cases, six times higher for children-only cases than for children and property cases, around two and a half times higher for cases in the Adelaide and Parramatta Registries than for cases in the Sydney Registry, and almost four times lower for cases involving a child representative than for cases with no child representative. The odds of a case involving a partially represented litigant rather than fully represented litigants were lower but in the same direction for children-only cases and for registry. However, the odds were also one and a half times higher for children and property cases than for property-only cases, one and a half times higher for cases involving a child representative than for cases without a child representative, and almost one and a half times higher for

cases involving a family violence order than for cases without such an order on the file.

Case Duration

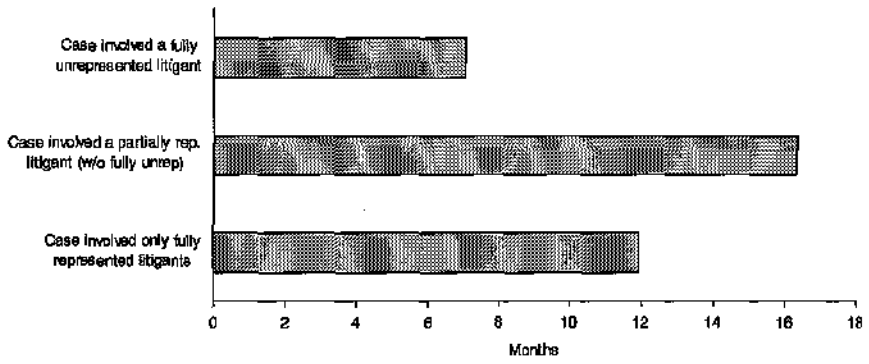
As noted in Chapter 2, the duration of cases in the file samples was calculated by determining the time in months from the date of the first document or file note on the file, to the date of the last document or file note on the file.

The median duration of all cases in the first instance sample was 13.5 months (mean 16.7 months). However this figure includes cases that were still active or had not clearly been finalised. Excluding those cases, the median duration of first instance cases was 12.7 months (mean 15.9 months).

The analysis by representation category showed a significant difference in average duration of cases, with cases involving a fully unrepresented litigant finalising more quickly, and cases involving a partially represented litigant taking longer to finalise than cases involving fully represented litigants.[67] Standard deviation figures also showed that cases involving a partially represented litigant had the greatest variation in duration, while cases involving fully unrepresented and fully represented litigants had similar, lower degrees of variation (see Table 5.7 in Appendix 3).

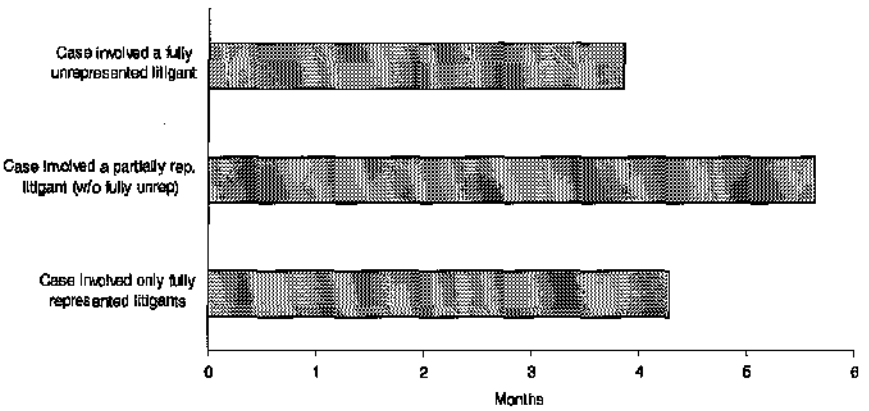
67 Kruskal Wallis χ^2=91.097, df=2, n=1337, p=0.000.

Figure 5.3: Case representation category at first instance by median duration (in months)



Although the overall time involved was compressed, the same pattern of significant difference in case duration by representation category was evident in appeal cases (see Table 5.8 in Appendix 3).[68]

Figure 5.4: Case representation category on appeal by median duration (in months)



68 Kruskal Wallis χ^2= 9.104, df=2, n=394, p=0.011.

These figures indicate that arguments in both directions about unrepresented litigants and case duration are correct. Litigants who are fully unrepresented resolve their cases more quickly, perhaps because they have chosen to self-represent because their case was never seriously in dispute, or perhaps because they tend to be rapidly 'vanquished' by the litigation process. By contrast, litigants who are partially represented take longer to resolve their cases. As suggested above, cases of longer duration may produce partial representation because of the exhaustion of private funds or the termination of legal aid funds. Alternatively, partial representation may produce cases of longer duration as litigants who commence their cases without representation waste considerable time seeking adjournments and making little progress while trying to negotiate the court's processes on their own, before giving up the attempt and obtaining legal representation.

Stage of Resolution

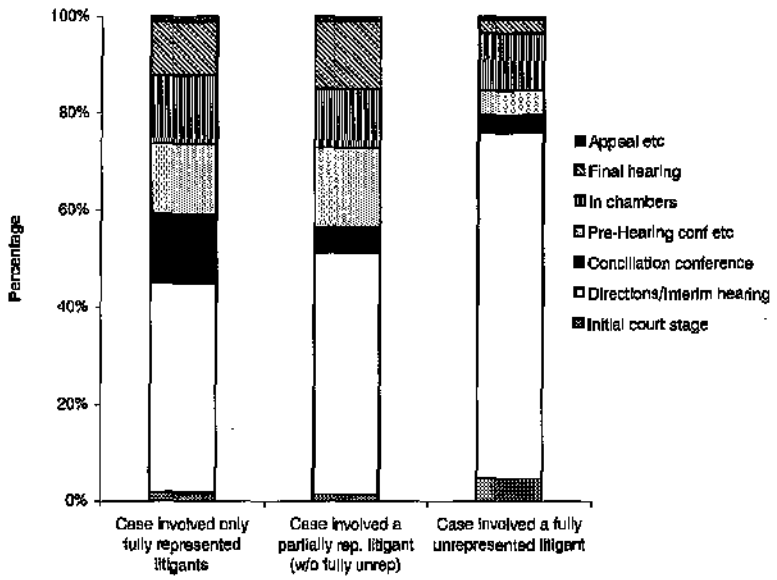
Cases may be resolved or finalised at any number of points along the continuum of Family Court proceedings from the initial filing of the application for final orders, to a decision on appeal. For ease of analysis, the continuum at first instance was broken down into the following, sequential stages: initial court stage; directions hearing or interim hearing; conciliation conference; status hearing, pre-hearing or compliance conference; in chambers with registrar or before judge; at, during or following final hearing; and review or appeal process.

The breakdown of case categories by stage of resolution at first instance showed a significant relationship,[69] with cases involving a fully unrepresented litigant more likely to be finalised in the earlier stages, cases involving fully represented litigants more likely to be finalised at or after a conciliation conference (conferences held only in property matters), and

69 χ^2=90.981, df=10, n=1456, p=0.000 (1 cell with expected count < 5, and cases taken on appeal excluded due to small numbers).

cases involving partially represented litigants more likely to finalise in the later stages, including at, during or after final hearing (see Table 5.9 in Appendix 3).

Figure 5.5: Case representation category at first instance by stage of resolution

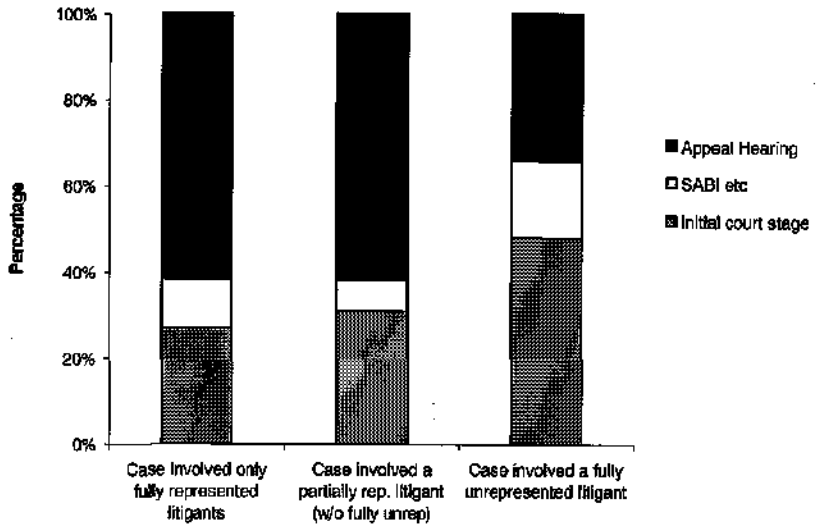


The longer duration of cases involving a partially represented litigant is thus explained by the fact that such cases are more likely to reach a final hearing. By contrast, cases involving a fully unrepresented litigant are least likely to reach a final hearing.

The three major stages used for the purposes of the analysis of appeal cases were: initial court stage; settling of the Appeal Book index or filing of a key document; and at, during or following the Appeal Hearing. Unlike the situation at first instance, the majority of appeal cases were finalised at, during or following the appeal hearing (56.4 per cent), although a considerable proportion were also finalised at the initial filing stage (31.4 per cent). In line with the pattern at first instance, however, appeal cases

involving fully unrepresented litigants were significantly more likely to settle (or be abandoned) at an earlier stage, while cases involving fully and partially represented litigants were more likely to proceed to the appeal hearing (see Table 5.10 in Appendix 3).[70]

Figure 5.6: Case representation category on appeal by stage of resolution



Recalling that unrepresented parties on appeal were most likely to be appellants, this pattern of finalisation suggests that fully unrepresented appellants were to an extent defeated by the process, finding it more difficult than partially or fully represented parties to progress beyond the stage of filing a notice of appeal or application for leave to appeal, to the preparation of appeal books and on to hearing. This point is explored in more detail in Part II of this report.

70 χ^2=18.749, n=388, df=4, p=0.001.

Nature of Resolution

The ALRC found that 'unrepresented or partially represented parties were less likely to resolve their case by negotiation, and more likely to have their case dismissed by default or resolved by judgment, than parties with full representation'.[71] Dewar et al. suggested that unrepresented litigants do not have a feel for the reasonable settlement range of their case, with the result that they settle too easily, or refuse to settle at all out of suspicion of being taken for a ride.[72] Accordingly, in addition to examining the stage at which cases in the different representation categories were resolved, we also examined the way in which they were resolved.

The major resolution types coded for the purposes of analysis were: agreement between the parties; withdrawn; directions or interim orders; default judgment, struck out or dismissed; and judgment following trial. There was also a small proportion of cases resolved through an appeal judgment or enforcement proceedings, but these have been excluded from the analysis, as have cases that were still active at the time of coding.

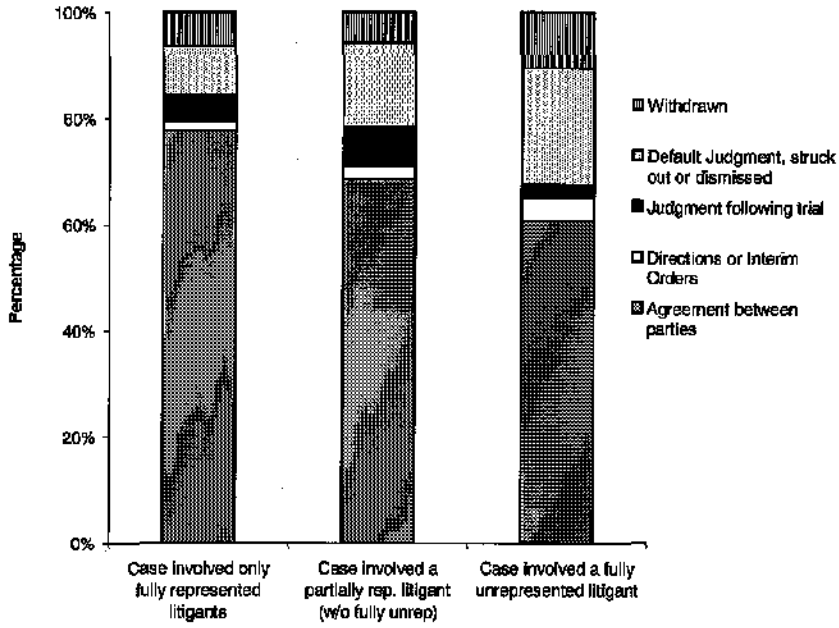
There was a significant relationship between case category and nature of resolution.[73] Cases involving a fully unrepresented litigant, were less likely to be resolved by agreement or to receive a judgment following trial, and more likely to be withdrawn, or resolved by directions or interim orders, default judgment or dismissal. Cases involving a partially represented litigant were also less likely to be resolved by agreement and more likely to receive a default judgment or be dismissed, but consistent with the findings on stage of resolution, they were also more likely to receive a judgment following trial. Cases involving only fully represented litigants were more likely to resolve by agreement, and less likely to receive a default judgment or be dismissed. (See Table 5.11 in Appendix 3.)

71 Australian Law Reform Commission (1999), 377.

72 Dewar et al. (1999a).

73 χ^2=42.202, df=8, n=1355, p=0.000 (1 cell expected count < 5).

Figure 5.7: Case representation category at first instance by nature of resolution



These figures support the ALRC's finding that litigants without legal representation are less likely to settle their cases by negotiation. Instead, the high rate of default judgments against and withdrawals by fully unrepresented litigants suggests that they find the litigation process too difficult to navigate, and are defeated by their incapacity to conform to the Court's rules and procedures.

Similarly, on appeal, cases involving a fully unrepresented litigant were significantly less likely to be resolved by appeal judgment and significantly more likely to be abandoned, struck out or dismissed at an earlier stage (see Table 5.12 in Appendix 3).[74] The category of 'abandoned' is included with struck out and dismissed in the case of appeals, since an appellant's failure to file the appeal book within time

74 χ^2=34.780, df=4, n=355, p=0.000 (one cell with expected count <5).

would result in the case being deemed abandoned by the Court, as distinct from the appellant formally withdrawing their appeal.

Conclusion

In response to the research question addressed in this chapter, cases involving unrepresented litigants at both trial and appeal levels did differ in significant ways from cases in which all litigants were represented.

At both first instance and on appeal, cases involving a fully unrepresented litigant were much more likely to involve only children's matters, to be of shorter than average duration, to finalise in the early stages of the case, and to be resolved by withdrawal, abandonment, default judgment or dismissal, rather than by agreement between the parties or by judgment following a trial or appeal hearing.

Cases involving a partially represented litigant at both first instance and on appeal were also more likely than cases involving only fully represented litigants to concern children's matters. By contrast to cases involving a fully unrepresented litigant however, cases involving a partially represented litigant at both first instance and on appeal were of longer than average duration, and correspondingly more likely to finalise at or close to final hearing or appeal judgment. At first instance this pattern was associated with a greater likelihood that these cases would include evidence of family violence and child abuse, the appointment of a child representative, and enforcement proceedings.

These findings suggest that fully unrepresented litigants may be disadvantaged by their inability to negotiate with the other party and to understand and comply with court processes. At the other end of the spectrum, particularly difficult children's matters at first instance, involving allegations of family violence and the appointment of a child representative, may be most likely to generate partially represented litigants, who doggedly pursue their cases beyond their ability or willingness to pay for a lawyer, or beyond any legal aid assessment of the merits of their case.

6

The Nature of Partial Representation

This chapter does not directly respond to one of the research questions, but addresses an issue that emerged in the course of the data analysis, that is, the dimensions and dynamics of partial representation at first instance. As noted earlier, of the 3027 litigants examined in the first instance study, 708 (23.4 per cent) were unrepresented at some stage of their case, but represented at other stages. By contrast, partially represented litigants were not prominent in appeal cases, and so are not further investigated in this chapter.

The analysis of first instance litigants' representation status by year of identifying document suggested one possible pattern of partial representation: litigants commenced their cases unrepresented under simplified procedures, but subsequently obtained legal representation after discovering that self-representation remains a difficult task. The analysis of case characteristics suggested a second possible pattern of partial representation: litigants continued to run their cases unrepresented, to the fullest possible extent, after their private or legal aid funds were exhausted, or they dispensed with legal representation. A third pattern of partial representation was suggested by the ALRC: litigants, in order to conserve their limited private or legal aid funds, make use of 'unbundled' legal services, that is, have their lawyer handle some aspects of their case, but handle other aspects on their own. In particular, the ALRC suggested that litigants might prepare and file their own documents, but be represented for court proceedings, or vice versa.[75]

The following discussion explores the kinds of patterns of partial representation found in the data and individual court files. One crucial

75 Australian Law Reform Commission (2000), 364-82. See also Hunter et al. (2000), 200-204.

limitation on the information available should be noted. That is, Family Court files do not reliably indicate whether a litigant was legally aided or not. Thus, while we can speculate on the role of legal aid in partial representation, we cannot be definitive about it.

Representation for Documents and Court Appearances

After our first round of coding at the Parramatta Registry, when the relatively high proportion of partially represented litigants became evident, we amended the coding form to record three additional details: representation for consent orders, overall representation for documents, and overall representation for court appearances. Information on these three variables was thus only gathered from the Sydney and Adelaide Registries. Recording litigants' overall representation for documents and for court appearances enabled us to test the ALRC's suggestion that 'unbundling' of legal services between documents and court appearances might be occurring.

Representation for Documents

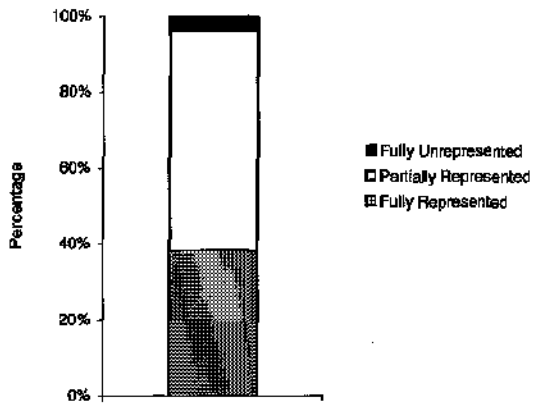
The group of partially represented litigants from all registries was examined in order to determine each litigant's representation status for the identifying document or response to that document, and for the last document they filed (litigants who filed no response to the identifying document were excluded from this analysis). Almost half of the partially represented litigants were represented for both their first and last document (n=274, 48 per cent), indicating either that they filed a document or documents unrepresented at some point between their first and last documents, or that they were wholly represented for documents but only partially represented or wholly unrepresented for court appearances. Very few of the remaining partially represented litigants were unrepresented for both their first and last documents. Rather, they were more likely to have been represented for one but not for the other (44 per cent). Members of this group were equally likely to begin unrepresented and end represented

as to begin represented and end unrepresented. (See Table 6.1 in Appendix 3).

In the Adelaide and Sydney Registries, the majority of the 350 partially represented litigants who filed consent orders did so with representation (257, 73 per cent), consistent with the fact that a substantial majority of partially represented litigants overall were represented for their last document (see Table 6.1 in Appendix 3).

Finally, and once again, only for the Adelaide and Sydney Registries, the overall representation status of partially represented litigants for documents was examined. As is evident in the following graph, partially represented litigants were most likely to be partially represented for documents, and least likely to be fully unrepresented for documents (see also Table 6.2 in Appendix 3). In combination with the figures for first and last documents, this suggests that partially represented litigants are not receiving systematically unbundled services involving the preparation and filing of all of their own documents. Rather, they may either file some of their own documents during the case, or receive unbundled services involving the preparation of documents by the solicitor and court appearances by the litigant in person.

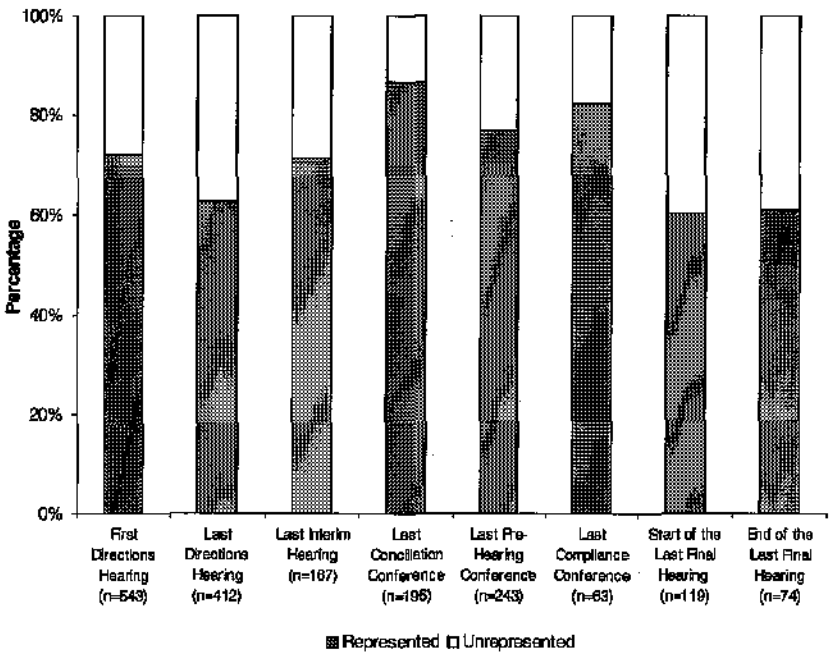
Figure 6.1: Partially represented litigants' overall representation for documents at first instance: Sydney and Adelaide Registries



Representation for Court Appearances

The following graph summarises the representation status of all partially represented litigants at each of the court stages recorded on the coding form. It should be noted that the figures exclude all litigants who did not reach the relevant stage, or whose representation status was unknown at a given stage (see also Table 6.3 in Appendix 3).

Figure 6.2: Partially represented litigants' representation for court stages at first instance



The graph shows that the level of representation was highest in conciliation conferences, compliance conferences, and pre-hearing conferences. Although not many cases involving partially represented litigants included the first two of these stages, a substantial number did involve a pre-hearing conference. There was a decline in representation from the first to the last directions hearing, however the lowest level of representation occurred at the point of final hearing. These figures lend support to two of the possible explanations for partial representation. First, the relatively low level of representation early compared to the middle-later stages of the case suggests a pattern of 'began unrepresented and subsequently obtained representation'. On the other hand, the relatively low levels of representation at last directions hearing and hearing compared to the middle stages of the case and pre-hearing conferences suggests a pattern of 'exhaustion of funds or otherwise ceased legal representation'.[76]

There was considerable attrition during the course of final hearing, with 45 of the partially represented litigants settling or otherwise finalising their case before reaching the end of the hearing. The drop out rate was the same, however, for those who began the hearing unrepresented and those who began with a legal representative. Thus it cannot be inferred that lack of representation *per se* caused litigants to settle or withdraw during the hearing.

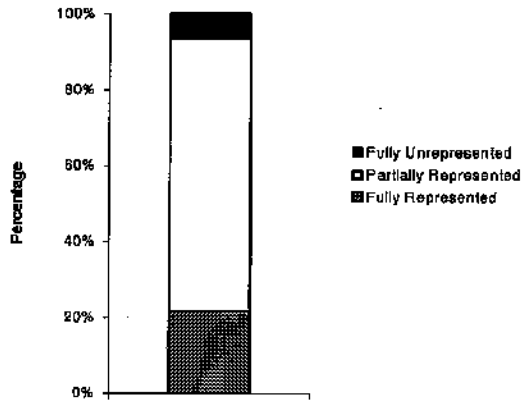
Moreover, of the 74 partially represented litigants going through to the end of the final hearing, only one changed representation status during the course of the hearing. This litigant was unrepresented at the beginning of the hearing, but was represented by the end. No litigants in the sample commenced the hearing represented but ended being unrepresented.

As noted above, for the Adelaide and Sydney Registries we also recorded the overall representation status of partially represented litigants for all court appearances, with the results set out in the following graph (see also

76 A similar pattern was evident on appeal with 51% of partially represented litigants unrepresented at filing and 55% unrepresented during the appeal hearing, but 77% represented for filing the outline of submission, and 62% represented at the settling of the appeal book index. See Table 6.4 in Appendix 3.

Table 6.5 in Appendix 3). The pattern in relation to documents was largely repeated, although it was even more likely that litigants would be partially represented for court appearances, rather than fully represented or fully unrepresented for this aspect of their case.

Figure 6.3: Partially represented litigants' overall representation for court appearances: Sydney and Adelaide Registries



Finally, for the Sydney and Adelaide Registries, we cross-tabulated partially represented litigants' overall representation for documents with their overall representation for court appearances (see also Table 6.6 in Appendix 3). The largest group of partially represented litigants (157) were fully represented for all documents, but only partly represented for court appearances. The second largest group (134 litigants) were partially represented for both documents and court appearances, followed by 88 litigants who were fully represented in court, but only partially represented for documents. While it thus appears that litigants are more likely to be fully represented for documents than for court, the overall picture is not one of systematic unbundling as between documents and court appearances.[77] The data suggests that unbundling may well be occurring,

77 The same was true for appeal cases. See Table 6.7 in Appendix 3.

but on a less systematic basis, involving partial representation for court, or partial representation for both documents and court. Alternatively, the figures are consistent with partially represented litigants moving into and out of representation for both documents and court, at different times.

Notice of Ceasing to Act

Where a solicitor believes that they can no longer continue to represent a litigant, they must give the litigant a Notice of Ceasing to Act (Form 54). This might occur, for example, if the solicitor is no longer prepared to act on the litigant's instructions, believing them to be unethical, unreasonable, or unachievable, or is no longer prepared to act on the litigant's behalf for financial reasons – because of the cessation of legal aid, the client's failure or inability to pay the solicitor's bill, or the solicitor's unwillingness to continue to run the case 'on spec'. The solicitor must then file with the Court a Notice of Ceasing to Act (Form 55).[78] The presence of a Form 55 on the court file provides some indication of a change of representation status, although litigants may subsequently obtain alternative representation rather than continuing unrepresented.[79]

Of the 708 partially represented litigants at first instance, only 157 litigants (22.2 per cent) had a solicitor file a Notice of Ceasing to Act for them.[80] This suggests that loss of legal representation initiated by the solicitor is only a minority explanation for partial representation.

78 Family Law Rules, Order 37, rule 1(5).

79 Alternatively, it is possible for litigants themselves to file a new notice of address for service, indicating that they are now represented by a different solicitor, or are self-represented, but the presence of these forms on the file was not recorded on the coding sheet.

80 Similarly, on appeal, only 10 of the 49 partially represented litigants (20.4%) had their solicitor file a Notice of Ceasing to Act.

Case Studies

In order to gain a better understanding of the patterns of partial representation, we randomly selected 24 cases involving a partially represented litigant to consider in detail, selecting four from each registry, representing both male and female applicants and respondents. In 16 of the cases, the relevant litigant was partially represented for both documents and for court; in the remaining eight cases, the relevant litigant was partially represented in some way: either for documents, or for court, or overall. The 24 cases contained a total of 31 partially represented litigants.

The case studies did not present any simple, obvious or typical pattern of partial representation. There were some recurring (and to some extent overlapping) features of the cases, however, which seem to reveal four main reasons for partial representation.

Firstly and most straightforwardly, just over half of the litigants (16) began proceedings (whether as the applicant or respondent) unrepresented, perhaps in ignorance of what the Family Court process involved, or in the belief that they could manage on their own, and then fairly soon afterwards obtained legal representation. However, in only one quarter (4) of these cases — all involving female litigants who were welfare recipients — was this the only operative factor in the litigant's partial representation. In these four cases, it appears that the litigant began their case unrepresented without realising what would be involved, but was subsequently able to obtain legal aid to continue.

Secondly, solicitors for 10 of the litigants filed a Form 55 Notice of Ceasing to Act. Two of these litigants (both male) commenced unrepresented, then obtained legal representation, and then became unrepresented again when their solicitor ceased to act for them. Three other litigants each had Form 55s filed by two different solicitors, suggesting that these were particularly difficult clients to represent, either due to their expectations about what could be achieved in their family law proceedings, or due to their financial circumstances. One of these cases involved a family violence order, one involved a notice of child abuse, and two involved a child representative.

Thirdly, in seven cases, Notices of Ceasing to Act were associated with a lengthy hiatus in the middle of the case. In five other cases, the litigant also appears to have lost their legal representation after a lengthy gap in proceedings, even though a Form 55 was not filed. In two of these cases, employed male respondents filed fresh Form 7s in person, after a gap in the case prior to which they had been represented. It is possible that in these cases, the litigants' solicitors had closed the files because they appeared resolved, or the litigants had decided to launch new applications for final orders against their solicitors' advice. In a third case, involving a female litigant who was a student, the case became bogged down, with four pre-hearing conferences occurring over the course of nearly four years. The litigant appeared in person at the fourth pre-hearing conference, and remained unrepresented for the rest of the case. It is possible that in this case, the litigant may have had a grant of legal aid which was terminated.

A fourth pattern involved 10 litigants who were mostly represented throughout, but made one court appearance (or less often) filed one document, in person. In three of these cases, minutes of consent orders had been prepared by the litigant's solicitor, but the litigant appeared in person at the directions hearing to hand up the minutes of orders to the Court. Interestingly, in half of these cases (5), the litigant had commenced their case unrepresented, and then made one court appearance (4) or filed one document (1) on their own after they obtained legal representation. Perhaps these litigants were more willing or felt more confident to undertake an occasional self-representation task having had the initial experience of appearing or filing documents in person. Four of these litigants were welfare recipients rather than in paid employment.

Finally, one litigant in the case study sample was unrepresented throughout, other than obtaining the assistance of a solicitor to file one document (the fairly complicated Form 17, which requires details of the person's financial affairs), and one litigant's representation status fluctuated throughout for no obvious reason. Both of these litigants were male and employed.

Thus, the four main patterns of partial representation found in the case studies may be identified as:

1 began unrepresented, then gained representation

2 solicitor ceased to act

3 hiatus in case, then lost or rejected representation, and

4 one-off change of status (either mostly represented with one action unrepresented or, less frequently, mostly unrepresented with one action represented).

There appear to be frequent overlaps between the first and second, the first and fourth, and the second and third of these patterns. Where the first and second and the first and fourth patterns overlap, there appears to be some element of the litigant asserting their autonomy. In the third pattern, however, the loss of representation may be less within the litigant's control. All four patterns may involve either litigants who can afford to pay for legal representation, or litigants whose only access to a lawyer would be through a grant of legal aid.

It was not an objective of the quantitative study to draw conclusions as to the types of assistance self-represented litigants might need in order to enable them successfully to negotiate the Family Court. The kind of qualitative research required to meet this objective has already been undertaken by other researchers,[81] and by the Family Court itself as part of its Self Represented Litigants project. Our data on partially represented litigants does, however, suggest strategies that the Court could adopt alongside its provision of assistance to unrepresented litigants, to maximise litigants' use of legal representation and prevent them becoming or remaining unrepresented.

First, litigants who appear unrepresented in the early stages of their case may not have chosen or been forced to do so. They may simply be unaware that legal representation is available, or that it may assist them in the resolution of their case. One strategy, then, would be to refer litigants who

81 Dewar et al. (2000).

do appear unrepresented in the early stages of their case to sources of legal assistance, or even to encourage them to seek legal representation.[82] Many will subsequently obtain representation, including through successful legal aid applications.

Secondly, it seems clear that loss of legal representation in the later stages of a case is associated with long periods of inactivity followed by the revival of the case, when the litigant's circumstances or attitude to proceedings may have changed. Another strategy, therefore, would be to minimise delay and particularly to eliminate long gaps in court proceedings (say, gaps longer than nine months) as far as possible. Identification of and intervention in these cases through the case management system could help to resolve or otherwise finalise matters with the aid of legal representation, and thus reduce the number of final hearings involving a partially represented litigant.

82 Similarly, the AIJA has recommended that courts should not assume that litigants in person are aware of available support services, and that courts can usefully provide referrals to legal as well as non-legal advisers. It has also argued that information provided to litigants in person should be realistic and not make court processes seem easier than they actually are. Australian Institute of Judicial Administration (2001), 14-15.

7

Conclusion

The quantitative study provides a clear indication of the dimensions of the phenomenon of unrepresented litigants in the Family Court of Australia. Across the five years covered by the study, almost half of the contested cases filed in the Court included a litigant who was unrepresented at some stage of the proceedings, and 30 per cent of appeal cases included a litigant who was unrepresented at some stage. The study also showed significant differences between registries, with cases filed in the Adelaide and Parramatta Registries being more likely to include an unrepresented litigant than cases filed in the Sydney Registry. It is likely that registries other than the ones included in the study have also experienced variations in the level of unrepresented litigants.

One of the major findings of the study is the distinction between fully and partially unrepresented litigants in first instance cases. Over the five years of the study, there was a steady increase in the proportion of fully unrepresented litigants at first instance, particularly among respondents, who were more likely to be unrepresented than applicants at first instance. Still, fully unrepresented litigants constituted under 10 per cent of all litigants in the last year of the study. Fully unrepresented litigants were more likely than fully represented litigants to be male and to be reliant on welfare payments, and somewhat more likely to be from a non-English speaking background. Their cases were more likely to concern children's issues alone rather than property issues alone or in combination with children's issues. Given the demographic profile of and issues disputed by fully unrepresented litigants, it would appear that this group may well have been excluded from eligibility for legal aid by operation of the merits test. However, there was no evidence to link this result specifically with the cuts to legal aid commencing in July 1997.

Fully unrepresented litigants do appear to have experienced disadvantages in the family law system. Their cases tended to finalise more quickly than others', and involved relatively high proportions of withdrawals and default judgments, indicating problems in defending cases and/or complying with court procedures. Information and procedural assistance from the Court is likely to be of benefit to this group of litigants.

The majority of unrepresented litigants at first instance, however, were unrepresented for part rather than all of their case. The proportion of partially represented litigants at first instance peaked following the introduction of Simplified Procedures by the Court in January 1996, and then declined to previous levels in subsequent years. Simplified procedures do, therefore, appear to have increased the proportion of litigants attempting to represent themselves, although many found this effort unsustainable and subsequently obtained legal representation.

Like fully unrepresented litigants, partially unrepresented litigants were more likely than fully represented litigants to be male, respondents to cases involving children's issues alone, and reliant on welfare payments, although those earning an income had a similar income level to fully represented litigants. Unlike cases involving fully unrepresented litigants however, cases involving partially represented litigants took longer to finalise, were more likely to reach the later stages of Family Court proceedings, including final hearing, and were more likely to involve issues of family violence and a child representative.

Further exploration of the patterns of partial representation resulted in a complex picture of choices to commence unrepresented, choices to continue unrepresented, loss of legal aid, and/or one-off changes of representation. Again, there was no specific impact evident from the 1997 legal aid cuts, although the limited availability of legal aid clearly contributed to these patterns. The complexity identified makes it difficult to devise clear proposals to address partial representation. It would appear, however, that encouraging litigants who commence their cases unrepresented to obtain legal representation, and providing appropriate referrals, can help at least to turn potentially fully unrepresented litigants

into partially represented ones. And potentially fully represented litigants may be prevented from becoming partially unrepresented by avoiding delays and long periods of inactivity in family law proceedings.

The features of unrepresented litigants differed between first instance and appeal cases. On appeal, fully unrepresented litigants were more common than partially unrepresented litigants, unrepresented appellants were more common than unrepresented respondents, and there were no significant increases or decreases in the proportion of unrepresented litigants on appeal across the five years of the study. As at first instance, however, fully unrepresented litigants were more likely to be male, reliant on welfare payments, and to have their cases withdrawn or struck out prior to the appeal hearing. The difficulties experienced by unrepresented litigants on appeal, and the difficulties some of those litigants create for the Court, were the subject of the qualitative study.

PART II

The Impact and Experiences of Unrepresented Litigants on Appeal

8

Methodology

Chief Justice Nicholson raised concerns publicly about the impact unrepresented litigants may be having on the jurisprudence of the Family Court in 1999.[83] He identified the fact that alongside the tensions between impartiality and fairness unrepresented litigants present at trial level, unrepresented **appellants** pose a further set of problems. The Chief Justice argued that the increasing incidence of unrepresented parties at appeal had serious implications for the development of family law, because:

> *...it is the appellate decisions in all jurisdictions...which shape the law and are binding on all judges at first instance, as well as Magistrates applying the Act. It has been a fundamental of our system of law that such cases require counsel to ensure that all relevant matters of law are considered by the Court. What we are now seeing is a serious breakdown of this expectation.*[84]

Such concerns gave rise to the research questions to be addressed in this part of the report:

5 What difficulties (if any) have unrepresented litigants experienced, and what impact have they had on the Family Court's processes at appeal level?

6 To what extent and in what ways has the appearance of unrepresented litigants at appeal level hindered the development of the Family Court's jurisprudence?

---

83 Nicholson (1999), 3.

84 ibid. See also *Johnson & Johnson* (1997) FLC 92-764.

7 What model or models of intervention are most appropriate to avoid any problems identified in relation to the appearance of unrepresented litigants at appeal level?

Clearly, these questions could not be answered by the statistical analysis of summary file data. Rather, the methodology adopted to answer these questions was an in-depth, textual analysis of Family Court appeal files. The qualitative study focused on appeal cases both because, as noted previously, there has been a substantial amount of other qualitative work done on litigants in person at first instance, and because appeal cases form the basis for the development of the Family Court's jurisprudence, hence it is those cases which reveal the impact of unrepresented litigants on that development.

The Appeal Process in the Family Court

The appeal process commences when an appellant files a Notice of Appeal (**Form 42**), which includes the grounds for appeal and an outline of argument. There is an automatic right to appeal in all cases concerning issues of child welfare or property distribution,[85] but special leave to appeal (**Form 67**) is required for appeals against interim orders, procedural directions, and certain other types of decisions.[86] If the Form 67 is heard by the Court and allowed, the appellant must then proceed with filing a Form 42, and follow the usual procedural steps.

After the appellant has filed their Form 42, the **respondent** must file a response (or may sometimes file a cross appeal), which includes their outline of argument. The Appeals Registrar will then arrange a meeting in chambers involving all of the parties to discuss the content of the materials to be brought before the Court, which are to be collated and presented in the form of the **Appeal Book.** This meeting is known as the settling of the appeal book index.

85 Family Law Act ss 94, 94AA.

86 Family Law Act s 94AA.

Following this meeting, there is an onus on the parties to file the required materials by dates specified under the Family Law Rules. If these procedural steps are not complied with, the appeal can be deemed abandoned by the Registrar, and will not proceed to an appeal hearing. If an appellant wishes to include additional evidence after the appeal book has been finalised, they must request the leave of the Court, and file a specific application, known as a **Form 42A.**

If the appeal does proceed to final determination by the **Full Court**, the hearing in most cases will take one day or less. During the appeal hearing, presentation of argument can only be based on the evidence included in the appeal book and any evidence allowed by a successful Form 42A application, and legal rules and precedent. There can sometimes be a short delay between the hearing and the handing down of the appeal judgment.

Sampling

The files we sought to review were all appeal and application for leave to appeal files initiated during the 1998-99 financial year in each of the Northern (Brisbane), Eastern (Sydney) and Southern (Melbourne) Appeal Registries. In the Northern and Southern Registries we were able to access all files initiated during the period, whatever the originating registry. In the Eastern Registry, however, we were confined to viewing files originating from Parramatta or Sydney, and were unable to view those originating from Canberra or Newcastle.

Since some parties had filed multiple initiating documents in the relevant year, concerning separate issues within the same proceedings, we amalgamated these related files into single 'cases'. There were a variety of reasons for multiple applications in the same proceedings. First, appellants joined leave to appeal applications with notices of appeal in the hope that the leave to appeal application would be successful. Secondly, there might be a cross appeal or a fresh notice of appeal citing new appeal grounds in a single case. Thirdly, some appellants filed numerous appeals relating to every step in the proceedings, including interim decisions and

procedural directions. These serial appellants also tended to be unrepresented.

We viewed a total of 279 files yielding 225 cases. Some of these cases, however, contained nothing or little more than an initiating document and notice of withdrawal. These cases were discarded from the analysis, as we could only obtain information relevant to the research questions from files containing substantive information. The 'qualitative sample' ultimately consisted of 152 cases. The breakdown of files and cases by registry is shown in Table 8.1 in Appendix 3.

Overall, there were 337 individual litigants in the 152 cases considered in the qualitative study. Of these, 265 (78.6 per cent) were fully represented throughout the appeal, 63 (18.7 per cent) were either fully unrepresented or partially represented, and nine litigants (2.7 per cent) either did not appear, or their representation status was unable to be determined.

Fifty-seven of the 152 cases (37.5 per cent) involved at least one unrepresented party, including five cases in which both parties were unrepresented. Consistent with the quantitative study, cases from the Southern Appeals Registry were significantly more likely than those from the Eastern and Northern Appeals Registries to involve an unrepresented litigant, while cases from the Eastern Appeals Registry were least likely to do so.[87]

Since we viewed the files at least a year after the appeals had been initiated, most of the cases in the qualitative sample had been finalised by the Full Court. Only seven of the 152 cases were still active at the time of viewing the files, although in a further two instances we were unable to determine whether the case was in fact finalised. Given our interest in files containing substantive information, rather than those that had been closed without much activity, it was not surprising that three quarters of the 152 cases had gone all the way to the appeal hearing.[88] The detailed breakdown of the stages reached in the 152 cases is shown in Table 8.2 in Appendix 3.

87 χ^2=17.800, df=2, n=152, p=0.000.

88 For all appeal cases filed in the 1998-99 financial year, 55.3% reached the appeal hearing.

Measures

Quantitative data was extracted from the appeal files using the same coding form as was used for appeal cases in the quantitative study. There was little scope for statistical analysis of this data, however, due to the small number of cases involved.

In order to illuminate fully the question of whether the presence of a legal representative impacted upon the presentation of issues for legal determination and the building of precedent, we examined in each case all documented aspects of the appeal process, where available. These included: grounds for appeal, summaries of arguments and submissions, correspondence with the Court regarding production of the Appeal Book, content of the Appeal Book, and the judgment itself.

In order to achieve consistency over the collection of the qualitative data, we devised a checklist of factors to be recorded from each file, with some variation as to the detail to be covered dependent on representation status. We developed our checklist after reviewing a pilot sample of appeal files, and after a review of recent decisions by the Full Court. The purpose of the checklist was to ensure that we recorded information systematically, in a way that would enable us to compare and contrast cases fairly using the same variables.

For all cases, we recorded the file number, the nature of the parties' representation status (including a comment on partially represented appellants and at what stages they chose to appear unrepresented through the appeal process), the relationship of the parties, the issue on appeal, and the outcome. To guarantee that we had a full picture of the matter, including the basis for the appeal grounds, we also examined the trial judgment, recording in each case a brief summary of the prior history of litigation, the main basis for the Court's decision at trial and any comment by the trial judge on the impact the representation status of the parties had on the process of determining the case.

In reviewing appeal judgments, we recorded how the Court referred to and dealt with the parties' submissions, if the Court introduced its own authorities and argument at any point, if the Court extended the law or departed from precedent or its previous approach, the main basis for the Court's decision, and any reasons for the awarding of costs.

In cases involving an unrepresented party, or a represented party whose lack of representation at first instance was cited as a ground for appeal, we also looked at the evidence and argument presented at first instance and on appeal. In these cases we recorded the unrepresented party's contributions to the Appeal Book, the arguments they raised, the authorities and evidence they relied upon, and any references (from available transcript) of their attitude to the Court at first instance, their understanding of legal and procedural issues, and their concepts of and claims to justice in the Family Court.

Analysis

The systematic recording and organisation of this qualitative data enabled us, in the first stage of our analysis, to compare and contrast the nature of the documents included in appeal cases involving unrepresented and represented parties, the progress of represented and unrepresented appellants through the appeal process, and the comments made by judges about the arguments presented to them by represented and unrepresented parties. These comparisons in turn enabled us to identify the points at which an absence of legal advice may have caused problems for the Court in the determination of the appeal, and to look for patterns and themes across the different stages of the appeal process. These patterns and themes were then developed with reference to the existing body of literature on the appellate process, unrepresented litigants, the relationship between family lawyers and their clients, and the jurisprudence of the Family Court. We also examined the various characteristics, motivations, and skill levels of unrepresented appellants, in order to provide a basis for a potentially differentiated response to unrepresented litigants.

While clear differences between unrepresented appellants did emerge from the data, we found that the patterns and themes we identified were not unique to any aspect of the appeal process, but were present throughout all of them. Accordingly, we have structured our analysis around the various stages of the appeal process, and traced the identified themes through each of the sections.

Chapter 9 discusses the characteristics of unrepresented litigants on appeal. These characteristics were identified from the information recorded about each party's representation status, in conjunction with an assessment of the entire matter. The section primarily reinforces the importance of recognising the diversity of unrepresented litigants.

Chapter 10 discusses categories of appeal. This section is based on data concerning the issues that were the subject of appeals, and discusses the differences between represented and unrepresented parties in the types of procedural and substantive issues presented on appeal.

Chapter 11, on the nature of the appeal application, focuses on appellants' grounds of appeal and summaries of argument. This section argues that, without the mediating influence of legal personnel, unrepresented appellants seem to be experiencing a range of problems with the appeal process, based in part on their inability to understand the purpose of appeals, and their inability to separate their emotional issues, and feelings of grievance, from the legal and substantive issues relevant to the Court.

Chapter 12 discusses the procedural aspects involved in making an appeal application. It relies primarily on information about the settlement of the appeal book index, and correspondence between appellants (or their representatives) and Appeals Registrars on the complex process of preparing appeal books. Unsurprisingly, the representation status of appellants appeared to have a direct impact on their ability to navigate the practice and procedure of appeals, and therefore appeared to also have an impact on the issues subsequently brought before the Court.

Chapter 13 specifically discusses the jurisprudence of appeals, from an analysis in particular of the judgments in the files. It examines the two

primary aspects of the Court's jurisprudential approach – the primacy of judicial discretion and the need to develop case law. From this analysis it appears that the representation status of the parties does not affect the operation of these central jurisprudential elements. We note in this section, however, that there is an emerging body of principles on unrepresented litigants, based on an understanding and application of the Full Court's decisions in *Johnson v Johnson,*[89] and more recently in *Re F: Litigants in Person Guidelines.*[90]

Chapter 14 addresses the question of appropriate models of intervention to mitigate or avoid procedural problems identified in the foregoing chapters in relation to the appearance of unrepresented litigants at appeal level.

89 *Johnson & Johnson* (1997) FLC 92-764.

90 *Re F: Litigants in Person Guidelines* [2001] FamCA 348.

9

Characteristics and Categories of Unrepresented Litigants

Characteristics of Unrepresented Litigants in the Qualitative Sample

As noted in the previous chapter, there was a total of 63 unrepresented litigants in the qualitative sample. As might have been expected from the quantitative data, the majority of these (54) were appellants. Also in line with the quantitative data, the majority (39) were fully unrepresented rather than partially represented. And the majority of fully unrepresented appellants had also been fully unrepresented at first instance.

Unrepresented litigants were more likely to be male (44) than female (19). Two thirds of unrepresented litigants in the sample were male appellants. Although occupational data was missing in a number of cases, the largest occupational groups among the unrepresented litigants were professionals, tradespersons and related workers, and retired persons, suggesting that lack of resources was by no means the only reason for these litigants to be self-representing.

The forms of partial representation in the qualitative sample ranged from the withdrawal of legal aid funding resulting in initially represented parties continuing unrepresented (3 cases), to the use of a solicitor to provide legal, procedural or tactical advice, assistance with the preparation of documents, or assistance with in-court representation at certain points of the proceedings (18 cases). It was often difficult to determine the reasons why the latter group of litigants chose to conduct their cases in this way. Eight used partial representation to good effect, and with no apparent adverse procedural consequences. One appellant, for example, instructed

counsel only for a pre-appeal hearing conference, where arguably professional and objective negotiating skills were required, which resulted in a settlement of the matter. However, ten of those who prepared their initial appeal documents unrepresented ran into difficulties and found that they needed assistance with either submissions or advocacy. In some cases, legal representatives instructed shortly before the appeal hearing amended the grounds for appeal filed by the appellant in person. In general, partial representation in these cases was more likely to involve commencing unrepresented than losing representation in the course of the appeal process.

Categorisation of Unrepresented Litigants on Appeal

As noted earlier, there has been a great deal of discussion of the characteristics of the Australian litigants in person population.[91] This literature identifies two main motivations as to why people are unrepresented in courts, particularly in family law matters.[92] Parties cannot afford a lawyer, and thus appear in person; or they feel that they do not need, or do not want, a lawyer, often because of prior negative experiences with lawyers, or a general mistrust of the legal profession.[93]

The first group of litigants may have difficulties obtaining legal aid for the entirety of their proceedings, or may not be able to afford a lawyer generally, but feel that they are capable of doing a good enough job without the assistance of legal representation. The second group includes litigants who are able to afford legal representation, but who have become disenchanted with the legal profession because of previous poor service or

91 See for example Australian Law Reform Commission (1996); Barclay (1996); Coleman (1998); Hunter (1998); Law Reform Commission of Western Australia (1998); Australian Law Reform Commission (1999), 375-76; Byrne and Leggat (1999); Dewar et al. (2000); Family Law Council (2000); Australian Institute of Judicial Administration (2001).

92 As will be discussed later, there are a number of other motivations for self-representation, but according to a majority of the literature, these two are the most significant and commonly present.

93 Dewar et al. (2000), 1.

because they are unrealistic in their expectations of the system, while others seem only to want to use the Family Court to air grievances or get some redress for actual or perceived wrongs. On the other hand, this group includes those who may have been encouraged to file a matter in court themselves because of the Family Court's simplified procedures. Members of either group may have sought information or advice from a Community Legal Centre, or have made use of self-help information available on various websites, from Legal Aid Commissions, or from the Court itself.

Our reading of appeal files (together with the quantitative data discussed in the previous Part) revealed particular patterns and important qualitative differences between groups of unrepresented litigants in appeal cases, from which we derived three categories of litigants in person: the 'vanquished' litigant, the 'serial appellant', and the 'procedurally challenged' litigant. Each group of litigants had a different kind of experience of the appeal process, and created different kinds of challenges or problems for the Court. The categories are based on behaviour and experience in the Family Court rather than motivations for appearing unrepresented. They are intended to provide useful descriptions rather than being terms of art. Nevertheless, we found that almost all unrepresented litigants in our appeal sample could be analysed by reference to one or other of these three categories.

The 'vanquished' litigants were those unrepresented litigants who could not afford legal representation, were not eligible to receive legal aid, and were in general overwhelmed by the family law system itself.[94] This was the group who were found in the quantitative study to be more likely to abandon their cases or have them struck out than to proceed to an appeal hearing. In eight of the 57 cases involving unrepresented litigants in our sample, it was clear that the litigant in person had been 'defeated' by the system, largely because they could not afford to take their matter further. One particularly illustrative matter was a **Hague Convention Case** filed in the Eastern Registry. In this case, the appellant in person had little

94 See also Rubin (1989), 999-1000.

understanding of the Australian legal process, having come from Macedonia. Half of the 'vanquished' litigants in person were from a non-English speaking background, or suffered from an inability to comprehend the court process due to psychiatric or psychological problems or a learning difficulty. Three of the cases were those mentioned above involving partial representation arising from cessation of legal aid funding, and two cases were run with the assistance of a lay advocate, one specifically involving a **'McKenzie friend'**.

'Serial appellants' were parties who brought multiple appeal applications before the Court. They created significant difficulties for the Court, as they had a tendency to appeal every decision (including interim orders and procedural directions), abused the assistance of Appeals Registrars, and often based their multiple grounds for appeal on a belief that their personal rights had been infringed (these issues are discussed further in subsequent chapters). Nineteen of the unrepresented litigants in our appeal sample could be classified as serial appellants, taking into account the number of applications they had, or had previously had, before the Court.

Section 118 of the Family Law Act gives the Court the power to act if it deems proceedings to be vexatious or frivolous. The Court can dismiss the matter, order costs against the offending party or most significantly, order that the litigant cannot bring any more matters to the Family Court unless they obtain the leave of the Court.[95] In general, the serial appellants we identified were not subject to s 118 orders. There was one litigant in the qualitative sample who was subject to a s 118 order, but who nevertheless was granted leave to appear, and a number of cases in which the behaviour of the litigant arguably should have attracted a s 118 order. It is not clear why the Court did not deem these serial appellants vexatious: it could be that the other party did not raise it as an issue, or that the Court was more lenient towards the behaviour of these litigants in person than it would have been had they had legal representation. One case involved a unrepresented appellant who had been problematic throughout the trial at

95 See generally Mueller (1984).

first instance, to the point where the other party had requested that the trial judge deem them a s 118 litigant. The judge refused to make the order, but did comment that it seemed likely that this litigant would have their access to the Family Court limited in the future through such an order.

The two most interesting serial appellants were both from the Southern Registry. One appeared in three cases in the sample, appealed almost every interlocutory or final order made against her, resulting in five applications before the Court at one time, and subsequently attracted a s 118 order. The other was serially involved with the Court in a different way: he brought his own appeal to the Court, and then appeared later as a McKenzie friend for another unrepresented litigant.

There were three other cases in which a litigant in person, although not a serial appellant, could have been described as vexatious. These litigants appeared to display a flagrant disregard for the Family Court as the arbiter of family law disputes. In one case, for example, the unrepresented appellant argued that he should not be subject to the jurisdiction of the Court as he had 'seceded' from the Commonwealth of Australia.

The 'procedurally challenged' category of litigants in person fell between the two extremes of 'vanquished' litigants and 'serial appellants'. Litigants in this group were not as enmeshed in the process of litigation as 'serial appellants', and exhibited a wide array of characteristics, but were clearly identifiable as having suffered because of procedural difficulties and lack of procedural knowledge and experience in their time at the Family Court. Twenty-seven cases in the appeal sample included an unrepresented litigant falling into this category. The group included five litigants in person who had disputes with their solicitors, over costs or alleged practitioner incompetence, and thus discontinued legal representation, and those partially represented litigants who commenced their cases unrepresented but then ran into difficulties and found they needed legal assistance.

The procedural complexity of the appeal process, as will be discussed in Chapters 11 and 12, is an intentional policy of the Court.[96] The process appears to be designed to prevent appeals being viewed as simply a re-hearing of the matters dealt with at first instance, by imposing rules that direct parties to produce documents which focus on allowable appeal issues with clarity and precision, and forcing appellants to honour strict deadlines in the preparation of their cases. As will be shown throughout our analysis, these requirements are central to the difficulties faced by many unrepresented litigants on appeal. Our discussion of the qualitative data will draw attention to the specific difficulties at appeal level that define this 'procedurally challenged' group of unrepresented litigants. This was also the point at which there was some overlap between the categories of unrepresented litigants, as those who were 'vanquished' by the system and 'serial appellants' might also experience procedural difficulties.

Overall, the difference between groups of unrepresented litigants on appeal, based on the nature of the difficulties they experience and/or create, raises important questions about the nature of any policy or procedural changes that may be required at appeal level to meet their needs, while at the same time keeping the policy basis of the appeal process intact.

96 Family Law Council (1996), paras 1.11, 5.26.

10

Categories of Appeal

Appeals may be brought either in relation to substantive matters, or in relation to procedural issues. In practice, the distinction is somewhat artificial, as a number of matters are brought on both substantive and procedural grounds. In this chapter, however, the two kinds of appeals are discussed separately, in order to examine the particular characteristics of each type of appeal.

Before doing so, it is worth noting that seven cases in the qualitative sample did not include any real grounds of appeal, and five of these were brought by unrepresented appellants. An example of such 'non-grounds' was the case in which a litigant in person only presented a list of what they wanted, rather than stating the elements of the trial judge's decision that they were appealing against. In such a matter, it could be concluded that the litigant was fundamentally seeking a new trial. On the other hand, in one case in which all parties were represented, the appeal was brought against the whole of the order made at first instance, but did not state the errors of the trial judge in providing reasons for appeal, other than that there was a denial of the rights of the appellant.

It should also be noted that in this chapter and the following chapter, the focus is on unrepresented *appellants* (since it is they who are responsible for initiating appeals and providing grounds for doing so), rather than on unrepresented *litigants* more generally.

Appeals On Substantive Matters

The family law jurisdiction is founded on equitable principles, and vests very wide discretion in the trial judge to decide what the best interests of the child require, or how marital property may most fairly be divided, on the facts of the particular case before them. Unsurprisingly then, the most common grounds for appeal to the Full Court were errors in the trial judge's exercise of his or her discretion, based on the weighting given by the judge to particular factors in the case.[97] Many cases included an appeal against the trial judge's decision on more than one issue (e.g. relocation, residence and contact, or property division and procedural matters).

Of the 152 cases in the qualitative sample, 41 per cent (62) were brought in relation to property issues, with a majority of the parties in these cases being represented for the entirety of the proceedings. Appellants without legal representation brought only thirteen of these cases. Children's matters comprised approximately one third of the sample (51 cases), with almost half of these cases (21) brought by unrepresented appellants. Only three of the cases involved both children and property, and one of these was brought by a partially represented appellant. This was an appeal against the distribution of property at first instance, as well as the alleged failure of the trial judge to take the child's wishes into account when determining contact arrangements.

Other substantive issues brought to the Full Court included child maintenance disputes (12 cases: half brought by unrepresented appellants), relocation matters (seven cases: two brought by unrepresented appellants), and Hague Convention cases (five cases: one brought by an unrepresented appellant). A small number of cases were also brought appealing against the granting of a divorce, a decision concerning domicile, and a decision in a solicitor/party dispute.

97 Sections 68F and 79(2) of the Family Law Act provide non-exhaustive lists of the factors to be taken into account in determining the child's best interests and the alteration of property interests respectively.

Appeals on costs

An important type of substantive appeal were appeals against costs orders arising out of the trial at first instance. Fifteen of the cases in the qualitative sample (10 per cent) involved appeals on costs, approximately half of which were brought by unrepresented appellants.

There were a variety of circumstances surrounding these costs appeals. Some were appeals from costs orders made at first instance because of a refusal to accept an offer of settlement, and others formed part of a general appeal against the whole order at first instance (often brought by a litigant in person). One such case involved costs orders against an unrepresented litigant due to their interlocutory behaviour, and another seemed to be a punitive order arising out of the general behaviour of the litigant in person at first instance. On the rare occasions when the litigant in person appears to have been successful in bringing a costs based appeal, they had applied for leave to appeal against a costs order made on an indemnity basis, or they were successful in a related property/children appeal. The Full Court's approach to costs orders and **costs certificates** is discussed further in Chapter 13.

Appeals Based on Procedural Grounds

There was a substantial number of cases (n=72; 47 per cent of the appeal sample) in which the appellant contended that the trial judge had erred in the course of making procedural directions and decisions. More often than not, these contentions co-existed with a substantive ground for appeal. It is worth noting the claim of procedural error as a separate category of appeals, however, as it illustrates the difficulties many litigants have with the concept of discretionary jurisdictions *per se*. The fact that the basis for a judge's decision is discretionary means that many litigants do not necessarily understand why an outcome was not in their favour. As a result, they tend to focus on perceived procedural errors by the Court, and identify these as the source of the negative outcome of their case. Cases in

which procedural problems were caused by or during the appeal process itself will be discussed separately in Chapter 12.

An inability of the appellant to understand, comply with or accept the procedural decisions made at first instance

As a general proposition, the decision to appeal in family law should not be seen as 'a reflex response to an unpalatable result, or simply as a continuation of the trial process'.[98] The nature and number of appeals in which appellants disputed the trial judge's procedural decision making, however, seriously challenges this assumption. It is one thing for a party involved in Family Court proceedings to feel aggrieved by a trial judge's understanding or interpretation of the facts in their case. It is quite another to dispute procedural decisions, and face the costs and difficult process involved in mounting an appeal, often on quite technical grounds which are usually the province of highly qualified legal personnel.

In our sample, appeals containing grounds alleging a procedural error disproportionately involved unrepresented appellants.[99] The character of these grounds for appeal from unrepresented parties was extremely varied, but taken as a whole these cases seem to provide a picture of litigants unable to separate their emotional concerns and personalised disputes from the general policy and machinery of the Family Court. For example, many of the grounds were couched in the language of claims to a denial of formal fairness or equality, such as procedural unfairness, natural justice, judicial bias, 'fairness', and miscarriage of justice.

The majority of the unrepresented litigants making these claims were the 'serial appellants' who brought repeated appeals on both minor procedural and factual matters. One case, for example, involved a litigant who was inclined to appeal nearly all judicial and quasi-judicial interlocutory decisions, regardless of the likely success of his efforts in legal terms. The basis of the appeal caught by our sample was that he disputed the refusal by

98 Fogarty (1991), 1.

99 Unrepresented appellants appeared in 35% of cases in the appeal sample (53/152), but brought 43% of the appeals based on procedural grounds (31/72).

the trial judge of an adjournment of all his pending appeals until his application for special leave to appeal to the High Court had been heard. He also included as a ground in this particular appeal a stay of his pending appeals until there had been a 'hearing of disciplinary charges' against his former wife's solicitor. Two other cases in our sample exhibited this characteristic of appealing the minutiae of procedural machinery, with five applications made by the same party. At least four others also involved serial appellants.

There were, however, other cases in this category involving those 'procedurally challenged' by the family law system, whose inability to meet procedural requirements was cited as one of the bases for their appeal. The non-compliance characteristics were varied, but included such difficulties as failing to file documents in time. There were other unrepresented appellants again whose appeal grounds revolved around the procedural difficulties identified in the ***Johnson* guidelines**, and were articulated in those terms. These cases will be discussed separately below.

The cases identified above formed part of a larger grouping of cases in which the unrepresented status of either party (but usually the appellant) at first instance formed the basis for the appeal in a more general sense. Eleven of these cases involved appellants who subsequently obtained legal representation for their appeal.[100] Appellants in this larger group, regardless of whether they were represented or not at appeal, did not necessarily articulate their appeal grounds as procedural errors by the trial judge. It was evident from an examination of their cases, however, that an inability to understand procedural directions and/or non-compliance with those directions did in fact form the basis for their appeals.

Many of these cases involved parties who could be identified as 'vanquished' by the system, including parties from non-English speaking backgrounds who had difficulty understanding what was procedurally required of them, or could not access information, as a consequence of

100 Data on whether an appellant was unrepresented at first instance, but represented on appeal, was not available in all cases examined for the qualitative study. Thus this figure of eleven cases may not represent all cases in this category.

their inability to speak English fluently, and as a result of lack of continuity of interpreter services. For example, one litigant who was unrepresented at first instance required a Croatian interpreter for all preliminary proceedings. A directions hearing to have a court date vacated was heard in the absence of this litigant, who had faxed the Court to indicate that he was unable to attend as he had not yet had the 1000 pages of documents relevant to the hearing translated. The trial judge, due to the non-compliance of the fax as notice of failure to attend, made orders to the party's detriment, in his absence. Other litigants in this category included a party with serious mental health problems, whose inability to attend at Court and notify the Court appropriately resulted in orders made in her absence to her detriment, and parties who misunderstood the meaning of procedural outcomes at first instance (e.g. contesting the dismissal of applications that were never dismissed, and misinterpreting responses to applications as cross-applications).

Represented parties and appeals on procedural issues

In comparison to the number of appeals on procedural issues involving unrepresented parties, there were only a small number of cases based on issues of fairness or natural justice involving represented appellants (five cases). Other procedural issues raised by represented appellants included: the disallowance of an application to adduce fresh evidence in a disputed sexual abuse matter; a refusal to hear an out of time application; and the trial judge's refusal to grant an adjournment to enable superannuation issues to be resolved, amongst others. The small number of cases in this group indicates that experienced family law counsel and solicitors may be less inclined to find fault with procedural decisions taken by the Court that operate to the detriment of their clients, unless there is a genuine chance that an error of law has been made in the process. For example, the adjournment for a superannuation issues case was actually reported, and costs certificates granted for both parties, indicating that the Court viewed the appeal grounds as legally significant.[101]

101 *Carson & Carson* [1999] FamCA 53.

Jurisdictional problems

Four of the cases in the qualitative sample involved cross-vesting difficulties caused by the decision of the High Court in *Re Wakim*.[102] Two of these cases involved fully represented parties, while the other two cases involved unrepresented appellants. There was also another jurisdictional matter in which the appellants were unrepresented, and the issue in dispute was whether a Family Court judge had jurisdiction over a child subject to a State-based child protection order.

Conflict with legal representative

There were three cases in the sample in which a litigant's dissatisfaction with their solicitor's handling of their matter at first instance was cited in their grounds for appeal. Two of these litigants subsequently self-represented at appeal as a consequence (one merely changed his representation). These cases, despite the small number in the category, are worth reflection as they indicate the important role lawyers can play in the management of their clients with regard to family law matters.

One of the litigants who chose to self-represent at appeal cited dissatisfaction with his solicitor's approach to evidence (the litigant felt that more evidence should have been presented to the Court regarding the value of assets). This litigant included as one of his grounds for appeal that his 'legal representation was so bad that it was like no representation at all'. From an examination of the judgment at first instance, it is arguable that the litigant's perception was a result of his dissatisfaction with the outcome of the case, as opposed to any objective incompetence by his legal representative. The trial judge even noted the disparity between evidence

102 *Re Wakim; ex parte McNally; Re Wakim: ex parte Darvall; Re Brown; ex parte Amann; Spinks and Ors v Prentice* [1999] HCA 27. Before the High Court decision in *Re Wakim*, under cross-vesting legislation, the Family Court was able to hear State law matters relating to family law issues (for example, de facto property disputes). The decision in *Wakim*, however, rendered the scheme for cross-vesting State law matters into federal courts invalid. The facts in *Wakim* were to do with bankruptcy proceedings in the Federal Court, however, the decision also affected the ability of other federal courts, like the Family Court, to hear State law disputes in conjunction with disputes covered by the Family Law Act.

presented by the litigant's counsel and evidence presented by the litigant himself under cross-examination, regarding the significance of contributions he had made to the marital property. The judge noted, for example, that the litigant at several stages of the trial voluntarily contradicted his own case under cross-examination, 'somewhat to the surprise of his learned counsel in evidence in chief'.

The other litigant who chose to appeal as a consequence of alleged mishandling by his lawyer appeared to have similar difficulties in accepting the outcome at trial. The substantive issue at trial was residence and contact. The appellant father's representative had raised the mother's health (she suffered from epilepsy and diabetes) as a factor casting doubt on her capacity to care for the children if she were to be awarded residence. The trial judge noted that there had been 'no real challenge' to the mother's medical witnesses, and went on to find her health problems posed no risk to her capacity to provide care. The trial judge ultimately made a residence order in favour of the mother, with defined contact for the father. He also made a costs order against the father, after asking for submissions, on the basis that the reliance on the wife's medical history as a 'platform' for his case for residence was wholly unsuccessful.

The appellant, after dispensing with the services of counsel, attempted to mount an appeal against the costs order. Without legal assistance however, he constructed a convoluted set of grounds based on his dissatisfaction with the residence outcome, for which he blamed his lawyer. He argued that the trial judge had erred in 'not recognising the enormous disadvantage the husband's case suffered by having lead counsel who was manifestly incompetent in handling the medical evidence'. The Full Court, in dismissing the appeal by virtue of the fact that the argument presented did not address the grounds for appeal, stated simply that 'the quality of the legal representation of a party to proceedings and that party's perceptions of, and response to, that matter are not matters to which regard can be shown by a trial judge or by an appellate court, except in exceptional circumstances which are not shown or even suggested in this case'.

The first of these cases demonstrates the way that family lawyers attempt to manage their clients by refocusing emotional issues as legal questions,

and by presenting appropriate evidence and submissions before the Court. It also demonstrates that this process of client management is not always successful. In the second case, by contrast, the lawyer at first instance does seem to have assisted his client to proceed with an arguably unreasonable case, with the result that costs were awarded against the client. Both of the cases further demonstrate that some appellants' inability to accept the outcome at first instance results in blame directed toward their representative, and a rejection of legal advice *per se,* evidenced both by their largely misconceived grounds, and by their choice to mount an appeal unrepresented.[103]

The Johnson guidelines cases

As noted above, a number of unrepresented appellants cited the guidelines in *Johnson v Johnson*[104] ('the *Johnson* guidelines') as evidence of unfairness occasioned by the Family Court.

The *Johnson* guidelines were articulated by the Full Court of the Family Court as dicta to assist judicial officers in their management of trials involving unrepresented parties. The guidelines noted the obligation of the Court to ensure that unrepresented parties 'are given every opportunity to explore the rights which they may appear to have',[105] including explaining to them the normal procedures of trial, including rules of cross-examination, the admissibility or otherwise of evidence, the clarification for unrepresented parties of obfuscated substantive issues, and the maintenance of a 'level playing field' with represented parties.[106] The Full Court, however, also noted the internal tension created by unrepresented parties and their need for judicial assistance. Specifically, it was noted that the guidelines exist under the umbrella of the Court's obligation to apply the provisions of the Family Law Act relating to children's matters, as well

103 See generally Davis et al. (1994); McEwen et al. (1994); Armytage (1996); Wade (1997); Australian Law Reform Commission (1999), 380.

104 *Johnson & Johnson* (1997) FLC 92-764.

105 From *Dawson v Deputy Commissioner of Taxation* (1984) 56 ALR 367 at 378.

106 *Johnson & Johnson* (1997) FLC 92-764, para 121.

as its obligations to ensure that proceedings are not unduly protracted,[107] and to have regard to the need to provide a prompt and inexpensive resolution to matters in dispute between parties.[108] In addition, the Full Court noted in *Johnson* the undesirability of the Court providing assistance to unrepresented parties if it would cause unfairness, or an impression of unfairness, to the other (represented) party, and/or without full knowledge of the facts in a particular case.[109]

Despite these qualifications, and despite the need identified by the Court for some clarity and equity in judicial treatment of unrepresented parties, it is arguable that the Court did not envisage the extent to which many legally autodidactic unrepresented appellants would appropriate the guidelines as precedent, claiming that a judge's non-compliance with the *Johnson* guidelines was tantamount to an error of law.

Our qualitative sample included 14 cases in which the appeal was based misguidedly on the *Johnson* guidelines. In these cases, the overwhelming claim made by appellants was that the trial judge had failed to 'maintain a level playing field' on their behalf, which in context appeared to be a general claim that they had been procedurally unfairly treated, and as a result were not satisfied with their outcome at trial.

The Full Court has recently moved to address this phenomenon in the decision *Re F: Litigants in Person Guidelines*.[110] At paragraph 230 of that decision, the Court noted:

> *we have noticed that a number of litigants in person are endeavouring to use the alleged breach of the guidelines as a ground of appeal in itself. We do not think it is appropriate for the guidelines to be used in this way as there may well be good reason in particular cases to depart from some of the*

107 Family Law Act s 97(3).

108 Family Law Rules Order 4(4).

109 *Johnson & Johnson (1997)* FLC 92-764, para 122.

110 *Re F: Litigants in Person Guidelines* [2001] FCA 348.

> *guidelines but always remembering the Court's obligation to provide procedural fairness and a fair trial. Thus, if in circumstances of a particular case, a trial judge does not follow guidelines, it does not follow that there has not been procedural fairness and a fair trial.*

The Court stressed that the guidelines were never intended to be a precedent for unrepresented litigants as a class, especially in a jurisdiction based on equitable principles, wide judicial discretion and case by case factual resolution.[111] In an effort to contain this category of appeals, the Court in *Re F* revised the guidelines and described a more subjective test for their application, reinforcing the baseline jurisprudential framework of the Family Court of a wide judicial discretion.[112] The implications of *Re F* will be discussed further in Chapter 13.

111 ibid., para 227.

112 ibid., para 230.

11

Nature of the Appeal Application

To initiate an appeal in the Family Court of Australia, an appellant must file a Notice of Appeal (Form 42), which should include a clear statement of grounds for appeal. This pro forma document is usually accompanied by a summary of argument. Together, the grounds for appeal and the summary of argument should identify the issues from first instance that are the subject of the appeal, the bases of the appeal argument, and the case law and section(s) of the Family Law Act that support the appeal argument or that are being distinguished. The premise behind the short statement of grounds for appeal and summary of argument is that accurate and succinct identification of the matters for appeal should shorten the hearing and reduce the cost of litigation,[113] pursuant to the policy of informal, prompt and inexpensive resolution of matters in the Family Court in general.

Our qualitative analysis of appeal files included an examination of the appeal application, including grounds for appeal and summaries of argument. Overall, it was evident that represented parties had little difficulty in fulfilling the objectives that lie behind the Notice of Appeal process. By comparison, unrepresented appellants tended to have difficulties with this aspect of the appeal process, the absence of legal representation resulting in often ill-conceived or ill-prepared documents. The problems faced by unrepresented appellants included: difficulty in limiting appeal grounds to appellable issues from trial, difficulty in interpreting and applying case law and sections of the Act appropriately, and problems associated with their tendency to view the appeal process as a means of allowing their whole story to be re-heard in full.

113 Family Law Council (1996), para 5.26.

This chapter discusses these difficulties, with reference to aspects of the language and intent behind unrepresented litigants' approaches to the appeal process. In particular, it describes how for many unrepresented parties, without the benefit of a legal 'translator',[114] there was real difficulty in understanding the ethos and policy of the Act and the Court, and a reliance instead on a generalist rights discourse, and claims that their rights as individuals were under threat.

Role of Legal Representatives in Appeal Preparation

In order to ground this discussion, it is important to consider the role legal representatives actually play in the process of family law litigation. Research conducted on the lawyer-client relationship in family law has shown that lawyers tightly manage their clients, acting in a variety of ways to re-construct their client's emotional reactions and sense of injustice into legal issues and language, and as a result enabling their client to participate effectively in an adversarial justice system.[115]

This process can be problematic, with the lawyer's professional role effectively dominating the individual wishes of the litigants.[116] In general, however, it is contended that constant and firm direction by the lawyer does in fact lead to settlement of disputes, and a reduction overall of the emotional and legal cost to litigants by decreasing their involvement in family law litigation, including appeals.[117] Ingleby, for example, has argued that solicitors have a significant role to play in advising a party when they are being unrealistic, and what the likely outcome of a determination of the Court would be. Solicitors facilitate 'bargaining in the shadow of the law',[118] by making the parties aware of their rights and

114 Cain (1979).

115 Ingleby (1992), 195; McEwen et al. (1994); Mather et al. (1995); Sarat and Felstiner (1995); Dewar and Parker (1999); Hunter et al. (2000).

116 Mather et al. (1995), 287.

117 See for example Ingleby (1992), 41; Kritzer (1998), 806-807.

118 Mnookin and Kornhauser (1979).

responsibilities under the law, and encouraging parties to resolve the dispute once it has been reduced to an essentially legal argument.[119]

There is a role then for family lawyers to play in translating difficult issues of hurt, revenge and confusion into identifiable (and justiciable) legal disputes. This role extends not only to negotiation and/or litigation *per se*, but also to the preparation of court documents according to the ethos and language of the Act and rules, and according to the prevailing jurisprudence.[120]

In their study of litigants in person appearing in Small Claims Courts, Conley and O'Barr noted that some unrepresented litigants are in fact rule-oriented in their approach to the law, understand the importance of deductive reasoning that is a necessary element of legal discourse, and have an ability to focus on relevant legal issues to the exclusion of motivations and feelings. They note, however, that this 'acquired [legal] skill' is usually demonstrated by a 'literate and educated business and legal class'.[121] Our study included some unrepresented litigants who fitted within this skill demographic. They effectively used legal language and argued their case using the rules and principles enunciated in the Family Law Act. In family law proceedings, however, there appeared to be no accompanying ability to simultaneously exclude emotional motivations from their appeal preparation, regardless of their level of education.

Description of Appeal Grounds

Just as many litigants (both represented and unrepresented) included in their Notice of Appeal a combination of substantive and/or procedural issues, so too did many appellants include a combination of grounds for appeal. For example, errors in the exercise of discretion were often mentioned in conjunction with an alleged error in the application of the

119 Ingleby (1992), 139.

120 See also Faulks (2001).

121 Conley and O'Barr (1990), 59.

law by the trial judge, insufficient weight given to particular evidence, and the provision of inadequate reasons for decision.

A marked difference between the Form 42s filed by unrepresented appellants and those filed by appellants with legal representation, however, was the legal specificity and precision with which the appeal grounds were listed and described.[122] As will be discussed further below, some unrepresented appellants used the listing of the appeal grounds in their Form 42 as an opportunity to review their entire case history, which involved describing multiple grounds, aimed at appealing the whole of the orders at first instance.[123] This appeared not to be a problem for represented appellants, whose lawyers were arguably aware of the need to avoid 'prolix advocacy'.[124] For example, one serial unrepresented appellant from the Southern Registry listed 106 grounds for appeal, many of which were accusations against the trial judge in relation to specific utterances and inferences made by him at first instance, rather than a more general claim that he may have 'erred in the exercise of his discretion'.[125]

Further, while lawyers generally did not attempt to flout convention by appealing matters not directly in issue at trial, this was not the case for

122 In consultations conducted by the AIJA, the Western Australian Court of Criminal Appeal also noted unrepresented litigants' difficulties in drafting grounds of appeal: Australian Institute of Judicial Administration (2001).

123 In the AIJA's consultations, the Australian Industrial Relations Commission also identified prolixity and excess of emotion as a feature of the court documents prepared by litigants in person: Australian Institute of Judicial Administration (2001).

124 From Full Court in Rasanayakam & Wallooppiliai v Thillaindesan (1996) FLC 92-696.

125 This case was subsequently reported as KS v DS [1999] FamCA 1221. In its decision, the Court noted that the appellant's grounds were 'without substance and an abuse of process' (at para 20), made primarily because 'the contact orders did not suit him' (at para 24), and were baseless in their reliance on bias and other 'fanciful' allegations (at para 36). The Court also commented (at paras 17-19) that: 'Prior to the commencement of these proceedings the husband did not provide a summary of argument as required by the Rules, and there was some discussion at the commencement of the proceedings as to why he had not done so. In the course of that discussion he made some far-fetched, and indeed offensive allegations in relation to the results of his examination of the file, so far as the child representative was concerned. These allegations were completely without foundation, but unfortunately the themes seemed to be indicative of the manner in which the husband had conducted himself throughout the proceedings. The husband had had ample opportunity to prepare a summary of argument in this matter. Although he is unrepresented, he is on his own account a well educated and highly intelligent person who should have had no difficulty, at least in preparing a summary that might have better directed the arguments that he advanced to the Court.'

many unrepresented appellants who appeared to misunderstand the function of the appellate court, viewing an appeal as a right to a complete hearing *de novo.* This misunderstanding appeared to exist across the spectrum of unrepresented appellants, involving the 'vanquished' and the 'serial appellant' alike.

For example, an unrepresented non-English speaking background appellant from the Southern Registry, with little evidence of any legal language or knowledge, cited as his only ground 'Not given the opportunity to talk when the order was made', and asked specifically for a rehearing of his applications for final and interim orders. Conversely, our sample also contained examples of serial unrepresented appellants who, despite giving the appearance of having learned or mimicked legal information and language as a result of their lengthy interactions with legal and court personnel,[126] still failed to understand the purpose of Part X of the Family Law Act, which governs the conduct of appeals. An unrepresented appellant, also from the Southern Registry, whose initial legal dispute revolved around contact, had a history of litigation in the Family Court which had been provoked by his own repeated breaches of contact orders. His Form 42, however, substantially departed from the central issues adjudicated at first instance, listing very general grounds for appeal revolving around alleged breaches of judicial office by the trial judge, couched in appropriated 'legal language', such as '[the trial judge] failed to ascertain judicial bias and abused his judicial discretion'. Despite these general grounds, the appellant did refer back to the contact issue when describing the orders he was seeking, albeit linking reinstatement of contact to disqualification of the trial judge from 'further hearings'.

The discursive nature of unrepresented appellants' applications

Although the listing of multiple grounds of appeal may be an aspect of unrepresented appellants' misinterpretation of appeals as a hearing *de novo,* it is arguably also an indication of the desire of many of them to use the appeal as an additional 'day in court'. This desire to obtain an

126 This will be discussed further in Chapter 12 in relation to unrepresented parties' interactions with Appeals Registrars.

additional appearance before the Full Court results in them telling their 'whole story' in a more discursive manner than the mere identification of appellable grounds and succinct summary of argument would allow.

There were 14 cases within the qualitative sample in which unrepresented appellants used the preparation of their summaries of argument as an opportunity to re-tell the stories of their matters, sometimes regardless of relevance to the stated appeal grounds. This discursive tendency appeared to be caused by the appellant's feelings of personal injustice, and involved a purposively stated desire to 'be heard.'

For some appellants, this need to be heard was based on a frustration with the Court not taking into account the prior history of the relationship. For example, in a Southern Registry application for leave to appeal file, where the issue at first instance was the failure of interim orders for a land sale, the non-English speaking background unrepresented appellant's affidavit contained multiple written submissions as appendices attempting to explain the familial history of bad blood over the land in question. The appellant stated: 'I apologise if I argued my case in the written documents....but I have difficulty in passing my message verbally...and I considered that in this way I would help the FULL COURT TO BETTER UNDERSTAND MY CASE'.[127]

Another example of re-telling the story of the relationship came from the Northern Registry. In this case, the issue was whether the trial judge had appropriately weighted all s 75(2) (future needs) factors. The unrepresented appellant felt the need to describe in great detail the actions of his former wife in order to make out his grounds for appeal, as he believed he had been subjected to a great injustice, and that he had not been listened to by the trial judge. To get his point across, he divulged in his summary of argument that the wife had been having an affair for three years and was 'waiting to put the property in her name' before leaving him. He went on to recount that: 'Within one week of this being done, she vacated our relationship...she not only destroyed our marriage but also

127 Appellant's own emphasis.

that of the man she was seeing [who] had been married for twenty odd years with three children. It is clear to me [the wife] was in the marriage for financial gain.'

The need to 'be heard' not only involved re-telling personal histories but also related to appellants' feelings of frustration and alienation, caused in part by the limitation of issues allowable at appeal level, which some felt did not explain in full the complexity of their treatment by the legal system.[128] A case from the Eastern Registry provides an example. The appellant in this matter was serving a lengthy prison sentence. In conjunction with his attempts to appeal contact and welfare orders for his child, unrepresented, in the Family Court, he was also involved in a series of appeals on his criminal conviction, including a High Court application. This appellant felt that the multiple legal issues which he was facing were not properly considered by the trial judge in the Family Court when deciding the contact issues, and his summary of argument was a discursive exposition of the entire history of his criminal and family law matters, and exposed his feelings of grievance towards the justice system as a whole. He wrote: '[The trial judge] has oversimplified my position as being guilty of [the crime]. It has taken almost 7 years for all the Courts to not come to that decision. I deserve the benefit of the doubt.... [The trial judge] is...compelling a child to suffer extra stress while the Criminal Court fails to resolve my future safely...I say I have seen the best legal minds in the country debate [my case], and fail to arrive at any conclusion while the Family Court sits on its hands...'

The discursive nature of these summaries of argument clearly does not fulfil their primary function for the Court of identifying and presenting a party's legal issues and argument succinctly. Again, if a lawyer had been involved in these cases, they may have managed to re-focus the emotional aspects of the stories presented into legal argument.

Another aspect of the need for appellants to 'tell their whole story' can be seen through an examination of the number of Form 42A applications

128 Conley and O'Barr (1990), 14 draw similar conclusions from research conducted in the criminal jurisdiction.

present in the sample, and how they were intended to be used. Fifteen applications were filed by represented parties, and appeared to be used for legitimate purposes of adducing fresh evidence, even though a substantial minority of them (40 per cent) were dismissed.[129] Unrepresented parties, however, were responsible for making the majority of Form 42A applications (20).[130] Many of these appeared to be an attempt by the litigant in person to provide all the information about their dispute to the Court, even when it was not directly relevant to the issue on appeal. Of the applications filed by unrepresented litigants, three quarters were dismissed and only one was fully successful, indicating an over-representation of unrepresented litigants bringing misguided Form 42A applications in comparison with represented parties.

These applications for leave to adduce fresh evidence were often filed by the unrepresented party to highlight issues of which they believed the Court was not aware. In one Northern Registry file, for example, the appellant wished to tender letters she had written describing her treatment during the matter, and also to provide an 'alibi' as to why she was not served by the other party's solicitor; this information appeared to be completely irrelevant to the issues on appeal. In another case, from the Southern Registry, the appellant in person sought to use a Form 42A to tell the Court about his psychological welfare, when he was essentially arguing that his bankruptcy prevented his ability to pay child support assessed under the legislation. Another Southern Registry appellant chose to use the Form 42A to seek to admit evidence concerning group certificates, medical evidence, and a police report, when his matter concerned the discretion of the trial judge to reject certain evidence introduced at trial.

129 In two of these cases, the parties applied for leave to adduce fresh evidence once the transcript from first instance became available. The Family Law Council has identified this as an important issue because the process of transcript production will not always be completed at the stage when the Form 42 is filed: Family Law Council (2000), para 5.26.

130 Fourteen Form 42A applications were brought by wholly unrepresented parties, 6 by partially represented parties.

Litigants' desire to 'tell their whole story' is not isolated to family law. Conley and O'Barr's Small Claims Court research, for example, showed that procedural informality encouraged many litigants to 'indulge in a variety of everyday storytelling practices that would be forbidden in most formal courts'.[131] These everyday storytelling practices usually concerned the context of the claim and the history of the relationship between the parties. Although the ability to tell these stories appeared to enhance litigants' satisfaction with the court process, the stories were nevertheless 'legally inadequate', because they did not assist the Court to assign blame according to law.[132] On the basis of their observations, Conley and O'Barr hypothesised a spectrum of approaches to the legal process, ranging from 'relationship oriented' litigants, to those who are 'rule oriented' and thus much more able to conform to the court's expectations about what evidence and arguments are relevant.[133] Clearly, many of the unrepresented appellants in our qualitative sample were highly relationship oriented. Perhaps in the family law jurisdiction, in which litigation is precisely based upon failed relationships, this is hardly surprising.

Unrepresented appellants and 'rights discourse'

The misunderstanding of the function of the Full Court and the misguided belief that it provides a right to a re-hearing was also evident in the 22 cases in which unrepresented appellants based their grounds for appeal on a general lack of 'fairness' or 'justice' in the manner that their matters were heard, or in the outcome that they received, at first instance. These unrepresented appellants often listed several bases on which they felt that their rights had been infringed, and these included 'procedural unfairness' (6 cases), 'natural justice' (10 cases), 'judicial bias' (9 cases), 'fairness' (4 cases), or a 'miscarriage of justice' (2 cases).

131 Conley and O'Barr (1985), 662.

132 ibid.

133 Conley and O'Barr (1990).

The files which contained these grounds for appeal are worth examining in some detail, as they appear to indicate a marked divergence in the rhetoric of grounds being presented to the Full Court, according to representation status. Represented parties, as noted, did not in general include 'rights infringements' grounds, adhering to what is allowed to be heard at appeal under Part X of the Act, and also describing grounds succinctly, and within the language of errors of discretion. Unrepresented parties, on the other hand, appeared to construct their experiences of a negative outcome at trial as a personal denial of a variety of amorphous 'rights', which appeared to be unrelated to the ethos of the Court and its body of jurisprudence. Specifically, in children's matters, where the emphasis of the Court is on the best interests of the children, there was scant recognition or mention of this fundamental principle in challenging the contact or residence orders in many of the files we examined in this category. Instead, the source or motivation for the appeal centred around the unrepresented parent's 'right' to their child, and how that was prevented by a denial of their 'rights under law' during the process of judicial determination at first instance.

One case in particular from the Southern Registry provides a good example of this tendency. The appellant in this case was a non-resident father, the child having lived with a third party since the death of the mother. There had been a history of litigation between the child's carer and the appellant over residence, culminating in the trial under appeal with the appellant being deemed vexatious under s 118, and the residence of and sole responsibility for the child remaining with the carer. Throughout the trial the self-represented father attempted to impugn the carer's motives and capacities for caring for the child, including criticism based on denial of the father's 'rights' to involvement in his child's religious upbringing, as she was his 'proxy'. The appellant's arguments at first instance centred on his fundamental rights to the child as a result of his status as a biological parent. The trial judge not only found against the father, but awarded costs against him, and also noted that he could not 'advance the welfare of the child in any particular whatsoever'.

Despite the extremely strong language used by the judge in finding against the father's application for residence, the father's grounds for appeal

indicated a complete failure to acknowledge any of the credit or legal issues which caused the trial judge's decision to go against him. He included 11 grounds for appeal, which were packaged as concepts designed to appear 'legal', and which used language gleaned from legal rhetoric, but which became meaningless when placed in the context of family law jurisprudence, and the particular appeal.

For example, the appellant argued that 's 116 of the Constitution was not addressed in the judgment',[134] that 'the doctrine of clean hands was not correctly applied, making this judgment wrong in law', and that the 'judgment reduces to absurdity in relation to the criminal law' on child stealing. He also attempted to refer to implied (and from his perspective, unidentified) rights in the Constitution,[135] listing as ground 8: 'the judgment was unconstitutionally incorrect based on what the unwritten part of the constitution may be said to be'. He further included the ground that 'the judgment was mistaken, wrong in law, and outside the international agreement Australia made with the UN concerning the rights of a child'. When he described what orders he sought, the appellant listed his desire for the matter to be re-heard by the High Court because of its Constitutional and 'international commitment' flavour. This resort to a higher legal authority than the Family Court, and reference to 'international obligations' associated with an individual's rights, was not confined to this particular case, but was also evident in other cases brought by unrepresented appellants.[136] These cases demonstrate the tendency of

134 Section 116 of the Constitution prohibits the making or enactment of any Commonwealth law establishing any religion, imposing any religious observance, and prohibiting any free exercise of religion.

135 The Australian Constitution contains no Bill of Rights. During the 1990s, through the process of judicial review, the High Court interpreted the Constitution to imply that certain rights are enshrined as law in Australia and should be upheld: for example, freedom of speech. This process of implying rights into the Constitution when they are not specifically encoded is controversial, and rights that have been implied to date have to a certain extent been overturned in more recent cases by a differently constituted High Court bench.

136 Twelve litigants in the qualitative sample who were dissatisfied with their outcome in the Full Court decided to take the matter further, either to the High Court or through complaints to other organisations. Nine of these litigants were unrepresented. One also wrote to the Commonwealth Attorney General to complain about bias, and to the Chief Executive Officer of the Family Court complaining about listings. Another litigant from the Southern Registry filed proceedings in both Federal and State courts complaining about the trial judge's 'perjury' and 'fabrication of evidence', as well as seeking special leave to appeal to the High

many serial unrepresented appellants, as will be discussed in Chapter 12, to appropriate and mimic legal concepts and language, often at random and with little understanding, arguably as a result of their lengthy interactions with legal personnel who may unconsciously act as legal tutors.

Other grounds described by the appellant in the Southern Registry case in his Form 42 also significantly excluded any mention of the best interest of the child, which, along with errors in judicial discretion, would likely have been the prime focus if a lawyer had prepared the application. An Eastern Registry case demonstrates the difference that a lawyer can make in a protracted and bitter children's matter. This case involved a lengthy history of disputes over contact, and difficulties with procedural issues. The appellant was represented, and the Form 42 evidenced no personally motivated rights infringement rhetoric, the grounds focusing on errors of law and exercise of discretion around the exclusion of certain evidence at first instance that would have promoted the appellant's case. The solicitor for the appellant did include a natural justice ground, but linked it to the way the hearing was conducted (i.e. procedural issues pertaining to the adduction of evidence) as opposed to a denial of an amorphous 'right'.

By contrast, the unrepresented appellant in the Southern Registry case focused almost exclusively on the rights that had been infringed as a result of his lack of contact with, and denial of residence of, the child. This lack of reflection on the rights of a child under the Family Law Act, as opposed to a parent's rights to them, and responsibility for them, was again not limited to this one case in our qualitative sample. This conceptual and linguistic reversal of the ethos behind the Family Law Act's provisions regarding children has arguably been exacerbated by the Family Law

136 Court. A third pursued a number of different avenues in his quest for what he saw as justice, (cont.) writing to the Family Court on three separate occasions, and also contacting his local Member of Parliament. The Member actually wrote to the Family Court on behalf of the litigant, stating that 'Mr F is frustrated by the length of time it is taking for a determination to be made in these matters... The delay in dealing with these matters is causing my constituent considerable anxiety and could possibly be detrimental to the final outcome.' One of the serial unrepresented appellants in the qualitative sample applied to the High Court for declaratory relief and mandamus against the President of the Senate for refusing to act under s 72(ii) of the Constitution to remove a judge of the Family Court for 'proven misbehaviour'. Kirby J dismissed the application because it did not present a reasonably arguable case, was misconceived, and thus doomed to failure: Re Reid; ex parte Bienstein [2001] HCA 54.

Reform Act 1995. The objectives of the Reform Act were primarily to effect an attitudinal shift. The inclusion of a new Part VII of the Family Law Act enshrined policies that aimed to encourage both parents to 'share' responsibility for their child(ren) after separation, and to reduce disputes between parents by removing the concept of children as parental property, emphasising instead that regardless of which parent is the primary caregiver, neither parent is more important to the child. From this perspective, the Family Law Reform Act explicitly codified the idea that while children have 'rights', parents have 'responsibilities'. A change in language from 'custody' and 'access' to 'residence' and 'contact' was intended to reinforce this philosophy.

In a research project examining the impact of the new Part VII of the Family Law Act, however, Rhoades et al. found that the new terms and concepts introduced by the Family Law Reform Act remained alien to many key players. They also found that the reforms in fact created a lack of clarity in the legislation, providing fresh ground for disputes, as many non-resident parents now believed that shared parenting regimes armed them with 'rights' to be consulted about day-to-day decisions to do with the child, as well as 'rights' to half time residence, based solely on their biological parental status.[137] Our analysis of appeal files accorded with these findings, demonstrating that unrepresented parties in particular had difficulties in interpreting the intention of the reforms.

The infringement of individual rights theme also became evident in our analysis in the number of unrepresented appellants who included in their grounds for appeal a personal grievance against the trial judge (6 cases). Many of the unrepresented appellants who listed 'judicial bias' as a ground for appeal appeared to directly blame the trial judge as an individual for the negative result they achieved at first instance.[138] In this way, they appeared to displace the anger previously directed at the other party, and without the

137 Rhoades et al. (2000), 2, 15-17.

138 See also Conley and O'Barr (1990), 155, 165, observing that some litigants involved in civil litigation direct their frustrations and dissatisfaction towards personnel in the system rather than towards the system as a whole, and have difficulty separating the ideal of law from the reality of its implementation.

benefit of legal 'management' directed it instead, usually quite unreasonably, to the family law system as represented by the judge.

The appellant in the Southern Registry case discussed above, for example, described how the process of the trial, and in particular the judge's treatment of him, were against his own personal rights. These grounds were in part a reflection of his unrepresented status, a point that many unrepresented appellants included as part of their recourse to the guidelines in *Johnson*, as discussed previously. The appellant in this case, however, also believed he was personally discriminated against by the judge, arguing that 'His Honour's cross-examination...was a racial discrimination against Dutch people'.

Other examples of grounds which evidenced this tendency of unrepresented appellants to embody their dissatisfaction in the trial judge included alleging the trial judge was incompetent, alleging the trial judge was in breach of his judicial office for commenting negatively on the credit of the appellant (despite the appellant's history of non-compliance with court orders), alleging the trial judge displayed 'personal prejudice' against the appellant, and alleging the trial judge had denied the appellant his 'constitutional right to a fair trial'.

It could be argued that the 'rights infringements' grounds being described by unrepresented appellants reflect a wider phenomenon. Mary Ann Glendon has argued that cultural discourse and language worldwide has become increasingly imbued with the language of rights, 'universal, inalienable, inviolable',[139] and that this has emerged from the increased attention by the law and legal activists in recent times to human rights and civil liberties cases. She suggests that in the struggle for individuals and societies to define who they are, and to make sense of the complex worlds in which they live, 'law talk' (including 'rights talk') has percolated through political discourse, and 'crept into the languages...employed around the kitchen table and in the neighborhood'.[140] A resort to the

139 Glendon (1991), 11.

140 ibid., 5.

preservation of one's 'rights' therefore appears to be an increasingly common tendency within the community, but without the aid of a lawyer to act as a 'translator', when a person brings this rhetoric to the Court, the essential interplay between rights and responsibilities is invariably glossed over.[141] The prevalence of 'rights talk' in the arguments presented by unrepresented appellants suggest the need for the category of 'rights orientation' to be added to Conley and O'Barr's schema discussed above. Instead of litigants falling on a spectrum of 'rules versus relationships', they may instead be understood as falling between the three points of rules, relationships and rights.

The increasing incursion of relationship stories and 'rights' discourse into family law appeal grounds undoubtedly obfuscates both the substantive issues that are appellable under Part X, as well as the content of the legal issues that are then presented to the Full Court for determination. The effect of the inclusion of 'relationship' and 'rights infringement' grounds by unrepresented appellants on the Court's jurisprudence will be discussed in Chapter 13. It could be argued, however, that if there is an identified need for a level of legal assistance for unrepresented appellants, it should encompass or even prioritise the pre-hearing process. Legal 'management' of appellants and 'translation' of the Act, its purposes and effects during the preparation of the grounds for appeal would undoubtedly assist in focusing the issues before the Court, and in achieving the policy objective of shortening hearing times and reducing the costs of litigation.

The Citation of Legal Authority in Appeal Grounds

Our analysis of Form 42s and summaries of argument revealed other problems associated with an appellant's representation status, centering around the identification of legal authority for their appeal grounds.

There are a number of reported decisions, both from the Full Court of the Family Court and from the High Court, that set the boundaries for the

141 ibid., 10.

review of judicial discretion on appeal. These cases, primarily *House v The King*,[142] *Gronow v Gronow*,[143] and *Norbis v Norbis*,[144] are consequently referred to by most appellants in their summaries of argument and submissions in order to justify their grounds for appeal. Citation of these authorities seems primarily to be the province of represented parties. For many appellants, however, there appears to be a trend towards using these cases automatically, without due consideration to whether they are precisely on point with their appeal. Parties (or their representatives) may find it easier to contend simply that the trial judge erred in the exercise of their discretion very generally rather than also specifying other authorities that support particular substantive grounds of appeal. It is more than likely, however, that parties do have a genuine ground of appeal based on an error in the exercise of the trial judge's discretion. The best indication of the appropriateness of citation and reliance on these cases is through judicial comment, which will be discussed in Chapter 13.

In comparison to represented parties, whose lawyers cite the 'set' cases either for tactical reasons, or as a pro forma element of appeal preparation,

142 (1936) 55 CLR 499 at 505: 'It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he [sic] allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'

143 (1979) 144 CLR 513 at 520: 'The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his [sic] decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight.'

144 (1986) CLR 513.

the small number of unrepresented parties who cited any case law at all (5 in our sample) indicates that it is uncommon for appellants without a legal 'translator' to include cases such as *Gronow* in their summaries, grounds and submissions. One Southern Appeal case involving an unrepresented appellant illustrated this point. In this case, the Full Court dismissed the appeal on the grounds that the trial judge's decision was within their discretion, and effectively criticised the appellant for not citing *House v The King* and *Gronow* when they were fundamental to the appeal.

When unrepresented parties do cite case law, they generally do not have the legal knowledge to understand whether or not the cases they cite are supportive of their appeal. It may be that they feel that citing cases is the 'right' way to run a case, thus giving their matter a sense of legitimacy in the eyes of the Court, rather than taking a conscious step to include them, as is the case with represented appellants.

One Southern Appeal case, which was subsequently reported,[145] provides a clear example of such a misuse of *Gronow* in the grounds of appeal. In this matter, the appellant husband, who was unrepresented for the entirety of the matter, sought to appeal against interim orders made by the judge at first instance. This husband, however, was not aware that they were interim orders, and so did not frame his appeal correctly. In dismissing the appeal, Nicholson CJ commented:

> *However, what is apparent in relation to the appellant's case is that it proceeds upon the basis of a complete misunderstanding of the principles upon which interim residence and contact orders are made. In support of his argument he referred to decisions such as that of the High Court in Gronow v Gronow (1980) FLC 90-716 and also decisions in relation to the giving of reasons for judgment in cases such as Towns and Towns (1991) FLC 92-199. However those cases were cases dealing with final orders that had been made in what was then termed custody proceedings. There has long been a significant distinction between the treatment of matters that come on for*

145 MB & AR [1999] FamCA 1222.

> *final hearing and matters that come on for the making of interim orders.*[146]

This distinction between the practices of represented and unrepresented parties is further highlighted in the way they cite relevant legislation. Fifty-eight of the cases examined involved citation of sections of the Family Law Act in their submissions and grounds. The most commonly cited section was s 75, which governs matters to be taken into consideration in relation to both property division and spousal maintenance. Section 79, which governs the alteration of property interests, was also commonly mentioned, more often by represented parties than not. This frequency of citation was not surprising considering the number of property cases within the sample. In relation to children, s 68F – factors to be used by the Court in determining what is in the child's best interests – was cited most often, evenly between represented and unrepresented appellants, in addition to ss 60B (objects and principles of Part VII of the Family Law Act), and 65E (child's best interests as paramount principle). Section 117 (costs) was also cited in a number of cases.

Sections of the Family Law Act were cited by a small number of unrepresented litigants. This may have been from a genuine knowledge of the law (possibly due to previous legal advice), or sufficient knowledge of the system to enable them to replicate the rhetoric required by the Court, but it appears more likely that it was an attempt to give their claims validity in the eyes of the Court. In one case, for example, an unrepresented party quoted multiple sections of the Act instead of merely citing them, for example stating: '1) s 43(d) of the Family Law Act states...; 2) s 60B(2) of the Family Law Act states...'. This demonstrated his understanding of the need for legal authority, but also displayed his lack of knowledge of the conventions of how that legislation should be referred to or used, and raises the issue once again of the apparent need for some legal assistance in preparation of appeal grounds to ensure that relevant questions of law are brought before the Full Court.

---

146 ibid., paras 12-13.

In summary, our analysis of appeal grounds and outlines of argument indicates that the absence of legal assistance or advice can circumvent the desire of the Court for coherent and succinctly prepared appeal documents. As noted previously, lawyers can be overly controlling of their family law clients as a result of their tight management of disputes. They do, however, play an important role for their clients in translating disputes into legal ideas and language, contextualising emotional issues, and guiding the client through a potentially traumatic process. The role of the lawyer is particularly important in terms of the preparation of documents for appeal, as they have the ability to remind clients that an appeal is not a re-hearing, and should be tightly focussed in terms of legal issues and argument presented for determination by the Full Court, to ensure that the costs and time of litigation are kept to a minimum.

The ALRC recommended that the Family Law Act should be amended to permit a single judge in an appeal to exercise the powers of the Family Court to stay or dismiss proceedings where no reasonable cause of action is disclosed, the proceeding is frivolous or vexatious, or the proceeding is an abuse of the process of the Court.[147] While this may be an expedient means of disposing of the proportion of appeals that are frivolous or vexatious, it does not help to deal with appeals in which a litigant in person has a genuine case but is incapable of expressing it clearly or succinctly, nor in distinguishing between the two categories of cases. A more effective measure might be the provision of legal assistance to unrepresented parties in the preparation of their appeal documents. The need for assistance at this stage is arguably as pressing as the need for assistance in advocacy before the Court. As will be noted in the next chapter, the Appeals Registrars appear to be stepping into the breach to fulfil some of those responsibilities during the preparation of the appeal book. Although they may be able to provide forms of legal assistance to unrepresented appellants once appeals are filed, they are unable to help in the earlier stages of preparing the appeal grounds and outline of argument.

147 Australian Law Reform Commission (2000), 621, recommendation 116.

12

Procedural Aspects of Appeals

An appeal to the Full Court of the Family Court is 'a distinct step with its own procedures and, more importantly, its own principles'.[148] It is not, as is widely acknowledged, intended to be a re-arguing of the case at trial. As a consequence, it could be contended that the practice and procedure involved in mounting an appeal is necessarily rule-based, and formalistic, so as to discourage frivolous appeal applications, which can create a cost and time burden for the administration of justice within the jurisdiction.[149] This creates a tension, however, with other policy bases of the Family Court, including the principle that the Court be accessible and non-hierarchical. As the Family Law Council noted in its 1996 review of Family Law appeals:

> *The need for limits on access to an appeal system is generally acknowledged. Resolution by appeal (or by exhaustion) does not necessarily suggest a healthy structure. While, on the one hand, providing a mechanism for judicial review which is accessible and fair is important, consideration must always be given to appropriate limitations on access to the appeal system so as to achieve a practical balance.*[150]

Our analysis of appeals cases involved a full and systematic evaluation of the process leading up to the hearing of the appeals by the Full Court. This included an examination of litigants' preparation of appeal materials, and correspondence with Appeals Registrars regarding the formal steps that are required to be taken by all parties before the hearing of an appeal can be

148 Fogarty (1991).

149 See Family Law Council (1996), para 1.11 for a discussion of the discretionary nature of the family law jurisdiction in general, and the relationship with appeals.

150 ibid., 4.

reached. Unsurprisingly, the representation status of litigants involved in appeals had a direct impact on their ability to navigate the complexity of appeals practice and procedure. Elements of these procedural difficulties caused by representation status will be discussed in this chapter.

Rules Governing Appeals Procedure

The rules governing appeals practice and procedure are contained in Order 32 of the Family Law Rules. Appeals in each region are coordinated by the Regional Appeals Registrar, who supervises the production of materials, and who has responsibility for the settlement of the content of appeal papers at a meeting with both parties. The rules governing this settlement of the appeal book index (SABI) and the preparation of the appeal book are worth noting, as they appear to be a source of difficulty for many unrepresented appellants.

The content and format of appeal books are governed by Order 32, rule 14(1). The books must be indexed, have a title page, and be paginated consecutively. They must contain the notice of appeal (Form 42), the orders appealed from and reasons for judgment at first instance, relevant affidavits and other relevant documents (including counsellors' reports), a list of exhibits, and relevant parts of the transcript. The appellant is generally responsible for preparation of his or her own appeal papers.[151] Assistance may be offered to unrepresented appellants by Appeals Registrars,[152] which usually extends to assisting with preparation of the index. Once prepared, the appellant must file copies of the appeal books with the Appeals Registrar as directed (usually 6 to 8 copies), and also serve two sealed copies on the other party to the appeal.[153] If the appellant does not file the appeal books with the Appeals Registry by the date given at the SABI, or demonstrate due diligence in proceeding with the appeal,

151 Family Law Rules, Order 32 rule 15(1).

152 Order 32 rule 15(2).

153 Order 32 rule 15(3).

the Full Court may dismiss the appeal for want of prosecution.[154] Further, an appeal may be deemed abandoned if appeal papers are not filed or served at the latest 28 days after the due date given by the Appeals Registrar at the SABI.[155]

At the SABI, the Appeals Registrar decides, by reference to the grounds for appeal, which parts of the transcript of the first instance hearing are relevant to the appeal.[156] The appellant is then required to obtain sections of the transcript,[157] which is only available through Auscript (the Commonwealth's own reporting service). This is quite a substantial expense for the appellant, as transcripts run at a current cost of $8.25 per page. The Family Court is under no statutory obligation to provide assistance in obtaining the transcript (or parts thereof) and is not funded to do so.[158]

Difficulties Meeting Procedural Requirements

In the context of the rules enumerated under Order 32, as noted above, it can be argued that there is a relative complexity associated with preparation of appeals compared to matters at first instance, especially since the introduction of simplified procedures at first instance. This creates the problem, though, that unrepresented litigants who were able to negotiate the procedures leading up to trial may well need a greater level of assistance to be able to progress to appeal, where the procedures remain more complex.[159]

154 Order 32 rule 15(18).

155 Order 32 rule 15(5).

156 Order 32 rule 12(1)(a).

157 Order 32 rule 13.

158 The Court has commented on its absence of obligation to assist with the cost of transcript in Zabaneh (1991) FLC 92-239.

159 Australian Law Reform Commission (1999), 338-40.

The policy associated with the appellate function of the Full Court ensures that this complexity is deliberate.[160] It does, however, cause difficulties and unintended problems for the administration of the appeals process within the Court as a result of the number of appellants (particularly unrepresented appellants) who appear to be falling foul of the requirements of Order 32. This is revealed most significantly from our analysis in the navigation of the appeal book process, obtaining the transcript, and the time requirements for filing of documents.

Problems caused by the preparation of the appeal books

Representation status had a significant effect on the ability of a party to understand and successfully complete the administrative procedures involved in preparing a matter for hearing before the Full Court.[161] Fully represented appellants did not appear to face any difficulties in complying with the directions of the Appeals Registrars given at the SABI, and did not appear to suffer any impediment to meeting the other requirements of Order 32. Again, this supports the observation that lawyers act as 'translators' and guides, using their experience in the jurisdiction, and their client management skills, to steer clients successfully through complex legal procedures.

The important role of the family lawyer as a guide was reinforced by the fact that parties who were unrepresented at first instance but subsequently contracted legal representatives for their appeal, and those who had partial legal representation without ever being entirely represented, also in general did not experience any procedural problems attributable to the preparation of the appeal book process. Of the 29 appellants falling into this category, only two experienced any procedural difficulties in the preparation of the appeal. In both of these cases the appellants had undertaken the document preparation themselves before engaging a lawyer.

---

160 Family Law Council (1996), paras 1.11, 5.26.

161 The AIJA in its study of appellate court management has also identified this problem, and argued that there is a great desirability for close supervision of the content and form of appeal books. See Opeskin (2001), 59; see also Australian Law Reform Commission (1999), 378, 390.

For example, in one of these cases the appellant attempted to prepare all of the materials himself, only engaging a solicitor a week before the hearing. After the appellant presented his appeal books, the Appeals Registrar of the Eastern Registry contacted him to advise that they were 'not in an appropriate state for filing', as they contained no index, incorrect pagination, and an incorrect number of books had been lodged. The Appeals Registrar advised the appellant, who lived on the Gold Coast, that the defects would need to be remedied before the appeal could proceed, and suggested that 'as you live far away you should consider contacting a Sydney solicitor, get them to pick the books up, and fix them up for you'. The appellant finally decided to instruct counsel (through the assistance of the Appeals Registrar who put him in touch with the NSW Bar Association), at which point the appeal was able to progress to hearing.

The majority of difficulties associated with complying with the requirements of Order 32 involved appellants who were unrepresented throughout the matter (32 cases). Some of the problems involved with progressing through the preparation for appeal process included failure to comply with the directions of the Appeals Registrar, inability to draft and produce submissions, producing the incorrect number of books or sending books to the wrong parties, difficulties with filing documents, and including inappropriate material in the appeal books. In many of these cases, the unrepresented party was assisted by the Appeals Registrar to identify and overcome problems caused by procedural ignorance or ineptitude (as will be discussed below). Despite this guidance, however, many unrepresented parties failed to successfully complete the process of preparing the appeal book, and consequently their cases never reached final determination by the Court.

Matters deemed abandoned, withdrawn, or dismissed for want of prosecution

There were a variety of reasons for matters falling short of final determination.[162] The most revealing in terms of the procedural experiences of litigants in person were those that were abandoned, withdrawn at the door of the Court, or dismissed for want of prosecution, or because the appellant did not appear at the final hearing (9 cases). The most common problem leading to the abandonment of the appeal, as already described, was in the SABI, and the filing of the appeal book itself. This appears to be because of the complexity of these elements of the appeal process, that arguably require a level of legal skill to complete successfully.

For example, one case in the appeal sample involved a litigant in person who was in prison on remand awaiting trial for murder. This father wanted a review of orders denying contact with his child. His particular circumstances quite clearly made it very difficult for him to participate adequately in the appeal process, but elements of his dealings with the Appeals Registry are worth noting as problems for litigants in person in a more general sense. Apart from his inability to physically appear before the Court, and the fact that his grounds of appeal did not contain any real grounds in law, he also had significant difficulties in attempting to settle the appeal book index, especially in light of an application for summary dismissal from the respondent. There appeared to be a great deal of assistance given by the Appeals Registrar in advising the appellant about the procedural status of his appeal, but the matter was eventually deemed abandoned when the appeal books disappeared in transit to the Court.

Another such case involved a serial appellant, one subject to a s 118 order. This litigant in person appeared well versed in the language and procedures of the Court, and had a number of other matters running in the Court at the same time. The SABI was adjourned, and the time to file

162 Other reasons for no adjudication amongst LIP cases included no recorded outcome, dismissed with the consent of both parties, or settled: see Australian Law Reform Commission (1999), 377-78.

extended, but there appeared to be no action after this point, so it may be assumed that the appellant chose to abandon the appeal, possibly because he had other appeals on foot.

A further case involved significant procedural problems because the appellant in person wished to join another party to the appeal as a respondent, when that person actually had nothing to do with the substance of the appeal. The appellant was warned that if this course of action was not discontinued, costs orders would be made against him. The appellant refused, the Full Court heard the matter and ordered that he delete all references to the third party, and file an amended Form 42 within 28 days, or the appeal would stand dismissed. The new Form 42 was filed, but the appellant did not appear on the hearing date, hence the appeal was dismissed.

The Appeals Registrar had cause to contact another self-representing appellant about the nature of the appeal he wished to bring to the Full Court. The Registrar suggested that he would need leave to appeal because the order being appealed against was interlocutory in nature, and also advised that he seek independent legal advice. The appeal was then delayed, with more correspondence from the Registrar warning the appellant that the appeal was out of time, and that he would require an extension of time to appeal if he wanted to continue. The appellant did not file the draft index, and there was no response to a letter from the Registry advising listing, so the appeal was dismissed.

One 'procedurally challenged' litigant in person caused various procedural problems in two separate cases before the Full Court. In the first matter, the litigant in person did attend and complete the SABI, but did not file the appeal books in time and thus his matter was deemed abandoned. The second involved a similar situation: the unrepresented litigant filed his Form 42 with his grounds of appeal, but the appeal book was never filed, and this matter was also deemed abandoned.

Another example of a 'procedurally challenged' litigant in person withdrawing their matter before hearing was a case where there was again significant difficulty in the production of the appeal book. In this instance,

the appellant's solicitors ceased to act for him and his legal aid funding was withdrawn, so he acted for himself. This resulted in a further extension of time being granted, with which the appellant did not comply, and the appeal was eventually withdrawn, possibly because of the lack of legal representation during the crucial stages before the appeal.

The issues surrounding partial representation were also significant in another Southern Registry appeal. There were no problems with the SABI and filing the appeal books in this matter, but the submissions were not completed, and there was a significant history of costs applications against the appellant with many defaults, so the matter was struck out before it was heard by the Full Court.

The presence of lay assistance raised procedural issues in one Northern Registry file. There were a number of disputes arising from a decision of the Appeals Registrar at the SABI: the appellant applied to have this decision reviewed, but this application was dismissed. The appellant then filed an appeal against the dismissal, which was also dismissed by the Full Court. The appellant claimed that she had problems getting legal representation to support her interests in the proceedings, and also sought interim orders to restrain the activities of the respondent's solicitors. The fact that the appellant had both her new husband and another person speaking for her further complicated the proceedings. Eventually the matter was dismissed for want of prosecution.

Language problems can compound procedural issues for unrepresented litigants on appeal. One Northern Registry matter involved parties from a non-English speaking background, who misunderstood the process before the appeal hearing. At a mention before the Court, the judge commented that the appellant had not diligently pursued the appeal because he had been advised that it should not proceed, and he had not formally advised the Court or the respondent of his intention to proceed with the appeal. The Appeals Registrar wrote to the appellant requesting that he fill in a Form 42B or the matter would be listed for dismissal. He was then informed that it would be listed for dismissal, and then the Registrar wrote one more time

to inform him about the hearing time. The appellant did not appear at the hearing, and the appeal was dismissed.

Difficulties with the transcript

Within our sample, there was a small group of cases (7) in which specific difficulties with obtaining the transcript caused the preparation of the appeal book process to be disrupted, or the appeal itself to be abandoned. These files are worth examining in some detail, despite the small number, as the problems that arise seem to be systemic, affecting parties irrespective of their representation status. It must also be noted that the number of parties having difficulty complying with the rules governing appeal books and the inclusion of transcript may in fact be greater than our qualitative sample indicates. We were only able to comment about these issues when they were specifically raised by parties in their grounds or submissions, or noted in memos or correspondence by the Appeals Registrars.

An obvious difficulty involved in obtaining the transcript for inclusion in the appeal book was cost. One litigant, who was represented throughout, directly challenged the rule that litigants are to bear their own costs for production of the transcript. The solicitor for this party, who it could be argued was inexperienced in the jurisdiction, wrote to the Appeals Registrar contending that an application of Order 32 rule 13 would cause her client 'undue hardship'. The solicitor filed a **Form 8** to obtain orders to force the Family Court to provide funds for the transcript, arguing it was the only way the appeal could proceed. Unsurprisingly, especially in light of the decision in *Zabaneh,*[163] the Court held that the decision of the Appeals Registrar to refuse to provide funds was an 'administrative decision', dismissed the application, and ordered the appellant to pay the respondent's costs for the application. The solicitor then attempted, unsuccessfully, to obtain a stay of the appeal proceedings to enable her client to 'save the $3000 necessary to obtain the transcripts'. On an administrative level, the Appeals Registrar extended the date for

163 (1991) FLC 92-239.

finalisation of the appeal books to accommodate the appellant. This deadline was not honoured and the matter was eventually deemed abandoned.

The issue of cost of the transcript is therefore also linked to an inability to fulfil time requirements for the production of the appeal books; at least six other parties, all of whom were unrepresented, indicated that they were unable to meet the deadline date set at the SABI. One of these parties, who was partially represented, changed solicitors frequently and had periods where he prepared his own documentation, indicating a level of dissatisfaction with the advice he received. This litigant attempted to stay his appeal proceedings as he argued that he was unable to fulfil the orders from first instance of a direct payment to his former wife in lieu of property settlement. He argued in a Form 42A (prepared on his own behalf) that due to this debt and the fact that his court documents were held as security for costs by his former solicitors, he had no money to obtain fresh transcripts. The preparation of his appeal books consequently fell into abeyance, but the appeal finally went ahead when he instructed new solicitors, who obviously assisted him with the production of these documents on a deferred billing system.

Other litigants, without the financial shield and managerial assistance of legal representation, did not fare so well, despite the effort of Appeals Registrars to assist them with time extensions. One of these appellants, from the Southern Registry, entered into lengthy correspondence with the Appeals Registrar, asking for an extension of time in order to meet the costs of the transcript. A self-employed shopkeeper, he argued that he would need to postpone the finalisation of the appeal books until after the Christmas period to generate more funds. The Appeals Registrar gave leave for an initial extension, but when the appellant required even more time, she was compelled to write to the other party for their consent. The respondent's solicitor refused to consent, arguing that 'The appellant has been offered every opportunity by the Court to proceed with his appeal. In our opinion he has abused the court process and is a vexatious litigant. It is our submission that it is inequitable to extend the time [for him] to file his appeal books and thereby delay taxation and the question of payment of

our accounts.' The outcome of this matter was that the respondent refused to appear, and the appeal was dismissed as a direct result of poorly conceived grounds for appeal, not ultimately supported by the sections of transcript finally provided.

This file provides a vivid illustration of the tensions caused by the need to give support and assistance to unrepresented parties on the one hand, and the need not to disadvantage represented parties in the process. The matter also indicates that some of the guidelines provided by the Full Court on the handling and treatment of unrepresented parties contained in *Johnson* and *Re F*, and directed at trial judges, may also need to be applied and redirected toward the administrative decisions made in chambers by Appeals Registrars. Those particularly relevant might be guideline two (explaining to the litigant in person any procedures relevant to the litigation) and guideline eight (attempting to clarify the substance of the submissions of unrepresented parties, 'especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated').[164]

Overall, the results of our analysis give some support to the recommendation of the Family Law Council in its 1996 report on *Family Law Appeals and Review* that steps be taken to reduce the costs of transcripts, and that the function of producing official transcripts of Family Court proceedings should be subject to competitive tender.[165] This would not, of course, eliminate the difficulties caused by the inherent inability of most unrepresented parties to navigate the deliberately complex process of mounting a Family Court appeal, but would alleviate the prohibitive cost burden many parties (both represented and unrepresented) currently face, and which does not seem to be a necessary element of the policy basis of the appellate function within the jurisdiction.

164 Johnson and Johnson (1997) FLC 92-764, para 121.

165 Family Law Council (1996), recommendation 3.

Appeals Registrars: Procedural Administrators, or Legal Tutors?

The role of the Appeals Registrar, according to the rules, is to be a procedural administrator.[166] As noted, it is the Appeals Registrar who supervises the production of materials, and who has responsibility for coordinating the settlement of the content of the appeals papers for both parties. Our analysis of appeals procedure, most notably drawn from correspondence between the parties and the Appeals Registrar and the Appeals Registrars' own internal memos, when included in the court file, indicate that the role of the Appeals Registrar is in fact much wider and more significant than that of a procedural administrator.

The Appeals Registrars, in the fulfilment of their administrative role, and because of the unrepresented status of many appellants, appear to be required to extend their coordination responsibilities and provide a greater level of assistance to parties than was perhaps ever envisaged by the Family Law Rules. Order 32, Rule 15(2) does note that the Appeals Registrars can in fact offer assistance in the preparation of appeal papers if they are satisfied that preparation of the appeal papers without assistance would impose hardship on the appellant. This unambiguously includes many unrepresented litigants. However, the level of assistance some Appeals Registrars are providing to unrepresented appellants goes beyond mere document preparation. Our analysis demonstrated that it appears the Appeals Registrars are in fact providing many unrepresented parties with *ad hoc* services as legal tutors, which seems to result in a protracted amount of court time being taken up with the administration of appeals.

There were 35 cases involving unrepresented parties within our qualitative sample in which this extended role of Appeals Registrar could be clearly identified. In most cases, the assistance given extended to the provision of advice on how to construct grounds and run the appeal, and the lenient administration of time restraints under the rules to assist legally

166 Australian Law Reform Commission (1999), 389.

uneducated and ill-prepared parties. In general, the assistance at the start of the matter given to unrepresented parties was clearly within the scope of Order 32 Rule 15(2), with the Appeals Registrar providing detached advice regarding document preparation, but this soon escalated into a much more individualised relationship in which parties referred to the Appeals Registrar as a quasi legal representative. More often than not this was characterised by considerable correspondence (both written and over the telephone) between the Appeals Registrar and the unrepresented appellant, and was not limited to the exchange of formal directions related to the SABI.

For example, in one file involving a non-English speaking background appellant, the Southern Appeals Registrar provided advice on service, filing of documents, the correct grounds for appeal, and also provided not only a prepared brochure outlining the appropriate steps to take in running an appeal, but also the correct forms. When the appellant incorrectly filed a Form 42B, she even contacted him, provided him with the correct form, and expedited the matter to ensure that it was kept within the system. Despite this level of assistance, and despite continuous correspondence and leniency with regard to filing dates, the matter was ultimately deemed abandoned, as the appellant was unable to finalise his document preparation. In other matters, the Appeals Registrars were seen to assist with submissions, re-send misdirected papers to the other side, give advice about the scope of the appeal, give advice about service and trial evidence, and give advice about the appropriateness of the grounds for appeal.

The role taken by Appeals Registrars differed according to the individuals in these positions. All three of the Appeals Registries in our study were headed by obviously conscientious and professional Registrars, aware of their obligations under the rules, but who also displayed a level of sympathy to many unrepresented parties by their wide interpretation of Order 32, Rule 15(2) and the hardship parties would endure without their assistance. This said, the Appeals Registrar from the Southern Registry was much more likely to engage in lengthy communications with unrepresented parties in meeting their procedural (and quasi-legal) needs. It must be noted, however, that the individual interpretation of the Appeals

Registrar role was directly related to the number of unrepresented appellants filing at the Registry. The Southern Registry, for example, dealt with the majority of the 35 cases falling within the category under discussion. This could, of course, be an indication that the Registrar was more inclined to write memos and correspond directly with unrepresented appellants. But it could alternatively be an indication of the identified need, caused by greater contact with 'procedurally challenged' or 'vanquished' unrepresented appellants, to provide them with personalised and explicitly clear instructions and directions in order to prevent their cases being deemed abandoned or withdrawn. As noted earlier, the Southern Registry had the highest proportion of unrepresented appellants overall.

The sub-sample of 35 cases in which unrepresented parties drew upon the advice and direction of Appeals Registrars also included a number of 'serial appellants' who appeared to disregard or disrespect the conventions of obtaining advice from qualified legal personnel. These appellants demonstrated a high level of expectation of the Appeals Registrar, demanding legal advice and constant and continuous personalised support and assistance.

A serial appellant from the Southern Registry provides an outstanding example. Involved in two appeals, with five separate files in the Court (one as a respondent), the appellant built up a relationship with the Appeals Registrar by constantly demanding from her information about dates, rescheduled dates, appropriate forms, and appropriate procedure, more often than not complaining to the Registrar individually, or seeking review of the Registrar's decisions, if she believed they were detrimental to her cases. In one of her matters, for example, the hearing date had been administratively adjourned by request of the other party for a month, and the appellant wrote to the Appeals Registrar that she was 'upset' that she had this information from the other party's solicitor, as opposed to the Registrar herself. Further, the respondent in this matter was excused from the SABI by prior arrangement (to quarantine the respondent, as the appellant was in the process of being deemed vexatious under s 118). This decision again 'upset and angered' the appellant, who wrote to the Appeals

Registrar: 'I had no notice of this decision nor any opportunity to object to it...I should have been told how I could file an objection or an application to expedite the appeals or seek interim orders for maintenance from a judge of the appeal division.' The appellant subsequently, on the settling of the appeal papers, wanted extra (and extraneous) documents included. She again wrote to the Appeals Registrar, hurt by her 'treatment': 'I felt I was told very rudely that people would not enter into an argument with me. I made many unsuccessful enquiries of several authorities in the Family Court system as to the manner in which decisions could be challenged. Having myself found out what the relevant rules are [I am now trying] to find out how to implement them.'

As can be seen through this example, serial unrepresented appellants quite openly used their communications with the Appeals Registrars as one of the ways in which they learnt about the law, and the family law jurisdiction, perhaps perceiving such communication as a sanctioned method of obtaining information. Reading these appellants' files, they emerge as singularly bright and autodidactic individuals, using correspondence with Registrars (and often the other party's legal representative) about rules, case law and procedure as tutorials. More often than not these parties would quote sections of the Act and sub-rules of the Family Law Rules that had been cited in correspondence from the Court, back to the Registrars, arguing in many instances that they had been subject to the denial of natural justice or procedural fairness in the administration of the appeals process.

This means of learning how to use legal language and process was not limited, however, to engaging in lengthy correspondence with the Appeals Registrar. One appellant, in the process of corresponding with the Appeals Registrar for an extension of time on the filing of his appeal books, indicated he would need three months to complete his learning 'program': 'I have attended sittings of the Family Court in order to observe the procedure, protocol and to familiarise myself with the Family Court environs...I have recently become a non-student member of the UNSW library so that I may access their law library facility and borrow texts relevant to the...appeal being conducted by me. I use these facilities

extensively to review both reported and unreported cases of the Full Court.'

In some instances, the unrepresented appellant would demand a review of the Appeals Registrar's decision. This need for vigilance against review applications by overly litigious unrepresented parties is arguably another reason for the high level of care and time taken by Appeals Registrars in communicating frequently, clearly and at length with unrepresented parties about the process of their appeals.

One file from the Northern Registry provides a good example. At the SABI, the Appeals Registrar informed the appellant (who attended with her new husband and another person, both of whom purported to be acting as McKenzie friends, although not authorised to do so) that her materials were not dealing with the real substance of the appeal. Specifically, the Appeals Registrar advised the appellant that her Form 42A to adduce fresh evidence on sexual abuse matters was in fact not relevant as these matters had not been before the trial judge. The meeting took half a day to complete, partly because the appellant was from a non-English speaking background, but also as a result of her (and her lay advisors') refusal to accept the Appeals Registrar's advice.

The appellant subsequently filed an application to have the Appeals Registrar's decision reviewed, which included a contention that as an unrepresented person she should not have to prepare her own appeal materials. A judge heard the review and upheld the Appeals Registrar's decision. In his reasons for judgment, the judge reinforced the policy basis behind the rules governing appeals, finding that there was no obligation on the Appeals Registrar to prepare the appeal, that it would be inappropriate in a complex matter to expect the Registry to fulfil this function, and that the Court was 'not resourced to assist in this way'. Further, he found that the documents the appellant wished to have included in the appeal book should not be included, and further removed an affidavit and a copy of some domestic violence orders, as they were not relevant to the substance of the appeal. The appellant subsequently filed other ancillary appeals attempting to force the Registrar to assist with photocopying costs, to

remove the judge who decided the review of the matter, and to include further materials not on point with the issue at first instance.

This case provides a further example of the tendency of many unrepresented parties to misguidedly view the appeal process as a means of creating a discursive space to 'tell their whole story', and bring all of their issues with the other party to a point of exhaustion. The case also indicates that despite the best efforts of Appeals Registrars to fulfil their obligations under the rules, there is ultimately a tension for them between administering justice in a timely and effective manner, and assisting unrepresented parties to complete the appeal process without becoming identified as a legal resource.

In conclusion, the obvious outcome of the level of care taken and assistance given to unrepresented appellants by Appeals Registrars is that the time taken to process appeals from the filing of the Form 42 to a hearing before the Full Court is increased.[167] This undoubtedly adds to the costs of litigation in the Family Court, both in its administration and for individual parties.[168] Combined with any unfairness that represented parties may perceive as a result of Appeals Registrars' leniency in applying the rules to unrepresented appellants, there is a strong argument that the court's guidelines for appropriate and fair ways in which to treat unrepresented parties (and their represented opponents) outlined in *Johnson* and *Re F* should be suitably revised and re-directed toward the appeals process, as well as hearings *per se*.

167 Statistically, there was no significant difference between the average duration of cases in the qualitative sample involving an unrepresented litigant and those not involving an unrepresented litigant. However, the average figures included cases in which unrepresented litigants had been 'vanquished' relatively early in the case, as well as those in which the preparation of appeal book process had been prolonged, so these two phenomena may have cancelled each other out overall.

168 Australian Law Reform Commission (1995), recommendations 21 and 22; Family Law Council (1996), paras 2.61-2.64; Leaver (1994), 92-93.

13

The Jurisprudence of Appeals

The primary research question motivating our analysis of appeal cases in the Family Court was whether the incursion of increasing numbers of unrepresented litigants at the appellate level was having an effect on the jurisprudence of the Court. By examining all of the judgments in the cases in the qualitative sample (n=117),[169] and reading these judgments against the background of appeal procedure and document preparation identifiable from individual files, we found that the representation status of the parties had little effect on the way the Full Court approached the determination of appeals (as opposed to deciding their outcomes).[170] This appeared to be primarily a result of the fact that the fundamental jurisprudential approach of the Court is to preserve the wide discretion of the trial judge.

Our analysis revealed also that the Full Court does 'make law' on substantive issues brought before it, and will even find jurisprudential merit in some cases regardless of the parties' understanding or presentation of the issues. In other words, the Court will go beyond the case presented by the parties, identifying from the factual and legal material presented to it points of law and procedure worthy of comment, or in need of development. We refer to this process as 'inscribing jurisprudential merit'. This occurred, however, in only a small number of cases (11), including cases involving unrepresented litigants.

169 There was no judgment in 35 of the 152 cases, because the matter was abandoned, withdrawn, settled, or summarily dismissed. Of the 117 cases that did reach final determination, 76 were brought by represented appellants and 41 by unrepresented appellants (21 unrepresented throughout the appeal, and 20 partially represented).

170 In relation to outcomes, 61% of unrepresented appellants had their appeals dismissed compared to 43% of represented appellants, indicating that the appeal grounds of represented appellants were less likely to be baseless, or unconnected to the issues decided at first instance, as discussed in previous chapters.

In addition, although unrepresented appellants may not have diminished the Court's ability to make law, their mere existence at appellate level has created new issues for the Court to deal with. This is primarily because of difficulties with the adversarial process at trial, and difficulties with the complexity of appeals procedure and document preparation, as discussed earlier. These difficulties have been raised in various ways before the Full Court, and have resulted in a distinct body of jurisprudence on litigants in person as a group.

Appellate Principles and Jurisprudential Approach in the Family Court

The principles applied to the hearing of appeals in the Family Court generally reflect a uniform model that has evolved in intermediate courts of appeal in Australia. The primary principle is that an appeal is not a re-hearing of the trial, on either questions of law, credibility or disputed facts, although there is a limited ability for appellate courts to examine facts and fresh evidence.[171] Secondly, in equitable jurisdictions where the basis for a trial judge's orders is discretionary, there is a marked reluctance of an appellate court to interfere with the trial judge's findings if they are reasonably open on the evidence.[172]

These principles are perhaps uniquely emphasised in the Family Court, stemming from the fact that the Family Law Act specifies lists of factors to be taken into account when making decisions, without dictating the weight to be given to those factors.[173] This approach is mainly due to the recognised fact that family law has a different character from other forms of litigation. Primarily, as family law disputes arise from interpersonal situations, involve finding long-term solutions to protect the interests of children rather than merely remedying past actions, and involve 'facts'

171 Family Law Act s 93A(2).

172 See Fogarty (1991), 5 for a general discussion of these principles.

173 For example, Family Law Act ss 68F, 75(2).

which are in many cases assertions or matters of perspective,[174] the discretionary power of the Family Court at first instance must be very wide. This wide discretion is also necessary as the Court encounters an extreme range of cases involving parties of diverse language and economic background, ethnicity, gender, and increasingly representation status, which require trial judges to adjudicate disputes which appear very similar but are in reality quite different.[175]

This centrality of the discretionary nature of decisions in the Family Court has recently been restated in the case of *Re F*,[176] in which the Court noted that 'the ultimate function of the Court in family law matters [is] doing justice as between the parties in the dispute at hand on the best evidence that may be adduced within the circumstances of the case'.[177] This centrality of discretionary decision-making, however, creates inevitable tensions when applied to the appellate process. As noted earlier, despite the very coherent and consistent authorities which ground an appellate court's reluctance to make findings contrary to those of the trial judge,[178] some parties, without the certainty of rule-based decisions, fail to understand the reasons behind the outcome in their matters, and tend to view the appeal process as an opportunity for a re-hearing, which disrupts one of the primary principles of the appeal process itself.[179] Our analysis indicates that this difficulty of understanding the appeal process is the particular province of unrepresented appellants.

Further tension arises, however, in the need for an appeal court to establish common principles, despite the wide exercise of discretion at first

174 See for general discussion Australian Law Reform Commission (1999), 317-18.

175 Family Law Council (1996).

176 *Re F: Litigants in Person Guidelines* [2001] FamCA 348.

177 ibid., para 227.

178 See generally *House v King* (1936) 55 CLR 499 at 504; *Gronow v Gronow* (1979) FLC 90-716; *De Winter v De Winter* (1979) 23 ALR 211; *Mallet v Mallet* (1984) 156 CLR 605; *Norbis v Norbis* (1986) 161 CLR 513; *Dearrman v Dearrman* (1908) 7 CLR 459; *Flannery v Cohunna Sewerage Authority* (1976) 51 ALJR 135; *Chambers v Jobling*, (1986) 7 NSWLR 1.

179 For a critique of the wide discretionary powers of the Family Court see Fagan (1990). See also discussion in Opeskin (2001), 103-104.

instance. As the Family Law Council in their review of family law appeals noted:

> *A pluralist society needs the binding force of clearly established guidelines as to what is seen as acceptable parenting behaviours and appropriate standards for the fair disentanglement of the financial aspects of personal relationships, [and] the appeal system seeks to acknowledge this diversity and at the same time to draw out the common principles.*[180]

From this perspective, the Full Court of the Family Court is invested in the process of making law, and developing a body of jurisprudence around the principles enunciated by the Family Law Act, as can be seen through the decisions in, for example, *Cilento, Cowling, Norbis, Mallet,* and *B v B.*[181]

Thus, it could be argued that there is a central tension in family law appeals between the need to establish principles and guidelines for the community in relation to the equitable distribution of property and safeguarding the best interests of children upon separation of their parents, and the responsibility to uphold the wide discretion of trial judges in adjudicating fairly the diverse fact scenarios in which these principles are applied. The operation of these two elements of Family Court jurisprudence will be discussed below, in relation to our qualitative sample.

The Re-exercise of Judicial Discretion

As stated, the primary jurisprudential approach of the Full Court is to preserve the wide discretion of trial judges, to enable them to determine cases equitably. It is not surprising, therefore, that in two thirds of the cases in the qualitative sample in which there was a judgment, the Court refused

180 Family Law Council (1996).

181 *Mallet v Mallet* (1984) 156 CLR 605; *Norbis v Norbis* (1986) 161 CLR 513; *Cilento & Cilento* (1980) FLC 90-847; *Cowling & Cowling* [1998] FamCA 19; *B & B* (1997) 21 FamLR 676.

to interfere with the decision of the trial judge (76 of 117 cases). Unrepresented appellants were not over-represented in the Court's refusal to re-exercise discretion.[182]

In general, when the Full Court did re-exercise the discretion of the trial judge, it did so in property matters. Of the 27 matters in which there was a re-exercise of judicial discretion, 22 involved property issues, and most of these (19 cases) involved fully represented parties. This tendency to re-exercise discretion in property matters reflects the fact that there is often material before the Full Court that has been considered by the trial judge, such as valuations, which enables them to actually do so. In most cases in our sample, the re-exercise of judicial discretion in property matters involved a review of the trial judge's reasons for assessing contributions to property and the weight given to s75(2) (future needs) factors, and a subsequent re-adjustment of the property distribution. In doing so, the Full Court often re-iterated the principles enunciated in *Gronow* and *House*, and gave these authorities primacy in their determination.

For example in one case, which involved an unrepresented appellant, the Court found that there had been an error in the trial judge's approach in determining the asset pool, despite an appropriate exercise of discretion in the evaluation of s75(2) factors. The Court re-exercised discretion to the extent of clarifying that a global approach was appropriate, but this did not actually interfere with the final property distribution *per se*. In explaining the re-exercise of discretion in the judgment, the Court appeared to be careful to enunciate the principles in *House* and *Gronow*, as the result would have otherwise appeared to be unsatisfying for an unrepresented appellant, ill-versed in the importance of discretionary principles, and seeking a larger slice of the marital property pool.

The Full Court, predictably, was even more reluctant to interfere with a trial judge's exercise of discretion in children's matters. This appears to be a result of the fact that children's matters are by nature more dependent upon a trial judge's assessment of the actions and credit of the parties and

182 Unrepresented appellants constituted 35% of the overall appeal sample, and 39% of those for whom the Court refused to re-exercise discretion (n=30).

the quality of the proposals they have made for their children, and it is difficult for an appellate court to substitute its own assessment of these subjective factors from merely reading sections of the transcript.[183] There were only three children's cases in the qualitative sample in which there was a re-exercise of discretion, although two of these involved unrepresented appellants. In two of the cases (one represented, one unrepresented), the justification for a re-exercise of discretion appears to have been that the appeal was against interim orders only, thus the Full Court's re-exercise of discretion did not affect the ultimate parenting arrangements. For example in one case, the Court suspended interim contact altogether until the pending appeal against the final orders had been heard.[184]

The third case involved significantly different issues, and is a good example of the need both for wide discretionary principles, and for an appellate court to have the ability to intervene in a trial judge's exercise of those principles. In this case, the unrepresented appellant suffered from epilepsy and psychiatric problems. These problems, and her admission to a psychiatric institution in the middle of proceedings at first instance, resulted in her non-appearance before the trial judge, who saw fit to make orders which went against her, in her absence. The Full Court noted that the trial judge had made a serious error in that he did not give reasons in his judgment for a decision that denied the appellant natural justice 'in a serious and a significant way'. Noticeably, it is partly the fact that the trial judge seems to have ignored the particular circumstances of this litigant (her lack of representation, and her mental health problems) in the exercise of his discretion, that persuaded the Full Court to re-exercise discretion and allow the appellant to care for her children, after due consideration of all the evidence before the trial judge.

There were 13 cases in our sample (seven involving unrepresented litigants) in which the Full Court found that there was an error at first instance in the exercise of discretion, but they could not ultimately justify

183 Fogarty (1991), 6.

184 See *Cooke v Stehbens* [1998] FamCA 154.

a re-exercise of discretion. In these cases, the Court remitted the matter for rehearing.[185]

In general, the judgments in our sample revealed not only that *House* and *Gronow* were the defining authorities in most determinations, but that there was a genuine reluctance to interfere with trial judges' decisions. In the few cases in which the Court was expressly critical of the trial judge's approach, there had been a serious disregard of a party's circumstances (as in the case mentioned above involving the appellant mother with psychiatric problems), or significant errors made by the trial judge. Otherwise, the power of the Full Court to superimpose its own wide discretion over that of the trial judge was kept tightly in check. This, in itself, limits the capacity of litigants' representation status to affect the Full Court's decision making processes.

Building Precedent

The observed tension between the primacy of discretion and the need for the Court to establish doctrinal certainties reveals itself in several ways. The first is that legal arguments are sometimes not raised by the parties in factual scenarios where it would be appropriate for the Court to comment on, and develop, the existing authorities. Second, if the status of particular authorities is raised by the parties, the Court often does not comment on them if it feels they are antithetical to the discretionary issues dominant in the case, thereby denying the opportunity to develop case law on the matters the parties (or their representatives) have felt are worth clarification. Third, the Court will sometimes inscribe jurisprudential merit on matters brought before it by citing authorities in its judgments, and identifying points of law and principles, not necessarily identified or raised by the parties at all. These three elements, which will be discussed

185 In the group of cases remitted for rehearing, 7 were property matters (5 involving represented parties, and 2 involving unrepresented parties) 4 were solely children's matters (2 involving a represented party, 2 involving unrepresented parties), one was a combined children and property appeal involving a represented appellant, and one was a child support matter, also involving a represented appellant.

below, show that the arguments raised by parties, regardless of representation status, often have little effect on the Court's direction regarding the building of precedent. This point is further borne out by reference to some of the cases that the Court put forward for reporting, and also some that it did not.

The Court's review of case law raised by parties

In 67 cases in the overall qualitative sample (44 per cent), no case law was raised at all by the appellant or the respondent.[186] Of the 85 cases in which at least one of the parties cited case law, a majority involved represented litigants. As noted earlier in Chapter 11, it is likely that 'procedurally challenged' or 'vanquished' unrepresented appellants may have had such a paucity of legal knowledge or experience that they were unaware of the benefits of backing up their claims with authority, or if they were, may have had difficulty in knowing how and where to access such information. For the represented appellants who did not cite any case law in their submissions, it may have been a reflection of their representatives' belief that a reliance on case law in a discretionary jurisdiction was pointless, or that the appeal was based on a straightforward assessment from the transcript at first instance of the trial judge's exercise of discretion, and that the principles governing the Court's approach on this matter were so well known that they did not require reiteration. Whatever the intent behind the decision not to include any authorities for the Court to consider, it appears that some opportunities for the Court to build upon existing precedent were lost in cases in which both parties were represented, although as discussed below, the Court in some appeals did insert case law not mentioned by the parties into its judgments in order to make broader points of law.

In the 84 cases in which at least one party did cite case law, and there was also a judgment, relevant citations were actually referred to in the

186 In 94 cases, the respondent did not cite any case law.

judgment in under half of the cases.[187] One Eastern Registry case, for example, involved an overly legalistic represented appellant, who was attempting to argue that he had been denied procedural fairness by virtue of a previous order which precluded him from interfering with medical and hair appointments for his child. His submissions included a reference to the *Teoh* case[188] to support his argument about procedural fairness. The Full Court declined to comment on this case at all, attempting in its judgment to re-focus the appellant onto the narrow issues in the case, and to a certain extent 'hose down' the rising level of litigiousness.

Another indicator of how much importance the Court places on the citation of authorities comes from an examination of cases in which the Full Court did mention one of the party's authorities in the judgment, but did not refer to others that had been put forward in support of the case. In 20 of the 37 cases which contained citations which were referred to by the Court there was no disparity between the authorities cited by the parties and their use by the Full Court, but in 17 cases, parties cited some authorities that were not mentioned in the judgment. The number of extraneous authorities ranged from one to seven, providing support for the suggestion that parties used case law fairly freely to bolster an argument before the Court. There appeared to be a difference between the experiences of represented parties and litigants in person in this respect. In all of the cases involving fully unrepresented appellants there was a disparity between cases cited by the party and their use by the Court, however, two partially represented litigants and 18 represented parties appear to have used authorities that the Court considered to be valid. On the other hand, 12 unrepresented parties

187 Of the 84 cases which reached final determination and which also referred to case law, the Full Court only mentioned or referred to the cited case law in 37 cases. Of these, 30 involved represented appellants.

188 (1995) 183 CLR 273. The central issue in the *Teoh* case was whether the fact that the appellant had Australian born children could prevent him from being deported. The appellant relied on the Convention of the Rights of the Child to create a basis for a legitimate expectation that the Department of Immigration should take the maintenance of a family unit into consideration when making decisions about deportation. A High Court majority upheld this argument, and found that procedural fairness required the making of proper inquiries into a person's familial situation and responsibilities before ordering deportation.

and five parties with legal representation referred to case law that was not cited in the judgment at all. Again, this appears to be a reflection of the difficulties most unrepresented parties face in navigating the course of appellate proceedings due to their lack of legal skill, information and knowledge.

One Southern Registry appeal file illustrates the Court's willingness to ignore authorities cited by any party. This case involved complex issues surrounding orders for the sale of property and provision for a child maintenance trust. The central issue was whether this arrangement complied with the Child Support (Assessment) Act. Each party, both represented, cited a significant, well-prepared list of relevant case law in their submissions to the Full Court. In finding that the grounds for appeal were not established, the Full Court made no reference to any of the case law cited by the parties, but rather based its decision on statutory interpretation of the legislation itself.

The inscription of jurisprudential merit

The counterpoint to the lack of judicial comment on case law raised by the parties was the fact that the Full Court did insert cases and other materials into its judgments that were *not* raised by the parties, in order to build precedent, or create dicta about various principles. Once again, the judgments in which the Full Court chose to inscribe jurisprudential merit involved both represented and unrepresented appellants, although the Court was more likely to do so where represented parties were involved (9 of the 11 cases in the sample). In the two cases involving unrepresented appellants, the Full Court, as will be discussed below, found the issue of how trial judges should best approach the carriage of cases involving unrepresented parties to be jurisprudentially important. The inscription of jurisprudential merit on some appeals reinforces the fact that arguments raised by the parties have limited effect on the Court's direction in the building of precedent or doctrine.

The cases in which this process of inscription of jurisprudential merit occurred were varied. In three cases, the Court mentioned case law not

cited by the parties in order to ground the arguments made, and to give the body of law on that issue some internal consistency. For example, in an Eastern Appeal case in which the central issue was whether the trial judge's findings were supported by the evidence before him, the Court made specific reference to the decision in *De Winter*[189] in order to 'record the principles which govern that argument'.

In two other cases, the Court introduced authorities to distinguish the argument being raised by the parties, and to solidify the Court's approach on the issue at hand. This occurred, for example, in a Northern Registry case, subsequently reported as *Tobin v Tobin*.[190] One key issue in *Tobin* was the definition of 'parent' in relation to the Child Support (Assessment) Act. The appellant (through her representative) did recognise this as an issue, but the main thrust of the grounds for appeal and submissions revolved around attempts to disprove the fitness of the respondent to be considered as a parent, and relied primarily on broad dictionary definitions of 'parent' to do so. The Full Court, however, viewing the case as an important opportunity to develop the case law around the meaning of the term 'parent', found that the appellant's approach was too broad and inconsistent with the Family Law Act, so it invoked the cases of *B v J*[191]

189 *De Winter v De Winter* (1979) 23 ALR 211. The majority of the High Court held in this case that in determining whether an order was 'just and equitable as between the parties' there is an element of discretion and there is a margin within which the Court may act. Despite the fact that in this case the trial judge had 'some misapprehensions as to fact', and the discretionary judgment was based on a number of mistakes, it was 'well within the range of discretion having regard to the totality of the facts presented to him'.

190 *Tobin and Tobin* [1999] FamCA 446.

191 *B and J* (1996) FLC 92-716. This case involved a sperm donor arguing that he was not a person from whom child support was entitled to be sought under the Child Support Assessment Act. The Full Court held that for a person to be considered 'a parent' of a child resulting from an artificial conception procedure pursuant s 60H(3) of the Family Law Act, they must be defined as such under a prescribed State or Territory law, and in the absence of such a law, a person could not be construed as a parent for Family Law Act purposes. The appellant was thus successful in his claim, but the Court called for legislative clarification, and claimed that s 60H did not inherently narrow the category of parent, although the requirement for legislative prescription did.

and *Hunt*[192] in order to clarify that there was nothing in the Child Support (Assessment) Act to expand the Family Law Act's definition.

In other instances, the Court inserted authorities that had been decided after the appellant's submissions had been made. The most striking example of this was the need to state the principles of *Wakim*[193] in an Eastern Registry appeal that had sought to have a cross-vested assault proceeding heard by the Court.

More interestingly, the Court chose in some cases to develop or clarify the existing law by redefining the issues as presented by the parties.[194] Another Eastern Registry case provides a good example. The grounds of appeal in this case, which involved a represented appellant, were that the trial judge had denied the appellant natural justice in prejudging conclusions before the close of evidence, that he had erred in his decisions about the best interests of the children, and that the orders were ambiguous and outside the scope of the judge's discretion. The Court, however, identified from the material before it that the key issue was actually the trial judge's lack of adequate reasons. In discussing this important principle, which had not been identified by the parties, the Court discussed and approved the test in *Bennett*,[195] and also cited with approval the decision of the Court in *A v J*.[196]

---

192 *Hunt and the Minister for Immigration and Ethnic Affairs* (1993) 41 FCR 380. The appellant in this case was seeking a visa on the grounds that she was the one 'remaining relative' of her step-father in Australia. The Court held that widening the scope of the definition of 'parent' under the Family Law Act would make it difficult for 'all hard or difficult cases [to be] accommodated by it'. The Court rejected the relevance of considering the substance of familial relationships and relied instead on an interpretation of the words in the Migration Act.

193 *Re Wakim; ex parte McNally; Re Wakim; ex parte Darvall; Re Brown; ex parte Amann; Spinks and Ors v Prentice* [1999] HCA 27. See discussion at note 102 above.

194 Eg. *Director-General Department of Families, Youth and Community Care & Moore* [1999] FamCA 284.

195 *In the Marriage of Bennett* (1990) 14 Fam LR 397. The legal issue in this case concerned the ambit and legitimacy of judicial discretion. The Court held that in general, the Full Court should be able to discern either expressly or by implication the path by which the trial judge has reached their decision. The Full Court circumscribed in this case the limits of judicial discretion, and provided a clear process by which decisions should be arrived at, and reasons given.

196 *In the Marriage of A & J* (1995) 127 FLR 79. The appellant claimed in this case that the trial judge had retrospectively granted legal aid to the respondent by awarding them costs, and

The Full Court used the opportunity presented by the case to discuss, clarify and uphold the principles governing provision of adequate reasons, which also grounded its decision to allow the appeal.

Reported cases

Interestingly, the above case was not reported, despite the fact that the Full Court obviously viewed it as a good opportunity to clarify the case law and principles that were discussed. This raises the question of why certain judgments are selected for reporting by the judges, and what developments in case law and policy directives the Court intends to impart to the community in doing so. An examination of the cases reported from the qualitative sample further illustrates the point that the arguments raised by parties, regardless of representation status, and regardless of what merit they may believe those arguments to possess, often have little effect on the Court's direction regarding the building of precedent.

There were 23 cases from the qualitative sample that were reported.[197] It was more than obvious why most of these were chosen for reporting. For example, two cases involved clarification of the way that the Court should deal with certain property issues: one contained issues regarding equity and trusts,[198] and the other discussed the bona fides of third parties, use of

196 (cont.) had failed to consider the appellant's financial hardship. It was argued that the judge had expanded the scope of judicial discretion on unreasonable grounds. The Full Court held that the trial judge had relied on material before her in arriving at her decision, as well as clearly expressed her reasons, and she was found to have acted within discretion.

197 These cases were *Centacare Central Queensland and Downing and 'G' and 'K' and Attorney-General of the Commonwealth* [1998] FamCA 109; *Cooke & Stehbens* [1998] FamCA 154; *Director-General, Department of Community Services & M & C & Child Representative* [1998] FamCA 1518; *Yunghanns & Ors & Yunghanns & Ors & Yunghanns* [1999] FamCA 64; *Dickson & Dickson* [1999] FamCA 278; *Director-General Department of Families, Youth and Community Care & Moore* [1999] FamCA 284; *Townsend & Director-General, Department of Families, Youth and Community Care* [1999] FamCA 285; *Kayes & Kayes* [1999] FamCA 357; *Tobin & Tobin* [1999] FamCA 446; *Buljubasic & Buljubasic* [1999] FamCA 474; *J & W* [1999] FamCA 1002; *Hallinan & Witynski* [1999] FamCA 1127; *Su & Chang* [1999] FamCA 1203; *KS & DS* [1999] FamCA 1221; *MB & AR* [1999] FamCA 1222; *Re Lynette* [1999] FamCA 1239; *Cierpiatka & Cierpiatka & Cierpiatka* [1999] FamCA 1286; *Rutherford & the Marshall of the Family Court of Australia* [1999] FamCA 1299; *Bassi & KD Sales Force Specialists Pty Ltd & Maas* [1999] FamCA 1352; *Browne & Green* [1999] FamCA 1483; *Roff & Roff* [1999] FamCA 2258; *Ferrier-Watson & McElrath* [2000] FamCA 219; *Wade-Ferrell & Wade-Ferrell & Read* [2001] FamCA 138.

198 *Cierpiatka & Cierpiatka & Cierpiatka* [1999] FamCA 1286.

s 85 (transactions to defeat claims) and partial settlement.[199] There were also two cases which provided guidance on particular children's issues: one involved significant judicial comment on the legal definition of a 'parent',[200] while the other canvassed concerns surrounding interim orders and contact in the context of Part VII of the Family Law Act.[201]

There were, however, other cases not reported that arguably could have been. One of these was the case discussed above which clarified 'adequate reasons' for decision by a trial judge. Another was a complex matter involving domicile. One Southern Registry appeal considered the validity of a decree nisi before children's issues could be heard, an important consideration in family law proceedings. It is interesting that in both of these matters the Court commented on the excellent quality of the submissions before it. It is arguable that these cases were not reported as they were not legal issues that affect most parties before the Court, in spite of the fact that the Court used them to update and clarify existing jurisprudential positions.

Of the 23 cases from the sample that were reported, five were brought by unrepresented appellants.[202] These cases all make distinct points about appropriate methods of dealing with unrepresented parties before the Court. The emerging jurisprudence of the Full Court around litigants in person, will be discussed further below.

199 *Bassi & KD Sales Force Specialists Pty Ltd & Maas* [1999] FamCA 1352.

200 *Tobin & Tobin* [1999] FamCA 446.

201 *Cooke & Stehbens* [1998] FamCA 154.

202 *Cooke & Stehbens* [1998] FamCA 154; *KS & DS* [1999] FamCA 1221; *MB & AR* [1999] FamCA 1222; *Re Lynette* [1999] FamCA 1239; *Rutherford & the Marshall of the Family Court of Australia* [1999] FamCA 1299.

Costs Orders

The tension in family law appeals between the establishment of legal principles and guidelines, and the need to uphold the discretion of the trial judge in deciding the matter before them, is also apparent in the use of costs orders in Full Court decisions. The Family Court is a jurisdiction where costs are supposed to be borne by each party to the case, and where costs orders are made only on rare occasions.[203] It is possible to suggest, however, that the Court will make costs orders, particularly on appeal, in order to establish principles regarding ill-conceived appeals. The intention appears to be to make an example of the litigant before it, and to dissuade other parties from attempting to appeal, for example, an exercise of discretion that is well within the accepted boundaries. At the same time, the Full Court is willing to grant costs certificates to those parties who have managed to prove an error in the exercise of the trial judge's discretion at first instance. The factors that govern the making of costs orders are found in s 117(2A) of the Family Law Act. These include the financial circumstances of a party, any receipt of assistance, the conduct of the parties throughout the proceedings, whether the proceedings were caused by the conduct of one of the parties, whether a party has been wholly unsuccessful, and all other such matters that the Court deems relevant.

According to Pesce,[204] these provisions suggest that costs should not follow the event, as they do in other jurisdictions: there should thus be fewer costs orders made in the Family Court than in other courts. Pesce found, however, in a small scale analysis of Family Court files, that more costs orders were made on appeal than at first instance, even though the prevalence of the s 117(2A) factors appeared to be the same at both stages of the court process. Most obviously, this could be because the parties have been in the system for a longer time, and thus had a greater opportunity to

203 According to s 117(1) of the Family Law Act, each party is to bear their own costs in all matters; however, the Court can use its power under s 117(9) to make costs orders in justified circumstances. For a critique of the discretionary principles of the Court in relation to costs orders, see Fagan (1990), 13.

204 Pesce (1997).

behave in an inappropriate manner, or, more relevantly for our qualitative sample, because of the lack of merit in a number of appeals.

Of the 120 cases in the qualitative sample in which there was an application for costs, costs orders were made against one of the parties in 34 per cent of the cases (34 against the appellant and seven against the respondent). There appeared to be two situations in which costs orders were made against a party: when the appeal brought was wholly unsuccessful, and when a party brought an appeal that was frivolous and/or doomed to fail. This may appear to be a somewhat arbitrary distinction, but the types of behaviour characteristic of each situation are revealing about the attitude of the Full Court towards various litigants before it.

Of those who were ordered to pay costs because they were wholly unsuccessful in their appeal (17), only four were unrepresented. A number of these decisions were based on there having been no error found in the exercise of discretion by the trial judge, indicating that there was nothing in the party's behaviour to warrant an adverse comment by the Full Court.

The twelve cases in which apparently exemplary costs orders were made against appellants were split between represented (7 cases) and unrepresented parties (5 cases), although in two of the cases, the represented appellant had appeared in person at first instance. These orders appear to have been made for a range of reasons, including the credit of the parties at first instance, and delaying or obstructionist behaviour in putting relevant information before the Court. In one Eastern Registry case, costs orders were made against a successful represented appellant, with the Full Court commenting that:

> *The husband's conduct at trial placed the trial judge in an invidious position and created a situation in which there was always the potential for an appeal to this Court to become necessary. In those circumstances, the husband should pay the wife's costs of the appeal, notwithstanding that, for reasons given, his appeal has succeeded, albeit on a limited issue which arose in circumstances reflecting no credit on the husband.*

Similar critical comments were made regarding the behaviour of an unrepresented appellant in the Southern Registry:

> *In this case, the appeal was entirely frivolous, the appellant brought the whole thing upon himself, he has unnecessarily wasted the funds of the child representative by his actions and the order of the Court is that he pay the costs of the child representative to be taxed if not agreed between the parties.*

Costs certificates were awarded in 15 of the decided matters, six in favour of unrepresented parties, and nine for parties with legal representation. Six of these cases involved a re-exercise of judicial discretion as the reason for the certificates being granted. In most of these cases, the judgment of the Full Court involved a comment about the significance of the error of the trial judge in the exercise of their discretion. It is possible that such certificates will only be awarded when the discretion was obviously misapplied, but the data does not provide a definite answer. The remaining nine files involved successful appeals on errors of law, in the application of the Act, or in deciding on a particular procedural course.

Two Eastern Registry files highlight the grounds on which costs certificates will be awarded. The first, involving two represented parties, was an appeal from a decision of the trial judge, based on the behaviour and credit of the parties, to make final orders without hearing final submissions from the appellant. In granting the certificates, the Full Court commented:

> *The parties were denied natural justice in that her Honour made contact orders on which the parties were not given an opportunity to be heard, when it had been indicated to them that they would in fact have that opportunity.*

The second Eastern Registry case again involved two represented parties and was an appeal regarding the inadequacy of the trial judge's reasons in making the decision. Again, the Full Court was openly critical of the behaviour of the judge at first instance:

> *The difficulty in this case is that his Honour has made no attempt in his reasons for judgment to evaluate the evidence of each of the parties. He has made no mention of his view as to the credibility of either of them. It is unclear to us on what basis his Honour made the finding that he did.*

It appears from our analysis that there is no consistent pattern behind the practice of the Full Court in awarding costs and granting costs certificates to represented and unrepresented parties. The representation status of the parties seems to make little difference to successfully obtaining a favorable costs order, nor does the mere fact of being unrepresented prevent a costs certificate being granted. It must be noted, however, that serial unrepresented appellants appear to be particularly exposed to the Court's practice of making costs orders against parties for wholly unsuccessful or frivolous applications.

If the policy intent behind the making of 'exemplary' costs orders is to deter similar fruitless appeals which can distract the Court from its real purpose, it seems unlikely that they will be successful against unrepresented parties. Legal representatives may take note of the potential financial detriment to their clients of pursuing indulgent claims, and may therefore be motivated to manage their clients at appeal (including advising them not to appeal) even more strenuously than they do at trial. Unrepresented parties, on the other hand, are unlikely in most cases to appear before the Full Court more than once, which ensures that the exemplary costs are isolated to individual cases, with no opportunity to develop into a body of deterrent principles. In the case of serial appellants, who do appear before the Full Court many times, the awarding of a cost order is unlikely to prevent them from bringing another unfounded appeal. Indeed, there is some evidence to suggest that the costs order itself would merely become the basis for their next set of appeal grounds.[205]

205 See also Mueller (1984), who argues that costs sanctions do not operate to deter litigants in person, but instead may strengthen their resolve to try and 'beat' the Court. He also notes that many litigants in person are impecunious and will not be able to pay any costs, putting the other party at a significant disadvantage.

The Emerging Jurisprudence Around Litigants in Person

Although our analysis reveals that unrepresented appellants have not affected the primacy of judicial discretion or diminished the Court's ability to establish general points of law, their presence at appellate level has created problems for the Court. As previously discussed in Chapters 11 and 12, this appears to be, in general, an effect of the procedural difficulties most unrepresented litigants experience prior to and at trial, which are compounded if they also confront the complexity of the appellate process unrepresented.

Our analysis of appeal judgments which involved litigants who had been unrepresented at trial, on appeal, or both, indicates that the Court is developing jurisprudential principles that are specifically directed towards these particular litigants. The primary focus of this emergent doctrine is an application of the Court's general discretionary approach, but it also entails the development of guidelines for trial judges on the hearing of matters at first instance involving unrepresented parties, as exemplified in *Johnson*,[206] and more recently *Re F.*[207] This emphasis on in-court procedures is arguably a result of unrepresented parties' expressed concerns in their grounds for appeal with the denial of their 'rights' to a fair trial and natural justice. The Court also makes comments about the inadequate preparation, and ill-conceived focus, of the appeal grounds and submissions that many unrepresented parties bring before it. Although this concern with pre-appeal hearing procedure is less dominant, it is arguably just as important an area for the development of guidelines as the conduct of trials.

The following discussion will focus on these elements of the emerging jurisprudence around litigants in person as they appeared in our sample, and will also reflect on other recent developments in the case law.

206 *Johnson and Johnson* (1997) FLC 92-764.

207 *Re F: Litigants in Person Guidelines* [2001] FamCA 348.

Unrepresented parties and the application of the Johnson guidelines

The problems that unrepresented parties cause at trial are well canvassed in the growing literature on the subject.[208] There is a central tension that presents itself to judges in the resolution of matters involving one or more unrepresented parties. This is, essentially: is it fair to unrepresented parties to be confronted with the procedure and process of an adversarial system which, without assistance from the bench, could cause them to be substantially disadvantaged; and at the same time, is it fair to represented parties that they are not, in these circumstances, to be given the same assistance and discretionary leniency by the Court?

The Full Court of the Family Court, in the 1997 decision of *Johnson*, attempted to create a set of guidelines that would 'assist parties and the judiciary in meeting the needs of litigants in person without compromising the impartiality of the court'.[209] These guidelines were always intended to be dicta, as the discretionary imperative of the Court, especially in its obligations to act in the best interests of children, necessitated that it not be 'inhibited by restrictive practices'.[210] That said, and using the decision in *C and O* [211] as a model, the Court set down eight guidelines to indicate how unrepresented litigants should, and could, be assisted by judges at trial.[212]

The basic principle underlying the *Johnson* guidelines is that all litigants have the right to a fair trial. Although the implementation of that principle necessarily varies from case to case, the guidelines recognised that unrepresented parties may require some assistance from the Court in their handling of evidentiary issues, cross-examination, and in the clarification of their submissions so as to avoid the situation where 'because of garrulous or misconceived advocacy, the substantive issues are either

208 See for example Hunter (1998); Dewar et al. (2000).

209 *Re F: Litigants in Person Guidelines* [2001] FamCA 348, para 217.

210 *Johnson and Johnson* (1997) FLC 92-764, para 121.

211 *C & O*, 18 March 1997, unreported. In this decision the Full Court provided the basis for the principles developed in *Johnson*.

212 The guidelines are set out in Appendix 1.

ignored, given little attention or obfuscated'.[213] In general, the emphasis of the guidelines could be argued to be cautiously on the particular needs of unrepresented parties, based on an understanding of them as 'vanquished', or at least 'procedurally challenged' by their engagement with the family law system. The only guideline that was also about balancing the tension unrepresented parties create *vis-à-vis* represented parties was guideline seven, which stated that trial judges should 'ensure as far as possible that a level playing field is maintained at all times'.[214]

The application of the *Johnson* guidelines was a central strand of the emergent jurisprudence on litigants in person in the qualitative sample. For a start, as noted in Chapter 10, 14 appellants viewed the guidelines enunciated in *Johnson* as law, as opposed to dicta, and misguidedly based their appeals on the trial judge's failure to fulfil his or her obligations under those guidelines. Although no judgment in our sample directly censured an appellant for this particular misapprehension, there was evidence that the Court felt uncomfortable with the tendency of many strident appellants to assert the *Johnson* guidelines as a 'right'.

A children's case from the Eastern Registry provides a good example. The appellant, who was unrepresented throughout his case, included 58 grounds for appeal, many of which were contentions based on the principles in *Johnson,* and alleging that the trial judge had failed in her obligation to maintain a level playing field. The Court held that any extra 'rights' that may have been implied by *Johnson* were not made out in his argument, and stated: 'The issue is whether her Honour met the obligations referred to in *Johnson* both specifically and in principle', and found that the trial judge had actually done so. Further, the Court was quite dismissive of the approach the appellant took to the *Johnson* guidelines more generally, finding that he failed to take into account the other competing obligations facing the trial judge. It stated that:

213 As per the decision in *Neil v Nott* (1994) 121 ALR 148, para 150.

214 *Johnson and Johnson* (1997) FLC 92-764, para 121; the Court also stated the qualification at para 122 that the rights of represented parties should not be overborne in the process.

> *In our view [the grounds based on Johnson] read like a set of post-judgment interrogatories delivered by an unsuccessful litigant to the judge for her to answer. Her Honour's obligation was not to laboriously and exhaustively set out each and every advantage and disadvantage...her obligation was to deduce from the evidence, and from her assessment of the parties and their witnesses, the essence of the competing proposals, to decide, having considered the relevant matters referred to in section 68F(2), which of these proposals would be more likely to advance the child's best interests, which she was required to regard as the paramount consideration.*

Appellants also relied on grounds for appeal which contended that the trial judge had denied them procedural fairness by failing to meet the 'obligations' the *Johnson* guidelines allegedly prescribed.

The way the Court dealt with these arguments reflected the prevailing discretionary principles of the Court. The Full Court tended to view these cases individually, noting the subjective motivations and characteristics of the unrepresented appellants before them, which resulted in their applying the *Johnson* guidelines equitably, rather than identically to all parties.

One of these cases was subsequently reported as *Su v Chang*.[215] The non-English speaking background appellant in this case had been unrepresented at first instance, although she instructed solicitors to handle her appeal. The central issue in the case was the alteration of property interests: the matter involved complex financial arrangements, which the trial judge believed neither party was fully disclosing. Consequently, at trial, there was substantial legal argument regarding the admissibility of evidence, which the unrepresented litigant found difficult to follow. The appellant's solicitor based some of the grounds for the appeal on the fact that the trial judge had failed to meet obligations under the *Johnson*

215 *Su & Chang* [1999] FamCA 1203.

guidelines. The Full Court upheld the appeal in relation to guideline six of *Johnson*, noting that the trial judge's discretion should have been exercised so as to give the unrepresented party, in the face of difficult legal interpretations of the Evidence Act, which she was following through an interpreter, a right to be told directly the evidence to which she could object.

In another matter, however, the Court was more qualified in its consideration of *Johnson*. This case involved a relatively legally experienced litigant, who was unrepresented at first instance and during the preparation of his appeal, but instructed counsel to appear on his behalf at the appeal hearing. The appellant believed that the trial judge had very obviously failed in his legal obligation to apply the general principles set forth in *Johnson*. He based his argument on the following quote from the trial judgment: 'whilst the father is a litigant in person, he has somewhat more legal experience than many litigants do have, not that that alters his entitlement to a fair trial, which I have at all times endeavoured to provide to him'. The Full Court, in considering this ground for appeal and evaluating the approach of the trial judge, noted that:

> *It is not necessary to be prescriptive as to the manner in which, in all cases involving unrepresented litigants, a trial judge may satisfy the obligations identified in Johnson. When what her Honour said to the father is...considered in the context of [the transcript and the circumstances of the case] we are satisfied that her Honour adequately fulfilled that obligation...we do not consider that the failure to slavishly adopt a particular approach amounts to an appellable error.*

There were other cases in our sample which were obviously assessed against the procedural fairness principles enunciated in *Johnson* although they did not necessarily make any direct reference to that case. These cases further indicate the prevailing centrality of discretion in the Court's decision-making, as the Court examined the full context of each specific matter rather than imposing a blanket principle as a 'correct' way to approach unrepresented parties coming before the Court.

Two cases in particular demonstrate how the primacy of judicial discretion disrupted any fixed interpretation of how litigants in person were to be treated. These cases are quite interesting as they both involved similar factual scenarios, and both involved appeals from orders made by the same judge. The first of these cases, involving the 'vanquished' unrepresented appellant with psychiatric problems, was discussed above. In this case, the Court actually constructed a ground for appeal from her submissions in order to make the finding that she had been denied procedural fairness, in line with the *Johnson* guidelines.

The second case was subsequently reported as *Buljubasic.*[216] In this case, the appellant was represented at the appeal, but unrepresented at first instance, which was the source of his problems and the basis of his grounds for appeal. The appellant had attempted to contact the trial judge by fax to alert him to the fact that he would not be present for part of the hearing. The fax was not viewed as an appropriate notice of failure to attend, and the hearing went ahead *ex parte.* The appellant based his appeal on the argument that this decision was procedurally unfair in light of his lack of knowledge of appropriate forms as an unrepresented party. The Full Court in this case affirmed the approach and decision of the trial judge. It noted that the appellant had on previous occasions been before the Court unrepresented, and had been warned about the possible results if he failed to attend. He had even been expressly told at trial level that 'if he chose to do that he had to take responsibility for it, and that he would not be treated differently from other litigants'. The Full Court commented that the appellant, in the circumstances of the case, was obstructive, and to a degree, vexatious. The judges described him as 'an author of his own misfortune', as 'he made an attempt to obtain a further adjournment by staying away, apparently not only staying away from Court, but absenting himself from places where he might, according to the Court's records, be able to be contacted, and sending a facsimile transmission to the Court in terms which raised insufficient substantive matters to justify the Court granting an adjournment.'[217]

216 *Buljubasic & Buljubasic* [1999] FamCA 474.

217 ibid., paras 41-42.

Overall, the judgments in our sample in which there was a consideration and application of the *Johnson* guidelines reinforced the tension that lies at the heart of family law jurisprudence. In the process of fulfilling the key function of an appellate court and developing principles and standards for the treatment of unrepresented litigants as a group, there was still an overriding need by the Court to preserve the wide discretion of the jurisdiction as a whole. This ensured, in the cases we examined in this category, that the guidelines were applied equitably, if not equally, dependent on the circumstances of each case.

Upholding judicial discretion: the Re F decision

The issues we identified from examination of cases in the appeal sample as being central to the Court's approach to the *Johnson* guidelines were subsequently refined and summarised by the Full Court before our analysis was completed. This statement of the Court's approach was reported in a case not included in our sample, *Re F: Litigants in Person Guidelines*, handed down in June 2001. It is worth stating briefly the position taken by the Court in *Re F*, as it now stands as the leading authority and statement on how trial judges should approach unrepresented parties, and reinforces the central tensions between the exercise of discretion and the building of precedent that we have been discussing in this chapter.

The Court noted in *Re F* that the intention behind the *Johnson* guidelines was to assist both parties and the judiciary in meeting the needs of unrepresented litigants, without disrupting the other imperatives of the Court. It cited with approval, however, the research conducted by Dewar et al. which makes the point that 'the distinction between information and advice, a cornerstone of appellate judicial guidance in relation to litigants in person, is seen by many judicial officers and court staff as logically and practically unworkable, [and that the *Johnson* guidelines] were often seen as involving a conflict, or at best being hard to fit into the realities of the Court'.[218] The Court also noted that the internal tensions in *Johnson* mirror

218 *Re F: Litigants in Person Guidelines* [2001] FamCA 348, para 217; Dewar et al. (2000), 2.

the tensions between the establishment of guidelines and the Court's other obligations under the Family Law Act and Rules.[219]

One of the primary concerns of the Full Court, however, was that although the decision in *Johnson* recognised the problematic position of the Court operating in an adversarial system, the fact remains that the Court is still a superior court of record, 'concerned with complex procedures requiring specific drafting and advocacy skills and an understanding of the rules of evidence...the parties [not the Court] retain the primary responsibility for defining issues in the case and presenting/advancing legal argument'.[220] Overall then, the Court argued that despite the need to afford assistance to litigants in person to ensure their experience before the Court is fair, the neutrality of the Court itself could not be compromised in the process. It contended that:

> *Judicial assistance [as parties demand under the guidelines] cannot make up for lack of representation without an unacceptable cost to matters of neutrality. However, in our view, the obligation to provide a fair trial has principal significance for a court of law and it must take steps to assist a litigant in person in order to do justice between the parties with an eye to the reality of the prevalence and diversity of litigants in person in the jurisdiction.*[221]

From this perspective, the Court acknowledged the need to retain some standards for the treatment of unrepresented parties, in order to avoid perceptions of bias from either represented or unrepresented parties, and in order to recognise the 'diversity of litigants in person in the jurisdiction'. As such, the Court reinforced the importance of discretion to its jurisprudential approach in general, by arguing that the application of guidelines regarding unrepresented parties at trial involves an informed standard that must 'take account of the responsibility of the Court seized of the family law matter to properly understand the litigant in person's

219 ibid., para 219: tensions with s 97(3) and Order 4, rule 4.

220 ibid., para 220.

221 ibid., para 221.

position within the litigation'.[222] In other words, the test to be applied in the assessment of assistance to be afforded by the bench to unrepresented parties is subjective, as the Full Court made very clear:

> *We think that the giving of [assistance to unrepresented parties by the bench] should lie in the discretion of the trial judge and should not be required by mandatory guidelines nor should the nature of the interventions from the bench be rigidly prescribed. The exercise of such discretion serves the goal of achieving a fair trial so that the interests of justice can be served. Therefore, the application of the guidelines must depend on the circumstances of the particular case.*[223]

From this position, the Full Court made some amendment to the wording of the guidelines in order to tighten and restrict the wide interpretation of them as 'rights' accruing for all unrepresented litigants regardless of the circumstances of the case.[224] The Court also noted particularly the need for guideline seven, the 'level playing field' guideline, to be reformulated. The Court acknowledged that in its present form it did not lead to the impression that there was an obligation on trial judges to ensure a fair trial for all, but that it possibly led instead to 'the creation of expectations that cannot be achieved'. The judges went on to note that this false expectation was exacerbated by the lack of legal representation for many people, as lawyers brought a 'professional objectivity that a litigant in person lacks, particularly in family law proceedings and it is simply not possible to create a level playing field where one party is represented by a professional and one party is not'.[225]

Implicit in the reinforcement of discretionary principles within the discussion of informed standards in *Re F* is an acknowledgement that there is indeed a diversity of litigants in person appearing before the Court, both

222 **ibid.**, para 225.

223 **ibid.**, para 229.

224 **ibid.**, paras 246-253.

225 **ibid.**, para 242.

at first instance and at appeal. The Court states explicitly that '[l]itigants may be self-represented by choice or increasingly, as a result of being unable to afford representation while at the same time failing to qualify for legal aid. The Court is moving to deal with this situation in a number of ways but it cannot by the use of guidelines affect its obligation to conduct trials according to law'.[226]

This explicit recognition that a subjective test must be applied in the trial judge's assessment of the need for and/or level of assistance to be afforded to unrepresented litigants has recently been upheld in the case of *T and S*.[227] This case involved an appellant mother who had been subjected to serious domestic violence by the respondent father. The mother was unrepresented for most of the trial, due to the denial of legal aid funding, but was represented at appeal. The major contention of her grounds for appeal was that she had not received a fair trial as a consequence of her inability, as an unrepresented litigant, to present evidence of and cross-examine the father on the domestic violence issues, and as a result the trial judge could not have made a decision that was in the best interests of the child. She wished to adduce fresh evidence to remedy the factual basis on which the judge's determination was made.

The Full Court allowed the appeal on the basis that the appellant mother did not have representation at the crucial stages of the trial hearing, and that the trial judge 'appeared to feel constrained about offering her too much assistance'.[228] The Full Court implicitly acknowledged the 'vanquished' nature of this unrepresented litigant, and reinforced the point that the particular characteristics and motivations of unrepresented litigants need to be taken into account by trial judges in their handling of the trial itself. The Court noted, however, that at the time the trial was heard, the decision in *Re F* had not been delivered, but if it had, the trial judge 'may have exercised his discretion to offer greater assistance to the Mother than in fact he did. However that may be, we consider that the

226 ibid., para 243.

227 *T and S* [2001] Fam CA 1147.

228 ibid., para 94.

difficulties that faced the Mother at that stage were apparent and very real.'[229]

It is arguable that the decision in *Re F*, that standards exist for the conduct of trials involving litigants in person, but that these standards should be applied on a case by case basis, will be difficult to communicate to many unrepresented litigants. Our analysis has demonstrated that in the preparation of their grounds for appeal and submissions, unrepresented appellants have real difficulty in understanding the exercise of discretion in general, and real difficulty in accepting the decisions of trial judges as principled and binding. This is particularly the case for serial appellants, who perceive that there are certain 'rights' as individuals that they should be accorded by the Court, as discussed in Chapter 11. Thus, despite the nuanced principles set down in *Re F*, unrepresented serial appellants in particular are unlikely to be prevented from consistently appealing the decisions of trial judges.

229 ibid.

14

Conclusion

In response to the specific research questions posed in the qualitative study, our in-depth analysis of appeal files suggests that the appearance of unrepresented litigants at appeal level has not hindered the development of the Family Court's jurisprudence, although it has engendered the development of a new strand of jurisprudence dealing specifically with unrepresented litigants at trial. Unrepresented litigants have undoubtedly experienced difficulties, however, with all stages of the appeal process, and have had an adverse impact on the Court's processes at that level. 'Vanquished' and 'procedurally challenged' litigants have been disadvantaged by their inability to comply with appeal procedures, particularly the preparation of appeal books. Serial appellants have created problems for the Court with lengthy, unfocused and legally irrelevant grounds for appeal and outlines of argument, and have created considerable work for Appeals Registrars in responding to their requests and demands for assistance. The question that remains is that of the model or models of intervention most appropriate to avoid – or at least minimise – the problems identified.

The Full Court's primary response to the challenges posed by unrepresented litigants to date, through cases like *Johnson* and *Re F*, has been to delineate the approach and principles that should guide trial judges when dealing with litigants in person at first instance. As well as providing for appropriate assistance for unrepresented litigants, and fair trial procedures for both unrepresented parties and their represented opponents, the enunciation of principles in this regard may be perceived by the Court as one means of removing, or at least reducing, appellable issues involving litigants in person. It would appear that such a reduction is unlikely, considering the acknowledged difficulties that arise from each case being assessed on its own circumstances, and the difficulties many unrepresented parties have in accepting outcomes based on the exercise of discretion.

This emphasis on trial procedure also overshadows the related problem of inadequate appeal grounds and preparation. Our analysis indicates that merely simplifying procedures at appeal level to mirror the simplified procedures at first instance would not work, as it would seriously undermine the Court's ability to have presented to it focused issues and informed legal argument for determination and the building of precedent. If, however, a series of simplified procedures were introduced in conjunction with, for example, mandatory legal assistance with the preparation of Form 42s, the negative impact on the Court's ability to discharge its appellate function would be minimised.

Our findings also indicate other approaches that the Court could employ during the pre-hearing process to minimise the difficulties unrepresented parties face, and which result in ill-conceived grounds and arguments. For example, the cost of transcript that many parties find prohibitive, and that results in procedural delays, could be reduced by sending the provision of this service to tender. There could be a greater level of educative support given to unrepresented appellants to assist them in understanding what the process of appeals entails. Arrangements could be made for the provision of duty solicitors or pro bono legal assistance for unrepresented appellants in framing grounds for appeal, and/or at the SABI, to prevent some appellants becoming 'vanquished' early in the process, to assist the 'procedurally challenged', and to ease the burden on Appeals Registrars. Finally, the guidelines for the treatment of represented parties *vis-à-vis* unrepresented parties at trial, as enunciated in *Johnson*, could be extended and applied to the quasi-judicial decisions made by Appeals Registrars at the SABI.

Due to the fact that the Court is a discretionary jurisdiction, which recognises the divergent characteristics of unrepresented litigants, these suggestions ought not, of course, be applied in an undifferentiated fashion. Our analysis demonstrates that serial appellants create distinct problems for the Court, and that assistance at pre-hearing would not alleviate these problems, as they are based primarily on these appellants' unwavering belief that their rights have been infringed or violated by the family law system itself. It appears unlikely, for example, that these appellants would

be deterred, either individually or in general, by the imposition of exemplary costs orders. However, there would perhaps be some benefit in dealing with these parties distinctly, for example by requiring that parties seek leave to appeal for any but the first appeal arising from the same first instance proceedings or associated appeal process; or by the Court more aggressively imposing s 118 orders. This would, of course, need to be preceded by some judicial consideration of the definition and identification of serial appellants to ensure they are appropriately managed by the Court.[230] In doing so, it is suggested that criteria based on observed behaviour and history would be easier to develop and apply than criteria based on (perceived) motivation(s) for appearing unrepresented.

The challenge for the Court, both at first instance and on appeal, is to provide appropriate support and fair procedures to those inexperienced unrepresented litigants who require it, while discouraging and controlling those self-representing litigants who have become so invested in their court proceedings that their endless quest for justice can never be satisfied.

230 See also Family Law Council (2000), recommendation 4.4.

APPENDICES

Appendix 1

Definitions

Appeal Book: The dossier of documents from the proceedings at first instance that are relevant to the appeal. The appeal book usually contains documents such as the original application for final orders, relevant affidavits and other documentary evidence filed in the original proceedings, and sections of the transcript from the trial judge's decision. In each case, the appropriate contents of the appeal book are determined by the Appeals Registrar in a meeting with the parties to the appeal. The appellant is then responsible for compiling the appeal book, and providing a specified number of copies for all other parties and for the court.

Appellant: The party who initiates an appeal.

Applicant: The party who makes an application for final orders. In children's matters, the applicant will usually be the mother or the father of the child or children in question, although other parties are possible (e.g. grandparents, other carers, or government officials). In property matters, the applicant will usually be the wife or the husband in the former marriage, although again, other parties with an interest in the relevant property may appear in some cases.

Children's Matters: Legal proceedings relating to the question of with which parent the children will reside following the breakdown of the parents' relationship ('residence'), and when and how often contact will occur between the children and the non-resident parent ('contact').

Contested Cases: Cases in which an application for final orders is made in relation to children, property, or some other matters relating to arrangements following family breakdown. Contested cases follow a certain set of steps through the Family Court, including an initial directions hearing or hearings, possibly the making of interim orders, Family Court counselling if the matter relates to children, a conciliation

conference if the matter relates to property, pre-hearing conference, and ultimately trial before a judge. The great majority of cases (around 94 per cent) are resolved by agreement between the parties at some stage before reaching a trial. When parties agree to settle their dispute, they will often have the terms of settlement made into court orders, known as 'consent orders'.

Costs Certificate: An authorised payment made by the Attorney-General to one or both parties to an appeal, for either part or whole of the incurred costs of the appeal, in cases in which the appeal succeeds on a question of law.[231]

Form 7: The standard form prescribed by the Court at the time of the study for making an application for final orders in relation to residence of or contact with children, and/or division of marital property (now Form 3).

Form 7A: The standard form prescribed by the Court at the time of the study for responding to a Form 7 (now Form 3A).

Form 8: The standard form prescribed by the Court for making an application for interim orders.

Form 12: The standard form prescribed by the Court for making an application for final orders in relation to maintenance. Maintenance may be ordered to be paid by one former spouse for the support of the other former spouse and/or for the support of the children of the relationship. In accordance with the principle that there should be 'clean break' in the financial affairs of a divorced couple, however, spousal maintenance applications and orders are now fairly rare.[232] Child maintenance applications have also become rare since the introduction of the child support scheme, which deals with child support as an administrative matter handled by a government agency, rather

231 See Federal Proceedings (Costs) Act 1981 (Cth), ss 6 and 7.

232 See Behrens and Smyth (1999).

than a legal matter to be decided in court.[233] Under the Child Support (Assessment) Act, the non-resident parent is assessed to pay a certain amount of child support on the basis of a statutory formula. The Family Court deals with cases in which the non-resident parent argues that they are not liable to pay the amount assessed or are not liable for child support at all, and cases in which the resident parent seeks a higher payment than that assessed under the child support legislation.

Form 42: The standard form prescribed by the Court for lodging an appeal against the decision of a judge at first instance.

Form 42A: The standard form prescribed by the Court for making an application for leave to adduce fresh evidence in an appeal. Form 42A may also be used to request the Full Court to dismiss an appeal because of a failure to comply with the rules and regulations of the Court, or a lack of reasonable diligence in pursuing the appeal; to ask the Full Court to issue a certificate saying that the matter involves an important legal question, or the public interest is involved; or to apply to the Full Court where no other form is provided.

Form 67: The standard form specified by the Court for making an application for leave to appeal. There is an automatic right to appeal from judicial decisions at first instance concerning issues of child welfare or property division. However, special leave to appeal is required for other types of cases, including appeals against interim orders, and in cases involving a review of a child support assessment.[234]

Full Court: Panel of three judges that hears appeals from the decisions of single judges at first instance. The Full Court is not always made up of the same three judges. The panel will vary according to location and availability.

Hague Convention Case: A case in which the central issue is the unlawful removal or abduction of children outside of Australia. The

233 Child Support (Registration and Collection) Act 1988 (Cth); Child Support (Assessment) Act 1989 (Cth).

234 Family Law Act, ss 94, 94AA.

Convention on the Civil Aspects of Child Abduction was signed at the Hague on 25 October 1980 (hence the shorthand name given to the type of matter) and was ratified by the Australian Government in 1986. In January 1987 Section 111B was introduced into the Family Law Act to enable orders to be made pursuant to this Convention. Hague Convention applications are not brought by one of the child's parents against the other, but rather are brought at first instance by the Federal Attorney-General's Department against the abducting parent.

Johnson Guidelines: Guidelines for trial judges on dealing with unrepresented litigants in hearings at first instance, established by the Full Court in the 1997 case of *Johnson v Johnson.*[235] The Guidelines set out the trial judge's responsibility:

1 To inform the litigant in person of the manner in which the trial is to proceed, the order of the calling of witnesses and the right which he or she has to cross-examine the witness;

2 To explain to the litigant in person any procedures relevant to the litigation;

3 To generally assist him or her by taking basic information from witnesses called, such as name, address, and occupation;

4 If a change in the normal procedure is requested by the other parties, such as the calling of witnesses out of turn, to explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;

5 If evidence is sought to be tendered which is or may be inadmissible, to advise him or her of the right to object to inadmissible material, and to enquire whether he or she so objects;

235 (1997) FLC 92-764, para 121.

6 If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;

7 To ensure as far as possible that a level playing field is maintained at all times;

8 To attempt to clarify the substance of the submissions of unrepresented parties, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated.

The *Johnson* Guidelines were subsequently reframed and revised in 2001 in the case of *Re F: Litigants in Person Guidelines.*[236]

McKenzie Friend: A 'McKenzie friend' is a lay person who can be permitted to attend court with a litigant in person, in order to assist them in court, without actually giving legal advice. The name comes from the English case of *McKenzie* in which this kind of assistance was permitted.[237]

Property Matters: Legal proceedings relating to the question of how the former matrimonial property (eg. house, furniture, cars, bank accounts, superannuation, investments, business assets) should be divided between the parties to the marriage (and any other claimants who are party to the proceedings).

Respondent: At first instance – a party who opposes the applicant's application; on appeal – the party who received a favourable decision at first instance, against which the appellant is appealing.

---

236 [2001] FamCA 348.

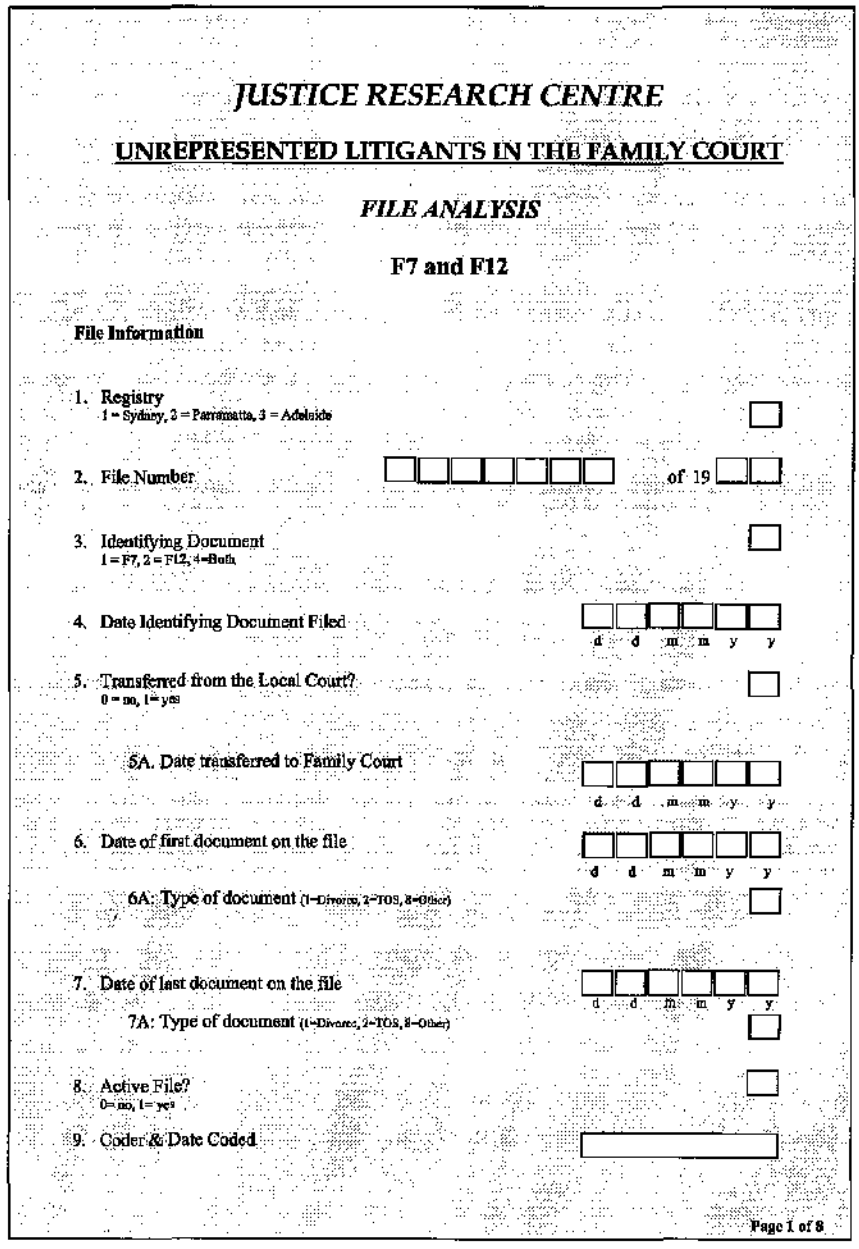
237 *McKenzie v McKenzie* [1973] All ER 1034. For discussions about the issue of McKenzie friends in family law litigation, see Australian Law Reform Commission (1996); Australian Law Reform Commission (1997a); Australian Law Reform Commission (1997b); Mildren (1999); Family Law Council (2000).

Appendix 2

Coding Forms

A. First instance coding form

Note that the following full version was only used in Sydney and Adelaide; the earlier version used at Parramatta did not include representation for consent orders and overall representation for documents and for court.



JUSTICE RESEARCH CENTRE

UNREPRESENTED LITIGANTS IN THE FAMILY COURT

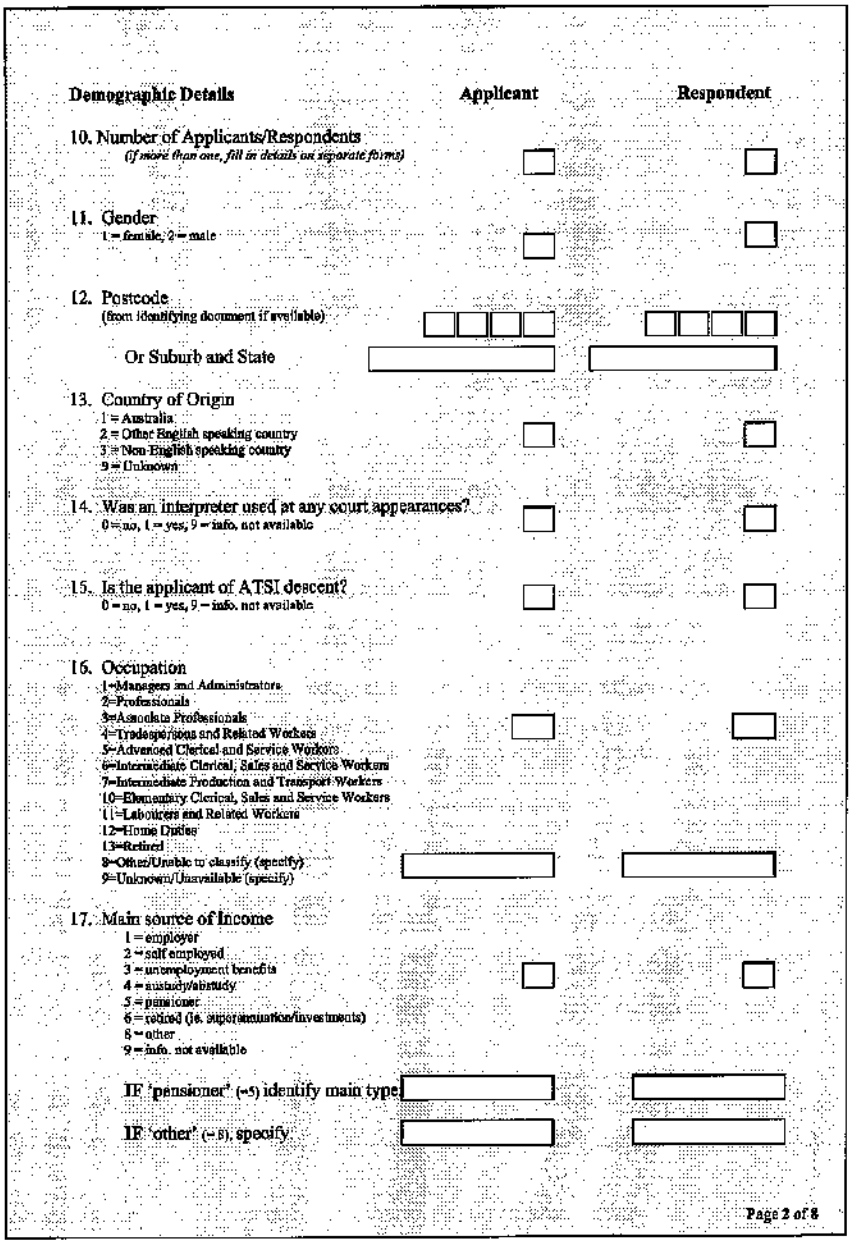
FILE ANALYSIS

F7 and F12

File Information

1. Registry
   1 = Sydney, 2 = Parramatta, 3 = Adelaide
2. File Number ☐☐☐☐☐☐☐ of 19☐☐
3. Identifying Document
   1 = F7, 2 = F12, 4=Both
4. Date Identifying Document Filed ☐☐☐☐☐☐ (d d m m y y)
5. Transferred from the Local Court?
   0 = no, 1= yes
   5A. Date transferred to Family Court ☐☐☐☐☐☐ (d d m m y y)
6. Date of first document on the file ☐☐☐☐☐☐ (d d m m y y)
   6A: Type of document (1=Divorce, 2=TOS, 8=Other)
7. Date of last document on the file ☐☐☐☐☐☐ (d d m m y y)
   7A: Type of document (1=Divorce, 2=TOS, 8=Other)
8. Active File?
   0= no, 1= yes
9. Coder & Date Coded

Page 1 of 8



Demographic Details | **Applicant** | **Respondent**

10. Number of Applicants/Respondents
(if more than one, fill in details on separate forms)

11. Gender
1 = female, 2 = male

12. Postcode
(from identifying document if available)

Or Suburb and State

13. Country of Origin
1 = Australia
2 = Other English speaking country
3 = Non-English speaking country
9 = Unknown

14. Was an interpreter used at any court appearances?
0 = no, 1 = yes, 9 = info. not available

15. Is the applicant of ATSI descent?
0 = no, 1 = yes, 9 = info. not available

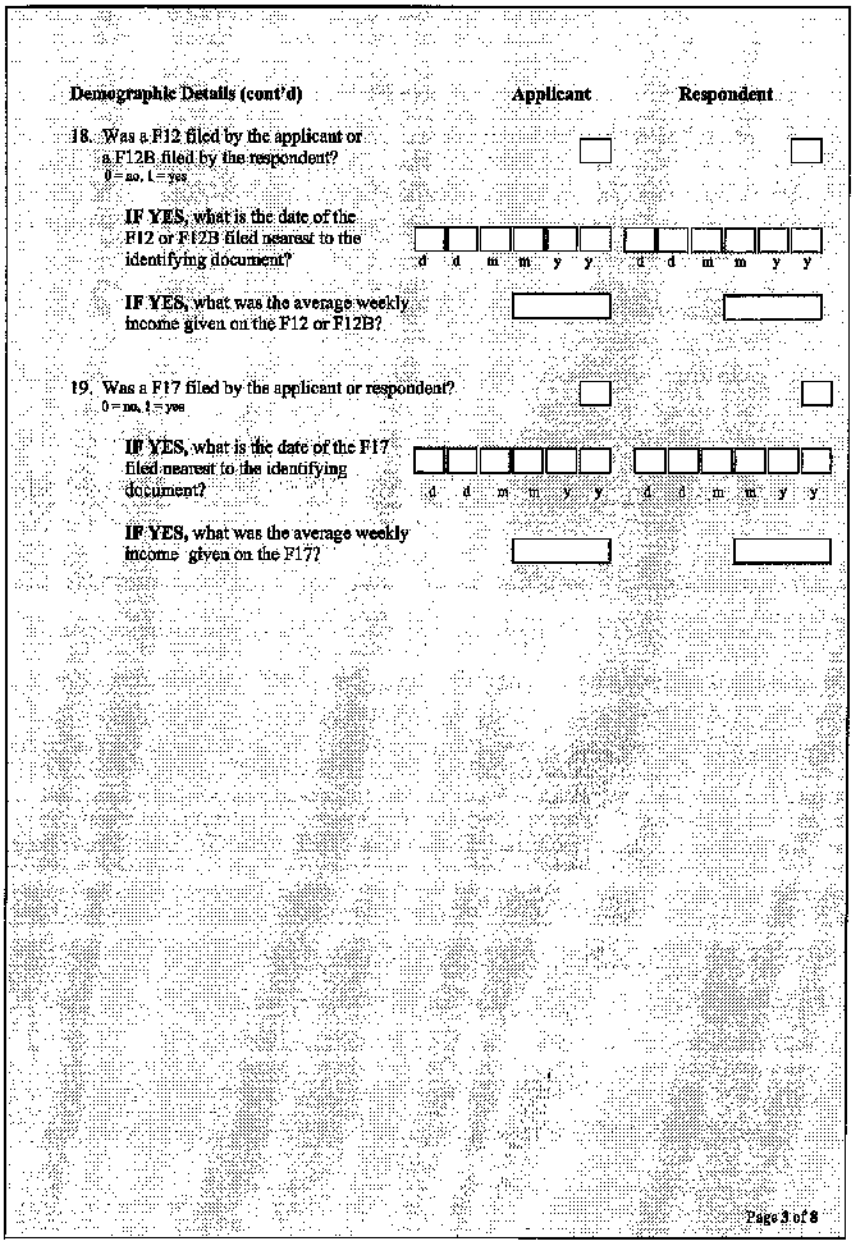
16. Occupation
1=Managers and Administrators
2=Professionals
3=Associate Professionals
4=Tradespersons and Related Workers
5=Advanced Clerical and Service Workers
6=Intermediate Clerical, Sales and Service Workers
7=Intermediate Production and Transport Workers
10=Elementary Clerical, Sales and Service Workers
11=Labourers and Related Workers
12=Home Duties
13=Retired
8=Other/Unable to classify (specify)
9=Unknown/Unavailable (specify)

17. Main source of Income
1 = employer
2 = self employed
3 = unemployment benefits
4 = austudy/abstudy
5 = pensioner
6 = retired (ie. superannuation/investments)
8 = other
9 = info. not available

IF 'pensioner' (=5) identify main type

IF 'other' (=8), specify

Page 2 of 8



Demographic Details (cont'd) — **Applicant** — **Respondent**

18. Was a F12 filed by the applicant or a F12B filed by the respondent?
0 = no, 1 = yes

IF YES, what is the date of the F12 or F12B filed nearest to the identifying document?

d d m m y y d d m m y y

IF YES, what was the average weekly income given on the F12 or F12B?

19. Was a F17 filed by the applicant or respondent?
0 = no, 1 = yes

IF YES, what is the date of the F17 filed nearest to the identifying document?

d d m m y y d d m m y y

IF YES, what was the average weekly income given on the F17?

Page 3 of 8

Applicant Representation – Filing of Documents

20. Was the identifying document filed by a solicitor? ☐
0 = no, 1 = yes

21. Was the last document for the applicant filed by a solicitor? ☐
0 = no, 1 = yes

22. What date was the applicant's last document filed? ☐☐☐☐☐☐
d d m m y y

Respondent Representation – Filing of Documents

23. Was the response to the identifying document filed by a solicitor? ☐
0 = no, 1 = yes, 9=no response

24. Was the last document for the respondent filed by a solicitor? ☐
0 = no, 1 = yes, 9=no document

25. What date was the respondent's last document filed? ☐☐☐☐☐☐
d d m m y y

Terms of Settlement – Representation
If Terms of Settlement were made, fill in the following. If multiple terms, note latest

A. Date Terms of Settlement were signed ☐☐☐☐☐☐
d d m m y y

B. Representation at Settlement (0=no, 1=yes) Applicant ☐ Respondent ☐

C. Nature of Terms: 1=final, 2=interim, 8=Other ☐

Representation – General
Only fill in Q26 – Q30 if the identifying document was not the initiating document.

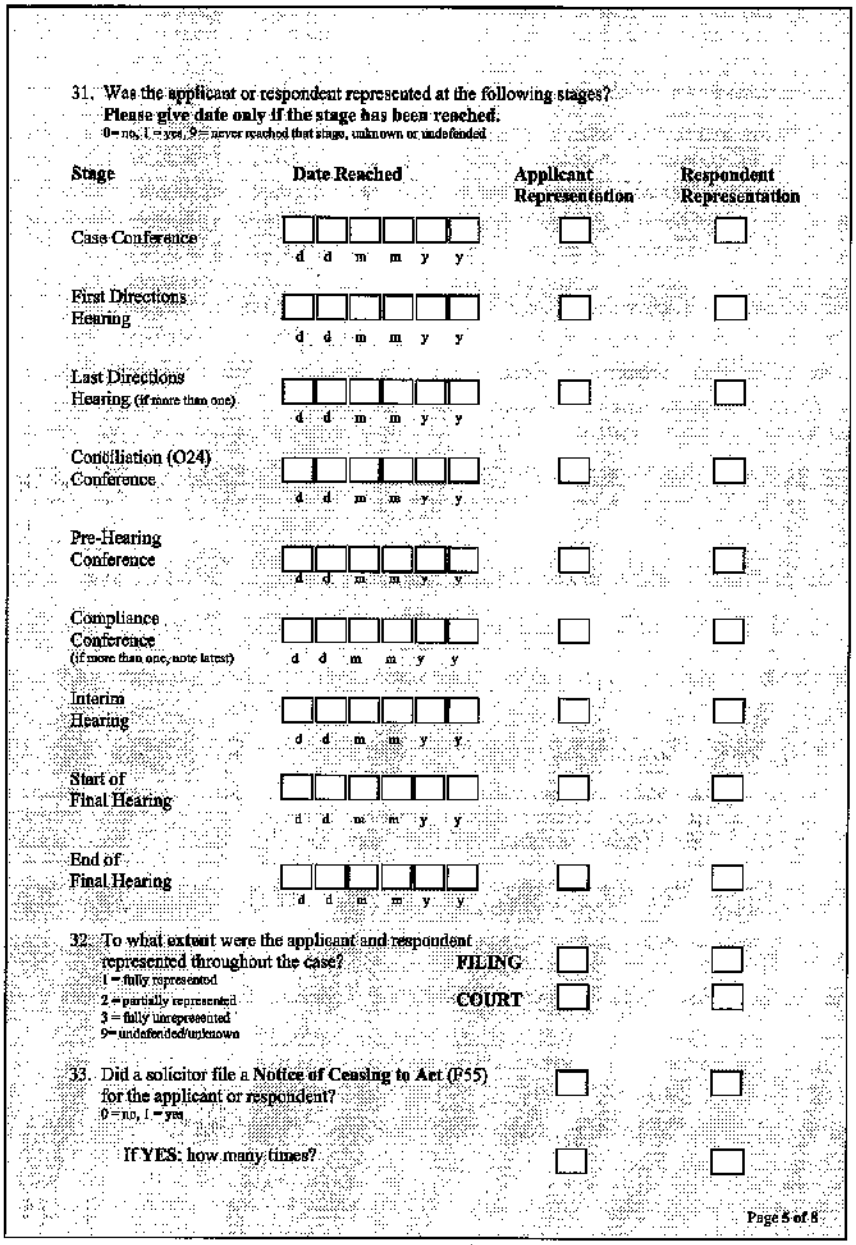
26. On whose behalf was the **initiating** document filed? ☐
1=Applicant, 2=Respondent, 3=Other (specify)

27. Was the initiating document filed by a solicitor? ☐
0 = no, 1 = yes

28. What date was the initiating document filed? ☐☐☐☐☐☐
d d m m y y

29. Was the response to the initiating document filed by a solicitor? 0 = no, 1 = yes, 9=no response ☐

30. What date was the response to the initiating document filed? ☐☐☐☐☐☐
d d m m y y



31. Was the applicant or respondent represented at the following stages?
Please give date only if the stage has been reached.
0 = no, 1 = yes, 9 = never reached that stage, unknown or undefended

Stage	Date Reached	Applicant Representation	Respondent Representation
Case Conference	d d m m y y		
First Directions Hearing	d d m m y y		
Last Directions Hearing (if more than one)	d d m m y y		
Conciliation (O24) Conference	d d m m y y		
Pre-Hearing Conference	d d m m y y		
Compliance Conference (if more than one, note latest)	d d m m y y		
Interim Hearing	d d m m y y		
Start of Final Hearing	d d m m y y		
End of Final Hearing	d d m m y y		

32. To what extent were the applicant and respondent represented throughout the case? **FILING** **COURT**
1 = fully represented
2 = partially represented
3 = fully unrepresented
9 = undefended/unknown

33. Did a solicitor file a **Notice of Ceasing to Act** (F55) for the applicant or respondent?
0 = no, 1 = yes

If YES: how many times?

Page 5 of 8

Case Matters

34. **Nature** of matter (0 = no, 1 = yes)

a) Children (F7)	b) Maintenance (F12)	c)Property (F7)
☐ contact/access	☐ spouse	☐
☐ residence/custody	☐ child	
☐ guardianship		

35. Was a **child representative** appointed?
0 = no, 1 = yes ☐

36. Was a notification of **child abuse** filed? (F66) ☐
0 = no, 1 = yes

If YES: against whom? ☐ ☐
1 =app, 2 =resp, 3 =both, 8 = other (specify)

37. Is there evidence of a **Family Violence Order/ Apprehended Violence Order?** ☐
0 = no, 1 = yes

If YES: against whom? ☐ ☐
1 =app, 2 =resp, 3 =both, 8 = other (specify)

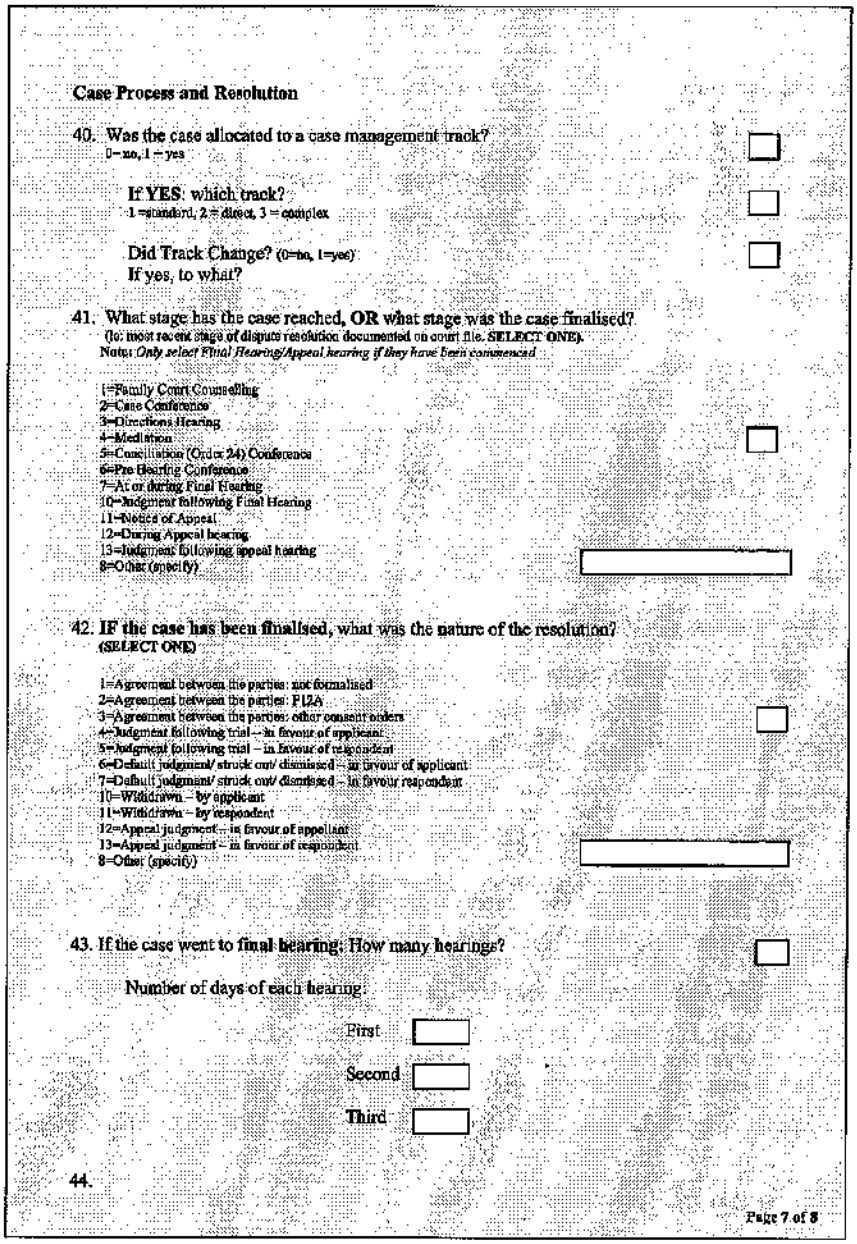
38. Is there evidence of an **enforcement proceeding?** (F49) ☐
0 = no, 1 = yes

If YES: against whom? ☐ ☐
1 =app, 2 =resp, 3 =both, 8 = other (specify)

39. Was there a **Form 4 (Divorce Application)** filed? ☐
0=No, 1=Yes

If YES, on whose behalf was it filed? ☐
1=Applicant, 2=Respondent, 3=Both

Was it filed by a solicitor? 0 = no, 1 = yes ☐



Case Process and Resolution

40. Was the case allocated to a case management track?
0=no, 1 = yes

If YES: which track?
1 =standard, 2 = direct, 3 = complex

Did Track Change? (0=no, 1=yes)
If yes, to what?

41. What stage has the case reached, **OR** what stage was the case finalised?
(Ie most recent stage of dispute resolution documented on court file. **SELECT ONE**).
Note: *Only select Final Hearing/Appeal hearing if they have been commenced*

1=Family Court Counselling
2=Case Conference
3=Directions Hearing
4=Mediation
5=Conciliation (Order 24) Conference
6=Pre Hearing Conference
7=At or during Final Hearing
10=Judgment following Final Hearing
11=Notice of Appeal
12=During Appeal hearing
13=Judgment following appeal hearing
8=Other (specify)

42. **IF the case has been finalised**, what was the nature of the resolution?
(SELECT ONE)

1=Agreement between the parties: not formalised
2=Agreement between the parties: FL2A
3=Agreement between the parties: other consent orders
4=Judgment following trial – in favour of applicant
5=Judgment following trial – in favour of respondent
6=Default judgment/ struck out/ dismissed – in favour of applicant
7=Default judgment/ struck out/ dismissed – in favour respondent
10=Withdrawn – by applicant
11=Withdrawn – by respondent
12=Appeal judgment – in favour of appellant
13=Appeal judgment – in favour of respondent
8=Other (specify)

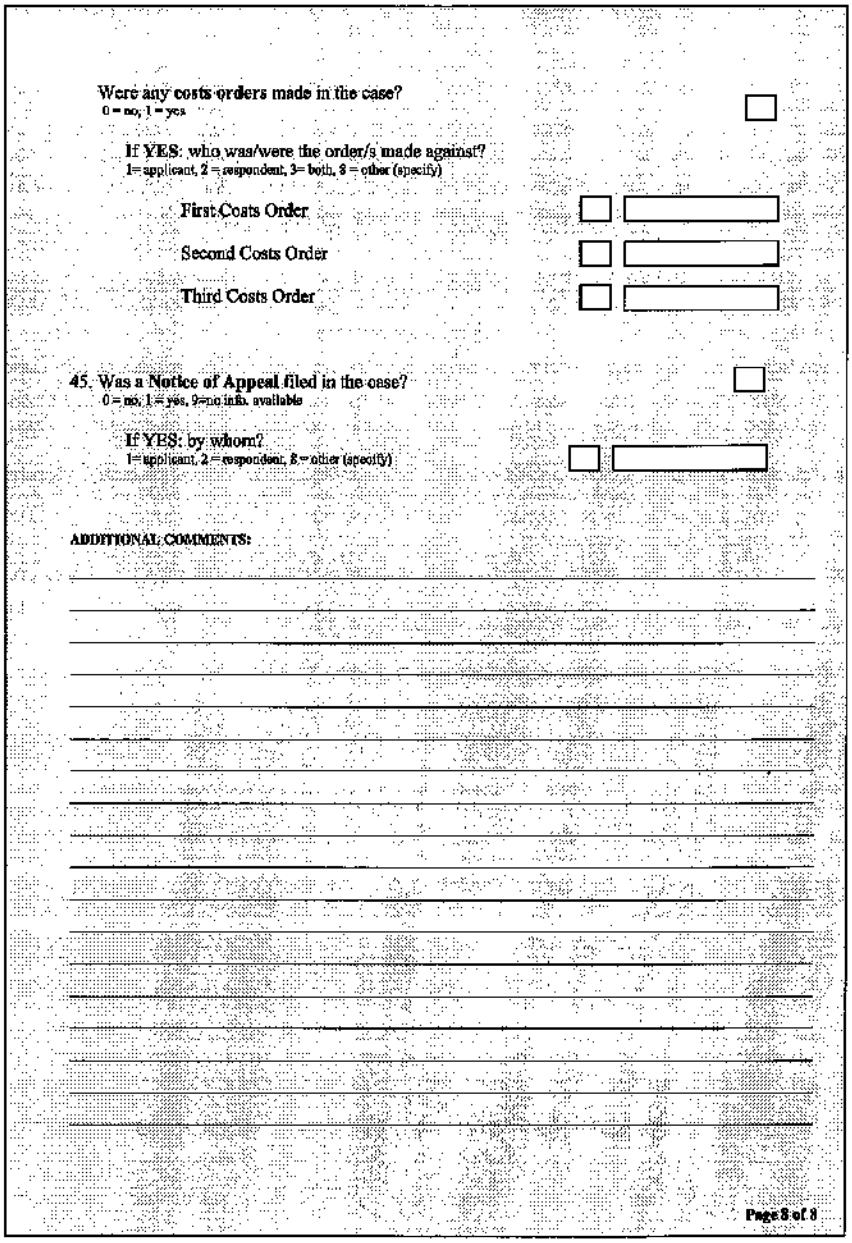
43. If the case went to final hearing: How many hearings?

Number of days of each hearing:

First
Second
Third

44.

Page 7 of 8



Were any costs orders made in the case? ☐
0 = no, 1 = yes

If YES: who was/were the order/s made against?
1= applicant, 2 = respondent, 3= both, 8 = other (specify)

First Costs Order ☐ ☐

Second Costs Order ☐ ☐

Third Costs Order ☐ ☐

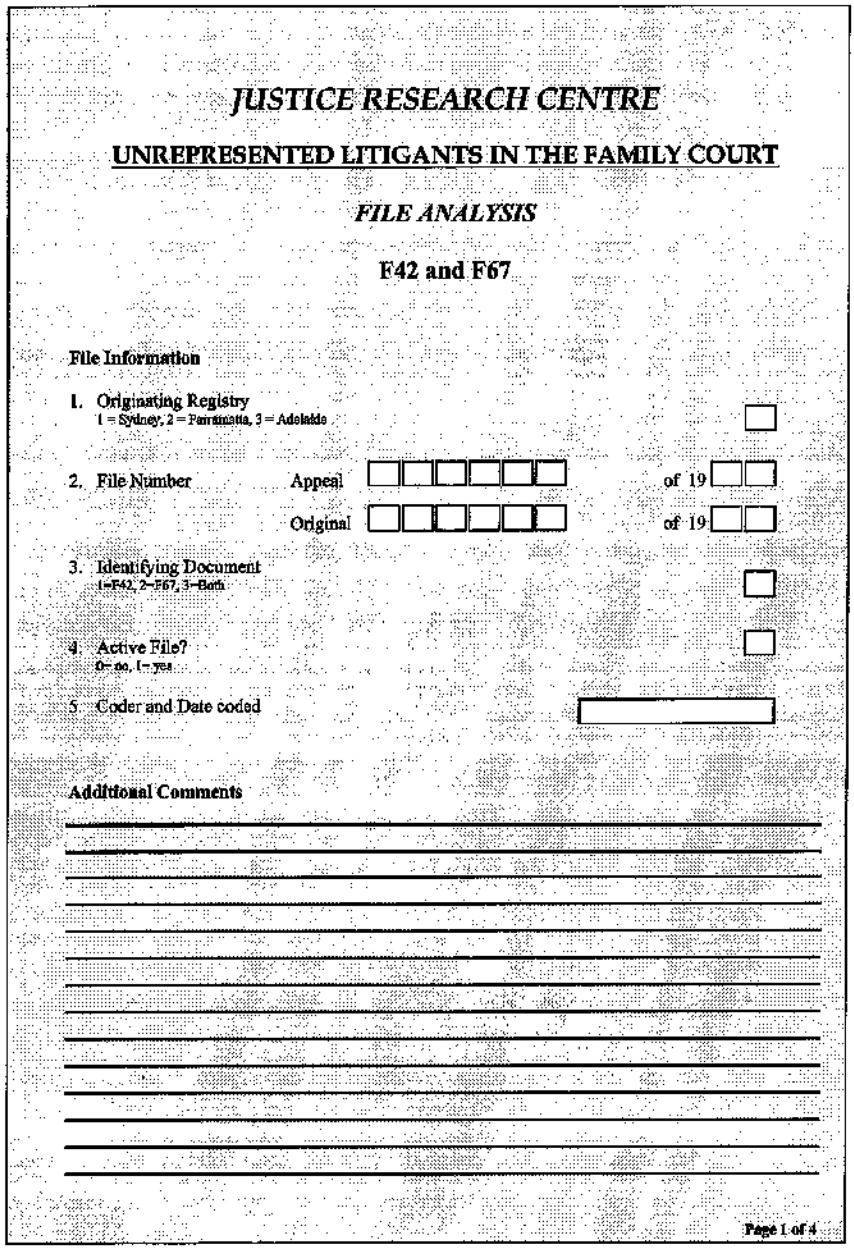
45. Was a Notice of Appeal filed in the case? ☐
0 = no, 1 = yes, 9=no info. available

If YES: by whom? ☐ ☐
1= applicant, 2 = respondent, 8 = other (specify)

ADDITIONAL COMMENTS:

Page 8 of 8

B. Appeal cases coding form



JUSTICE RESEARCH CENTRE

UNREPRESENTED LITIGANTS IN THE FAMILY COURT

FILE ANALYSIS

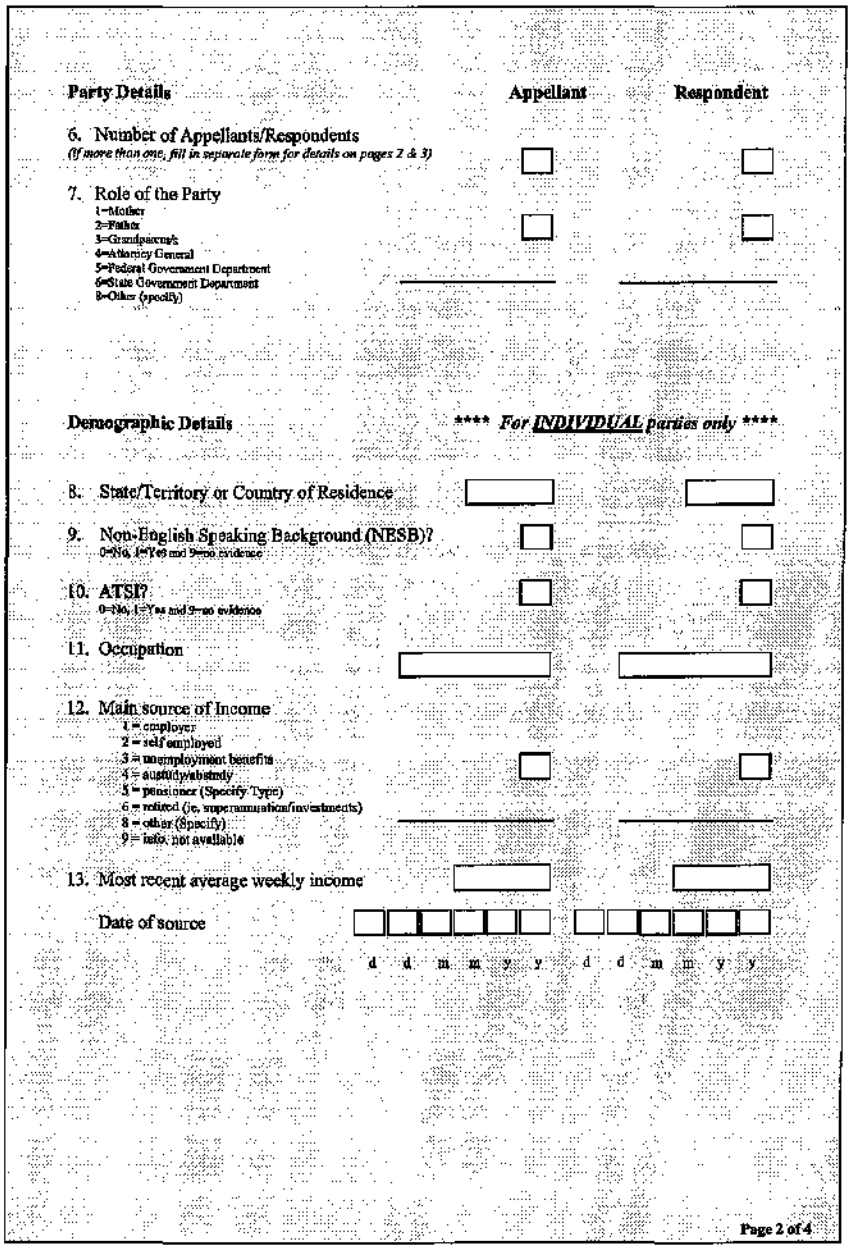
F42 and F67

File Information

1. Originating Registry
   1 = Sydney, 2 = Parramatta, 3 = Adelaide ☐
2. File Number
   Appeal ☐☐☐☐☐☐ of 19☐☐
   Original ☐☐☐☐☐☐ of 19☐☐
3. Identifying Document
   1=F42, 2=F67, 3=Both ☐
4. Active File?
   0= no, 1= yes ☐
5. Coder and Date coded ☐

Additional Comments

Page 1 of 4



Party Details **Appellant** **Respondent**

6. Number of Appellants/Respondents
(If more than one, fill in separate form for details on pages 2 & 3)

7. Role of the Party
1=Mother
2=Father
3=Grandparent
4=Attorney General
5=Federal Government Department
6=State Government Department
8=Other (specify)

Demographic Details **** *For INDIVIDUAL parties only* ****

8. State/Territory or Country of Residence

9. Non-English Speaking Background (NESB)?
0=No, 1=Yes and 9=no evidence

10. ATSI?
0=No, 1=Yes and 9=no evidence

11. Occupation

12. Main source of Income
1 = employer
2 = self employed
3 = unemployment benefits
4 = austudy/abstudy
5 = pensioner (Specify Type)
6 = retired (ie, superannuation/investments)
8 = other (Specify)
9 = info. not available

13. Most recent average weekly income

Date of source

d d m m y y d d m m y y

Page 2 of 4

Representation at Filing of Documents and Court Processes

14. Was the Appellant or Respondent represented at the following stages?
Please give date only if the stage has been reached.
0 = no, 1 = yes, 9 = never reached that stage, unknown or undefended

Stage	Date Filed	Appellant Representation	Respondent Representation
Filing of F42 or F67	d d m m y y		
Filing of Response Or Cross-Appeal	d d m m y y		
Settling of Appeal Book	d d m m y y		
Filing of Appellants Outline of Submission	d d m m y y		
Filing of Respondents Outline of Submission	d d m m y y		
When appeal/cross appeal was Withdrawn	d d m m y y		
During the Appeal Hearing (give the date the appeal hearing commenced, if representation changed during the appeal hearing, make a note of the change)	d d m m y y		

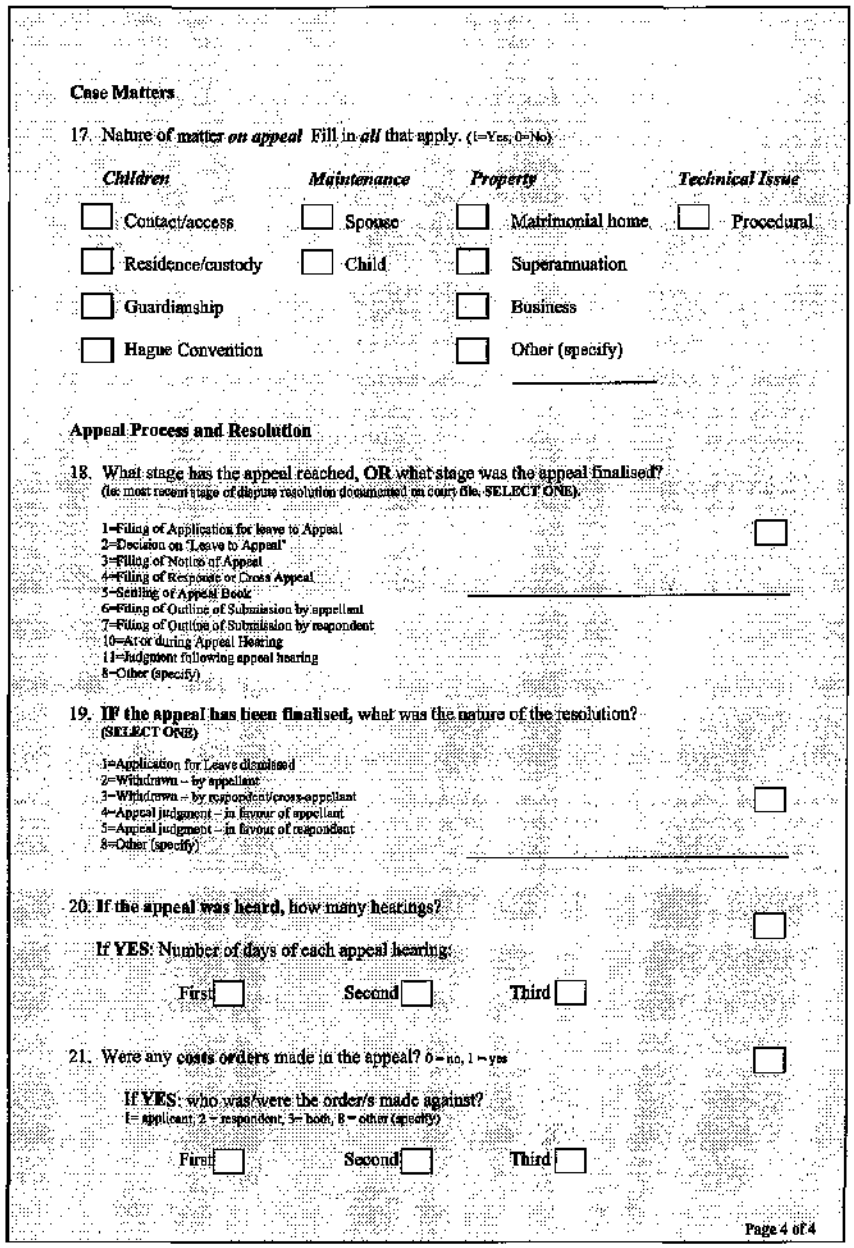
15. To what extent were the appellant and respondent represented throughout the appeal process?

1 = fully represented
2 = partially represented
3 = fully unrepresented
9 = undefended, unknown

	Appellant Representation	Respondent Representation
FILING		
COURT		

16. Did a solicitor file a Notice of Ceasing to Act (F55) for the appellant or respondent? 0 = no, 1 = yes
If YES: how many times?

Appellant Representation	Respondent Representation



Case Matters

17. Nature of matter *on appeal* Fill in *all* that apply. (1=Yes, 0=No)

Children	*Maintenance*	*Property*	*Technical Issue*
☐ Contact/access	☐ Spouse	☐ Matrimonial home	☐ Procedural
☐ Residence/custody	☐ Child	☐ Superannuation	
☐ Guardianship		☐ Business	
☐ Hague Convention		☐ Other (specify) _____	

Appeal Process and Resolution

18. What stage has the appeal reached, OR what stage was the appeal finalised?
(ie: most recent stage of dispute resolution documented on court file. SELECT ONE).

1=Filing of Application for leave to Appeal
2=Decision on "Leave to Appeal"
3=Filing of Notice of Appeal
4=Filing of Response or Cross Appeal
5=Settling of Appeal Book
6=Filing of Outline of Submission by appellant
7=Filing of Outline of Submission by respondent
10=At or during Appeal Hearing
11=Judgment following appeal hearing
8=Other (specify) _____ ☐

19. **If the appeal has been finalised,** what was the nature of the resolution?
(SELECT ONE)

1=Application for Leave dismissed
2=Withdrawn – by appellant
3=Withdrawn – by respondent/cross-appellant
4=Appeal judgment – in favour of appellant
5=Appeal judgment – in favour of respondent
8=Other (specify) _____ ☐

20. **If the appeal was heard,** how many hearings? ☐

If **YES**: Number of days of each appeal hearing:

First ☐ Second ☐ Third ☐

21. Were any **costs orders** made in the appeal? 0 = no, 1 = yes ☐

If **YES**: who was/were the order/s made against?
1= applicant, 2 = respondent, 3= both, 8 = other (specify)

First ☐ Second ☐ Third ☐

Page 4 of 4

Appendix 3

Statistical Tables

Table 2.1 Total Form 7 and Form 12 Applications filed in the Brisbane, Sydney and Melbourne Registries

Year	Sydney	Parramatta	Adelaide	Total applications
1994-95	2587	2458	2708	7753
1995-96	2586	2486	2850	7902
1996-97	2882	2601	3105	8588
1997-98	2841	2777	3303	8921
1998-99	2776	2884	3087	8527
Total	13672	12986	15053	41691

TABLE 2.2 Registry at first instance by year of identifying document

Year	Sydney		Parramatta		Adelaide		Total	
	n	%	n	%	n	%	n	%
1995	92	18.6	89	17.9	74	15.5	255	17.3
1996	105	21.2	119	23.9	103	21.5	327	22.2
1997	114	23.0	107	21.5	94	19.7	315	21.4
1998	100	20.2	96	19.3	104	21.8	300	20.4
1999	84	17.0	86	17.3	103	21.5	273	18.6
Total	495	100.0	497	100.0	478	100.0	1470	100.0

TABLE 2.3 Litigant role at first instance by sex

Litigant Role	Male		Female		Total	
	n	%	n	%	n	%
Applicant	593	39.7	907	59.2	1500	46.6
Respondent	899	60.3	624	40.8	1523	50.4
Total	1492	100.0	1531	100.0	3023	100.0

TABLE 2.4 Registry by year appeal was filed

Year	Sydney		Parramatta		Adelaide		Total	
	n	%	n	%	n	%	n	%
1995	8	3.7	2	1.9	29	33.0	39	9.5
1996	32	14.8	8	7.6	15	17.0	55	13.4
1997	61	28.2	32	30.5	17	19.3	110	26.9
1998	55	25.5	28	26.7	9	10.2	92	22.5
1999	60	27.8	35	33.3	18	20.5	113	27.6
Total	216	100.0	105	100.0	88	100.0	409	100.0

TABLE 2.5 Litigant role on appeal by sex

Gender	Male		Female		Total	
	n	%	n	%	n	%
Applicant	241	61.3	155	38.9	396	50.1
Respondent	152	38.7	243	61.1	395	49.9
Total	393	100.0	398	100.0	791	100.0

TABLE 3.1 Representation at first instance by litigant role

Overall Representation	Applicant		Respondent		Total	
	n	%	n	%	n	%
Fully Represented	1111	74.0	899	63.1	2010	68.7
Partially Represented	321	21.4	387	27.2	708	24.2
Fully Unrepresented	70	4.7	138	9.7	208	7.1
Total	1502	100.0	1424	100.0	2926	100.0

TABLE 3.2 Representation on appeal by litigant role

Overall Representation	Applicant		Respondent		Total	
	n	%	n	%	n	%
Fully Represented	308	73.7	316	93.8	624	82.6
Partially Represented	43	10.3	6	1.8	49	6.5
Fully Unrepresented	67	16.0	15	4.5	82	10.9
Total	418	100.0	337	100.0	755	100.0

TABLE 3.3 Representation at first instance by registry

Overall Representation	Sydney		Parramatta		Adelaide		Total	
	n	%	n	%	n	%	n	%
Fully Represented	760	77.6	634	64.6	616	63.9	2010	68.7
Partially Represented	181	18.5	268	27.3	259	26.9	708	24.2
Fully Unrepresented	39	4.0	80	8.1	89	9.2	208	7.1
Total	980	100.0	982	100.0	964	100.0	2926	100.0

TABLE 3.4 Representation on appeal by registry

Overall Representation	Sydney		Parramatta		Adelaide		Total	
	n	%	n	%	n	%	n	%
Fully Represented	358	86.5	151	80.7	115	74.7	624	82.6
Partially Represented	22	5.3	14	7.5	13	8.4	49	6.5
Fully Unrepresented	34	8.2	22	11.8	26	16.9	82	10.9
Total	414	100.0	187	100.0	154	100.0	755	100.0

TABLE 3.5 Logistic Regression model: Representation at first instance by litigant role and registry

Effect	Chi-square	df	Sig
Registry	61.593	4	0.000
Litigant Role	50.153	2	0.000
Final Model (n=2926)	110.721	6	0.000
Pearson goodness-of-fit	11.196	4	0.024
Deviance goodness-of-fit	11.152	4	0.025

TABLE 3.6 Logistic Regression model: Representation on appeal by litigant role and registry

Effect	Chi-square	df	Sig
Originating Registry	10.686	4	0.030
Litigant Role	57.703	2	0.000
Final Model (n=755)	69.220	6	0.000
Pearson goodness-of-fit	2.356	4	0.671
Deviance goodness-of-fit	2.574	4	0.631

TABLE 3.7 Representation at first instance by year of identifying document

Year of Identifying Document	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	361	71.6	120	23.8	23	4.6	504
1996	422	64.2	192	29.2	43	6.5	657
1997	440	69.6	145	22.9	47	7.4	632
1998	417	70.9	125	21.3	46	7.8	588
1999	370	67.9	126	23.1	49	9.0	545
Total	2010	68.7	708	24.2	209	7.1	2926

TABLE 3.8 Applicant's representation for initiating document by year

Year of Identifying Document	Represented		Unrepresented		Total
	n	%	n	%	n
1995	160	89.4	19	10.6	179
1996	171	81.4	39	18.6	210
1997	171	85.5	29	14.5	200
1998	200	91.3	19	8.7	219
1999	173	86.5	27	13.5	200
Total	875	86.8	133	13.2	1008

TABLE 3.9 Overall representation of applicants filing initiating document unrepresented by year

Year of Identifying Document	Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n
1995	12	63.2	7	36.8	19
1996	28	71.8	11	28.2	39
1997	19	65.5	10	34.5	29
1998	9	47.4	10	52.6	19
1999	15	55.6	12	44.4	27
Total	83	62.4	50	37.6	133

TABLE 3.10 Respondent's representation for response to initiating document by year

Year of Identifying Document	Represented		Unrepresented		Total
	n	%	n	%	n
1995	114	96.6	4	3.4	118
1996	108	87.8	15	12.2	123
1997	132	95.7	6	4.3	138
1998	125	94.0	8	6.0	133
1999	123	89.8	14	10.2	137
Total	602	92.8	47	7.2	649

TABLE 3.11 Applicant's representation status at first instance by year of identifying document

Year of Identifying Document	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	196	75.1	56	21.5	9	3.4	261
1996	227	67.6	93	27.7	16	4.8	336
1997	242	75.4	63	19.6	16	5.0	321
1998	239	78.4	51	16.7	15	4.9	305
1999	207	74.2	58	20.8	14	5.0	279
Total	1111	74.0	321	21.4	70	4.7	1502

TABLE 3.12 Respondent's representation status at first instance by year of identifying document

Year of Identifying Document	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	165	67.9	64	26.3	14	5.8	243
1996	195	60.7	99	30.8	27	8.4	321
1997	198	63.7	82	26.4	31	10.0	311
1998	178	62.9	74	26.1	31	11.0	283
1999	163	61.3	68	25.6	35	13.2	266
Total	899	63.1	387	27.2	138	9.7	1424

TABLE 3.13 Representation status at first instance in the Sydney registry by year of identifying document

Year of Identifying Document	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	141	79.2	32	18.0	5	2.8	178
1996	150	71.8	53	25.4	6	2.9	209
1997	182	77.1	44	18.6	10	4.2	236
1998	160	82.9	25	13.0	8	4.1	193
1999	127	77.4	27	16.5	10	6.1	164
Total	760	77.6	181	18.5	39	4.0	980

TABLE 3.14 Representation status at first instance in the Parramatta registry by year of identifying document

Year of Identifying Document	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	115	65.7	51	29.1	9	5.1	175
1996	142	59.4	81	33.9	16	6.7	239
1997	141	67.1	52	24.8	17	8.1	210
1998	126	68.1	43	23.2	16	8.6	185
1999	110	63.6	41	23.7	22	12.7	173
Total	634	64.6	268	27.3	80	8.1	982

TABLE 3.15 Representation status at first instance in the Adelaide registry by year of identifying document

Year of Identifying Document	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	105	69.5	37	24.5	9	6.0	151
1996	130	62.2	58	27.8	21	10.0	209
1997	117	62.9	49	26.3	20	10.8	186
1998	131	62.4	57	27.1	22	10.5	210
1999	133	63.9	58	27.9	17	8.2	208
Total	616	63.9	259	26.9	89	9.2	964

TABLE 3.16 Logistic regression model: Representation at first instance by litigant role, registry and year of identifying document

Effect	Chi-square	df	Sig
Originating Registry	60.239	4	0.000
Litigant Role	50.082	2	0.000
Year ID doc	19.625	8	0.012
Final Model (n=2926)	130.346	14	0.000
Pearson goodness-of-fit	45.227	44	0.421
Deviance goodness-of-fit	48.095	44	0.311

TABLE 3.17 Representation status by year appeal filed

Year Appeal filed	Fully Represented		Partially Represented		Fully Unrepresented		Total
	n	%	n	%	n	%	n
1995	57	77.0	5	6.8	12	16.2	74
1996	81	82.7	6	6.1	11	11.2	98
1997	163	82.3	16	8.1	19	9.6	198
1998	139	82.7	12	7.1	17	10.1	168
1999	184	84.8	10	4.6	23	10.6	217
Total	624	82.6	49	6.5	82	10.9	755

TABLE 3.18 Case Representation Category at first instance by year of identifying document

Year of Identifying Document	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant	
	n	%	n	%	n	%
1995	140	54.9	96	37.6	19	7.5
1996	154	47.1	138	42.2	35	10.7
1997	174	55.2	102	32.4	39	12.4
1998	170	56.7	92	30.7	38	12.7
1999	140	51.3	92	33.7	41	15.0
Total	778	52.9	520	35.4	172	11.7

TABLE 3.19 Cases at first instance involving an unrepresented litigant by year of identifying document and registry

Year of Identifying Document	Sydney		Parramatta		Adelaide	
	n	%	n	%	n	%
1995	28	30.4	49	55.1	38	51.4
1996	46	43.8	70	58.8	57	55.3
1997	41	36.0	51	47.7	49	52.1
1998	26	26.0	46	47.9	58	55.8
1999	32	38.1	43	50.0	58	56.3
Total	173	34.9	259	52.1	260	54.4

TABLE 3.20 Case Representation Category at first instance by year of identifying document: Children-only Cases

Year of Identifying Document	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant	
	n	%	n	%	n	%
1995	36	41.8	40	44.0	13	14.3
1996	43	30.5	75	53.2	23	16.3
1997	55	41.0	51	38.1	28	20.9
1998	50	40.3	46	37.1	28	22.6
1999	48	38.7	49	39.5	27	21.8
Total	234	36.1	261	42.5	119	19.4

TABLE 3.21 Case Representation Category at first instance by year of identifying document: Children-only and Children+property cases (excluding Property-only)

Year of Identifying Document	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant	
	n	%	n	%	n	%
1995	87	48.6	76	42.5	16	8.9
1996	81	37.3	108	49.8	28	12.9
1997	109	48.7	82	36.6	33	14.7
1998	88	46.6	69	36.5	32	16.9
1999	84	46.4	67	37.0	30	16.6
Total	449	45.4	402	40.6	139	14.0

TABLE 3.22 Case Representation Category by year appeal filed

Year of Identifying Document	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant	
	n	%	n	%	n	%
1995	24	61.5	5	12.8	10	25.6
1996	39	70.9	5	9.1	11	20.0
1997	79	71.8	13	11.8	18	16.4
1998	63	68.5	12	13.0	17	18.5
1999	82	72.6	10	8.8	21	18.6
Total	267	70.2	45	11.0	77	18.8

TABLE 4.1 Representation status by sex at first instance

Gender	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Female	1104	55.0	324	45.8	72	34.6	1500	51.3
Male	903	45.0	384	54.2	136	65.4	1423	48.7
Total	2007	100.0	708	100.0	208	100.0	2923	100.0

TABLE 4.2 Representation status at first instance by sex and litigant role

Applicants

Gender	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Female	704	63.5	174	54.2	29	41.4	907	60.5
Male	405	36.5	147	45.8	41	58.6	593	39.5
Total	1109	100.0	321	100.0	70	100.0	1500	100.0

Respondents

Gender	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Female	400	44.5	150	38.8	43	31.2	593	41.7
Male	498	55.5	237	61.2	95	68.8	830	58.3
Total	898	100.0	387	100.0	138	100.0	1423	100.0

TABLE 4.3 Representation on appeal status by sex

Gender	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Female	295	53.3	15	31.3	21	25.9	331	48.5
Male	258	46.7	33	68.8	60	74.1	351	51.5
Total	553	100.0	48	100.0	81	100.0	682	100.0

TABLE 4.4 Representation status at first instance by country of origin

Country of Origin	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Australia	1113	70.9	365	68.0	86	61.4	1564	69.6
Other English speaking country	179	11.4	71	13.2	19	13.6	269	12.0
Non-English speaking country	277	17.7	101	18.8	35	25.0	413	18.4
Total	1569	100.0	537	100.0	140	100.0	2246	100.0

TABLE 4.5 Representation status on appeal by country of origin

Non-English Speaking Background	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Yes	81	13.6	7	14.3	19	23.2	107	14.7
No Evidence	514	86.4	42	85.7	63	76.8	619	85.3
Total	595	100.0	49	100.0	82	100.0	726	100.0

TABLE 4.6 Representation status at first instance by main source of income

Main Source of Income	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Pension/Welfare	473	33.3	170	42.2	33	51.6	676	35.8
Other Income	946	66.7	233	57.8	31	48.4	1210	64.2
Total	1419	100.0	403	100.0	64	100.0	1886	100.0

TABLE 4.7 Representation status on appeal by main source of income (three way)

Main Source of Income	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Employer	123	40.3	9	33.3	6	14.6	138	37.0
Self Employed/ Investments/ Other	123	40.3	12	44.4	5	12.2	140	37.5
Pension/Welfare	59	19.3	6	22.2	30	73.2	95	25.5
Total	305	100.0	27	100.0	41	100.0	373	100.0

TABLE 4.8 Representation status on appeal by main source of income (two way)

Main Source of Income	Fully Represented		Partially Represented		Fully Unrepresented		Total	
	n	%	n	%	n	%	n	%
Pension/Welfare	59	19.3	6	22.2	30	73.2	95	25.5
Other Income	246	80.7	21	77.8	11	26.8	278	74.5
Total	305	100.0	27	100.0	41	100.0	373	100.0

TABLE 4.9 Logistic Regression model: Representation at first instance by sex and main source of income

Effect	Chi-square	df	Sig
Sex	44.369	2	0.000
Income Source	34.216	2	0.000
Final Model (n=1886)	61.761	4	0.000
Pearson goodness-of-fit	3.857	2	0.145
Deviance goodness-of-fit	4.283	2	0.117

TABLE 4.10 Logistic Regression model: Representation on appeal by sex and main source of income

Effect	Chi-square	df	Sig
Sex	32.395	2	0.000
Income Source	62.904	2	0.000
Final Model (n=373)	79.790	4	0.000
Pearson goodness-of-fit	1.931	2	0.381
Deviance goodness-of-fit	1.602	2	0.449

TABLE 4.11 Logistic Regression model: Representation at first instance by all variables

Effect	Chi-square	df	Sig
Registry	16.875	4	0.002
Litigant Role	5.599	2	0.061
Year ID doc	14.426	8	0.071
Sex	35.505	2	0.000
Income Source	28.986	2	0.000
Final Model (n=1886)	99.232	18	0.000
Pearson goodness-of-fit	199.246	220	0.839
Deviance goodness-of-fit	208.727	220	0.697

TABLE 4.12 Logistic Regression model: Representation on appeal by all variables

Effect	Chi-square	df	Sig
Originating Registry	6.956	4	0.138
Litigant Role	24.312	2	0.000
Sex	30.417	2	0.000
Income Source	46.358	2	0.000
Final Model (n=373)	115.060	10	0.000
Pearson goodness-of-fit	224.911	230	0.582
Deviance goodness-of-fit	228.564	230	0.514

TABLE 5.1 Case Representation Category at first instance by issues in dispute

Issues in Dispute	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
Children Issues Only	284	36.2	261	50.3	119	70.8	614	42.0
Property Issues Only	325	42.0	117	22.5	29	17.3	471	32.2
Children and Property Issues	215	27.8	141	27.2	20	11.9	376	25.7
Total	774	100.0	519	100.0	168	100.0	1461	100.0

TABLE 5.2 Applicant's main source of income at first instance by issues in dispute

Main Source of Income	Children Issues Only		Property Issues Only		Children and Property Issues		Total	
	n	%	n	%	n	%	n	%
Pension/Welfare	154	62.1	149	32.7	122	35.8	425	40.7
Other Source of Income	94	37.9	307	67.3	219	64.2	620	59.3
Total	248	100.0	456	100.0	341	100.0	1045	100.0

TABLE 5.3 Respondent's main source of income at first instance by issues in dispute

Main Source of Income	Children Issues Only		Property Issues Only		Children and Property Issues		Total	
	n	%	n	%	n	%	n	%
Pension/Welfare	111	65.3	65	17.2	69	22.6	245	28.8
Other Source of Income	59	34.7	312	82.8	236	77.4	607	71.2
Total	170	100.0	377	100.0	305	100.0	852	100.0

TABLE 5.4 Case Representation Category on appeal by issues in dispute

Issues in Dispute	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
Children Issues Only	94	36.4	20	52.6	40	63.5	154	42.9
Property Issues Only	147	57.0	15	39.5	21	33.3	183	51.0
Children and Property Issues	17	6.6	3	7.9	2	3.2	22	6.1
Total	258	100.0	38	100.0	63	100.0	359	100.0

TABLE 5.5 Case Representation Category at first instance by appointment of a child representative

Appointment of a Child Representative	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
No Child Rep appointed	682	87.7	391	75.2	161	93.6	1234	83.9
A Child Rep appointed	96	12.3	129	24.8	11	6.4	236	16.1
Total	778	100.0	520	100.0	172	100.0	1470	100.0

TABLE 5.6 Logistic regression model: Case Representation at first instance by all variables

Effect	Chi-square	df	Sig
Registry	32.984	4	0.000
Case Issue/s	114.851	4	0.000
Child Representative	38.684	2	0.000
FVO	9.511	2	0.009
Final Model (n=1461)	220.656	12	0.000
Pearson goodness-of-fit	69.337	50	0.036
Deviance goodness-of-fit	67.149	50	0.053

TABLE 5.7 Case Representation Category at first instance by duration in months

Case Representation Category	N	Median	Mean	Std. Dev	Min	Max
Case involved only fully represented litigants	720	11.9	14.2	11.1	0.2	77.7
Case involved a partially represented litigant (w/o fully unrep)	458	16.3	20.2	14.9	0.2	108.5
Case involved a fully unrepresented litigant	159	7.1	10.8	10.6	0.0	48.9
Total	1337	12.7	15.9	12.9	0.0	108.5

TABLE 5.8 Case Representation Category on appeal by duration in months

Case Representation Category	N	Median	Mean	Std. Dev	Min	Max
Case involved only fully represented litigants	277	4.3	5.0	4.0	0.0	34.3
Case involved a partially represented litigant (w/o fully unrep)	44	5.6	5.8	2.5	1.1	12.2
Case involved a fully unrepresented litigant	73	3.8	4.9	4.3	0.0	19.8
Total	394	4.3	5.1	3.9	0.0	34.29

TABLE 5.9 Case Representation Category at first instance by stage of resolution

Stage of Resolution	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
Initial Court Stage	14	1.8	7	1.3	8	4.7	29	2.0
Directions Hearing or Interim Hearing	336	43.2	260	50.0	123	71.5	719	48.9
Conciliation Conference	110	14.1	27	5.2	6	3.5	143	9.7
Status Hearing, Pre-Hearing or Compliance Conference	114	14.7	85	16.3	9	5.2	208	14.1
In chambers with Registrar or before a Judge	109	14.0	63	12.1	20	11.6	192	13.1
At, during or following judgment from Final Hearing	87	11.2	73	14.0	5	2.9	165	11.2
Review or Appeal Process	8	1.0	5	1.0	1	0.6	14	1.0
Total	778	100.0	520	100.0	172	100.0	1470	100.0

TABLE 5.10 Case Representation Category on appeal by stage of resolution

Stage of Resolution	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
Initial Court Stage	74	27.1	13	31.0	35	47.9	122	31.4
Settling of Appeal Book Index or Filing of Key Document	31	11.4	3	7.1	13	17.8	47	12.1
At, during or following judgment from Appeal Hearing	168	61.5	26	61.9	25	34.2	219	56.4
Total	273	100.0	42	100.0	73	100.0	388	100.0

TABLE 5.11 Case Representation Category at first instance by nature of resolution

Nature of Resolution	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
Agreement between parties	566	77.7	316	68.5	99	60.7	983	72.5
Directions or Interim Orders	12	1.6	12	2.6	7	4.3	31	2.3
Judgment following trial	37	5.1	34	7.3	4	2.5	75	5.5
Default Judgment, struck out or dismissed	67	9.2	73	15.7	36	22.1	176	13.0
Withdrawn	46	6.3	27	5.8	17	10.4	90	6.6
Total	728	100.0	464	100.0	163	100.0	1355	100.0

TABLE 5.12 Case Representation Category on appeal by nature of resolution

Nature of Resolution	Case involved only fully represented litigants		Case involved a partially represented litigant (w/o fully unrep)		Case involved a fully unrepresented litigant		Total	
	n	%	n	%	n	%	n	%
Withdrawn	79	31.7	13	31.7	24	36.9	116	32.7
Abandoned/ Dismissed/ Struck Out	13	5.2	3	7.3	18	27.7	34	9.6
Appeal Judgment	157	63.1	25	61.0	23	35.4	205	57.7
Total	249	100.0	41	100.0	65	100.0	355	100.0

TABLE 6.1 Partially represented litigants' representation for first and last documents at first instance

Representation for First Document	Representation for Last Document				Total	
	Represented		Unrepresented			
	n	%	n	%	n	%
Represented	274	47.6	126	21.8	400	69.4
Unrepresented	129	22.4	47	8.2	176	30.6
Total	403	70.0	173	30.0	576	100.0

TABLE 6.2 Partially represented litigants' overall representation for documents at first instance: Sydney and Adelaide registries

Overall Representation	N	%
Fully Represented	166	37.7
Partially Represented	250	56.8
Fully Unrepresented	16	3.6
Undefended/Unknown	8	1.8
Total	440	100.0

TABLE 6.3 Partially represented litigants' representation for court stages at first instance

Court Stage	Unrepresented		Represented		Total
	n	%	n	%	n
First Directions Hearing	152	28.0%	391	72.0%	543
Last Directions Hearing	153	37.1%	259	62.9%	412
Last Interim Hearing	48	28.7%	119	71.3%	167
Last Conciliation Conference	26	13.3%	169	86.7%	195
Last Pre-Hearing Conference	56	23.0%	187	77.0%	243
Last Compliance Conference	11	17.5%	52	82.5%	63
Start of the Last Final Hearing	47	39.5%	72	60.5%	119
End of the Last Final Hearing	29	39.2%	45	60.8%	74

TABLE 6.4 Partially represented litigants' representation for court stages on appeal

Court Stage	Unrepresented		Represented		Total
	n	%	n	%	n
Filing of Identifying Doc/Response	22	48.9%	23	51.1%	45
Settling of Appeal Book	10	38.5%	16	61.5%	26
Filing of Outline of Submission	6	23.1%	20	76.9%	26
Withdrawal of appeal/x-appeal	8	53.3%	7	46.7%	15
During the Appeal Hearing	14	45.2%	17	54.8%	31

TABLE 6.5 Partially represented litigants' overall representation for court at first instance: Sydney and Adelaide registries

Overall Representation	N	%
Fully Represented	93	21.1
Partially Represented	310	70.5
Fully Unrepresented	27	6.1
Undefended/Unknown	10	2.3
Total	440	100.0

TABLE 6.6 Partially represented litigants' representation for documents by representation for court at first instance: Sydney and Adelaide registries

Representation for Court	Representation for Documents								Total	
	Fully Represented		Partially Represented		Fully Unrepresented		Undefended /Unknown			
	n	%	n	%	n	%	n	%	n	%
Fully Represented			157	35.7	9	2.0			166	37.7
Partially Represented	88	20.0	134	30.5	18	4.1	10	2.3	250	56.8
Fully Unrepresented	5	1.1	11	2.5					16	3.6
Undefended/Unknown			8	1.8					8	1.8
Total	93	21.1	310	70.5	27	6.1	10	2.3	440	100.0

* Blank cells are not applicable for partially represented litigants

TABLE 6.7 Partially represented litigants' representation for documents by representation for court on appeal

Representation for Court	Representation for Documents						Total	
	Fully Represented		Partially Represented		Fully Unrepresented			
	n	%	n	%	n	%	n	%
Fully Represented			12	24.5	2	4.1	14	28.6
Partially Represented	4	8.2	6	12.2	3	6.1	13	26.5
Fully Unrepresented	3	6.1	7	14.3			10	20.4
Undefended/Unknown			12	24.5			12	24.5
Total	7	14.3	37	75.5	5	10.2	49	100.0

* Blank cells are not applicable for partially represented litigants

TABLE 8.1 Appeal files 1998-99 by appeals registry

Appeals	Northern Appeals Registry	Eastern Appeals Registry	Southern Appeals Registry	Total
	n	n	n	n
Files Viewed	69	112	98	279
Cases Viewed	53	90	82	225
Qualitative Sample	31	67	54	152

TABLE 8.2 Stage reached by cases in the qualitative sample

Stage Case Reached	N	%
Initial Court Stage	10	6.6
Settling of Appeal Book Index	8	5.3
Filing of Key Document	8	5.3
At, during or following judgment from Appeal Hearing	114	75.0
Review or Appeal Process	3	1.9
Still Active or Unknown	9	5.9
Total	152	100.0

Appendix 4

References

Armytage, Livingstone (1996) 'Client Satisfaction with Specialists' Services: Lessons for Legal Educators', APLEC Conference - Skills Development for Tomorrow's Lawyers: Needs and Strategies, Sydney.

Australian Bureau of Statistics (2002a), *Catalogue 6401.0: Consumer Price Index, March Quarter 2002*, <www.abs.gov.au>.

Australian Bureau of Statistics (2002b), *Catalogue 6202.0: Labour Force, Australia, Preliminary, May 2002*, <www.abs.gov.au>.

Australian Institute of Judicial Administration (2001), *Litigants in Person Management Plans: Issues for Courts and Tribunals*, Melbourne: AIJA.

Australian Law Reform Commission (1995) *Report No 75: Cost Shifting - Who Pays for Litigation*, Sydney: ALRC.

Australian Law Reform Commission (1996) *The Unrepresented Party*, Sydney: ALRC.

Australian Law Reform Commission (1997a) *Issues Paper 20: Review of the Adversarial System of Litigation - Rethinking the Federal Civil Litigation System*, Sydney: ALRC.

Australian Law Reform Commission (1997b) *Issues Paper 22: Review of the Adversarial System of Litigation - Rethinking Family Law Proceedings*, Sydney: ALRC.

Australian Law Reform Commission (1999) *Discussion Paper 62: Review of the Federal Civil Justice System*, Sydney: ALRC.

Australian Law Reform Commission (2000) *Report No 89: Managing Justice - A Review of the Federal Civil Justice System*, Sydney: ALRC.

Barclay, S (1996) 'The Decision to Self-represent', 77 *Social Science Quarterly* 912.

Behrens, Juliet and Bruce Smyth (1999), *Spousal Support in Australia: A Study of Incidence and Attitudes*, Melbourne: Australian Institute of Family Studies.

Brown, Hon. Justice Sally (1998) 'Litigation Rules: Whose Interests Do They Serve?', 8th National Family Law Conference, Hobart, 24-28 October.

Byrne, L and CJ Leggat (1999) 'Litigants in Person: Procedural and Ethical Issues for Barristers', 19 *Australian Bar Review* 41.

Cain, M (1979) 'The General Practice Lawyer and the Client: Towards a Radical Conception', 7 *International Journal of the Sociology of Law* 331.

Cashen, C (1998) 'Legal Aid and Unrepresented Litigants: A Registrar's Perspective', 3rd National Family Court Conference, Melbourne.

Coleman, Hon. Justice Ian (1998) 'Unrepresented Litigants and the Family Court', 73 *Reform* 41.

Conley, John M and William O'Barr (1985) 'Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives', 19 *Law & Society Review* 661.

Conley, John M and William M O'Barr (1988) 'Lay Expectations of the Civil Justice System', 22 *Law & Society Review* 137.

Conley, John M and William M O'Barr (1990) *Rules Versus Relationships: The Ethnography of Legal Discourse*, Chicago: University of Chicago Press.

Davis, Gwynn, Stephen Cretney and Jean Collins (1994) *Simple Quarrels: Negotiating Money and Property Disputes on Divorce*, Oxford: Clarendon Press.

Dewar, John and Stephen Parker (1999) 'The Impact of the New Part VII Family Law Act 1975', 13 *Australian Journal of Family Law* 96.

Dewar, John, Jeff Giddings and Stephen Parker (1998) 'The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland', Report prepared for the Queensland Law Society and Family Law Practitioners Association of Queensland, Brisbane: Griffith University.

Dewar, John, Jeff Giddings and Stephen Parker (1999a) 'The Impact of Legal Aid Changes on Family Law Practice', 13 *Australian Journal of Family Law* 33.

Dewar, John and Stephen Parker, with Barbara Tynan and Donna Cooper (1999b), *Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975*, Brisbane: Family Law Research Unit Working Paper No.3, Griffith University.

Dewar, John, Barry W. Smith and Cate Banks (2000) *Litigants in Person in the Family Court of Australia*, Family Court of Australia Research Report No.20.

Engler, R (1999) 'And Justice For All - Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks, 67 *Fordham Law Review* 1987

Fagan, DM (1999) 'Discretions Should Go', 25(3) *Australian Law News* 12.

Family Court of Australia (1998a) *Annual Report 1997-98*.

Family Court of Australia (1998b) '1998 Study of the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants: Final Report', December.

Family Court of Australia (1999) *Annual Report 1998-99*.

Family Court of Australia (2000) *Future Directions Committee Report*, July.

Family Law Council (1996), *Family Law Appeals and Review: An Evaluation of the Appeal and Review of Family Law Decisions*, Canberra.

Family Law Council (1997), *Annual Report 1996-97*, Canberra.

Family Law Council (2000) *Litigants in Person: A Report to the Attorney-General Prepared by the Family Law Council*, Canberra.

Faulks, Hon. Justice John (2001) 'Self-representing Litigants - A Challenge: The Family Court's Commitment to Finding Solutions', NSW Legal Aid Commission Conference, 10-11 March.

Fleming, Don (2000) 'Australian Legal Aid Under the First Howard Government', 33 *University of British Columbia Law Review* 343.

Fogarty, Hon. Justice John (1991) 'Full Court Appeals: Practice and Principles', 6(3) *Australian Family Lawyer* 1.

Glendon, Mary Ann (1991) *Rights Talk: The Impoverishment of Political Discourse*, New York: The Free Press (Macmillan).

Goldschmidt, J, B Mahoney, H Solomon and J Green (1998) *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers*, Chicago: American Judicature Society.

Hunter, Rosemary (1998) 'Litigants in Person in Contested Cases in the Family Court', 12 *Australian Journal of Family Law* 171.

Hunter, Rosemary (1999) *Family Law Case Profiles*, Sydney: Justice Research Centre.

Hunter, Rosemary, with Ann Genovese, Angela Melville and April Chrzanowski (2000) *Legal Services in Family Law*, Sydney: Justice Research Centre.

Ingleby, Richard (1992) *Solicitors and Divorce*, Oxford: Clarendon Press.

Kaye, Miranda and Julia Tolmie (1998) 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law', 12 *Australian Journal of Family Law* 19.

Kritzer, Herbert M (1998) 'Contingent-fee Lawyers and their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship', 23 *Law & Social Inquiry* 795.

Law Reform Commission of Western Australia (1998) *Self-Represented Litigants: Review of the Criminal and Civil Justice System - Consultation Drafts*, Perth: LRCWA.

Leaver, B (1994) 'Reduction of the Costs of Litigation in the Family Court of Australia', National Seminar Papers 1992, Canberra: Family Court of Australia.

Mather, Lynn, Craig McEwen and Richard J Maiman (1995) '"The Passenger Decides on the Destination and I Decide the Route": Are Divorce Lawyers "Expensive Cab Drivers"?', 9 *International Journal of Law and the Family* 286.

Mathews, Hon. Justice Jane (1998) 'Assisting Unrepresented Parties in the AAT', 72 *Reform* 38.

Matruglio, Tania (1999) 'Part Two: The Costs of Litigation in the Family Court of Australia - Research Conducted for the Australian Law Reform Commission', Sydney: ALRC.

Matruglio, Tania and Gillian McAllister (1999) 'Part One: Empirical Information about the Family Court of Australia - Research Conducted for the Australian Law Reform Commission', Sydney: ALRC.

McConnell, B (1995), 'Watch These LIPs', *New Law Journal* 1549.

McEwen, Craig, Richard J Maiman and Lynn Mather (1994) 'Lawyers, Mediation, and the Management of Divorce Practice', 28 *Law & Society Review* 149.

Mildren, DJ (1999) 'Don't Give Me any LIP - The Problem of the Unrepresented Litigant in Criminal Trials', 19(1) *Australian Bar Review* 30.

Mnookin, Robert H and Lewis Kornhauser (1979) 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale Law Journal* 950.

Mueller, MJ (1984) 'Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control', 18 *Journal of Law Reform* 93.

Nicholson, Hon. Justice Alistair (1999) 'Opening Keynote Address', Yarran & Baxter's Family Law Conference, Sydney, 5 May.

Noone, Mary Anne (2001) 'The State of Australian Legal Aid', 29 *Federal Law Review* 37.

Opeskin, Brian (2001) *Appellate Courts and the Management of Appeals in Australia*, Melbourne: Australian Institute of Judicial Administration.

Pesce, G (1997) 'The Application of the Costs Provisions under the Family Law Act', 17(1) *Proctor* 13.

Rhoades, Helen, Reg Graycar and Margaret Harrison (1999), *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report*, Sydney: University of Sydney and Family Court of Australia.

Rhoades, Helen, Reg Graycar and Margaret Harrison (2000), *The Family Law Reform Act: The First Three Years*, Sydney: University of Sydney and Family Court of Australia.

Rubin, HM (1989) 'The Civil Pro Se Litigant versus The Legal System', 20 *Loyola University Law Journal* 999.

Sales, BD, CJ Beck and RK Haan (1993) 'Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?', 37 *Saint Louis University Law Journal* 553.

Sarat, Austin and William LF Felstiner (1995) *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process*, New York: Oxford University Press.

Springvale Legal Service (1998) 'Hitting the Ceiling: Springvale Legal Service Report into the Impact of Funding Limits in Legally Aided Family Law Matters Which Came into Effect on 1 July 1997', Melbourne: Springvale Legal Service.

Wade, John H (1997) 'New and Recycled Services by Family Lawyers: Responding to a World of Change', 11 *Australian Journal of Family Law* 68.

Women's Legal Service Inc. (1998), 'Submission to the Australian Law Reform Commission on Issues Paper 22: Review of the Adversarial System of Litigation - Rethinking Family Law', Brisbane.

Other publications in this series

Access to Justice Series

Gateways to the Law (2001)

Unrepresented Parties & the Equal Opportunity Tribunal (2000)

Future Directions for pro bono legal services in NSW supplementary report: proposed models (1999)

Legal Expense Insurance: an experiment in access to justice (1998)

Law and Justice Foundation Research Reports incorporating the Justice Research Centre Monograph Series

Case Management Reform: A Study of the Federal Court's Individual Docket System (2002)

Legal Aid for Committals (2001)

Managing Prejudicial Publicity (2001)

Legal Services in Family Law (2000)

Model Key Performance Indicators for NSW Courts (2000)

Family Law Case Profiles (1999)

Claiming under the Motor Accidents Scheme (1998)

Awards made under the Motor Accidents Act (1998)

Plaintiffs' Satisfaction with Dispute Resolution Processes (1997)

The Prototype Access to Justice Monitor Queensland (1996)

Case Management Rolling Lists in the Family Court, Sydney Registry (1996)

Conveyancing Fees in a Competitive Market (1996)

Economic Evaluation of Differential Case Management (1995)

An Implementation Evaluation of Differential Case Management (1995)

Who Settles and Why? (1994)

Compensation in an Atmosphere of Reduced Legalism (1994)

So Who does use the Court? (1993)

The Costs of Civil Litigation (1993)

The Pace of Litigation in NSW (1991)

Role of Conciliation (1990)

Legal Information

Email law: a planning guide for delivery of free legal assistance via email (2001)

Best practice guidelines (2001)

The Law & Justice Foundation of New South Wales

The Law and Justice Foundation seeks to improve access to justice, particularly for socially and economically disadvantaged people. The Foundation is an independent statutory body with a 34 year history of improving access to justice for the people of NSW. Its staff and Board come from a range of different backgrounds such as law, research, education and the social sciences. This enables us to consider issues of access to justice from different perspectives.

The Law and Justice Foundation believes that:

- a fair and equitable justice system is essential for a democratic, civil society
- reform should, where possible, be based on sound research
- people need accurate, understandable information to have equitable access to justice
- community support agencies and NGOs play a critical role in improving access to justice for disadvantaged people.

Our strategies for 2001–2003 include:

- identifying legal and access to justice needs, particularly of socially and economically disadvantaged people
- conducting rigorous, independent research to inform policy development
- contributing to the availability of understandable legal information
- supporting projects and organisations that improve access to justice.