

Family Violence and Undesirable Behaviour – how much is too much and what can be done to promote the best interests of children?

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There have been many studies conducted, in many jurisdictions, into the impact of violence on children – whether they are directly or indirectly exposed to that conflict. In all cases the fundamental conclusion is the same: exposure to violence is harmful to children – sustained exposure to inappropriate behaviour affects a child’s sense of security and attachment and damages their relationship with both parents. The impact on a child’s long term emotional well being is also compromised. It is a cycle of harm that experts working in the field recognise requires early and comprehensive intervention.

Prolonged exposure to conflict is also harmful to children although behaviour of this sort (eg denigration of the other parent, open hostility at change over, conflict over routine and long term decisions, lack of capacity for compromise) is far more difficult to systematically address and manage. Severely limiting the time a parent with what might be described as an antisocial personality spends with a child is far more difficult than imposing limits on a parent who has engaged in serious family violence – but each kind of conduct is undesirable and has negative consequences for the child. It is impossible to legislate for attitudinal change and the reasons for relationship breakdown are often closely linked to the conflict that follows and are not necessarily appropriately addressed by what the legal system offers.

This paper looks at how the Federal Magistrates Court and the Family Court of Australia have dealt with Family Violence in recent years, in what circumstances the presumption of shared parental responsibility has been rebutted and what time has been ordered in those circumstances. It also considers the complex issue of behaviour that is undesirable but falls short of family violence and what services exist outside of the court system to assist parents in developing the necessary skills to co-parent in a manner that minimises the impact of separation on their children.

1. What, and how common, is *Family Violence*? What can be done about *Family Violence* within the scope of the *Family Law Act*?

Legislative Framework

Despite the breath of potentially inappropriate conduct with which courts and family law practitioners are faced, and despite references to *family violence*, *abuse* and *neglect* in the provisions of the Family Law Act 1975 (“the Act”), only the first two of those terms are defined in the Act, and narrowly at that.

Section 4(1) of the Act defines family violence as:

“conduct whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.”

The note to the definition confirms that *“a person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.”*

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Abuse, in relation to a child, is defined in section 4(1) as:

“(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first mentioned person or the other person, and where there is unequal power in the relationship between the child and the first mentioned person”.

There is no definition in the Act of abuse so far as it relates to any other person. Interesting, there is no definition in the Act of *neglect* at all.

There are no readily available statistics about what percentage of matters before the Federal Magistrates and Family Courts involve elements of Family Violence and/or abuse but the issue is clearly prevalent, and serious, enough to warrant specific treatment in both the Act and the Courts’ internal and client management procedures.

One of the articulated objects of Part VII of the Act is to ensure the best interests of children are met by *“protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence”* (section 60B(1)(b)). While it is difficult to challenge this goal, many cases involve conduct that is inappropriate and damaging for children but which does not fall within the definition of abuse or family violence. The level of protection from ongoing psychological harm to children in cases of that sort is much more limited than in cases where the conduct of the parents is seen as, arguably, more extreme and damaging. Drawing a line on how bad conduct has to be before children are systematically protected from it, is fraught.

The Act acknowledges the importance of the interrelationship between family violence orders (as defined in section 4(1)) and parenting orders. Section 60CG confirms that any parenting order must, where possible, be consistent with a family violence order and not expose any person to an unacceptable risk of family violence. To enable the court to fulfil this function, there is an express obligation on a party who is aware of the existence of a family violence order to inform the court of the order (section 60CF(2)). Rule 2.05 of the *Family Law Rules* requires a party to file a copy of any family violence order affecting the parties or a child of the parties. If the family violence order is not available written notice of the order, and the relevant details, must be filed. Further, any person who is not a party to proceedings who is aware of such an order may inform the court of it (section 60CF(3)). As a failure to notify the court of the order does not affect the validity of any order made by the court (section 60C(4)) clearly, if it is essential that any parenting order be consistent with a family violence order, the onus is on the party who requires the order to make full disclosure of both the relevant issues and the existence of the family violence order.

Division 11 of Part VII further articulates the following objects:

1. to resolve inconsistencies between family violence orders and parenting orders/injunctions/arrangements made under the Act;
2. to ensure that orders/injunctions/arrangements do not expose people to family violence; and
3. to otherwise achieve the objects of Part VII. (Section 68N)

Sections 68P, 68Q and 68R contain the court’s obligations and powers to ensure that orders are consistent with existing family violence orders, or where they are not, to identify that fact and explain, in language able to be readily understood, the effect of the order on the parties (section 68P). Significantly though, an order of the court will invalidate any family violence order to the extent of any inconsistency

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(section 68Q(1)). There is no prohibition on a court of a State or Territory exercising jurisdiction under the Act from reviving, varying, discharging or suspending an order made under Part VII when making or varying a Family Violence Order (section 68R). Whether such a course occurs in practice, particularly where parenting matters remain before the Federal Magistrates or Family Court, is another matter.

In addition to these legislative provisions, the Family Court established its Family Violence Committee in 2002 and in March 2004 launched the Family Violence Strategy which embodied the Court's commitment to *"the management of matters involving violence and the protection from harm of its clients, their children and court staff"*. A copy of the strategy, and its 8 Guiding Principles, is available from the Court's website.

The Court also advertises prominently within the registries and on its website details of what clients who hold fears about their personal safety should do when they are required to attend court events. The website contains the contact details of Family Violence support groups in each of the States and Territories.

In addition, in March 2009 the Attorney-General launched the Family Court's Family Violence Best Practice Principles which have been developed to provide judicial officers and other decision makers with practical guidance in dealing with matters in which a notice has been filed alleging family violence/abuse or the risk of it.

The Best Practice Principles are readily available from the Court's website and represent a useful resource for ensuring the Court provides all available protection during the litigation process and ensures that all relevant factors (including published psychiatric reports on the impact of violence on children) are properly considered, including in cases where consent orders are sought. The principles provide practical for practical measures such as:

- not disclosing addresses;
- appointing Independent Children's Lawyers;
- joining another person as a party;
- considering whether affidavits should be filed or a family report obtained and, if so, what the specific qualifications and expertise of the report writer should be;
- allocating the matter to the Magellan list;
- developing and implementing a safety plan for court events; and
- making interim or procedural orders without notice.

What the principles cannot do, of course, is remedy the damage done to children (and parties) by exposure to family violence, or ensure that such behaviour does not continue into the future.

Social Science Commentary on Family Violence

In 2008 Dr Peter Jaffe (psychologist), Professor Janet Johnston (justice studies), Dr Claire Crooks (psychologist) and Professor Nicholas Bala (lawyer) published a paper entitled "Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans"¹.

¹ Jaffe, P.G., Johnston, J.R., Crooks, C.V. & Bala, N. (2008, July) Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans, *Family Court Review*, Vol. 46 No.3, 500-522.

They suggest that “there is an emerging consensus that the following types of spousal violence are relevant to family law cases, with the first two receiving more research attention than the others”².

The types of spousal violence are described as follows:

- Abusive-controlling violent relationships (ACV), also called *battering* or *intimate terrorism* or *coercive controlling violence*: This is an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate one partner and induce fear, submission, and compliance in the other. In studies of shelter and criminal court samples, men are often the offenders and women are victims in most cases of this type.
- Conflict-instigated violence (CIV), also called *situational* or *common couple violence* or *situational couple violence*: In these cases, violence is perpetrated by both partners, who have limited skills in resolving conflict. These cases involve bilateral assertion of power by the man and woman, without a regular primary instigator, and are often identified more in community samples.
- Violent resistance (VR): This occurs when a partner uses violence to defend in response to abuse by a partner. Women have been identified most clearly as this type in shelter samples and in studies of victims who have killed their batterers. In some cases, this may in law constitute self-defence, but in other cases it may be an overreaction.
- Separation-instigated violence (SIV): This is isolated acts of violence perpetrated by either a man or a woman reacting to stress during separation, divorce, and its aftermath in a relationship that has not otherwise been characterized by violence or coercive control.³

Impact of domestic violence on parenting issues:

Jaffe, Johnson, Crooks and Bala go on to offer the following insights about the impact of spousal violence on parenting issues:

- spousal abuse does not necessarily end with separation of the parties;
- in extreme cases, domestic violence following separation is lethal, especially in the case of the more abusive relationships (ACV);
- **perpetrators of domestic violence are more likely to be deficient, if not abusive, as parents** [emphasis added];
- **individuals who have a pattern of abuse of their partners (ACV) and those who commonly resolve conflicts using physical force (CIV) are poor role models for children** [emphasis added];
- **abusive ex partners (ACV) are likely to undermine the victim’s parenting role** [emphasis added];

² Page 500

³ Page 501

- abusive ex spouses (ACV) may use family court litigation as a new forum to continue their coercive controlling behaviour and to harass their former partner;
- **diminished parenting capacities among victims of domestic violence often occurs** [emphasis added];
- victims' behaviour under the stress of the abusive relationship (ACV) and during the aftermath of a stressful separation (SIV) should not inappropriately prejudice the residential or access decision; and
- **victims of abusive relationships may need time to re-establish their competence as parents and opportunity to learn how to nurture and appropriately protect themselves and their children** [emphasis added].⁴

PPP Screening:

Jaffe, Johnson, Crooks and Bala suggest that 3 basic factors relating to domestic violence should be considered when determining appropriate parenting arrangements. They refer to this as "PPP screening".

1. Level of potency – "the degree of severity, dangerousness and potential risk of serious injury and lethality." "Prior incidents of severe abuse and injuries inflicted on victims are an important indicator of the capacity of an individual to explode or escalate to dangerous levels".
2. "The extent to which the violence is part of a pattern of coercive control and domination (rather than a relatively isolated incident) is a crucial indicator of the extent of stress and trauma suffered by the child and family and the potential for future violence." "However, overt acts are often mere tips of the iceberg in a deeply embedded pattern of coercive control that can be long hidden from public scrutiny. It is also important to consider the degree of submission induced in the victim, the control asserted by a partner's insistence on unilateral authority in multiple domains, and after separation the more subtle harassment and control exerted through manipulation of the children and/or continued litigation."
3. "Whether there is a primary perpetrator of the violence (rather than it being mutually instigated or initiated by one or the other party on different occasions) will indicate whose access needs to be restricted and which parent, if either, is more likely to provide a non-violent home, other things being equal."⁵

Credibility of allegations:

Jaffe, Johnson, Crooks and Bala also suggest that when considering the credibility of allegations of domestic violence, there are a number of steps to avoiding premature or erroneous judgements:

1. Systematic enquiry from the following multiple sources can yield direct or circumstantial information that supports or refutes the parents' respective claims:

⁴ Page 501-504

⁵ Page 504-506

- a. Objective verification of specific incidents can be provided by police and medical reports, self-admissions, or eye-witness accounts.
 - b. Corroboration of aspects of an allegation by neutral third parties – like neighbours, teachers or babysitters – is important. Relatives may offer useful information but their allegiance and potential bias must be considered.
 - c. The psychological status of the alleged abuser or victim may affect credibility assessment.
2. The specific abuse complaints need to be examined in terms of their logical and emotional meaning for the complainant. How an incident is perceived (by both parties) needs to be understood in terms of the family or cultural context in which it is made.
 3. The timing of the disclosure and stage of the legal proceedings are potentially relevant, although often difficult to interpret. Reports of abuse first made in the context of litigation should never be dismissed solely because of the timing of disclosure.⁶

However, Jaffe, Johnson, Crooks and Bala warn that *“Accounts of the violent incident(s) by the participants themselves should be assessed with caution, because victims may tend to assume more blame and abusers generally minimize or deny their conduct”*. Further, that *“Sociopaths, narcissists, and chauvinists – who use violence for interpersonal control – can make a very smooth presentation whereas the victim can appear emotionally distraught and disorganised.”*⁷

Principles for making parenting arrangements and resolving conflicting priorities:

Jaffe, Johnson, Crooks and Bala submit that the goals of any parenting arrangements should be prioritised in the following order:

1. Protect children directly from violent, abusive and neglectful environments;
2. Provide for the safety and support the well-being of parents who are victims of abuse (with the assumption that they will be better able to protect their child);
3. Respect and empower the victim to make their own decisions and direct their own lives;
4. **Hold perpetrators accountable for their past and future actions (i.e. in the context of family proceedings, have them acknowledge the problem and take measures to correct abusive behaviour)** [emphasis added]; and
5. Allow and promote the least restrictive plan for parent-child access *that benefits the child*, along with the parents’ reciprocal rights.⁸

Premised on the notion that the goal of protecting children must never be compromised, the strategy is to begin with the aim of achieving all five goals and to resolve conflicts by abandoning the lower priorities.

Jaffe, Johnson, Crooks and Bala conclude by noting that *“constraints on a parent-child relationship like supervised visits and related injunctions are highly intrusive*

⁶ Page 507

⁷ Page 505-506

⁸ Page 509

Interventions in the family.” They recommend that “any court-imposed restrictions need to include explicit goals with behavioural criteria that need to be met in order for the parent and child to graduate to a less restrictive option, a timely review of progress, and/or monitoring by the family court or its designated agent. Likewise, any removal of restrictions on a parent’s access to his or her child should be contingent upon cessation of the threat of violence, as well as credible reports of successful progress or completion of treatment for the problem (of violence, substance abuse, mental illness).”⁹

While the issues referred to in this report relate specifically to cases of family violence, it is submitted that the implications on, for example attitude to parenting and appropriate remedies, are equally apposite in cases where a parent regularly engages in inappropriate/undesirable behaviour that has a lasting, negative impact on a child, but which falls short of *family violence*.

The question that must be asked is how, in practical terms and in all parenting cases, given the court system’s inherent limitations are those goals articulated, monitored and reviewed? Arguably, without the means to change underlying behaviour, the risk of harm to children remains regardless of what court orders are made.

3. How has the court treated *Family Violence* and other *undesirable behaviour* since the 2006 amendments? How bad does conduct have to be before time is limited or the presumption does not apply? A case update.

General principles for the consideration of parenting matters under the current legislation:

The Full Court decision of *Goode v Goode* [2006] FamCA 1346 sets out the correct approach to consideration of parenting matters in light of the 2006 amendments at paragraph 82 (specifically for an interim hearing but the same applies to final hearings) as:

- a. identifying the competing proposals of the parties;
- b. identifying the issues in dispute in the interim hearing;
- c. identifying any agreed or uncontested relevant facts;
- d. considering the matters in s 60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place);
- e. deciding whether the presumption in s 61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the Court does not consider it appropriate to apply the presumption;
- f. if the presumption does apply, deciding whether it is rebutted because application of it would not be in the child’s best interests;

⁹ Page 509 and 510

- g. if the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;
- h. if equal time is found not to be in the child's best interests, considering making an order that the child spend substantial and significant time as defined in s 65DAA(3) with the parents, unless contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;
- i. if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the Court that are in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC;
- j. if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and
- k. even then the Court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be in the best interests of the child.

Recently the High Court in *MMR v GR* [2010] HCA 4 clarified steps (g) and (h) of the *Goode* process above and held that if an order for the child to spend equal time (or substantial and significant time) with the parents is not "reasonably practicable", then the Court cannot consider making such an order. At paragraph 13:

"Section 65DAA(1) [the requirement to consider the child spending equal time with each parent if an order has been made for equal shared parental responsibility] is expressed in imperative terms. It obliges the Court to consider both the question whether it is in the best interests of the child to spend equal time with each of the parents (par (a)) and the question whether it is reasonably practicable that the child spend equal time with each of them (par (b)). It is only where both questions are answered in the affirmative that consideration may be given, under par (c), to the making of an order. The words with which par (c) commences ("if it is") refer back to the two preceding questions and make plain that the making of an order can only be considered if the findings mentioned are made. A determination as a question of fact that it is reasonably practicable that equal time be spent with each parent is a statutory condition which must be fulfilled before the Court has power to make a parenting order of that kind. It is a matter upon which power is conditioned much as it is where a jurisdictional fact must be proved to exist. If such a finding cannot be made, sub-ss (2)(a) and (b) require that the prospect of the child spending substantial and significant time with each parent then be considered. That sub-section follows the same structure as sub-s (1) and requires the same questions concerning the child's best interests and reasonable practicability to be answered in the context of the child spending substantial and significant time with each parent."

Review of Cases where Family Violence was alleged:

A review of some reported cases of the Family Court and Federal Magistrates Court decided after the 2006 reforms reveals the following:

- 31 reported cases in the Family Court and Federal Magistrates Court where family violence was alleged

- 27 final hearings
- 4 interim hearings
- 28 cases where findings were made that family violence had occurred
- 3 cases where family violence was not able to be established (all interim)
- 28/28 cases where family violence occurred, the presumption in favour of equal shared parental responsibility was held not to apply
- 3/3 interim hearings where the presumption was held to apply
- 23/28 case where sole parental responsibility was ordered where the presumption was held not to apply (20 to mothers, 2 to fathers, and 1 to DOCS)
- 1/28 case where equal shared parental responsibility was ordered even though the presumption did not apply (violence held to be confined to the past not the present/future)
- 2/28 cases where sole parental responsibility to mother was ordered for specific issues, otherwise equal shared parental responsibility
- 1/28 case where no order was made as to parental responsibility (interim hearing)
- 1/28 case where an order was made that each parent retain individual parental responsibility
- 4/31 cases where equal time ordered (3 of these were interim, the other was the one case where equal shared parental responsibility was ordered because violence was only in the past)
- 6/31 cases where no time at all with the father was ordered
- 6/31 cases where supervised time with the father was ordered
- 15/31 cases where family violence was established but the children still spent significant time with the perpetrator (20% or more time)

Overview of Reported cases where Family Violence is Alleged

Case	Family Violence Established?	Equal Shared Parental Responsibility?	Equal Shared Care?
<i>Biss & Biss</i> [2009] FamCA 1234 Final Hearing	Yes – in the past by father. Not in present / future.	Presumption not applicable. Equal PR ordered.	Yes
<i>Damiani & Damiani (No. 2)</i>	Yes – by father.	Presumption not applicable.	No – ‘standard’ time.

[2009] FamCAFC 215 Appeal		Sole PR to mother.	
Cole & Chapman [2009] FamCA 650 Final Hearing	Yes – by father.	Presumption not applicable. Sole PR to mother.	No – ‘standard’ time.
Abrams & Demars [2008] FMCAfam 797 Interim Hearing	No – not at interim stage.	Yes – presumption applied. No sufficient evidence to rebut.	Yes
Pilcher & Schneider [2007] FMCAfam 1163 Interim Hearing & [2008] FMCAfam 1092 Final Hearing	No – not at interim stage. No – mother no longer pursued.	Yes – presumption applied. Yes – presumption applied.	No – very young children. Yes – gradual increase to shared care once children are old enough.
El-Akmar & El’Akmar [2007] FamCA 1075 Final Hearing	Yes – by father – at extreme end of the spectrum.	Presumption not applicable. Sole PR to mother.	No – no contact with father – family to live anonymously.
Sabin & Francis [2008] FMCAfam 1411 Final Hearing	Yes – by father to mother and to children.	Presumption not applicable. Sole PR to mother.	No – ‘standard’ time.
Oates & Hamilton [2009] FamCA 1271 Interim Hearing & [2010] FamCA 248 Final Hearing	No – not at interim stage. No - mother did not pursue.	Yes – presumption applied. No sufficient evidence to rebut. Yes.	Yes. Yes – by consent.
Bartlett & Corey [2008] FMCAfam 607 Final Hearing	Yes - father.	Presumption not applicable. Sole PR to mother.	No – ‘standard’ time.
Bookhurst & Bookhurst [2009] FamCA 6	Yes – father.	Presumption not applicable. Sole PR to mother for health, religion and	No – ‘standard’ time.

Final Hearing		cultural upbringing. Joint PR for all other major long term issues.	
Moore & Murray [2007] FMCAfam 253 Interim Hearing	Yes – both parents – but not sure at interim stage who is main perpetrator.	Presumption not applicable. No order made for PR.	No – ‘standard’ time.
Colson & Olds [2007] FamCA 668 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – no contact with father.
KMA & SAN and Anor [2008] FamCA 1211 Final Hearing	Yes – both parents. Also unsubstantiated allegations of child sexual abuse against father. Mother undermining father.	Presumption not applicable. Sole PR to father.	No – children live with father in Australia – mother had returned to New Zealand – school holiday time.
Poblano & Millard [2007] FamCA 424 Final Hearing	Yes – both parents but mother in response to father’s violence.	Presumption not applicable. Sole PR to mother.	No – no contact with father.
Tran & Ferguson [2009] FamCA 1026 Final Hearing	Yes – both parents.	Presumption not applicable. Sole PR to DOCS.	No – child to live with mother and spend time with father.
James & Mae [2007] FamCA 99 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – no contact with father.
Jallip & Jallip (No. 2) [2008] FamCA 629 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – mother permitted to relocate.
Moher & Moher [2009] FMCAfam 67 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – ‘standard’ contact.
Carlton & Carlton [2008] FMCAfam 440 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – ‘standard’ contact.
Jenkins & Lloyd	Yes – father.	Presumption not	No – supervised contact in interim – updated

[2009] FamCA 832 Final Hearing (but only interim orders made).		applicable. Sole PR to mother.	family report to be prepared.
Pottinger & Bainton [2009] FamCA 124 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – supervised contact.
Nast & Nast [2010] FamCA 132 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – ‘standard’ contact.
Merman & Cotton [2007] FamCA 47 Final Hearing	Yes – father.	Presumption not applicable. Each party to retain individual parental responsibility pursuant to s61C.	No – supervised contact.
Wang & Jong [2009] FamCA 1150 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – supervised contact initially.
Arman & Arman [2008] FamCA 923 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother for education and health matters. Joint PR for other major long term issues.	No – ‘standard’ contact.
Dalca & Hamid [2009] FamCA 1256 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – no contact with father.
Collins & Collins [2007] FamCA 74 Final Hearing	Yes – father.	Presumption not applicable. Sole PR to mother.	No – supervised contact.
Maluka & Maluka [2009] FamCA 647 Final Hearing.	Yes – father.	Presumption not applicable. Sole PR to mother.	No – no contact with father.

<i>Nawaqaliva & Marshall</i> [2006] FamCA 958 Final Hearing	Yes – past violence by father but not future threat.	Presumption rebutted on best interests. Sole PR to mother.	No – ‘standard’ contact.
<i>Claringbold & James</i> [2007] FamCA 1032 Final Hearing	Yes – mother victim of domestic violence in her new relationship.	Presumption not applicable. Sole PR to father.	No – live with father and have ‘standard’ contact with mother.
<i>Partington & Cade</i> [2009] FamCAFC 230 Appeal (rehearing not reported)	Yes – unacceptable risk of sexual abuse (not disturbed on appeal).	Presumption not applicable. Sole PR to mother (not disturbed on appeal).	No – supervised contact with father. In first instance mother not allowed to relocate from Tasmania – required to stay and facilitate supervised contact. Relocation application submitted for rehearing.

4. *Undesirable Behaviour* – how can the court, and parents, deal with behaviour that is concerning but is not strictly *Family Violence*.

There is nothing expressly in the Act that prohibits or discourages undesirable behaviour that falls short of *family violence*. Understandably, it is impossible to legislate for every kind of behaviour or conduct which causes a negative reaction in some other person. But, as practitioners working regularly in this jurisdiction know well, there is a vast array of conduct and high conflict behaviour which does not fit within the relatively limited definition of *family violence* but which nonetheless causes ongoing stress, conflict and animosity between separated couples (and their families) and which creates stress and instability for children.

Federal Magistrate Altobelli, recently identified¹⁰ some of the features of ‘high conflict’ parenting relationships as follows:

- intractable disputes (e.g. multiple and repeat users of the legal system; unwilling to listen to or respond to advice, adopting fixed views or positions in negotiations);
- ongoing disagreement over day to day parenting practices;
- expressed hostility, verbal abuse, physical threats;
- intermittent violence;
- poorly concealed acrimony;
- on-going denigration of one parent by another;
- insidious embroilment in supporting the separate views of each parent.

¹⁰ “A response to ‘A Cautionary Tale’: *Learning to paint with a fine brush*,” presentation to the 8th Annual Family Law Intensive, Sydney.

The effect of exposure of children to entrenched conflict has been well documented. The effects are deleterious and represent major challenges for children in terms of their short and long term coping mechanisms, confidence, sense of security and capacity to form healthy, lasting relationships of their own. It is difficult to imagine a situation in which parents would not want to shield their children from such influences but, sadly, for many family law clients it is an extremely difficult ask.

Types of Parenting and the Impact on Children

friendly → ideal for children
 tolerant → ok for children
 hostile/angry → damaging for children
 violent → damaging for children

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Two of the objects of Part VII, as noted in section 60B(1), are:

- “(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
- (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children”.*

and at least four of the section 60CC factors which the court must consider in determining the best interests of a child make reference, either directly or indirectly, to conduct related issues:

- “(b) the nature of the relationship of the child with (i) each of the child’s parents;*
- (c) the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*
- (f) the capacity of (i) each of the child’s parents ... to provide for the needs of the child, including emotional and intellectual needs;*
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents”*

However, the Act (in section 60CC(4)) expressly limits the considerations for the court in determining the extent to which a parent has fulfilled or failed to fulfil their responsibilities as a parent *to issues relating to the extent they have participated in major long-term decision making, spent time with or communicated with the child or facilitated the other parent doing those things.* Arguably the question of whether a parent has met the responsibilities of parenthood – including ensuring a safe passage for the child to adulthood – goes beyond these issues and includes the extent to which a parent has meaningfully engaged with the other parent in a child focussed manner, including the extent to which he or she has made appropriate compromises or reduced conflict on a permanent basis.

In the case of *RE:L & Ors (Children)*¹² the Family Division of the England and Wales Court of Appeal considered a psychiatric report by the Children Act Sub-committee in relation to the effect, both short and long term, of domestic violence on children. The president, Dame Butler-Schloss made the following pertinent observations¹³:

¹¹ Adapted from New Zealand Ministry of Justice *Parenting through Separation* program

¹² *RE:L & Ors (Children)* [2000] 2 FCR 404

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“... violence to a partner involves a significant failure in parenting – failure to protect the child’s carer and failure to protect the child emotionally” and

*“... often in cases where domestic violence has been found, too little weight had been given to the need for the father to change. ... the father should demonstrate that he was a fit person to exercise contact and should show a track record of proper behaviour”.*¹⁴

It is submitted that these comments – and the consequences of ongoing inappropriate behaviour – also apply to conduct which is problematic but falls outside the definition of *family violence* in the Act. Proving the impact of this kind of conduct (as distinct from encouraging a court to accept that it is simply a case of two parents having different “world views”) is much more challenging than proving a history of family violence however and, of course, it is ultimately a question of degree in each particular case. Any requirement that a judicial officer pass personal judgment on the appropriateness or otherwise of conduct is fraught. However, in order to ensure the court has sufficient evidence to consider both the impact of sustained inappropriate conduct on a child and the implications on the attitude to parenting of the person who engages in it, family report writers and other experts should be specifically directed to consider the issue in the course of report preparation.

The parts of section 60B and 60CC extracted above appear to be the only parts of the Act that (obliquely) embody the expectation that parents will do all in their power to minimise conflict and the impact of separation on children. It is arguable that not articulating the expectation that parents will focus on and do all they can to meet the well documented short and long term needs of children who are experiencing separation, is an opportunity missed.

Part E of the Family Court’s Family Violence Best Practice Principles contains an express reference to the benefit of decision makers having regard to the findings in the Sturge and Glaser psychiatric report referred to above. No doubt the requirement that Australian judges consider this report has led parents to do the same.

But more could be done to focus parents’ attention on what steps they can take to improve the situation they and their children find themselves in. While it is, of course, not possible to legislate for attitudinal change, perhaps a requirement (whether enshrined in the Act or by way of a practice direction) that parents **MUST**, before filing, participate in not only Family Dispute Resolution but also programs to ensure they develop skills to, among other things:

- minimise conflict;
- improve communications;
- become, and remain, child focussed; and
- manage anger and other adverse reactions

might better leave parents in no doubt about what their children need in the aftermath of a separation and who should be responsible for delivering it. At all times, parents should be encouraged by their legal advisors and by the court to be mindful of the fact that the primary people with the power to improve the situation for their children, is them. The court and legislation can give certainty and some boundaries in relation to conduct but ensuring attitudinal change, and genuine improvement in conduct, is beyond the scope of the legal profession.

¹⁴ By reference to the comments of Wall J in *Re M (Contact: Violent Parent)* [1999]2 FLR 321. Her Honour also noted the significant shortcoming seen in many cases however – assertions without supporting evidence may well be insufficient.

In addition to supporting the intensive *Parenting Through Separation* Programme, the New Zealand Department of Justice have produced a number of excellent Fact Sheets for parents which identify what children experiencing a separation require and what parents can do to meet those needs. It might well be helpful if the attention of parents in this jurisdiction were directed to the impact of inappropriate (but not violent) behaviour on children in a similar manner.

Section 62B requires the court to inform parties about other available family services (such as counselling and Family Dispute Resolution) and section 65LA empowers the court to orders requiring parties' attendance at post separation parenting programs. It is through this section that, relatively recently, the Federal Magistrates in Brisbane have been ordering the participation in the Relationships Australia and other recognised programs. Anecdotal feedback from participants in these programs is that often, and despite initial reluctance and resistance, parents see the benefit of participating in these programs and drawing the skills learned there. Perhaps intervention of this sort could be facilitated by enshrining an obligation on practitioners to inform clients about programs which exist and which might help improve the inter-relationship between them and their formal partner (similar to the section 63DA obligation to advise clients about parenting plans).

5. Negotiating in the shadow of shared care - what is the impact of the presumption of joint parental responsibility on parents in high conflict situations?

The article by Dr Jennifer McIntosh and Richard Chisholm "*Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale from Current Research*"¹⁵, has been considered by many Judges and Federal Magistrates in recent decisions.

McIntosh and Chisholm make reference in their report to the Australian Institute of Family Studies Research report No. 9, 2004 "*Parent-child contact and post-separation parenting arrangements*" edited by Bruce Smyth. Smyth's research found that, at that time (prior to the 2006 amendments), equal shared care arrangements were "*relatively rare*" and that it proved to be a viable arrangement for "*a relatively distinct subgroup of separated parents*" who self-selected into shared care arrangements.

Smyth concluded that "*a number of conditions - relational and structural - appear conducive to making shared care a viable option for separated parents. These conditions include:*

- *geographical proximity;*
- *the ability of parents to get along and, at minimum, to maintain a 'business-like' working relationship as parents with children being kept 'out of the middle';*
- *child-focused arrangements, with children's activities forming an integral part of the way in which the parenting schedule is developed;*
- *a commitment by everyone to make shared care work;*
- *family-friendly work practices;*
- *a degree of financial independence, especially for mothers; and*
- *a degree of paternal competence."*

¹⁵ *Australian Family Lawyer*, Volume 20 No 1

In their paper, McIntosh and Chisholm review two studies, the “*Children Beyond Dispute*” research program and “*The Child Responsive program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes*” report to the Family Court of Australia.

The first study dealt with parents who went through a brief therapeutic mediation for entrenched parenting disputes. 27% of families left mediation with an agreement for substantially shared care of their children, of at least five nights per fortnight with each of the parents on average. **21% of children in the sample of conflicted families had a higher than average rate of clinical anxiety compared to ‘non-divorced’ children in the Australian population.**

The second study examined outcomes for 77 parents and 111 children who had attended the Child Responsive Program Pilot in the Family Court of Australia. The following findings were observed:

- Four months after resolution of their cases, 28% of the 111 children had emotional well-being scores in the clinical range, indicating a high degree of emotional distress;
- 28% of the children entered Court, and 46% left Court, in a substantially shared care arrangement (five nights per fortnight or more in the care of each parent);
- 73% of the parents involved in shared care arrangements post Court reported ‘almost never’ co-operating with each other;
- 39% of shared care parents reported ‘never’ being able to protect their children from their conflict;
- In 4 of the shared care cases, parents reported ‘never’ having contact of any kind with each other and the children being responsible for conveying day-to-day messages between their parents;
- **70% of the shared care orders were made by consent (but during the litigation) and 30% were judicially determined.**

McIntosh and Chisholm record that “*data from this second study are concerning because they suggest that a significant portion of these children emerged from Family Court proceedings with substantially shared care arrangements that imposed a psychological strain for the child*”. No doubt this is in part due to the fact that the underlying issues which caused the parental conflict were not (and could not be) adequately addressed.

The data suggests that almost half of the parents resolved matters on the basis of significant time being spent in each household (5 nights/fortnight) regardless of whether the mechanisms and skills existed to ensure that the children actually benefited from those arrangements. The results of this study beg the question – what is the mindset of parents when negotiating consent orders in the shadow of the presumption and prospect of equal shared care orders. There have, to date, been no studies specifically considering this issue but, anecdotally, practitioners have become aware of a pressure on primary carers (usually mothers in the cases of young children) to agree to regimes of visits that increase towards equal time more quickly, and for younger children, than was the case prior to mid 2006. The flow on result has been more orders limited to periods up to the age of 5 years and more parents questioning and seeking to revisit the orders once arrangements have been tested (and in their minds failed) over a reasonably short period of time. The problems of the *Rice and Asplund* threshold test remain and conflict becomes further entrenched and parenting skills further compromised. The sense that parents of young children are bound to highly conflicted relationships in which one is perpetually unhappy does not bode well for the prospects of children in such circumstances remaining free from what should otherwise be adult pressures and concerns.

When discussing the impact of shared care arrangements on young children (under 4), McIntosh and Chisholm make the following observations:

“Part of the developmental conundrum posed for young children of divorce is this: their attachment formation is likely to be poorly affected (or to become ‘disorganised’ in theoretical terms) when the infant does not have a continuous experience of care with either parent. Shared care arrangements that involve frequent moves from one parent to another can, inadvertently, bring about this experience. Frequent transitions of care and absences from each parent necessarily interrupt the infant’s experience of care with each parent, especially their relationship with a primary carer when there has been one. This brings about potential developmental difficulties with infants, particularly those with parents who remain acrimonious and struggle to facilitate a smooth transition for the infant.”

In relation to inter-parental conflict, McIntosh and Chisholm observe that it *“brings a higher likelihood of harsh styles of discipline and diminished emotional responses, which are parenting behaviours associated ultimately with the child’s emotional insecurity and social withdrawal”*. Further, ***“when children of any age make frequent transitions between warring parents who are unable to conceal their feeling in the presence of the child, children then begin to use considerable energy to ensure their own comfort and emotional safety in each environment, actively and constantly monitoring the ‘emotional weather’ they encounter in each parent’s home.”***

McIntosh and Chisholm conclude:

“The findings sound a strong cautionary note about applying the new presumptions to cases characterised by ongoing high conflict between parents. We have shown how, in living between and within climates of ongoing dispute and emotional pre-occupation, the mental health ‘benefits’ of substantially shared care accrued by children are questionable.”

“The research outlined here suggests that substantially shared care arrangements may entail risks for children’s healthy emotional development in families that have the following specific factors, especially in combination:

Parent factors:

- Low levels of maturity and insight;
- A parent’s poor capacity for emotional availability to the child;
- Ongoing, high level conflict;
- Ongoing significant psychological acrimony between parents;
- Child is seen to be at risk in the care of one parent.

Child factors:

- Under 10 years of age;
- The child is not happy with a shared arrangement;
- The child experiences a parent to be poorly available to them.”

“...the new Australian data suggest that shared physical care is an arrangement best determined by the capacity of parents to exercise maturity, to manage their conflict and to move beyond egocentric decision-making in order to adequately

*embrace the changing developmental needs of their children. When considering ‘the benefit to the child of a meaningful relationship with both parents’, considerable weight should be given to the need of the child for care and contact arrangements that protect them from parental dynamics otherwise likely to erode their developmental security. Here, **the capacity of parents for ‘passive cooperation’ and the containment of acrimony may prove to be central benchmarks.**”*

These are precisely the types of issues that court orders cannot address. If children are to have any hope that their parents can develop better skills to improve their conduct and parenting abilities, alternate programs must be identified and promoted by the profession and funded by government.

Interestingly, and in contrast to what one suspects motivates parents agreeing to consent orders where the time a child spends in each parent’s household is equal, in 2008 Gavin Howard reviewed all parenting cases reported that year¹⁶ and observed that of the 27 cases where shared care was sought, equal shared care was ordered on only 4 occasions (3 of which involved the same Federal Magistrate). Mr Howard found that *“more than 60% of cases have an outcome where the ‘non-residential parent’ obtained an order for the child or children to live with them for 5 or more nights per fortnight. Only 14.8% of these cases were actually [equal] shared care cases.”* Mr Howard concludes that *“It continues to be the situation that in most cases a lack of willingness or ability to co-operate or communicate will prove fatal to a shared care application”* and that *“where there is a high level of hostility, or the parties don’t communicate well or co-operate well or don’t have mutual respect, then in most cases shared care will not be ordered.”*

While this should give parents who oppose equal time some comfort in the ability of the system to prioritise the best interests of the child and tailor the time a child spends with each parent in a manner that maximises their welfare, the negative impact of a shared care arrangement on young children in cases of high conflict remains and the process does nothing to ensure that prior problematic behaviour is appropriately addressed. The benefit of the boundaries put in place by court orders should not be underestimated but if truly lasting, conflict free arrangements are the goal, more needs to be done to ensure parents at least attempt to address the non-legal, psychological, inter-personal issues that lead to the conflict in the first place.

6. Other potential issues arising from the presumption of equal shared parental responsibility – conflict and consultation.

Section 61C of the Act confirms that parents each have parental responsibility for a child under the age of 18 – a position which is altered only where orders for parental responsibility are expressly conferred on a person under section 61D.

The presumption that parents share parental responsibility for a child (and the consequence of that situation) is set out in section 61DA and section 65DAC. Section 65DAC confirms the requirement that parents with joint parental responsibility are to make decisions about issues relating “long term” matters jointly and, specifically, to consult about those issues and make a genuine attempt to resolve them.

The policy behind the requirement that both parents be involved in their children’s lives in this way is sound but, without addressing the inter-relationship dynamic and providing genuine mechanisms through which genuine consultation occurs, the legislative requirement that parents consult about, and jointly

¹⁶ “Shared Parenting at Work – the Reality” *Australian Family Lawyer* Volume 20 No 3

make, major long-term decisions arguably has the effect of locking parents into a situation of entrenched conflict. Matters which might better be determined in a more pragmatic way are now subject to consultation and negotiation and, in many circumstances, such requirements create significant stress and tension and have an ultimately deleterious effect on the parents' relationship and, consequently, on the welfare of their children. Lawyers, for example, spend much time learning the skills of negotiation (and a life time perfecting them), it is unrealistic to expect that separated parents will acquire the necessary skills to engage in productive discussion simply because the legislation says they must. Participation in programs such as those identified in this paper, at the same time as negotiations about parenting plans and orders are undertaken may help address this issue.

Consent Orders and Section 61DA(1) - an unnecessary layer of complexity?

When applying to the Court for orders by consent, parents must provide a 'Yes' or 'No' answer to the first question at Item 16 *"Are you seeking a parenting order that provides for the child's parents to have equal shared parental responsibility for the child?"*.

If the answer to the first question is 'No', the parents must then answer 'Yes' or 'No' to the question *"Is this a case where all parties accept that the presumption in Section 61DA(1) does not apply?"*.

If the answer to the second question is 'Yes', the parents must *"give brief details of why the presumption does not apply"*.

If the answer to the second question is 'No' then the parents must *"briefly explain why it is in the best interests of the child for the court to make the order/s you are seeking rather than order/s which provide for the child's parents to have equal shared responsibility for the child."*

It is difficult to envisage a case where the parents would agree for the purpose of making orders by consent that the presumption in favour of equal shared parental responsibility does not apply.

However, it is easier to envisage cases where parents in high conflict relationships will reach a compromised agreement about parenting arrangements, in order to avoid the emotional and financial cost of contested litigation. In such cases sole parental responsibility may well be in the child's best interests, but to 'open the can of worms' about parental responsibility and whether the presumption applies would derail the agreement.

Parents in such cases may be prepared to retain their individual parental responsibility pursuant to Section 61C rather than being forced to agree to equal shared parental responsibility just to avoid litigation. In practice it may be that where parents each retain their individual parental responsibility, the parent with whom the child primarily lives may effectively exercise sole parental responsibility or something like it, without the other parent raising issue.

There would also be cases where parents already have orders in place, whether by consent or by judicial determination, which were made prior to the 2006 reforms and are silent as to the issue of parental responsibility. Such parents, even in highly conflicted relationships, may reach agreement to modify some aspects of the previous order (such as changeover arrangements which are more suitable for a child who is now older). These parents may also wish to avoid getting into a debate about parental responsibility and whether the presumption should apply when all they are seeking are some modifications to an existing order.

The reason for sole parental responsibility being ordered is usually the high level of conflict between the parents and their inability to communicate and agree on matters concerning the children. It is therefore submitted that it is the cases in which the Court is most likely to make an order for sole parental responsibility which are the cases most likely to result in the derailment of agreements where consideration of the issue of parental responsibility is forced upon the parents.

Parents may be able to persuade the Registrar dealing with their matter that no specific order in relation to parental responsibility is sought because they would prefer to retain their respective individual parental responsibility pursuant to Section 61C, and avoid any potential dispute which may arise as to the application of the presumption in section 61DA(1).

If they are unable to do so, parents in high conflict relationships, who nonetheless have been able to reach agreements about other parenting arrangements, will either be forced to agree to equal shared parental responsibility, or to initiate proceedings to seek an order for sole parental responsibility.

7. Reviewing the effects of the 2006 changes – better or worse?

Evaluation of the 2006 Family Law Reforms, Australian Institute of Family Studies, December 2009, key findings (emphasis added):

1. There is evidence of fewer post-separation disputes being responded to primarily via the use of legal services and more being responded to primarily via the use of family relationship services. This suggests a cultural shift whereby a greater proportion of post-separation disputes over children are being seen and responded to primarily in relationship terms.
2. Family relationship service professionals generally rated their capacity to assist clients as high. They also spoke of considerable challenges linked to the complexity of many of the cases they are dealing with and of waiting times linked largely to resourcing and recruitment issues, especially in some of the FRCs.
3. ...ensuring that families are able to access the right services at the right time represents one important area where there is a need for ongoing improvement. Pathways through the system need to be more clearly defined and more widely understood. There is still evidence that some families with family violence and/or child abuse issues are on a roundabout between relationship services, lawyers, courts and state-based child protection and family violence systems. While complex issues may take longer to resolve, resolutions that are delayed by unclear pathways or lack of adequate coordination between services, lawyers and courts have adverse implications for the wellbeing of children and other family members.
4. There is a need for more proactive engagement and coordination between family relationship service professionals and family lawyers and between family law system professionals and the courts. This need is especially important when dealing with complex cases.

5. About two-fifths of parents who used FDR reached agreement and did not proceed to court. Almost a third did not reach agreement and did not have a certificate issued. However, most of these parents reported going on to sort things out mainly via discussions between themselves. About a fifth were given certificates from a registered family dispute practitioner that permitted them to access the court system. Most of these parents mainly used courts and lawyers and most had not resolved matters or had decisions made approximately a year after separation.
6. Family Relationship Centres have also become a first point of contact for a significant number of parents whose capacity to mediate is severely compromised by fear and abuse, and there is evidence that FDR is occurring in some of these cases. This may reflect an inadequate understanding of the exceptions to FDR (*SPR Act 2006* s60I(9)) by those making referrals. At the same time, the complexities of this process need to be acknowledged. There are decisions that need to be made on a case-by-case basis, including decisions about who is best placed to make a judgment concerning whether there are grounds for an exception and the extent to which professionals should respect the wishes of those who qualify as an “exception” but opt nonetheless for FDR.
7. Clearer inter-professional communication (between FDR professionals, lawyers and courts) will not provide prescriptive answers to such questions but would assist in developing strategies to ensure that there is a more effective process of sifting out matters that should proceed as quickly as possible into the court system. Progress on this front, however, also requires earlier access to courts and greater confidence on the part of lawyers and service professionals that clients will not get “lost in the family law system”.
8. Shared decision-making was much less common among parents who reported a history of family violence or had ongoing safety concerns for their children. Nonetheless, the exercise of shared decision-making was reported by a substantial proportion of parents with a history of violence.
9. In contrast to the systematic variation in decision-making practices reported by parents with different care-time arrangements, legal orders concerning parental responsibility demonstrated a strong trend, pre-dating the reforms, for decision-making power to be allocated to both parents. There is evidence of some increase in shared responsibility outcomes for cases that went to court following the 2006 changes. Conversely, there were only relatively small decreases in the proportion of cases in which the mother or the father had sole parental responsibility.
10. Although only a minority of children had shared care time, the proportion of children with these arrangements has increased. This is part of a longer term trend in Australia and internationally. Judicially determined orders for shared care time increased post-reform, as did shared care time in consent cases.
11. The majority of parents with shared care-time arrangements thought that the parenting arrangements were working well both for parents and the child. While, on average, parents with shared care time had better quality inter-parental relationships, violence and dysfunctional behaviours were present for some.
12. Generally, shared care time did not appear to have a negative impact on the wellbeing of children. Irrespective of care-time arrangements, mothers and fathers who expressed safety concerns described their child’s wellbeing less favourably than those who did not hold such concerns. However, the reports of mothers suggest that the negative impact of safety concerns on children’s wellbeing is exacerbated where they experience shared care-time arrangements.

13. Families where violence had occurred, however, were no less likely to have shared care-time arrangements than those where violence had not occurred. Similarly, families where safety concerns were reported were no less likely to have shared care-time arrangements than families without safety concerns (16–20% of families with shared care time had safety concerns). Safety concerns were also evident in similar proportions of families with arrangements involving children spending most nights with the mothers and having daytime-only contact with the father. The pathways to these arrangements included decisions made without the use of services and decisions made with the assistance of family relationship services, lawyers and courts.
14. Mothers and fathers who reported safety concerns tended to provide less favourable evaluations of their child’s wellbeing compared with other parents. This was apparent for parents with all care-time arrangements, including the most common arrangement where the child lives mainly with mother. But the poorer reported outcomes for children whose mothers expressed safety concerns were considerably more marked for those children who were in shared care-time arrangements.
15. There is also evidence that encouraging the use of non-legal solutions, and particularly the expectation that most parents will attempt FDR, has meant that FDR is occurring in some cases where there are very significant concerns about violence and safety.
16. A majority of lawyers and a large proportion of family relationship service professionals expressed the view that the system had some scope for improvement in achieving an effective response to family violence and child abuse. Some problems referred to were evident before the reforms, such as difficulties arising from a lack of understanding among professionals, including lawyers and decision-makers, about family violence and the way in which it affects children and parents. While the legislation sought to place more emphasis on the importance of identifying concerns about family violence and child abuse (e.g., *SPR Act 2006* s60B(1)(b), 60CC(2)(b)) other aspects of the legislation were seen to contribute to a reticence among some lawyers and their clients about raising such concerns. These include *SPR Act 2006* s117AB, which obligates courts to make a costs order against a party found to have “knowingly made a false allegation or statement” in proceedings and a requirement for courts to consider the extent to which a parent has facilitated the other parent’s relationship with the child (s60CC(3)(c)).
17. The link between safety concerns and poorer child wellbeing outcomes, especially where there was a shared care-time arrangement, underlines the need to make changes to practice models in the family relationship services and legal sectors. In particular, these sectors need to have a more explicit focus on effectively identifying families where concerns about child or parental safety need to inform decisions about care-time arrangements.
18. These findings point to a need for professionals across the system to have greater levels of access to finely tuned assessment and screening mechanisms applied by highly trained and experienced professionals. Protocols for working constructively and effectively with state-based systems and services (such as child protection systems) also need further work. At the same time, the progress that continues to be made on improved screening practices will go only part of the way to assisting victims of violence and abuse.
19. The philosophy of shared parental responsibility is overwhelmingly supported by parents, legal system professionals and service professionals. However, many parents do not understand the distinction between shared parental responsibility and shared care time, or the rebuttable (or non-

applicable) presumption of shared parental responsibility. A common misunderstanding is that shared parental responsibility allows for “equal” shared care time, and that if there is shared parental responsibility then a court will order shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and care time is expressed in the legislation. This confusion has resulted in disillusionment among some fathers who find that the law does not provide for 50–50 “custody”. This sometimes can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Legal sector professionals in particular indicated that in their view the legislative changes had promoted a focus on parents’ rights rather than children’s needs, obscuring to some extent the primacy of the best interests principle (s60CA). Further, they indicated that, in their view, the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.

20. However, the changes have also encouraged more creativity in making arrangements, either by negotiation or litigation, that involve fathers in children’s everyday routines, as well as special activities. Advice-giving practices consistent with the informal “80–20” rule have declined markedly since the reforms.
21. The new substantive parenting provisions introduced into Part VII of the *FLA* by the *SPR Act 2006* tend to be seen by lawyers and judicial officers to be complex and cumbersome to apply in advice-giving and decision-making practice. Because of the complexity of key provisions, and the number of provisions that have to be considered or explained, judgment-writing and advice-giving have become more difficult and protracted. There is concern that legislation that should be comprehensible to its users—parents—has become more difficult to understand, even for some professionals.
22. The majority of parents in shared care-time arrangements reported that the reforms worked well for them and for their children. But up to a fifth of separating parents had safety concerns that were linked to parenting arrangements; and shared care time in cases where there are safety concerns correlates with poorer outcomes for children.
23. Similarly, the majority of parents who attempted FDR reported that it worked well. Most had sorted out their arrangements and most had not seen lawyers or used the court as their primary dispute resolution pathway. But many FDR clients had concerns about violence, abuse, safety, mental health or substance misuse. Some of these parents appeared to attempt FDR where the level of these concerns were such that they were unlikely to be able to represent their own needs or their children’s needs adequately. It is also important to recognise that FDR can be appropriate in some circumstance in which violence has occurred.
24. Further unintended consequences are also evident. A majority of lawyers perceived that the reforms have favoured fathers over mothers and parents over children. There was concern among a range of family law system professionals that mothers are disadvantaged in a number ways, including in relation to negotiations over property settlements. There is an indication that there may have been a reduction in the average property settlements allocated to mothers. Financial concerns, including child support liability and property settlement entitlements, were perceived by many lawyers and some family relationship professionals to influence the care-time arrangements some parents seek to negotiate. The extent to which these concerns are generally pertinent to separated parents is uncertain. The evaluation indicates a majority of parents are able to sort out their post-separation parenting arrangements quickly and expeditiously; however, there is also a proportion whose post-separation arrangements appear to be informed by a

“bargaining” rather than “agreeing” dynamic. For these parents, it appears the reforms have contributed to a shift in the bargaining dynamics. This is an area where further research is required.

25. A central point, however, is that many separated families are affected by issues such as family violence, safety concerns, mental health problems and substance misuse issues, and these families are the predominant users of the service and legal sectors. In relation to these families, resolution of post-separation disputes presents some complex issues for the family law system as whole, and the evaluation has identified ongoing challenges in this area. In particular, professional practices and understandings in relation to identifying matters where FDR should not be attempted require continuing development. This is an area where collaboration between relationship service professionals, family law system professionals and courts needs to be facilitated so that shared understandings about what types of matters are not suitable for FDR can be developed and so that other options can be better facilitated.
26. Beyond effective screening, possible ways forward include:
- continued development of protocols for the sharing of information within the family
 - relationship service sector and between the sector and other critical areas, such as child protection;
 - development of protocols for cooperation between family relationship service professionals and independent children’s lawyers;
 - development of protocols for cooperation between family relationship service professionals and lawyers acting as advocates for individual parents;
 - a considerably improved capacity in courts to solicit or provide high-quality assessments that will assist them to make safe, timely and child-focused decisions, especially at the interim stage; and
 - consideration of whether (and if so how) information already gained via sometimes extensive screening procedures within the family relationship service sector can be used by judicial officers or by those providing court assessments to assist in the process of judicial determination.
27. While communication in relation to privileged and confidential disclosures made in assessment and FDR processes raises some complex questions, investigation of how such communication could potentially occur may be an avenue for achieving greater coordination and ensuring expeditious handling of these matters. Currently, much relevant information may be collected by family relationship service professionals in screening and assessment processes, but this information is not transmissible between professionals in this sector and professionals in the legal sector, or between other agencies and services responsible for providing assistance.
28. Effectively, families who move from one part of the system to the other often have to start all over again. For families already under stress as a result of family violence, safety concerns and other complex issues, this may delay resolution and compound disadvantages.
29. Effective responses should ensure that the parenting arrangements put in place for children in families with complex issues are appropriate to the children’s needs and do not put their short or long-term wellbeing at risk. Further examination of the needs and trajectories of families who are unsuitable for FDR would assist in identifying what measures are required to assist these families. A key question is the extent to which such families then access the legal/court system and whether there are barriers or impediments (e.g., financial or personal) to them doing so.

8. Other Interventions to Consider - the things that children need but the law and lawyers can't bring about.

Court orders, be they imposed or negotiated by consent, provide boundaries within which parents who are otherwise unable to agree about parenting arrangements are to operate. To a degree (and assuming compliance), the certainty that accompanies orders provides much needed stability for both children and their parents. However, solicitors who negotiated consent orders without any attempt to encourage their clients to look for ways to address, and potentially resolve, the underlying tensions in the co-parental relationship do their clients a disservice. It has long been thought that orders negotiated by consent between the parties have greater prospects of success. It follows then that orders negotiated between parties who are, simultaneously, taking steps to address their own shortcomings and relationship dynamic must have an even greater likelihood of success.

Even where orders are negotiated by consent, Jaffe, Johnson, Crooks and Bala recommend that explicit goals with behavioural criteria should be included in any parenting plan or court order which restricts a parent's ability to spend time with a child. However, they also acknowledge that *"there is often a large gap between the ideal plan that a family requires and the actual resources available in the community. There is also debate about the effectiveness of various programs to change behaviour quite apart from a family member's willingness to attend."*¹⁷

Programs such as the Relationships Australia *Keeping Up Contact (Parenting Orders Program)* and the Foundations Child and Family Support group's *Moving Forward (Parenting Orders Program)* offer a useful service in focussing parents attention on potential behavioural and attitudinal changes that can be made. The Child Support Agency produces a number of excellent publications in the *Me and My ...* series including *Me and My Kids* (which provides practical ideas on developing and maintaining relationships with children) and *What about Me?* (which provides tips on how parents can deal with the emotional issues they face following separation). Lynne Clark and Cheryl Smith's book *Separating Respectfully – How to Separate Without Emotionally Harming Your Children* also provides excellent practical advice for parents.

The Relationships Australia and Foundations programs should not be seen as competition to the role of solicitors (or the court for that matter). They are entirely complimentary services which provide parents with skills that legal practitioners are not engaged to do. Practitioners are strongly encouraged to incorporate referrals to post separation parenting programs in the course of negotiating matters on their client's behalf. Providing clients with access to other resources such as the literature identified above may also prove useful in ensuring that the arrangements which are ultimately negotiated have been reached once parties have had full opportunity to consider the consequences of their proposals and what is required of them to make arrangements work.

In addition to these programs and publications, and the myriad of private counsellors available, the following interventions may be of particular assistance to parents with limited resources or particular mental health needs.

Mediation at Relationships Australia

Given the requirement of section 60I of the *Family Law Act* to attend family dispute resolution (FDR) prior to commencing proceedings, and the cost implications of attending upon a private family dispute

¹⁷ Page 518

resolution practitioner, many parents make use of the free mediation service provided by Relationships Australia (RA).

John Cleary, leader of the FDR program in Relationships Australia Queensland, provided the following information about this service:

- The role of the mediator is to balance the power in the relationship between the parents, however the reality is that the traditional roles often tend to continue.
- The mediator's role is to identify, at the intake stage, cases which are not suitable for FDR due to family violence, and not to allow cases to proceed to mediation in an unsafe way. RA has guidelines for the identification of such cases.
- Only about one third to one fifth of initial inquiries result in a mediation – sometimes this is due to unsuitability because of family violence, but often it is due to inability to interest the other parent, or the inquiring parent deciding not to proceed or to explore other options.
- After an initial telephone conversation, each parent is to attend an intake session, which is a structured 1 to 1.5 hour appointment with the mediator. The mediator views this as a sort of “education” process whereby the process is explained to the parent, the parent is coached on the types of matters to discuss at the mediation, the mediator challenges the parent to ‘reality check’ their position (‘doubt creation’) and discuss with them the development stages of children and the impact of conflict and different types of parenting arrangements on them.
- RA has been running a mediation practice since 1989. Mediators offer advice about the types of parenting arrangements that generally work for clients of their service. They do not offer advice about what a Court might do.
- After the intake session, parents are generally required to attend a group session (the other parent attends a different group). The purpose of this group is to educate parents about the needs of children and the impact of conflict on them. The aim is to use the group dynamics to ‘create doubt’ for the parent about their position and hopefully find some recognition or ‘mirroring’ of their situation in the situations of other parents in the group, so that the parent may safely retreat from their ‘position’.
- A time limit of 3 hours is set for mediations. A further 2 to 3 sessions can be allocated to the parents, at the mediator's discretion, if the parents are making good progress and showing a good propensity for further work. If the parents want to proceed by the mediator does not think it is worthwhile, the mediator will challenge the parents about their position, why they want to mediate and what they think will need to change to bring about an agreement.
- The timeframes from intake session to mediation vary for each Relationship Centre around the state. Often the hold up is getting the other parent involved. A mediator will conduct 2 mediations per day, so it doesn't take much to clog up the schedule, but equally there can be a period where few mediations are scheduled.

Access to Psychologists – GP Mental Health Treatment Plans

All GPs are able to complete GP Mental Health Treatment Plans for patients with a mental disorder who would benefit from a structured approach to the management of their treatment needs. Mental disorder in this context is a term used to describe a range of clinically diagnosable disorders that significantly interfere with an individual's cognitive, emotional or social abilities. A psychiatric "diagnosis" is not necessary for a Plan to be completed, but symptoms that point to the need for psychological intervention are required, for example anxiety, depression, problems with anger management, etc.

Treatment options can include referral to a psychiatrist; referral to a clinical psychologist for psychological therapies, or to an appropriately trained GP or allied mental health professional for provision of focussed psychological strategy services; pharmacological treatments; and coordination with community support and rehabilitation agencies, mental health services and other health professionals.

Essentially, once a GP Mental Health Treatment Plan has been completed and claimed on Medicare by the GP, a patient is eligible to be referred for up to twelve Medicare rebateable allied mental health services per calendar year for psychological therapy or focussed psychological strategy services (with provision for exceptional circumstances). Patients will also be eligible to claim up to 12 separate services for the provision of group therapy (either as part of psychological therapy or focussed psychological strategies).

The patient can be referred to an appropriate psychologist by his or her GP or can attend one of their own choosing, provided that they are a clinical psychologist registered with Medicare. Some psychologists will charge a gap of between \$40 to \$50 per session, whereas others are prepared to bulk bill.

GP Mental Health Treatment Plans could potentially provide a fast and cost effective way for either or both parents and/or children to access appropriate psychological interventions which could assist parents to improve psychological issues which are affecting their parenting ability, and/or assist them to deal with ongoing conflict or litigation with the other parent. Plans could also assist children in coping with situations of high conflict between their parents.