

Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation

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Abstract

This article examines the role played by evidence relating to parental attitudes and children's interests in litigation over contact and residence applications under the *Family Law Act 1975* (Cth), with particular reference to cases involving violence.

The analysis shows that mothers' attitudes to fathers were the subject of significant scrutiny in the context of the 'right of contact' principle enshrined by the *Family Law Reform Act 1995* (Cth), whilst children's interests were to some extent marginalised. The insights from the small scale empirical research referred to in this article provide a basis for reflecting on the potential impact of particular provisions in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which introduces an explicit 'friendly parent criterion' and provisions directing attention to parenting history, in the context of a presumption in favour of 'equal shared parental responsibility'.

1. Introduction

The Federal Government's latest round of family law reforms are vaunted as increasing the child focus in the system at the same time as attempting to equalise the position of parents in relation to post-separation parenting arrangements.¹ In addition to a presumption in relation to 'equal shared parental responsibility',² the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('*Shared Parental Responsibility Act 2006*') introduces to the *Family Law Act 1975* (Cth) ('*Family Law Act 1975*') a series of provisions that explicitly focus attention on parental attitudes — specifically those in relation to the other parent³ — and on

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1 Philip Ruddock, 'Bill Marks "Cultural Shift" in Dealing with Family Breakdown' (Press Release, 8 December 2005).

2 *Family Law Act 1975* (Cth) s 61DA.

3 See, for example *Family Law Act 1975* (Cth) s 60CC(3)(c).

parenting history.⁴ This article presents insights from small scale empirical research on the role played by evidence relating to parental attitudes⁵ in the context of the child's right to contact,⁶ which was legislatively articulated by the *Family Law Reform Act 1995* ('*Reform Act 1995*') a decade ago, with particular reference to cases involving a history of violence. These insights provide a basis for reflection on how the new provisions introduced by the *Shared Parental Responsibility Act 2006* guiding the 'best interests' inquiry might operate.

The analysis of the empirical data referred to in this article examines the way in which parental attitudes and children's emotional alliances were the subject of competing parental claims in litigation over residence and contact issues under the *Reform Act 1995*.⁷ The analysis incorporates a discussion of the strategic pressures that influence claims related to children's relationships and the way the judicial system responds to them. The empirical data were drawn from 40 Family Court files involving children's matters heard under the *Reform Act 1995*. A significant feature of more than half of these cases was a history of violence. In turn, the deployment of parental claims relating to children being alienated and/or manipulated was a marked characteristic of the data in the violence subset. The analysis in this article indicates that there are two aspects to such claims. First, violent fathers attempt to manipulate children against their mothers, but this is not necessarily seen in the legal process to negate the necessity for contact. Second, a history of violence may trigger ambivalence about the perpetrator in the children, but such ambivalence is argued by fathers to be evidence that mothers are insufficiently supportive of the father-child relationship. This argument stems from the operation of an informal friendly parent criterion operative in Family Court litigation, under the umbrella of the *Family Law Act 1975* s 68F(2)(h).⁸ Overall, the analysis suggests that the litigation strategies adopted by the parties in the pro-father legal climate that prevailed under the *Reform Act 1995* obscured the question of what parenting arrangements really were in children's best interests.

4 See, for example *Family Law Act 1975* (Cth) s 60CC(4).

5 *Family Law Act 1975* (Cth) s 68F(2)(h), inserted by the *Family Law Reform Act 1995* (Cth) s 31, repealed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 60CC(3)(i).

6 *Family Law Act 1975* (Cth) s 60B(2)(b), inserted by the *Family Law Reform Act 1995* (Cth) s 31, repealed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 60B(1)(a).

7 A more general analysis of the treatment of violence in contested children's cases is in Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *Australian Journal of Family Law* 112.

8 *Family Law Act 1975* (Cth) s 68F(2)(h), inserted by the *Family Law Reform Act 1995* (Cth) s 31, repealed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 60CC(3)(i). The empirical evidence indicates that the attitudes of resident parents (mainly mothers) to contact with non-resident parents (mainly fathers) are subject to significant scrutiny. An insufficiently supportive attitude can result in mothers losing their cases: see Rae Kaspiew, *Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Australian Family Court Decision Making* (PhD Law Thesis, University of Melbourne, 2005) <<http://eprints.unimelb.edu.au/archive/00000129>> accessed 14 February 2007. See also Kaspiew, n7 at 134–36.

A body of research evidence has suggested that the safety of children was compromised because the *Reform Act 1995* failed to address the issue of family violence effectively.⁹ Indeed, the treatment of children's interests in Family Court litigation has become a central concern in policy,¹⁰ research¹¹ and practice¹² since the inception of the *Reform Act 1995*. These concerns have been influential in shaping some aspects of the *Shared Parental Responsibility Act 2006*, in particular the way it enshrines new case management processes for matters involving children,¹³ and elevates ensuring the protection of children from physical and psychological harm through exposure to abuse, neglect or family violence to an object in the new scheme.¹⁴

This article has two parts. The first part presents an analysis of empirical research that sheds light on the role of arguments relating to parental attitudes and children's emotional alliances, particularly in the context of cases involving violence, in litigation under the *Reform Act 1995*. The second part discusses the potential impact of the Federal Government's latest reforms in light of the empirical analysis.

2. *The Research*

A. *Method and Sample*

The data referred to in this article was gathered as part of a larger project undertaken for doctoral research in Melbourne.¹⁵ The aim of the overall project was to assess how key sections of the *Reform Act 1995* were being used in litigation and applied in judicial determinations. The project focused on an empirical assessment of how s 60B (the objects provision), s 65E (the best interests principle), s 61C (shared parental responsibility) and s 68F (the checklist) were applied in practice.

9 John Dewar & Stephen Parker, 'Parenting, Planning and Partnership: The Impact of the New Part VII of the Family Law Act 1975' (Working Paper No 3, Family Law Research Unit, Griffith University, 1999) 83. A shorter version of this report has been published as John Dewar & Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *Australian Journal of Family Law* 96; See also Helen Rhoades, Reg Graycar & Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years*, University of Sydney & the Family Court of Australia (2000) at 1.21 ('*The First Three Years Report*'); Miranda Kaye, Julie Stubbs & Julia Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93; Kaspiw, above n7; Amanda Shea Hart, 'Children Exposed to Domestic Violence: Undifferentiated Needs in Australian Family Law' (2004) 18 *Australian Journal of Family Law* 170. The Federal Attorney General's Department has responded with: Attorney General's Department, *The Family Law Violence Strategy* (2006). As a result, the Australian Institute of Family Studies has been asked to conduct research on how issues relating to family violence arise and are dealt with in family law proceedings.

10 See House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story; Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) ('*Every Picture Report*'). A central conclusion of the FACA Report was that the system needed to become more child focused.

A grounded theory¹⁶ approach was applied in analysing 40 files involving disputes over residence and contact issues that proceeded to trial (including 17 that became subject to appeal)¹⁷ between 1999 and 2000 in the Melbourne Registries of the Family Court of Australia.¹⁸ A key part of the analysis involved tracking common themes between the files and within three main layers of information in each file: the parents' affidavit material, the family reports and the judgments. The breadth, depth and strength of particular themes were analysed, allowing the question of how the legislation was being used (by the parties) and how it was being applied (by the judges) to be addressed in a detailed and systematic way. A background involving family violence emerged as a significant theme in more than half of the cases across the sample.¹⁹

The analysis in this article is informed by insights from research which identify key aspects of the post *Reform Act* 1995 litigation environment. A significant feature of this environment was the way that the shared parenting philosophy of the *Reform Act* 1995 created a perception, particularly among male litigants, 'that they would be granted extra "entitlements"'²⁰ and destabilised litigants' expectations of the family law system.²¹ The changes strengthened the position of men significantly so that the 'family law "system" [became] tilted more and more against women, either by accident or design'.²² A history of violence became no barrier to male litigants pressing parenthood claims,²³ whilst women were faced with the imperative to be 'good' mothers (and successful litigants) by supporting ongoing paternal involvement.²⁴ I have argued elsewhere that the extent to which women could problematise paternal involvement was very limited except in cases where the evidence of severe violence was clear-cut.²⁵ These trends reflect the primacy placed on the child's 'right of contact'²⁶, at the expense of the considerations contained in the 'welfare based' checklist²⁷ in the *Family Law Act* 1975.

11 Children's interests in a variety of family law contexts are the focus of Australian research currently underway. For example: Jennifer McIntosh & Caroline Long, 'Current Findings on Australian Children in Postseparation Disputes: Outer Conflict, Inner Discord' (2005) 11 *Journal of Family Studies* 99; Patrick Parkinson, Judy Cashmore & C Wilson, 'Children's Involvement in Decision Making About Residence and Contact in Family Law Proceedings' referred to in Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (2004) at 6. Taylor et al have examined children's attitudes to their legal representation in the context of the New Zealand family law system: Nicola Taylor, Megan Gollop & Anne Smith 'Children and Young People's Perspectives on their Legal Representation' in Nicola Taylor, Megan Gollop & Anne Smith (eds), *Children's Voices: Research, Policy and Practice* (2000) at 110–133.

12 See for example Diana Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127.

13 *Family Law Act* 1975 (Cth) Pt VII div 12A.

14 *Family Law Act* 1975 (Cth) s 60B(1)(b).

15 Kaspiew, above n8.

16 Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory* (1967).

17 All appeals in children's matters (excluding child support) from these two registries were included in the sample. The trial files were selected on a simple random sampling basis. None of the files were involved in the Court's Magellan Pilot program.

B. Children's Interests, Violence and Alienation/Manipulation

A significant theme in the data was an overlap between a history of violence and allegations concerning interference by one parent in the other parent's relationship with the child or children.²⁸ There were two distinct patterns in the data in terms of the nature of these allegations. In one smaller group of five cases ('the severe group')²⁹ there was alleged behaviour that was extremely manipulative, and in all but one case it overlapped with a significant history of violence. I have chosen to refer to this pattern as 'alienation/manipulation'. The other larger group ('the less severe group') comprised 20 cases³⁰ where claims of 'manipulation' by one parent or the other were an underlying issue in the litigation, in the sense that they were raised by one of the parties and dealt with at the psychological and judicial levels as one of several relevant issues.³¹

The distinction between the two groups rests on the level of severity in the alleged behaviour and the extent to which it was dealt with as an issue in the litigation. The pattern that I have referred to as manipulation involved alleged conduct that was designed to induce the child largely to favour one parent over another, or alleged conduct that impeded parent-child contact and communication for the purpose of damaging the relationship. The pattern that I have referred to as alienation/manipulation involved a more serious set of alleged behaviours that were not only manipulative and damaging to the parent-child relationship but were also abusive to the child, with there being psychological evidence to this effect. At this point I wish to distinguish between what I have called alienation/manipulation

18 Permission from the Family Court of Australia was obtained to gain access to the files. In addition, the Family Court of Australia provided a work space for the two-year period over which data collection continued. A pre-condition for access to the files was an undertaking that the identities of the parties to the litigation would remain anonymous and that no identifying information would be used, in compliance with the *Family Law Act 1975* (Cth) s 121. The referencing system used accommodates the confidentiality undertaking. Files have been given codes starting with 'A' (for files from the appeal sample) and 'T' (for the trial sample). References identify the coded file number, with the source and date of quoted material. Affidavits are identified as being the mother's (m), or the father's (f), or that of another witness. Judgment dates are restricted to month and year to prevent identification of parties through other electronic sources such as Austlii. Approval for the project was also obtained from the Human Research Ethics Committee at the University of Melbourne, Project No 990438. Federal Magistrates Court files are not included in the sample because the project began prior to its inception.

19 The analysis in this article refers largely but not exclusively to the violence subset (n=23). Appeal files in this sub-set (n=9/17) were: A1, A12, A2, A3, A11, A17, A6, A15, A7. Trial files were (n=14/23): T1, T3, T7, T11, T22, T15, T2, T8, T5, T10, T6, T9, T12, T19. Violence was a less significant or historical factor (there had been violence in the past) in a further three cases: T17, T20, A8. This is a conservative assessment of the incidence of this issue. It is based on an assessment of the parties' affidavit material and other evidence in the context of the overall credibility of the allegations, and judicial findings as to parties' credit.

20 Dewar & Parker, 'Parenting, Planning and Partnership' above n9 at 79.

21 This was reflected in a marked increase in the amount of litigation in the years after the commencement of the Reform Act 1995: see Rhoades et al, above n9 at 1.7-1.10; Dewar & Parker, 'Parenting, Planning and Partnership' above n9.

22 Dewar & Parker, 'The New Part VII' above n9 at 84.

and what is known as ‘Parental Alienation Syndrome’ (‘PAS’). This controversial concept refers to situations in which one parent is alleged to have manipulated the child’s emotions and allegiances to the extent that they unjustifiably reject the other parent. In the US, PAS has been described in a body of work by the late child psychiatrist Richard Gardner.³² The core of his theory is that a child who evinces PAS has been brainwashed by one parent (usually a mother with residence) to reject the other parent (usually a father with contact).³³

PAS has not however been recognised as a formal psychiatric diagnosis³⁴ and it is subject to significant controversy.³⁵ In the UK, ‘the majority view’ ‘seems to be that the syndrome does not exist’.³⁶ The theory is said to confuse reactions in children to their parents’ separation that are developmentally normal with psychosis.³⁷ It is also seen to overstate the frequency with which false allegations are made of abuse.³⁸ In this way, PAS operates to shift ‘attention away from the perhaps dangerous behaviour of the parent seeking custody to that of the custodial parent. This person who may be attempting to protect the child, is instead presumed to be lying and poisoning the child.’³⁹

The role that allegations of PAS play in unjustifiably discrediting mothers is increasingly being recognised. Referring to its role in the US in court proceedings, legal academic Joan Meier argues that the way that PAS has been constructed ‘is both blatantly gender biased and fundamentally misguided’.⁴⁰

PAS has been accepted in Australia by the Family Court as a ‘real psychological phenomenon’,⁴¹ but the Court is seen to be reluctant to accept

23 *First Three Years Report* above n9 at 5.12; Dewar & Parker, ‘Parenting, Planning and Partnership’ above n9 at 104.

24 Helen Rhoades, ‘The “No Contact Mother”: Reconstructions of Motherhood in the Era of the “New Father”’ (2002) 16 *International Journal of Law, Policy and the Family* 71; Kaspiew, above n8.

25 Kaspiew, above n7.

26 *Family Law Act* 1975 (Cth) s 60B(2), inserted by the *Family Law Reform Act* 1995 (Cth) s 31, repealed by the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth).

27 *Family Law Act* 1975 (Cth) s 68F(2), inserted by the *Family Law Reform Act* 1995 (Cth) s 31, repealed by the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth).

28 This overlap was evident in a total of 17 files; A7, A15, A1, A3, A12, T1, T2, T3, T5, T6, T7, T8, T9, T10, T12, T15, and T19. In the following discussion files that also fall into the violence subset are indicated by a ‘V’. Such interference was also alleged in a further file where violence was a ‘historical’ factor (see above n19): A8 (‘HV’).

29 A7V, A15V, A1V, A3V, and A12V.

30 T2V, T1V, T23V, T3V, T7V, T8V, T5V, T10V, T6V, T21, T19V, A5, A9, T4, T9V, T17, T12V, T15, T18, and A8HV.

31 The files in the two groups comprise the totality of the subset in which alienation/manipulation and manipulation were classified as significant issues in the litigation.

32 Richard Gardner, *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse* (rev ed, 1998).

33 *Ibid.*

34 Sandra Berns, ‘Parents Behaving Badly: Parental Alienation Syndrome in the Family Court — Magic Bullet or Poisoned Chalice’ (2001) 15 *Australian Journal of Family Law* 191 at 194.

35 See, for example Carol Bruch, ‘Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases’ (2001) 35 *Family Law Quarterly* 527.

allegations of its presence in specific cases at face value.⁴² An Australian study by legal academic Sandra Berns of 36 cases heard in the Brisbane Registry of the Family Court between 1995 and 2001 indicated that fathers and mothers raise allegations of alienation/manipulation in almost equal numbers.⁴³ The research suggested PAS was more likely to be raised in a tactical way by fathers, and that allegations against mothers were less often found to be valid. This is consistent with the promotion of the allegation as a 'magic bullet' in family law proceedings on fathers' rights groups' websites,⁴⁴ and highlights the tactical role these arguments play. The study also noted the overlap between a history of violence and allegations of alienation.⁴⁵

The analysis in this study supports Berns' finding of an overlap between a history of violence and allegations of alienation. Two significant themes emerge from this overlap in the sample. First, alienation/manipulation appears to be a tactic of violent fathers. The discussion in the next section highlights how some of the most violent fathers in the sample also manipulated children against their mothers. This is consistent with growing recognition of the propensity of violent fathers to use manipulation and litigation over children to maintain control of the family and their former partners after separation.⁴⁶ Children thus become tools in a pattern of control based violence.⁴⁷ They may also be subject to manipulation by the abusive parent which impairs their relationship with the other parent.⁴⁸ Further, the 'abused parent may be seen by the children as weak and "ineffectual", and

36 Jonathon Herring, 'Contact in a Private Law Context' in Andrew Bainham et al (eds), *Children and Their Families: Contacts, Rights and Welfare* (2003) at 99.

37 Bruch, above n35 at 530.

38 Id at 532.

39 Ibid.

40 Joan Meier, 'Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions' (2003) 11 *American University Journal of Gender, Social Policy and the Law* 657 at 689.

41 *Johnson v Johnson* (1997) 22 Fam LR 141.

42 Berns, above n34 at 208.

43 Id at 207.

44 Id at 197.

45 Berns, above n34 213–214.

46 Australian Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995) at 5.28–5.30 recommended that the Family Court should be more robust in refusing contact in circumstances involving violence and continuing conflict (see Recommendation 2.7). See also Kathryn Rendell, Zoe Rathus & Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family* Women's Legal Service (2000) at 48–49; Rhoades, above n24 at 77; Rosemary Hunter, *Family Law Case Profiles* (1999). The use of the *Family Law Act* 1975 (Cth) s 118 orders to curb the use of litigation against a background of domestic violence is discussed in Belinda Paxton, 'Domestic Violence and Abuse of Process' (2003) 17 *Australian Family Lawyer* 7.

47 Nicholas Bala, 'A Differentiated Legal Approach to the Effects of Spousal Abuse on Children: A Canadian Context' in Robert Geffner, Peter Jaffe & Marlies Suderman (eds), *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention and Policy Development* (2000) at 301–328.

48 Id at 315.

children may wish to align themselves with the “stronger”, more powerful abusive parent’.⁴⁹

The second significant theme in the sample was the way that a history of violence may create ambivalence about the violent father in the children, triggering a claim of alienation/manipulation against the mother by the father.⁵⁰ These claims are related to the operation of the informal friendly parent criterion referred to earlier. When raised strategically by fathers such claims are oriented towards proving that the mother concerned deviates from the normative standard set in relation to fostering relationships between fathers and children. In this way, such allegations focus attention on the behaviour of the mother, rather than on the parenting skills of the father and the nature of the father-child relationship. The possibility that contact may not be a positive experience for the child potentially remains obscure.

(i) *Alienation/Manipulation: the Severe Group*

The five cases in the severe group included four cases⁵¹ where extreme patterns of physical violence and control, or in one instance, changeover conflict and serious control features,⁵² were involved. In each of these four cases mothers raised the allegations against fathers, although in one instance the claim was mutual.⁵³ Long running litigation, mostly necessitating numerous evaluations of the children, was a common feature in each of the four cases.⁵⁴ A characteristic of the fathers’ arguments in these files is virulent denigration of the mothers in the legal proceedings, with evidence that these views were also expressed to the children. In A1, for example, the father, who had been convicted of 43 counts of criminal assault against the mother⁵⁵ and was found in the Family Court proceedings to

49 Ibid.

50 Even in some cases where violence was not relevant, alienation/manipulation claims are raised against mothers to impugn their motivation for opposing fathers’ claims for increased contact.

51 A15V, A1V, A3V, A12V. The fifth case (A7V) followed a different pattern to the other four in this group. It involved a mother who lost residence of her daughter on the basis of what the trial judge found was her ‘wilful and irrational’ attitude to the child’s father. The mother and father had never lived together as a family unit and the on-again off-again relationship terminated in a scene where the father threw ant-rid in the mother’s eyes, wishing she would go blind: see Kaspiew, above n8 at 105–107. See also the text accompanying n84–n86 below.

52 A15V.

53 A3V. This was the only case in which PAS was explicitly raised as an issue by a party, with the father framing his argument in these terms and the mother in turn focussing attention on his own manipulation of the children: see text accompanying n79–n82 below.

54 In A15V, A1V and A12V the children had been seen by numerous experts, including court appointed experts and experts retained by the parties to prepare reports. Additionally, the child in A15V and one of the group of five siblings in A3V had been subject to Department of Human Services (‘DHS’) investigations. In A1V, the children had been seen by family report writers for the court proceedings and had undergone a DHS investigation, which substantiated abuse of the children by the father. Each of the fathers in these cases were criticised in the judgements for being excessively litigious. In each case concerns were expressed, either by the Child Representative or the judge, about the way that the litigation was exhausting the resources of the mothers.

55 Trial judgment 1/ 1999.

have also been violent against the children,⁵⁶ insisted the mother had an inferior intellect, was an inferior parent and a liar, who 'broke good family against all Christian values for selfish reasons'.⁵⁷ In this case, and three others in this group, the suggestion that emerges on the basis of the material as a whole is that the children were being subjected to extreme levels of manipulation in the context of attempts by the father to maintain control of the family.

This point, and the consequences of a history of violence and ongoing manipulation for children, are illustrated particularly powerfully in A12, a case where the father had been relentless in his pursuit of residence of his two children against the backdrop of a serious history of violence and control during his relationship with the mother. After the break up of the relationship this continued through abuse at changeover times and protracted litigation over the children. In a judgment relating to proceedings in which the father sought residence of the children in 1997, the trial judge made this factual finding about the father's violent and controlling pattern of behaviour: 'I accept the mother's version as the "more truthful" as to the way in which she lived with [the father] and the pressures which she has continued to be under since the separation — subject to his dominance and abuse.'⁵⁸

The judge made this observation about the evidence given by the mother (who was self-represented) as to the nature of her life with the father:

[h]er demeanour ... was from start to finish one of apparently genuine upset and distress as she recounted her life with [the father]. She gave detailed evidence of her thirteen years of "misery". Interestingly, her emphasis appeared to be more on the degradation than the actual violence; more on the control exerted by [the father] than the actual abuse She was questioned in depth as to why she did nothing about it and gave what I regarded as unrehearsed and credible evidence. She described the difficulties in engaging the police who appeared not to be interested unless she had actually been injured She talked of the feeling of not knowing where to go and not knowing who to turn to — of sometimes telling friends or family, but that for the most part of things happening behind closed doors and that in public [the father] could be very nice.⁵⁹

In making the finding that the mother's account of the history of the relationship was more credible than that of the father, the judge noted that s/he was nonetheless assessing the father's case at its 'absolute highest' because he had had the benefit of legal representation: 'The mother's version has been fully cross-examined; he has had the opportunity to give evidence in chief (which he did at unusual length in this court); he has tendered a range of materials in evidence and he has not been cross examined in any detail.'⁶⁰

The judge characterised the father's behaviour at contact changeover as 'manipulative' in presenting his/her findings on the parties' conduct as parents:

56 Ibid.

57 Affidavit (f) 3/98.

58 Trial judgment 8/97.

59 Ibid.

I note, by illustration, his approach to the contact changeovers. The tension between the parents at the point of changeover must be more than apparent to the children. It was [the mother]'s evidence that [the father] has at all times manipulated events by making it very difficult for [their son] to leave him and return to his mother. He, [the father], will not partake in removing [the son] from his care or in encouraging him to go to his mother. He swore that the child could interpret such conduct as in effect "disloyalty" on the part of his father. It puts the mother in an impossibly difficult position and raises the stress for the children to a very considerable degree.⁶¹

In these proceedings, orders for residence were made in favour of the mother with orders for alternate weekend contact with the father. Another trial of the father's claim for residence, and the mother's application to stop contact on a final basis, came before the court in May 1999, after numerous proceedings in the intervening years, including contravention proceedings and recovery orders. The mother's material noted that an order under the *Family Law Act* 1975 s 118⁶² made against the father 'appear[ed] to have had little impact on the father and he continues to issue applications on a regular basis'.⁶³

The mother's argument for a cessation of contact emphasised the father's determination to influence the children against her, and the consequences this was having for the children's emotional development: 'The children's exposure to this dispute is causing them irreparable harm. The children each display clear signs of stress at each contact changeover. The children are confused and troubled by the father's constant disparagement of me.'⁶⁴

The family report quotes the mother as saying that 'the only way to ensure the children's emotional survival is to suspend all contact with their father until they are mature enough to make their choice and protect themselves against the father's emotional pressure'.⁶⁵

The family report's descriptions of the children involved in the case highlight the implications of being subject to such intense pressure. The behaviour of one of the children was described in the family report in this way:

In spite of [my] encouragement, he seemed unable to express himself freely ... [he] kept checking the doors and windows and asked [me] several times if anyone was watching the interview through the one way mirror ... [t]he only spontaneity in his demeanour was his unchecked crying about missing his father. Whenever the subject of his father came up, he sobbed profusely, covering his face with both his hands and curling up into a foetal position in his chair.⁶⁶

60 Ibid. According to an outline of submission (3/2000) filed on behalf of the mother for appeal proceedings in relation to the outcome of a subsequent trial (see further below), by the time of the trial the mother's capped legal aid funding amount had been exhausted on interlocutory proceedings. The father had represented himself in these proceedings, ensuring that he had legal aid funding for representation in the trial.

61 Trial judgment 8/97.

62 These orders prohibit the institution of proceedings in the court without prior leave of the court.

63 Affidavit (m) 9/1999.

64 Ibid.

65 Family report 9/1999.

The family report author expressed strong concern over the implications for the children of being subjected to numerous assessments throughout the years of litigation: '[this] has exhausted them emotionally and robbed them of spontaneity and childlike trust in the adult world'.⁶⁷

Other evidence in the file provides one of the most disturbing indications across the sample of harm being sustained in relation to a child. The Family Court counselling service had referred the boy to a child psychiatrist after he revealed that he heard several voices speaking to him in the third person and offering him advice.

A report tendered to the court by the psychiatrist noted that the child's symptoms would not be assisted by psychiatric treatment because they were 'inextricably bound up with the ongoing hostility between his estranged parents'.⁶⁸ Responsibility for resolution of the issue lay with the court: '[The child] did not present as either psychotic or depressed and the voices can be seen as a manifestation of the anxiety and stress that he is experiencing in the context of unresolved parental conflict which continues to be played out around access issues'.⁶⁹

This boy's younger sister was also observed by the family report author to be 'guarded' when issues about her care were broached, though she 'chatted amicably' about other subjects. When the counsellor suggested she make up a story, she refused, stating: 'I have stuffed up the stories before'.⁷⁰ This poignant comment expresses this child's experience in the court process: she has been unable to tell the 'right' story on previous occasions, so refuses to engage in the task again. Whilst the family report appropriately adopts a descriptive approach in this context,⁷¹ the inference that arises from the material in the file as a whole, particularly in light of the judicial finding discussed earlier, is that the child had been coached by the father to say things favourable to his case but had been unable to carry this through when asked to tell a story when interviewed for a family report for previous proceedings.

The family report's author concluded that while both children claimed they were closer to their father than their mother, 'the observed fond interaction between the children and the mother was incongruent with their statements'.⁷² This comment acknowledged that the children's expressed views were inconsistent with their real feelings. Whilst the family report stopped short of making factual pre-judgments in relation to the mother's allegations that the father

66 Ibid.

67 Ibid. Similar concerns were expressed by judges about the children in A3V and A15V.

68 Affidavit by child psychiatrist filed on 9/1999.

69 Ibid.

70 Family report 9/1999.

71 It is not the role of family reports to pre-empt factual findings that should be made by the court. The constraints that family report writers operate under has been described in: Carole Brown, 'Custody Evaluations; Presenting Data to the Court' (1995) 33 *Family and Conciliation Courts Review* 446.

72 Family report 9/1999.

was alienating the children from her, comments such as these in the family report tended to provide support for her claims.

The report nonetheless recommended that contact between the father and the children should resume, because otherwise their ‘unrequited longings’ to be with the father would become ‘a burdensome, unresolvable issue’.⁷³

This recommendation underlines the fact that the behaviour of the fathers in this subgroup raised serious dilemmas for the court. In the judgments, the fathers’ constant recourse to litigation and their persistent criticisms of the mothers, attracted judicial disapproval. In A15 for example, the judge noted that ‘the husband was determined upon a course to demote the mother’s claim, to denigrate and besmirch her character and her performance as a parent’.⁷⁴ If the husband’s application for residence of the child was successful, ‘there would be a high likelihood that the relationship between the mother and the child would be “destroyed”’.⁷⁵ However, the behaviour of this father, and others in this group of cases, was not dealt with in the framework of alienation, nor were links drawn between such behaviour and the histories of violence and/or control in the relationship. Further, the mothers’ attitudes to the fathers nonetheless received scrutiny to establish whether they were sufficiently supportive of the father-child relationship, notwithstanding the fact they had been subjected to violence and/or control, denigration and vilification in the litigation.⁷⁶ The mother in A15, for example, was praised for ‘recognis[ing] the value and importance of the husband in the [child’s] young life’.⁷⁷ The mother in A12 was given credit in the first trial relating to the father’s application for residence for supporting contact and acknowledging what the relationship with their father meant to the children: ‘she has been forthright and honest in volunteering that the children like to see their father and in talking openly of [their son]’s expressed wishes. She has in no way tried to suggest otherwise’.⁷⁸

Similar findings were made about the mother’s behaviour in A3, the case where alienation allegations were mutual, and the father explicitly raised PAS as an issue in the litigation. The mother’s attitude to the father’s relationships with the children in the family was seen to contradict the father’s claim:

I am satisfied that [the mother] acts with greater insight in relation to the children and genuinely endeavours to place her feelings second to their own. By way of illustration, despite what [the father] said about [the mother] trying to poison [the youngest son] against him, it was absolutely clear that [the youngest son] had been free to express affection towards his father ... There was nothing to suggest that she had closed off [the youngest son]’s option for a close relationship with his father.⁷⁹

73 Ibid.

74 Trial judgment 12/99.

75 Ibid. Contact was nonetheless held to be in the child’s best interests.

76 The exception to this was A1, where the mother’s attitude was not an issue because of the very strong history of violence (the mother was accepted to be suffering from post-traumatic stress disorder) and child abuse.

77 Trial judgment 12/99.

78 Trial judgment 8/97.

The father had based his case against an application permitting relocation by the mother on the argument that the mother's plans were part of a campaign of alienation against him. His allegations in this regard were seen to be invalid⁸⁰ and his own behaviour in the family was held by the judge to be 'manipulation within the family which can also be described as abusive'.⁸¹ As a result of this manipulation, the relationships among the five children in the family, and particularly between some of them and their mother, were fractured:

[A son in the father's household] has apparently not been afforded the same freedom [to maintain a relationship with his mother]. There were examples of his being used as an "enforcer" and it seemed from all the evidence that [he] has not been free to express warm emotion towards his mother. [Another son] too has been used by the father to convey messages/threats to the mother in relation to the other children's contact.⁸²

As noted earlier, the analysis in this study, particularly the foregoing discussion of the cases in the severe group, suggests a possible link between alienating behaviour and a history of violence.⁸³ A further interesting feature of the data is the way that mothers framed their cases to raise concerns about paternal violence and emotional manipulation of the children, but did not place these concerns within a formal PAS framework. In addition, despite paternal behaviour that was judicially accepted as manipulative, the predominant tendency was for the mothers to acknowledge the importance of the father-child relationship, underlining the operation of the implicit (and gendered) friendly parent criterion. A further aspect of the empirical analysis presented in this section is the suggestion of a disparity between the trends indicated in the empirical data and those reflected in the jurisprudence on alienation/manipulation. The empirical material indicates that the fathers, against a background of violence, engaged in alienating behaviour as part of a campaign to maintain control over the family after separation. In contrast, the reported decisions focus on alienating mothers, emphasising the role of mothers in determining children's attitudes to their fathers. Only one case in the empirical study (across both the severe group and the less severe group discussed below) reflected such a dynamic, with the mother in A7 losing residence of her daughter on the basis of her 'wilful and irrational' attitude to the child's relationship with her father.⁸⁴ This outcome occurred in a context where the father (who had legal representation) originally filed orders for contact enforcement under s 112AD of the *Family Law Act 1975*, but by the time of the trial was seeking residence without having filed a formal application for such orders.⁸⁵ The mother, who was self-represented at trial (and who also suffered significant health problems),

79 Trial judgment 6/99.

80 They were explicitly rejected by the judge: trial judgment 6/99.

81 Ibid.

82 Ibid.

83 Given the small sample size, I wish to re-emphasise that these findings are tentative and exploratory in nature.

84 See above n51.

85 Appeal judgment 4/1999.

subsequently appealed and her appeal was upheld on the basis of procedural unfairness in the running of the trial.⁸⁶

Although the ‘alienating mother’ was a minor presence in the sample, her stereotype dominates reported decisions on children’s wishes and parental attitudes. In *In the Marriage of R (Children’s Wishes)*,⁸⁷ for example, the Full Court upheld a decision of Guest J which ordered contact to take place contrary to an 11 year old girl’s expressed wish. His Honour had found at first instance that in the absence of violence or abuse, the girl’s wish not to see her father was influenced by her mother’s lack of positive encouragement of contact.⁸⁸ In circumstances where the girl had previously had a positive relationship with her father, her wishes could not be allowed to be determinative because she was ‘not appreciative of the implications or long term effects’.⁸⁹

The rhetorical stereotype of the ‘no contact mum’ dominates public discussion of alienation. Rhoades’ research,⁹⁰ together with the evidence in relation to alienation/manipulation and violent fathers in this study and in that by Berns,⁹¹ suggests however that the stereotype of the alienating mother requires further scrutiny. The following analysis of the less severe group of cases, where allegations of manipulation were raised, indicates that they are used tactically by fathers to show that mothers breach the friendly parent criterion.

(ii) Manipulation: the Less Severe Group

Among the less severe group of 20 files, 14 fathers⁹² and five mothers made claims suggesting their relationship with the child was being undermined by the other parent.⁹³ Such allegations were mutual in one further case.⁹⁴ Violence was relevant in nine of the files where fathers raised the allegations,⁹⁵ and in two of the cases where mothers raised them.⁹⁶ Rather than being central to the litigation, the claims of manipulation remained underlying issues in these cases. They were raised in the context of explanations about the wishes expressed by children and recorded in family reports.

The differences between the way manipulation claims were raised in mothers’ and fathers’ material were qualitative as well as quantitative. Mothers were not only less likely to raise manipulation allegations, but were less likely to raise them spuriously.⁹⁷ Further, some of the cases where mothers raise the allegations suggest manipulative behaviour on the part of fathers is also part of a pattern of violence and control in this group of files.⁹⁸

86 Ibid.

87 [2002] 29 Fam LR 230 (Nicholson CJ, Holden & Monteith JJ).

88 Id at 235.

89 Ibid. Compare with *In the Marriage of K and Z* (1997) 22 Fam LR 382.

90 Rhoades, above n24.

91 Berns, above n34.

92 T2, T1, T23, T3, T7, T4, T8, T5, T10, T6, T21, T19, A5, and A9.

93 T17, T12, T15, T18, and A8.

94 T9.

95 T2, T1, T3, T7, T8, T5, T10, T19, and T22.

96 T12 and T15.

In contrast, manipulation allegations appeared to be raised by fathers in a tactical way, in the context of judicial findings that allegations by fathers of mothers' threats or attempts to impede or sever father-child contact were not substantiated. The allegations implied that the mothers' opposition to contact, increased contact or residence stemmed from a deviant, anti-father attitude, rather than being based on valid concerns in relation to the children's needs and interests. They also provided an explanation for children's attitudes to their fathers that diverted the attention away from the fathers' parenting capacity and onto the attitudes of the mothers. In T4, for example, the judge found that the father's claim that the mother refused to facilitate phone contact was false, as was his account of the extent to which he had cared for the children prior to separation and the level of his engagement with them after separation.⁹⁹

In the violence cases, the use of allegations of manipulation against mothers appeared to be linked to the tendency to use litigation over residence and contact to maintain control following separation, albeit to a less extreme extent than in the severe group. In T7, for example, the father engaged in intensive litigation to disprove the parental fitness of the mother. The mother claimed she had been subjected to physical violence and verbal abuse during the marriage which ended when the father attacked the mother's car with an axe, causing her to fear for her life and those of the children.¹⁰⁰ In litigation, the father accused the mother of undermining his relationship with the children, but the family report provided independent verification that the converse was in fact the case.¹⁰¹ The judge noted that:

[I]n my view, the husband is quite unable to separate his own feelings of antipathy from the welfare of the children. He continually demeaned, besmirched and belittled her, the result of which has left me to speculate whether he could promote the mother to the children or act in such a way as to foster their relationship with her. I have no confidence at all that he would properly and adequately nurture the children and in particular attend to their emotional needs were he to have residence of them.¹⁰²

The children were placed at the centre of the conflict by being the objects of the litigation through which the father perpetuated his campaign against the mother. More concretely, they were also exposed to the vilification of their mother at changeovers. Contact according to the mother's application was nonetheless ordered.¹⁰³

97 Mothers' allegations of manipulation were judicially accepted in all cases. None of the father's allegations were upheld. Although in one case, T19V, there was no judgment on the file. However expert evidence established that the husband was suffering from an untreated psychiatric disorder. The mother's affidavit evidence indicated she supported contact supervised by the paternal grandfather, despite a history of violence and the child being subjected to inappropriate behaviour: see further Kaspiew, above n8 at 111-112.

98 This was evident in three cases: T12V, T15V and A8HV.

99 Trial judgment 6/1999.

100 Affidavit (m) 2/99.

101 Family report 11/1998.

102 Trial judgment 3/99.

Other cases in the sample exemplified a further aspect of the overlap between violence and manipulation claims, specifically the way that fathers blamed mothers for children's attitudes, rather than accepting responsibility for their own actions. This was illustrated clearly by T10V, which concerned a relocation application in relation to two boys, aged seven and 10. They lived with their mother, her 18 year old daughter from a previous relationship and her new partner. The daughter had obtained a scholarship to study at an interstate university and the mother was applying for permission to relocate in order to be with her daughter. The daughter required considerable emotional support because she suffered from various serious health problems. There was a history of conflict between the mother and the boys' biological father, who had faced court proceedings for assaulting their sister during a contact changeover and received a \$1000 fine without conviction.¹⁰⁴

The father argued that it was unnecessary for the mother to relocate and that the daughter should either go alone or study in Melbourne. He depicted the mother as a serial no contact mum, arguing that she had continuously attempted to alienate his sons from him: 'each of the children have been subjected to numerous male role models in their lives ... I say that the wife has had children to each husband and that each husband has been used as the sole father for the different children.'¹⁰⁵

Notwithstanding the alleged manipulation by his former wife, the father argued his relationship with the boys remained strong, and that any reservation they expressed about him was attributable to his wife's behaviour.

The father's evidence was contradicted by the family report.¹⁰⁶ It highlighted the impact that the conflict between the parents, and the assault on the boys' older half-sister, had on their attitude to their father. In symbolic play, the report says, their father was depicted 'as an interfering figure about which they expressed some irritation'.¹⁰⁷ Moreover, the older boy remembered seeing his father assault his sister when he was six, and commented that this was 'a sad day' for the family. He also noted that his father hated his sister, adding 'I don't know why'.¹⁰⁸ The report noted that both boys were in favour of the proposed relocation.¹⁰⁹

The evidence referred to in the previous paragraph was emphasised in the judge's decision.¹¹⁰ In considering the implications of the move for contact, the judge noted that 'although the children's relationship with their father must not be

103 This was the only case in the sample where the Child Representative took a more conservative view than the mother. He recommended the proceedings be adjourned so that a psychiatric report on the father could be obtained. The issue of child representation is discussed further below.

104 Trial judgment 6/99.

105 Affidavit (m) 2/99.

106 Family report 5/99.

107 Ibid.

108 Ibid.

109 Ibid.

110 Judgment 6/99.

severed, it is not without problems'. His/Her Honour rejected the father's arguments that the mother was alienating the children, noting that they 'had been witness to sufficient problematic behaviour from the father for that to be the cause of any negativity in the children'.¹¹¹ The boys' close relationship with their sister, and their sister's need for their mother's support, meant that the relocation was in their best interests. Contact would still be exercised, but less frequently, and the distance would mean the children would be exposed to less conflict between their parents.

In this case there was judicial acknowledgement that the father's own behaviour was responsible for his sons' greater sense of loyalty and attachment to their mother's family unit. The father's argument in this file highlights a more general tendency among fathers in the sample to blame mothers unjustifiably for their children's attitudes to them. These claims were usually contradicted by the evidence provided by family reports¹¹² and rejected at the judicial level.

In contrast, among the smaller number of files where mothers made claims in relation to alienation and manipulation, they were more likely to be found to be valid.¹¹³ This is demonstrated by the judge's findings in T15V, in which a mother alleged that the father was influencing their children against her.¹¹⁴ In this instance, the judge demonstrated an unusually sensitive approach to violence. The father's highly negative attitude to the mother was an important factor in his/her Honour's decision to return the three children, aged between seven and nine, to the care of their mother. This determination overturned a year long status quo.

Two factors were emphasised by the judge. The first was the father's previous history of violence toward the mother and an older son not directly involved in the proceedings. The second was his admitted habit of telling the children that their mother was a bad mother. Both factors indicated that the father had limited insight into the consequences of his actions. The father's negative attitude to the mother had already had an impact on the children. In particular, the eldest child, a nine year old girl, had expressed her wish to remain resident with her father. The judge placed little weight on this factor because he doubted it had a sound basis: 'there was no evidence to suggest that they have a mature understanding even for their ages, of the issues involved in their welfare. I am also concerned about the foundation for their wishes because of their father's willingness to condemn their mother as a bad mother.'¹¹⁵

Other data reveals children's vulnerability to manipulation in ways specifically linked to their capacity to express wishes in the context of litigation. In one case, for example, a mother raised the suspicion that the father had offered an incentive to her oldest son (aged nine) to say 'positive things about himself and negative

111 Ibid.

112 This was not invariably the case. In two files, T9V and T18, the family reports deemphasised the mothers' concerns about manipulation. In both cases the judges affirmed the mothers' concerns.

113 As noted, mothers' allegations of manipulation were judicially accepted in all cases: above n97.

114 Trial judgment 6/2000.

115 Ibid.

things about myself” in an interview with the author of the family report.¹¹⁶ She related how, as soon as the Family Court counsellor had left her house after an in-home visit, the boy immediately telephoned his father:

[A]t the end of the phone call [my oldest son] said to me “now I am getting my play station from Dad”. Due to the fact that this occurred immediately after [the counsellor] left I thought the husband may have promised [my son] the play station if he said what the husband wanted him to say.¹¹⁷

The mother’s claim was accepted by the judge, who found that her evidence ‘certainly indicates a high degree of indulgence of the child and children, and raises in the [oldest boy’s case] in particular, a strong suspicion of manipulation’.¹¹⁸ The orders made in this case resulted in the two older children in this file joining their two younger siblings in the care of their mother. Contact with their father was maintained in an alternate weekend pattern.¹¹⁹

In summary, this empirical analysis shows how children’s emotional alliances were linked in arguments in litigation to friendly and unfriendly parental behaviour. There were two main patterns in the data concerning the way that claims in relation to alienation/manipulation were deployed. The analysis of the severe group highlighted how alienation/manipulation claims made by mothers were found to have a factual basis by judges and were a tool used by violent fathers. However, even the use of such tactics by fathers was not seen to impact upon the children’s right to contact. It was judicially accepted that children in four of the five families in the severe group of cases were subjected to serious levels of pressure and manipulation by their fathers.¹²⁰ Despite these findings, ongoing contact¹²¹ was held to be in the children’s best interests in three of the four cases.¹²² This outcome pattern underlines the prevalent reluctance in the family law system to sever relationships between fathers and children, even against backgrounds of severe violence and ongoing manipulation and control.¹²³

116 T9V, affidavit (m) 3/2000.

117 Ibid.

118 Trial judgment 5/2000.

119 Ibid.

120 A7 was the exception to this. See above n51.

121 Supervised in A1; unsupervised in A15 and A3.

122 In A12, orders reflecting the mother’s application were made after the father withdrew from proceedings, so a full hearing of his application did not occur: judgment 9/1999. The trial transcript (9/1999) reveals that outside the court during an adjournment, the father’s new partner had chased and kicked the mother to the ground. The mother’s solicitor was also assaulted in attempting to intervene to prevent further assaults on the mother, who was pregnant. Amidst this, the father had been making threats to the mother’s instructing solicitor, according to the mother’s barrister, saying ‘I am going to get you, you dog; you’re finished, you’re going to pay for this’. The mother had been taken away in an ambulance, while the father and his new partner reappeared in court to be charged with contempt. It appeared that the Children’s Representative was prepared to support unsupervised contact: Children’s Representative Outline of Case Document filed on [date illegible]. The father’s appeal against the trial judge’s decision was successful on the basis that the trial judge’s failure to give reasons for her/his decision amounted to an error of law (appeal judgment 6/2000). The Children’s Representative did not subsequently oppose consent orders under which the children became resident with the father (6/2000).

The analysis of the less severe group illustrated the way spurious manipulation claims against mothers were raised tactically to establish the mothers' deviance in relation to the requirement to be a friendly parent.¹²⁴ While these claims were generally not accepted in family reports and judgments, the fact that they were raised spuriously by fathers did not lead to the questioning of their bona fides as litigants or as contact parents.

Overall, the analysis in this study, together with the other studies referred to earlier,¹²⁵ suggests that the litigation strategies adopted by the parties in the pro-father socio-legal climate under the *Reform Act* 1995 obscured scrutiny of what implications a history of violence may have for ongoing parenting arrangements. It appears that women were impelled to accept a baseline level of contact¹²⁶ so as to avoid the label of 'no contact mum',¹²⁷ and the penalising discourses¹²⁸ that surround this construct.¹²⁹ This meant that in relation to contact, the court's consideration of the 'best interests' question became skewed as a result of the tactical positions adopted by the parties. The analysis in this study indicated there was little scope in Family Court proceedings for a substantial inquiry into the question of whether ongoing contact would 'advance and promote the welfare of the child',¹³⁰ even though this was said to be the court's task in its pre *Reform Act* 1995 jurisprudence. In *Brown and Pederson*,¹³¹ the leading Full Family Court judgment on the child's right to contact (then known as access), it was accepted that while the importance of maintaining filial ties would be given 'great weight',¹³² the court's obligation was to make an 'independent investigation of what the welfare of each child requires'.¹³³ Yet as a result of the tactical pressures that shaped the court's consideration of the contact question it appeared that orders for no contact were really only made in 'exceptional circumstances'.¹³⁴ This produced a situation where, consistent with the view taken in dissent by Kay J in *In the Marriage of D Koutalis and CJ Bartlett*,¹³⁵ 'it is unnecessary in the vast majority of access cases to have to prove that the continuance of the parent-child relationship will be to the child's benefit. It goes without saying'.¹³⁶

123 Kaspiew, above n7.

124 Hart, above n9 at 186, has drawn a similar connection.

125 See above n9.

126 Except in the most clear-cut cases of severe violence or where there was no pre-existing relationship between the child and father, combined with other factors militating against contact — for example, substance abuse or untreated mental illness. See Kaspiew, above n8 at 207–212.

127 Rhoades, above n24.

128 John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467 at 483. See also Kaspiew, above n8 at 105–110.

129 Kaspiew, above n8 at 109.

130 *Re A* [1982] FLC 91–284 at 77,612 (Treyvaud J), approved in *Brown and Pederson* [1992] FLC 92–271 (Full Family Court).

131 [1992] FLC 92–271. This judgment was upheld in the post *Reform Act* 1995 decision *B and B, Re: Family Law Reform Act 1995* (1997) 21 Fam LR 676.

132 Following *M v M* (1988) 166 CLR 69 at 76.

133 Following *Cotton and Cotton* [1983] FLC 91–330 (Nygh J).

134 *B and B, Re: Family Law Reform Act 1995* (1997) 21 Fam LR 676 at 745.

135 (1994) 17 Fam LR 722.

The prediction made in 1996 by a former Family Court judge, the late Peter Nygh, that s 60B(2)(b) of the *Family Law Act 1975*¹³⁷ would create a ‘rebuttable presumption in favour of contact’¹³⁸ was apparently fulfilled. He suggested at the time that the test in relation to contact would become: ‘are there any cogent reasons why the child should be denied contact with the parent?’¹³⁹ A significant problem with this approach in the *Reform Act 1995* litigation environment was that consideration of any possible cogent reasons was inhibited by the operation of the friendly parent criterion. Attention was focused on preserving the father-child connection, but the possibility that this may have threatened the healthy development of the child or children received little consideration. This trend was concerning given the growing body of research showing that exposure to violence, conflict and poor parenting is detrimental to children.¹⁴⁰

3. *The Family Law Amendment (Shared Parental Responsibility) Act 2006*

The analysis presented above suggests that under the *Reform Act 1995*, tactical pressures on Family Court litigants arising from the pro-father socio-political environment and the primacy placed on the child’s right of contact in s 60B(2)(b) of the *Family Law Act 1975* essentially curtailed the terms of the court’s consideration of children’s interests in contact and residence disputes, particularly the question of whether contact was in a child’s best interests. The implications of this development were acutely highlighted in cases where there had been a background of violence. Such cases revealed the extent to which children became pawns in court battles between their parents, and the lack of opportunity in the adversarial process for a genuine enquiry into what parenting arrangements were in their best interests. According to the Federal Government, the amendments to

136 *In the Marriage of D Koutalis and CJ Bartlett* (1994) 17 Fam LR 722 at 746. Kay J’s extensive discussion on the rationale for maintaining contact was referred to by the Full Family Court in *In the Marriage of PA and DA Irvine* (1995) 19 Fam LR 374 at 386. The court explicitly acknowledged the differences between Kay J’s approach in *Koutalis* and that of the Full Family Court in *Brown and Pederson*, but declined to rule which was correct because resolution of the case at hand did not require it. Other judicial statements have been made that are akin to Kay J’s stance. In the High Court decision in *U v U* (2002) 211 CLR 238 at 285 Hayne J held, in obiter, that it is now recognised as ‘self-evidently true’ that children benefit from the development of good relationships with both their parents. This ‘truth’ is acknowledged to have a limitation in ‘some cases of abusive relationships’ [emphasis added]: *U v U* (2002) 211 CLR 238 at 285. In a judgment dealing with the unacceptable risk test, the Full Family Court reinforced a conservative approach to orders that may lead to a cessation of the parent-child relationship. In applying the unacceptable risk test, the Full Family Court held that a ‘false negative finding accompanied by appropriate safeguards ... such as adequate supervision to guard against possible abuse’ may be ‘far less disastrous for the child than an erroneous positive finding’: *Re W (Sex Abuse: Standard of Proof)* [2004] FLC 93-192.

137 Inserted by the *Family Law Reform Act 1995* (Cth) s 31, and repealed by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

138 Peter Nygh, ‘The New Part VII — an Overview’ (1996) 10 *Australian Journal of Family Law* 4 at 9.

139 Id quoting: *Re H (Minors) (Access)* [1992] 1 FLR 148 at 152 (Balcombe LJ).

the *Family Law Act* 1975 by the *Shared Parental Responsibility Act* 2006 represents a new era in child focused dispute resolution.¹⁴¹ The new legal framework changes both the substantive law and the procedural mechanisms for dealing with children's interests. Depending on how the new legislative provisions are interpreted, and how the procedures are implemented, the changes could either exacerbate or alleviate the pressures highlighted in this analysis. In this regard, two aspects of the new regime are particularly significant. The first is the way the substantive legislative provisions seek to draw attention to violence, parental attitudes and parenting history alongside a strengthened equality philosophy. The second is the introduction of new case management procedures and the legislative articulation of the role of the Independent Children's Lawyer ('ICL'). Each of these issues will be considered in turn.

A. The Best Interests Inquiry

While the best interests of the child remain the touchstone of decision making,¹⁴² the provisions guiding this consideration have been changed significantly. For the purpose of the analysis in this article, the two most significant changes are the addition of an objects provision relating to safety and violence,¹⁴³ and the addition of explicit 'friendly parent' considerations¹⁴⁴ in the two-tier list of primary and additional factors that the court may consider in determining what is in a child's best interests. A further important issue is the way that the new presumption in relation to parental responsibility,¹⁴⁵ which is in turn linked to the allocation of parenting time,¹⁴⁶ may impact upon the way that the Family Court (and other system players)¹⁴⁷ approach the best interests enquiry.

The new emphasis placed on the need to safeguard children from harm is evident in the way that this goal is articulated in the objects provision¹⁴⁸ and repeated as one of the primary considerations¹⁴⁹ that guides the court in determining what orders are in a child's best interests. In each of these contexts,

140 For example: Jennifer McIntosh, 'Thought in the Face of Violence: A Child's Need' (2002) 26 *Child Abuse and Neglect* 229 at 230; Jan Pryor & Bryan Rodgers, *Children in Changing Families: Life after Parental Separation* (2001) at 214; Paul Amato & Joan Gilbreth, 'Nonresident Fathers and Children's Well-being: A Meta-Analysis' (1999) 61 *Journal of Marriage and the Family* 557; Mary Whiteside & Betsy Jane Becker, 'Parental Factors and the Young Child's Postdivorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements' (2000) 14 *Journal of Family Psychology* 5.

141 Ruddock, above n1.

142 *Family Law Act* 1975 (Cth) s 60CA.

143 *Family Law Act* 1975 (Cth) s 60B(1)(b). This is repeated in the reformulated checklist section as a primary consideration: *Family Law Act* 1975 (Cth) s 60CC(2)(b).

144 *Family Law Act* 1975 (Cth) ss 60CC(3)(c) and 60CC(4).

145 *Family Law Act* 1975 (Cth) s 61DA.

146 *Family Law Act* 1975 (Cth) s 65DAA.

147 Dewar & Parker highlight variations in the way that the messages radiated in the *Reform Act* 1995 were received in various parts of the family law system: 'The New Part VII' above n9 at 107-113.

148 *Family Law Act* 1975 (Cth) s 60B(1)(b).

149 *Family Law Act* 1975 (Cth) s 60CC(2)(b).

the safety provision is preceded by a provision recognising the importance of both the child's parents 'having a meaningful involvement'¹⁵⁰ in his or her life to the maximum extent possible. The new objects provision, s 60B, provides that:

- (1) The objects of this Part [ie the new Part VII] are to ensure that the best interests of children are met by:
- (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (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.

As former Family Court judge Richard Chisholm has observed, the twin parenthood and safety goals may be mutually exclusive in some cases.¹⁵¹ However, he argues the way these provisions are framed suggests that the 'legislature is saying that a child's need for a meaningful relationship with both parents is inherently more important than the child's needs for nurturing and love.'¹⁵² In contrast, Patrick Parkinson's analysis of the relationship between s 60B, s 60CC and s 60CA suggests that the scheme provides ample scope to question whether or not an ongoing relationship with each parent is necessarily in the best interests of a particular child.¹⁵³ He argues that in addition to situations of violence and abuse, there are four other potential circumstances where a 'meaningful relationship' (which is not to say no contact) may not be possible: where the child resists contact, where the parent is unable to offer a meaningful relationship (because of such issues as violence, alcoholism or mental illness), where a parent is unwilling to keep up a meaningful relationship, and, finally, where the parental relationship features intractable conflict.¹⁵⁴

The court's fact finding process is crucial in determining whether any of these circumstances apply. The cases analysed in this article highlighted the way that mothers' arguments were framed to indicate that they were not bent on undermining the relationships between the children and their fathers, but rather they were concerned about the impact on the children of being subject to manipulation and pressure. In contrast, the fathers' arguments focused on

150 *Family Law Act 1975* (Cth) ss 60B(1)(a) and 60CC(2)(a).

151 Richard Chisholm, 'The *Family Law Amendment (Shared Parental Responsibility) Bill 2006*: Putting Children at Centre Stage?' (Paper presented at the Contact and Relocation — Focusing on Children conference, organised by the Centre for Children and Young People, Southern Cross University, 1 May 2006) at 9–10.

152 *Id* at 9.

153 Patrick Parkinson, 'Decision-making about the Best Interests of the Child: the Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179 at section 4.

154 *Ibid*.

vilification and criticism of the mothers, with judicial acceptance in many instances that they themselves had engaged in manipulative behaviour. Despite these patterns of entrenched conflict, contact was rarely terminated. I argue that these trends suggest the presence of an implicit friendly parent criterion with a gendered operation leading to a lack of scrutiny of the implications of ongoing contact (and exposure to conflict) for the child. In this regard, the introduction of an explicit friendly parent criterion is a further significant change. Now, as one of the additional considerations, the court must consider '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.'¹⁵⁵ A similar consideration is reiterated in the parental history provision, s 60CC4(b) (discussed further below).

The introduction of these considerations is potentially a two-edged sword. Whilst there is commentary from overseas jurisdictions indicating that the friendly parent criterion operates to the disadvantage of women,¹⁵⁶ this may equally be a function of the way it is applied. On an optimistic view, it is possible that in making the requirement to foster and support the child's relationship with the other parent an explicit incident of adequate parenthood, the legal framework provides greater scope for dealing with the kinds of manipulation evident in the empirical data. Further, new parental history provisions may assist in focusing attention not just on the primary caregiver behaviour, but also on the extent to which the other parent has taken an active and constructive approach to their responsibilities. These provisions require the court to consider the extent to which each parent has taken, or failed to take, the opportunity to exercise parental responsibility, communicate with the child, and fulfil their obligation to maintain the child.¹⁵⁷ The obligation to facilitate the other parent's involvement in these areas — to be a friendly parent — is also repeated in this sub-clause.¹⁵⁸

A significant aspect of the friendly parent criterion and the parental history provisions will be the way they are applied in cases where there has been a history of violence. My analysis suggested that the implicit operation of the friendly parent criterion limited the extent to which women could problematise contact for fear of being seen as an unfriendly parent. This meant they tended not to argue that a history of violence was relevant to parenting capacity unless it was severe and provable. There are three further aspects of the new scheme that may discourage women from disclosing domestic violence, or from suggesting that a history of violence might be relevant to the question of whether ongoing contact is in the child or children's best interests. First, the definition of family violence has been altered to include a semi-objective measure: that is whether the perpetrator's actions would cause a 'reasonable' person 'in the circumstances of' the target to

155 *Family Law Act 1975* (Cth) s 60CC(3)(c).

156 See for example: Susan Boyd, *Child Custody, Law and Women's Work* (2003) at 121; Martha Fineman, 'Law of the Father' in Julia Hanigsberg & Sara Ruddick (eds), *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (1999) at 139–156.

157 *Family Law Act 1975* (Cth) s 60CC(4). The legislation particularly directs the court to consider post-separation behaviour: *Family Law Act 1975* (Cth) s 60CC(4A).

158 *Family Law Act 1975* (Cth) s 60CC(4)(b).

fear for his or her safety.¹⁵⁹ Second, a new provision gives the court the power to order costs against a party found to have ‘knowingly’ made ‘false allegations.’¹⁶⁰ Third, rather than having regard to any family violence order in s 60CC(k) of the *Family Law Act* 1975, the court is limited to considering orders made on a final or contested basis. This excludes those made on an interim basis in the absence of the other party, circumstances which are indicative of crisis and urgency. Whilst these changes reflect the Federal Government’s concerns over claims that false allegations of violence are made in Family Court proceedings, research has shown that women are reluctant to disclose violence for a range of reasons,¹⁶¹ and these provisions may operate as a further disincentive to doing so, particularly if the friendly parent criterion is applied in a gendered and punitive way. John Dewar has commented that ‘attempts to protect children could well be perceived negatively by decision makers in the light of the new “friendly parent” provisions’, placing parents in a ‘Catch 22 position’ in that ‘the more they seek to protect children, the less likely they are to succeed’.¹⁶²

The visibility of violence in litigants’ arguments will also have a crucial impact on another significant aspect of the new substantive provisions: the introduction of a presumption in favour of equal shared parental responsibility.¹⁶³ This presumption does not apply if a litigant establishes that there are reasonable grounds to believe that a parent, or someone who lives with him or her, has engaged in abuse of the child to whom the order applies (or another child) or family violence.¹⁶⁴ More generally, it may be rebutted by evidence that such an

159 *Family Law Act* 1975 (Cth) s 4(1). This change was oriented toward addressing ‘concerns ... that allegations of family violence can be made in family law proceedings even where a fear of violence is far fetched or fanciful’: Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill* 2006 (Cth) at 8.

160 *Family Law Act* 1975 (Cth) s 117AB. This provision ‘attempts to address concerns that have been expressed, in particular, that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings’, although its application is broader than such allegations: Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill* 2006 (Cth) at 40. Among the groups that expressed concern over this provision was Relationships Australia, which argued that ‘an expectation of false allegations may distort how family violence issues are addressed’: Relationships Australia, Response to Inquiry into the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005, 27 February 2006. The Senate Legal and Constitutional Legislation Committee was also concerned about this provision and recommended against its enactment until the Australian Institute of Family Studies’ research on violence (see above n9) was completed: Legal and Constitutional Legislation Committee, Senate, ‘Provisions of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005’ (2006) Recommendation 7.

161 For example: Kaye, Stubbs & Tolmie, above n9; Adrienne Barnett, ‘Disclosure of Domestic Violence by Women Involved in Child Contact Disputes’ [1999] *Family Law* 104; Meier, above n40; Marianne Hester & Lorraine Radford, ‘Contradictions and compromises: The Impact of the *Children Act* on Women and Children’s Safety’ in Jill Radford, Liz Kelly & Marianne Hester (eds) *Women, Violence and Male Power* (1996); Lesley Laing, *Children, Young People and Domestic Violence* Issues Paper 2–2000, Australian Domestic and Family Violence Clearing-house, at 2.

162 John Dewar, ‘Session A: Legislative Change’ (Paper presented at the International Forum on Family Relationships in Transition: Legislative, Practical and Policy Responses, Canberra, 1–2 December 2005) at 37, 39.

order is not in the child's best interests.¹⁶⁵ Whilst the legislation specifically states that this presumption applies only to parental responsibility and not to time,¹⁶⁶ it is nonetheless strongly linked to the court's decision making in relation to the allocation of the child's time between parents. This link is contained in s 65DAA of the *Family Law Act 1975*, which imposes on the court an obligation to consider orders for 'equal time',¹⁶⁷ or, failing that, 'substantial and significant time',¹⁶⁸ where practicable in cases where there has been an order for 'equal shared parental responsibility' made.

Under previous regimes, Family Court decision making has proceeded on a case by case basis in a context where there has been wide discretion to tailor orders to suit the circumstances of a particular case. These new equality-based provisions potentially constitute a significant fetter on the court's discretion and potentially create a one-size-fits-all decision making template that will further focus attention on the positions of the parents rather than the needs of the children.¹⁶⁹ Moreover, a similar prescriptive philosophy is carried through to non-court-based decision making (a central aim of government policy also reflected in the *Family Law Act 1975* is to strengthen the role of non-court-based dispute mechanisms in family law disputes)¹⁷⁰ through the imposition of an obligation on advisors to inform parents making consent-based agreements to consider 'equal-time' or 'substantial and significant' time arrangements.¹⁷¹

This latter point highlights a further significant issue in relation to the new scheme — the way it not only introduces much greater complexity in its substantive provisions but also establishes new 'interpretive sites',¹⁷² through the introduction of Family Relationship Centres. The larger scale analyses of the

163 *Family Law Act 1975* (Cth) s 61DA. The introduction of a presumption into Australian family law for the first time raises a range of issues relating to the burden of proof and what type of evidence will be sufficient to displace the burden.

164 *Family Law Act 1975* (Cth) s 61DA(2).

165 *Family Law Act 1975* (Cth) s 61DA(4).

166 See the note to the *Family Law Act 1975* (Cth) s 61DA(1).

167 *Family Law Act 1975* (Cth) s 65DAA(1).

168 *Family Law Act 1975* (Cth) s 65DAA(2).

169 The need for post-separation parenting arrangements to be based on the individual needs of children has recently been reiterated in Bruce Smyth & Richard Chisholm, 'Exploring Options for Parental Care of Children Following Separation: A Primer for Family Law Specialists', (2006) 20 *Australian Journal of Family Law* 193.

170 Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill 2006* (Cth) at 2.

171 *Family Law Act 1975* (Cth) s 63DA. It is concerning that the *Family Law Act 1975* (Cth) s 60CC(5) removes any obligation on the court to have regard either to the primary considerations (in the *Family Law Act 1975* (Cth) s60CC(2)) or the additional considerations (in the *Family Law Act 1975* (Cth) s 60CC(3)) in making consent orders. The Senate recommended a review of this issue: Legal and Constitutional Legislation Committee, Senate, 'Provisions of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*' (2006) Recommendation 4, but the provision enacted remained unchanged. Under Regulation 62 of the *Family Law Regulations 1984* (Cth), mediators are required to consider whether a dispute is unsuitable for mediation because of a history of violence, among other factors.

172 Dewar & Parker, above n9.

impact of the *Reform Act* 1995 highlighted the significance of the way that the messages in the scheme were received and applied in the various parts of the family law complex.¹⁷³ They suggested that the equality messages in the shared parental responsibility provisions, together with the right of contact principle in s 60B of the *Family Law Act* 1975, overwhelmed the safety messages in the checklist in s 68F of the *Family Law Act* 1975, rendering violence paradoxically less visible than it had been before, in court proceedings and consent-based negotiations.

The substantive provisions in the new framework carry an even greater number of potentially contradictory or competing messages through the equality presumptions, the values expressed in the objects provisions and the factors to be considered in the two-tier checklist. Despite the government's claim that the new system is child-focused, the equality presumption, the explicit friendly parent criterion and the parenting history provisions have the potential to bring increased focus onto the position of parents and their behaviour, notwithstanding the fact that Family Court litigation under the previous regime had been characterised as excessively parent focused.¹⁷⁴ As Relationships Australia noted in arguing against the introduction of the equality presumption, it is inherently parent focused, configuring a child's time as a commodity to be split equally between her or his parents.¹⁷⁵ Highlighting the potential impact of the equality message, the organisation noted the presumption would operate 'as a de facto presumption of equal time'.¹⁷⁶

B. Child Focused Changes

In this context, the procedural changes referred to earlier will be of crucial significance. These changes are oriented toward making the system less adversarial and more inquisitorial, with the aim of increasing the focus on children's interests rather than parental arguments. A new division 12A of the *Family Law Act* 1975 provides judges with broad ranging case management

173 Rhoades, Graycar & Harrison, above n9 and Dewar & Parker above n9.

174 For example, Family Court of Australia counsellors Bob Hinds & Ruth Bradshaw undertook a study analysing the contents of parents' affidavits in 28 contested children's matters heard in far North Queensland in 1995 and 1996. Descriptions of the children accounted for only seven per cent of the material in the affidavits: see Bob Hinds & Ruth Bradshaw, 'Still the Hidden Client? Children and Their Parents in Family Law Proceedings' (Paper presented at the Third National Conference, 20–24 October 1998). This is consistent with concerns expressed by the Family Court of Australia in its submission to the *Every Picture Report* inquiry which noted that parental conflict in proceedings

'clouds the judge's ability to determine the best interests of the child ... [j]udges are increasingly being represented with reams of unnecessary/irrelevant material, usually dwelling on events long past. This material is frequently adult and not child focussed and replete with allegations about what each party is alleged to have done to the other':

Family Court of Australia, 'Submission of the Family Court of Australia: Standing Committee on Family and Community Affairs Inquiry into Joint Custody Arrangements in the Event of Family Separation' (2003) at 51.

175 Relationships Australia, above n160 at 4.

176 *Id* at 1.

powers. The most significant of these include powers to: determine which issues require full investigation,¹⁷⁷ determine whether and when particular steps in proceedings are to be taken,¹⁷⁸ make findings of fact or orders during the proceedings (rather than in final judgment)¹⁷⁹ and designate that a particular family consultant act in that capacity throughout the proceedings.¹⁸⁰ The exercise of these powers is guided by a series of principles. The first of these directs the court to consider the needs of the child and the impact that the proceedings may have on them.¹⁸¹ The need to safeguard the child from exposure to violence, abuse and neglect, and the parties from exposure to family violence, is reiterated in the third principle.¹⁸²

The new division 12A of the *Family Law Act* 1975 facilitates across the board implementation of case management practices that were piloted in the Family Court of Australia's Children's Cases Program ('CCP') in the Sydney and Parramatta Registries. Two independent evaluations of the pilot, focusing on different aspects of the program, were conducted.¹⁸³

The larger scale evaluation by Rosemary Hunter focused on gathering and analysing data on aspects of the program such as take-up rates, processes and outcomes and legal aid implications, in addition to surveying parties to cases in a CCP sample¹⁸⁴ and those in a control group,¹⁸⁵ and conducting interviews with a range of professional stakeholders including judges, mediators, solicitors and barristers. While the evaluation is cautiously optimistic about the potential for CCP style processes, now enshrined in division 12A of the *Family Law Act* 1975, to improve the handling of children's matters, Hunter also sounds some significant notes of caution. For the purpose of this analysis, the most significant of these is the capacity of a CCP-based program to handle effectively cases involving domestic violence and abuse for both philosophical and process-based reasons.

At a philosophical level, Hunter suggests that the underlying premise of the program — the need for parents to set aside their differences and focus on their children's well-being in order to strengthen parent-child relationships — is inherently unsuitable in cases involving 'one of the parties exercising power and control over the other' in which it is necessary to 'ensure the safety of the child and the abused parent'.¹⁸⁶ Hunter further suggests that some of the process aspects of

177 *Family Law Act* 1975 (Cth) s 69ZQ(1)(a).

178 *Id* at ss 69ZQ(1)(c) and (d).

179 *Id* at s 69ZQ.

180 *Id* at s 69ZS.

181 *Id* at ss 69ZN(1) and 69ZN(3).

182 *Id* at ss 69ZN(1) and 69ZN(5).

183 Rosemary Hunter, 'Child-related Proceedings Under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program Can and Can't Tell Us' (2006) 20 *Australian Journal of Family Law* 227; Jennifer McIntosh, *Final Report to the Family Court of Australia: The Children's Cases Pilot Project an Exploratory Study of Impacts on Parenting Capacity and Child Well-being* (2006).

184 A total 168 finalised and 32 unfinalised CCP cases were included: Hunter, above n183 at 228.

185 The control group comprised 168 cases: Hunter, above n183.

186 *Id* at 231.

the program may compound problems that women have in disclosing their experiences of violence, in particular the ‘invitation ... to speak directly to the judge ... to express their concerns in the presence of their abuser’.¹⁸⁷ In addition, she suggests that the reliance in the program on early identification of relevant issues may mean that concerns in relation to violence — which often take some time to emerge — will not be addressed in family reports, affidavits and other evidence-gathering processes.¹⁸⁸ Hunter also raises the concern that the new friendly parent criterion in s 60CC(3)(c) of the *Family Law Act* 1975 may lead legal representatives to discourage their clients from raising violence to avoid being perceived as an ‘unfriendly parent’.¹⁸⁹

More generally, the Hunter evaluation found that the CCP program was successful in achieving outcomes more quickly, producing a greater child-focus in proceedings and encouraging greater parental cooperation.¹⁹⁰ However, it also found that CCP-based outcomes were less durable than those in the control group, perhaps counter-balancing the advantages of faster outcomes.¹⁹¹ Hunter questions whether in any event, faster outcomes would be maintained with the across the board implantation of the program, with indications that the initial expediency had already proved unsustainable.¹⁹²

The smaller scale and exploratory evaluation by Dr Jennifer McIntosh focused on the issue of how the CCP process affected parental capacity and the co-parental relationship. It showed that in comparison with a group of parents who had disputes resolved through the mainstream Family Court of Australia system, the CCP group who participated in the research emerged from the process with better co-parenting relationships with their former partner. The report concluded that the CCP system dissipated rather than exacerbated hostility between former partners, protected and improved parenting capacity and, according to parental reports, improved child well-being and produced outcomes that were more satisfactory to both parents and children.¹⁹³

An issue highlighted by Hunter’s analysis of the CCP is the ‘more enhanced and pro-active role’ that Child Representatives assumed in the process.¹⁹⁴ In the new part VII, the functions of this role — now called the ICL — are articulated in legislation for the first time. The new schedule 5 provisions in relation to this role essentially codify descriptions that were previously contained in case law¹⁹⁵ and guidelines.¹⁹⁶ The key function of the ICL is to form a view, on the basis of the evidence, as to what course of action would be in the best interests of the child.¹⁹⁷

187 Ibid.

188 Id at 232.

189 Id at 233.

190 Id at 234.

191 Id at 235.

192 Ibid.

193 McIntosh, above 183 at 36.

194 Hunter, above n183 at 244.

195 For example, *In Re K* [1994] FLC ¶ 92–461.

196 Family Court of Australia, *Guidelines for Child Representatives*, <http://www.familycourt.gov.au/html/child_representative.html> at 27/10/03.

Consistent with the previous mandate of the Child Representative, the ICL is not the legal representative of the child, nor must they follow the child's instructions.¹⁹⁸ They are obligated however to ensure that the child's views are put to the court¹⁹⁹ and to analyse reports and other documents to give guidance to the court as to the significance of such evidence.²⁰⁰ An additional aspect of the role is an obligation to 'minimise the trauma to the child' associated with the proceedings.²⁰¹

There is a dearth of published empirical research that focuses in practical terms on the way that children's interests are dealt with in the Family Court system.²⁰² In this study, litigants' arguments largely centred on parental attributes and conduct even where a Children's Representative was involved. Argument dealing with the needs of the children in the sample played a much smaller role than that dealing with parenthood claims. In the overall sample, children's views were predominantly represented to the court through family reports and in 17 cases through a Children's Representative.²⁰³ The data suggests that despite the involvement of a Children's Representative, the parents' arguments determined the parameters of the court's consideration in most instances.²⁰⁴ In the 13 cases in which it was possible to identify the outcome advocated by the Children's Representative, final orders consistent with this were made in 11 cases.²⁰⁵ These outcomes were consistent with mothers' applications in nine cases²⁰⁶ and a father's application in one case.²⁰⁷ Concerns about the role of Children's Representatives, particularly in cases involving violence, have been raised in other research.²⁰⁸

197 Section 68LA(2).

198 Section 68LA(4).

199 Section 68LA(5)(b). The legislation now requires the Court to have regard to the child's 'views' rather than wishes: s 60CC(3)(a). Chisholm suggests that this consideration has been symbolically demoted by being placed in the list of 'additional considerations': Chisholm, above n151 at 6.

200 Section 68LA(5)(c).

201 Section 68LA(7).

202 Most discussion of the role has been practice-oriented rather than research based: see, for example Family Law Council, above n11; Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Family Law Journal* 197; Lawrie Moloney & Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10 *Journal of Family Studies* 71. Useful research on the way children's interests are dealt with in different models of mediation practice is currently underway: Jennifer McIntosh, Caroline Long & Lawrie Moloney, 'Child focused and child-inclusive mediation: A comparative study of outcomes' (2004) 10 *Journal of Family Studies* 87-95.

203 T2, T23, T7, T5, T6, T11, T18, A3, A1, A4, A17, A12, A15, A7, A8, T15, A16. Eleven of these cases were in the family violence sub-set: T7, T5, T11, A3, A1, A17, A12, A15, A7, T15, A16. There was a paucity of material generated by Children's Representatives in the files, due it appears to funding constraints. The costs of funding a Child Representative are met by Legal Aid, and in most cases it appears that funding was insufficient to meet the costs of filing written submissions. In some cases, it was not possible to discern the final outcome advocated by the Children's Representative. Research indicates that legal aid funding may not be available beyond the interim stage: Dewar & Parker, 'Parenting, Planning and Partnership' above n9 at 62-63.

In summary, research has shown that the shared parenting philosophy and right to contact introduced in the *Reform Act* 1995 brought about significant shifts in litigants' expectations and system responses in trends that obscured the needs of children. The very strong equality messages in the new scheme may produce similar results. It remains to be seen how the process-related, child-focused, changes will interact with the very strong, parent-focused equality-based messages in the new regime. A significant issue in this regard is the increased reliance on alternative dispute resolution mechanisms in the new system, through the implementation of the 65 Family Relationship Centres ('FRC'). These centres are key sites for the implementation and interpretation of the new legislative regime, but in these contexts, neither the new CCP-based model nor the ICL are relevant. Although child-focused dispute resolution techniques are to be applied in the centres,²⁰⁹ it is uncertain how the competing messages in the new scheme will be reconciled in the private context of mediation. The CCP-based process changes are unlikely to impact on the 94 per cent of cases that are resolved privately,²¹⁰ raising the question as to which messages embodied in the legislation will influence the practices of mediators and the expectations of the clients in both the FRC context and other mediation services.

204 Technically, the Family Court is not restricted by the parties' proposals in making orders: *In the Marriage of Guthrie* (1995) 19 Fam LR 781. Nor should proceedings be unduly adversarial: *M v M* (1988) 166 CLR 69 at 79. However it was clear in most sample cases that the parties' proposals determined the boundaries of the court's consideration. This is consistent with the Family Court's own observations: 'the current position is that the parties through their lawyers, if legally represented, essentially determine the issues in each case and determine what evidence is to be adduced and how this is to occur. The weaknesses in the current system have also been exacerbated in recent years as the proportion of litigants who represent themselves has increased', Family Court of Australia, above n174 at 51. In *U v U* (2002) 211 CLR 238 at 260 the majority with the High Court held that the Family Court was 'obliged to give careful consideration' to the proposals of the parties but that these proposals, were not, on any view, binding (Gleeson CJ Gummow, Callinan, McHugh & Hayne JJ).

205 T2, T6, T18, A3, A1, A4, A17, A15, A7, A8, T15. In only one case (T7) was the Child Representative's recommendation consistent with neither party. In T7, the Child Representative applied for orders to adjourn the proceedings, reserve the question of contact and obtain psychiatric assessment of the father. The trial outcome was consistent with the mother's application to allow contact on a fortnightly basis.

206 T2, T6, T18, A3, A4, A16, A15, A8, T15.

207 A7. In one further case, the Child Representative supported an application for contact by a man who believed that a child born to his wife during their marriage was his biological son until DNA tests revealed otherwise after the separation: A17.

208 Rendell, Rathus & Lynch, above n 46 at 95-96.

209 Philip Ruddock, 'A New Family Law System', (Address at the International Forum on Family Relationships in Transition: Legislative, Practical and Policy Responses, Canberra, 1-2 December 2005).

210 Family Court of Australia, above n174 at 13.

4. Conclusion

The exploratory insights from the small scale empirical study referred to in this article have highlighted the role played by tactical pressures in shaping Family Court determinations in children's matters. The data indicates that the children in the severe group in the sample were subjected to significant emotional pressure by their fathers in the context of a history of violence, but their need for an ongoing contact relationship was questioned only to a limited extent even in extreme circumstances. In the less severe group, the children were also subjected to pressure, albeit to a less extreme extent, as fathers attempted to prove that their mothers were insufficiently 'friendly'. The focus on parental attitudes in both groups leads to a questioning of the validity and meaning of the views expressed by the children in the sample.

These findings, together with other research evidence,²¹¹ suggest that in establishing a template for shared parenting the *Reform Act* 1995 brought about a shift in the bargaining dynamics over children. The right of contact principle in s 60B(2)(b) of the *Family Law Act* 1975 strengthened claims for contact even against a background of violence or a tenuous parenting history. The capacity of mothers to argue against contact in such circumstances was curtailed by the application of an unofficial version of the friendly parent criterion operative under s 68F(2)(h) of the *Family Law Act* 1975. Examination of the needs of children in the process of litigation was therefore hindered by the tactical pressures that affected the litigation strategies adopted by their parents.

Whilst the process-based initiatives in the *Shared Parental Responsibility Act* 2006 have the potential to alleviate these pressures, new difficulties may be introduced by the Federal Government's strengthened commitment to equal post-separation parenthood. At a conceptual level, the new scheme embodies two competing tendencies. On the one hand, it establishes an equality based template that limits judicial discretion and will condition the expectation of litigants and system professionals. This template creates a close connection between equality in parental responsibility (and potentially allocation of time) and the construction of children's best interests. The character of this template is prescriptive. On the other hand, the guidance given to judges on how to determine what is in a child's best interests outlines a complex range of additional discretionary considerations that include an explicit friendly parent criterion and provisions directing court attention to parenting history. It remains to be seen how these provisions will operate in practice, especially how the equality and safety priorities will be reconciled in the context of inquisitorial trial practice. An even more significant question is what impact they will have in the private context of mediation.

211 See above n9.

