Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Family Law Decision Making

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Abstract

The Family Law Reform Act 1995 (Cth) introduced a new legal framework for handling disputes involving children whose parents are separated or divorced. A radically different template for post-divorce parenting was established by the Act, which aimed to strengthen connections between fathers and children after separation. There were two key elements in this template. The first was the child’s right to maintain contact with, and be cared for by, both parents regardless of marital status. The second was a notion of jointly held and exercised parental responsibility.

This thesis adopted a socio-legal approach in assessing how the legislative framework was applied in practice. A particular concern was to establish how the legislative ideal would be applied in social circumstances where parenting remains gendered in practical terms. The empirical basis for this inquiry was a sample of 40 Family Court files involving children’s matters that were heard in the Melbourne Registries of the Court in 1999 and 2000. The research involved collecting data from each of three layers in the files; parents’ affidavit materials, psycho-social assessments of the litigating families and judicial determinations. Judicial approaches could thus be assessed in the context of the evidence on which they were based.

The analysis reveals that a complex interplay between three factors has produced different standards of ‘adequacy’ that are applied to mothers (mostly residence parents) and fathers (mostly contact parents) in contemporary Family Court decision making. The three factors are the factual backgrounds of the cases, the litigation strategies adopted by the parties and particular psychological and legal concepts that are influential in informing current legal approaches to the question of what children need.

The research shows that separated fathers are making claims for bigger roles in their children's lives. These claims occur in the context of family histories that often involve violence, entrenched conflict, mental illnesses and substance addiction. These backgrounds prevent fathers’ aspirations for more
involvement with their children being completely realised, but a commitment
to maintaining father-child relationships is nonetheless strongly evident. In
many instances little scrutiny is applied to the nature and quality of the
relationship being sustained by contact and some mothers and children
continue to be exposed to family violence under court orders. Furthermore,
the legal process allows little scope for children to assume a role in
determining how their parenting arrangements are worked out. Litigation
places them at the centre of conflict between their parents but their
opportunity to influence its outcome is very limited.
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For my family

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Declaration

This is to certify that

(i) the thesis comprises only my original work towards the PhD except where indicated in the Preface,
(ii) due acknowledgment has been made in the text to all other material used,
(iii) the thesis is less than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices
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CHAPTER 1

INTRODUCTION

This thesis examines the constructions of parenthood that are present in contemporary Australian family law decision making. It adopts a socio-legal approach in analysing an empirical sample of 40 cases involving children’s matters that proceeded to trial in the Melbourne-based Registries of the Family Court of Australia (FCA). The cases were heard between January 1999 and December 2000. The sample is discussed in greater depth at text accompanying fn 192 and 195. A range of relevant theoretical, social science, sociological and jurisprudential material is used in developing an informed interpretation of the empirical data.

A central concern of this study was to examine the operation of legislation that was acknowledged to be ahead of its time in establishing a template for equal parenting in an era where parental roles remain gendered. In exploring the issues this raises, the study combines empirical and theoretical insights to produce a detailed account of the way key legislative provisions operate. In this introduction, before elaborating on the research in greater depth, I present an overview of the social and political background to current family law policy. This is followed by a discussion of the nature of the legislative framework.

PART 1 THE POLITICAL AND SOCIAL BACKGROUND

Family law policy in Australia is hotly contested. Most recently, this has been demonstrated by the debate over a proposal to introduce an ‘equal custody’ regime that would make a legal presumption in favour of a 50/50 time division between parents a starting point in determining where children will live after their parents separate. An inquiry by a

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1 The cases were heard between January 1999 and December 2000. The sample is discussed in greater depth at text accompanying fn 192 and 195.
Parliamentary Committee into this proposal was initiated in June 2003 by the Federal Attorney General, the Hon Daryl Williams and the then Minister for Children and Youth Affairs, the Hon Larry Anthony.3

The Every Picture Tells a Story Report [Every Picture Report] resulted from the inquiry. It rejected the 50/50 presumption in relation to residence determinations but recommended that this be introduced for parental responsibility orders.4 More importantly, it recommended a complete overhaul of the family law system with the introduction of a Families Tribunal.5

The debate surrounding the Every Picture Report, the way in which the inquiry arose and the Federal Government’s response to its recommendations6 highlight some defining features of the way family law policy is shaped in Australia. The inquiry was initiated by the Federal Government in response to another report produced by the Family Law Pathways Advisory Group.7 This Group was comprised of a range of Family Law experts, including practitioners, academics and judges.8 Its task was to review the operation of the Family Law system and make suggestions for reform. It made a complex range of

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4 Every Picture Report, above n 3, xxi.
5 Ibid.
8 Ibid vi.
recommendations oriented towards improving the operation of the system. In simple terms, these recommendations responded both to men’s perceptions that existing system was ‘unfair’ and to concerns expressed by women that it provided insufficient protection from violence. The 50/50 time share proposal in the Government’s response reflected the former concerns. A much less robust response to the latter concern can be seen in the term of reference requiring the Committee to consider the circumstances in which the presumption could be rebutted.

The way that women’s concerns about safety were submerged in the process surrounding the 2003 inquiry illustrates how demands by fathers’ rights groups have dominated family policy debates in Australia for over a decade. Government policy makers have consistently responded to claims by fathers’ rights groups that the family law system in general, and the FCA in particular, favours women. Rather than being based on informed consideration and empirical research, reform proposals have been driven by the imperative to accede to the demands of ‘squeaky wheels’. The Australian Government’s recent response to the recommendations of the Every Picture Report indicates that this trend remains strong. Whilst the Every Picture Report’s proposals were

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9 Ibid 5.
10 Ibid 5.
11 The Inquiry’s most vaunted term of reference was: (a) given that the best interests of the child are the paramount consideration: (i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted: Every Picture Report, above n 3, xvii.
12 Ibid.
14 This is a myth that persists in popular accounts of the Court’s operation but has been disproved by empirical research see eg Angela Melville and Rosemary Hunter, “As Everybody Knows”: Countering Myths of Gender Bias in Family Law” (2001) 1 Griffith Law Review 124.
substantially geared toward making the family law system more child-focused, the Government’s response centres on proposals to further improve the position of fathers in the system.\textsuperscript{16}

This reflects the political momentum that has developed to seek legislative solutions for a problem that has its genesis in a distinct social and emotional pattern: the tendency for fathers to disengage from their children after separation.\textsuperscript{17} Father-absence has become a dominant societal concern, to the extent that it has become a \textit{leitmotif} in family policy discourses on both sides of the political spectrum. In announcing the inquiry into the 50/50 ‘custody’ presumption, the Prime Minister, Mr John Howard, emphasised his belief that ‘one of the regrettable features’ of the social landscape was the fact that ‘far too many young boys are growing up without proper male role models’.\textsuperscript{18} This same point was reiterated in family policy speeches made by the then Federal Opposition leader, Mr Mark Latham.\textsuperscript{19}

This concern arises against a backdrop of major shifts in the make-up of modern families. Relationships between adults are increasingly impermanent, with about 43 per cent of marriages now ending in divorce.\textsuperscript{20} De facto relationships have increased in number,\textsuperscript{21} as has the

\begin{footnotesize}
\item[16] In announcing the initiative, the Prime Minister, Mr John Howard noted a central aim of the changes would be to ‘assist fathers in maintaining a substantial role in their children’s lives immediately following a relationship breakdown’: ‘Reforms to the Family Law System’, Media Release, 2/8/2004. The proposed changes received support from fathers’ rights groups who nonetheless also complained that they did not go far enough, Steve Lewis and Elizabeth Colman, ‘Labor wants more family law reform’ \textit{The Weekend Australian}, 31 July 2004.
\item[20] Peter Whitford, Kim Bond and Robyn Seth-Purdie, \textit{Australian Families: Circumstances and Trends}, Department of Family and Community Services, Research Sheet Number 6 (2000) 1.
\end{footnotesize}
number of children born into such relationships.\textsuperscript{22} The number of lone parents is also rising, the majority being mothers.\textsuperscript{23} Divorce affects more than 50,000 children a year, and many others are affected by the separation of non-married parents.\textsuperscript{24} Recent research indicates that some 26.6 per cent of children experience the dissolution of their families by age 18.\textsuperscript{25}

The traditional division of family responsibilities along breadwinner father/ homemaker mother lines is being weakened in intact families as increasing numbers of women enter the workforce.\textsuperscript{26} However, while women are increasingly assuming some economic responsibility,\textsuperscript{27} men’s involvement in domestic tasks has not increased at the same rate. A report on work and family issues prepared for the Commonwealth Department of Family and Community Services in 2000 concluded that Australian studies ‘over the last 15 years are consistent in showing that divisions of labour for family work are very rigid indeed’. Father involvement in ‘family work’ remained limited with only 15 per cent of fathers showing a high participation rate. Women took responsibility for 90\% of childcare tasks and 70 per cent of all ‘family work’.\textsuperscript{28} More recent research has confirmed that masculine identity remains firmly tied

\textsuperscript{21} The number of couples cohabiting rose from 5.7 per cent in 1986 to 12.4 per cent in 2001: David de Vaus, \textit{Diversity and change in Australian families: statistical profiles} (2004) 115.
\textsuperscript{22} By 1997, 46 per cent of de facto couples had children, up from 39 per cent in 1992: Whitford, Bond and Seth-Purdie, above n 22. More recently, 2001 census data showed that 12 per cent of the 8 million men and women living in couple relationships were in de facto relationships: Australian Bureau of Statistics, \textit{Marriages and Divorces}, Australia, Cat 3310.0 (2002).
\textsuperscript{23} Lone parent families now make up 15.4 (762,632) per cent of all household families. Lone mother families account for 83.3 per cent of these: de Vaus, above n 21, 5.
\textsuperscript{24} Ibid 134.
\textsuperscript{25} Ibid 232.
\textsuperscript{27} Women are predominantly involved in part time employment and their average wage rates are 66 per cent for those of men: Anne Summers, \textit{The End of Equality} (2003) 21.
\textsuperscript{28} Russell and Bowman above n 26, 28. See also De Vaus, above n 21, 236-237.
to the breadwinner role and that men consistently prioritise work over family, even where family friendly work structures are available.\textsuperscript{29}

Research evidence shows that separation consolidates mothers’ primary caregiving responsibilities. Where parents reach arrangement by consent, Family Court data show that the mother has residence in 78 per cent of cases.\textsuperscript{30} Where parties embark on litigation but settle prior to trial or proceed to a judicial determination, the figures are slightly lower.\textsuperscript{31} Maintaining contact between fathers and children is nonetheless prioritized with orders for no contact being made in only three per cent of cases across the total Family Court sample.\textsuperscript{32}

It is not possible to say whether contact is actually exercised according to these orders. Data drawn from a non-Family Court sample reveals a much higher percentage of fathers not maintaining contact with their children after separation. An analysis of data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey by Patrick Parkinson and Bruce Smyth reveals that 36 per cent of fathers in a sample of 1,041 separated parents had no contact with their children.\textsuperscript{33} Just under half (48 per cent) of the fathers in the sample had overnight contact, with 17 per cent seeing their children on a daytime basis only.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{30} Family Court of Australia, \textit{Submission of the Family Court of Australia; Part B Statistical Analysis and Part C Full Court Analysis} (2003) 8 (Family Court Submission Parts B and C). These figures were drawn from a sample of 450 consent applications, 300 settled applications and 91 judicially determined matters dealt with in the Sydney, Melbourne and Brisbane Registries of the FCA between January and June 2003.
\item \textsuperscript{31} 76 per cent and 69 per cent respectively: ibid.
\item \textsuperscript{32} Ibid.
\item \textsuperscript{33} Patrick Parkinson and Bruce Smyth, 'When the Difference Is Night and Day: Some Empirical Insights into Patterns of Parent-Child Contact after Separation' (Paper presented at the Eighth Australian Institute of Family Studies Conference, Steps forward for families: Research, practice and policy, Melbourne, 2003) 6.
\item \textsuperscript{34} Ibid.
\end{itemize}
Only about six per cent of separated parents maintain ‘equal sharing’ arrangements after separation. Small scale qualitative research suggests that these families have special characteristics which enable such arrangements to work. These include geographical proximity, both parents being in paid employment with fathers having family friendly work practices, the ability to co-operate to make child-focussed arrangements and a degree of paternal competence.

A key policy issue stemming from the increase in sole-mother headed households has been the question of economic support for these families. Government policy agendas in the past two decades have focussed on ‘re-privatising’ the obligation of economic support for children in such families, in order to lessen the burden on the public purse. The Child Support Scheme was established in 1988 with the aim of enforcing ‘private parental responsibility for the financial well-being of children’. The level of Government support for lone parent families remains high however, with Government expenditure on Parenting Payments to lone parents totalling some $4.1 billion per annum.

Against this background, an explicit part of the Federal Government’s policy agenda over the last decade has been to increase fathers’ participation in family life. This is reflected in a range of Government

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36 Ibid 29.
37 See eg Department of Family and Community Services, Department of Family and Community Services (FaCS) Submission to the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the Event of Family Separation (2003) 9.
38 Ibid.
39 Department of Family and Community Services, Information Sheet 14, Lone Parents and Income Support. The Every Picture Report, above n 3, noted that 41 per cent of the 597,000 families with a natural parent living elsewhere receive no child support. A slightly higher number, 42.3 per cent, received cash payments, with 16.3 per cent receiving ‘in-kind’ support, 1.48.
40 This is one manifestation of a broader socio-political concern with the position of men in society generally that is evident at a local and international level. Fatherhood has become a particular focus of a diverse range of scholarly and popular analysis. See eg Deborah Lupton and Lesley Barclay, Constructing Fatherhood: Discourses and Experiences (1997), David Popenoe, ‘Life without Father’ in Cynthia Daniels (ed) Lost
policies relating to work structures, funding for relationship services and welfare structures. The introduction of the *Family Law Reform Act 1995 (Cth) (Reform Act)* was an important part of this policy agenda. In general terms, this legislation is consistent with developments in overseas jurisdictions that are based on shared parenting paradigms.

From the 1970s, joint parenting became much vaunted as a legislative ideal, largely in response to social welfare discourses that emphasized the need for children to maintain relationships with both parents after divorce. US jurisdictions led the way in introducing joint parenting laws, but according to the American legal academic Katharine Bartlett, ‘few American states actually apply a meaningful presumption in favour of joint custody’. Rather, such a presumption is applied only where there is parental agreement and in many instances it covers parental responsibility, not physical custody of the child. A move away from joint custody norms in US law reform agendas is evidenced by the adoption of an ‘approximation standard’ in the American Law Institute’s (ALI) Principles of the Law of Family Dissolution. These recommended standards, which ‘reflect the most current thinking about

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42 Whilst the *Reform Act 1995 (Cth)* resembles the *Children Act 1989* (UK) in several key aspects, notably in adopting the language of ‘residence’, ‘contact’ and ‘parental responsibility’, it is important not to overstate the similarities since the schemes have significant philosophical differences. See eg John Dewar, ‘The *Family Law Reform Act 1995 (Cth)* and the *Children Act 1989 (UK)* Compared - Twins or Distant Cousins?’ (1996) 10 *Australian Journal of Family Law* 18.


45 Ibid. In California, for example, §3080 of the *Family Code* provides that a presumption in favour of joint custody applies when the parents agree to it, subject to the best interests of the child under § 3011. This provision directs the Court to consider the health safety and welfare of the child (a), any allegations of abuse in relation to the child (b) and the nature and amount of contact with both parents (c). Another section specifically states that no preference or presumption applies for or against either joint or sole legal or physical custody arrangements and preserve the ‘widest discretion’ for the Court on this issue: §3040(b).

the welfare of children and the optimal role of law’, favour a departure from a heavily discretionary approach in light of the view that ‘the child’s best interests are a policy goal and not an administrable legal standard’.

In broad terms, the approximation standard requires the court to allocate physical custody according to past caretaking patterns. In requiring the Court to consider evidence of domestic violence, the ALI Principles also reflect a concern that Bartlett argues has become a pre-eminent consideration in custody law reform across US jurisdictions in the last decade. Some states have introduced a rebuttable presumption against joint custody where such violence has occurred and the aim of protecting children and their caregivers from violence has become more prominent in US family law reform agendas.

The UK shifted to a shared parenting paradigm in the late 1980s with the introduction of the Children Act 1989. Recently, the operation of the Children Act 1989 has been subject to government review. A Green Paper, Parental Separation: Children’s Needs and Parents’ Responsibilities, presented to Parliament in July 2004, responds to concerns about the way that disputed contact cases are dealt with under the current regime. The paper notes that the number of such cases coming before the Courts is rising, with some 67,000 contact orders

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47 Bartlett, (US Custody Law) above n 44, 17.
48 Ibid 16.
49 One US jurisdiction, West Virginia, has adopted the standard in its statutory code: West Virginia Code § 48-0-206. See also chapter six text accompanying fn 1106 and 1116.
50 Bartlett, (US Custody Law) above n 44, 28.
52 Parental Separation, above n 3.
being made in England and Wales in 2003. Whilst it acknowledges perceptions among fathers’ rights groups that the system is biased, the *Parental Separation* paper places particular emphasis on concerns that the issue of domestic violence is not dealt with adequately. This issue has been the subject of academic comment for some time and the courts have already moved to clarify how the issue of contact should be dealt with in cases involving domestic violence.

Domestic violence has also been central to controversy over Canadian moves to introduce shared parenting reforms in the federal jurisdiction. Debate on the law reform process in that jurisdiction has been informed by developments in overseas jurisdictions, particularly the UK and Australia. A 1997 review of child support legislation sparked a much wider reconsideration of the custody and access provisions in the *Divorce Act 1985* (Canada). Whilst fathers’ rights groups pressed for legislation enshrining joint custody provisions, women’s groups lobbied to ensure the new regime protected women and children from violence. The resultant template for child custody law reform, Bill C-22, is based on the concept of ‘parental responsibility’ rather than custody and

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55 Ibid, 20. The option of legislative reform is however rejected. The paper focuses on changing existing processes. See Carol Smart et al *Residence and Contact Disputes in Court: Volume 1* (at [http://www.dca.gov.uk/research/2003/6-03es.htm](http://www.dca.gov.uk/research/2003/6-03es.htm)) noting the high number of cases where orders for direct contact were made notwithstanding allegations of violence.


57 *Re L; Re V; Re M; Re H (Contact: Domestic Violence)* (2000) (2) *FLR* 334, Court of Appeal (UK). See further discussion in chapter six at text accompanying fn 1020 and 1033.


60 Ibid.

61 The Bill passed second reading in the House of Commons but its further progress through the legislative process was halted when the federal election was held in June 2004: Pamela Cross, *What’s Happening with Custody and Access Law Reform* (2004) [http://www.owjn.org/custody/july04.htm](http://www.owjn.org/custody/july04.htm).

62 s16(1).
access. It also makes family violence\textsuperscript{63} a relevant consideration in determining what orders are in the best interests of the child, which remains the ‘only’ consideration in making orders in relation to parental responsibility and parenting time.\textsuperscript{64}

\textbf{PART 2 THE AUSTRALIAN LEGISLATIVE FRAMEWORK: EQUALISING PARENTHOOD AND ENFRANCHISING FATHERS}

\textit{A The Legislation}

The \textit{Reform Act 1995} was regarded as ‘an important piece of social legislation’.\textsuperscript{65} It was introduced to achieve the strongly normative goal of changing parental behaviour after divorce. It came into effect in June 1996 and made major changes to \textit{Division VII} of the \textit{Family Law Act 1975 (Cth) (FLA)}, which governs disputes over children in the context of family breakdown. These changes embodied the legislature’s aspiration for post-separation parenting to be conducted co-operatively, with fathers as well as mothers maintaining an active role in their children’s lives after separation.\textsuperscript{66}

A key aspect of the changes was the replacement of a regime where court orders were framed in terms of ‘custody’ and ‘access’\textsuperscript{67} with terminology referring to ‘residence’\textsuperscript{68} and ‘contact’.\textsuperscript{69} This was

\textsuperscript{63} s16.2(2)(c), (d). The definition of family violence in Bill C-22 has been criticised for being too narrow: see eg Linda Neilson, ‘Putting Revisions to the Divorce Act Through a Family Violence Research Filter: The Good, the Bad and the Ugly’ (2003) 20 Canadian Journal of Family Law 11.

\textsuperscript{64} s16(2).


\textsuperscript{67} Former s63E(2) of the \textit{FLA}.

\textsuperscript{68} s64B(3).

\textsuperscript{69} s64B(4). Key terms are explained in Appendix 1.
accompanied by the introduction of a concept of jointly held and exercised parental responsibility.\footnote{61C.} In terms of parental authority, this eliminated previous formal distinctions between custody and guardianship. The former role carried with it day-to-day and long-term responsibility for the child. Only long-term responsibility was held in the latter role. These changes were oriented toward breaking down social perceptions of a difference in importance between ‘custodial’ parents (mothers) and ‘access’ parents (fathers). Custodial parents were considered to hold all the power and access parents were considered to be inferior.\footnote{Eg Commonwealth Parliament, \textit{Hansard}, House of Representatives, 8 November 1994 2841-2842 (The Hon D Williams).} The changes were intended to convey the idea that ‘neither parent should be considered more important, regardless of where the child lives or who is the child’s primary carer’.\footnote{Helen Rhoades, Reg Graycar and Margaret Harrison, \textit{The Family Law Reform Act 1995: The First Three Years} (2000) 2.9 (\textit{The First Three Years Report}).}

It is increasingly being recognised that there is a significant amount of confusion surrounding the notion of parental responsibility and how it is to be exercised in practice.\footnote{Eg ibid 4.83; \textit{Every Picture Report} above n 3, 2.33.} The parental responsibility model ‘severs …the nexus between caregiving work and parental authority’.\footnote{Susan Boyd, Helen Rhoades and Kate Burns, ‘The Politics of the Primary Caregiver Presumption: A Conversation’ (1999) 13 \textit{Australian Journal of Family Law} 233, 244.} The scope of the notion of parental responsibility remains unclear. The new model contributed to a considerable increase in applications for specific issues orders and lead to more detailed final orders being made.\footnote{The First Three Years Report, above n 72, 4.81.} Key proposals for legislative reform made in the \textit{Every Picture Report} focus on this aspect of the legislation\footnote{\textit{Every Picture Report}, above n 3. This is discussed in greater depth in chapter six. See text accompanying fn 1077 - 1092.} and have also become part of the Federal Government’s reform agenda.\footnote{\textit{Framework Statement}, above n 6.}
The legislature’s concern to encourage fathers to stay involved with their children after separation was further reflected in a new objects clause inserted into Division VII. Four principles are enunciated in this clause: children’s right to ‘know and be cared for by both parents’ regardless of their marital status, children’s right to regular contact with both parents, the duty of parents to share responsibility for their children and an obligation on parents to ‘agree’ about the future parenting of their children.

In promoting these objects, the legislation requires the Court to have regard to the child’s ‘best interests’ as the paramount consideration. This terminology replaced ‘welfare’ under the previous regime and again is viewed as bringing Australia into line with its obligation under the United Nations Convention of the Rights of the Child (UNCROC) rather than being a substantive change in approach. The Court’s consideration of what is in a child’s best interests is informed by a ‘checklist’ of factors that it is to consider in its task of case by case decision-making. Some of these factors were relevant under the old regime. These include the parents’ attitude to their responsibilities as parents, the nature of the relationship between the child and his/her parents, and the child’s wishes. New factors introduced by the Reform Act 1995 included the need to consider ‘any family violence’ involving the child or a member of his/her family and the need for

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78 s60B(2). In part this clause reflects Australia’s obligations to bring its legislation into line with the United Nations Convention on the Rights of the Child which it ratified in December 1990: The First Three Years Report, 13.
79 s60B(2)(a).
80 s60B(2)(b).
81 s60B(2)(c).
82 s60B(2)(d).
83 s65C.
84 Art 18.
86 s68F(2)(h).
87 s68F(2)(b).
88 s68F(2)(a).
89 s68F(2) (i). Other provisions dealing with family violence include s68F(2)(j), s68J, s68K. Division 11 deals with the relationship between contact orders and family violence orders.
children to maintain cultural connections, including those among the indigenous population.\textsuperscript{90}

At a theoretical level, this framework raises a number of tensions that are explored throughout this thesis. These are outlined in the next section.

\textit{B Theoretical issues}

Two theoretical issues that arise from the philosophical underpinnings of the \textit{FLA} are relevant to the analysis presented in this thesis. The first relates to the fact that the legislation has both a normative purpose and a regulatory one.\textsuperscript{91} The second arises because the legislation embodies two significantly different approaches at a philosophical level that establish a fundamental inconsistency in its operation. Each of these issues, and the implications they have for the analysis presented in this thesis, are now discussed.

1 \textit{The FLA’s normative and regulatory purposes}

Australia’s family law system is strongly oriented toward private ordering. Only six per cent of disputes proceed to the final phase of the Court’s three-stage dispute resolution process and require a judicial determination.\textsuperscript{92} The remaining 94 per cent of disputes over children’s matters are settled through the Court’s alternative dispute resolution mechanisms. This underlines the dual function of the legislation. First, it has a normative role in providing a source of standards that establish the ground rules of and for private ordering in family disputes. The American legal theorist Ira Ellman describes such a function as

\textsuperscript{90}s68F(2)(f).


\textsuperscript{92}\textit{Family Court Submission}, above n 17, 13.
‘instrumental’ in that it is ‘designed to affect people’s behaviour in some way that policymakers believe desirable’.  

Secondly, it fulfils a regulatory function in which legal rules and standards are applied when the ideal of private ordering fails. Ellman describes this function as ‘restrospective’ in that it is ‘concerned with changing the consequences of what’s already happened’.

A paradox arises out of the dual function of the legislation – the Court’s jurisprudence is developed and refined in relation to the small proportion of intractable disputes that fail to settle. Furthermore, the normative/instrumental aims of the legislation produce what Ellman describes as a set of ‘wide boundaries’ that potentially compromise its ‘fair’ operation. This is because of a conflict between the goals of ‘trying to set incentives for socially desirable intimate behaviour’ and sorting out the difficulties that ensue when the legislative norms fail to bring about the social change desired by policymakers.

The standard the FLA sets for ‘socially desirable intimate behaviour’ requires adults to be ‘reasonable, self-denying and conciliatory, and fully conscious of the implications of their actions for themselves and others’. Yet it is only in situations where the normative goals of legislation have not succeeded – where parents have failed ‘to agree about the future parenting of their children’ – that the rules are obviously and directly applied. This thesis examines how the conflicts this produces are played out in the context of the social conditions in which the legislation is applied.

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95 Ellman, above n 93, 702.
96 Ibid.
97 Ibid.
99 FLA s60B(2)(d).
Adjudicated outcomes are recognised to be influential in establishing expectations among disputants and family law professionals in the area about what they can expect from the system. When operating in its regulatory mode, the family court system can thus be seen to be ‘radiating messages’ to the divorcing population about how it should behave.

This point underlines the importance of developing our understanding of litigated outcomes. The messages encoded in the way the Court resolves the six per cent of litigated disputes have a wider role than settling individual disputes: they show other disputants what happens when the ideal established in the legislation is transgressed. Judicial decisions therefore have a ‘penalising’ function that reinforces the central values of the family law system. This in turn influences the litigation strategies adopted by the parties.

This insight about the ‘penalising function’ of judicial determinations, and the way they reveal the legal system’s core values, is crucial to the empirical analysis presented in this thesis. The analysis identifies particular standards in relation to parental behaviour, violence and children’s interests that reveal the values the legal system upholds in the particular socio-political context within which it operates. As discussed


in the previous section, a defining feature of this context is the socio-political goal of ‘fitting fathers into families’.  

2 Philosophical tensions: ‘rights’ versus ‘functionalism’

The second theoretical issue relevant to the empirical analysis presented in this thesis relates to an underlying philosophical inconsistency inherent in the legislative framework. In exploring this point, I draw on the work of two influential Australian family law scholars, Stephen Parker and John Dewar.

Parker has described how in philosophical terms, ‘[l]aw generally is made up of competing and changing ethical impulses’.  

Exploring the implications of a rights/utility dualism embedded in liberal ethics, he describes how family law policy in Australia has reflected shifts between ‘contract’ and ‘functionalist’ approaches since Victorian times.

The ‘contract era’ was characterised by a reliance on the notion of rights and duties founding enforceable legal obligations between family members, which historically were distributed unequally between men and women. The ‘functionalist era’ reflected a ‘utility-based’ approach that was concerned with ascertaining and fulfilling needs rather than obligations. Legal policy became ‘predominantly about

105 Stephen Parker, ‘Rights and Utility in Anglo-Australian Family Law’ (1992) 55 *Modern Law Review* 311, 319. See Bailey-Harris, above n 53, for a discussion of this duality in the context of the *Children Act 1989* (UK). No ‘right to contact’ is explicitly stated in the UK legislation, but Bailey-Harris et al argue that Art 9(3) of UNCROC has been influential in the development of the pro-contact approach that operates in the UK in practice.
106 Parker (1992) above n105, 322.
weighing interests in some kind of balance, rather than adjudicating over rights'.

Parker argues that these approaches co-exist within family law policy and decision making, but that at varying times, one approach has been dominant rather than the other. Functionalism has dominated since the middle part of the twentieth century though rights-based notions have been increasingly influential since the 1970s.

The duality between rights and functionalism can be seen in the *FLA* Division VII provisions that were outlined in the preceding section. It is evident in the *FLA* s60B(2) provisions that were introduced in 1995. The reference to parents’ ‘responsibilities and duties’ evokes a contractual approach while children’s need for ‘adequate and proper parenting’ suggest a functional influence. A contractual approach moreover, is strongly evident in the precept that a child has a ‘right’ to know and be cared for by both parents and a right to contact.

This rights-based approach is potentially modified by the caveats that apply in effectuating the objects provisions, specifically the ‘best interests’ standard and the functionalist *FLA* s68F(2) checklist that provides an indication of the content of that standard. This checklist focuses the Court’s attention on the affective history that lies between the child and her or his carers or parents. The practical implications of the philosophical ambiguity reflected in the rights/functionalism duality are explored in chapter three. They are clearly evident in the way that

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107 Ibid 324.
109 *Parenting, Planning and Partnership*, above n 100, 13.
110 s60B(1).
111 s60B(1).
112 s60B(2)(a).
113 s60B(2)(b).
114 s65E.
115 For example, ss68F(2)(b)(c)(e)(g)(h)(i).
parents’ claims are framed and dealt with in legislation. At this point, it is sufficient to foreshadow that, broadly, while fathers’ claims reflect a rights-based approach, mothers’ arguments are more focussed on needs.

The philosophical duality in the legislation confronts the Court with the necessity to perform a balancing act in its task of case-by-case decision making. This balancing act requires it to consider how the promotion of the child’s ‘rights’ as enunciated in FLA s60B(2) may impinge on the fulfillment of their needs as referred to in the FLA s68F(2) checklist. In considering these issues, the Court needs to weigh a complex array of factors and take into account both the child’s immediate needs and his or her future well-being. Significant tensions arise in the resolution of these questions.

The analysis presented in the following chapters highlights divergent approaches to the resolution of these tensions in judicial decision-making. This divergence centres on differing approaches to the meaning of the best interests standard. It reflects what Dewar has described as a fundamental lack of coherence within legislative policy:

[T]he Family Court is presented with an issue framed simultaneously in terms of rights and [functionalism], while being offered no guidance on how the relationship between a child’s right to contact and a child’s best interests are to be constructed in a particular case.116

This creates a tension that goes beyond a mere balancing exercise: it embodies two incompatible ways of conceptualising children and their needs.117 One involves a highly individualistic image of a ‘rights-bearing’ child ‘free of other relationships or connections’.118 The other emphasises the interconnectedness of the interests of the child with those of her or his caregivers: ‘the child is both an individual and a participant

117 Ibid 472.
118 Ibid.
in a network of relationships with others'. The empirical analysis presented in this thesis explores how children’s interests are affected under each of these interpretations.

The following sections describe in greater detail the research undertaken for this study, in light of the salient features of its legal, social and political context outlined above.

**PART 3 THE EMPIRICAL STUDY**

In this part, I first describe how this study will expand our knowledge of Family Court decision making in children’s matters in the context of insights from other research. This is followed by an explanation of the methodology applied in conducting the study.

_A How does this study add to what is already known?_

1 _Previous Research_

The impact of the _Reform Act 1995_ has been evaluated in two main research reports. The larger of these was _The First Three Years Report_ by Helen Rhoades, Margaret Harrison and Regina Graycar. A smaller

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119 Ibid.  
120 Above n 72. This study was conducted over three years and was based on multiple (mainly qualitative) data sources. These included interviews with judges, solicitors, Family Court counsellors and mediators in key urban areas across Australia: 3.12. It also involved telephone interviews with parents who had sought legal advice about residence and contact matters: 3.16-3.20. In addition, court observations were conducted and judgments were analysed: 3.14-3.28-32.
Brisbane-based project conducted by Dewar and Parker produced the *Parenting, Planning and Partnership Report*. Three key issues of relevance to this study were highlighted by these projects. First, litigation increased significantly after the introduction of the new regime. Secondly, the legislative provisions aimed at increasing protection for mothers and children from domestic violence have been ineffective. Thirdly, the changes strengthened the position of men significantly so that the ‘family law system is tilted more and more against women, either by accident or design’.

These effects stem from a duality embedded in the legislation. The first aspect of this duality is the principle that both parents should be involved in children’s lives after divorce, indicated most clearly in the s60B(2) provision on the child’s ‘right to contact’. The second is that domestic violence is a relevant factor in decision making in relation to residence and contact. The studies found that the first message has been promoted at the expense of the latter, and that the emphasis on maintaining father involvement has potentially exposed children to harm. Both reports indicated that the safety of children was being compromised in cases involving violence because of an increasing trend toward maintaining contact in interim proceedings in order to ‘equalise’...
the position of the parents. This reflected an increased emphasis on the child’s ‘right to contact’ with the non-residential parent.\(^{128}\)

A further important finding in *The First Three Years Report* was that the normative aims of the *Reform Act 1995*, specifically that parents should share the care of their children\(^{129}\) and agree on parenting matters after separation,\(^{130}\) failed to be realised.\(^{131}\) The report suggested that while parents who had always shared the care of their children continued to do so after divorce regardless of the legislative regime, the changes lead to an increase in litigation by those parties who could not agree.\(^{132}\) Fathers had increased expectations in relation to their ‘rights’ under the new regime.\(^{133}\) In addition the new provisions created scope for non-resident parents to ‘interfere in the life of the child’s primary caregiver by challenging her decisions and choices’.\(^{134}\) This was particularly manifested in a jump in the number of specific issues orders,\(^{135}\) and contravention applications.\(^{136}\)

\(^{128}\) *The First Three Years* 1.15, *Parenting Planning and Partnership* 75. The consistency between the findings of the *First Three Years Report* and *Parenting Planning and Partnership* in these respects suggests that concerns in relation to bias in *The First Three Years Report* (Lawrie Moloney, ‘Researching the Family Law Reform Act’ (2001) 59 *Family Matters* 64) are unsustainable.

\(^{129}\) s60B(2)(c).

\(^{130}\) s60B(2)(d).

\(^{131}\) Ibid 1.2.

\(^{132}\) The *Parenting, Planning and Partnership* report made a similar observation: 80.

\(^{133}\) *The First Three Years* 4.10

\(^{134}\) Ibid 1.8. Similar observations were made in *Parenting Planning and Partnership*, 80.

\(^{135}\) These rose from 14,253 in 96/97 to 19,424 in 99/2000: *The First Three Years* 4.80. Cf *Parenting Planning and Partnership* 29.

\(^{136}\) These increased from 786 in 95/96 to 1976 in 99/2000: *The First Three Years Report* 1.32.
Subsequent work by Rhoades\textsuperscript{137} on contact enforcement proceedings\textsuperscript{138} showed that these too have been used as a tool of harassment by non-resident parents against resident parents. Out of the 100 breach proceedings brought in Rhoades’ study of Family Court files, only 9 resulted in findings that the residence parent had breached existing contact orders.\textsuperscript{139} This research also highlighted the prevalence of violence in these cases, with domestic violence being identified as a concern in 55 of the files, and restrictions being placed on fathers’ contact with children as a result in 32 cases.\textsuperscript{140}

Rhoades concluded on the basis of this data that enforcement proceedings are a means by which a non-resident parent can continue to exert control over their former partners and children. While the empirical data contradicted the image of the ‘no-contact mum’ Rhoades argued that the stereotype persisted in popular discourse.

Another recent study has shed further light on the problems faced by women negotiating child contact arrangements under the present regime against a background of violence.\textsuperscript{141} Between 1998-2000 Miranda Kaye, Julie Stubbs and Julia Tolmie interviewed 40 women who had negotiated contact arrangements with a former partner who had been violent. They also conducted interviews with professionals involved in the process of facilitating and implementing these arrangements.\textsuperscript{142} The study found that continuing violence was often linked to negotiation of


\textsuperscript{138} A new contact enforcement regime was introduced by Schedule 1 of the Family Law Amendment Act 2000. It introduced a new Division 13A into the FLA to create a three-phase enforcement regime. The third phase of the regime allows punitive measures to be taken against residence parents who fail to comply with contact orders without ‘reasonable excuse’ (s70NE). The Federal Government’s A New Approach Discussion Paper, above n 6, proposes to amend the FLA to make a change of residence of the child (subject to best wishes) the sanction in instances where there has been more than one deliberate and intentional breach of court orders: 13.

\textsuperscript{139} Rhoades, ‘The ’No Contact Mother’ (2002), above n 137, 76.

\textsuperscript{140} Ibid 85.


\textsuperscript{142} Ibid 93.
contact arrangements. Further, it appeared that the issue of violence was given little attention in the formulation of contact orders.\textsuperscript{143}

An Adelaide-based study of Family Court judgments involving contact disputes has added further detail to our knowledge on the impact that the Reform Act 1995 has had on the issue of contact and family violence.\textsuperscript{144} The research compared pre-and post-Reform Act 1995 judgments in disputed contact cases to analyse how the child’s best interests are constructed in cases involving violence.\textsuperscript{145} The research findings highlighted a 66 per cent increase in the number of such cases after the inception of the Reform Act 1995.\textsuperscript{146} Although there was evidence of greater scrutiny of violence as an issue in the proceedings in the post-Reform Act 1995 sample, the rate of orders for contact made in circumstances involving violence remained substantially unchanged in the two samples.\textsuperscript{147}

2 The contribution of this study

This research augments existing knowledge on the impact of the Reform Act 1995 by providing a deeper and more detailed insight into how parental claims are framed and dealt with in the process of litigation. In particular, it identifies the influence of particular psychological and legal concepts in FCA proceedings involving children’s matters. No research project conducted to date has involved systematic analysis of complete Family Court files (as opposed to judgments) in residence, contact and specific issues orders matters.\textsuperscript{148}

\textsuperscript{143} Ibid 132.
\textsuperscript{145} Ibid 171.
\textsuperscript{146} Ibid 180.
\textsuperscript{147} Ibid 180
\textsuperscript{148} Rhoades, The No-Contact Mother (2002) above n 137, used full file analysis to research contact enforcement proceedings.
As a socio-legal study, the research is aimed at exploring the relationship between the legal framework and the social issues\textsuperscript{149} that are relevant in family law decision making on children’s matters. It is concerned with examining the gap between law-as-written and law-in-action\textsuperscript{150} but a further goal is to place the empirical findings within a theoretical framework\textsuperscript{151} with the intention of generating a deeper understanding of why the law operates in the way this data suggests it does.

As a small-scale qualitative study, this project is primarily exploratory and reflexive in nature. Rather than being designed to arrive at particular conclusions, its intention is to gather and analyse data to enable further hypotheses to be generated and other research projects undertaken.\textsuperscript{152}

Discretion plays a large role in Family Court decision making.\textsuperscript{153} This factor has created significant disquiet about the indeterminacy of family law generally and the meaning of the best interests standard in particular.\textsuperscript{154} One of the defences against such indeterminacy is that the standard is given content by the prevailing norms in the jurisdiction in which it operates. Parker suggests that ‘communities of rule users’ construct cultural conventions about the meaning of the standard ‘which can reduce uncertainties of application to a considerable extent’.\textsuperscript{155} This does not inevitably mean that that these ‘cultural conventions’ are uniform and consistent.

\textsuperscript{149} John Eekelaar and Mavis Maclean, ‘Introduction’ in Eekelaar and Maclean (eds), \textit{A Reader on Family Law} (1994) 2.
\textsuperscript{150} Donald Black, ‘The Boundaries of Legal Sociology’ in Black (ed) \textit{The Sociology of Law} (1978) 98.
\textsuperscript{151} John Eekelaar and Mavis Maclean, above n 149, 2.
\textsuperscript{153} The exercise of discretion remains crucial in case-by-case decision making although in a broad sense, family law is becoming less discretionary: Dewar (1997) above n 108.
Empirical research can play a crucial role in examining the cultural conventions that may be operative at a given time and in a particular socio-political context. Systematic research on family court decision making can show how ‘the chaos of family law is stabilised or translated into solutions or outcomes in particular cases’. 156

In general terms, this thesis attempts to further our insight into the ‘cultural conventions’ that informed the outcomes of the cases considered in the empirical sample. Its focus is not just on outcomes however, since these reveal little about such cultural conventions in the absence of insight into ‘the discourses prefiguring those outcomes’. 157

As the FCA noted in its submission to the Every Picture Report inquiry:

A true understanding of the situation can only be obtained by also placing orders made in the context of what parenting orders the court is being asked to make, not simply in the originating documents, but at trial. 158

A further reason why empirical research is particularly important in this area is that little public (ie media) reporting takes place due to the constraints imposed by s121 of the FLA on the identification of parties to litigation. Given that the operation of the Family Court is highly controversial and the subject of regular claims of bias, as discussed earlier, 159 systematic and detailed analysis of its decision making is particularly important. Such research assumes added significance as perceptions about how the Court operates are critical in informing the views of client and professional groups in the area. 160

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158 Family Court Submission, above n 17, 13.
159 See text accompanying fn 14 and 16.
B The research question

The central research question for the empirical part of this project was: how are key sections of the Reform Act 1995, in particular s60B, s65E, s61C and s68F, being used in litigation and applied in judicial determinations? As discussed earlier, these provisions embody policy objectives aimed at strengthening the role of fathers in children’s lives. This raises the question of whether, and to what effect, the normative aims of the legislation are reflected in the Court’s day-to-day process of decision making.

C Aims and limitations

In order to address the empirical research question, five research aims were developed. They were:

1) To conduct a systematic, qualitative analysis of trial and appeal case files (including transcripts, judgment and Family Reports) in a variety of residence, contact and specific issues matters dealt with by the Court.
2) To assess how each side constructs its arguments in relation to specific provisions of the FLA as amended by the Reform Act 1995, particularly s60B, s61C, s65E and s68F.
3) To analyse how the parenting roles of the individuals concerned are depicted by each of the parties involved in the litigation.
4) To analyse how Family Reports depict the parenting capacities of the parties.
5) To examine how the judgment in the case responds to these issues.

161 A range of factors, including Court Rules and practice directions and Legal Aid funding patterns contribute to the effect of formal legal rules: ibid 110 . These issues are referred to at relevant points throughout the analysis although they are not the specific focus of the research.
Resources were a significant constraint in determining how these aims could be best addressed. As this research was undertaken for the purposes of a PhD thesis, research and analysis had to be undertaken by one person and external funding was not available. This was a key factor in the decisions made on the scope of the research question and the methods to be undertaken to address it.

In light of these constraints, the scope of the research question was confined to the fairly narrow parameters set out above. The method adopted to address this question was analysis of a sample of 40 Family Court files.

The primary limitation of this research arises because data was drawn only from the Melbourne-based registries of the Family Court. Given that the Court has registries all over Australia in areas with varying demographic profiles, the applicability of these findings to other areas cannot be assumed.162 Other research has highlighted variations in trends in outcomes between various registries.163

Further, as Dewar and Parker argue, rather than being a ‘system’, family law is a ‘complex’ in which multiple interpretations of the law co-exist among different professional groups and at varying points in the process.164 This study sheds light only on a small part of the ‘complex’,

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162 This is particularly pertinent in relation to cultural issues. Although the sample covered a diverse range of people with immigrant backgrounds (see text accompanying fn 215 and 217 below) no indigenous people are included. This in part reflects the demographic make-up of Victoria, which has a much smaller indigenous population than other states and territories (excluding Tasmania and the ACT): Australian Bureau of Statistics, 2001 Census: Further Analysis of Aboriginal and Torres Strait Islander Population Distribution (2002).


164 Parenting, Planning and Partnership, above n 100, 87-90.
namely litigated cases. It’s quite narrow concern was to assess the way legislative provisions operate in practice.

This focus on litigated disputes raises complex questions about the relevance of the findings of this study more broadly. Given that only six per cent of disputes proceed to final hearing, such cases represent the most intractable cohort of parenting disagreements. It is now widely acknowledged that cases involving difficult issues such as violence, sexual abuse and drug addiction form the ‘core business’ of the FCA’s litigation workload. This raises questions in regard to the similarities and differences between the disputes covered in this sample and those that do not proceed to litigation. Little information is available about the 96 per cent of disputes that settle by mediation, so our knowledge on this point remains in the realm of speculation. It is relevant to note however, that there is a growing body of research highlighting the prevalence of violence among the divorcing population and that links between violence and child abuse are increasingly being substantiated. It is possible therefore that the range of issues found in the files in the sample is also present to a significant extent in the disputes that do settle out of Court. Furthermore, the caregiving patterns in the files are consistent with the broader social trends outlined earlier in this chapter.

As the Out of the Maze report notes, the course taken by separating parents may be influenced as much by their ‘entry point’ into the system as by the

165 Family Court Submission, above n 17, 2.
167 Every Picture Report, above n 3, 1.23.
170 This point is discussed more fully in chapter two: see text accompanying fn 243 and 247.
171 Above n 7, 16. See also Parenting, Planning and Partnership, above n 100, 85. A small scale study of separated parents in Adelaide found that participants had trouble actually distinguishing what part of the overall ‘complex’ they had contact with: Anna Byas, ‘Family Law: Old Shadows and new directions’, paper presented at the Eighth Australian Institute of Family Studies Conference, 12-14 February 2003, Melbourne.
nature of the issues involved in their dispute. These entry points are as variable as a private solicitors, government and private sector welfare agencies and government departments. In expanding our knowledge of the way the legislation operates in the context of litigated disputes, this study provides insights that may inform future research projects examining mediated outcomes. The need for such research is discussed in greater depth in chapter six.

D Rationale and Approach

The rationale for the selection of the data source was that the files comprise a complete set of material involved in the litigation, including the parties’ applications and affidavits, witness’ affidavits, expert material such as Family Reports, some transcript of court proceedings and the judgments. The files provide a source of data on Family Court proceedings which is both deep and rich, encompassing most of the relevant perspectives on the issues. Each of these layers of data made a particular contribution to my exploration of the research question which is outlined in the following paragraphs.

The availability of the parties’ affidavit material made it possible to consider the question of how the parties and their legal advisors view the legislation and their position in relation to it. In collecting the data I was mindful that rather than representing a ‘true’ account of the parties’ positions, this evidence was formulated in order to pursue a ‘winning’ litigation strategy. The drafting of affidavits is a particular skill developed by legal practitioners. This was evident in the data when affidavits prepared by parties with legal advice were compared with those prepared by self-represented litigants. The former were clearly carefully prepared and edited documents. This point is of significance to the analysis presented in the following chapters that identifies specific concepts operative in legal decision making that place tactical pressure on the parties.
Data from the Family Reports,\textsuperscript{172} and in some instances other psychological evidence, provided an important means of cross-checking the validity of the claims made by the parties in their affidavits. Their strategic importance in strengthening or weakening the position of the parties in litigation is reflected in the fact that an adverse Family Report may result in the termination of legal aid funding.\textsuperscript{173} The recommendations made in Family Reports also have the potential to influence whether cases settle or proceed to trial.\textsuperscript{174} These Reports provided important insights into the role that psychological perspectives play in Family Court proceedings. It is well recognised that concepts drawn from psychological theory play an important role in developing legal understandings of what children need.\textsuperscript{175}

Family Reports are prepared by a person appointed by the Court who has expertise in either psychology or social work. They interview and observe key participants in litigation to assess the caregiving capacities of the parents and the needs of the children. As Carole Brown, for many years the head of FCA’s counselling services notes, the reports have three separate audiences: the judge, the family and the legal representatives. Because the needs of each of these parties are different, Family Report writers are faced with a complex task in communicating messages effectively.\textsuperscript{176} Information that may be useful for the judge, for example, may be damaging in a therapeutic sense for one or more of the

\textsuperscript{172} These are requested by the Court under FLA s62G.
\textsuperscript{175} Problems may be raised by the absorption of psychological and welfare discourses into legal frameworks and practices: see eg Michael King and Christine Piper, \textit{How the Law Thinks About Children} (1995); Martha Fineman and Anne Opie, ‘The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce’ (1987) \textit{Wisconsin Law Review} 107.
family members. Moreover, issues that may otherwise be relevant to recommendations made in a Family Report, such as the presence of domestic violence or sexual abuse, remain a question of fact for the Court to decide. These factors constrain non-judicial assessors in the recommendations they make.\textsuperscript{177}

Such complexities were taken into account when considering the implications of the insights derived from the data gathered from the Family Reports. It was evident within the sample that a range of methods was deployed by Family Report authors to communicate their findings to the Court without pre-judging issues of fact or doing therapeutic damage. One of the most significant techniques is the presentation of vignettes revealing family dynamics to the Court. These are based on observations of interactions between parents and children. They communicate issues in a somewhat indirect way to the judge by providing a ‘snapshot’ of interactions between family members. The messages encoded in these vignettes are considered at various points throughout this thesis.

The data collected from the parties’ affidavit material and the Family Reports allowed contextualised assessments to be made in relation to the judicial determinations. Differences and similarities in emphasis could be traced through the affidavit material and the Family Report into the judgment. Judgments were therefore not just considered in isolation. Rather, a detailed assessment could be made of how the judgment responded to the issues raised by the evidence. This enabled comparisons to be drawn on which issues receive consistent emphasis at the level of judicial determinations and the evidentiary basis of these determinations.

\textsuperscript{177} Research conducted in Queensland suggests Family Reports deal inadequately with violence for a number of reasons: Kathryn Rendell, Zoe Rathus and Angela Lynch, \textit{An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family} (2002). This issue is considered further in relation to my sample in the discussion of violence in chapter five.
This process of data collection and cross-checking enabled the question of how the legislation was being used (by the parties) and how it was being applied (by the judges) to be addressed. Key themes were identified and traced through the various layers of data to provide a detailed account of the inter-relationship between parents’ claims, psychological responses and judicial determinations. In this way, evidence of the depth and significance of particular themes was triangulated through these three main layers of data. The Parenting Planning and Partnership Report has noted that a ‘principle of variable reception’ operates in the family law complex. This means that different system players bring varying interpretations of what the legislation means into their professional practices. The process of tracking key themes through the different levels of data expands our insight into the practical ramifications of this point.

Consideration was given to alternative methods of data collection, for example interviews with parties and solicitors and barristers. However, it was decided that such interviews would not provide the detail and depth of information that could be obtained from files. Moreover, such interviews have been conducted by other researchers, as discussed above. Given the constraints on time and resources, and the obligation of confidentiality that attaches to FCA research, it was impracticable to attempt also to conduct interviews with the parties involved in the cases in the files. For similar reasons, locating a litigating sample to interview outside of the files was also beyond the scope of this project.

Use of the files provided a unique opportunity to gather data on the positions adopted by each party, as well as Family Reports and judicial determinations in each case in the sample. The richness of the data in the

178 Above n 100, 87. See also The First Three Years, above n 72, 3.27.
179 See text accompanying fn 120 and 136.
180 This is discussed more fully at text accompanying fn 192 and 193.
files allowed ample scope to conduct a valuable analysis of the issues raised by the research questions. As noted previously, no previous project has gathered and analysed Family Court data in this way.

The initial phase of this study took place prior to the completion of The First Three Years Report and Parenting Planning and Partnership. It was decided that a pre-determined hypothesis would be too limiting in an area new to such research. However, certain views based on overseas research on shared parenting regimes, and expert comment on the likely effect of the Reform Act 1995, informed expectations of the nature of the findings.

A key premise was that the new FLA provisions in relation to the child’s right to contact and to know and be cared for by both parents, together with the new parental responsibility provisions, would provide impetus for non-resident parents to make claims for greater involvement and authority in their children’s lives. However, the Court would be faced with some difficulty in giving effect to these claims given the realities of post-separation parenthood and the high level of conflict in Family Court cases that proceed to a full hearing. This would mean that the notion of shared parenting was likely to be reflected in Court decision making in only a symbolic way. A further

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181 See text accompanying fn 148..
182 Eg Smart and Neale, above n 43.
183 s60B(2)(b).
184 s60B(2)(a).
185 Eg s61C.
187 Smart and Neale (1997) above n 56.
188 Judges remained unwilling to make orders for shared residence arrangements after the introduction of the Children Act 1989 (UK) because such orders are considered unworkable in the absence of parental agreement and co-operation: Ines Weyland, Judicial attitudes to contact and shared residence since the Children Act 1989’ (1995) 17 (4) Journal of Social Welfare and Family Law 445.
assumption was that the way cases were argued and decided would reflect the policy goal of enfranchising fathers that underpinned the reform agenda. This in turn would place pressure on the way that the concept of the child’s ‘best interests’ was defined in practice and potentially compromise the safety of children and their caregivers.

E The sample

The sample comprised 40 files involving children’s matters (excluding child support) that proceeded to trial between 1999 and 2000. This included 17 cases that proceeded to Appeal (the total of available appeal cases for this period), and 23 cases that proceeded to trial but not to appeal. Two thirds of the sample came from the Melbourne Registry of the Family Court and one third from the Dandenong Registry. The files held at these Registries cover the whole of Victoria.

It was necessary to obtain permission from the FCA to gain access to the files. A pre-condition for this access was an undertaking that the identities of the parties to the litigation would remain anonymous and no identifying information would be used, in compliance with s121 of the

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189 Nygh, above n 186, argued s60B(2)(b) essentially created a presumption in favour of contact: 9. A greater emphasis on maintaining contact between children and the non-residential parent was evident in Court approaches to the meaning of ‘welfare’ under the Children Act 1989 (UK): Gwynn Davis and Julia Pearce, ‘On the trail of the Welfare Principle’ [1999] March Family Law 144.

190 Women and children’s safety were found to have been compromised following the introduction of the Children Act 1989 (UK): Marianne Hester and Lorraine Radford, ‘Contradictions and compromises: the impact of the Children Act on women and children’s safety’ in Jill Radford, Liz Kelly and Marianne Hester, eds Women, violence and male power: feminist activism, research and practice (1996) 81. Unlike the Children Act 1989 (UK), the Reform Act 1995 made the relevance of violence to decision making in children’s matters explicit (eg FLA s43ca, s68F(2)(i)). However considerable uncertainty surrounded the issue of how the violence provisions would be applied and interpreted in the context of the s60B(2) objects: Juliet Behrens, ‘Ending the Silence, But…Family Violence under the Family Law Reform Act 1995’ (1996) 10 Australian Journal of Family Law 35.

191 Four of these appeals were against decisions made on an interim basis.

192 Approval for the project was also obtained from the Human Research Ethics Committee at the University of Melbourne, Human Research Ethics Committee, Project No 990438.
In order to comply with the confidentiality undertaking, the files were given a coded reference number, consisting of a letter and a number. Files with an “A” in the coded reference number are drawn from the Appeal sample while those with a “T” are drawn from the trial sample.

The trial sample was selected according to a simple random sampling method. A list was compiled by Court staff of all cases involving residence, contact and specific issues orders in the Dandenong and Melbourne Registries of the court. Access to each fourth file on list was requested. If a file was not available, the fifth one on the list was requested in its place.

It was considered important to include the appeal cases because it was anticipated that they would be most likely to deal with substantive issues relating to the construction of the new provisions in the legislation. An assessment could then be made as to how the new provisions were being interpreted by the Court. The trial cases provided a means of assessing how atypical the fact situations were in the appeal sample and provided a more representative selection of cases.

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193 As a result of this constraint I have developed a special referencing system for material gathered from the files. The reference identifies 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 publicly available electronic resources such as AustLII data bases.


195 This prediction proved largely incorrect. See my discussion of the Appeal cases below at text accompanying fn 351 and 359. See also Rosemary Hunter, Ann Genovese, April Chrzanowski, Carolyn Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, (2002), for a discussion of the FCA’s appellate jurisprudence.
F Data Collection and Analysis

A grounded theory\textsuperscript{196} approach in which data collection and analysis proceed concurrently with the aim of producing an inductively-based hypothesis\textsuperscript{197} was applied. This process had two main components. The first involved data collection and preliminary analysis. The second involved a more detailed process of analysis. The following paragraphs describe these steps in greater depth.

The first stage involved the development of data collection sheets.\textsuperscript{198} These sheets were based on common themes identified in a pilot sample of nine files. They were used to ensure consistency in data collection and to facilitate analysis. Four different types of data collection sheets were used. The first provided basic information about the case, such as the age of the parents, their occupations, the ages of the children and an overview of parties’ applications, arguments and outcomes.

A different data collection sheet was then developed for each of the three key ‘layers’ of information: the parents’ affidavit material, the Family Reports and the judgments. These sheets reflected the key themes that emerged from each layer and allowed for themes to be tracked between the layers and among the files.

Initially, each file was read and basic data collection using the sheets took place. Detailed notes were then taken of material that provided especially rich illustrations of particular themes or of material that was atypical. Each file was reviewed on the completion of note-taking to ensure that my initial judgment about its thematic significance was valid. This involved considering alternative ways of construing the file in thematic terms, based on the material in the file as a whole. Family

\textsuperscript{196} Barney Glaser and Anselm Strauss, \textit{The Discovery of Grounded Theory} (1967).
\textsuperscript{197} W James Potter, \textit{An Analysis of Thinking and Research About Qualitative Methods} (1996) 151.
\textsuperscript{198} See Appendix 2.
Reports and judgments, particularly findings as to the credibility of the parties’ evidence, were used (not uncritically) to assess the validity of the parties’ claims. In some instances, this lead to a revision of my original assessment. Each review included a brief summary indicating my assessment of key aspects of the case.

The second component of the data collection and analysis process took place as the available data began to build up. It involved a more detailed process of analysis aimed at assessing the breadth, depth and strength of particular themes. This was undertaken through a process of revising the data collection sheets and notes to collate the data on a series of charts drawing themes together and assessing their significance across the overall sample.

This was complemented by a process of comparing the findings emerging from the data with relevant broader theoretical and empirical sources. The findings emerging from my research were checked against those yielded by the research of The First Three Years Report and Parenting, Planning and Partnership in order to monitor emerging consistencies and divergences.

The very richness of this data has presented a challenge in developing and presenting the analysis in this thesis. A crucial part of that analysis has been to develop themes dominant in the data while also endeavouring to convey the diversity of the material.

G Structural Outline

The analysis presented in this thesis is divided into five further chapters. In chapter two, the empirical analysis is introduced through a description of the nature of the sample. Detailed analyses of the empirical material are presented in chapters three, four and five, each covering a key theme
in the data. These themes are interconnected and arise from the social context in which the legislation is applied.

In chapter three, I examine the constructions of parenthood that arise from the application of an equality based framework to a gendered parenting reality. This discussion considers the tensions that arise in the application of the s60B(2) objects and the s68F(2) provisions that focus attention on the respective parenting histories and capacities of the parties to the litigation. This analysis produces an account of an ‘asymmetrical’\textsuperscript{199} model of parenthood in the empirical sample in which different standards of ‘adequate’ parenthood are applied to residence parents (mainly mothers) and contact parents (mainly fathers). These standards are produced by the way individual decision makers reconcile the philosophical tensions that arise between the s60(B)(2) objects and the specific s68F(2) considerations.

In chapter four, I analyse the way that violence is dealt with in the sample files. This analysis builds on the insight from chapter three in relation to the differential standard of adequacy applicable to residence and contact parents. It focuses on the way that the s60B(2) objects provision raises conflicts with the violence related provisions\textsuperscript{200} in the checklist. It indicates that within the definition of ‘adequate’ parenthood that applies to contact parents all but the most severe histories of violence are condonable. A very high standard of severity and evidentiary support are required before the ‘adequacy’ of contact fathers can be questioned in Court proceedings.

Children are the focus of chapter five, in which I explore what scope they have to be heard and how their needs are constructed in the sample. This analysis examines how the different standards of adequacy applied

\textsuperscript{199} Smart and Neale, (1997), above n 56, argue that shared parenting frameworks such as the \textit{Children Act 1989} (UK) are based on an idealised model of ‘symmetrical’ parental roles: 336.

\textsuperscript{200} s68F(2)(i),(j).
to residence and contact parents, and the invisibility of all but the most severe histories of violence as a factor relevant to parenting capacity, influence the construction of children’s interests in the sample. This analysis highlights how, despite the centrality of children’s interests in the formal legislative framework, these are marginalised in practice.

The overall findings of the study are presented in chapter six. This chapter also briefly considers the implications of current reform proposals in light of the findings, suggests alternative directions for reform and canvasses possibilities for future research.

I have made a deliberate decision not to include a specific literature review chapter. Rather, material that would be included in such a chapter is referred to at relevant junctures as the analysis is presented. This decision was made because of the wide range of issues raised by this material and the vast array of material relevant to the family law area. A smoother, more coherent analysis has been produced by integrating the empirical analysis with secondary sources.

SUMMARY

This chapter has introduced the key issues that form the background to the research conducted for this thesis and outlined the aims and methods that underpin the study. A significant aspect of the socio-political background to this study is the way that both debates about policy and policy initiatives themselves reflect a dominant political concern with the status of fathers. Yet, despite moves to broaden the role of fathers in families, including the introduction of the Reform Act 1995, father involvement in ‘family work’ is only increasing incrementally. Mothers carry most of the practical day-to-day responsibility for ‘family work’ even as their level of workforce participation increases. This is the social context for the application of an ‘equality based’ legal framework,
described in part two of this chapter, to the six per cent of disputing families that fail to agree about the future parenting of their children.

A central concern of this study was to examine how the legislative provisions that regulate post-separation parenting arrangements are applied in the context of this social background. The central research question for the empirical study conducted for this thesis has been explained in part three of this chapter. In conceptual terms, this question explores how the philosophical inconsistencies inherent in family law are stabilised to produce litigated outcomes on a case by case basis. In specific terms, the analysis explores how the philosophical tensions between FLA s60B, s65E and s68F(2) are reconciled in the sample cases. The empirical foundation for this inquiry is a sample of 40 trial and appeal cases in children’s matters heard in the Melbourne and Dandenong registries of the Court. The sample is described in greater depth in the next chapter, which also introduces key themes arising from the empirical analysis.
CHAPTER 2

AN INTRODUCTION TO THE SAMPLE

INTRODUCTION

In this chapter, I provide an overview of the sample of Family Court files that comprises the empirical basis of this study. This overview covers two aspects of the sample. First, basic features of the files, such as the demographic characteristics of the litigants and the make-up of the families involved in the disputes are described. Key thematic issues are introduced in the second part of the overview. It describes the nature of the disputes covered by the sample, the outcome patterns in the sample and the broader context in which these disputes occurred. This context was an expectation of ‘extra entitlements’ under the Reform Act 1995 among fathers. However, the factual backgrounds to the disputes frequently involved issues such as violence and entrenched conflict, militating against realisation of fathers’ expectations.

A Characteristics of the Sample

As set out earlier, the sample comprised 40 files involving children’s matters (excluding child support) that were heard in the Melbourne and Dandenong Registries of the FCA between 1999 and 2000.

1 Parties to the Disputes

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201 Parenting, Planning and Partnership, above n 201, 79.
The majority (n=36) of the cases involved disputes between the biological parents of the children involved.\(^{202}\) Most children were in the primary care of their mothers.\(^{203}\) In only two files did fathers have residence that was being contested by mothers.\(^{204}\) In two further cases, fathers were contesting the residence of children in the care of people other than their mothers, who were both deceased. Neither of these fathers had ever lived in a familial situation with the mother and the child. In one case, the carer was a social worker who had taken on the role as a result of the mother’s death-bed plea.\(^{205}\) In the other, the child’s maternal aunt and her husband were caring for her.\(^{206}\) The parents had separated prior to the child’s birth and the mother had committed suicide shortly after the birth.\(^{207}\)

2. Family profiles

In total, the applications in the sample concerned 64 children directly: 35 girls and 29 boys. Just over half (21/40) concerned children who were the sole issue of the relevant relationship. Fourteen other files involved sibling pairs, with larger groups being the focus of only four files.\(^{208}\) The majority of children in the sample were aged between five and ten years, although the age range was from two and half to fifteen.

\(^{202}\) One file, A10, involved a great grandmother’s application for contact.

\(^{203}\) There were a total of seven exceptions to this. Those not described in the text were: a file where there was a 50/50 time share arrangement that was under challenge by the mother (A6) and two further files where siblings were split between their parents (T9, T20).

\(^{204}\) T15, T12.

\(^{205}\) A4.

\(^{206}\) A14.

\(^{207}\) A further file (A17) involved a dispute over contact between a child’s biological mother and her former husband. The child was born into their marriage but was the biological child of another man. After separation, the mother went to live with the child’s biological father. Her former husband was applying for contact with the child he had believed to be his until DNA tests proved otherwise after separation.

\(^{208}\) Two concerned groups of three children that were subject to the application but were also part of still larger sibling groupings. Two files concerned siblings groups of four and five children respectively.
In a significant minority of cases (15/40), one or both parents had children from other relationships. The majority of these were mothers - nine had children from previous relationships, and two had children from subsequent relationships. Five fathers had children from previous relationships, with two having children from subsequent relationships. There was only one case where both parties had other children.\textsuperscript{209}

In most cases, the existence of other siblings, and the need to maintain and develop relationships between the children subject to the applications and their half-brothers and sisters, were important considerations in the proceedings. This issue is discussed in greater depth in chapter five.\textsuperscript{210} The existence of additional offspring was of marginal relevance in a minority of these cases, as the other children were either older teenagers or adults.

The majority of couples (26/40) in the sample had been legally married, compared with only nine who were in de facto cohabitation. A further three couples had never lived together, with the children in two of these cases being conceived as a result of relationships which proceeded on an inconsistent basis.\textsuperscript{211}

New partnerships had been formed by more than half (28/40) of the parents in the sample – 17 mothers and 12 fathers. In three cases, the fathers’ new domestic arrangements were significant issues in the arguments of the parties in that the existence of the new partner created an environment argued to be superior to that provided by the mother.\textsuperscript{212}

\textsuperscript{209} T7.
\textsuperscript{210} See text accompanying fn 949 and 965.
\textsuperscript{211} A7, A9. In the third case, (A4) three children had been born from an unusual relationship in which the biological parents had never lived together and the father had changed his surname to the mother’s by deed poll prior to each birth, changing it back again after the child’s birth had been registered. Only one of the children born from this arrangement was the subject of proceedings as the other two had already reached adulthood.
\textsuperscript{212} T12, T18, A5.
Interestingly, cases in which the new relationship of the mother was the subject of parties’ arguments and judicial comment were those in which the new arrangement threatened the primacy of the biological father as the male role model in the child’s life. These points are discussed in greater depth in chapter three.

3 Demographic characteristics

(a) Cultural backgrounds

The sample was culturally diverse. This is consistent with other research highlighting ethnic diversity among Family Court clients, particularly within the Melbourne Registry. Parents with non-white Australian backgrounds formed a significant proportion of the sample. The parent’s affidavit material explicitly revealed different cultural backgrounds in relation to 21 individuals. Most of these individuals were born overseas. A non-Australian ‘background’ was mentioned as an important detail in relation to a further four individuals.

In total, 12 of the couples came from mixed cultural backgrounds, as diverse as Middle Eastern with European and Latin American with French. Seven couples involved one Australian-born person with a partner who was either born overseas or who identified themselves as being Australian-born of a different cultural background. Five couples had the same cultural background, with countries of origin ranging from Yugoslavia, Croatia, New Zealand to the Netherlands.

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213 A9.
214 See text accompanying fn 471 and 472.
216 Only cases in which different cultural backgrounds were dealt with overtly in the material have been included in this figure. In other cases, material suggestive of different cultures may have been present however no assumptions have been made in relation to this. There was no indication that interpreters had been used in any of the proceedings.
217 I infer from this that the individual was Australian-born but had other cultural origins.
(b) Occupations

A range of occupations, highlighting differences in class and economic status, was represented in the sample. In relation to women, indicators of socio-economic status were masked to an extent by the fairly high number (17/40) who stated their occupation as “home duties”. Among those who did state an occupation, there was an even spread among professional/white collar occupations, business-related occupations and menial jobs.

Among the men, 10 fathers were on unemployment or sickness benefits, nine were in professional/white collar category, five were in business related occupations, with an equal number in trade jobs. Four were in menial jobs and two were involved in services such as the armed forces and the fire service.

4 Legal Representation and legal aid funding

In recent years, the FCA has been faced with an increasing number of litigants who represent themselves rather than appointing legal counsel. This is a pre-existing trend which has been intensified by the diminishing amount of legal aid funding available to those who are unable to afford private legal assistance. Research has shown that while many litigants in person represent themselves for economic reasons, a ‘significant minority’ do not want, or believe they do not

218 John Dewar, Barry Smith and Cate Banks, Litigants in Person in the Family Court of Australia, (2000) 1. Another study found the number of litigants from a sample of 1470 cases across the FCA’s Sydney, Parramatta and Adelaide Registries that were fully unrepresented at first instance had doubled between 1995 and 1999: Hunter et al, above n 195, vii.
need, to have lawyers involved in their disputes. The rising number of litigants in person presents the FCA with a range of challenges, including the necessity to ensure that they are dealt with fairly in proceedings in a way that does not compromise the principle of judicial impartiality.

A significant number of litigants in the sample were self-represented. As the following analysis shows, fathers were overwhelmingly more likely to be unrepresented. At trial level, 17 fathers ran their own cases, while 22 had legal representation. Only two mothers ran their own trials, while 38 mothers or carers had barristers or solicitors representing them.

At appeal level, no mothers or carers were self-represented, while nine fathers ran their own cases. These figures are consistent with research that shows a high proportion of self-represented litigants in Family Court children’s matters with more men than women representing themselves. Speculating on the reasons for this, John Dewar, Barry Smith and Cate Banks observed: ‘we were told several times, usually by men, that they felt an obligation towards their children to be seen to be doing something to retain a role in their lives’.

The greater number of self-represented fathers in my sample is also consistent with other research explored in some depth in chapter three that indicates mothers and fathers are differently positioned as legal

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219 Dewar, Smith and Banks, ibid.
220 Ibid.
221 T2, T1, T3, T7, T5, T10, T21, T13, T19, A1, A5, A4, A16, A12, A14, A15, A6.
222 A7, T21.
224 Dewar, Smith and Banks, above n 218; Hunter above n 195 ix.
225 Dewar, Smith and Banks, above n 218, 5.5. In another study, 64 per cent of litigants in person were men: Barry Smith, 1998 Study of the effects of legal aid cuts on the Family Court of Australia and its litigants (1999) Research Report No 19 FCA, 4. The study by Hunter et al, above note 195, confirms this trend: x.
226 Dewar, Smith and Banks, above n 218, 5.5.
Higher levels of self-representation among fathers suggest their greater preparedness to pursue their legal rights.

The issue of self-representation is also linked to the extreme nature of some of the situations reflected in the cases. Dewar, Smith and Banks noted that a ‘significant number’ of self-represented litigants are ‘considered to be dysfunctional serial litigants’. Dewar, Smith and Banks, above n 218.

The system is not adequately equipped to deal with litigants in person whose personalities are such that they do not accept that a decision may not go their way. In fact the system allows them to persist with repeated applications unless they are declared vexatious. There is a small percentage who keep coming back because they do not believe that the system is right or that they have not had their say. There is a group of ‘problem litigants’, usually associated with children’s matters. Dewar, Smith and Banks, ibid.

They further observed that some litigants in this category appeared to avoid consulting lawyers because they did not want to be told that their applications, or defences of applications, were ill-advised.

It can confidently be said that these observations about problem litigants are relevant to a number of files in the sample. In three of these cases, fathers had had orders made against them under s118 (1)(c) of the FLA. Dewar, Smith and Banks, ibid.

These orders prohibit the institution of proceedings in the court without prior leave of the Court. Another father had given the Court an

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228 Dewar, Smith and Banks, above n 218 4.2. Berns, above n 121, also notes that Litigants in Person were more likely to make unsupported allegations of sexual, abuse, abuse, neglect and Parental Alienation Syndrome: 214.
229 Dewar, Smith and Banks, ibid.
231 A1, A12, A15.
232 The Australian Law Reform Commission suggested in 1995 that these provisions should be used more frequently to curtail the activities of problem litigants in contact cases: For the Sake of the Kids: Complex Contact Cases and the Family Court Report No 3, 5.28-5.30.
undertaking to similar effect. In one further case, a s118 order had been made against the father in relation to earlier proceedings but was overturned on appeal.

It was initially intended that data on whether litigants had financial assistance to obtain legal representation from the publicly-funded Legal Aid Commission would also be gathered. However, it proved impossible to do this. Consistent data on this issue was not present in the files. Similar difficulties were noted in the *Family Law Case Profiles* report: ‘evidence of legal aid was rarely found on Family Court files unless a party was represented by an in-house legal aid solicitor’.

**B The Nature of the Disputes in the Sample**

1 *Issues covered in the applications*

The majority of files in the sample involved disputes over the allocation of the child’s time with each parent. In half of the cases, fathers were seeking shared residence or outright residence of the children. Twelve cases involved disputes over contact, predominantly involving fathers seeking to increase, or sometimes defend, the amount of time they spent with their children. In five cases mothers’ relocation plans were being disputed.
Authoritative aspects of parenthood were dealt with, mostly as ancillary issues in the context of residence and contact determinations, in an explicit sense in the orders made by the Court in 36 cases. In two cases, different aspects of authority — choice of school and a proposed change of surname — were the sole focus of the litigation.

2 The factual backgrounds in the files – a continuum of extremity

The factual backgrounds to the disputes in the files encompassed a spectrum of issues such as violence, substance addiction and abuse. Three key issues, reflecting a continuum of extremity, are recurrent themes in the files. First, the sample cases fall within the six per cent of applications that proceed to trial. In this respect, all of the sample cases represent an ‘extreme’ in the context of the total number of disputes over children because such a small percentage proceed to litigation. The other two issues, discussed in the next section, cover inter-related aspects of the files: the first is relationship history and the second is the factual background to the case. Both of these are relevant to parenting capacity.

(a) Relationship history

Relationship history encompasses both the history of the parent-child relationship and the parent-parent relationship. In the majority of cases, conflict in the parent-parent relationship was endemic, with varying levels of severity.
In terms of parent-child relationship history, most cases in the sample involved scenarios where mothers had been primary caregivers both before and after separation, as noted earlier. This is consistent with wider social patterns as discussed in chapter one.\textsuperscript{243} It also underlines the gap between the shared parenting framework in the legislation and the social reality among the litigants.\textsuperscript{244} Relationships between the fathers and children in the sample varied greatly. In about a quarter of the files, contact had been non-existent or sporadic.\textsuperscript{245} One file, for example, concerned a father’s application to establish contact with two children after he had served time in prison for an assault on their mother that ended the marriage.\textsuperscript{246}

A minority of files\textsuperscript{247} reflected a committed, enduring and active parenting history on the part of both parents. In most cases even in this sub-section of the sample, the relationship between the parents was imbued with conflict. This conflict centred on parenting arrangements for the children. In A6, for example, a four-year-old girl had been brought up in a 50/50 time sharing arrangement after her parents separated when she was two years old. The mother was applying to reduce the amount of time the child spent with her father because she argued the child was stressed by the time-share arrangement. The father opposed this application. The relationship between the parents was fraught with conflict, which had even erupted in physical confrontations at changeover times.

\textsuperscript{243} See text accompanying 26 and 36.
\textsuperscript{244} This point is developed further in chapter three. See text accompanying 509 and 516.
\textsuperscript{245} T14, T22, A4, A16, T11, A12, T19, T2, T3, T5, T23.
\textsuperscript{246} T11.
\textsuperscript{247} A6, T16, A5, T17, A13.
In most cases, relationships between fathers and children were maintained through a pattern of regular contact, usually involving alternate weekends. The nature of the relationship sustained through this contact also varied, due to the influence of different issues. These are discussed in the next section.

(b) Factual circumstances

It is now well-recognised that cases involving violence, child abuse, mental health illnesses and substance abuse form a substantial majority of the Family Court’s litigation workload.\(^\text{248}\) Consistent with previous research, one or more of these issues was present in the overwhelming majority of cases in the sample, to varying degrees of severity. This section provides an indication of the extent to which these issues occur in the files across the sample, as an introduction to the more detailed analysis of how these issues are dealt with in litigation that is presented in the following chapters.

(i) Violence

Violence was a factor in more than half (23/40) of the sample cases.\(^\text{249}\) In most files it remained a ‘background’ issue for reasons that are discussed extensively in chapter four. In 10 cases it was a highly significant issue in the proceedings.\(^\text{250}\) In three of these cases, the

\(^{248}\) FCA Submission Part B and C above n 30, 4; Brown, et al above n 166; Hunter above n 215, 390.

\(^{249}\) T1, T3, T7, T11, T22, T15, A1, A12, A7, T2, T8, T5, T10, T6, T9, T12, T19, A2, A3, A11, A17, A6, A15. It was a less significant or an 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. This is consistent with Hart’s (above n 144) finding that an increased number of cases involving disputed contact and violence came before the Adelaide Registry of FCA after the Reform Act 1995 came into effect.

\(^{250}\) T1, T3, T7, T11, T22, T15, A1, A12, A7, T2.
fathers had received criminal convictions for violence against their former partners.251

Domestic violence orders were mentioned in more than half the files. These orders may be obtained under Victorian legislation252 (intervention orders) or under the FLA253 and are aimed at providing protection from harassment and violence by restricting the perpetrator from approaching the target. In most cases, it appeared the order had been obtained under the Victorian legislation, although this was not always clear. Orders had been obtained by women in 16 cases254 and by men in 5 cases.255 In three cases each party to the dispute had obtained a domestic violence order against the other.256

(ii) Child abuse

Allegations of physical, emotional257 or sexual abuse258 involving the children in the sample were made in half the files. In circumstances where abuse allegations are made, the FCA’s primary focus is on the resolution of the dispute between the parents, according to the child’s best interests.259 The FCA does not have a role in investigating the abuse,260 rather it reviews the evidence presented, which may include

251 A1, T3, T11.
253 Family Law Act 1975 (Cth) s114(1).
254 T2, T1, T23, T3, T7, T4, T24, T11, T22, T9, T13, T20, T19, A2, A1, A17.
255 T7, T9, T20, A6, A7.
256 T7, T9, T20.
258 T5, T17, A3.
260 Family Court procedures for dealing with cases involving child abuse have been dealt with in depth in: Brown et al, above n 166. Issues in relation to the jurisdictional problems raised in cases that involve Family Court proceedings (at Federal level) and State welfare authorities are discussed in Fiona Kelly and Belinda Fehlberg, ‘Australia's
direct evidence from welfare authorities, doctors and psychologists. The
High Court has held that the FCA should ‘refrain from making a positive
finding that sexual abuse has actually taken place unless it is impelled by
the particular circumstances of the case to do so’. 261 It should only make
a positive finding that an abuse allegation is true when satisfied that the
evidence supports such a finding on the civil (as opposed to criminal)
standard of proof that is, the balance of probabilities. 262 The primary
issue for determination in such cases is whether an unacceptable risk of
abuse exists and how this should be addressed by the Court orders. 263

In the sample, the degree of severity and the emphasis placed on the
abuse allegations varied. In T17, for example, concerns about sexual
abuse raised by a mother were found to be genuinely held but unproven.
In A1, in contrast, the father was found to have subjected both the
children and their mother to extreme levels of physical violence during
the marriage. This was central to the rejection of his application for
residence of the children and the decision to allow contact to occur only
under supervision.

Overall, fathers raised such allegations without foundation more often
than mothers. This was manifested particularly strongly in four files in
which self-represented fathers made persistent allegations of abuse
against mothers that were found by the Court to be unsubstantiated. 264
The implications of this will be discussed more fully in chapters four
and five.

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262 Briginshaw v Briginshaw (1938) 60 CLR 336; Evidence Act 1995 (Cth) s140. In
WK v SR [1997] FLC 92-787 the Full Court of the Family Court specified that the
standard to be applied ‘must be toward the strictest end of the civil spectrum’: 84, 695.
263 M and M (1988) 166 CLR 69. This test is subject to academic criticism; eg Joanne
Roebuck, ‘Allegations of Child Sexual Abuse: Should ‘Unacceptable Risk’ be the Only
See below, text accompanying fn 414 and 433 for a discussion of the application of the
unacceptable risk test in the sample.
264 A15, A8, T7, A16.
The files revealed involvement of child welfare authorities in 17 cases.\(^{265}\) In some instances this involvement had occurred as a result of notifications made under the mandatory reporting provisions of the *Children and Young Persons Act (1989) (Vic)*\(^{266}\) by parties such as schools and doctors.\(^{267}\) In other files the notifications were made by parents, grandparents or other relatives under the voluntary reporting provisions of the Act.\(^{268}\) In only two cases did notifications result in positive findings by welfare authorities that abuse had taken place.\(^{269}\) It cannot be assumed that the balance of notifications were necessarily false.\(^{270}\)

(iii) Mental illnesses

Issues relating to parental mental illnesses were raised in a total of 18 files.\(^{271}\) Again, the severity and relevance of the allegations varied. Fathers raised the issue against mothers in more cases, to lesser effect,\(^{272}\) than did mothers against fathers.\(^{273}\) In A6, for example, the father

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\(^{265}\) In most instances, this was the Victorian Government’s Department of Human Services which has carriage of abuse investigations under the *Children’s and Young Persons Act 1989* (Vic). One case had been investigated interstate (T11). In nine of these cases, Form 66 Notices were also on file. These are Family Court documents used to officially notify the Court of allegations of child abuse. Three were filed by fathers (T7, T12, A8) two by mothers (A3, A7) and in one case the identity of the party filing the notice was unclear. In two further cases, each party had filed a notification against the other side (A1, A4).

\(^{266}\) s64 (1C)(a)-(l).

\(^{267}\) T23, T17, T15, A1, A11, A8.

\(^{268}\) s64. Mothers made them in: T5 (substantiated), T9 (unsubstantiated), A3, A7 (outcomes unclear). Fathers made them in: T2, T1, T7, A11, A16, A15, A8. None were substantiated, although DHS expressed concerns about the father’s fitness to exercise contact in A16. The father and mother made notifications against each other that were not substantiated in: T12, T23.

claimed the mother had a depressive illness and used their daughter as a form of ‘human prozac’. This claim was not accepted by the judge.\textsuperscript{274}

In T16, in contrast, the mother’s history of post-natal depression, along with subsequent emotional difficulties, was relevant to the father’s successful argument against her relocation. This father had had substantial involvement with his son comprising contact three days a week. It was accepted that it was in the child’s interests that the relocation not proceed, especially given the emotional vulnerability of the mother.\textsuperscript{275}

In two cases, severe mental health problems involving fathers were central to mothers’ arguments either to stop\textsuperscript{276} or limit contact.\textsuperscript{277} In both cases, the fathers denied they had an illness and refused to seek treatment.

\textit{(iv) Substance addiction}

Problems in relation to parental substance addiction were very influential in two cases.\textsuperscript{278} In T14, for example, the father, a heroin addict, failed to appear at Court when the mother’s application for orders granting her residence and day-to- day parental responsibility was heard. The question of contact was reserved\textsuperscript{279} and affidavits filed by the mother recorded her two sons’ distress at having no contact with the father.\textsuperscript{280}

\textsuperscript{274} A6, judgment 8/99, 15.
\textsuperscript{275} T19 judgment 6/99.
\textsuperscript{276} A16.
\textsuperscript{277} T19.
\textsuperscript{278} T6, T14
\textsuperscript{279} T14 judgment 2/01.
\textsuperscript{280} Affidavit (m) 5.2.2001.
In a further 10 cases, parental substance addiction was a background issue with differing levels of influence. It was most often relevant in relation to fathers and tended to be one of a number of different factors that were raised in opposition to their applications. In Coded File T8, for example, the father’s alcoholism was among several factors emphasised in the mother’s arguments against shared residence.

3 Themes and outcomes: an overview

This section provides an overview of the types of applications represented in the sample and the outcome patterns present in the data. The wider litigation environment of the relevant period is also briefly outlined, as this provides the context for the outcomes in the sample. The outcome patterns described in the overview raise issues of thematic significance to the analysis presented in chapters three, four and five of the thesis. These themes are discussed in a preliminary way in this section, to provide an introduction to the substantive analysis that follows.

Fathers in the sample files were seeking greater involvement, both in terms of time and authority, in their children’s lives. In many instances, these applications assume the character of an ambit claim when the factual circumstances reflected in the files are taken into account. Fathers were asking for greater legal recognition than would appear warranted by their previous parenting history, and the nature of their existing relationship with their children. This is an indication of the extent to which the Reform Act 1995 stimulated expectations of ‘increased rights’ among men.

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281 T23, T8, T6, T11, T22, T19, A16, A9, T20, T2, T6, T15.
282 T23, T8, T6, T11, T22, T19, A16, A9, T20.
283 Affidavit (m) 3/9/99.
284 Solicitors interviewed for Parenting, Planning and Partnership, above n 110, also noted such a tendency: 52.
285 The First Three Years Report, above n 72, 5.8-5.12.
In the years immediately following the introduction of the Reform Act 1995, applications for parenting orders increased markedly, according to figures released by the FCA. In 1997-98, 16,595 residence orders were made by consent and judicial determination. By comparison, 13,333 such orders were made between 1994-95. In the period covered by my sample, the numbers of applications had started to decrease, although they still remained higher than pre-Reform Act 1995 levels.

These figures also highlight an increase in the number of residence orders being made in favour of fathers by consent and judicial determination. These rose from about 15.3 per cent prior to the introduction of the new Part VII, to more than 19 per cent between the second half of 1997 and the first half of 2001. Other Family Court data shows fathers gain residence in 22 per cent of cases that proceed to trial. In contrast, they obtain residence under consent agreements in 9 per cent of cases and under agreements reached prior to trial in 13 per cent of cases.

It is not my intention to draw any comparison between these figures and the outcome patterns described below. Given the small sample size in my study, no such meaningful comparison can be made. However, it is pertinent to consider this data because it provides insight into the broader context of the sample cases. Both the increased number of parenting applications made after the Reform Act 1995 and the higher

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287 Ibid.
289 FCA Submission, Parts B and C, above n 30, 8.
290 Ibid.
number of orders made in favour of fathers suggest a de-stabilisation of prior assumptions in relation to post-separation parenting arrangements.

Across the sample, mothers were largely successful at trial level with orders being made that substantively reflected their applications in 22 cases. Fathers, in contrast, were successful in only seven matters. Orders reflecting compromises between the respective parties’ applications were made in a further four cases. Fathers were appellants in 13 of the 17 appeal cases and were successful in only two appeals. The following paragraphs outline outcome patterns in the four different types of cases covered in the sample: residence, contact, relocation and parental responsibility. The appeal group is dealt with last.

The largest category of cases heard by the court in this sample was competing applications for residence either on an outright or shared basis. Just over half (21/40) the disputes in the sample were concerned with applications for residence. The residence and shared residence cases in the sample illustrate the extent to which the Reform Act 1995...
encouraged fathers to seek more time with their children. Impediments to the fulfillment of these claims lay in the personal histories, and the parental capacities, of the litigants.\(^{297}\) In one case, for example, a father who had subjected the mother to extreme levels of violence, and had sustained a criminal conviction as a result, was claiming shared residence of his four-year-old son.\(^{298}\)

Overall, the 16 cases in the competing residence group highlight the difficulties in viewing outcomes of family law trials in terms of a ‘winner/loser’ analysis.\(^{299}\) In almost all of these cases, the parenting histories of the fathers were much less substantial than those of the mothers.\(^{300}\) In a number of them, the father’s capacity to provide adequate care was also questionable.\(^{301}\) In three cases, the fathers had never even lived with their children, let alone cared for them on a daily basis.\(^{302}\) In all cases, the relationship between the parents was conflictual. The fathers’ claims to residence against these backgrounds highlight how literal interpretations of the child’s ‘right to know and be cared for by both parents’\(^{303}\) conflicts with the way that their needs are constructed in the application of the s68F(2) checklist. This tension is explored in more depth in chapter three.\(^{304}\)

Fathers’ claims for residence or shared residence may have been unsuccessful in most cases across the sample, but the contact arrangements made reinforce the emphasis placed on keeping fathers

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\(^{297}\) This point is explored in greater depth in chapter three and four.

\(^{298}\) T3.

\(^{299}\) Cf Lawrie Moloney, ‘Do Fathers 'Win' or Do Mothers 'Lose'? A Preliminary Analysis of Closely Contested Parenting Judgments in the Family Court of Australia’ (2001) *International Journal of Law, Policy and the Family* 363. Moloney applied such an analysis in the context of a sample of appeal cases described as being ‘finely-balanced’ (or in similar terms) in the judgment.

\(^{300}\) The exception is A6.

\(^{301}\) By this I mean an ability to provide both an emotionally healthy environment and provide adequate physical care. These were questionable in these cases: T1, T3, T7, T9, A4, A12, T15, A15, A8, T12, A1, A14.

\(^{302}\) A14, A7, A4.

\(^{303}\) s60B(2)(a).

\(^{304}\) See text accompanying 437 and 516.
involved in children’s lives. In most cases, orders reflecting either traditional,\textsuperscript{305} or more generous contact arrangements were made.\textsuperscript{306} Intense levels of conflict between the parents, and in some cases questionable parenting capacity (even a history of violence) were no barrier to weekend contact in many cases.\textsuperscript{307}

Contact arrangements per se were at issue in a narrower band of cases than the residence/shared residence group.\textsuperscript{308} The cases in this group mainly\textsuperscript{309} reflect very extreme situations, involving severe violence,\textsuperscript{310} mental illnesses,\textsuperscript{311} sexual abuse,\textsuperscript{312} and drug addiction.\textsuperscript{313} Mothers were opposing direct contact taking place in seven cases\textsuperscript{314} and were seeking supervised contact in a further four cases.\textsuperscript{315}

In most of these cases, not only was there a history of domestic violence, but fathers’ relationships with the children were either non-existent or tenuous. In T22, for example, the father had never met the two-year-old girl with whom he was applying for contact. The mother opposed contact, arguing the father had been extremely violent to her and her son (who was not the biological child of the applicant).\textsuperscript{316} Her application

\textsuperscript{305} Contact for one weekend a fortnight. This pattern was ordered in: T1, T23, T7, T8, T21, T15, A5, A15, A8.

\textsuperscript{306} T4, T17, T9, T18, A17, A14, A6. These arrangements usually involved an extra night of midweek contact. The First Three Years Report noted a trend for increased amounts of contact to be ordered: 5.16.

\textsuperscript{307} This issue is examined in detail in chapter five.

\textsuperscript{308} T2, T11, T22, T19, T14, T17, T5, T21, T23, T3, A16. In two cases, A12, A1, mothers were opposing contact with fathers who applied for residence.

\textsuperscript{309} Two cases were less extreme. In one case (T23) the father was refusing to follow a medical regime for his daughter on contact because he disagreed with it. In the other (T17) the father was asking for increased contact.

\textsuperscript{310} T2, T11, T22.

\textsuperscript{311} T19.

\textsuperscript{312} T5, T17.

\textsuperscript{313} T14.

\textsuperscript{314} T11, T9, A4 (this case involved a carer), A16, A12, A1, T2. In A17, the child’s mother was opposing contact taking place between her son and her former husband, who had thought the child was biologically his until the marriage broke up. He was successful in obtaining orders for weekend contact.

\textsuperscript{315} T19, T5, T3, T17.

\textsuperscript{316} Affidavit (m) 9.8.99.
was successful.317 This was one of seven cases across the sample in which orders were made prohibiting direct contact between fathers and children.318 A history of extreme violence was relevant in five of these cases.319

Relocation is a particularly significant issue in Australia. Large distances separate all main cities. Furthermore, 23 per cent of Australia’s estimated population of 19.6 million people was born overseas.320 Applications for relocation therefore frequently raise difficult issues in relation to distance, cost and cultural considerations. Five of the cases321 in the sample involved disputes over the relocation of mothers, with two fathers gaining success with their applications.322 In one case, a father prevented his former wife from relocating from Melbourne to Sydney.323 In the other, a court made orders requiring a mother to return to Melbourne from Brisbane after she had relocated with her reconstituted family in contravention of interim restraining orders.324

Given the small number of relocation cases in my sample, no generalisations can be made on the basis of this pattern of outcomes. It is pertinent to note that relocation was perceived, at a popular and professional level, to have been made more difficult by the Part VII reforms,325 notwithstanding the Full Court’s judgment in B and B: Family Law Reform Act 1995.326 Increased litigation in this area

318 T3, T11, T9, A4, A16, A12, T2.
319 T2, T11, T22, T3, A12. A16 involved a father with an untreated psychiatric illness. In A4, the father had had no contact with the daughter of whom he sought residence for a number of years. He lived in a ‘hide’ on a vacant allotment.
320 Australian Bureau of Statistics, Migration, Australia, Cat 3412.0 (2002).
321 T6, T10, A3, T16, A9.
322 T16, A9.
323 T16.
324 A9.
325 The First Three Years Report, above n 72 5.91-5.99; Parenting, Planning and Partnership, above n 100, 61.
326 (1997) 21 Fam LR 676.
followed the Part VII reforms, and relocation cases have been the subject of a number of Full Court and High Court appeals.

Research into relocation case outcomes in the Canberra and Perth Registries of the Family Court by Patricia Easteal, Juliet Behrens and Lisa Young between July 1997 and December 1998 found that 68 per cent of mothers were successful applicants for relocation in a group of 38 cases that proceeded to judicial determination. Highlighting the difficulty in making generalisation about trends in Family Court decision making overall, the study found that mothers in the Perth cohort were more likely to be successful than those from Canberra.

Issues relating to the disposition of parental authority were recurrent themes in many cases in the sample. This is consistent with the lack of clarity surrounding the notion of shared parental responsibility noted in The First Three Years Report and Parenting, Planning and Partnership. It also provides further support for the hypothesis that the parental responsibility provisions in the Reform Act 1995 increased the range of disputable issues and contributed to the alteration in the balance of the parties’ respective bargaining positions. The disposition of particular aspects – education and surname – of parental authority were the central question in two cases. These issues were also ancillary in several other cases. In one additional case, parental responsibility was a key issue in an appeal file, after an interim decision allocated sole parental responsibility to the mother.

327 The First Three Years Report, above n 72, 5.96.
329 See Easteal, Behrens and Young, above n 121, 240.
330 Above n 72 1.5.
331 Above n 100, 77-78.
332 Ibid 76-77.
333 A13.
334 T13.
335 A11.
Orders relevant to parental authority were made in 36 cases in the sample. Long-term parental responsibility was specified to be held by both parents in a quarter of cases, while day-to-day responsibility was to be exercised jointly or by the parent who had the child with them in five instances. Day to day responsibility was to be held by the mother in 14 cases and the father in only one. These patterns are consistent with the observation made in the Parenthood Planning and Partnership report that the guardianship/custody distinction under the previous regime was being recreated under the Reform Act 1995 by specific issues orders allocating long term authority to both parents and responsibility for day to day matters to the resident parent.

A further interesting trend that emerges from the data on parental authority in the sample is the use of such orders to curtail parental involvement in cases reflecting particularly extreme circumstances. In 10 cases, fathers were explicitly excluded from this domain of parenthood by orders allocating sole parental responsibility to the mother or carer. These orders were made in extreme cases involving high levels of conflict or violence, sexual abuse or mental illness. Such an order was made in the father’s favour in only one instance.

In more than half the cases (25/40), specific issues orders going beyond the mechanics of the exercise of contact were made. The issues covered by these orders varied, but more common themes concerned

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336 T9, T15, T18, A8, T12, T6, T16, T20, T8, A14.
337 T18, T16, T20, T8, A14.
338 T1, T3, T4, T9, A5, T15, A15, A6, A8, A1, T14, T15, T6, A16.
339 T12.
340 Parenting, Planning and Partnership, above n 100, 24.
341 T7, A12, A15, A1, T2, T11, T17, T5, A16.
342 A4.
343 T7, A15.
344 A12, A1, T2, T11.
345 T5.
346 A16.
347 A7.
education, medical issues, and measures aimed at ensuring contact was safe for the child.

Fathers were the appellants in thirteen of the 17 appeal cases. Their lack of success continued at this level. Their appeals were dismissed in nine cases and upheld in only two cases. The observation made above in relation to trials — that in some instances it was the fact that applications were brought at all, rather than their lack of success — that is significant, holds true for the appeal sample. A comment made by Hunter et al in relation to appeals in children’s matters by unrepresented litigants is equally applicable to such litigants in this sample, who ‘appeared to construct their experiences of a negative outcome at trial as a personal denial of a variety of amorphous ‘rights’ and more specifically their ‘right’ to their child’.

In four cases, for example, the grounds of appeal can be regarded as fanciful. All four cases involve self-represented male litigants and extreme litigiousness was a hallmark of two files. In one instance, for example, the appellant argued unsuccessfully that the FLA had not been assented to and the judge’s decision on an interim matter was consequently invalid.

While most appeals involved several grounds, the most common were lack of procedural fairness, miscarriage of discretion in relation to weight accorded to evidence and bias. In two instances, appeals involved

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348 A5, A6, A8, T20.
349 A1, T7, A15 A2.
350 T19.
352 A13, A12.
353 Hunter et al, above n 195, 128.
354 Hunter et al (ibid) note that seven cases in their appeal sample of 152 cases did ‘not include any real grounds of appeal’: 107.
355 A16, A14, A4, A8.
356 A16.
arguments in relation to errors of law. In one case, the father unsuccessfully argued that the trial judge had applied the wrong approach to relocation in the wake of the decision in *B and B*. In the other, the appeal bench accepted the father’s argument that the trial judge had relied on an outdated precedent in finding that the mother, as the residence parent, was entitled to choose what school the children attended. The Appeal Bench rejected the proposition that there was a presumption that the decision in relation to education should fall to the residence parent. However, it re-exercised the trial judge’s discretion and found that in the circumstances of the case, the mother’s choice of schools was appropriate.

**SUMMARY**

The 40 files that comprise the sample for the empirical part of the research conducted for this thesis represent a culturally, economically and socially diverse group of litigants. Consistent with more general trends in FCA litigation, the sample included a significant proportion of self-represented litigants, mainly men. It is evident from my discussion of the overall patterns in the sample that the parenting roles in the families in the sample mirror wider social trends with mothers being primary caregivers in the majority of cases. In keeping with the broader social aspiration for fathers to assume greater involvement in parenting, the fathers in the sample were claiming more time and more authority in relation to their children. These claims were made in the context of fractured parental relationships and parenting histories and capacities that were in many instances tenuous. Only a small minority of the cases in the sample could be considered ‘finely balanced’ in relation to the respective parties’ histories and capacities as parents. The other files reflect varying levels of extremity with most being characterised by

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357 A3.
358 (1997) 21 Fam LR 676.
359 A13.
conflict in the parent-parent relationship. Issues such as violence, drug
addiction and physical, sexual or emotional abuse affected parent-child
relationships, particularly those with fathers, to varying extents. These
factors were influential in producing the outcomes patterns across the
sample, with mothers being largely successful both at trial and appeal
level in most cases. However, the pattern of contact outcomes across the
sample highlights the emphasis placed on maintaining connections
between fathers and children.

In the following chapter, the issues raised by the fathers’ claims for
greater involvement with their children in the context of the factual
backgrounds to the sample cases are considered in greater depth. The
analysis specifically focuses on the way that the philosophical tensions
between s60B(2), s65E and s68F(2) identified in chapter one[^360] are
played out in the empirical sample.

[^360]: See text accompanying fn 104 and 119.
CHAPTER 3

‘Admirable and Adequate’: The Depiction of Mothers and Fathers in the Sample

[I] am satisfied that during the marriage, the wife performed not just adequately but admirably her role as mother to these children. I have no real reason to doubt the husband’s adequacy as a father during this period.361

INTRODUCTION

The aim of this chapter is to examine in more detail the representation of parenthood that emerges from the data, in particular, the way parents are depicted by themselves and others. As the introductory quotation indicates, a consistent theme in the data was a significant difference between the parental capacities and histories of the mothers and fathers in the sample. In general, mothers were found to have fulfilled their parenting role to an ‘admirable’ standard whilst fathers were merely ‘adequate’. As noted in chapter two, the parenting arrangements in the files in the main mirror wider social patterns.362 Mothers were primary caregivers and the fathers had varying levels of lesser involvement. The analysis in this chapter explores how the parties used the legislative framework to support their claims and how the Family Reports and judgments responded to these claims. In the context of the factual backgrounds to the files, the fathers’ claims for more involvement in their children’s lives highlighted the tensions between the s60B(2) rights based provisions and the functionalist s68F(2)363 checklist. The way that these tensions are resolved in the legal process is the focus of the discussion in this chapter.

362 See text accompanying fn 243 and 247.
363 The analysis in this Chapter focuses particularly on the FLA s68F(2) factors relevant to parental history and capacity: ss68F(2)(b)(c)(e)(h).
Gender is a key theme in this chapter. The analysis of the empirical material explores issues related to gender at three levels. First, the claims of the fathers and mothers in the sample reflect divergent attitudes to parenthood, its meaning and the rights and obligations to which it gives rise. Secondly, these gendered differences in attitudes to parenthood mean that fathers and mothers are differently positioned as litigants and their legal claims reflect differing concerns. Thirdly, the analysis examines how the tensions raised by the gendered practices of parenting in the empirical sample are reconciled with the gender-neutral legal framework in judicial determinations.

This chapter has two parts. The first part briefly considers differing approaches to what parenthood means and how these approaches are reflected in legal policy. It also discusses empirical research on the way that men and women are positioned differently as legal claimants. The second part presents a detailed analysis of the parenthood claims in the sample.

**PART 1 PARENTHOOD: BIOLOGY/RELATIONSHIP**

‘Parenthood’ is a contested concept in social and legal terms. The meanings ascribed to the terms ‘father’, ‘mother’, and ‘parent’ are culturally determined and shift over time. As discussed in chapter one, in the current Australian context, a pre-eminent social policy objective is to make optimal ‘parents’ out of men by raising the level of involvement they have in their families and ensuring obligations of financial support are met.

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364 Other empirical research has confirmed gendered differences in attitudes to the responsibilities of parenthood: John Eekelaar and Mavis Maclean, *The Parental Obligation* (1997).
366 See text accompanying fn 38 and 42.
This policy objective has been supported by increased emphasis on biological understandings of parenthood and resistance to the idea that children’s needs be can adequately be met within single parent families. An emphasis on biological links obscures the fact that the parent-child relationship is constituted by a range of other connections which may be emotional, psychological and social. Indeed, ‘parenthood’ as a set of caretaking practices can occur independently of any biological connection.

The recognition of these aspects of parenthood — biology on the one hand and relationship on the other, has been characterised as one of the key tensions in legal policy. Biological parenthood receives automatic recognition in law. However, those whose parenting takes place in the context of an affective relationship rather than a biological one, such as step-parents, co-parents in homosexual relationships, receive no automatic recognition, although in Australia they may apply for parenting orders under the FLA as may any person with an interest in the welfare of the child.

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368 Eg Bettina Arndt, 'When Dads Are Disposable, I Fear for My Sons', The Age (Melbourne), 13.
370 The exception to this is relates to artificial conception procedures. Children born as a result of such procedures are deemed to be the child of the male partner of the relationship if he has consented (FLA s60H(2), and ss (4)). The only definition of ‘parent’ in the s60D ‘defined expressions’ section of the FLA relates to adoptive parents.
373 A ‘parenting order may be made in favour of a parent of the child or some other person: s64C’.
This biology/relationship duality in social meanings of parenthood has a direct parallel in the rights/functionalism duality in the philosophical foundation of the FLA introduced in chapter one.\(^{374}\) Section 60B(2) directs attention primarily to parenthood as a biological status in enunciating children’s ‘right to know and be cared for’ by both parents. Section 68F(2), in contrast, raises a consideration of the caretaking history between the parents and the children, and relative capacities of the parties to undertake ongoing caring responsibilities. The discussion in subsequent sections of this chapter shows how this duality is dealt with in the empirical sample.

Tensions between understandings of parenthood as ‘biology’ and parenthood as a ‘relationship’ (or a set of caretaking practices) are central to the claims made by the parents in the sample files and the psychological and judicial responses to those claims. A body of empirical research showing that men and women are differently positioned as litigants provides a context for understanding how these claims arise.

This research has highlighted a gendered divergence in the way that separated parents view themselves in relation to the legal system.\(^{375}\) Research from the UK by Carol Smart and Bren Neale has revealed that men and women have fundamentally different ways at looking at the issue of their positioning in family law. Women ‘did not construe themselves as legal subjects’, instead, ‘they identified a series of needs that had to be met’.\(^{376}\) Men, on the other hand, were perceived by both men and women as possessors of rights with an entitlement to a legal

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\(^{374}\) See text accompanying 104 and 119.

\(^{375}\) Research suggests a fundamentally gendered fault-line running through attitudes to marriage and divorce. For an Australian consideration of this see: Kathleen Funder, ‘His and Her Divorce’ in Peter McDonald, (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) 224-258.

\(^{376}\) Smart and Neale (1999), above n 43, 163. Their analysis draws on the work of psychologist Carol Gilligan which suggests that men and women have fundamentally different ways of responding to moral issues, with women’s responses reflecting an ‘ethic of care’: *In a Different Voice* (1982).
mechanism to enforce them. These constructions have important implications for the women’s positioning in the legal system:

because women were not construed as the legitimate holders of rights in the first place, they had no legal discourse available to them if they wanted to take issue with the way in which the legal process operated.  

A similar gendered division in the framing of claims in the context of protracted contact disputes has been confirmed in further recent UK research by socio-legal scholars Shelley Day Sclater and Felicity Kaganas. In a study based on ‘personal narrative accounts’ from disputing parents conducted in 1999-2000, Sclater and Kaganas found a ‘gendered pattern in the deployment of the welfare discourse, with mothers at pains to emphasise ‘welfare’ and fathers less circumspect in invoking ‘rights’ talk’.  

Australian and US research suggests that the relevance of these insights is not confined to the UK. In Australia, the First Three Years Report noted similar differences in views between men and women in relation to the significance of the Reform Act 1995. Fathers’ perceptions of the reforms focussed on ‘equality’, ‘fairness’ and ‘justice’. Mothers, in contrast, were concerned with matters relating to caregiving issues and effects on children. The Parenting, Planning and Partnership report also confirmed that the Reform Act 1995 has ‘encouraged more rights-thinking on the part of fathers’.  

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377 Smart and Neale (1999), above n 43, 163.
379 The First Three Years Report, above n 72, 4.11.
380 Ibid 4.14. Further Australian research confirms that men are more likely to litigate over children than women: Hunter (1999), above n 215, 308. In some instances, such litigation has been tied to the perpetuation of abuse and control: For the Sake of the Kids, above, n 232, 230-232. See also Parenting Planning and Partnership, above n 100, 77. This issue is explored in more depth in chapter four.
381 Above n 100, 37. Canadian research has revealed similar trends: see eg Neilson (2003) above n 63, 20.
In the US, research on divorced fathers by the sociologist Terry Arendell has also highlighted the tendency of men to characterise their divorce experiences in terms of rights violations:

Despite being couched in the abstract principles of justice and equity, the language of rights was a euphemism for prerogatives, expected if not actually held, within the stratified gender system. Divorce unseated men, especially noncustodial fathers, from their positions of privilege in the family.  

More than three quarters of the 75 divorced fathers in Arendell’s study had threatened to challenge their former spouse’s custody of the children and one-third had issued threats through legal representatives. Concerns about the living conditions of the children were not the motivation behind these threats. At issue was the relationship with the former spouse and threats of legal proceedings were made primarily as a means of harassment.

The research discussed in the preceding paragraphs is relevant to the empirical analysis developed in this chapter (and subsequent chapters) in two ways. First, it indicates that the way that many men and women view parenthood and its legal effect is fundamentally different. Broadly speaking, men are rights bearers in these formulations while women are concerned less with rights than with needs, particularly those of children. Secondly, these views mean that men and women are differently positioned as litigants with men being more likely to pursue their ‘rights’ in litigation.

**PART 2 PARENTHOOD CLAIMS AND THEIR TREATMENT IN THE LEGAL PROCESS**

The different ways in which men and women think about parenthood and, more broadly, their relationships with others, is highly relevant to

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383 Ibid 130-131.
understanding the parenthood claims in my sample, as well as their treatment in the legal process.

In particular, the arguments used by the parties to support their ‘parenthood’ claims in the sample are linked to two related issues. The first is the extreme nature of the factual backgrounds to many cases in the sample. This is most relevant to fathers’ claims. In relation to the more extreme cases, biological connections between fathers and children are the key issue emphasised in the fathers’ material. The fathers’ claims reflect a sense of ‘entitlement’ to pursue their rights. Rhetorically, these claims assert a concern with the needs of their children which often fails to withstand the scrutiny of the Court. Biology remains a theme in most cases throughout the rest of the sample but this is supplemented by claims in relation to the importance of the existing father/child relationship. Where there is a pre-existing relationship between a father and children, even one that has involved or may have involved abuse, very serious consideration is given to maintaining that relationship. This highlights the emphasis placed on the child’s ‘right to know’ both parents.

The second issue underlying parenthood claims in the sample is the gendered manifestation of parenthood in the sample, with mothers being primary caregivers in almost all the cases. This means that mothers’ claims are based on their caregiving history and intimate knowledge of their children’s needs. While the mothers’ more substantial caring histories in the sample underpin their ‘wins’ in most cases, the analysis shows ‘caring for’ of itself is not privileged as a basis for parenthood.

384 Carol Smart, 'The Legal and Moral Ordering of Child Custody' (1991) 18 Journal of Law and Society 485. Smart argued in 1991 that in the UK, the emphasis in legal and social policy on fatherhood meant the primarily female work of ‘caring for’ occupied an inferior moral position to that of the primarily male attitude of ‘caring about’. She maintained that under UK legal policy the moral discourse of care as a foundation for parenthood claims had been silenced as increased emphasis was placed on ‘rights’ discourses which privileged fatherhood claims ‘based solely on biological status or on ‘caring about’': 489. Whilst I use the terms ‘caring for’ and ‘caring about’ in the subsequent discussion to refer succinctly to the differences in the way that mothers and fathers in the sample frame their parenthood claims, I am not arguing that Smart’s
The first section in this part examines the way notions of parenthood as ‘biology’ are reflected in the parties’ claims and in psychological and judicial responses. The second section analyses how parenthood as ‘relationship’ is reflected in the arguments related to the s68F(2) checklist.

A. Parenthood as biology: FLA s60B(2) and the cases at the ‘extreme’

Biological conceptions of parenthood, supported in legal terms by the child’s right to contact\textsuperscript{385} and to know and be cared for by both parents,\textsuperscript{386} underpinned claims by fathers in a band of sample cases\textsuperscript{387} in which relationships between fathers and children were either tenuous or non-existent. The claims in these cases reflect the influence ‘those few words’ in the objects provisions have had in bringing about ‘a shift of interpretive paradigm’ in litigation over children’s matters.\textsuperscript{388}

In some cases,\textsuperscript{389} the fathers had never lived in a family unit with their children. In one case the father had never met his child.\textsuperscript{390} Where fathers had lived with their children, little or no contact was a feature of the recent history of the relationship due to issue relating to violence,\textsuperscript{391} sexual abuse,\textsuperscript{392} drug addiction\textsuperscript{393} or mental health difficulties.\textsuperscript{394} In these cases, biological constructions of fatherhood were deployed to ground an entitlement, to in some cases residence,\textsuperscript{395} and in other

\textsuperscript{385}FLA s60B(2)(b).
\textsuperscript{386}FLA s60B(2)(a).
\textsuperscript{387}Ten cases: A4, A14, A16, T2, T3, T5, T11, T14, T19, T22.
\textsuperscript{388}Parenting, Planning and Partnership, above n 100, 86.
\textsuperscript{389}A4, A14, T22.
\textsuperscript{390}T22.
\textsuperscript{391}T2, T3, T11.
\textsuperscript{392}T5.
\textsuperscript{393}T14.
\textsuperscript{394}T19, A16.
\textsuperscript{395}A4, A14, T3.
contact with their children. An emphasis on the child’s right to know and be cared for by both parents was a crucial element in the construction of these arguments.\footnote{A16, T2, T5, T11, T14, T19, T22. UK research has found that fathers view ‘contact as a right conferred by biological parenthood’: Ann Buchanan and Joan Hunt, ‘Disputed Contact in the Courts’ in Bainham, et al (eds) above n 378, 366, 370.}

In three cases, the claims followed DNA tests that confirmed paternity of the child.\footnote{FLA s60B(2)(a)&(b).} In two cases,\footnote{A4, A14.} the dichotomy between biology and relationship was drawn especially acutely because the fathers were contesting the residence of children in the care of people other than their mothers.

Arguments implying a proprietorial view of children were a consistent feature of this material.\footnote{Parenting Planning and Partnership, above n 100, also provided evidence of a resurgence of such a conceptualisation under the Reform Act 1995: 50.} Although strongest in this group, this was an approach which recurred throughout the sample. It characterises the link between children and fathers as immutable and possessory, evoking the era when children and wives were legally defined as possessions of men.\footnote{See eg Martha Fineman, ‘Dominant Discourse, Professional Language and Legal Change in Child Custody Decision Making’ (1988) 101 Harvard Law Review 727, 737.}

For example, in A14, a one-year-old child was being cared for by her maternal aunt and her husband following the mother’s suicide. The couple had separated prior to the child’s birth, and the father had apparently shown little interest in her until DNA tests established his paternity. He alleged that the child’s aunt and husband had ‘kidnapped’ her following the mother’s death, with the child being a ‘tool for their purposes to get their hands on’ the mother’s estate.\footnote{Affidavit (f) 20/11/2000.}

The dilemmas such claims raise in the context of the tension between s60B(2) and the S68F(2) legal framework were summarised perceptively
in the Family Report in this case. The Report noted that the case raised a direct conflict between ‘blood and attachment’. While the importance of blood could not be discounted, the logical extension of an argument prioritising that connection could, it was argued ‘result in the child being deemed a piece of real estate with the various stakeholders having greater or lesser claims on her depending on their level of consanguinity’. 403

The report’s answer to this dilemma was to recommend the child stay in the care of her aunt and uncle, given that she was thriving in their care and a second disruption in her attachment processes could be extremely damaging to her psychologically. While doubts existed about the father’s capacity to adequately parent the child as a primary caregiver, it was essential the Report said to sustain the relationship between the child and the father through regular contact. 404 This recommendation underlines a point that recurs throughout this analysis: a significant difference exists between the roles of residence and contact parents, such that a much lower capacity to provide care is acceptable in contact parents.

The fathers’ arguments in this part of the sample assert a ‘right’ to residence of their children which is unconnected to their capacity to care for them in physical and emotional terms. The father in A4 for example, lived in a ‘hide’ on a vacant allotment. He was unable to provide the Court with any evidence that he could adequately house the child. His lack of capacity to meet her emotional needs was beyond doubt, according to the judge, with his approach to the Court case showing a ‘total lack of sensitivity’. In this case, the child’s aversion to even the thought of seeing the father was a crucial factor in the judge’s decision not to order contact. 405

404 After an unsuccessful appeal in relation to procedural issues, consent orders consistent with this recommendation were made.
405 Judgment 1/99.
A further dimension of the fathers’ arguments in this wider group of 10 cases is a simple assertion that as a result of the biological connection, the children’s interests are inevitably served by ongoing contact. In T22, for example, the father was an alcoholic with a predilection for cross-dressing.\textsuperscript{406} His relationship with the mother and her two other children was characterised by a history of violence of such magnitude as to inspire intense fear and loathing in the three of them.\textsuperscript{407} Denying the history of violence, the father told the Court that ‘[my] daughter has not been allowed the care and affection of her father, let alone her extended family. I want to correct the harm the respondent has caused in this regard’.\textsuperscript{408} His argument depended on what the judge accepted was a misrepresentation of his qualities as a partner and father figure in his relationship with the mother. It positioned him as a putatively loving, caring father and his daughter as having a ‘need’ to know him based on their biological relationship:

\begin{quote}
I believe it is particularly important that she knows and understands me as her natural father and that all persons with whom she has contact now and in the future are able to recognise her even from her name as my daughter.\textsuperscript{409}
\end{quote}

The trial judge made a factual finding that the father had given evidence claiming the mother had a self-mutilating disorder known as Munchausen Syndrome\textsuperscript{410} in order to provide an alternative explanation for injuries he had caused, for which she needed to seek medical treatment. The judge rejected the father’s claim for contact, finding him to be an ‘inaccurate witness with no concern for his lack of accuracy’. Her Honour found that given the history between the mother, her two other children and the father, there would be little benefit in contact for the child and potentially much detriment. However, under consent orders

\textsuperscript{406} Judgment 11/99.  
\textsuperscript{407} Affidavit (m) 9/8/99.  
\textsuperscript{408} Affidavit (f) 29/7/99.  
\textsuperscript{409} Ibid.  
\textsuperscript{410} Munchausen Syndrome is a disorder in which people repeatedly seek medical treatment for false illnesses and injuries: WebMDHealth, Munchausen Syndrome, http://mywebmd.com/content/article/60/67152.htm (accessed September 15, 2004).
made after the start of the trial, the father was successful in having his name added to the child’s birth certificate and her surname changed from the mother’s to his. These orders meant the child would bear the name of someone she had met only once, and would have a different surname from her mother and brother.

This outcome illustrates the practical impact of the way that the parental responsibility provisions and s60B(2) in the FLA have increased the number of issues around which bargaining occurs in children’s matters, as noted in chapter two. The father’s original ‘ambit’ claim in this case was for contact with both his biological daughter and her half-brother who had no biological relationship with him. Additionally, he sought the change to the birth certificate and the name change for the child. By the end of the trial, he had abandoned his claim for contact to the boy and the mother had conceded on the issue of the child’s surname. The father therefore had a ‘win’ in relation to part of his claim, but the child was left with a surname different to that of everyone else in her family unit.

There were two other cases in which the child’s surname was under dispute. In each of these cases, orders were made for the children to have the father’s surname. Given that surnames historically define the connection between children and their paternal origins, erasing that between mothers and children, these decisions underline in a symbolic way the Court’s reluctance to sever paternal connections. The broader question of how maintaining connections between children and violent parents is addressed.

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412 See text accompanying fn 330 and 350.
413 T5, T13. Determinations in relation to children’s surnames are subject to their best interests: Chapman and Palmer [1978] FLC 90-510. Factors to be taken into account include the short and long term effects of the name-change, confusion in identity that may occur, the effect of the change on the parent-child relationship, the embarrassment the child may feel over having a different surname from the primary caregiver. Additional factors outlined in Beach and Stemmler [1979] FLC 90-692 include the amount of contact between the child and the non-residential parent and the degree of identification between the child and the father.
and abusive fathers is dealt with in the sample is discussed in the next section.

1 Biology/Identity: the ‘negative father’ construct

The preceding section has shown that ‘biology’ was the foundation of the fathers’ arguments in the group of cases in which relationships between fathers and children were tenuous or non-existent. The lack of substantive relationship history in this group was no barrier to fathers pressing claims for residence or contact. This section examines in detail the way these claims were dealt with in Family Reports and judgments.

The focus of this discussion is the role played by what I have termed the ‘negative father’ construct in family law proceedings. This term is used to encapsulate the position put in many psychological accounts and some judgments that an absence of contact with a violent or abusive father is potentially more damaging than maintaining contact with such a figure. The use of the word ‘negative’ indicates both that the fathers are ‘negative’ figures and that it is an argument that is negative in character in that it revolves around the potential for prospective harm rather than the presence of positive benefit.

The ‘negative father’ argument arises in relation to the question of maintaining children’s knowledge of the fathers in circumstances where there is no pre-existing relationship or where issues such as violence and sex abuse are relevant.⁴¹⁴ As the outcomes in A4 and T22, discussed in the previous section, highlight, mere biology is insufficient to establish a claim to residence or contact in decision making. However, the more complex issue of the child’s need to know his or her parents – based on the theory of identity formation – underpin psychological

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⁴¹⁴ The unacceptable risk test was explained in chapter two at text accompanying fn 259 and 263. This test was explicitly applied in four cases in the sample. An unacceptable risk to the child was found to exist in T5, T3. No such risk was found to exist in: A3, T17.
recommendations in circumstances where the fathers have little to offer their children in an affective sense.

Identity formation is grounded in Erik Erikson’s psycho-analytically based theory of development. According to this theory, people progress through eight stages of development from infancy to old age. In each of these stages, fundamental conflicts between two opposing beliefs arise. Resolution of these conflicts is central to the development of an integrated self. Adolescence is the critical time for identity formation, as the individual negotiates a period of ‘identity versus role confusion’. This involves a process of actively selecting and discarding new and pre-existing identifications according to one’s own interests, talents and values. As a source of early identifications, relationships with parents play a crucial role in this process. Confusion may arise if these relationships are absent.

A subsidiary theme is the notion that a lack of knowledge of one’s genealogical origins leads to confusion about identity. The concept of ‘genealogical bewilderment’, most often relevant in relation to adopted children, was originally theorised in detail by British psychiatrist HJ Sants. It is based on the idea that ‘[not] knowing [one’s genealogical origins] would appear to be incompatible with the secure ‘self-image’.

Subsequent accounts of adoption and psychological development have however emphasised that the crucial factor for adopted children is open and loving relationships with their adopted parents. In this context, curiosity about genealogical origins may arise, but will not inevitably lead to disturbances in psychological development. These are most

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416 Ibid.
417 Role models in childhood provide the early source of ‘identifications’ Harke Bosma and Coby Berlsma, ‘From Early Attachment Relations to the Adolescent and Adult Organization of Self’ in Jaan Valsiner and Kevin Connolly (eds), Handbook of Developmental Psychology (2003) 471.
likely to occur in circumstances where relationships in the adoptive family are disturbed.  

In the empirical material, the theory of identity formation underlies recommendations for ongoing contact with a parent who is impaired. A common theme in the psychological material is that the absence of a flawed father is more problematic for a child’s long term development than is his presence. The theory is used to support arguments for a parental role based in biology in the absence of a solid relationship history. Such arguments focus on the long term consequences for the child of the absence of a relationship with a flawed father, rather than the short term consequences of exposure to a parent who may be abusive. The issues raised by such arguments touch on a grey area in existing knowledge about child development: ‘how much conflict and anger can be experienced safely and without long-term consequences’.

The negative father argument involves a focus on the detriment that may ensue from a lack of contact with a biological father. The need for contact becomes framed in a way that is negative and speculative: harm may ensue if contact does not occur. The issue of whether contact is either beneficial or detrimental to the child in the short-term becomes obscured. Even though the argument has been rejected as a rationale for maintaining contact between parents and children in Family Court jurisprudence, my analysis shows that it receives considerable emphasis throughout the sample.

420 A similar tendency was evident in the UK: Bailey Harris et al, above n 53, 124.
422 Brown and Pederson [1992] FLC 92-271. The Full Court explicitly rejected the argument that ‘grave consequences’ would follow if contact between a biological parent and their child was denied as a justification for contact: 79,010. The First Three Years Report, above n 72, noted an emerging emphasis on this issue not present in surveyed pre-Reform Act 1995 cases: 5.73-5.76.
The way that the negative father construct operates is well illustrated by a sample case in which a positive finding that an unacceptable risk of child abuse was made and supervised contact was ordered. The six-year-old girl in the file had made disclosures of sexual abuse to her mother after separation, when she was four years old. The mother contacted the child protection unit of a local hospital. An investigation by the unit concluded abuse had occurred. The Assistant Director of the Unit recommended to the Court that no contact should take place since even supervision could not protect the child from further psychological damage.

According to the mother’s evidence, the child displayed intensely disturbed behaviour before and after contact, including tantrums and incontinence. On one contact visit, the father gave the child a toy bear covered with ‘honey’. This caused the child intense emotional distress and she requested that the ‘honey’ be cut off the bear because honey had been used in one of the sexual abuse incidents. The contact visits had ended about six months before the start of the trial because the father had refused to exercise contact unless it was supervised by the mother. At trial, the father was seeking unsupervised contact on an alternate weekend basis and joint long-term parental responsibility. The mother had applied for orders permitting supervised contact to take place four times a year.

The evidence of the Family Report writer was equivocal. Her report concluded that the child’s behaviour supported the view that ‘there are serious concerns about her welfare’. While no recommendation for contact to take place was made in her written report, the writer said in oral evidence that if contact ceased entirely, the child may ‘blow the husband up to be larger than life’. If contact was ordered, it should take place only if the child had therapeutic help in dealing with the
implications of the abuse. Further, the contact should be supervised by a person who could deal with the father’s behaviour:

adults that have abused children, even though they are being supervised, have powerful ways of working with and grooming children to accept power over them in a manipulative way. [T]he supervisor would really have to know what they were doing and what they were looking at.  

Although the evidence of the Family Report writer was highly qualified in this regard, the judge ordered contact to take place at a children’s contact centre on a two-hourly basis six times a year for one year, having found that the child would be subject to an unacceptable risk of abuse if unsupervised contact was ordered. After a year had elapsed, contact was to take place on the same schedule but under the supervision of the wife’s sister. The outcome in this in case responded to the suggestion that a cessation of contact would lead to long-term prospective harm, but not to the indications that harm was being sustained by the child in the short term.

The approach adopted by the judge to the dilemmas exposed by the expert evidence in this case exemplifies the way that complicated psychological issues may become translated into simplistic legal solutions. It was unclear from the judgment how the orders made would address the concerns raised by the psychological evidence in relation to two issues. First, there was no clear indication that the child would be receiving ongoing counselling to help her deal with the legacy of the

428 Judgment 7/1999. The approach taken in this case departs from that outlined in the leading reported decision on the use of supervised contact. In the pre-Reform Act 1995 decision of In the Marriage of Bieganski [1993] FLC 92-357 the Full Court cautioned against reliance on family members for supervision where an unacceptable risk was found to exist. It also held that supervised contact [then known as access] was not an appropriate long term measure. In the sample, a similar departure was evident in the other supervised contact case: T19. Increased reliance on supervised contact was noted in The First Three Years Report, above n 72, 5.73. Unpublished research suggests that this is consistent with a more general trend toward increased reliance on supervised contact without the Bieganski restrictions, reflecting the pro-contact culture that has developed since the inception of the Reform Act 1995: Rachel Carson, ‘Complex Contact Cases’, Guest Lecture, ‘Current Issues in Family Law’, 24 August 2004.
‘abhorrent forms of relationships’ she had experienced with her father which would ‘make her vulnerable’.\(^{429}\) Secondly, it would appear uncertain whether the contact centre had staff of sufficient knowledge of the factual background or sufficient expertise to deal with the abusive behaviour of the father when its manifestation was as subtle as the gift of an apparently innocuous toy. Moreover, how the wife’s sister would be able to address these issues as a supervisor in the longer-term was even less certain.

In taking the view that the Family Report author’s evidence clearly indicated that some contact would be better than none at all, the judgment oversimplified a series of complex psychological issues. The possibility of the child sustaining ongoing harm from maintaining contact with a manipulative and abusive father was seen as less dangerous than a cessation of contact altogether. There were indications in the child’s behaviour that the former type of harm was already being sustained and should — in the eyes of one expert\(^{430}\) — lead to a cessation of contact. This harm was concrete and immediate. The harm from the latter possibility was speculative and prospective, yet it was this possibility that the orders were tailored to avoid.

The highly qualified statements in the psychological discourse in this case became translated into the legal proposition that maintaining contact is in the child’s best interests. The more subtle and ambiguous messages about how difficult this may be at a psychological and emotional level were lost in the translation. This is characteristic of what the UK child welfare law experts, Michael King and Christine Piper describe as law’s ‘reductionist’ tendency’.\(^{431}\) Views and opinions expressed by psychologists and social workers that may be tentative and highly qualified become a matter of black and white. Such insights

\(^{430}\) Affidavit, Assistant Director of Child Protection Unit, 7/6/1999.
\(^{431}\) King and Piper, above n 178.
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undergo a process of reconstruction to meet the demands of legal discourse:

the law’s demand for decisiveness and finality, for winners and losers, for rights and wrongs to be identified and exposed to the public gaze in order to further its normative objectives tend to force legal judgements out of the mouths of child welfare representatives.\[432\]

In this way, statements about children and predictions for their future that should more properly be seen as imprecise and uncertain are seen as pronouncements of fact.\[433\]

The ‘negative father’ construct was a recurrent theme throughout the psychological material in the sample in relation to the more extreme cases. Whilst it had a significant impact on the outcome in T5, as discussed above, it was not always considered so persuasive in judgments.

In T22 for example, the case involving the cross-dressing father discussed above, the argument that the child needed a relationship with her father to ensure future emotional health was a central plank in the argument of the father’s counsel. The judge remained unconvinced, noting the father did not have sufficient insight to foster such a relationship. Given the past history of the relationship, the mother’s fear of the father was not unfounded and she would be unable to prevent her anxiety from being transmitted to her daughter. In the circumstances, ‘contact would be largely for the father’s benefit and not for the child’s’ and no contact was ordered.\[434\]

A distinction that goes some way toward explaining the differential outcomes can be made between the fact situations in T22 and T5. Whilst the father and child had a pre-existing relationship in T5, this was absent

\[432\] Ibid 50.
\[433\] Ibid.
\[434\] Judgment 30/11/99.
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in T22. In general, this is an important issue in considering the variation in approaches to the acceptance of the ‘negative father’ argument throughout the sample. Where there is an existing relationship between fathers and children, efforts are made to maintain it, even against a background of violence, sex abuse or mental health illness.

Both cases illustrate the power that the psychological theory of identity formation gives fathers: claims for parental roles are seriously considered, and even supported at the level of psycho-social discourse, in the absence of an affective history and in the context of a history of abuse. This point is considered further in the discussion of violence in chapter four.

In summary, this section has examined how biological notions of parenthood underlie the claims of fathers in the more extreme cases in the sample. In these fathers’ claims, the mere fact of biological fatherhood grounds an entitlement to a parental role, independent of a pre-existing relationship or an emotional and physical capacity to provide adequate care. The picture that emerges from judicial and psychological responses to this argument is more complex. While the argument that biology establishes a parental right is rejected in its crudest form, it is clear that the maintenance of blood connections, or at least knowledge of those connections, is a priority. The psychological theory of identity formation, which is influential in the production of the negative father construct, is a crucial element in this approach. This construct means that fathers’ claims for a parental role receive serious consideration even in the absence of a solid relationship history.

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435 The implications of the ‘negative father’ arguments are considered further in chapters five and six.
436 See text accompanying fn 736 and 766.
B Parenthood as relationship: FLA s68F(2)

The discussion in this section examines how parenthood as relationship, or a set of caring practices, is constructed in the empirical sample. More specifically, the analysis focuses on how particular provisions in the FLA s68F(2) checklist focus attention on parenthood as a set of caring practices in the context of judicial considerations of fathers’ and mothers’ claims. These provisions require the Court to consider the nature of the child’s relationship with each parent, the effect of any change in the child’s circumstances, including separation from either parent, the capacity of each parent to provide for the child’s needs, and the attitudes each parent has demonstrated to the child and the responsibilities of parenthood. Whilst FLA s60B(2) centralises biological connections, the FLA s68F(2) checklist necessitates a qualitative assessment of the relative caring capacities of the mothers and fathers.

The analysis in this section reveals that the application of the FLA s68F(2) checklist results in judicial findings that the parenting capacities of most of the fathers are not commensurate with their aspirations. An entitlement to an ongoing role for fathers is accepted in mothers’ arguments and judicial pronouncements but this remains limited to a contact relationship in a majority of cases due to a range of impediments. At the extreme, these impediments include histories of violence, addiction and mental illness as foreshadowed in chapter two. Often more than one of these elements is present in a case. Even in less extreme cases, consideration of the nature of each parent’s relationship with the child, and their ability to provide for the child’s needs, generally results in fathers being found to be less suitable caregivers than mothers.

437 ss(b).
438 ss(c).
439 ss(e).
440 ss(h).
441 See text accompanying fn 248 and 283.
1 Mothers

In most of the cases across the sample, mothers (or carers other than fathers) had been the primary caregivers to the children both before and after the break up of the relationship. In a minority of cases at the less extreme end of the spectrum, post separation parenting arrangements had followed a relatively straightforward residence/contact pattern where contact was exercised constructively and consistently. More commonly, residence and contact arrangements were the subject of ongoing tension and conflict, with contact in some cases occurring only on a sporadic basis or not at all.

In claiming residence, shared care or increased contact, fathers consistently impugned the quality of parenting provided by the mothers. In psychological discourse, ‘good’ mothers provide a ‘safe base’ from which their children can explore the world and form other healthy relationships. Bad mothers, on the other hand, engender insecurity and even psychopathology in their children. Within the sample, fathers’ arguments about mothers consistently pursued the theme of the bad mother: the woman who abused her children, used them as ‘fashion accessories’ or a form of ‘human prozac’, and alienated them from their fathers. This reflects the tendency for Family Court proceedings

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442 Exceptions are the shared care case: A6. Five fathers had care of all or some children in the family after separation: A3, T9, T12, T15, T20. Orders for the children in T12, T15 and T9 to be resident with the mothers were made as a result of the court proceedings.
443 A13, T1, T4, T6, T17, T21.
444 A16, T2, T3, T5, T7, T19, T23.
445 A4, T14, T22.
446 Inge Bretherton, 'Attachment and Bonding' in Vincent Hasselt and Michel Hersen (eds), Handbook of Social Development: A Lifespan Perspective (1992) 133.
448 Eg A2, A8, A11, A15, A16, T1, T7.
449 A15,
450 A6.
451 This argument is examined in detail in chapter five. See text accompanying 857 and 925.
to become ‘a critical assessment of a mother’s parental performance’ rather than a serious challenge to her primary caregiver role.452

The claims made by fathers in the sample were consistently undermined by the evidence presented in the Family Reports and in judicial decision making.453 Links were continually drawn between the mothers’ histories of caregiving and the creation of highly salient emotional and psychological relationships with children. In one case, for example, where the father was contesting residence of his two daughters, the judge noted that ‘[i]n the children’s life the mother is clearly the most important person. Their life is...intimately woven with her and the care that she can give to them’.454

A recurrent theme in Family Reports was the psychological theory of attachment, developed by British psychologist John Bowlby455 in the 1950s. It focuses attention on the quality of the relationship between a child and their primary caregiver from infancy. In circumstances where the caregiver is responsive, sensitive and consistent in attending to the child’s needs, a secure attachment is said to arise.456 An anxious, insecure attachment is said to develop where responsiveness and consistency are absent. Primary attachment relationships are said to establish a template for other relationships in later life: the child who is denied the opportunity to establish a secure attachment relationship, or who suffers disrupted attachments, may have difficulty with subsequent important relationships and may even develop psychological difficulties.457

452 Helen Rhoades in Boyd, Rhoades and Burns above n 74, 246.
453 Exceptions were: T20 where orders for residence of a 6 year old boy were made by consent after the start of the trial so he could reside with his sister in his father’s care: T12 which is discussed further at text accompanying In 481 and 483 and 694-698; A9 and A7 which are discussed later in this chapter at text accompanying 531 and 547.
454 T1, judgment, 8/99.
455 Child Care and the Growth of Love (1953).
457 Ibid.
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Bowlby’s early work stressed the importance of mother-child attachment relationships and was implicated in the development of views which characterised working mothers as harmful to their children. This work also contributed to a tendency to blame mothers both for minor behavioural problems in the children and more serious problems such as truancy and schizophrenia. Subsequent research however, has highlighted the fact that fathers can also be important attachment figures for their children and there is growing understanding of the father’s contribution to child development, both in terms of creating healthy children and in contributing to the development of psychological and emotional problems in children.

Within the sample, Family Reports frequently referred to the nature of the attachment relationship observed between the children and their parents, particularly mothers. Mothers were consistently found to be the primary attachment figures. This played an important role in undermining the veracity of fathers’ claims about ‘bad’ mothers’ and the extent of their own parenting history. This is illustrated in a case where the father had claimed to have been the primary caregiver for the child, a 3 year old girl, prior to separation. The psychologist’s observations undermined this claim in recording how the father became

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460 Ibid 170.
463 Affidavit (f) 2/7/1998.
464 A8, Family Report, 2/7/98.
‘flummoxed’ when the child became anxious and asked for her mother at the start of a play session with her father. So distressed was the child that it was necessary for the child care worker to step in and comfort her. On the basis of a series of observations of the child with each of her parents, the psychologist concluded that the child’s mother was ‘clearly the principal attachment figure’ from whom the child derived ‘greater security and comfort’. 465

In most instances mothers were found to have a greater capacity to deliver high quality and consistent care, meeting their children’s physical and emotional needs. Descriptions of mothers’ attributes noted their ability to put their children’s interests ahead of their own and act with insight and sensitivity in relation to their children. 466 Even in relation to the less extreme cases in the sample, there was a significant disparity between most mothers and fathers in this regard. In T4, for example, the mother emphasised her role as the primary functional parent in arguing against the father’s proposal for a shared care regime for an eleven-year-old girl and a nine-year-old boy. Prior to the breakdown of the marriage, she had worked from home so that she could also perform the tasks she saw were necessary to give the children ‘a happy childhood’. These included bathing the children, buying their clothes, driving them round, organising their birthday parties, being involved in kindergarten and doing reading at school. The children were the main focus of her life: ‘I structure all my activities around the needs of the children. I have a wonderful relationship with them. They are and always have been the first priority in my life’. 467

Even though this file might be described as ‘typical’ of the wider population, not showing family violence, drug abuse or mental illness, the difference between the levels of commitment shown to parenting by

465 Ibid.
467 T4, affidavit (m), 15/4/99.
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the parties was marked. This mother said that her ex-husband had undertaken some caring activities at her instigation but that until the last few months of the marriage his interest in them was limited: ‘[h]e occasionally played with the children after school whenever he was home and assisted me in preparing them for school on some mornings’. She argued that while the present regime of alternate weekend contact was working well, a shared care regime would not be in the children’s interests because of the husband’s casual approach to their day-to-day care. ‘I am very concerned that any increase in the amount of contact the husband has with the children would be disruptive to their homework requirements and routine’.  

The father’s application for shared residence was unsuccessful, although contact was extended with the addition of one night in the ‘alternate’ week. The psychological evidence relied on by the judge emphasised that the children were well adjusted because of the stability and routine provided by the mother: ‘They display affection and a close bond with both parents and are keen to spend time with their father. However, given their comments, it is clear that…they perceive that their mother has provided their care and looks after them’.  

A further interesting aspect of this case was the role played by the mother’s new partner. This reflected the prevailing imperative to clearly concede the primacy of the biological father in the children’s lives. He deposed that while he had a good relationship with the children and was happy ‘to assist the wife with their supervision’, ‘I do not aspire to take over the role of their father’. The theme of the supportive, but not presumptuous, new partner recurred through several files.  

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468 This was accepted by the judge: judgment 6/99. See also text accompanying footnotes 475 and 476 below for a discussion of the father’s role.  
469 T4, affidavit (m), 15/4/99.  
470 This is quoted in the judgment: 6/99.  
471 Affidavit (mother’s partner) 15/4/99.  
472 T1, T5, T9, T12, T18. Smart and Neale, (1999) above n 43, note the development of significant resistance to ‘the old idea of the new husband becoming the father substitute’ under the UK Children Act 1989: 100.
A big difference between the parental capacities of the mother and father has been exemplified in this discussion of T4. The mother was the parent most able to effectively meet her children’s day to day needs. The father’s capacity, considered in detail in the next section, was found to be somewhat more limited. Such a difference was manifested in most other files in the sample, though usually the father’s capacity was even more limited.

2 Fathers

The preceding discussion has established that in most cases in the sample, mothers were the primary parents in a practical sense. This underpinned their greater ‘success’ in proceedings across the sample. The extent to which fathers also fulfilled a practical parenting role varied significantly across the sample. In some cases, they assumed responsibility for the care of their children. In many more instances, their relationships were more tenuous due to varying levels of impairment.

Fathers in a few cases claimed to have fulfilled a primary caregiver role, but these claims were found to be inaccurate in a factual sense. For example, the father in T4, discussed in the preceding section, claimed he had taken a primary, or at least equal, role in caring for the children prior to separation because the mother had become ‘bored with playing a home-maker role’. This claim was contradicted by the husband’s work diaries. They showed he had been away from home for work for large amounts of time. He had further conceded under cross-examination that the mother had done all the domestic chores during the marriage and it became clear in the interview by the author of the Family Report that

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473 A6, T16, T17.  
474 A2, A8, A15, T18, T4.  
475 Affidavit (f) 12/5/1999.
he was unfamiliar with certain aspects of the physical care of the children.\textsuperscript{476}

There were also several cases in the sample in which fathers’ took little responsibility for the day-to-day care of their children post-separation even when they were with them. In two cases, the caring responsibilities were undertaken by the mothers.\textsuperscript{477} One mother deposed that until her former partner repartnered, she had to ensure that the child was adequately prepared for school. At times, the child would be delivered to her after an overnight stay unfed and unclean: ‘[The child] often smelt to the extent that she could not have had a bath on the previous night’.\textsuperscript{478}

In other cases, substitute carers such as new partners or parents fulfilled the caregiver role.\textsuperscript{479} Whilst the preceding section on mothering noted the reticence of mothers’ new male partners in claiming a fathering role, the caring capacities of fathers’ new female partners were often at the forefront of their arguments for residence. In T18, for example, the father of two girls aged 12 and nine claimed they should live with him and his new partner. She was portrayed as a capable, loving and very domestic woman who would be delighted to take on the care of the girls. His new partner’s characteristics were in stark contrast to those he claimed for his former wife: she was a cold parent who shouted at the children and often ignored them, being more interested in her work than her family.\textsuperscript{480}

In another file,\textsuperscript{481} the father gained orders confirming that two boys who had lived with him since separation would remain resident with him. A crucial factor in the judge’s decision making process was the fact that this would allow the paternal grandparents to maintain their caregiving role in relation to the two boys, whose mother was found ‘to have

\textsuperscript{476} Quoted in judgment 6/1999.
\textsuperscript{477} T9, A5.
\textsuperscript{478} A5, affidavit (m), 25/10/1996.
\textsuperscript{479} T1, T4, T8, T21, T12, T15, T20, T18, A5, A7, A9.
\textsuperscript{480} Affidavit (f) 5/6/2000.
\textsuperscript{481} T12.
struggled with the direction and control of [them] over the years’. In making a residence order in favour of the husband, the judge noted that:

it is the husband who has been fortunate enough to be able to provide, mainly through his mother, a consistent and high standard of care for the children. Moreover, I accept the evidence of [the grandmother] that she will continue to provide the present level of support for the children. 482

The outcome of this case, and the way that fathers’ arguments rely on the presence of others to do the caring work more generally, reflects the distinction between parenthood as ‘biology’ and parenthood as ‘relationship’ discussed earlier in this chapter. 483 In these instances, legal recognition was attached to the biological parent even though others assumed primary responsibility for the practical aspects of parenthood.

The quality of the relationships between the fathers in the sample and their children varied greatly. As noted in the preceding section, in the cases in the extreme part of the sample, such relationships were tenuous due to factors such as violence and mental illnesses. In the balance of the sample, some relationships were characterised by conflict and ambivalence 484 while others were solid and consistent. One father in a relocation case, for example, was found to have an exemplary relationship with his son, which had been sustained and developed in the context of a contact arrangement spanning three nights a week. The psychologist reported that it was clear the child had a ‘warm and close relationship with his father’ marked by reciprocal displays of warmth and affection: ‘There was considerable chat between the [child] and his father and [the boy] was very natural and comfortable in the presence of his father’. 485

482 T12, judgment, 10/1999.
483 See text accompanying fn 365 and 383.
484 Children’s wishes in the sample are explored in chapter five. See text accompanying 843 and 925.
In the majority of cases, father-child relationships were less substantial than this. Many fathers had provided ‘assistance’ to their former partners in caregiving tasks such as nappy-changing but their substantial involvement was more often of a recreational nature. Fathers’ frequently emphasised in their affidavits that they had an entitlement to a greater role in their children’s lives:

As a father I believe I have the right to see my daughter on a regular basis without any conflict or difficulties from the respondent…I want to be fully involved in [the child’s life] and not simply as a contact parent.  

Descriptions of the role of being ‘fully involved’ tended to focus on leisure activities, rather than the more tedious day-to-day aspects of caregiving. Arguing against a mother’s proposal to relocate to Brisbane, one father said:

I will become a “holiday parent” with no opportunity to be involved in school functions, festivals, swimming karate or any other extra-curricular activities…I have always envisaged watching him play cricket and being involved in helping coaching and with the social functions of a [cricket team]. This will be denied to us.

It is significant that this father’s description of the activities that would be denied to him as a ‘holiday parent’ focussed on mutual enjoyment of sporting and recreational pursuits and special educational activities. Throughout my sample, fathers’ claims for greater involvement in their children’s lives rarely envisaged responsibility for the practical aspects of parenting. Rather, participation in symbolic activities, such as attendance at sporting events, was equated with involved parenthood in this material. This is consistent with research showing that fathers spend more time playing and socialising their children than in caregiving tasks.

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488 Russell et al above n 103, 12.
In many cases, the practical parenting capacities of fathers were questionable. Fathers’ lack of capacity to provide sufficient levels of care for their children emerged as a consistent theme in the mothers’ material. These concerns ranged from basic issues, such as the capacity to provide healthy and nutritious meals and meet simple hygiene needs, to more complex social and emotional tasks such as facilitating social relationships and supporting educational needs. Fathers denied these concerns had a basis in reality but judicial fact-finding processes in most cases lead to the validation of mothers’ concerns.

In one case, for example, a key plank in the mother’s argument against an increased level of contact was the father’s failure to ensure the children completed homework tasks, even though he was a qualified teacher. The father’s claims to be ‘strongly involved with the children’s homework’ were found to be factually inaccurate after he conceded in cross examination that he made no attempt to ensure that the children did their homework when they were with him. This led the judge to conclude he deserved little credit for his children’s achievements: ‘I am satisfied, on the balance of probabilities that the children’s excellent performance at school is, in large measure, due to the efforts of the wife.’

In some instances, the deficiencies in fathers’ care skills were evident at an even more basic level. Both safety and adequate nutritional intake were consistent concerns. In one case, for example, the mother argued that the father had little regard for the child’s safety by engaging in such activities as sawing trees with a chainsaw while the four-year-old boy was in his sole care. Independent verification of the inadequacy of this

489 This is consistent with Rhoades’ study on contact enforcement proceedings: above n 137, 75.
490 T3, T4, T9, A5, A4, A16, A14, A8.
491 T4, affidavit (m), 15/4/99.
father’s caregiving was supplied by the Family Report evaluator, who observed that:

[t]he child is at a vulnerable age when significant and attentive supervision and care is still required. For such to occur, responsible adults are needed. [The father] presents as someone with minimal internal controls and who has a significant history of irresponsible and at time dangerous behaviour.\(^{493}\)

In support of his application for unsupervised contact, the father had argued that:

a father should rear the child in the same standing as the mother for further reason that Parliament has also recognised the need for both the parents to be equally responsible in the care, attention and long term welfare of the child.\(^{494}\)

In contrast, the recommendation made in the report was for supervised contact to continue since it was clear that the child ‘saw the father as being important in his life’. However, because the father would not agree to supervision, no direct contact was to take place under the orders made at trial.\(^{495}\)

One of the most clear-cut aspects of fatherhood has traditionally been the obligation of financial support. While the emotional, psychological and ‘caring’ dimensions of fatherhood are more obscure,\(^{496}\) the importance of financial provision as an aspect of parental obligation,\(^{497}\) and more practically an incident of the breadwinner role, is uncontested. A recurrent theme within the sample however was the failure of a significant proportion of fathers to consistently meet this obligation.\(^{498}\)

\(^{494}\) Affidavit (f) 7/5/1999.
\(^{497}\) Each parent has an obligation to support the child to the extent they are able to do so: Child Support (Assessment) Act 1989 (Cth) s3(1).
\(^{498}\) T2, T1, T23, T7, T4, T10, T17, T11, T18, A3, A5, A16, A15, A9. Research prior to the introduction of the Reform Act 1995 and the Child Support Scheme indicated a weak association between the payment of child support and the exercise of contact:
Within judicial discourse, this was treated as evidence of a lack of genuine commitment to their parenting role.

The avoidance of the child support obligation was manifested in the sample in a number of ways, ranging from simple failure to pay to taking deliberate steps to reduce assessable income.\(^{499}\) A particularly extreme case involved a mother and father who had been enmeshed in litigation over both property and children’s matters for a number of years. The father was found to have deliberately reduced his financial worth by closing a lucrative consulting business to take on employment at a much lower rate of pay.\(^{500}\) In addition, after a Family Court decision on the disposition of property he had entered a bankruptcy arrangement which threatened the realisation of the judgment. This, the judge noted, was seen by the wife as part of an ongoing pattern of abusive behaviour:

> The possibility of now losing her only financial security with which to re-house herself and the children in her care is no doubt frustrating and frightening. She said that [the father] had threatened to see her without money so she cannot help but feel this as ongoing abuse.\(^{501}\)

The failure of fathers to fulfill their child support obligations was seen by judges as a factor that made mothers’ responsibility more onerous. In one case, for example, the father criticised the mother for working long

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Kathleen Funder, Exploring the Access Maintenance Nexus, in Kathleen Funder, Margaret Harrison, Ruth Weston (eds) Settling Down: Pathways of Parents After Divorce (1993). However, the The First Three Years Report, above n 72, 1.29-130 and the Every Picture Report, above n 3 (6.95-6.114), suggest social pressures to link these issues are increasing. See also Bruce Smyth, Grania Sheehan and Belinda Fehlberg, ‘Patterns of parenting after divorce: A pre-Reform Act benchmark study’ (2001) 15 Australian Journal of Family Law 114, 126.

\(^{499}\) A recent report highlights non-payment or minimisation of child support after separation as a manifestation of financial abuse, defined as ‘a serious form of abuse that deprives women of sufficient financial resources to fulfill their basic needs’: Elizabeth Branigan, ‘“His Money or Our Money?”: Financial Abuse of Women in Intimate Partner Relationships’ (2004), ii. The Report was based on individual and focus-group based interviews with 64 Melbourne women. It also notes that institutions such as the FCA (particularly through proceedings relating to the division of marital property), the Child Support Agency and Centrelink contribute to the difficulties confronting women who experience financial abuse from former partners: 31-34.

\(^{500}\) A3.

\(^{501}\) A3, judgment, 6/1999.
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hours and using child care to enable her to do so. However, it was recognised in the judgment that the father’s actions in not contributing to the child’s upkeep financially and continuing to pursue applications in the Family Court put the mother in this position:

his failure to appreciate the fact that his non-contribution towards the support of the child [put the mother in this position] was breathtaking in its audacity…by his performance he demonstrated a dogmatic view that he was neither obliged, and nor should he contribute, towards the child’s day to day care. It was his view that any monies paid to the wife by way of child support would be squandered by her upon herself and not for the benefit of the child.

In some cases, fathers’ claims for more time with their children were explicitly linked to a desire to reduce their child support obligations. In one case, for example, the judge concluded that the father’s ‘anger over his child support assessments was a driving force behind his attack on his wife’s parenting’. The husband had claimed that he was told that payment was optional by the Child Support Agency, a claim the judge dismissed as ‘fatuous’.

In another case where the mother had applied to reduce the amount of time the child the spent with her father, she offered to forego any extra entitlement to child support:

[e]ven though the reduction in time [the child] spends with the husband will have the effect of increasing the husband’s child support liability, I am happy to accept the situation where his child support payments remain the same as if he had substantial contact.

This offer was made against a background where the mother said she had accepted an ‘unfavourable’ financial settlement because the father had said ‘it would go against the [child] if I argued about money’.

This is consistent with US research that shows women are prepared to

502 A15, affidavit (f), 18/11/1999.
504 This is consistent with trends noted in the *The First Three Years Report*: 1.29-1.30.
505 T18, judgment, 8/2000.
507 Ibid.
compromise on property entitlements in order to preserve their positions as primary caregivers for the children. 508

In summary, this discussion has shown that relationship history and parenting capacity are key factors militating against the success of fathers’ claims for orders allowing substantially increased involvement in their children’s lives. The primary caregiver role that mothers have fulfilled in relation to their children mean that they are more salient figures, at an emotional, psychological and practical level. In contrast with the social and legal ideal of a non-gendered, ‘symmetrical’ ideal of parenthood, 509 the model in the sample is deeply gendered and highly asymmetrical. The histories and capacities of the parents are nowhere near commensurate. In some cases in the sample, this is recognised in orders that curtail the time fathers spend with children and the level of responsibility they can exercise. 510

In general, the gender-neutral legal model does not fit the social reality. The sample data confirms a social difference between the roles and capacities of ‘residence’ parents (mothers) and ‘contact’ parents (fathers). This is acknowledged in judicial discourses in the context of the application of the FLA s68F(2) ‘checklist’. However, prevailing legal policy discourses on parenting are increasingly oriented toward erasing recognition of this difference. 511 This reinforces a double standard operative in society more widely in relation to the parenting by mothers and fathers, within which a ‘much lower standard of caregiving is expected of fathers’. 512 It reflects the fact that women’s caring work is viewed ‘as a natural attribute requir[ing] little or no substantive

508 See eg Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985) 394. The Parenting Planning and Partnership, above n 100, report suggested, as an ‘educated guess’, that the bargaining dynamics around children’s issues and property appeared to ‘operate independently’: 74.
509 Smart and Neale (1997) above n 56.
510 See above, text accompanying fn 341 and 347.
511 The Every Picture Report (above n 3) recommended yet another semantic change aimed at eliding this difference. It suggested ‘residence’ and ‘contact’ be replaced with ‘family friendly terms’ such as ‘parenting time’: Recommendation 4.
512 Boyd, Rhoades and Burns, above n 74, 246; see also Boyd (2003) above n 58, 219.
acknowledgement’. 513 Any involvement by fathers that indicates that they ‘care about’ their children supports their ‘sacred’ place in a legal and social order514 preoccupied with ‘fitting fathers into families’. 515

While the greater ability of mothers to meet the demands of practical parenthood is acknowledged to a limited extent in case-by-case outcomes, caregiving as a basis for parenthood cannot be said to be privileged.516 As the discussion of biological constructions of parenthood in the first section of this part highlights, great emphasis is placed on maintaining ties between fathers and children and fulfilling the normative aims of s60B(2). The next section explores the way this is reinforced in the application of s68F(2)(h) which requires the Court to scrutinise the parties’ attitudes to the child and parenthood.

3 The Friendly Parent Criterion

Rhoades has argued that the rhetorical construct of the ‘no-contact’ mum is one of the most significant features of the contemporary family law arena.517 She has established that while the figure of the contact-denying mother looms large in fathers’ claims, there is little evidence in contact enforcement proceedings to suggest that this is a real life phenomenon.518

The data from the sample sheds further light on this issue.519 A pervasive theme in the mothers’ affidavit material is their support for ongoing contact between fathers and children: in all but the most extreme cases,

513 Smart (1991), above n 384, 494.
514 Ibid.
515 Russell et al, above n 103.
517 Rhoades, The ‘No Contact Mother’, above n 137.
518 Ibid.
519 This issue is typically considered in relation to s68F(2)(h) which requires the judge to consider the attitudes to the child and the responsibilities of parenthood demonstrated by each parent.
contact is a given. Negative attitudes to the other parent were found most frequently and forcefully among the fathers: in many of the fathers’ affidavits the mothers in the sample were subject to quite extreme levels of criticism which were mostly found to be unjustified. This is most strongly, though not exclusively, evident in the affidavits drafted by self-represented litigants.

Currently, the friendly parent criterion is not explicit in the FLA. Attitudes to the other parent are examined by the Court in the context of assessing ‘parental attitudes’ more widely under FLA s68F(2)(h). This provision requires the Court to consider ‘the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents’. The willingness of the residential parent to support the child’s relationship with the non-residential parent has always been a consideration in Australian family law, as the 1979 decision in Gronow v Gronow highlights. However, this analysis suggests that it has become a highly influential consideration under the Reform Act 1995 with adverse consequences for the positioning of mothers and the safety of children in circumstances where the Court has been faced with increased applications for contact in cases involving domestic violence.

Other data support this conclusion. A Family Court analysis of 91 judgments in three registries conducted in 2003 found that FLA s68F(2)(h) was considered to be of high or moderate importance in 63.7 per cent of judgments. The next most emphasised provisions were

520 The possibility that this reflects strategic pressures arising from the necessity to adopt a ‘winning’ position is discussed below. See text accompanying 548 and 565.
521 (1979) 144 CLR 513. In Gronow, the High Court rejected the proposition that the ‘mother principle’, meaning that a young female child is best left in the care of her mother, was ‘a rule of law’. It overturned a decision by the Full Court of the Family Court which reversed a trial judge’s decision to award custody of a four-year-old girl to her father in ‘finely balanced’ circumstances because the mother was hostile to him in the presence of the child.
522 See Hart above n 144, The First Three Years Report above n 72, 5.24-5.35.
523 FCA Submission Part B and C, above n 30, 11.
524 A range of issues may be considered under the umbrella of this provision so it cannot be assumed that this figure relates exclusively to friendly parent attitudes. It
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found to be those directing attention to the nature of the child’s relationship with each parent (s68F(b)) and the likely effect on the child of any change in circumstances (s68F(2)(c)). Each of these factors was considered to be of high or moderate importance in 60.4 per cent of cases. Issues relating to family violence, in contrast, received emphasis in only 24.2 per cent of cases. The analysis in this section highlights some concerning aspects of the role that the friendly parent criterion plays in a context where the Court has been inundated with fatherhood claims by men whose capacity to parent is marginal.

A proposal to introduce an explicit friendly parent criterion in the FLA has recently been raised by the Federal Government in the A New Approach Discussion Paper. The Government has based its proposal on two provisions operative in the US state of Florida which require the Court to consider the willingness of the parents to facilitate contact and encourage a close relationship between the child and the other parent. Such a rule is also part of the formal legislative framework in Canada, where s16(10) of the federal Divorce Act 1985 requires the Court to consider the willingness of the custodial parent to facilitate as much contact with the non-custodial parent as the Court determines to be in the child’s best interests.

In the UK, ‘obdurate mothers’ who were ‘implacably hostile’ to contact became the subject of judicial criticism provides some indication however of the emphasis placed on this issue. The Parenting, Planning and Partnership Report, above n 100, also foreshadowed the possibility that the friendly parent criterion would receive increased emphasis under the Reform Act 1995: 19. It suggests that FLA s68F(2)(k) also raises this consideration. It requires the Court to consider whether it would be ‘preferable’ to make an order that would be least likely to lead to the institution of further proceedings. Where friendly parent issues were explicitly linked to a s68F(2) provision in my sample, this was most frequently done so under ss(h).

Florida Statutes § 61.13.3(a) and (j). See also A New Approach Discussion Paper, above n 6, 14. Such provisions are common in other US jurisdictions. See eg Cal Family Code (West) § 3040(a)(1); Lemon, above n 51, 644.

Susan Boyd, (2003) above n 58, argues this provision weakened the position of mothers in custody proceedings significantly: 121. The proposed amendments to the Divorce Act 1985 in Bill C-22, discussed in chapter one (see text accompanying fn 58 and 64), water down the existing provision. The new provision (s16.2(b)) requires the Court to consider the benefit to the child of developing and maintaining ‘meaningful’ relationships with both parents and the parents’ willingness to support this. This directs attention to relationship quality: Neilson (2003) above n 63, 41.
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following the implementation of the Children Act 1989 (UK).\textsuperscript{528} Whilst the UK legislation contains no explicit provision such as that in Canada’s Divorce Act 1985, its contact order provisions require the person ‘with whom the child lives’ to allow contact to take place with the person named in the order.\textsuperscript{529} Against the background of the pro-contact culture that developed under the Children Act 1989 (UK), Smart and Neale observed that the ‘hostile mother herself [became] defined as the problem’ in contact disputes.\textsuperscript{530}

(a) Mothers’ attitudes to fathers

Although the central point in this part of the analysis is that most of the mothers in the sample were supportive of ongoing contact between fathers and children, I begin with a discussion of two cases that do not support this claim. In each of these cases, a residence case, A7, and a relocation case, A9, the mothers were found to be insufficiently supportive of the fathers’ relationships with their children. Each of these mothers ‘lost’ their cases for this reason and the judicial approaches reflect a prioritisation of the shared parenting aims and right to contact in FLA s60B(2).

This discussion refers back to the point made in chapter one about the role of judicial decisions in a jurisdiction dominated by alternative dispute resolution mechanisms.\textsuperscript{531} In such a context, judicial decisions have an important role in ‘radiating messages’ about the limits of acceptable behaviours. They play a penalising function in showing what happens when the normative standards of the legislation are breached. This point informs the analysis presented in the following section.

\textsuperscript{528} Smart and Neale (1997) above n 56, 334.
\textsuperscript{529} s8(1).UK Courts also exercise jurisdiction in relation to children when considering divorce applications: Family Law Act 1996 (UK) (s11(a)). In 1996, this legislation was amended to provide that in exercising powers deriving from the Children Act 1989 (UK) in divorce proceedings, Courts are required to assume that ongoing contact with parents and other family members serves the welfare of the child unless there is evidence to the contrary: s4(c).
\textsuperscript{530} Smart and Neale (1997) above n 56, 333.
\textsuperscript{531} See text accompanying 92 and 103.
(i) *The Deviants*: ‘wilful and irrational’

The six year old girl involved in case A7 had always lived with her mother and her older half-brother. Her mother represented herself in the legal proceedings while her father had legal representation. Her father saw her regularly but they had never lived together as a family unit. After the relationship broke up, the father experienced difficulty exercising contact, which he claimed was a result of the mother’s obstructive conduct. His application was initially for orders under the *FLA* s112AD contact enforcement provisions but ultimately he applied for residence orders without formally filing such an application prior to the commencement of the proceedings. He claimed that ‘as a father I believe I have the right to see my daughter on a regular basis without any conflict or difficulties’ from the mother’.  

According to the mother, the relationship was emotionally and physically abusive: this abuse took place in the presence of the children and the father had a tendency to behave in an abusive way towards the children. She claimed that the child herself was reluctant go on contact visits because of this history. The relationship ended after an incident in which the father, in the presence of the two children, threw ant rid and cordial in the mother’s face, expressing a wish for her to go blind.

The judge took an adverse view of the mother’s credibility, observing that she was not a truthful witness and that she became tearful when under pressure in the witness box on ‘too many occasions for it to be coincidental’. The judge made a positive finding that the relationship was not abusive, either to the mother or the two children, but that it was ‘turbulent’ and there were occasions ‘that the father did not behave in an appropriate manner’. She accepted that until the relationship broke

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532 Affidavit (f) 31/5/1999.
533 Affidavit (m) 22/6/1998.
534 The issue of violence is dealt with substantively in chapter five.
down and the mother began to hinder contact, the father had had a positive relationship with the child and was ‘a person capable of putting [the child’s] interests ahead of his own’.  

Having accepted the father’s credibility, the judge made a positive finding that the mother had alienated the child from the father since the break up of the relationship and was unable to accept that it was necessary for the child to have an ongoing relationship with the father. The mother’s reason for doing this, according to the judge’s interpretation, was to punish the father for the break-up. Indeed, ‘her attitude’ was found to be so ‘either wilful or irrational that it does indicate a defect of personality or character which in turn indicates to me that she is not a suitable person with whom [the child] should reside’. If the child was to have a relationship with her father, a change of residence would be necessary.

The judge’s analysis thus became focussed on weighing the implications of two potential sources of trauma. These were: first, an ‘immediate source of trauma’ that would ensue for the child if she was to be removed from the family unit comprising her mother and half-brother, which she had lived in since birth; and, secondly, the longer term implications of not seeing her father. According to evidence from a psychiatrist who had seen the family, the latter scenario could result in the child developing an emotional disorder that would impair her ability to form relationships in later life. While the father was untested as residence parent, the judge noted he would receive ‘assistance and guidance’ from his new partner who also had children. Notwithstanding her findings on the mother’s ‘wilful and irrational’ attitude as a residence parent, the judge was hopeful that in time the mother would be able to sustain her role as a contact parent.

536 Ibid.  
537 Ibid.
The mother appealed successfully in this case on the basis of a lack of procedural fairness in the running of the trial. However, the messages radiated by the trial judge’s approach to the issues remain relevant. The procedural unfairness may have impaired the mother’s ability to argue her case effectively, but there remains little doubt about the factors emphasised in the judge’s balancing of the issues: residential parents with an inappropriate attitude to contact risk losing residence.

In A9, the relocation case, a similar approach was taken to a father-son relationship. The case concerned a four-year-old boy, whose father had lived with the mother and child for a total of 11 weeks in two periods the year after his birth. The mother subsequently re-partnered, eventually moving to Brisbane with her husband and children (the boy that was the subject of the application, an older daughter from a different relationship and a baby from the marriage). This was in breach of court orders restraining her from moving the child interstate. The mother did not inform the father that the child had left Melbourne, and the child was transported to Melbourne for the purpose of contact. The father discovered the child was not residing in Melbourne and took legal action. After several interim hearings, the matter came on for trial. By this time, the mother and her family had been settled in Brisbane for almost a year.

The judge’s reasoning in this case clearly manifested a concern to ‘penalise’ the mother for her attitude to the father and the litigation, and explicitly acknowledges the role that the court orders would play in discouraging her from maintaining this attitude.

When the matter came on for trial, the judge noted he was ‘far from convinced that the mother is in favour of contact, or at least regular

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539 This case is discussed in more depth in chapter five at text accompanying fn 949 and 962.
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A decision made in her favour would strengthen her position so that any ‘reason for a missed contact period, or missed ongoing contact, would be harder to gainsay’. Further, His Honour was unconvinced that the mother really did believe the father-child relationship was of value:

I believe that the extent to which she may feel it has some value is not strong and would be likely to give way in the face of relatively small difficulties or irritations.  

The judge emphasised his view that s60B(2) included the notion of ‘reasonable frequency of contact’. While the mother’s reasons for wishing to live in Brisbane were bona fide, her previous breaches of court orders (preventing relocation) and her attitude to contact ‘threw doubt on her actions and motives’. His Honour ordered that the mother and the boy live in Melbourne so that the father could exercise contact on alternate weekends from Friday to Sunday and for half the school holidays.

The judicial approaches in these two cases represent something of a high water mark in the sample in the legal prioritisation of the father-child relationship. Two significant points emerge from these decisions. First, they are indicative of what has been described as ‘a new balance in family law’ and the pro-contact culture that followed the introduction of the Reform Act 1995. In each case, the histories of the fathers’ relationships with the children were much less substantive than those of the mothers. In both cases, the mothers’ caregiving capacities were unchallenged, except in the respect of their ability to foster the father-child bond. In each case, this was in itself a factor of sufficient importance to ensure the success of the fathers’ applications. In A9, the

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541 Ibid.  
543 Parker, New Balances, above n 104.  
544 Rendell, Rathus and Lynch, above n 177; The First Three Years Report, above n 72, 1.20.
child had a series of other bonds with his mother, his older half-sister, his younger half-sister and his stepfather. The child in A7 had only ever been cared for by her mother in a family unit that also included her older half-brother. The relationships between the siblings were close. These networks of connections were subjugated in both cases to the father-child bond. The implications of this approach for children are explored in greater depth in chapter five.

Secondly, the role of judicial determinations as ‘penalising’ those who breach accepted standards can be seen most clearly. In not being sufficiently supportive of the relationships between their children and their biological fathers, each of these women breached what is seen in the current environment to be a crucial standard. Although their capacities as parents were unimpeachable in other respects, their attitudes to their children’s biological fathers were intolerable. The message radiated is this: mothers who impede contact are flawed, regardless of their other qualities as parents. A significant aspect of this message is its role in ‘disciplining’ mothers and reinforcing a particular ‘ideology of motherhood’ that requires women to ‘accept selfless responsibility for encouraging the father-child relationship, act reasonably, and try her hardest to make [contact] work’.

In terms of the philosophical duality in the FLA discussed in chapter one, the judicial approaches in these cases are indicative of a rights-based approach to balancing interests and obligations. This involves a construction of the child that insists the ‘right’ to contact should be emphasised over and above the other interests and connections to which s68F(2) refers. In each of these cases, the attachment relationships between the children, their mothers and their siblings were seen to be

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545 No Family Report was available in these proceedings. A subsequent Report, made in relation to a further application by the mother for orders permitting her to relocate to Brisbane with the child, emphasised that the child’s strongest attachment was to the family unit he lived in with his mother. See below, text accompanying fn 958 and 959.
546 See text accompanying 948 and 965.
547 Boyd (2003) above n 58, 156.
inferior to their relationships with the fathers. Neither of these children had never lived with these fathers, yet this relationship was prioritised.

(ii) The Conformists

The emphasis placed on the friendly parent criterion as an essential attribute in resident mothers is confirmed by evidence in the data of a pro-contact approach in all but the most extreme circumstances in the mothers’ affidavit material. Mothers’ attitudes to fathers also received scrutiny in Family Reports and judgments, suggesting a mutually-reinforcing interaction between the approaches of various system players to this issue. This is consistent with UK research which has highlighted how the shared parenting philosophy underlying the *Children Act 1989* (UK) created new standards and expectations for lawyers and their (female) clients.

Research by Neale and Smart established that the practices of ‘good’ lawyers under the new regime became oriented toward achieving outcomes consistent with the pro-contact culture of the legislation. Similarly, Rebecca Bailey-Harris, Jacqueline Barron and Julia Pearce noted that judges treated ‘recalcitrant mothers’ ‘like naughty schoolgirls who should be persuaded, or if necessary, coerced to ‘behave’, rather than as responsible adults trying to do the best for their children’. Evidence of the adoption by mothers themselves of a welfare-oriented philosophy favouring ongoing contact with fathers has been established by Day Sclater. Her research indicated that in order to conform to prevalent definitions of what constitutes a ‘good’ mother, separated women recognise ‘they have to put the ‘welfare’ of their children first

548 See also *The First Three Years Report*, above n 72, 5.49-5.51.
550 Above n 53, 122.
551 Above n 378.
and they have to accept the premise of the dominant welfare discourse that contact is good for children’.

Indications of a similar requirement to conform to the pro-contact philosophy prevalent in Australia under the Reform Act 1995 are evident in my sample. In contrast with the two ‘deviant’ mothers, the majority were supportive of relationships being maintained between their children and their fathers including even in some cases where fathers suffered mental illnesses or there was a history of violence. In these instances, the mothers stressed the fact that they were in favour of an ongoing relationship provided the safety of the children could be maintained.

In one case, for example, the father suffered from a severe psychiatric condition for which he refused to seek treatment. Violence had occurred both before and after separation. On one occasion, the child’s maternal grandmother had rung to warn the mother that the father was on his way to her house threatening to kill her. The police were called to forestall this possibility. The father had exercised contact under the supervision of the paternal grandfather. Even under such conditions, the father had allowed the child to play with cigarette lighters and had spoken inappropriately to the child. After one contact visit, for example, the child, a 4-year-old boy, said to his mother that Daddy ‘didn’t like her’. The mother deposed:

I asked him why he thought that and he explained this by telling me that his father had said he thought that and he explained this by telling me that his father had said he would look after him and our dog after he had killed me.

552 Ibid 166.
553 As noted in chapter two, there were seven cases where direct contact was opposed by mothers/or carers: see text accompanying fn 314 and 319. These cases involved severe violence or mental health impairments. These will be discussed in chapter four.
554 See also The First Three Years Report, above n 72, 5.25-5.33 and Rhoades, The 'No Contact Mother', above n 137, 85.
555 T19.
556 Affidavit (m) 14/2/2000.
557 Ibid.
Although she opposed the father’s application for unsupervised alternate weekend contact, the mother was nonetheless supportive of ongoing supervised contact:

I still believe that it is in [the boy’s] best interest to see and have a relationship with his father provided that appropriate supervision is undertaken and that contact should only take place when the husband’s mental condition is stable.\(^{558}\)

Some mothers in the sample were prepared to facilitate contact even though it exposed them to verbal and physical abuse. In one case,\(^{559}\) where the father had received a community service bond for an assault on the mother, she was still prepared to supervise contact outside a police station to maintain the father-child relationship. ‘Whilst I did not wish to prevent contact between [the child] and the Husband… I was concerned about the husband’s violent and threatening behaviour and his lack of experience in caring for the child.’\(^{560}\)

Having been warned by police that the father would use contact orders to ‘get around’ an intervention order preventing him from being near the mother,\(^{561}\) she ‘felt that the only contact arrangement which could proceed was limited supervised contact outside the Police Station’. The mother in this case stressed her ongoing compliance with contact orders:

Any contact that did not happen was missed by the husband. Even during the period when the husband was having contact supervised by me for three and a half hours outside the police station I would sit there and wait with [the child] despite the inconvenience, even when the husband did not arrive.\(^{562}\)

In some instances, mothers admitted to holding an attitude of ambivalence, based on their own experience of a relationship with the

\(^{558}\) Ibid.

\(^{559}\) T3.

\(^{560}\) Affidavit (m) 20/5/1999.

\(^{561}\) FLA s68R provides that the Court may make a contact order that is inconsistent with a family violence order. Under FLA s68S, the inconsistent contact order prevails over the family violence order.

\(^{562}\) Ibid.
father. In one case, for example, while the mother claimed the father was malicious and manipulative, she also recognised that her children’s relationships with him had some value. ‘I see my children want to be with him. I understand that. I want them to enjoy what’s positive about him but I don’t know how to protect them from the things that aren’t.’

This aspect of her evidence was stressed in the judgment, which noted that the mother ‘appreciated his strengths and contributions to their lives. She appreciated their attachment (in varying degrees) to him’. This case provides a good illustration of how the ability on the part of mothers to separate their own experiences from those of their children was seen as a mark of maturity and child-centredness in the judgments. It also shows how women are required to distance themselves from their own subjective experiences in order to conform to prevalent ideas about what constitutes a ‘good’ mother.

As the approach in the judgment discussed in the preceding paragraph shows, the shadow of the no-contact mum also influenced Family Reports and judgments. A consideration of whether there was evidence that the mother had acted obstructively in relation to father/child relationships recurred in many of the Family Reports. In a relocation case for example, there was no suggestion the mother was attempting to impede her son’s relationship with his father. Even so, her attitude to the father-son relationship was commented upon in the psychological evidence, and stressed in the judgment:

The Counsellor was particularly struck with [the mother’s] affirmation to [the child] of his father…the mother was always encouraging to [the child] about his father…[the mother] acknowledged to the counsellor that [the father] was a good father to the child and they enjoyed a close relationship.

(b) Fathers’ attitudes to mothers

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564 A3 judgment 6/99.
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One of the biggest contrasts in the data can be drawn between mothers’ attitudes to fathers and fathers’ attitudes to mothers. While mothers explicitly acknowledged the value of fathers in children’s lives, fathers, in contrast, engaged in wholesale denigration of mothers. Fathers in many instances claimed that mothers were inadequate carers who had little regard for their children.

In some cases, even more serious claims, relating to emotional, psychological and physical abuse were made. These claims were qualitatively different to the concerns raised by mothers. While mothers’ concerns were frequently found by judges to have a basis in reality, those of fathers were more often found to be unjustified.

A file involving a four-year-old girl, A15, provides a very clear example of this pattern. This file involved protracted legal proceedings over residence and property matters for three years before the matter finally proceeded to trial. The father alleged that the mother had been physically, verbally and emotionally abusing the child before and after separation. He had made reports to the Department of Human Services that were investigated and found to be unsubstantiated.

The mother had residence of the child under interim orders. The father had been exercising alternate weekend contact although this had at one stage been suspended for a period of ten months after a series of conflicts at changeover. On one occasion, the police were called after the parents were literally involved in a physical altercation over the child.

According to the father, the mother had shown a ‘total lack of understanding of the child’s, needs wishes and rights’. Not only was she

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566 T2, T1, T23, T3, T7, T8, T10, T17, T9, T12, T15, T18, A2, A5, A16, A12, A15, A6, A8.
567 Adverse credibility findings in relation to fathers were explicit in these files: T1, T23, T3, T7, T10, T9, A2, A5, A16.
568 The system of DHS notification was explained in chapter two: see text accompanying fn 265 and 270.
570 Affidavit (m) 14/11/1999.
physically and emotionally abusive, but she had ‘destroyed the family life that [the child] would have had’. In his argument, the mother’s lack of maternal warmth was further evidenced by the fact that she worked full time.\textsuperscript{571}

Despite what the judge accepted was the husband’s virulent denigration of her,\textsuperscript{572} the wife deposed that she had always supported the father-daughter relationship:

\begin{quote}

\textit{since separation I have always endeavoured to foster a relationship between the husband and [the child] notwithstanding…the husband’s aggressive attitude towards me and his manipulative behaviour towards the child in seeking at times to alienate her from me.}
\end{quote}

His behaviour in this regard was of ‘considerable concern’ but an ongoing contact relationship was nonetheless uncontested by the mother. She also argued that as primary caregiver to the child, her ‘balanced’ approach to the child’s emotional development would ‘negate the effect of the husband’s obsessive and negative attitudes’\textsuperscript{573}.

The Family Report noted the father’s concerns about the mother, quoting his allegations that she was ‘immoral’, a ‘liar’ and abused the child. The counsellors’ observations of the child with each of her parents undercut these claims. The mother was ‘competent’ and ‘loving’ with the child, but also displayed a ‘firm but fair no-nonsense’ approach. After the child was left alone with the father, she initially protested and asked to be with her mother but then settled to play happily with her father. Concluding that the child was ‘well attached and comfortable’ with both parents, the counsellor nonetheless observed that it was her mother whom she sought when upset. The father’s negative attitude to the mother was a significant factor in the counsellor’s recommendations: she observed

\textsuperscript{571} Affidavit (f) 29/10/1999.
\textsuperscript{572} Judgment 9/2000.
\textsuperscript{573} Affidavit (m) 14/11/1999.
that this led to a concern that he ‘would not promote the child’s relationship with the mother if he had [the child] in his primary care’. 574

The judgment also stressed the father’s extreme view of the mother. It noted that the mother had fulfilled the ‘onerous’ task of caring for the child emotionally, physically and financially notwithstanding ‘the constant level of deep seated antagonism’ directed to her: ‘[s]he has, in my view, borne this tirade of abuse with dignity and demonstrated insight, compassion and considerable parenting skills’. 575

The judge found that in endeavouring to foster the father-daughter relationship despite the father’s attitude, the mother had shown she was able to put the child’s interests ahead of her own. The father, in contrast, had made deliberate attempts to alienate the child from her mother. This was evidenced by the transcript of an exchange tendered to the court which was made on the occasion that the police had been called to attend changeover. It demonstrated, the judge observed, ‘the husband’s unbridled determination to make known in the presence of the child his obsessive belief that the wife has physically abused the child’. 576

It was a mark of the strength of the mother-daughter relationship that it was able to withstand such ‘grossly inappropriate comments’ likely to ‘disaffect the child’ from her mother. This conduct on the part of the father amounted to ‘emotional abuse’ of the child, who had ‘suffered greatly’ and would suffer ‘permanent scarring to her fragile emotional fabric,’ according to the judge. Notwithstanding this assessment, His Honour, somewhat paradoxically, concluded that the father had ‘the capacity’ to provide for the child’s emotional and intellectual needs, 577 albeit to a lesser extent than the wife. His behaviour nonetheless,

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574 Family Report 12/10/99.
576 Ibid.
577 This is characteristic of judicial rhetoric that also occurred in other sample cases which appears oriented toward softening the blow for the unsuccessful party.
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evidenced an inability to separate his own needs from those of his child.  

The orders made in the case confirmed the child’s residence with the mother. Contact on an alternate weekend pattern was ordered, with supervision of the arrangements by a court counsellor under FLA s65L. In making the orders, the judge issued a stern warning to the father that unless his denigration of the mother ceased, he would risk losing contact altogether. The father appealed against the orders, on grounds that included bias and denial of natural justice. The appeal was unsuccessful. An order was subsequently made under FLA s118, preventing the father from bringing legal proceedings without leave of the court.

This case features a particularly intense level of denigration directed at the mother by the father. This level of intensity was evident in at least five other cases in the sample, which were also distinguished by unsubstantiated allegations of child abuse. Less extreme, but nonetheless significant, levels of denigration were evident in almost half of the other cases across the sample. The judge in the case study discussed above adopted an unusually robust approach to the issue, in characterising the husband’s behaviour as child abuse. While similar behaviour in the other cases attracted judicial disapproval, it was not viewed as abusive.

In contrast to the mothers’ pro-contact attitudes, there was little inhibition on fathers’ attitudes to mothers: the material revealed unbridled levels of hatred and contempt across many cases in the

579 Ibid.
581 T2, T1, T7, A16, A15, A8. This means that notifications were made to DHS but were not substantiated by further investigation. In one further case, A11, the judge accepted that the father had made a ‘tit for tat’ notification after a doctor consulted by the mother had notified DHS of bruising sustained while the child was in the father’s care: judgment 10/1998.
582 See fn 566.
These attitudes attracted judicial criticism and were one of many factors that militated against fathers’ claims being successful. Even though claims for increased involvement were mostly unsuccessful, an entitlement to a more limited role as a contact parent appeared uncontestable. While mothers who failed to foster relationships between fathers and children were portrayed as deviant, negative attitudes in fathers were seen to be a result of ‘unresolved personal issues’.

SUMMARY AND CONCLUSIONS

The friendly parent criterion is one of the ‘cultural conventions’ referred to in chapter one that is influential in contemporary family law litigation. It necessitates a consideration of the willingness of residence parents to facilitate as much contact as possible with the other parent, underlining the importance placed on maintaining connections between fathers and children in the current era. However the analysis also begins to suggest that the degree of emphasis placed on this factor in the current environment inhibits women from problematising contact with violent and impaired fathers. The application of this criterion consolidates the weakened bargaining position of women under the Reform Act 1995. This is a significant issue in an environment where fathers are claiming greater recognition of their ‘rights’ in the Family Court in circumstances where, as this chapter has shown, the parenting capacity of many litigating fathers is questionable.

My analysis of the application of the friendly parent criterion has reinforced the key theme in this chapter: the existence of different standards of care, behaviour and parental capacity in relation to mothers and fathers. In general, fathers’ applications for increased involvement

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583 This may be related to the fact that more fathers are unrepresented, so their arguments have not undergone ‘filtering’ through a legal representative.
585 See text accompanying 153 and 155.
586 Parenting, Planning and Partnership, above n 100, 42.
with their children, reflecting the objects in FLA s60B(2), were consistently defeated by a fact-finding process that highlighted their deficiencies in the application of the FLA s68F(2) checklist. These deficiencies were evident in their history as parents, their lack of capacity to offer high levels of consistent care and their inability to meet the emotional needs of children with sensitivity and insight. Even so, contact was maintained except in extreme cases. Most mothers, in contrast, were able to provide consistent, high quality care and to put their children’s needs ahead of their own in order to meet the standard of self-sacrifice that society expects of them.

Rather than the equality-based standard implied in the legislative model, what emerges from the sample files is an asymmetrical model of parenthood where ‘admirable’ residence parents, mainly mothers, were required to meet high standards of care and behaviour and exercise high levels of responsibility. ‘Adequate’ contact parents, mainly fathers, had a much lower standard to meet: even though they lacked sensitivity, insight, care skills, a caring history and had failed to meet their financial obligations, their role as contact parents in most instances was nonetheless virtually uncontested. The differences between the mothers and fathers in the sample were recognised on an individual basis in case-by-case decision making, as my analysis of parenthood as ‘relationship’ and the application of the FLA s68F(2) checklist showed.

However, the application of the broader concept of parenthood in the legislation, reflected in the ‘equality-based’ parental responsibility provisions, produced a double standard whereby parents who had...
substantially different roles and capacities in practical terms were allocated the same parental powers under the shared parenting paradigm in the \textit{FLA}. These parental powers were reduced by specific issues orders in relation to some contact parents only in situations of extreme conflict, violence or impairment. A defining feature of the ‘admirable resident’ parent was compliance with the ‘disciplining’ influence of the friendly parent criterion. No such compliance was required of the ‘adequate’ contact parent. This is consistent with insights from Rhoades’ research on contact enforcement. She has observed that while enforcement proceedings commonly result in residence parents being required to attend parenting classes, no such demand is placed on contact parents. This is characteristic of the way that greater levels of ‘regulation’ are placed on residence parents (mothers) by the practical application of shared parenting family law frameworks.

The most obvious manifestation of this ‘double standard’ in the application of regulatory mechanisms is the way that fathers can enforce contact, but forcing fathers to exercise contact is considered impracticable. As the UK family law scholar, Jonathon Herring observes, ‘[t]here is a notable distinction between the law’s response to mothers who prevent a father seeing his child and a father who decides not to see his child’. This suggests that in practical terms, contact is a

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‘right’, devoid of corresponding obligations. In Australia, the right of contact is technically allocated to children, however this ‘right’ is susceptible to alignment with the ‘entitlements’ of fathers in practical terms. Fathers may seek and obtain orders reflecting their children’s ‘right’ to contact with their parents, but exercise of that contact remains a prerogative. As Helen Rhoades argues, the law impels women to participate in its ideal of shared parenting post-separation but the ‘power of ambivalence’, or the capacity to choose to opt out of this project, remains available to fathers.

In effect, ‘sharing’ parenthood is compulsory for residence parents (mainly mothers) but optional for contact parents (mainly fathers). Furthermore, the definitions of adequate ‘parenthood’ Family Court decision making produces vary according to the gender of the subject. Rather than producing one definition of ‘parenthood’, judicial decision making produces separate definitions of adequate motherhood and fatherhood that respond to current socio-political demands. This is evident in the application of the friendly parent criterion. The strict application of the criterion to mothers reinforces the value placed on fathers. This is underlined by the legal response to the deviant mothers – loss of residence in one case in the sample – which highlights the penalising function of the law in this context. In contrast, definitions of adequacy in relation to contact fathers are more elastic, reflecting the social policy goal of the legislation to enfranchise fathers. In some cases the analysis showed fathers were acknowledged to be potentially...

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599 Andrew Bainham (‘Contact as a Right and Obligation’ in ibid 61-88), argues that contact should be seen as a right of both the parent and the child, involving corresponding obligations.

600 FLA s60B(2)(b); B and B: Family Law Reform Act 1995 (1997) 21 Fam LR 676.

601 In researching judicial attitudes to whether the child’s right of contact would be enforceable against the contact parent, the Parenting Planning and Partnership Report, above n 100, found in principle support for what it terms the ‘logic of reciprocity’ but scepticism about how this could be applied in practice: 24. Recently, in a High Court decision on relocation (U v U (2002) 29 Fam LR 74) Hayne J suggested in obiter that the contact parent could be required to explain to the Court their reasons for not relocating: 113.

602 Rhoades, The ‘No-Contact Mother’, above n 137, 77.
positively harmful, yet the psychological discourse of identity formation supported a continuing, albeit limited, role for them.

The next chapter develops further my analysis of the implications of these varying definitions of ‘adequate’ motherhood and fatherhood, and the practical effect of the legislation, in relation to the way that violence is dealt with in the sample.
CHAPTER 4

VIOLENCE, CONTROL AND ‘PARENTHOOD’

‘..I lived in fear for my own safety and life and was concerned whether, whilst in a rage, the husband was capable of harming the children’ 603
‘…[the mother] is a very dangerous individual, particularly around children…’ 604

INTRODUCTION

The preceding chapter presented an analysis of the double standard in the definitions of ‘adequate’ parenthood that judicial decision-making produces in the context of the empirical sample. This flows from the necessity to reconcile the issues raised by the nature of the factual backgrounds of the cases in the sample with the prevailing socio-political imperative that demands children receive fathering in the application of an ‘equality’ based legal framework.

This chapter explores further the implications of this conclusion in relation to the issue of violence. As noted in chapter two, violence is raised in the parties’ material in more than half of the cases in the sample. 605 A recurring theme in this chapter is that while there is recognition in the FLA, in case-law and in social science research that exposure to violence, directly or indirectly, is harmful to children, this recognition is reflected in only a minority of cases in the sample.

The specific focus of the empirical analysis in this chapter is the tension raised by fathers’ claims for greater involvement with their children under FLA s60B(2) and the application of the s68F(2) provisions in

603 T7, affidavit (m) 4/2/1999.
604 T7, affidavit (f) 1/3/1999.
605 See text accompanying fn 249 and 256.
relation to parental capacity\textsuperscript{606} generally and violence in particular.\textsuperscript{607} As with the analysis of parenthood claims and their treatment in the legal system in chapter three, the issue of the differential positioning of men and women as litigants is of significance to the discussion here. The analysis highlights how the legitimacy attached to men’s fatherhood claims in the current era obscures the visibility of violence, both as a factor relevant to parenting capacity and as a motivating factor in the pursuit of legal claims. It shows how women, in contrast, are constrained by the necessity to adopt litigation strategies that will avoid a loss because of the operation of the friendly parent criterion. The analysis suggests that they are inhibited from problematising father involvement in all but the most extreme situations and that violence as a factor relevant to parenting capacity therefore remains obscure in many instances.

This chapter is divided into three parts. The first part considers what family violence\textsuperscript{608} actually is. An approach recognising that violence is more than mere physical abuse is adopted. This approach recognises that family violence also includes domination and control. Part two examines the ‘official’ legal position in relation to violence and family law decision making with brief reference also to empirical research on the

\textsuperscript{606} s68F(2)(e) and (h).

\textsuperscript{607} The court must take into account: ss (i) any family violence involving the child or a member of the child’s family; ss(j) any family violence order that applies to the child or a member of the child’s family. Further provisions place an obligation on parties to inform the court of the existence of a relevant family violence order (s68J) and require the court to consider the risk of family violence in making contact and residence orders (s68K). However the Court is empowered to make parenting orders that are inconsistent with family violence orders (s68R) but must explain its reasons for doing so (s68R).

\textsuperscript{608} The issue of terminology in this area is complex: see eg Adam Tomison, \textit{Exploring Family Violence: Links between Child Maltreatment and Domestic Violence} (2000). I use the term ‘family violence’ in this analysis for two reasons that are primarily pragmatic. First, it is wider than the term ‘domestic violence’. This is significant because the analysis in this chapter argues that there is insufficient attention given to the way that the children in the sample were directly and indirectly affected by violence. Secondly, this terminology is consistent with the usage adopted by the FCA (see fn 640 below). I also acknowledge however the problematic issues raised by the gender neutrality of this definition: see eg Behrens, above n 190, 40.
impact of violence on children. Part three presents an analysis of the
construction of violence within the sample. The cases involving violence
fall into two groups. The first smaller group involves a high level of
physical severity, strong evidential support and evidence of post
traumatic stress syndrome in the mothers. In these cases, it appeared
tactically permissible for women to argue against contact taking place,
though these arguments were not necessarily successful. The second
larger group of cases involved less (though still significant) levels of
severity and patterns of power and control. In these cases, a history of
violence remained a background factor and the father’s entitlement to
ongoing contact remained largely unquestioned.

PART I CONSTRUCTING VIOLENCE

Violence that occurs in the domestic sphere has for at least three decades
been the subject of feminist attempts to make the issue visible,
condemnable and ‘illegal’ in practical as well as theoretical terms.
Feminist analyses construct violence as a gendered phenomenon, a
means by which men exert power over women.\textsuperscript{609} It is not simply
physical assault or conflict, but a combination of behaviours designed to
victimise family members in a comprehensive and extensive way.\textsuperscript{610}
Family violence both results from and reinforces the power imbalance
that exists between men and women.\textsuperscript{611}

The visibility of family violence has historically been impaired by the
operation of the public/private dichotomy that shielded behaviour which
would otherwise have been considered criminal from law’s gaze when it
took place in the private sphere of the family.\textsuperscript{612} This veil of privacy has


\textsuperscript{610} Dianne Kirkby, ’Chapter Three: Violence in the Family’ in Family Violence
Professional Education Taskforce (ed) \textit{Family Violence; Everybody’s Business
Somebody’s Life} (1994) 60.

\textsuperscript{611} Ibid 61.

\textsuperscript{612} See eg Michael Freeman, \textit{The State, the Law and the Family} (1984).
been pierced in the past two decades or so by a range of laws\textsuperscript{613} specifically aimed at addressing family violence, although their effectiveness remains subject to controversy.\textsuperscript{614}

For the purpose of this analysis,\textsuperscript{615} I have adopted the definition put forward by Partnerships Against Domestic Violence, an Australian intergovernmental taskforce on family violence:

Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women in a relationship or after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation. Many forms of domestic violence are against the law.

For many indigenous people the term family violence is preferred as it encompasses all forms of violence in intimate, family and other relationships of mutual obligation and support.\textsuperscript{616}

As Kaye, Stubbs and Tolmie, who also use this definition, note\textsuperscript{617} its strength lies in its emphasis on the relationship between violence and control. The tactics involved in violence – abuse of a physical, sexual, emotional, psychological and economic nature – are recognised to be part of a systematic pattern of behaviour designed to maintain control by the perpetrator over the target. A wide range of behaviours are encompassed in the definition, although a potentially significant one for the purposes of this analysis is not explicitly included – the use of children as tools to maintain ongoing control even after separation. This is recognised to be one of several means by which men maintain power

\textsuperscript{613} Regina Graycar and Jenny Morgan, The Hidden Gender of Law (2002) 317.
\textsuperscript{614} Ibid. See also Family Violence Laws Consultation Paper (above n 252).
\textsuperscript{615} See below text accompanying fn 638 - 641 and 1064 - 1068 for a discussion of the definition in the FLA and recent initiatives adopted by the FCA.
\textsuperscript{616} Partnerships Against Domestic Violence, ‘What is Domestic Violence?’ (2003).
\textsuperscript{617} Kaye, Stubbs and Tolmie, above n 141.
and control over women in a ‘patriarchal terrorism’ typology developed by US sociologist Michael Johnson in the 1990s.618

Drawing on work by Pence and Paymer,619 Johnson highlights the following features of power and control tactics typical of ‘patriarchal terrorism’:

- Use of coercion and threats
- Use of intimidation
- Use of emotional abuse
- Use of isolation
- Minimizing, denying and blaming in relation to the abuse
- Using the children as tools in harassment
- Using male privilege to deny the women decision making agency
- Using economic abuse by denying access to fiscal resources620

Johnson’s definition provides a useful insight into mechanisms of control used by perpetrators. However, he applies this definition in the context of a dualistic approach to family violence that is somewhat more problematic. In Johnson’s analysis, ‘patriarchal terrorism’ stands in contra-distinction to a typology known as ‘common couple’ violence. It reflects a dynamic where conflict occasionally ‘gets out of hand’ and leads often to minor forms of violence and less often to serious, possibly life threatening, forms of violence.621

From a strategic perspective, the creation of a dichotomy which describes family violence in this way provides a means whereby

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620 Johnson, above n 618, Power and Control Wheel at 288.
621 Ibid. This formulation resonates with Chisholm J’s discussion in In the Marriage of JG and BG [1994] FLC ¶92-515 where his Honour distinguishes between violence associated with ‘power and control’ dynamics and ‘once-off’ type instances: 81,317.
violence in particular situations could be too readily dismissed as ‘common couple’ violence. The potential for this is exacerbated by the relative difficulty that surrounds making violence visible, particularly controlling tactics such as emotional abuse and economic abuse. Furthermore, as Kaye, Stubbs and Tolmie note, typologies obscure the fact that violence involves contested meanings that are inherently gender based and context related: ‘too ready resort to simple typologies…may also risk imposing other people’s definitions on the women concerned’.

Indeed, the following discussion shows that in the empirical sample, violence is constructed by fathers and some judges as mutual and inherent in the relationship. This construction implies that since separation has ended the relationship, the violence has ceased and is no longer relevant in decision making. It also implies that violence is an expected incident of the intimate adult relationship. This approach fails to apprehend that violence and control continue after separation and that women who are separated and divorced are at most risk of family violence.

Such an approach constrains the relevance of violence to parenting capacity. It also obscures the fact that litigation over residence and contact matters may be used to perpetuate the dynamics of violence and control and directly impinges upon the interests of children by placing them at the centre of conflict. The link between a history of violence and the use of litigation over children’s matters has been noted in an

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622 See also Branigan, above n 499.
Australian Law Reform Commission Report on complex contact cases which found that ‘violent partners use repeated applications as a weapon against women and their children’.

Nicholas Bala, a Canadian legal academic, notes that threats in relation to litigation over children are common in situations involving control patterns. These threats ‘may seem credible to a spouse who has been constantly denigrated by her partner’, even if there is little chance of success.

In summary, this discussion about the construction of violence establishes that family violence involves more than physical abuse. It is part of a pattern of behaviour designed to control and dominate the target. The following section outlines how violence is dealt with in the legislation and in Family Court jurisprudence. Its impact on children is also considered.

PART 2  FAMILY LAW AND VIOLENCE

In early Family Court jurisprudence, the issue of violence was originally obscured by an emphasis on the ‘no fault’ philosophy of the Family Law Act 1975. For the first decade and a half or so, Family Court decision making, both in property and children’s matters, was permeated by a
view that consideration of issues such as violence was irrelevant. In the early nineties, the Family Court began to acknowledge violence as a factor to be taken into consideration in relation to both property and children’s matters. It was only with the implementation of the Reform Act 1995 that the relevance of violence to children’s matters was recognised in legislation.

A The Legislation

Following the enactment of the Reform Act 1995, exposure to violence, both direct and indirect, is a factor to be taken into account under FLA s68F(2). Under sub-section (i) the Court is required to consider ‘any family violence involving the child or a member of the child’s family’. A series of provisions aimed at clarifying the relationship between parenting orders and family violence orders was also introduced in this Part. Significantly, if the Court decides to make a contact order that is inconsistent with a family violence order, the former order prevails.

More broadly, the need to ‘ensure safety from family violence’ was introduced as one of five general principles to be applied by the Family Court in exercising its jurisdiction under the FLA. ‘Family violence’ is given this definition:

[it] means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any

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631 s (g), (i), (j).
632 See FLA ss 68N-68T.
633 FLA s68S. The Family Violence Consultation Paper, above n 252, found that Magistrates too readily make intervention orders subject to the standard ‘except for agreed child contact’ exception: 8.30. It also noted that Magistrates appear to rarely use their power under FLA s68T to vary Family Court contact orders when making intervention orders: 8.36.
634 s43(ca).
other member of the person’s family to fear for, or to be apprehensive about, his or her personal well-being or safety. 635

It is worth noting that this definition is significantly narrower than the one adopted above, 636 focusing on ‘actual or threatened’ conduct, rather than a wider range of behaviours. While it implies a definition based on the subjective perception of the target, it fails to acknowledge the gendered nature of family violence. 637

The Family Court has recently adopted a wider ‘description’ of family violence in its Family Violence Strategy. 638 This description is based on the New Zealand model 639 and is also gender neutral, though it explicitly recognises post-separation violence:

Family violence covers a broad range of controlling behaviours, commonly of a physical, sexual and/or psychological nature, which typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.

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635 s60D(1).
636 See text accompanying 615 and 617.
637 Graycar and Morgan, above n 613, Chapter 10.
639 New Zealand has adopted a wide definition of ‘domestic violence’ in its Domestic Violence Act 1995 (NZ) (s3(2)). The definition encompasses physical, sexual and psychological abuse. Psychological abuse is defined as including, but not limited to, intimidation, harassment, damage to property and threats of abuse. Psychological abuse of children through exposure to domestic violence is also encompassed in the definition (s3(3)(a)) though the person who suffers the abuse is not regarded as having caused such exposure: s3(3)(b). New Zealand’s Guardianship Act 1968 also contains what amounts to a presumption against contact in cases where domestic violence has been established (s16B(4)). In combination, these changes have contributed to a significant improvement in the handling of cases involving domestic violence: Ruth Busch and Neville Robertson, ‘Innovative Approaches to Child Custody and Domestic Violence in New Zealand: The Effects of Law Reform on the Discourses of Battering’ (2000) in Geffner, Jaffe and Sudermann (eds) above n 626, 269. The issue of what definition of family violence should be contained in the Crimes (Family Violence) Act 1987 (Vic) has recently been raised in the Family Violence Laws Consultation Paper, above n 252, 85.
Common forms of violence in families include:

- Spouse/partner abuse (violence among adult partners and ex partners);
- Child abuse/neglect (abuse/neglect of children by an adult);
- Parental abuse (violence perpetrated by a child against their parent); and
- Sibling abuse (violence among siblings).

The Family Violence Strategy is discussed in greater depth in chapter six.

B Family Court jurisprudence

The Family Court’s recognition of violence as relevant to its decision making in a series of reported decisions pre-dates the Reform Act 1995. The implications of both direct and indirect exposure to violence as a source of harm for children’s development are clearly recognised within these decisions, and others made since the introduction of the new Part VII. Violence is acknowledged to be a factor which can negate the suitability of a parent to have residence of their children and it militates against contact orders being made. Approaches which characterise violence as symmetrical within a relationship, in the absence of clear supporting evidence, are also said to be unsound.

Risks for children flowing from exposure to conflict and violence have been amply recognised, beginning with Chisholm J’s judgment in In the Marriage of JG and BG. His Honour recognised that children could be harmed by direct and indirect exposure to violence. This harm could

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640 FCA Family Violence Strategy, above n 638.
641 See text accompanying fn 1064 and 1068.
643 In the Marriage of CK and IW Kennon (1997) 22 Fam LR 1, the Court awarded damages to the wife for a series of assaults suffered during the marriage. Each separate assault had to be proven. The history of violence was also held to be relevant to assessing the parties’ respective contributions under FLA s79.
644 In the Marriage of Blanch (1998) FamLR 325.
646 In the marriage of Blanch (1998) FamLR 325.
ensue on a number of levels: through adversely affecting the parenting capacity of the custodial parent; through the establishment of a ‘bad model’ of family relationships; and through the creation of an ongoing climate of stress and fear.\(^{648}\)

The relevance of violence to decision making in children’s matters was affirmed by the Full Court in the post-Reform Act 1995 decision, *In the Marriage of Blanch*.\(^{649}\) The Court overturned residence orders in favour of a father on the basis that insufficient weight had been given to evidence of an ongoing and systematic pattern of violence perpetrated against the wife.

These decisions dealt with the relevance of violence to a claim by a parent for residence. The principle that contact is subject to the best interests of the child\(^{650}\) was held by the Full Court in *B and B*\(^{651}\) to be unchanged by the *Reform Act 1995*. The relevance of a history of violence in relation to contact parents has more recently been recognised in a first instance judgment, *M v M*, by Mullane J.\(^{652}\) In *M v M*\(^{653}\) contact between an extremely violent father and his children was to be phased out after a twelve month period of supervised sessions so that the children did not suffer unnecessarily from a sudden disruption of their attachment to him.\(^{654}\) In this instance, his Honour accepted evidence put forward by the mother and the Child Representative that the father’s violence was part of an entrenched pattern of behaviour, that the prognosis for change was poor as he continued to deny responsibility for

\(^{648}\) Ibid 81,317.
\(^{649}\) Ibid 81,317.
\(^{650}\) (1998) FamLR 325.
\(^{651}\) *M and M* (1988) 166 CLR 76
\(^{652}\) (1997) 21 Fam LR 676.
\(^{653}\) *M v M* [2000] FLC 93-006.
\(^{654}\) Ibid.

In the UK, recent case law developments suggest a move away from the pro-contact approach that followed the introduction of the *Children Act 1989* in cases involving domestic violence: *Re L; Re V; Re M; Re H (Contact: Domestic Violence)* (2000) 2 FLR 334. This is discussed in greater depth in chapter six. See text accompanying fn 1020 and 1030.
violence against his former partner and his contribution to serious emotional problems manifested by his partner.

Although clear principles in relation to the relevance and impact of violence are to be derived from this series of decisions, the judicial commentary also underlines that decisions made by the parties and their lawyers in relation to litigation tactics are highly significant in making the issue of violence both visible and relevant in court proceedings. As Chisholm J in \textit{JG and BG} makes clear, it is only when sufficient evidence is presented, and explicit links are drawn between the evidence and its meaning for parental capacity, that the issue becomes one for judicial determination.$^{655}$

His Honour further emphasised the point that the Court can only make findings in relation to violence where sufficient evidence is presented to allow it to do so.$^{656}$ It is the very emphasis placed on this obvious point that is of concern. In reinforcing that favourable findings in relation to the wife’s credibility and the availability of corroborating evidence underpinned his findings, Chisholm J highlights a stringent evidential standard for claims of this nature to meet. Such a standard, particularly the requirement for corroboration, may well be unrealistic for an issue that is surrounded by secrecy and silence.$^{657}$

Lindenmayer J’s judgment in \textit{Blanch} articulated an approach that demands more of the judge in making such connections. His Honour held it was necessary for the trial judge to consider the risk of harm to children even where it was not squarely raised by counsel. It was incumbent upon ‘a judge of this specialist court…to at least turn his or her mind to that risk in a case where the issue of domestic violence has

$^{655}$ \cite{FLC:92-515,81,318}.

$^{656}$ Ibid.

$^{657}$ Kirkby, above n 610.
been so clearly and squarely raised by the evidence’. However, this responsibility only applies when the issue of violence is highlighted and proved by the evidence.

These points are particularly relevant to the discussion of how violence is constructed in the empirical sample that is presented in the next part. This discussion suggests that tactical pressures contribute to the lack of visibility in relation to violence in the less severe group of cases in the sample, discussed below. Before this issue is considered in detail, however social science research on the impact of exposure to violence on children is briefly discussed.

C Social science research on the impact of violence on children

Even indirect exposure to family violence is now well-recognised to have adverse affects on children. According to Australian psychologist Jennifer McIntosh, recent overviews of various studies on the way family violence affects children have established ‘beyond a doubt’ the negative consequences that children suffer when exposed to violence in the home:

Bearing witness to spousal violence poses a significant threat to any child’s emotional development, with many studies also highlighting cognitive and social ramifications. Established findings indicate that the more lasting the violence, the more acute the discord, the fewer mediating influences, the worse the outcomes for children.

Links between family violence and child abuse are increasingly being substantiated in empirical research. The World Report on Violence and Health notes that a ‘strong relationship’ between child abuse and family

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659 See text accompanying fn 767 and 801.
violence was indicated from a range of studies covering a very diverse geographical area, including countries from Asia, the Middle East and the US. According to a review published by the Australian Institute of Family Studies, ‘exposure to violence is not only an ‘unintended’ consequence of violence between adults, but at the very least, is a potential indicator of the occurrence of child abuse’.

Australian research has shown this overlap is particularly relevant in relation to Family Court matters. In Australia, Kaye, Stubbs and Tolmie’s study of contact disputes where violence had been a feature of the parental relationship found that 62.5 per cent of children in their sample had witnessed violence against their mothers while a third had also been the targets of physical violence. A co-incidence between intimate partner violence and child abuse has also been highlighted by Thea Brown and her co-authors, in the context of litigated Family Court cases. This study examined Project Magellan, a Family Court pilot program conducted in 1998 that was aimed at improving the way cases involving serious allegations of child abuse were handled. It found that partnership violence had occurred in 75 per cent of the 100 cases in the pilot program.

Men who use violence in adult intimate relationships also exhibit characteristics that make them poor parents. US family violence expert Lundy Bancroft notes that such men often ‘tend toward authoritarian,

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663 Kaye, Stubbs and Tolmie, above n 141. The research comprised interviews with 40 women who negotiated or were negotiating contact orders after relationships involving violence had broken down. Eighty-eight children were covered by the research: 96.
664 Ibid 28.
666 Ibid 93.
neglectful and verbally abusive approaches to child-rearing’. He notes in addition that such men are also likely to be manipulative of children. The implications for children of such ‘parenting weaknesses may be intensified by their prior traumatic experiences of witnessing violence’.  

Despite the links made between violence and outcomes for children in the research referred to the preceding paragraphs, and the reported decisions discussed in the preceding section, the analysis of the empirical material in the next part confirms other research which shows that violence is, somewhat paradoxically, becoming less visible in Family Court proceedings unless very extreme. This reflects the tension between the child’s right to contact in FLA s60B(2)(a) and the provisions relating to exposure to violence in s68F(2). As Rhoades argues, the emphasis on maintaining connections between fathers and children in the post Reform Act 1995 era has led to ‘a retreat from the Court’s [previous] sensitivity’ to violence in recent years. The analysis presented in the following part offers new insights into how this comes about by examining the tactical significance of the negative father argument and the friendly parent criterion in the violence cases in the sample.

PART 3 FAMILY VIOLENCE IN THE SAMPLE

This part presents an analysis of the way violence is dealt with in the files in the empirical sample. The first section provides an overview of the extent and nature of the violence in the sample. The second section

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668 Ibid.
669 The First Three Years Report, above n 72; Parenting Planning and Partnership, above n 100; Kaye, Stubbs and Tolmie, above n 141. See also discussion in chapter one at text accompanying 120 and 147.
670 Helen Rhoades, The 'No Contact Mother', above n 137.
comprises a detailed analysis of the way violence is dealt with in the parents’ affidavit material, in the Family Reports and in judicial determinations.

A The Extent and Nature of Violence in the Sample

The issue of violence was claimed to be relevant by women in more than half (n=23) of the 40 files in the sample. There were 10 files in which violence was assessed as being a particularly strong theme in that it was a central emphasis in the affidavits of the mothers. Three fathers in this part of the sample had been convicted of assault against their partners in criminal proceedings, while another man had been fined $1000 without conviction in the County Court for assaulting his former wife’s daughter from a previous relationship. In the remaining 13 of the 23 cases in this part of the sample, violence had a less strong, but nonetheless significant presence.

The level of prevalence described in the preceding paragraph may be lower than that across Family Court cases generally. A recent analysis of Family Court data covering 91 matters that required judicial determination in registries in three states showed that violence was an issue in 68 cases. In 51 per cent of these cases the allegation was upheld. In a further 8 per cent of cases a finding of ‘unacceptable risk’ was made. Other research also specifically in relation to Family Court

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671 T1, T3, T7, T11, T22, T15, A1, A12, A7, T2, T8, T5, T10, T6, T9, T12, T19, A2, A3, A11, A17, A6, A15. It was a less significant or an historical factor (there had been violence in the past) in a further three cases: T17, T20, A8.
672 T1, T3, T7, T11, T22, T15, A1, A12, A7, T2.
673 A1, T3, T11.
674 T10.
675 T8, T5, T10, T6, T9, T12, T19, A2, A3, A11, A17, A6, A15.
676 As noted in chapter two (see fn 249), a conservative approach was adopted in assessing allegations of violence.
677 FCA Submission Parts B and C, above n 30, 18.
678 The registries were Melbourne, Sydney and Brisbane.
679 Explained above at text accompanying fn 259 and 263 and discussed in the context of my sample in fn 414.
matters has found that where allegations of violence were raised, the perpetrator was male in 90 per cent of cases.\(^680\)

Research by the Australian Institute of Family Studies indicates that among the divorcing population, violence should not be seen ‘as an exceptional circumstance’ but rather a common occurrence.\(^681\) An analysis of data from the Australian Divorce Transitions Project, which randomly surveyed 650 divorced Australians in 1997, indicated a majority of both women (65 per cent) and men (55 per cent) reported experiencing physically abusive behaviour during the marriage or after separation. ‘Severe and ongoing’ violence was experienced by 30 per cent of the women in the sample.\(^682\) Furthermore, there was a link between women’s experience of violence and financial disadvantage after divorce. The study concluded that many such women ‘appear to have been denied their right to a just and equitable share of property on divorce, despite their disadvantaged economic circumstances and their ongoing responsibility for the care of children’.\(^683\) This confirms other views that the bargaining positions of women are weakened when there has been a history of violence.\(^684\)

The files in my sample reflected varying levels of severity, encompassing scenarios ranging from severe levels of both violence and control, to relationships marked by less violence but significant levels of domination and control. One or more of the features identified by Johnson as being hallmarks of ‘patriarchal terrorism’\(^685\) were present within most of these cases. Many featured a systematic pattern of not

\(^{680}\) Hunter (1999) above n 215, 390. See also Hart, above n 144.


\(^{682}\) Ibid.

\(^{683}\) Ibid 118.

\(^{684}\) Hilary Astor, ‘Swimming Against the Tide: Keeping Violent Men Out of Mediation’ in Stubbs (ed) above n 609, 147.

\(^{685}\) Johnson, above n 618.
only physical, but also verbal and emotional abuse, combined with behaviour designed to denigrate the women both before and after separation. Five women alleged that they were raped by their partners during marriage. 686

As noted in chapter two, thirteen of the women had obtained family violence orders against their former partners, 687 and in two cases these were mutual. 688 Fathers had obtained them in a further two cases. 689 Even though the existence of family violence orders are to be taken into consideration in making contact orders under s68F(2)(j) and s68K, there was little evidence in the files of these provisions being explicitly applied. 690 According to the Parenting Planning and Partnership Report, these orders are not considered ‘good evidence’ by judges. 691 The report notes that judges perceive that such orders are made ‘too easily’ with little ‘evidential basis’. 692

At least five of the women described being isolated in varying ways, 693 socially, physically and emotionally. In one case, for example, where the abuse during the marriage was primarily verbal and emotional, the mother had been brought to Australia in what amounted to an arranged marriage. 694 The marriage came about after the husband’s mother had visited the European village where she lived and brought the woman home to marry her son. Speaking poor English, the woman found herself very isolated during the marriage with social contacts limited to her

686 A3, A12, A17, T11.
687 T2, T1, T3, T7, T17, T11, T22, T9, T19, A2, A1, A17, A12.
688 T7, T19.
689 A6, A7.
690 The First Three Years Report, above n 72, found more awareness of this provision among judicial registrars than judges: 5.58.
691 Above n 100, 65.
693 T7, T11, A1, T12, T9.
694 T12.
husband’s family and friends. She related how, after the couple moved in to live with her parents-in-law, the husband

commenced significant verbal and emotional abuse of me. He constantly complained about my cleaning, my cooking, my washing and my ironing, although all these chores were undertaken with much care and dedication by me. The husband never gave me any praise even when I did complete tasks to his satisfaction. 695

The marriage ended after the husband left to live with another woman who was pregnant with his child. This precipitated a suicide attempt by the mother followed by a hospitalisation during which the father took the children to live with him. This arrangement was subsequently confirmed by final orders in the father’s favour. 696

This file also illustrated how the parenting capacities of women in abusive relationships can suffer impairment as a result of the abuse, a theme that occurred in five other cases in the sample. 697 An important thread in the judgment relates to the mother’s lack of capacity to handle the extremely difficult behaviour of the couple’s two sons, due to her emotional vulnerability. Psychiatric evidence given at the trial, and accepted by the judge, emphasised that the mother’s mental health problems were related to the history of abuse she had suffered during the marriage. This was not seen by the judge to affect the capacity of the husband to fulfil the role of residence parent. 698 Further, the role that the husband’s abuse of the mother may have played in contributing to the boys’ difficult behaviour was not explored, despite the fact that their pattern of anti-social conduct had continued to be manifest in the husband’s care.

695 Affidavit (m) 10/3/2000.
697 Abuse as a factor leading to the impairment of mothers’ parenting skills was also present in these files: A1, A3, A12, T7, T15.
The fact that litigation over children may be used to perpetuate the
dynamics of power and control was referred to earlier in this chapter.699
This scenario appeared to apply in a number of the cases in the sample
which had the common features of long running litigation, a background
of violence and high levels of denigration against the mothers.700 There
was judicial acknowledgment in four cases701 that legal proceedings
were being used as a means of harassment, including three cases702 in
which FLA s118 orders preventing the fathers from further proceedings
without leave of the court had been made.

Highlighting yet another aspect of the differential positioning of men
and women as litigants in family law, a significant theme in several of
the fathers’ claims in the violence cases was recourse to discourses of
‘justice’ in relation to the treatment of their claims in the legal
process.703 A number of these files are characterised by very strong
claims of ‘bias’, in some cases particularly in relation to gender, and a
‘lack of justice’ in Family Court proceedings.704 There is a parallel
between these arguments and those based in biology discussed in
chapter three,705 in that both evoke an abstract entitlement to ‘legal
rights’ as a basis for their claims. This is illustrated acutely in A12
where violence was an exceptionally strong issue but the father
ultimately ended up with residence of his children under consent
orders.706 Appealing against orders made after he withdrew from the

699 See text accompanying fn 625 and 629. The Parenting, Planning and Partnership
Report, above n 100, noted that men who wish to seek avenues of control,
particularly through specific issues orders, form ‘a significant part of the population
with which the Court deals’. 80.
701 T3, T7, T1, A3.
702 A1, A12, A15.
703 T2, T3, T5, A3, A1, A12, A15.
704 Kaye and Tolmie identify this as common theme in the material of fathers’ rights’
groups: ‘Fathers’ Rights Groups in Australia and the Engagement with Issues in
705 See text accompanying fn 385 and 401.
706 Consent orders made 6/2000. These were unopposed by the Child Representative.
This case is discussed more fully in chapter five: see text accompanying fn 878 and
890.
trial, the father claimed that the orders giving residence of two children aged 10 and 12 to the mother and suspending contact exhibited ‘such a degree of gender bias that justice has not been seen to be done’. Prior to withdrawing from the trial, the father told the judge:

   It is my belief that you are in collusion with the women there [the mother] and the other feminists that are organising this, and this is just one big set up to rip my poor innocent little kids away from me…

In this case, the court proceedings meant that the mother continued to be exposed to physical violence as well as control through litigation. The trial transcript 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 re-appeared in court to be charged with contempt.

The data from the sample also indicates the range of ways that children are victims of family violence in a more direct sense than just being subject to litigation as part of an ongoing campaign of harassment. In five files, children in the family had been direct targets of violence. In ten cases, children were indirectly involved through being exposed to

709 Ibid.
710 This is issue is dealt with in greater depth in chapter five. See text accompanying fn 854 and 900 and 967 and 974.
711 In A1, all the children were directly involved. In three cases the violence was directed at children who were not biologically related to the perpetrator: T11, T22, T10. In one case, T15, the violence was directed at a child not involved in the residence proceedings because he was resident with a relative overseas due to the violence directed at him.
verbal or physical conflict at changeover times. This commonly involved hearing their father cast epithets such as ‘slut’, ‘prostitute’ and ‘whore’ at their mother, and in a couple of these cases, overt physical conflict also took place over possession of the child.

In twelve cases, evidence was given that the children were subject to emotional manipulation by fathers in the context of a history of violence. In most instances, this involved criticisms of the mother being made to the children but in some cases this even extended to being involved in discussion of the litigation. In one case, the mother claimed that her four year-old-son would display highly aggressive behaviour towards her after contact visits. She related how he said to her: ‘If you say no to me, my Dad will say yes and I can punch you in the face. My Dad showed me how to do it’. This was even translated into action: ‘he has punched me in the face on at least ten occasions when I have tried to discipline him’.

In summary, this discussion has shown that violence was widespread throughout the sample with varying levels of physical severity and features of control. It affected the parenting capacities of some mothers in the sample and had both direct and indirect effects on the children. In some cases, the litigation itself was part of an ongoing attempt to maintain control of the family after separation. The following section examines more closely how violence was dealt within the legal process in these files.

B ‘Real’ violence and ‘simple’ violence

712 T1, T7, A12, T2, T8, T19, A2, A11, A6, A15.
713 A6, A15.
714 T1, T3, T7, T15, A1, A12, A7, T8, T9, T19A3, A15.
715 T3.
716 Affidavit (m) 18/5/1999.
717 I have borrowed this terminology from the American legal academic Susan Estrich who argues that the criminal offence of rape is divided into two categories as a result of attitudes that are prevalent within law enforcement agencies and within
The cases involving violence in the sample fell into two distinct groups: those where mothers argued against that no contact at all should take place because of a history of violence (‘real’ violence) and those where violence was one of several arguments against fathers’ claims for residence, increased contact or unsupervised contact (‘simple’ violence).

My analysis indicates that this distinction is produced by tactical considerations. Violence becomes ‘real’ only when it meets a stringent standard in relation to severity and the availability of evidential support. When this standard is met, it then becomes tactically permissible for women to argue against contact taking place. This is because, as the analysis in chapter three demonstrated, the application of the friendly parent criterion makes it strategically dangerous to mount such arguments. Even in extreme circumstances, very serious consideration is given to maintaining or establishing contact because of the influence of the ‘negative father’ argument, also introduced in chapter three.

‘Simple’ violence, in contrast, arises when the level of physical severity is not as great (in some files it was nonetheless serious but did not result in the laying of criminal charges) and evidence other than that of the mother is not available. Thus allegations of violence are made in the mothers’ material in arguments refuting fathers’ suitability to be residence parents, but their entitlement to ongoing contact remains unchallenged. In this way, links between a history of violence and fathers’ parenting capacity remain obscure in the sample and the effect of the sub-sections relating to violence in FLA s68F(2) are minimal.

Society more generally. ‘Real’ rape involves violence, is committed by a stranger and is considered worthy of prosecution. ‘Simple’ rape in contrast may involve little or no physical force and is not committed by a stranger and is not considered worthy of prosecution. Her point is, of course, that such a distinction should not be made: Susan Estrich, Real Rape (1987).

718 See text accompanying fn 517 and 565.
719 See text accompanying fn 414 and 436.
720 ss(i) and (j).
The following sections present an analysis of the two groups of cases. ‘Real’ violence is dealt with first. A particular focus of the discussion is how violence is treated in the three levels of discourse in the sample: parents’ material, Family Reports and judicial determinations.

1 ‘Real’ violence as a key issue in litigation

Violence was a central theme in five of the seven sample cases in which mothers argued against any direct contact taking place between their children and their biological fathers. These cases involved severe levels of violence, underlining that only in extreme situations are women and their legal advisors prepared to risk adopting what in the current climate may be perceived as an extreme position. In two of these instances, fathers had received criminal convictions for assaults against their wives. The mothers in both files presented evidence to the court that they were suffering from post traumatic stress disorder.

In three cases, the applications to cease contact came after lengthy litigation histories. These histories were indicative that litigation was being used to perpetuate control tactics. They saw the women brought back to court time and time again to answer applications in relation to contact issues, and in two cases, in relation to repeated instances where the children had not been returned after contact. In all five cases, the women’s accounts of violence were accepted by the judges. However, there were some significant differences in the view taken of the implications of this finding.

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721 T11, T22, A1, A12, T2.
722 The First Three Years Report, above n 72, 5.40-5.41, 5.50; Parenting, Planning and Partnership, above n 100, 73.
723 T11, A1.
724 A1, A12, T22.
725 A12, T2.
726 In two cases where determinations were made after fathers withdrew (T2 and A12) judicial recognition had occurred in previous proceedings.
Three related arguments were made by the mothers in the five cases. First, that in pursuing residence or contact the fathers were perpetuating the control dynamic that had subsisted prior to separation. Secondly, that exposure to the father was detrimental to the children. Thirdly, that their own capacity to parent their children adequately was being impaired by ongoing exposure to abuse and control.

The mother’s evidence in T11 illustrates these points. After describing years of rape, violence and verbal abuse at the hands of her husband, the mother in this file said that so intense was her fear of her husband following the assault that resulted in his jail term that she ‘felt ill from fear’ at the ‘mere thought’ of having to speak to him. She argued that her former husband’s constant breaches of an Intervention Order, while apparently trivial in nature, were part of a deliberate campaign by him to maintain her fear and were part of an ongoing pattern of abusive behaviour. Evidence given to the Court by the woman’s psychologist indicated that so severely affected as a unit were the women and her children that they had on occasion, ‘been stressed to the point of almost not coping with daily living’.

According to the evidence of the mothers in these five cases, the children were either directly subject to abuse or they were abused by being used as tools in a continuing campaign of harassment and control. This was exemplified in T2 and A12, where the mothers argued that contact with children became a means of perpetuating patterns of denigration and abuse. Each of these cases featured conflict at changeover and patterns of retaining the children after contact in breach of court orders. The mother in A12, for example, deposed that at contact

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727 These were explained in chapter two. See text accompanying fn 252 and 256.
729 Affidavit by mother’s psychologist 2/5/1999.
changeovers which took place in front of a police station, the father ‘continues to call me names, including ‘slut’, ‘bitch’ and ‘whore’’.\textsuperscript{730}

The fathers in these cases adopted tactics of either denying that there had been a history of violence or minimising its extent and their culpability.\textsuperscript{731} When violence was admitted, the women were portrayed as being responsible for its occurrence. In T11, for example, the father claimed that the wife was responsible for the violence in the relationship 90 to 95 per cent of the time and that he occasionally retaliated. On the night the final beating took place, he alleged that ‘the wife was goading me and I snapped’.\textsuperscript{732}

In common with other men’s accounts of violence throughout the sample, these claims reflect the ‘remedial work’\textsuperscript{733} that characterises the response of violent men to their own actions. The term ‘remedial work’ was developed by UK family violence researcher Kate Cavanagh and her co-authors to describe strategies of ‘damage limitation’ deployed by violent men that re-define offensive acts into those which are acceptable. This is part of an interactive process in which these redefinitions are imposed on the targets of the violence ‘as an extension of the control exercised my men over women more generally’.\textsuperscript{734} Common tactics employed in this process of redefinition include outright denial, minimisation of the violence and attributing responsibility to others, most often the target. The men’s affidavits in the sample are replete with examples of these tactics. In one especially alarming instance, the father in T3 asserted in relation to a violent assault for which he received a

\begin{itemize}
  \item \textsuperscript{730} Affidavit (m) 23/9/1999.
  \item \textsuperscript{731} Kate Cavanagh, R Emerson Dobash, Russell P Dobash, and Ruth Lewis (2001) ‘Remedial Work: Men’s Strategic Responses to Their Violence Against Intimate Female Partners’ Sociology 35:695.
  \item \textsuperscript{732} Affidavit (f) 29/4/1999.
  \item \textsuperscript{733} Cavanagh, et al, above n 731.
  \item \textsuperscript{734} Ibid. 700.
\end{itemize}
criminal conviction that: ‘I say my actions were by law technically incorrect but morally understandable to all Australians’. ⁷³⁵

The recommendations made by the Family Report evaluators in these five cases highlight the significance of the ‘negative father’ discourse discussed in chapter three. ⁷³⁶ None of the evaluations provided unequivocal support for the mother’s arguments against contact. In each evaluation, support, albeit highly qualified in some instances, for ongoing contact was expressed.

The psychological issues that a history of violence raises in relation to the question of contact were illustrated in depth by a psychological report ⁷³⁷ tendered to the Court by the Child Representative in T11. The report acknowledged the damage that could be sustained by children growing up with family violence:

> Even as passive victims thereof, the impact on their self esteem, their view of the world, the perception of male and female roles, their confidence and even their social relations can all be severely and adversely affected. Children whose mothers are victims of domestic violence consistently do far worse across any number of psychological measures, including their social functioning, academic performance and are at considerably higher risk of later psychological difficulties. ⁷³⁸

It was clear from the evaluation that the children in this case had been seriously affected by the violence in their family:

> They are anxious, view the world as a dangerous place and whilst they perceive their mother as caring and nurturing, they also perceive her as less powerful,

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⁷³⁶ See text accompanying 414 and 436.
⁷³⁷ This was a report by an independent psychologist commissioned by the Child Representative 21/4/1999.
⁷³⁸ Ibid.
more vulnerable and less capable of protecting them in a world which is perceived to be dangerous.\textsuperscript{739}

Notwithstanding this, the father remained ‘psychologically relevant’ to these children. Although contact would traumatisate the children because ‘they…have a belief that he is a risk to them’, it would ‘ultimately be better for these children to know [their father] for what he is and what he has done than to have him completely absent in their lives’. This would forestall the possibility that they may later in life ‘idealise’ him. ‘It may be better to have first hand and direct experience of him, rather than to create an image which bears little semblance to the realities of the behaviour.’\textsuperscript{740}

In order to protect the children, any contact that did take place would have to be supervised by a psychologist and be conditional upon the father establishing that he was genuinely remorseful, took responsibility for his actions and had curtailed his violent and aggressive behaviour. If these pre-conditions were not met, then the immediate concerns for the children’s physical and emotional safety would ‘outweigh longer term considerations’. Underlining the ambivalence that permeates this report was the observation that this highly qualified recommendation for contact ‘has nothing to do with the rights of [the] father or what might be fair and reasonable for him’. It was, ‘an attempt to accommodate the future psychological problems that may be experienced by these children’\textsuperscript{741}

Although the psychologist noted that he ‘unequivocally’ understood the mother’s concerns about the father, any detailed consideration of the impact that the contact may have on her was lacking in his report.\textsuperscript{742}

This underlines a tendency to consider the interests of children in

\textsuperscript{739} Ibid.
\textsuperscript{740} Ibid.
\textsuperscript{741} Ibid.
\textsuperscript{742} Affidavit by mother’s psychologist 2/5/1999.
isolation from those of their primary carer. A psychologist’s report tendered in evidence by counsel for the mother, in contrast, recommended against contact taking place, on the basis that it would be detrimental both to the mother and the children. Contact would cause ‘stress levels’ to go ‘out of control’ and would result in distress and emotional damage for the children.743

The report presented to the Court by the Child Representative in this case was unusual in the depth of the consideration given to the issues raised by contact and family violence. Other Family Reports tendered to the Court in files in this group were much less detailed in their recommendations. While the issue of violence was canvassed in these reports, this occurred in the context of a recounting of the parents’ respective ‘versions’ of the relationship history.744 These accounts acknowledged each party’s differing perceptions without drawing firm conclusions about the veracity of their accounts. Ongoing contact appeared to be somewhat of a ‘base-line’ recommendation in these reports, made in the context of a factual vacuum, in that Family Report writers are constrained from pre-judging issues of factual significance, as discussed in chapter one.745

A tension emerged between the perspectives of the mothers and those within the psychological evaluations and Family Reports. The mothers’ arguments constructed their interests and those of their children as being intertwined. The experience of violence was not a separable, individual

743 Ibid.
744 Concerns have been raised by other research about the way violence is dealt with in Family Reports. These include the lack of understanding about the dynamics of domestic violence among Family Report authors, the lack of time available to conduct assessments and the limited opportunities for children to make disclosures about abuse: Rendell, Rathus and Lynch, above n 177, 98-101; see also Parenting Planning and Partnership above n 100, 38; UK research has also found that mothers involved in contact and residence litigation where violence is an issue were dissatisfied with the welfare reporting that took place in their disputes: Buchanan and Hunt, above n 396.
745 See text accompanying fn 177.
experience. It was an experience that had affected them and their children, both directly and indirectly. According to the mothers, these violent former partners were not ‘good enough’ fathers.\footnote{Maria Eriksson and Marianne Hester, ‘Violent Men as Good-Enough Fathers?’ (2001) (7) Violence Against Women 779.} They were violent men who, as fathers were significantly impaired. The maintenance of the connection between the father and the child, moreover, meant the continuation of a destructive relationship that eroded their ability to function effectively as mothers.

In contrast, the Family Report evaluations constructed the interests of mothers and children as separate. Reinforcing the power of the ‘negative father’ construct, these fathers represented figures of ‘psychological relevance’ of whom ‘knowledge’ was essential for future psychological well-being. This ‘knowledge’ was to be maintained even though the connection may be a source of ongoing trauma for mothers and children in an indirect and even direct sense. The possibility that the father had little to offer as an active parent, and may in fact be a source of current harm received little attention.

This tension between constructing the interests of mothers and children as either separate or connected was also reflected in differing approaches in the judgments in this group.\footnote{In two cases judicial determinations followed a failure to appear (T2) or a withdrawal from proceedings so no substantive discussion of the issues occurred in the judgements.} In two files, T11 and T22, orders for no contact were made, on the basis that it would be of detriment to the mothers and of little positive benefit to the children. Both cases involved families where the mothers had children from previous relationships. The fathers had initially applied for contact for both their biological and non-biological children, although in each case this had been narrowed to the biological children by the time of trial. In T22,\footnote{Also discussed at text accompanying fn 406-412 in chapter three.} the father had not even met the two-year-old daughter who was the subject of his
application except on one occasion for the preparation of the Family Report.

In each of these cases, the mother’s account of the violence was accepted, in the face of the fathers’ attempts to claim it was both minimal and mutual. These acceptances were based not only on a finding that the mothers were more credible witnesses than the fathers but also on extraneous supporting evidence. In T11, the final violent attack which resulted in the mother being hospitalised and the father being jailed meant the history had a publicly documented, highly visible manifestation. In addition, there was evidence that the father had attended a psychiatrist for anger management treatment in the three years leading up to the final violent incident.\textsuperscript{749} In T22, it was a matter of some significance to the judge that another former partner of the father was compelled by sub-poena to give corroborating evidence of a history of violence in her relationship with the father. This woman, the judge found, was ‘a most impressive witness’:

\begin{quote}
She acknowledged that she had not reported…any incident to the police. She said she was too ashamed to tell anybody what had happened. She did not seek any legal advice. She said she had been subjected to abuse in the past but had now come to understand a lot of things which she had believed were normal were not normal.\textsuperscript{750}
\end{quote}

Noting that ‘domestic violence was most often committed in secret’ and that corroborating evidence was uncommon, the judge accepted the mother’s evidence of a history of rape and violence in the relationship.\textsuperscript{751}

In each instance, the mothers’ arguments required the judgments to respond to a construction of the relevance of violence as being more

\textsuperscript{749} Judgment 5/99.
\textsuperscript{750} Judgment 11/99.
\textsuperscript{751} Ibid.
than a question of ensuring the children’s safety from physical harm. So severe had the histories of violence been that both women had also argued that contact, even if it were to be supervised, would destabilise the entire family unit by re-establishing a dangerous connection with the father. The fathers’ arguments in contrast, were geared towards establishing the fact that supervision would ensure physical safety, thereby counteracting any potential for harm.

In each case, the judges accepted the mothers’ arguments about the wider impact that contact would have on the family as a unit. The judge in T11, for example, described the legacy of the history in this way:

[The mother] is genuinely fearful of the husband and still suffers from and exhibits the symptoms of post-traumatic stress disorder…The children [aged 3 and 6] show varying degrees of uncertainty and insecurity in the world and are adamant that they do not wish to see their father.\textsuperscript{752}

The evidence given by the mother’s therapeutic psychologist was a critical factor in considering the recommendation for supervised contact made by the independent psychologist. It established that ‘any contact with the father would be extremely damaging to them directly and extremely damaging to them indirectly in the sense that [the mother] would have such genuine difficulty coping’. Her Honour concluded that the ‘long term gain’ in psychological development that underpinned the independent expert’s view was ‘speculative’, but the ‘short term damage is highly probable’.\textsuperscript{753} A similar view was taken by the judge in T22, who noted that ‘notwithstanding the valiant efforts’ of the father’s counsel, the evidence of the Family Report writer had failed to establish that long term detriment would indeed flow from the absence of the

\textsuperscript{752} Ibid.

\textsuperscript{753} Judgment 5/99.
father from the child’s life. ‘I did not obtain …evidence as to what those possible consequences might be.’\footnote{Judgment 11/99.}

In these two cases, the judicial approaches emphasised the interconnectedness of the interests of the mothers and children. The potential for difficulty arising as a result of lack of contact was seen as speculative, while the possibility of contact destabilising the family as a unit was seen as real.

The judicial approach taken in the third file in this group, A1, was very different. Although the mother and the children in the file had been subject to severe levels of violence and control, the mother’s argument against supervised contact quite literally slipped from view in the judgment. The couple in A1 immigrated to Australia after their marriage. They were from different cultural backgrounds. They had five children, aged between four and twelve years at the time of trial. According to evidence accepted by the trial judge, the relationship had always been characterised by violent and controlling behaviour exerted by the father over the mother and children. The father controlled every aspect of the family’s life, including shopping, food intake and social contacts. He beat the mother and used violence in disciplining the children if they manifested difficult behaviour or had problems with their homework.

Again, in this case there was evidence of the history of violence in statements made to police by the wife which were being used in criminal proceedings against the husband.\footnote{He had been convicted of 43 counts of criminal assault against the wife. He was appealing against these, as well as pursuing action against her for perjury: judgment 1/99.} A large part of the judgment was taken up with comparing these statements against the wife’s affidavit material, in response to numerous discrepancies pointed out by the
husband, a self-represented litigant. Notwithstanding the attacks mounted by the husband on the wife’s credibility, the judge accepted that the wife and children had been subjected to an extreme regime of violence and control by the father. This is how his treatment of the children was described:

All of the children…were afraid of the husband…he would force them to eat through fear and strike them if they refused to eat. He encouraged fights between the children and would place their favourite toys in the rubbish bin if they did not do as he wished. On occasions when the husband wished to use the telephone or computer he would confine all five children and the wife to one room for the whole day. If the children were noisy he would yell at them and throw objects [such] as shoes, books, toys, bottles, plates and water at them.

Other evidence which dealt with the issues of violence and abuse against the mother and children before the Court included that of two Family Court evaluators, a child protection officer from Department of Human Services, the wife’s psychologist and a psychologist working with a family violence service who had assisted the wife and the children.

The wife’s psychologist gave evidence that she suffered from post-traumatic stress disorder as a result of the violence and control in the marriage. ‘She continues to experience anxiety and depression…Her condition is unlikely to improve while she continues to be subjected to continual court appearances. In oral evidence, the psychologist said that the experience of reliving the family violence through constant litigation ‘had a very distressing effect’: ‘[s]he is unable to eat for some days after such litigation. Moreover she has an increase in the severity of dreams and nightmares relating to being chased or attacked or the children being chased or attacked’. The occurrence of contact, even under supervision, was extremely stressful for her: ‘She reports being very anxious if they are late back. She reports all sorts of fears that they won’t come back,

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756 Ibid.
that he will take them out of the country, that he may have harmed them’. 757

The father’s application in this case was to have residence of the four older children from Monday to Friday so that he could supervise their education. The court’s judgment was more significant for what it did not say than for what it did say. Much of the discussion in the judgment, and in the report of the Family Court evaluator, was directed at justifying the Court’s refusal of the father’s application. Apart from a reference to the children’s wishes to keep seeing their father under supervision, there was no detailed discussion in the judgment of the mother’s application to cease contact altogether. Her argument against contact taking place because of the ongoing trauma it caused her became virtually invisible in the context of the father’s application for shared residence. The failure to even consider the mother’s arguments implies a view that constructs the interests of the mothers as quite separate from those of the children. 758

Although the history of violence and abuse was amply acknowledged to be a crucial factor against the father’s application, the judgment was silent on the justification for ongoing contact. The provisions relevant to violence in _FLA_ s68F were said to ‘be of great importance’ in the framing of the final orders, but this was not further elaborated. In circumstances where violence and control of such magnitude and severity was proven, it is inconsistent with the approach taken in _JG and_

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758 Previous Family Court jurisprudence has acknowledged a nexus between the genuinely-held views of the primary caregiver and the interests of the children in relation to the question of whether contact should be ordered see eg _Sedgley and Sedgley_ [1995] _FLC_ 92-623, _Irvine and Irvine_ [1995] _FLC_ 92-624, _A v A_ [1998] _FLC_ 92-800, _Re Andrew_ [1996] _FLC_ 92-692. Under this approach, it is recognised that concerns about contact may impact on the primary caregiver’s capacity to parent the children adequately and that this is a relevant concern in decisions on whether contact should be ordered. Overall the analysis in this thesis suggests this issue is receiving less emphasis, due to the operation of the friendly parent criterion and the emphasis placed on the negative father construct in psychological evidence. This is discussed in greater depth in chapter six, at text accompanying fn 1034 and 1047. See also _Parenting Planning and Partnership 70; The First Three Years Report: 5.73-5.76._
BG and Blanch, discussed earlier in this chapter, that the advantages and disadvantages in ongoing contact do not even receive consideration. This is particularly so given that that the violence was directed both at the children and the mother and the judge found the father to be highly manipulative. Moreover, the father had continued his vehement denials of the history of violence, challenging any account, including those of the Department of Human Services officer, the Family Report writer and the Children’s Representative that contradicted his version of reality.

Because of the persistence and force with which the father pursued his case in this file, it appears that the mother’s arguments’ slipped from view. This is symptomatic of a more generalised tendency evident across the sample for mothers’ arguments about violence to be virtually invisible alongside men’s claims about fatherhood. As Helen Rhoades argues:

> The expectations that have been created of equality and a right to contact have effectively reduced practitioners’ sensitivity to, and the Court’s scrutiny of, women’s concerns about violence.

In summary, this analysis of the group of cases in which ‘real’ violence underpinned a ‘no contact’ argument by the mothers highlights a number of important insights into approaches to violence in Family Court litigation. It shows where the bar that determines relevance and legitimacy is placed in relation to allegations of violence. In each case, the violence was, by any standard, extreme. In each case, it had a highly ‘visible’ presence, in that there was evidence that provided corroborated its occurrence. The violence had an extensive physical manifestation in addition to being part of a system of control. It also had had a clear

759 FLC [1994] 92-515, Chisholm J.
761 Judgment 1/1999.
impact on the children, either directly or indirectly. Moreover, in order to even sustain (without necessarily being successful) an argument that contact was detrimental to the mother and children, evidence of severe psychological stress was available, with the women being virtually at breaking point.

Even in such circumstances, psychological approaches highlighted the emphasis placed on maintaining the connections between even significantly impaired fathers and children. The discussion of files T22 and T11763 shows that in some instances judicial approaches resisted this emphasis, focussing instead on the more immediate risks contact in such circumstances might pose for children and their caregivers. As the discussion of the outcome in A1 showed however, such sensitivity to the connection between the interests of mothers and children in circumstances where there was a history of violence and abuse was not universal.

These insights support Rhoades’ contention that in the current environment, fathers’ claims are seen to carry greater legitimacy than those of mothers at a number of levels.764 This obscures recognition that fatherhood claims in litigation may be a means of perpetuating the dynamics of violence and control. In comparison with the unambiguous deviance associated with the ‘no-contact’ mum discussed in chapter three765 there is significantly more ambivalence associated with the violent father. This evidence of reluctance to sever ties between fathers and children, even where there has been a serious history of violence, further underlines the differential standards applied to mothers and fathers in contemporary family law decision making. Within this

763 At text accompanying 747 and 754 above.
764 Rhoades, The ‘No-Contact Mother’, above n 137.
765 See text accompanying fn 532 and 547.
standard, men who beat their wife and children are not disqualified from the field of temporal\textsuperscript{766} fatherhood.

The next section expands on these themes of violence and ambivalence in the context of a discussion of the group of cases involving ‘simple’ violence in the sample.

2 ‘Simple’ violence

The striking feature of the group of ‘simple’ violence cases in the sample was that issues relating to violence and control were present to varying extents in the mothers’ material yet received little attention at the level of judicial comment.\textsuperscript{767} In this group of cases, violence was a factor raised by mothers in the context of relationship history and as a factor militating against fathers’ arguments for residence. Patterns of controlling behaviour were a marked feature of these cases and in some instances this was also accompanied by fairly serious physical violence, yet links between these issues and parenting capacity of the fathers were not drawn.

For example, violence was a significant feature of the relationship history in the mother’s account in T7. She described how the husband’s violence emerged just months after the marriage began, and escalated after the birth of the couple’s first child:

The husband became more critical of me, complaining about the lack of work I was doing, calling me lazy and criticising my weight and looks. Arguments followed which often ended in his physical abuse of me but I kept quiet about the attacks in order not to inflame the situation.\textsuperscript{768}

\textsuperscript{766} The fathers’ application for parental responsibility was unsuccessful, due to the level of ‘conflict’ in the case: judgment 1/1999.
\textsuperscript{767} T1, T3, T7, T15, A7, T8, T5, T10, T6, T9, T12, T19, A2, A3, A11, A17, A6, A15.
\textsuperscript{768} Affidavit (m) 4/2/1999.
The couple lived in isolation on the husband’s rural property. The wife, who had lived in the city prior to her marriage, found that the combination of isolation and abuse led her to develop mental health problems: ‘[m]y self esteem plummeted and I found myself questioning my self worth, resulting first in one suicide attempt followed by several hospitalisations’. She left the farm after a particularly bad bashing but returned on finding that she was pregnant. An incident after the birth of the couple’s second child, in which the husband smashed her car with an axe precipitated her decision to finally leave: ‘[f]rom that moment on I lived in fear for my own safety and life and was concerned whether, whilst in a rage, the husband was capable of harming the children’. 769

By the time of the trial, which took place about three years after the separation, the wife had re-established her life and was in a relationship with a new partner. She deposed that within a month of leaving her former husband, her ‘stress levels had fallen remarkably and my reactive depression had lifted’. Despite the history of violence, the mother deposed that she had always tried to facilitate contact between the children and their father. When he first requested contact many months after the separation, she willingly agreed:

I tried to facilitate as much contact as the children could cope with. I drove the children to the farm once or twice a week….When I left the farm, I had few contacts in the area and all my family and friends lived [in the city]. I would not have stayed in the country but for the fact that the children had their father there. 770

This attitude was maintained, despite the fact that the husband continued to abuse her verbally and made a series of unfounded complaints about her to various authorities. ‘[t]he husband has frequently denigrated me to

769 Ibid.
770 Ibid.
the children and tried to destroy me by threats and intimidation that the children would not remain with me’. 771

At trial, the husband applied for residence of the two children, arguing that the mother was mentally ill and abusive to the children. He claimed that she had tried to alienate the children from him and was an unfit parent: ‘the Respondent is a very dangerous individual, particularly around children and I believe my children are in great danger in her care’. 772

Within the judgment, the history of violence in the relationship received little discussion. This history was referred to as ‘disharmony between the partners [that] was most serious and manifest’. 773 The judge noted that the husband ‘was physically abusive of the wife from time to time and both unpredictable and erratic in his behaviour’. However, the only issue noted to be of relevance in His Honour’s consideration of FLA s68F(2)(g) was the husband’s tendency to denigrate the mother in front of the children. This was a matter of serious concern:

The husband has launched and maintained a virulent attack upon the wife both personally and as a parent. He has ignored the reality that since their separation …he has never had one night of overnight contact with them. He has failed abysmally to contribute financially to their support…His proposals for housing the children are quite inadequate and based on the anticipated benevolence of a friend….

According to the judge, the husband’s obsessive pursuit of his claim for residence was motivated by ‘unresolved personal issues’. While the husband had a ‘loving relationship with his children’, of ‘grave concern’ was his negative attitude to his former wife.

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771 Ibid.
772 Affidavit (f) 1/3/1999.
The framing of the issues in the judgment separates the pre-separation history of violence from the husband’s post-separation behaviour in using litigation to continue his tactics of abuse and control. Indeed, neither his pre- nor post-separation conduct was appropriately acknowledged, despite a finding of credit in the wife’s favour.\footnote{Judgment 3/1999.} In failing to link the violence and control that occurred prior to separation with the persecution and denigration that occurred after separation, the dynamics of power and control, and the fact that children were being used to perpetuate them, remained largely unrecognised at the level of judicial comment. This was despite acknowledgment in one of the Family Reports available to the court of this feature of the case.\footnote{Family Report 16/7/97.} This report noted that the father sought ‘sole residency’ and ‘full parental control’. Under this proposal, the mother would have daytime contact, increasing in quantity if the mother was ‘to improve somehow’. The evaluator commented that ‘[h]is plan is highly controlling of all activities – he has the power to decide activities to which the mother must take the children and his view is that “a firm hand and control is needed with the wife to act in the children’s best interests”’. Each of the Family Reports relied upon by the judge recommended that the children remain resident with the mother, with contact being exercised by the father.\footnote{Family Reports dated: 4/11/1998, 16/7/1998}

The obscurity attached to the issue of violence in the judgment contrasts strongly with the attention paid to the friendly parent criterion. In the face of the husband’s allegations that the wife was alienating the children from him,\footnote{Claims of alienation across the sample are discussed in detail in chapter five. See text accompanying fn 857 and 925.} her conduct in this regard received much scrutiny. The judge emphasised that the Family Report established that there was no evidence that the mother had attempted to alienate the children from their father. The Family Court evaluator concluded that interactions
between the children and their father were ‘warm gentle and affectionate’. This contradicted the father’s claims of alienation and was emphasised by the judge. His Honour noted that the mother had a ‘healthy and positive attitude towards the husband’s contact’ and this should receive more acknowledgment from the father. Clear evidence of the father’s negative attitude, on the other hand, was available from the Family Report evaluator:

the father spoke about the mother in derogatory terms in their presence despite this counsellor’s reminders of its undesirability. He believed that they were too young to understand. Yet the daughter’s age, her demeanour and her probable experience of past disputes between the parents would suggest that she would at least have some awareness of the parents’ hostility.

The depiction of the father in the judgment emerges as somewhat paradoxical. He was found to have a ‘loving’ relationship with his children. Yet his preparedness to denigrate the mother in their presence was constructed as a source of harm: he was a loving yet possibly abusive father. The paradoxical nature of this depiction results from the way that violence is constructed in this judgment. There is a clear distinction drawn between the ‘physical abuse’ that took place during the marriage and the ‘denigration’ that occurred after it. The denigration is seen to result from the father’s reaction to the failure of the marriage at a psychological and emotional level, rather than being seen as part of an ongoing attempt to maintain the dynamics of violence and control that subsisted during the marriage. His behaviour as a violent spouse is separate from his behaviour as a (potentially) harmful father. In this way, the fact that contact continues to expose the children to the dynamics of violence and abuse remains obscure.

Several key points that are also relevant to other cases in the sample can be drawn from this case study to demonstrate how psychological and judicial approaches obscure the extent and relevance of a history of violence.

There is a tendency within judicial discourse to view violence in an ‘incident based’ way which fails to acknowledge that it is part of an ongoing system of violence and control. This approach fails to connect pre-separation violence with post-separation control tactics, in which litigation can play a key part. It inherently fails to apprehend the gendered dynamics of power that subsist in violent relationships.

A further manifestation of this tendency was evident in other cases in the sample where judges adopted a ‘symmetrical’ account of violence that emphasised individual incidents and characterised them as ‘mutual’. In T1, for example, the judge described what the woman claimed was an ongoing violence in the context of a control pattern as ‘occasional flare-ups, namely with the husband menacing the wife and wife responding by standing up to him’. A number of criticisms were made of the husband by the judge in this case, including his ‘overzealous’ tendency to make unsubstantiated reports of child abuse to ‘various State authorities’. Additionally, the fact that he forced the wife to attend hospital for an internal examination to ascertain whether she had been unfaithful to him was ‘less than disgraceful’. No connection was made between these issues, so the pattern of violence and control remained unrecognised.

781 Similar themes are present in: T1, A7, T8, T9, T12, A15. In two cases, T15 and A6, more robust approaches were taken to violence and control tactics, with judicial recognition of their implications. This only extended to the fathers’ capacities to be residence parents. Their suitability as contact parents was unquestioned. Hart (above n 144) makes similar observations in relation to the judicial discourse evident in her sample: 182, 185.


A related feature of judicial approaches was the adoption of a view that constructed spousal behaviour as separate from parental behaviour. In this way, the paradoxical image of the ‘abusive’ husband but ‘loving’ father arises, as in the T7 case study discussed above. The father’s continuing vilification of the mother, and his previous history of violence, was marginalised in relation to the consideration of whether continuing contact was in the children’s best interests. The implications for children of being caught within an ongoing dynamic of power and control thus remain unconsidered. This is symptomatic of the way that ‘the desire for greater parental [specifically, paternal] involvement is exerting a magnetic pull in these cases which impels courts to avoid consideration of domestic violence’. 784

The way that gender neutrality pervades family law culture more generally is also relevant here. As has previously been discussed, both the model of parenthood in the legislation more widely and the definition of violence in particular are framed in gender neutral terms. Against this background, and in the context of the imperative of ‘judicial neutrality’, 785 there is little recognition of the way gendered imbalances in power impact upon Family Court litigants. This is especially the case in circumstances where ‘men’s demands for access to their children are typically met with a presumption of good faith’. 786

The implications of this are manifested in the operation of the friendly-parent criterion. This is exemplified in the T7 case study in which each parent’s attitude to the other received scrutiny, both at the level of psychological and judicial discourse. While the litigation was judicially recognised to be a forum for venting the father’s hatred of the mother but not as a means of exercising control, the mother’s evidence was

784 Meier, above n 623, 659.
785 Ibid.
786 Ibid.
tailored to convey the message that she valued and would facilitate the connection between the father and children. In part, the position adopted by the mother may have contributed to the lack of visibility surrounding the tactics of violence and control. Although the control dynamic was amply acknowledged in the Family Report and the mother’s affidavits covered the violence in considerable detail, the mother’s agreement that contact should occur limited the extent to which these issues could be considered as relevant to parenting capacity.

This point highlights how the application of the friendly parent criteria acts as an inhibiting factor in relation to mothers’ discourses about violence in particular and impaired fathers in general. My analysis suggests that the penalising discourses surrounding the ‘no-contact mum,’ discussed in chapter three, result in women being placed in a double bind in relation to violent fathers. To oppose contact is to invite the wrath of the law, yet to support it involves downplaying violence. Explicit evidence of this is not available from the files. Rather, this conclusion is based on my analysis of the way mothers’ claims are framed in the empirical material in combination with insights from the recent study by Kaye, Stubbs and Tolmie. This research suggests the position adopted by women in relation to contact reflects a compromise on what they believe is in their children’s best interests. It also highlights a number of other potential impediments to violence becoming fully visible in the context of child contact proceedings.

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787 See text accompanying fn 532 and 547.
789 Above n 141.
A fundamental issue, which has also been highlighted in US and UK studies, is the reluctance of women to discuss the histories of violence in their lives with professionals. Kaye, Stubbs and Tolmie noted that 70.9 per cent of the women in their study found it hard to raise the issue of violence because it was too personal, they were embarrassed or they were in denial about it themselves. Furthermore, the responses of professionals were found to be influenced by their own understandings of the nature of violence, with those who lacked insight into violence as part of a system of control being inclined to downplay its significance.

Ambivalence is a hallmark of the attitudes to contact among the mothers interviewed by Kaye, Stubbs and Tolmie. Fewer than half of the women in their sample thought that contact was positive, while the others were either opposed or ambivalent. However, there was a prevailing belief among many women and some professionals that a presumption in favour of contact applied even in circumstances where the contact parent was ‘self-destructive, unstable or abusing the children’.

Almost half the women in the study by Kaye, Stubbs and Tolmie had orders for contact which they believed exposed themselves or their children to risk. Further, it was a commonly held view that the significance of violence was not sufficiently recognised in relation to contact and residence proceedings. This is consistent with the observation in The First Three Years Report that a majority of the mothers in its sample had contact orders made by judicial determination.

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790 Meier above n 623.
792 Kaye, Stubbs and Tolmie, above n 141, 41.
793 Ibid 43. The Parenting Planning and Partnership report, above n 100, highlighted a lack of understanding among some legal practitioners about the relevance of violence to children’s matters: 76.
794 Ibid 72
795 Ibid 107.
796 Reached privately, by consent or by judicial determination: ibid.
797 Ibid 105
or consent that they believed did not provide adequate levels of protection.\textsuperscript{798} Fathers, on the other hand, were said by solicitors and counsellors to have an expectation of an entitlement to contact regardless of a history of family violence.\textsuperscript{799} Solicitors expressed the view that arguments against contact are strategically unwise, particularly at interim level, because they may make mothers appear ‘hostile’.\textsuperscript{800}

The insights from the study by Kaye, Stubbs and Tolmie and \textit{The First Three Years} report provide the backdrop for the arguments of the mothers and fathers in the violence cases in my sample. The arguments of the mothers have been formulated in a context where fathers have a greater sense of entitlement and are making larger claims, regardless of relationship history. Solicitors have a belief that opposing contact will give an appearance of hostility and is therefore strategically dangerous. Mothers believe that contact is essentially compulsory and are in any case reluctant to discuss a history of violence. These insights suggest that the issues about violence raised in the mothers’ affidavit material become ‘siphoned off’ in the process of formulating litigation strategies.\textsuperscript{801} In a context where it is seen as essential to support contact, discourses about violence, unless it is extreme, have been displaced.

\textbf{SUMMARY AND CONCLUSIONS}

In summary, family violence in the sample files falls into two categories of ‘real’ and ‘simple’ violence arising as a result of strategic decisions made in relation to the arguments to be raised in litigation. ‘Real’

\textsuperscript{798} \textit{The First Three Years Report} above n72, 5.26, 5.44.
\textsuperscript{799} Ibid 5.24.
\textsuperscript{800} Ibid 5.39, 5.40.
\textsuperscript{801} Neilson (1997) above n 782, 129. In a later article Neilson (2003) above n 63 makes the point that ‘rights’ based legal decision making uses fewer resources than decision making that requires a detailed assessment of needs. In seeking shortcuts to achieve settlement in an under-resourced system, lawyers seek to enforce rights rather than undertaking a more time consuming inquiry into whether the fulfillment of those rights is actually to the benefit of the child 22-23.
violence is considered significant enough to challenge paternal fitness. The sample cases indicate that what is required to meet this standard is significant physical extremity, corroboration — such as a criminal conviction, medical records or evidence from another ‘victim’ — and psychological evidence of post-traumatic stress disorder. Even in the sample cases in this category, psychological and some judicial responses favoured the maintenance of contact between children and violent fathers.

In the cases involving ‘simple’ violence, the relevant sample files indicate that while the level of violence may be serious and involve ongoing issues relating to control, there was insufficient evidence in these scenarios to risk a strategy of problematising father involvement. This reflects a failure on the part of professionals and judges to appreciate that violence is more than physical abuse. Patterns of domination through the use of both violence and control tactics are overlooked.

The cases involving ‘simple’ violence highlight a lack of coherence in mothers’ discourses about fathers. These fathers are violent and controlling on the one hand, yet valuable to their children on the other. This incoherence reflects a disjunction between the ‘lived’ histories of these women and the positions they must adopt in order to retain residence of their children. In espousing the ‘valuable father’ position to avoid the label of ‘bad mum’, their experience of violence remains submerged. This reflects the way that ‘[t]he experiences at the heart of a potential legal claim may need to be restructured so as to fit into a legal

802 A poor understanding of violence among solicitors and welfare professionals was highlighted in the interviews conducted with judicial registrars in Parenting Planning and Partnership, above n 100, 38.
framework" to such an extent that their significance to those who had
those experiences may be virtually lost.

A belief among parents and professionals that contact is compulsory
under the present system shapes what parents ask for. This is reinforced
by ambivalent attitudes to maintaining contact between fathers and
children among mothers themselves. The application of the friendly
parent criterion further acts as a powerful influence in shaping the claims
of mothers’. It discourages criticism, even that which is legitimately
based, of the other parent, by the putative residential parent. In addition,
the construct of the ‘negative father’ within psychological discourse
reinforces beliefs that fathers, even impaired ones, are essential.

Judicial approaches reflect the tension between the issues raised by the
FLA s68F(2) fact finding process in relation to parental adequacy and
the child’s right to be cared for by both parents in s60B(2). This tension
produces descriptions such as those of the father in case study T7 as
‘loving’ but ‘abusive’, reflecting an artificial distinction between the
‘valuable father’ and the ‘violent husband’. It parallels a phenomenon
grounded in joint custody frameworks which has been described by
Maria Eriksson and Marianne Hester on the basis of research from the
UK and Sweden. They argue that there is a disjunction between the
constructions of fathers in family law and in child protection law. In the
former, modern fatherhood discourses have ensured fathers are
constructed as essential and valuable. The latter depicts them as harmful
and potentially dangerous. However, a lack of focus on the connection
between violence and parental capacity, combined with the
contemporary emphasis on fatherhood, ensures that ‘any involvement by

\[803\] Regina Graycar, ‘Telling Tales: Legal Stories About Violence against Women’
\[804\] See also discussion in chapter four in text accompanying footnotes 568 and 584.
\[805\] Eriksson and Hester, above n 746.
fathers with their children constitutes good enough fathering’.\textsuperscript{806} Within family law frameworks this ‘means that women are simultaneously responsible for the well-being of children and for acting in accordance with the best interests of the child by promoting contact with the other parent, the violent father’.\textsuperscript{807}

The discussion in this chapter reinforces the point made in chapter three in relation to the differential definitions of parental ‘adequacy’ that are produced by decision making in the sample. The fathers in the section of the sample discussed in this chapter are seriously flawed, yet their claims for a parenting role carry great discursive power. This discursive power is reinforced by the ‘negative father’ construct in psychological discourse and a mutually reinforcing emphasis on the friendly parent criterion in litigation strategies and judicial approaches. It is further exacerbated by the historical invisibility of violence in liberal discourse. This in turn obscures the way that violence and control may be perpetuated by the assertion of legal ‘rights’. The legitimacy attached to ‘fatherhood’ claims in the current socio-political environment masks the fact that the pursuit of such claims through the legal system may be motivated by continuing power and control dynamics rather than a genuine concern for children.

Underlining the implications of the different definitions of ‘adequacy’ applicable to mothers and fathers in the current environment, continuing contact\textsuperscript{808} with violent fathers is constructed as being in the best interests of most of the children in this section of the sample, even in some cases where they were directly affected by the violence. This runs counter to suggestions from social science research that contact with impaired fathers may be destructive for children. As Hart observes, in such circumstances children are ‘place[d] at unacceptable risk of exposure to

\textsuperscript{806} Ibid 791.
\textsuperscript{807} Ibid 787.
\textsuperscript{808} Even residence in two cases.
further trauma’, in the face of mounting evidence that on contact children ‘can become the focus of the perpetrator’s violence, or be forcibly involved in the father’s violence toward the mother’.809 In these circumstances, there is a further need to examine how this notion of the best interests of children is constructed. This is the subject of the next chapter.

809 Above n 144, 189.
Rae Kaspiew
Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Australian Family
Court Decision Making
CHAPTER 5

THE CONSTRUCTION OF CHILDREN’S INTERESTS IN THE ERA OF ESSENTIAL FATHERING

‘I have stuffed up the stories before’.  

INTRODUCTION

The two preceding chapters have focussed on parents’ claims and their treatment in the legal process across the empirical sample. Chapter three established the existence of a divergence in the parenting histories and capacities of residence and contact parents. This results in varying definitions of ‘adequate parenthood’ being applied to residence parents (mothers) and contact parents (fathers). A much lower standard of parenting is acceptable in contact parents. Chapter four demonstrated how links between violence and parenting capacity remain substantially unexplored except in very extreme cases. Orders for contact, and in some cases even residence, were made in favour of violent fathers in the sample.

The discussion in this chapter extends these analyses by examining how the children’s interests in the sample were treated in the context of their parents’ claims. The specific focus of the analysis is the tension between FLA s60B(2) and the child focussed provisions in the FLA s68F(2) checklist, in particular, those which require the Court to consider the child’s wishes, the nature of the child’s relationship with each parent, the effect any change in circumstances would have on the

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811 s68F(2)(a).
812 s68F(2)(b).
Rae Kaspiew  
Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Family Court Decision Making

child\textsuperscript{813} and the child’s maturity, sex and background.\textsuperscript{814} In addition, the way the children’s ‘best interests’\textsuperscript{815} question is dealt with in the cases in the sample is examined.

A central theme in this chapter is the way children’s relationships with their parents are constructed in the context of the factual backgrounds to the cases in the empirical sample. As established in chapter three, mothers were functional parents to a greater extent and to greater effect than the fathers in the sample. However, in keeping with the differential positioning of men and women as litigants, fathers’ claims are oriented toward challenging the primacy of mothers and asserting their own importance to the child. The tensions between fathers’ claims for ‘equal’ recognition and mothers’ concerns in relation to children’s day to day needs are the subject of the analysis in this chapter. A particular focus of this analysis is the impact that these competing claims have on the children in the sample and how these are dealt with in the legal process.

This chapter has four parts. The first part briefly considers the formal mechanisms that exist for children to be heard in family law proceedings and the extent to which they were used in the sample. Part two extends the analysis of the way violence is treated in proceedings with an examination of the overlap between violence, alienation and the treatment of children’s wishes in the sample. Part three focuses on the implications fathers’ claims for parenting ‘equality’ have for children and the way these are dealt with in the process of balancing \textit{FLA} s60B(2) against s68F(2) considerations. Part four examines how the Court’s consideration of whether contact is in the best interests of the child is affected by the tactical pressures placed on mothers by the operation of the friendly parent criterion and the negative father construct.

\textsuperscript{813} s68F(2)(c).
\textsuperscript{814} s68F(2)(f).
\textsuperscript{815} s65E.
PART 1 CHILD-FOCUSED ASPECTS OF THE LITIGATION

In a formal sense, children’s interests are the central concern in Family Court decision-making under the existing legislative framework. This is most evident in the way that their ‘best interests’ are given paramountcy in s65E. The legal framework also offers a number of opportunities for children to be heard in proceedings relating to their care. Theoretically, they may participate directly in proceedings through their own legal counsel briefed by a next friend. Their views can be expressed to the Court through Family Reports or they may be interviewed by the judge in Chambers. Most significantly in recent times, the Court has been given the power to order that a separate legal representative be appointed to safeguard children’s interests (Children’s Representatives).

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817 This is unusual for cost reasons. It occurred in a recent case testing the limits of the FCA’s welfare jurisdiction that went to the High Court: Minister for Immigration and Multicultural and Indegenous Affairs v B (2004) Fam LR 339.
818 Either a Family Report or an Order 30A which is a report prepared by an independent expert appointed by the Court.
819 Order 23 Rule 4(1). This is unusual: FCA Submission, above n 17, 46. However in the recent case of Re Alex: Hormonal Treatment for Gender Identity Dysphoria (2004) Fam LR 503, Nicholson CJ interviewed the young person involved in Chambers.
820 s68L. Since this research was conducted, the Family Court has moved to clarify the role of the Children’s Representative in proceedings by the issuing of a set of Guidelines in relation to this role: Family Court of Australia, Guidelines for Child Representatives, <http://www.familycourt.gov.au/html/child_rerepresentative.html> at 27/10/03. A Family Law Council Report, Pathways for Children: A review of children’s representation in family law (2004) has also made a range of recommendations aimed at clarifying and increasing the efficacy of the role.
The circumstances in which such an appointment should be made were outlined by the Court in the 1994 decision of In Re K.\textsuperscript{821} They include situations where there are allegations of child abuse, where there is intractable conflict between the parents, where alienation had occurred, where cultural or religious differences were affecting the child and where a parents’ sexual preference may affect the child.

Within the sample, the two main ways that children’s views were represented to the Court were through Family Reports\textsuperscript{822} and the appointment of a Children’s Representative. 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.\textsuperscript{823}

It is clear that Children’s Representatives were involved in the proceedings in 17 cases in the sample.\textsuperscript{824} In some instances, it appeared that the degree of involvement of the Children’s Representative was quite circumscribed and information on the final position advocated was not available. The cases where a Children’s Representative was appointed fell mostly into the extreme end of the continuum.

The material in the sample suggests that despite the involvement of a Children’s Representative, the parents’ arguments determined the parameters of the Court’s consideration in most instances.\textsuperscript{825} In the 13

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\textsuperscript{821} FLC ¶ 92-461.
\textsuperscript{822} The treatment of children’s interests in Family Reports is discussed substantively throughout the other three parts of this chapter.
\textsuperscript{823} Research indicates that legal aid funding may not be available beyond the interim stage: Parenting, Planning and Partnership, above n 100, 62-65.
\textsuperscript{824} T2, T23, T7, T5, T6, T11, T18, A3, A1, A4, A17, A12, A15, A7, A8, T15, A16.
\textsuperscript{825} 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, 79. However it was clear in most
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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. These outcomes were consistent with mothers’ applications in nine cases and fathers’ applications in one case.

In only one case did the Children’s Representative advocate the issuing of orders that were consistent with neither the mothers’ nor the fathers’ position. In T7, discussed extensively in chapter four, the Children’s Representative applied for orders to adjourn the proceedings, reserve the question of contact and obtain a psychiatric assessment of the father. This was more conservative than the mothers’ position, which was to allow contact to take place on a fortnightly basis. The application was unsuccessful and orders were made reflecting the mother’s application for residence, with contact for the father.

Concerns have been raised about the level of knowledge about domestic violence among Children’s Representatives by other Australian research which has questioned the safety of children (and their mothers) under the pro-contact culture that has emerged since the introduction of the Reform Act 1995. Two sample files, A1 and A12, involving Children’s Representatives and severe levels of violence would appear to support these concerns. In A1, the Children’s Representative

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826 T2, T6, T18, A3, A1, A4, A17, A15, A7, A8, T15.
827 T2, T6, T18, A3, A4, A16, A15, A8, T15.
828 A7. In one further case, the Child Representative supported the non-biological father’s application for contact: A17.
829 See text accompanying 768 and 780.
830 Rendell, Rathus and Lynch, above n 177, 95-96.
supported continuing supervised contact even though the father had been extremely violent and controlling to both the children and the mother in the case.

In A12, the Children’s Representative reserved his position at trial because Legal Aid funding had only been obtained just prior to the start of trial. After the father successfully appealed orders suspending contact, the Children’s Representative did not oppose the making of consent orders giving residence of the children to the father.831 This was despite a background of extreme violence and the very strong suggestion that the children had been alienated from their mother by their father.832 In a previous trial, the fathers’ application for residence of the children had been refused, with the judge observing that her findings about the father’s ‘violent, controlling and manipulative’ behaviour towards their mother meant he would be an unsuitable resident parent.833 The making of the consent orders which remain subject to the best interests principle in s65E, suggests that the father’s relentless campaign of litigation against the mother finally wore her down.834

Notwithstanding those cases where Children’s Representatives were involved, most of the material in the files dealt with issues relating to parental attributes and conduct. This is consistent with concerns expressed by the FCA 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’:

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832 See below, text accompanying fn 879 and 889.
834 The Parenthood, Planning and Partnership Report, above n 100, indicates that judicial scrutiny of consent orders primarily involves ‘checking the formal or technical aspects of the order and to seeing if there is anything of obvious concern’: 27. Kaye Stubbs and Tolmie, above n 141, question the validity of the ‘consent’ obtained from mothers in circumstances involving violence: 101.
judges 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.\footnote{FCA Submission, above n 17, 51.}

The amount of argument in the sample files that specifically related to the children involved in the cases was minor, compared with the volume of argument directed toward establishing and refuting parenthood claims. Arguments focussed on the needs of the children in the sample played a much smaller role throughout the parents’ affidavit material, the Family Reports and the judgments. Other Australian researchers have made similar observations. For example, FCA counsellors Bob Hinds and 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.\footnote{Bob Hinds and 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) Melbourne, <http://www.familycourt.gov.au/papers/html/hinds.html> 5.}

This tendency to focus on parents rather than children has also been substantiated by the Family Court’s\footnote{FCA Submission, Parts B and C, above n 30.} analysis of factors emphasised in judgments, referred to previously in chapters three\footnote{See text accompanying fn 523 and 525.} and four.\footnote{See text accompanying fn 677 and 679.} In an assessment of the weight attached to each of the FLA s68F(2) factors across a sample of 91 judgments in three registries conducted in 2003, the two provisions that involve consideration of the individual child received less emphasis than the parent-focussed provisions. The issue of the child’s wishes\footnote{s68F(2)(a)} was considered of high or moderate significance in only 29.7 per cent of cases. In 30.8 per cent of cases, this weighting was accorded to the provision that directs attention to the individual

\footnotesize{\begin{itemize}
\item \footnote{FCA Submission, above n 17, 51.}
\item \footnote{FCA Submission, Parts B and C, above n 30.}
\item \footnote{See text accompanying fn 523 and 525.}
\item \footnote{See text accompanying fn 677 and 679.}
\item \footnote{s68F(2)(a)}
\end{itemize}
characteristics of the child, such as the child’s maturity, sex and background. As noted in chapter three, this compares with a weighting of 63.7 per cent for attitudes to parenting and 24.2 per cent for family violence.

My analysis shows that arguments directly relevant to the children in the sample covered three main areas: the wishes that the children themselves had expressed, the impact of current and proposed arrangements on the children and the impact of court orders on relationships between the child/ren involved and other important figures. The analysis presented in the next two parts provides new insights into the way that children’s interests are treated in litigation. No other research has systematically examined Family Court files to assess how children’s perspectives are treated in the context of their parent’s arguments.

**PART 2 LISTENING TO CHILDREN?**

This section presents an analysis of the role played by the preferences expressed by the children in the sample. The data revealed significant complexity surrounding this issue. It indicated that children’s wishes either play a minimal part in litigation, due to issues such as the young age of the child, or raise highly problematic questions. The latter tendency is manifested most clearly in a group of cases where overlapping issues relating to violence, allegations of alienation, and the validity of the children’s wishes raise complex questions for determination. The overlap between these factors was an extensive theme in the data and is the focus of the discussion presented in this part.

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841 s68(f)(2)(f).
842 See text accompanying fn 523 and 524.
843 In three cases, T15, T18, A13, judicial determinations explicitly went against the children’s wishes because other factors were considered more important.
Judicial attention is directed to the issue of children’s wishes by *FLA s68F(2)(a)*. This provision requires the Court to consider any wishes expressed by the child. The child’s maturity or level of understanding is relevant to the weight accorded to those wishes. Further provisions provide guidance on how the court should ascertain what wishes children have expressed. This is to occur by means of a Family Report, or ‘by such other means as the Court thinks is appropriate’. A child’s right to refuse to express any wishes at all is preserved in the legislation.

The wishes of children have been recognised in case law to be an ‘important matter’, deserving of being accorded ‘proper and realistic’ weight. Factors considered to be important in determining that weight include the strength and duration of the child’s expressed wish, its basis, the maturity of the child and their capacity to understand the longer-term implications of the issues before the Court. It has also been recognised that decisions based on best interests criteria may involve a rejection of the child’s expressed preference. A more recent decision requires evidence to be put before the Court of what the child’s view would be if such a rejection occurred.

Eliciting information about children’s wishes involves many complex issues, in terms of how this is done and assessment of the implications of what is said. As Carole Brown notes, the wishes expressed by a child in the context of a residence dispute do not necessarily reflect their own best interest: ‘[they] may state a preference that reflects the loyalty bind

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845 s68G(2)(a)
846 s68G(2)(b).
847 s68(H).
848 *In the Marriage of Harrison and Woollard* (1995) 18 Fam LR 788, 797.
849 Ibid 800.
they are in, or their perception of one of their parents as needing them or the coaching by one parent or alienation.\(^{851}\)

The Family Court’s submission to the *Every Picture Report* inquiry noted the skill that was required in conveying children’s interests: ‘[i]n some cases a bald description of what a child said may result in a breakdown in the child’s relationship with the non-preferred parent, or some form of reprisal’.\(^{852}\) A qualitative study involving young adults who were subject to contested proceedings as children by the Australian social work academic, Yvonne Darlington, highlights the consequences for children of not being listened to. Participants in her study who had residence or contact arrangements made that were contrary to their expressed wishes ‘described feelings of anger and frustration’: ‘[a]lready strained relationships were further stressed by this sense of compulsion, that they were “made” to see or live with this parent’.\(^{853}\)

The issues surrounding children’s wishes are particularly complex in cases involving violence. The way children may be used as tools in patterns involving violence and control was referred to briefly in chapter four.\(^{854}\) They may be subject to manipulation by the abusive parent which impairs their relationship with the other parent.\(^{855}\) Moreover, the ‘abused parent may be seen by the children as weak and “ineffectual,” and children may wish to align themselves with the “stronger”, more powerful abusive parent’.\(^{856}\) My analysis of the empirical data revealed a

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852 *FCA Submission*, above n 17, 46.

853 Yvonne Darlington, “’When All is Said and Done”: The Impact of Parental Divorce and Contested Custody in Childhood on Young Adults’ Relationships with Their Parents and Their Attitudes to Relationships and Marriage’ (2001) 35 (3/4) *Journal of Divorce and Remarriage* 23, 31.

854 See text accompanying fn 625 and 627.

855 Bala, above n 626.

856 Ibid.
strong interconnection between a history of violence, disputes over the meaning of children’s wishes and also allegations of ‘alienation’.

Alienation 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, alienation has been labelled as a syndrome, Parental Alienation Syndrome (PAS), in the work of the late child psychiatrist Dr Richard Gardner. 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).

PAS has not however been recognised as a formal psychiatric diagnosis and it is subject to significant controversy. In the UK, ‘the majority view’ ‘seems to be that the syndrome does not exist’. The theory is said to confuse reactions in children to their parents’ separation that are developmentally normal, with psychosis. It is also seen to overstate the frequency with which false allegations are made of abuse. 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.

The role that allegations of PAS play in unjustifiably discrediting mothers are increasingly being recognised. Referring to its role in the

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858 Ibid.
861 Herring, above n 598, 99.
862 Bruch, above n 860, 530.
863 Ibid 532.
864 Ibid 532.
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’.

PAS has been accepted in Australia by the Family Court as a ‘real psychological phenomenon’ but the Court is seen to be reluctant to accept allegations of its presence in specific cases at face value. 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, in almost equal numbers. 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 promotion of the allegation as a ‘silver bullet’ in family law proceedings on fathers’ rights groups’ websites and focuses attention on the tactical role these arguments play. The study also noted the overlap between a history of violence and allegations of alienation.

The following analysis of the way that allegations of alienation serve to complicate the meanings of the wishes that the children expressed in my sample is broadly consistent with these findings. My analysis also suggests alienation claims are related to the application of the friendly parent criterion discussed in chapters three and four. When raised strategically by fathers, they 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

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865 Meier, above n 623, 688.
866 Johnson and Johnson (1997) 22 Fam LR 141.
868 Ibid 207.
869 Ibid 197.
870 Ibid 100.
relationship. The possibility that contact may not be a positive experience for the child potentially remains obscure.

There are two related aspects to the overlap between violence and alienation claims in the sample. First, alienation is a tactic of violent fathers. The discussion in the next section highlights how some of the most violent fathers in the sample also alienated their children against their mothers. This stems from the propensity of violent fathers to use manipulation and litigation over children to maintain control as discussed in chapter four. Secondly, a history of violence may create ambivalence about the violent father in the children, triggering a claim of alienation against the mother by the father. Even in some cases where violence was not relevant, alienation claims are raised against mothers to impugn their motivation for opposing fathers’ claims for increased contact.

Two broad patterns emerged in relation to the way that alienation claims arose and were dealt with in litigation. There was a ‘severe’ group and a less ‘severe’ group. The former group comprised five cases in which ‘alienation’ was a major theme and was overtly dealt with, to varying extents, in the litigation. The latter group comprised 20 cases where claims of alienation by one parent or another 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. The following sections examine these two groups in turn.

A ‘Alienation’: the ‘severe’ group

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871 See text accompanying footnotes 625 and 627.
872 A7, A15, A1, A3, A12.
873 T2, T1, T23, T3, T7, T8, T5, T10, T6, T21, T19, A5, A9, T4, T9, T17, T12, T15, T18, A8.
The five cases in the severe group included four cases\(^{874}\) where violence was a significant issue. The fifth case, A7, was discussed extensively in chapter three.\(^{875}\) It involved the mother who lost residence of her daughter on the basis of her ‘wilful and irrational’ attitude to the child’s father. The other four cases involved circumstances where extreme patterns of physical violence and control, or in one instance, changeover conflict and extreme control\(^{876}\) were involved. In each of the cases mothers raised the allegations against fathers, although in one instance the claim was mutual.\(^{877}\) In these four cases, the suggestion that emerges on the basis of the material as a whole is that the children were being subject 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 alienation for children are illustrated particularly powerfully in A12, a case where the father had been relentless in his pursuit of residence of his son (aged 10) and daughter (aged 8), against the backdrop of a serious history of violence and control during his relationship with the mother.\(^{878}\) After the break-up of the relationship this continued through abuse at changeover times and protracted litigation over the children. The father had previously breached court orders in overholding the children, forcing the mother to obtain recovery orders. The mother’s material noted that an order under \textit{FLA} s118\(^{879}\) made against the father ‘appear[ed] to have had little impact on the father and he continues to issue applications on a regular basis’.

\(^{874}\) A15, A1, A3, A12.
\(^{875}\) See text accompanying fn 532 and 538.
\(^{876}\) A15.
\(^{877}\) A3.
\(^{878}\) A12.
\(^{879}\) These were explained in chapter two at text accompanying fn 232 and 233.
\(^{880}\) Affidavit (m) 23/9/1999.
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.\(^{881}\)

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’.\(^{882}\)

The Family Report’s descriptions of the children involved in the case highlight the implications of being subject to such intense emotional pressure. The 10-year-old son’s behaviour in the interview with the Family Report author was described 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.\(^{883}\)

This child’s ability to communicate his true feelings was nullified by the pressure he was placed under by his father’s manipulation. His only permissible expression was of longing for his father. 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

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\(^{881}\) Ibid.


\(^{883}\) Ibid.
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’. 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.

This boy’s eight-year-old 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’. 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.

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’. This comment acknowledged that the children’s expressed views were inconsistent with their real feelings and implied

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884 Affidavit by child psychiatrist filed on 16/9/1999.
885 Ibid.
887 Ibid.
that pressure exerted by the father was responsible. Rather than being explicitly stated, evidence of the father’s manipulation was inferred from the descriptions of the children’s behaviour. The Report recommended that contact between the father and children should resume, because otherwise their unrequited longings to be with the father would become ‘a burdensome, unresolvable issue’.  

This recommendation underlines the difficult balance to be struck in deciding whether children’s interests are best served by severing or maintaining contact: the former would involve depriving the children of an ‘affectionate’ relationship with their father but the latter would release them from being subjected to his ongoing emotional pressure and denigration of their mother. Given that the father’s manipulation occurred in the context of an extreme history of violence and control, it is concerning that a connection between the two issues was not made in the report.  

While the impact on the 10 year old boy in A12 was the most serious indication of distress experienced by the children in the ‘severe’ group, it was judicially accepted that all children in these cases were subject to serious levels of pressure and manipulation by their fathers. However, despite these findings, ongoing contact was nonetheless held to be in the children’s best interests in three of the four cases.

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888 Ibid.
889 This possibly reflects the restrictions on pre-empting findings of fact discussed in chapter one (see text accompanying fn 177).
890 Supervised in A1; unsupervised in A15 and A3.
891 In A12, orders reflecting the mothers’ application were made after the father withdrew from proceedings, so a full hearing of his application did not occur: judgment 9/1999. It appeared that the Children’s Representative was prepared to support unsupervised contact: Children’s Representative Outline of Case Document filed on [date illegible]. As noted above, see text accompanying fn 831 and 834, the Children’s Representative did not oppose consent orders under which the children became resident with the father.
These outcomes further illustrate the double standard that exists in relation to what type of parenting behaviour is ‘adequate’ in relation to mothers and fathers. Ongoing contact with the fathers was accepted as being in the children’s best interests, despite the backgrounds of violence and or control accompanied by pressure and manipulation. The ‘alienating’ mother ‘lost’ residence of her daughter, whose entitlement to ongoing contact with her mother was subject to reformation of the mother’s ‘wilful and irrational’ attitude.  

Another important aspect of the outcomes in this group is a disparity between the trends indicated in the empirical data and those reflected in the jurisprudence on alienation. The empirical material indicates that the fathers engaged in alienating behaviour as part of a campaign to maintain control over the family after separation against a background of violence. In contrast, the reported decisions focus on alienating mothers, emphasising the role of mothers in determining children’s attitudes to their fathers.

*In the Marriage of R (Children’s Wishes)*, 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 was upheld. 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. 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’.
The role of the mother in creating the situation was emphasised by the Appeal Bench, which held that if the mother changed her attitude ‘the problem would cease to exist’. Underlining the ‘penalising’ function of judicial determinations, it referred to the fact that a residence order in favour of the father, subject to the child’s best interests, ‘would seem to be one of the only realistic sanctions remaining’ if this did not occur. The mother was said to have ‘manipulated’ the family law system to engineer the father’s ‘deprivation of contact in circumstances [where there was no] fault on the part of the father’. The rhetorical stereotype of the ‘no-contact mum’ discussed in chapter three dominates public discussion of alienation. Rhoades’ research, together with the evidence in relation to alienation and violent fathers in this study and in that by Berns suggests that the stereotype of the alienating mother requires further scrutiny. The following analysis of the ‘less severe’ group of cases where alienation allegations were raised provides further evidence that they are used tactically by fathers to show that mothers breach the friendly parent criterion.

B The ‘less severe’ group

Among the ‘less severe’ group of 20 files, 14 fathers and five mothers made claims suggesting their relationship with the child was being undermined by the other parent. Such allegations were mutual in one further case. Violence was relevant in nine of the files where fathers

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896 In the Marriage of R [2002] 29 Fam LR 230.
897 Ibid 250. The decision reinforces the obligation on resident parents to take ‘all reasonable steps to ensure contact occurs’ enunciated in the 1997 decision in Re David 22 Fam LR 489.
898 See text accompanying 517 and 518.
899 Rhoades (2002), ‘The No-Contact Mother’ above n 137.
900 Berns (2001), above n 121.
901 T2, T1, T23, T3, T7, T4, T8, T5, T10, T6, T21, T19, A5, A9.
902 T17, T12, T15, T18, A8.
903 T9.
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raised the allegations\(^{904}\) and in two of the cases where mothers raised them.\(^{905}\) Rather than being central to the litigation, the claims of alienation and manipulation remained underlying issues in these cases. They were raised in the context of ‘explanations’ about the wishes expressed by children in Family Reports.

The differences between the way alienation claims are raised in mothers’ and fathers’ material are qualitative as well as quantitative. Mothers were not only less likely to raise alienation allegations, but were less likely to raise them spuriously.\(^{906}\) Further, some of the cases where mothers raise the allegations suggest alienating behaviour on the part of fathers is also part of a pattern of violence and control in this group of files.\(^{907}\)

In contrast, alienation allegations were predominantly raised by fathers in a tactical way.\(^{908}\) They implied that the mother’s 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 father’s parenting capacity and onto the attitude of the mother.

In the violence cases, this appears 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. This has already been illustrated to some extent in the discussion of T7 in chapter four.\(^{909}\) This file involved a father who engaged in intensive

\(^{904}\) T2, T1, T3, T7, T8, T5, T10, T19, T22.  
\(^{905}\) T12.  
\(^{906}\) Mothers’ allegations of manipulation were judicially accepted in all cases.  
\(^{907}\) This was evident in three cases: T12, T15, A8.  
\(^{908}\) In the cases where they were raised that didn’t involve violence, they were found to be invalid: T4, T21, A5.  
\(^{909}\) See text accompanying footnotes 768 and 780.
litigation to ‘disprove’ the parental fitness of the mother. The mother was accused of undermining the father’s relationship with the children, but the converse was in fact the case. 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. Illustrating judicial reluctance to question the bona fides of fathers’ claims, my analysis highlights the characterisation of this father as ‘loving’ but ‘abusive’.\textsuperscript{910}

Other cases in the sample exemplify a further aspect of the overlap between violence and alienation claims, specifically the way that fathers blame mothers for children’s attitudes, rather than accepting responsibility for their own actions. This is illustrated clearly by T10, 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.

The father argued that it was unnecessary for the mother to relocate and 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:

\textsuperscript{910} Ibid.
Notwithstanding his former wife’s alienation attempts, 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.\(^{912}\) 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’. 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’. The Report noted that both boys wanted to go to live in Queensland.\(^{913}\)

The evidence referred to in the previous paragraph was emphasised in the judge’s decision.\(^{914}\) In considering the implications of the move for contact, the judge noted that ‘although the children’s relationship with their father must not be severed, it is not without problems’. 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’.\(^{915}\) 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,

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911 Affidavit, 23/2/99.
913 Ibid.
914 Judgment, 6/99.
915 Ibid.
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 unjustifiably blame mothers for their children’s attitudes to them. These claims were usually contradicted by the evidence provided by Family Reports and rejected at 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. This is demonstrated by the judge’s findings in T15, in which a mother alleged that the father was influencing their children against her. 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 Honour’s decision to return 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 the wish to remain resident with her father. The

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916 This was not invariably the case. In two files, T9 and T18, the Family Reports de-emphasised the mothers’ concerns about manipulation. In both cases the judges affirmed the mothers’ concerns.

917 Above n 906. Cf T12.

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.  

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 things about myself’ in an interview with the author of the Family Report. 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:

at 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.  

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’. This occurred against a background of violence in the file that was inaptly characterised by the judge as mutual. The judgment ordered the two older children in this file to join their two

919 Ibid.
920 Affidavit (m) 3/2000.
921 Ibid.
younger siblings in the care of their mother. Contact with their father was maintained in an alternate weekend pattern.\textsuperscript{923}

In summary, this analysis of how alienation claims complicate the issue of children’s wishes has explored the way that in giving children a voice, the legal process creates pressures that also silence them. The wishes expressed by the children in the sample were marginalised by their parents’ claims as to what they should feel.

The analysis of the ‘severe’ group highlighted how actual alienation occurred in just a few cases in the sample and was a tool predominantly used by violent fathers. However, even the use of such tactics was not seen to impact upon the children’s ‘right’ to contact. The analysis of the ‘less severe’ group illustrated the way spurious alienation claims against mothers were raised tactically to establish the mothers’ ‘deviance’ in relation to the requirement to be a friendly parent.\textsuperscript{924} 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.

This is another area where mothers’ attitudes and behaviour are subject to a greater level of regulation than those of fathers. This is consistent with the more stringent standard of ‘adequate’ parenthood applied to residence parents (mothers) in the sample. The reported decisions on alienation place an onus on mothers to adjust their attitudes and behaviour to ensure that their children receive fathering. Yet there is little evidence of a corresponding onus on contact parents (fathers) to adjust their attitudes both to their former partners and their children. Children’s ‘need’ for fathering is construed as so significant that even

\textsuperscript{923} Ibid.

\textsuperscript{924} Hart, above n 144, has drawn a similar connection: 186.
fathering involving tactics of manipulation and alienation is regarded as ‘good enough’. 925

PART 3 CHILDREN’S INTERESTS AND ‘EQUAL PARENTHOOD’

This part further explores child-related arguments in the sample, by examining how the children’s relationships with their parents and other family members such as step-parents and siblings are constructed in their parents’ arguments, in the Family Reports and in judicial determinations. It primarily focuses on how the notion of best interests is constructed in the context of the tension that arises between the FLA s60B(2) provisions that enunciate the child’s right to know and be cared for by both parents and the s68F(2) provisions that focus attention on the nature of the child’s relationships with their parents and other persons. 926

This tension is illustrated most clearly when fathers assert claims for parental ‘equality’ in the shared care and relocation cases in the sample.

Three key issues are highlighted in the following analysis. First, the parents’ claims reflect their differential positioning as litigants. Fathers’ claims asserted that the father/child relationship was equally as important as the mother/child relationship. Mothers in contrast were again concerned with security, stability and the workability of day-to-day routines. Secondly, there was a tendency for fathers’ claims to place their children in positions of stress which raised loyalty conflicts for them, particularly in relation to the older children in the sample. Thirdly, the outcomes in most cases reflected an approach that emphasised the

925 Eriksson and Hester above n 746.
926 These issues arise under: FLA s68F(2)(b) which requires the Court to consider the nature of the child’s relationship with each parent and ‘other persons’ and ss(c) which directs attention to the likely effect of any changes in the child’s circumstances, including the likely affect on the child of any separation from (i) either parent or (ii) any other child or person, with whom he or she has been living.
child’s ‘needs’ rather than their ‘rights’. There were exceptions to this which are also discussed.

The underlying theme in this discussion is the tension between functional and biological constructions of parenthood referred to in chapter three. In the sample, this tension is raised by fathers’ assertions that parental ‘equality’ is in their child’s best interests in arguments that conflate biological relationships with affective ones. The issues raised by such claims are clearly illustrated in file A5. This case involved a 10-year-old girl whose father and his de-facto partner were applying to have residence of her during alternate weeks. After her parents had separated when she was six, she initially resided with each parent for a fortnight at a time.

A Family Report prepared for proceedings that were eventually settled by consent when she was seven described her as ‘very quiet and rather withdrawn’. She appeared to have ‘little of the sparkle expected of a normal seven and half year old and was ‘clearly under a great deal of pressure’. She manifested sadness, in particular over the fact that her father had stopped allowing her mother to visit her on nights she was at his house. Even at that age, she ‘appeared to be quite afraid of showing any preference between either parent’ because she was worried about how her father would feel and whether he might get upset. She ‘appeared to be parenting her own parent’.

The Report concluded that the alternating fortnightly arrangement was ‘no longer tenable’. The child was depressed. An arrangement involving residence with her mother and blocks of contact with her father from Thursday night to Monday morning in alternate fortnights, with an

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927 FLA s68F(2)(b) and (c).
Consent orders reflecting this recommendation were subsequently made.929

After this arrangement had been in effect for over two years, her father and his de-facto applied for orders reflecting week about residence. The father told the Court he was applying for ‘exactly equal custody’ (sic) of his daughter because ‘that is what the best interests of my daughter are.’ He argued that the child flourished under the care provided by him and his de-facto, because the mother was too absorbed with her work to provide adequate care and supervision:

[The mother] has pursued her own career with such vigour as to totally forget the concerns which she previously had for [the child] and now finds very little time in her busy schedule for [the child].930

He attributed the mother’s application for a reduction in contact, and a specific issues order allowing her to enrol the child, who had been assessed as being gifted, in a private school, to a desire to ‘sever the paternal bond in the most unscrupulous way’931 He opposed the mother’s school proposal, arguing that it was financially not viable. Further, he wanted to be ‘fully involved in the school curriculum’, which would be ‘possible only in an equally shared residence arrangement’.932

The mother argued that the father’s application for shared residence, and his opposition to sending the child to a private school, was based on his reluctance to pay increased levels of child support. She argued that the child was emotionally stressed by the extended contact arrangement. The care provided by the father and his de-facto was inadequate, physically and emotionally:

929 Consent orders 11/1996.
930 Affidavit (f) 21/9/1998.
931 Ibid.
932 Affidavit (f) 8/12/1998.
When the child returns to me from contact, she is like a deflated balloon. She is wound up and anxious and it takes a day or two to unwind. When she is returned to me after contact, it is as if she has insulated herself from what is going on around her and I give her a lot of comfort to help the protective blanket to dissolve. When she is so uptight, I generally run her a warm bath and gently wash her back and rub her toes to help her relax.  

The father’s lack of insight into the child’s needs was also an important theme in the Family Report prepared for the trial. As with the first Report, quoted above, it was noted that the child was reluctant to convey her true wishes to her father:

[the child] had clearly thought about what arrangements she would like for her care and said that week about was not what she wanted at all…Initially when interviewed [the child] was quite fearful of her father discovering what she wanted particularly as she felt that she would be punished for this. 

The report noted that the father appeared ‘to be totally unable to separate out his needs from those of his daughter’, seeing his half-time proposal in terms of ‘fairness’ based on his previous input into her:

It appeared at times that [the father] saw this work as being some sort of investment from which he expected a return rather than the normal inputs of parenting from which no parent can really expect anything although they may hope for the best.

The mother’s proposals for residence/contact and the child’s education were reflected in the orders made by the judge, who placed emphasis on the account of the child’s wishes in the Family Report. The judgment was sceptical about the father’s lack of frankness about his financial

933 Affidavit (m) 10/11/1998.
935 Ibid.
position and was highly critical of his attitude towards the mother. He lost his claim for ‘equal parenthood’ on this basis, but the child’s ‘need’ for contact remained unquestionable.\footnote{936}

This case exemplifies four significant points that show how issues in relation to relationship quality are dealt with in the sample. First, the arguments of the father and mother in this case illustrate the gendered differences in approaches to litigating about children referred to earlier in this section.\footnote{937} The father’s claims focussed on abstract arguments about the child’s ‘needs’ that implied her symmetrical biological connection to her father and mother mirrored her affective relationships with them. Equality and fairness, issues that relate to the parents rather than the child, were emphasised in the father’s material. In contrast, the mother’s concerns were focussed on the impact that the Court orders would have on the child’s everyday routines and her emotional health. The child’s emotional and physical state and her educational needs were at the centre of the mother’s argument. The differences between mothers’ and fathers’ arguments reflect that in most cases, mothers carry most of the day-to-day responsibilities of practical parenthood as discussed in chapter three.\footnote{938} They illustrate the distinction between the masculine prerogative of ‘caring about’ and feminine obligation of ‘caring for’.\footnote{939}

Secondly, the case study illustrates the consequences for children of being the subject of fathers’ claims for ‘equal’ rights. The psychological evidence about the child revealed how being the long term subject of her father’s claims for ‘equality’ had a detrimental impact on the child, who at the age of seven experienced depression. In another of the shared care cases, a four-year-old girl was found to be ‘operating under a certain

\footnote{936}{Judgment 1/1998.}
\footnote{937}{T8, T4, A6.}
\footnote{938}{See text accompanying fn 437 and 516.}
\footnote{939}{Smart (1991) above n 384.}
amount of stress’ as a result of being at the centre of an intense competition between her parents that ‘placed an obligation on the child to meet each parent’s expectations…[to an extent that would] become a heavy load as the child gets older’. Like the children that were subject to claims of alienation discussed in the previous part of this chapter, the children in this part of the sample were adversely affected by being at the centre of their fathers’ claims for ‘equality’.

Thirdly, the psychological evidence tended to undermine the fathers’ claims that their ‘equality’ was in the children’s best interests, particularly in relation to the shared care cases in the sample. It highlighted the implications for children of being placed in positions where their loyalties were subject to scrutiny and question. Further, this evidence emphasised that the mothers’ previous history of caregiving meant that the mother/child relationship had greater substance than the father/child relationship and was of more significance in maintaining the day-to-day security and stability of the children. These findings were consistently supported by the preferences expressed by the children. The psychological approaches rejected the proposition that ‘equal time’ arrangements were necessary to ensure a substantial father-child relationship but reinforced the children’s needs for ongoing, substantial contact.

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940 A6, Family Report, 2/1999.
941 This was generally the case in relation to relocation applications also. However, an exception was T16, a relocation case where the father had exercised contact from Friday night to Sunday morning each week, in addition to two evening periods each week. Both the Family Report and judgment found that as a result of this arrangement the child’s relationship with his father and paternal relatives was of great significance (judgment 6/1999). Relocation was denied for this reason and because of a lack of substance in the mother’s proposals.
942 In A6 the father had taken full responsibility for caring for a four-year-old child in a half-time arrangement that was imbued with conflict. The child’s own expressed preference to spend more time with her mother, together with the history of conflict, underpinned the Family Report recommendation and judicial determination to change the half-time arrangement to a situation where the father had contact from Friday afternoon to Sunday evening on three out of four weekends (judgment 6/2000).
943 This point is made in other studies see eg Christy Buchanan, Eleanor Maccoby and Sanford Dornbusch, Adolescents after Divorce (1996) 179.
A further issue emphasised in judicial comment in the equal care cases was that shared care arrangements are dependant on high levels of communication and co-operation if they are to work in the children’s favour.\textsuperscript{944} Conflict is widely acknowledged\textsuperscript{945} to be a factor militating against the success of such arrangements and this was consistently referred to in psychological evidence and judicial determinations. UK research on children brought up in shared care households has highlighted the emotional cost for children even when such arrangements involve parents who are ‘loving and attentive’.\textsuperscript{946} In this light, the conservative approaches of the psychologists and judges in this sample accord with a caution issued by Bren Neale, Jennifer Flowerdew and Carol Smart:

\begin{quote}
[\textit{P}arents who use their children as pawns or who treat them as matrimonial property when the children are 8 or 9, will not necessarily change when the children are 14 or even 18. We should perhaps be careful that, in seeking to solve a compelling problem at the time of divorce or separation, we do not create much bigger problems for children in the future.}\textsuperscript{947}
\end{quote}

While there was an overall consistency in the way the factors discussed in the preceding paragraphs were emphasised across the sample, there

\textsuperscript{944} See eg Foster and Foster [1997] FLC 90 281, Family Court of Australia at ¶76,511. The fathers’ applications in the four shared care cases in the sample were all unsuccessful. Other research findings vary on this point. The First Three Years Report, above n 72 found evidence of shared care arrangements being ordered where there was disagreement and conflict: 4.52. In contrast, Parenting Planning and Partnership confirmed judicial scepticism that such arrangements were feasible in cases where litigation took place because of lack of any evidence of ability to co-operate. One judicial respondent however suggested that such arrangements may be ordered at interim level to give ‘both parents the same rights’ ahead of the final determination: 28-29.


\textsuperscript{946} Bren Neale, Jennifer Flowerdew and Carol Smart, 'Drifting Towards Shared Residence' (2004) 17 (2) Australian Family Lawyer 15.

\textsuperscript{947} Ibid 16.
were two cases where a substantially different view was taken of the significance of the father-child relationship. These cases, A9 and A7, were discussed in chapter three and involved the ‘deviant’ mothers who breached the friendly parent standard. In both of these cases, the judicial determination reflected an emphasis on the ‘child’s right to know and be cared for by both parents’, in addition to a concern to penalise the mothers’ deviant behaviour.

In penalising the deviant mothers in these files, the orders made had serious implications for the children’s relationships with other important people in their family circles. File, A9, provides a particularly clear illustration of the complex issues raised in such circumstances. This file involved a dispute over the mother’s relocation to Brisbane with her husband and three children. The child subject to the application was a four-year-old boy, whose father lived in Melbourne. The judge found the mother to have been insufficiently supportive of her son’s relationship with his biological father. This resulted in orders requiring her to live in Melbourne with her son, so contact could occur, although her husband and two other children were resident in Brisbane. The initial relocation to Brisbane took place on the initiative of the child’s stepfather and was in breach of interim orders prohibiting relocation.

The fact situation in this file raises particularly strikingly a conflict over the meaning of two different ‘families’ to the child. In Melbourne, the father lived with his de facto partner, her adult son and her 80 year old mother, who owned the house they lived in. The child’s mother lived in Brisbane with a 7 year old daughter from a previous relationship, her husband and their 18 month old daughter. The child had lived in a household with his step father from the age of one, and it was this step

948 The mother A7 appealed against the trial judgment. One ground of appeal was that the trial judge had failed to properly apply FLA s68F2(b) and (c). Because the appeal was successful (see above, text accompanying fn 538) on the basis of procedural unfairness, this point was not decided.

949 FLA s60B(2)(a).
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father’s application to adopt the child that appeared to motivate his biological father to re-establish contact with him at the age of about two. The biological father had only ever lived with the child for two separate periods of eight weeks during the child’s first year.\(^950\)

Whilst an appeal against the trial judgment was unsuccessful,\(^951\) the issues were again opened up for judicial scrutiny when the mother applied for orders permitting the boy to reside in Brisbane a year later. She argued that she was pregnant with her fourth child and that it had become untenable for her to live in Melbourne with the boy, away from her husband and two other daughters. She claimed she had resided in Melbourne in a caravan park with the boy in compliance with the Court orders, although her mother had cared for him at times when she was in Brisbane.\(^952\)

The father claimed that for most of the time, both the mother and the boy had lived in Brisbane, in breach of court orders.\(^953\) At all times however, contact had taken place according to the requirements of the orders. An interim decision suspended orders requiring the mother and child to reside in Melbourne and a subsequent decision ordered that a new hearing of the residence and contact matters be expedited.\(^954\)

A core issue in the material filed for the new hearing focussed on the child’s place in two different households, particularly in that of the mother. The step-father, for example, deposed that:

\[\text{During 1996 while the [father] was not interested in seeing [the child], I fulfilled the role of father figure and provider to the [child] and [his sister]. Although the}\]

\(^950\) Case Outline (m) 25/7/2000.  
\(^952\) Affidavit (m) 22/5/2000.  
\(^953\) Affidavit (f) 1/8/2000.  
\(^954\) The matter was eventually settled by consent with orders allowing the boy to live in Brisbane with his mother and have contact with his father in Melbourne (orders made 8/2000).
This man’s role in his son’s life was clearly a significant concern to the biological father, who argued that if the boy remained resident in Brisbane, his own relationship with him would dwindle: ‘The [stepfather] …will become the most significant influence in my son’s life’.

An additional factor emphasised in the stepfather’s material was the child’s relationship with his siblings and the strain the court orders had placed on this:

I don’t think [the father] or [his girlfriend] fully understand the nature of brothers and sisters. I don’t think [the child] would be very happy without his sisters for companionship…during 1999 [at the times the child lived in Melbourne] [his sisters] were constantly asking when they would see their brother next. [The oldest sister] was especially frustrated at not being able to see her brother more often.

The Family Report also cast a spotlight on the significance of these issues. It noted that when asked to draw his family, the boy first of all drew his older sister, and then everyone else in his mother’s household:

It was very clear that he views his family unit as his mother, stepfather, whom he calls ‘dad’ and his sisters, including the new baby…There is a clear difference for [the child] in the strength of the feelings of attachment to the family unit he lives in. He said that when he is down here in Melbourne he misses his family…His expression regarding missing his father, when not here was not strong at all.

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In light of this Report, it appears the original trial outcome had the effect of completely side-lining the child’s interests. In the wake of the original trial judgment, the five-year-old child endured some 18 months of being shifted between a caravan park in Melbourne and his mother’s home in Brisbane. This took place during his first year at school, which he commenced in Melbourne but then continued in Brisbane. When resident in Brisbane, he was taken to Melbourne for contact with his father on a fortnightly basis.

The trial judgment prioritised the child’s biological connection with his father. This connection assumed added importance in the context of his mother’s ‘deviance’ as a litigant disregarding court orders and a step-father usurping the fatherly role. Emphasis was placed on the father’s aspiration to be more than a mere ‘contact parent’ but not a primary caregiver.

The judge’s approach centralised FLA s60B(2) and treated the child as an autonomous individual whose relationships with each parent were ‘equally’ important. It prioritised his need, and, ‘right’, to have regular and frequent contact with his biological father. This ‘need’ was seen to be equal, if not superior, to his need to live with his mother, sisters and step father. Further, the needs of these individuals were seen to be of little relevance in the decision.

It was only when the Family Report for the subsequent proceedings was prepared that the salience of the child’s other connections was revealed. In recognising that the attachments within his mother’s family unit were of greater significance to the child, the Report highlighted a disjunction between the ‘needs’ imputed by FLA s60B(2) and those experienced by the actual child. It acknowledged that other connections, such as those with siblings and step-parents, raised in FLA s68F(2)(c), may be of greater significance to children’s emotional lives. Such an approach
recognised a hierarchy of relevant relationships, with the father-child bond coming well behind others, particularly in the context of a tenuous relationship.

The importance of sibling relationships for children experiencing separation and divorce has been reinforced by an Australian study by Grania Sheehan and her co-authors. The study compared the quality of sibling relationships between a group of 137 divorcing families and 165 intact families. It found relationships of greater depth and intensity among the siblings in the divorcing group. It concluded that the ‘natural support system existing among certain groups of siblings may serve to strengthen children against the adverse consequences of parental conflict and parental absence’.

The outcome of A9 shows how an emphasis on children’s ‘rights’ may conflict with discovery of what is in their interests. In centralising the child’s ‘right’ to contact with his biological father, the trial judgment failed to appreciate that the child’s interests required greater consideration of what impact the effectuation of this right would have on the child’s connection in his wider family unit. As Sheehan et al observe, in determining residence and contact applications, ‘facilitating siblings’ access to one another and maintaining the quality of the sibling bond are important considerations’.

In summary, the analysis in this part has examined how children’s relationships with their parents and other family members are treated in

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960 Ibid 90.
961 This observation is applicable to the other deviant mother case, A6. See text accompanying fn 543 and 545. Issues in relation to different family forms and kinship structures are particularly pertinent to indigenous people and lesbian and gay families. See eg In the Marriage of B and R (1995) 19 Fam LR 594; Burns in Boyd, Rhoades and Burns, above n 74, 253; Kelly above n 372.
962 Above n 959, 90.
the legal process. It has shown how father’s assertions of ‘equality’ were in the main found to be inconsistent with their children’s best interests when relevant issues in the *FLA* s68F(2) checklist were taken into account. This reflects that in the sample, mothers were functional parents to a greater extent than fathers, leading to significant differences in the nature of the mother-child and father-child relationship. The discussion has also shown that an approach that emphasised the child’s ‘right to know and be cared for by both parents’ was present to a lesser extent in the sample. It is suggested that such approaches prioritised the father-child relationship at the expense of the child’s other relationships.

The differences in these approaches flow from the underlying conceptual incoherence within the contemporary family law framework discussed in chapter one. The individualistic image of a ‘rights-bearing’ child ‘free of other relationships or connections’ is produced by an approach that emphasises the rights-based elements of the legal framework. A functionalist emphasis evident to a larger extent in this section of the sample, in contrast, emphasises a greater interconnection between the interests of the child with those of her or his caregivers. Each of these constructions implies a different approach to the way that the best interests question is considered. This issue is discussed in the next part.

**PART 4 THE CONSTRUCTION OF ‘BEST INTERESTS’**

As noted in part one of this chapter, the child’s best interests are of paramount importance in Family Court decision making under *FLA* s65E. Rather than being a free-floating inquiry, the analysis developed throughout this thesis suggests that this question is determined by the litigation strategies adopted by the parties. In particular, the analysis has identified the tactical pressures fathers’ claims created for the mothers in

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963 See text accompanying fn 104 and 119.
965 Ibid.
the sample. Two significant issues in relation to these claims were highlighted in the analysis in chapter three. First was the way that the ‘negative father’ construct in psychological theory provides a base-line rationale for the ongoing involvement of even the most impaired fathers with their children. The second issue was the application of the friendly parent criterion in relation to mothers’ attitudes to fathers, evident in mutually-reinforcing litigation strategies and judicial approaches.

The analysis in chapter four indicated that the operation of the friendly parent criterion meant that mothers were subject to a restriction on the extent to which they could problematise contact between children and violent and impaired fathers. It suggested that links between parenting capacity and a history of violence were only drawn in the most extreme cases. The discussion of children’s wishes in part two of this chapter further developed the analysis of the operation of the friendly parent criterion and the way family violence is dealt with in litigation. It showed that in the sample, violent fathers alienated children against their mothers. Furthermore, allegations of alienation were raised by fathers in a tactical way to establish that mothers breached the friendly parent criterion.

Overall, the analysis has indicated that the tactical pressures referred to in the preceding paragraphs shaped the Court’s inquiry into whether contact was in the best interests of the children in the sample. The Court’s consideration of whether contact should occur was truncated by the discursive inhibition placed on mothers by the application of the friendly parent criterion. In circumstances where mothers acceded to contact, even though it may be supervised contact, to avoid the label of ‘no-contact’ mum, the possibility that contact may be harmful to the child was not raised. The validity of the ‘negative father’ construct as

966 The discursive power of the ‘negative’ father construct was established in chapter four (see text accompanying fn 414 and 436) and five (see text accompanying 736 and
a rationale for the maintenance of relationships with violent and impaired fathers thus remained unchallenged.

This is evident from the fact that contact, albeit in some cases supervised, was maintained between children and fathers who had beaten them, manipulated them and were on occasion, delusional. In one case, supervised contact was maintained with a father who one welfare authority concluded had sexually abused, and continued to manipulate, his daughter.

Moreover, children in the sample continued to be exposed to the dynamics of violence and control through being the subject of litigation. In most of these cases the issue of whether ongoing unsupervised contact was in their best interests was not even questioned. This was because the violence fell into the ‘simple’ category in relation to the level of physical severity and the availability of evidential support. Yet these children were exposed to verbal or physical conflict at changeover. They witnessed epithets such as ‘slut’ and ‘prostitute’ being cast at their mothers. Some were told their mothers were abusive, no good and did not love them. However, the implications of this remained unexamined. Furthermore, as the analysis in chapter four indicated, there was little evidence that any of the violent fathers had taken responsibility

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745). It underlies the arguments of fathers, psychologists and some judges for ongoing contact with impaired fathers. Its concern is to avoid the potential future harm resulting from idealisation of an absent father figure or confusion about identity in teenage years. Adelaide-based research (Hart, above n 144) has highlighted how children in disputed contact cases involving violence are subject to clinical interventions to improve the possibility of contact between the child and the non-resident parent: 181.

746 A1.
747 T7, T15, A1, A12, T2, T9, T19, A3, A15.
748 T19.
749 T5.
750 T1, T3, T7, T15, T8, T5, T10, T6, T9, T12, T19, A2, A3, A11, A15.
751 T1, T7, A12, T2, T8, T19, A2, A11, A6, A15.
752 A15, T7.
753 A15, T7.
for their actions or demonstrated insight into their impact on their families.974

This data indicates there is little scope in Family Court proceedings for a substantial inquiry into the question of whether ongoing contact will ‘advance and promote the welfare of the child’975 even though this is said to be the Court’s task in its official jurisprudence. In Brown and Pederson,976 the leading Full 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’,977 the Court’s obligation was to make an ‘independent investigation of what the welfare of each child requires’.978 Yet as a result of the tactical pressures that shape the Court’s consideration of the contact question that have been identified in this thesis, it appears that orders for no contact were really only made in ‘exceptional circumstances’.979 This produces a situation where, consistent with the view taken in dissent by Kay J in In the Marriage of D Koutalis and CJ Bartlett:980 ‘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’.981 This indicates that the prediction made in

974 See text accompanying fn 731 and 780.
977 Following M and M (1988) 166 CLR p 76.
979 Ibid 745.
980 (1994) 17 Fam LR 722.
981 Ibid 746. Kay’s J’s extensive discussion on the rationale for maintaining contact was referred to by the Full Court In the Marriage of PA and DA Irvine (1995) 19 Fam LR 374, 386. The Court explicitly acknowledged the differences between Kay J’s approach in Koutalis and that of the Full Court Brown and Pederson, but declined to rule which was correct because resolution of the case at hand did not require it to do so. Other recent judicial statements have been made that are akin to Kay J’s stance. Recently in the High Court decision in (U and U (2002) 29 Fam LR 74) 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: ‘some cases of abusive relationships’ (emphasis added): 113. In a recent unreported judgment dealing with the unacceptable risk test,
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1996 by the former Family Court judge, Peter Nygh, that FLA s60B(2)(b) would create a ‘rebuttable presumption in favour of contact’ has been 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?’

A significant problem with this approach in the current litigation environment is that consideration of any possible ‘cogent reasons’ is inhibited by the operation of the friendly parent criterion. Attention is focused on preserving the father-child connection, but the possibility that this may threaten the healthy development of the child/ren receives little consideration. In these circumstances, the content of the father-child relationship remains obscure. These fathers do indeed need no ‘licence for parenting’. The child’s ‘right’ to contact is protected and maintained in all but the most extreme circumstances, but functionalist concerns in relation to their ‘need’ for adequate fathering receive little attention. This approach enforces the child’s ‘right’ to contact but imposes no corresponding obligation on the parent to provide quality parenting. I do acknowledge that in the context of a history in which connections between children and parents, particularly amongst the indigenous population, were severed in the pursuit of a culturally-specific version of ‘welfare’, it is appropriate to be protective of those

the Full 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 Bench 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) (Full Bench Family Court, Kay, Holden and O’Ryan JJ) 24 August 2004, 11.

984 Kay J in In the Marriage of D Koutalis and CJ Bartlett (1994) 17 Fam LR 722, Family Court of Australia, 746.
985 See Bainham, above n 599, for an argument that contact should be conceptualised as a right for both parent and child with corresponding obligations.
986 The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Bringing the Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997).
connections. A cessation of the father-child relationship altogether may not necessarily be the answer in these situations. However, the way that the issues for determination in Court proceedings are defined means that insufficient attention is paid to the complexity of the needs of both children and mothers in these cases. As McIntosh has observed:

To think about the child’s experience and to move at the child’s pace is the only way in which such cases can ever succeed. To push ahead in a manner that thinks about parents’ legal rights rather than children’s psychological needs is to perpetuate the violence that children experience, doing untold damage not only to the child but to the potential for the parent-child relationship to re-form in a more healthy manner.  

SUMMARY AND CONCLUSIONS

This chapter has presented an analysis of the construction of children’s interests in Family Court litigation in light of the data in the empirical sample. Three key points are made in this analysis. Each sheds light on the way that children are affected by their fathers’ claims for greater involvement within an equality-based legal framework that is applied in a social context where parenting practices remain gendered.

First, children’s interests are in practice marginalised in Family Court litigation. The analysis concerning the overlap between violence, children’s wishes and allegations in relation to alienation highlight how children’s feelings become contested in an adversarial battle between their parents. The system offers little scope for children to exercise agency. The very capacity to express wishes results in them being subject to manipulation and pressure.

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987 McIntosh, above n 660, 240.
988 This is consistent with the suggestion in the Parenting, Planning and Partnership report, above n 100, that the Reform Act 1995 had occluded the introduction of the child’s perspective on the arrangements being made by making it easier to achieve ‘distributive justice’ between the parents: 85.
The tactical use of alienation allegations by fathers means that both
mothering behaviour and the basis of wishes expressed by children are
subject to intense levels of scrutiny. In contrast, even when mothers’
allegations of alienation are found to be valid, the worth of an ongoing
father-child contact relationship remains unquestioned. This is consistent
with the lack of visibility of the dynamics of power and control in family
law proceedings as discussed in chapter four. More generally, it reflects
the failure to make connections between a history of violence and
parenting capacity.

Secondly, fathers’ claims to be recognised as ‘equally’ important to their
children as their mothers raised a direct conflict between the normative
*FLA* s60B(2) objects and the *FLA* s68F(2) provisions directing attention
to relationship quality. In most instances, fathers’ claims for ‘equality’
were found to be inconsistent with their children’s best interests as a
result of the mothers’ more substantial caregiving histories and the
quality of their relationships with their children. It was also evident that
in instances where s60B(2) considerations were emphasised in judicial
approaches, children’s relationships with their fathers were prioritised
over and above sibling and step-parent relationships.

Thirdly, in relation to contact, the best interests consideration has
become skewed as a result of the litigation strategies adopted by the
parties. The discursive inhibition placed on mothers by the operation of
the friendly parent criteria means that the possibility that contact with
violent and impaired fathers may be damaging for children receives little
consideration. The implications of this discursive inhibition assume
greater significance in an environment where fathers are seeking legal
‘equality’ despite a dubious track record as parents. Reported decisions
such as *Brown and Pederson*,989 indicate that the quality of the
relationship being sustained is a highly relevant concern in relation to

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contact determinations. There is little evidence in the sample that a consideration of this issue takes place. As Rhoades observes in relation to contact enforcement proceedings, the system ‘marginalizes the child’s entitlement to be cared for …during contact periods’. 990

The lack of scrutiny of the relationship between children and contact fathers in the sample reinforces the differential definitions of adequate parenthood that are applicable to residence parents and contact parents. It also maintains obscurity in relation to the nature of the relationship between contact fathers and children. This means that sources of potential harm for children remain invisible.

990 Rhoades, The 'No Contact Mother', above n 137, 79.
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CHAPTER 5

THE CONSTRUCTION OF CHILDREN’S INTERESTS IN THE ERA OF ESSENTIAL FATHERING

‘I have stuffed up the stories before’.\(^{810}\)

INTRODUCTION

The two preceding chapters have focussed on parents’ claims and their treatment in the legal process across the empirical sample. Chapter three established the existence of a divergence in the parenting histories and capacities of residence and contact parents. This results in varying definitions of ‘adequate parenthood’ being applied to residence parents (mothers) and contact parents (fathers). A much lower standard of parenting is acceptable in contact parents. Chapter four demonstrated how links between violence and parenting capacity remain substantially unexplored except in very extreme cases. Orders for contact, and in some cases even residence, were made in favour of violent fathers in the sample.

The discussion in this chapter extends these analyses by examining how the children’s interests in the sample were treated in the context of their parents’ claims. The specific focus of the analysis is the tension between F LA s60B(2) and the child focussed provisions in the F LA s68F(2) checklist, in particular, those which require the Court to consider the child’s wishes,\(^ {811}\) the nature of the child’s relationship with each parent,\(^ {812}\) the effect any change in circumstances would have on the

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\(^{811}\) s68F(2)(a).  
\(^{812}\) s68F(2)(b).
child and the child’s maturity, sex and background. In addition, the way the children’s ‘best interests’ question is dealt with in the cases in the sample is examined.

A central theme in this chapter is the way children’s relationships with their parents are constructed in the context of the factual backgrounds to the cases in the empirical sample. As established in chapter three, mothers were functional parents to a greater extent and to greater effect than the fathers in the sample. However, in keeping with the differential positioning of men and women as litigants, fathers’ claims are oriented toward challenging the primacy of mothers and asserting their own importance to the child. The tensions between fathers’ claims for ‘equal’ recognition and mothers’ concerns in relation to children’s day to day needs are the subject of the analysis in this chapter. A particular focus of this analysis is the impact that these competing claims have on the children in the sample and how these are dealt with in the legal process.

This chapter has four parts. The first part briefly considers the formal mechanisms that exist for children to be heard in family law proceedings and the extent to which they were used in the sample. Part two extends the analysis of the way violence is treated in proceedings with an examination of the overlap between violence, alienation and the treatment of children’s wishes in the sample. Part three focuses on the implications fathers’ claims for parenting ‘equality’ have for children and the way these are dealt with in the process of balancing FLA s60B(2) against s68F(2) considerations. Part four examines how the Court’s consideration of whether contact is in the best interests of the child is affected by the tactical pressures placed on mothers by the operation of the friendly parent criterion and the negative father construct.

813 s68F(2)(c).
814 s68F(2)(f).
815 s65E.
PART I CHILD-FOCUSSED ASPECTS OF THE LITIGATION

In a formal sense, children’s interests are the central concern in Family Court decision-making under the existing legislative framework. This is most evident in the way that their ‘best interests’ are given paramountcy in s65E.\textsuperscript{816} The legal framework also offers a number of opportunities for children to be heard in proceedings relating to their care. Theoretically, they may participate directly in proceedings through their own legal counsel briefed by a next friend.\textsuperscript{817} Their views can be expressed to the Court through Family Reports\textsuperscript{818} or they may be interviewed by the judge in Chambers.\textsuperscript{819} Most significantly in recent times, the Court has been given the power to order that a separate legal representative be appointed to safeguard children’s interests\textsuperscript{820} (Children’s Representatives).

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\textsuperscript{817} This is unusual for cost reasons. It occurred in a recent case testing the limits of the FCA’s welfare jurisdiction that went to the High Court: \textit{Minister for Immigration and Multicultural and Indigenous Affairs v B} (2004) Fam LR 339.

\textsuperscript{818} Either a Family Report or an Order 30A which is a report prepared by an independent expert appointed by the Court.

\textsuperscript{819} Order 23 Rule 4(1). This is unusual: \textit{FCA Submission}, above n 17, 46. However in the recent case of \textit{Re Alex: Hormonal Treatment for Gender Identity Dysphoria} (2004) Fam LR 503, Nicholson CJ interviewed the young person involved in Chambers.

\textsuperscript{820} s68L. Since this research was conducted, the Family Court has moved to clarify the role of the Children’s Representative in proceedings by the issuing of a set of Guidelines in relation to this role: Family Court of Australia, \textit{Guidelines for Child Representatives}, <http://www.familycourt.gov.au/html/childrepresentative.html> at 27/10/03. A Family Law Council Report, \textit{Pathways for Children: A review of children’s representation in family law} (2004) has also made a range of recommendations aimed at clarifying and increasing the efficacy of the role.
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The circumstances in which such an appointment should be made were outlined by the Court in the 1994 decision of In Re K.\textsuperscript{821} They include situations where there are allegations of child abuse, where there is intractable conflict between the parents, where alienation had occurred, where cultural or religious differences were affecting the child and where a parents’ sexual preference may affect the child.

Within the sample, the two main ways that children’s views were represented to the Court were through Family Reports\textsuperscript{822} and the appointment of a Children’s Representative. 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.\textsuperscript{823}

It is clear that Children’s Representatives were involved in the proceedings in 17 cases in the sample.\textsuperscript{824} In some instances, it appeared that the degree of involvement of the Children’s Representative was quite circumscribed and information on the final position advocated was not available. The cases where a Children’s Representative was appointed fell mostly into the extreme end of the continuum.

The material in the sample suggests that despite the involvement of a Children’s Representative, the parents’ arguments determined the parameters of the Court’s consideration in most instances.\textsuperscript{825} In the 13

\textsuperscript{821} FLC ¶ 92-461.
\textsuperscript{822} The treatment of children’s interests in Family Reports is discussed substantively throughout the other three parts of this chapter.
\textsuperscript{823} Research indicates that legal aid funding may not be available beyond the interim stage: Parenting, Planning and Partnership, above n 100, 62-63.
\textsuperscript{824} T2, T23, T7, T5, T6, T11, T18, A3, A1, A4, A17, A12, A15, A7, A8, T15, A16.
\textsuperscript{825} 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, 79. However it was clear in most
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. These outcomes were consistent with mothers’ applications in nine cases and fathers’ applications in one case.

In only one case did the Children’s Representative advocate the issuing of orders that were consistent with neither the mothers’ nor the fathers’ position. In T7, discussed extensively in chapter four, the Children’s Representative applied for orders to adjourn the proceedings, reserve the question of contact and obtain a psychiatric assessment of the father. This was more conservative than the mothers’ position, which was to allow contact to take place on a fortnightly basis. The application was unsuccessful and orders were made reflecting the mother’s application for residence, with contact for the father.

Concerns have been raised about the level of knowledge about domestic violence among Children’s Representatives by other Australian research which has questioned the safety of children (and their mothers) under the pro-contact culture that has emerged since the introduction of the Reform Act 1995. Two sample files, A1 and A12, involving Children’s Representatives and severe levels of violence would appear to support these concerns. In A1, the Children’s Representative considered 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’, FCA Submission, above n 17, 51. A recent High Court decision on this issue, U v U (2002) 29 Fam LR 74 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.

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826 T2, T6, T18, A3, A1, A4, A17, A15, A7, A8, T15.
827 T2, T6, T18, A3, A4, A16, A15, A8, T15.
828 A7. In one further case, the Child Representative supported the non-biological father’s application for contact: A17.
829 See text accompanying 768 and 780.
830 Rendell, Rathus and Lynch, above n 177, 95-96.
supported continuing supervised contact even though the father had been extremely violent and controlling to both the children and the mother in the case.

In A12, the Children’s Representative reserved his position at trial because Legal Aid funding had only been obtained just prior to the start of trial. After the father successfully appealed orders suspending contact, the Children’s Representative did not oppose the making of consent orders giving residence of the children to the father.\footnote{Consent orders 6/2000.} This was despite a background of extreme violence and the very strong suggestion that the children had been alienated from their mother by their father.\footnote{See below, text accompanying fn 879 and 889.} In a previous trial, the fathers’ application for residence of the children had been refused, with the judge observing that her findings about the father’s ‘violent, controlling and manipulative’ behaviour towards their mother meant he would be an unsuitable resident parent.\footnote{Judgment 8/1997.} The making of the consent orders which remain subject to the best interests principle in s65E, suggests that the father’s relentless campaign of litigation against the mother finally wore her down.\footnote{The Parenthood, Planning and Partnership Report, above n 100, indicates that judicial scrutiny of consent orders primarily involves ‘checking the formal or technical aspects of the order and to seeing if there is anything of obvious concern’: 27. Kaye Stubbs and Tolmie, above n 141, question the validity of the ‘consent’ obtained from mothers in circumstances involving violence: 101.}

Notwithstanding those cases where Children’s Representatives were involved, most of the material in the files dealt with issues relating to parental attributes and conduct. This is consistent with concerns expressed by the FCA 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.  

The amount of argument in the sample files that specifically related to the children involved in the cases was minor, compared with the volume of argument directed toward establishing and refuting parenthood claims. Arguments focussed on the needs of the children in the sample played a much smaller role throughout the parents’ affidavit material, the Family Reports and the judgments. Other Australian researchers have made similar observations. For example, FCA counsellors Bob Hinds and 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.  

This tendency to focus on parents rather than children has also been substantiated by the Family Court’s analysis of factors emphasised in judgments, referred to previously in chapters three and four. In an assessment of the weight attached to each of the FLA s68F(2) factors across a sample of 91 judgments in three registries conducted in 2003, the two provisions that involve consideration of the individual child received less emphasis than the parent-focussed provisions. The issue of the child’s wishes was considered of high or moderate significance in only 29.7 per cent of cases. In 30.8 per cent of cases, this weighting was accorded to the provision that directs attention to the individual child’s wishes.  

835 FCA Submission, above n 17, 51.  
837 FCA Submission, Parts B and C, above n 30.  
838 See text accompanying fn 523 and 525.  
839 See text accompanying fn 677 and 679.  
840 s68F(2)(a)
characteristics of the child, such as the child’s maturity, sex and background. As noted in chapter three, this compares with a weighting of 63.7 per cent for attitudes to parenting and 24.2 per cent for family violence.

My analysis shows that arguments directly relevant to the children in the sample covered three main areas: the wishes that the children themselves had expressed, the impact of current and proposed arrangements on the children and the impact of court orders on relationships between the child/ren involved and other important figures. The analysis presented in the next two parts provides new insights into the way that children’s interests are treated in litigation. No other research has systematically examined Family Court files to assess how children’s perspectives are treated in the context of their parent’s arguments.

PART 2 LISTENING TO CHILDREN?

This section presents an analysis of the role played by the preferences expressed by the children in the sample. The data revealed significant complexity surrounding this issue. It indicated that children’s wishes either play a minimal part in litigation, due to issues such as the young age of the child, or raise highly problematic questions. The latter tendency is manifested most clearly in a group of cases where overlapping issues relating to violence, allegations of alienation, and the validity of the children’s wishes raise complex questions for determination. The overlap between these factors was an extensive theme in the data and is the focus of the discussion presented in this part.

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841 s68(f)(2)(f).
842 See text accompanying fn 523 and 524.
843 In three cases, T15, T18, A13, judicial determinations explicitly went against the children’s wishes because other factors were considered more important.
Judicial attention is directed to the issue of children’s wishes by FLA s68F(2)(a). This provision requires the Court to consider any wishes expressed by the child. The child’s maturity or level of understanding is relevant to the weight accorded to those wishes. Further provisions provide guidance on how the court should ascertain what wishes children have expressed. This is to occur by means of a Family Report, or ‘by such other means as the Court thinks is appropriate’. A child’s right to refuse to express any wishes at all is preserved in the legislation.

The wishes of children have been recognised in case law to be an ‘important matter’, deserving of being accorded ‘proper and realistic’ weight. Factors considered to be important in determining that weight include the strength and duration of the child’s expressed wish, its basis, the maturity of the child and their capacity to understand the longer-term implications of the issues before the Court. It has also been recognised that decisions based on best interests criteria may involve a rejection of the child’s expressed preference. A more recent decision requires evidence to be put before the Court of what the child’s view would be if such a rejection occurred.

Eliciting information about children’s wishes involves many complex issues, in terms of how this is done and assessment of the implications of what is said. As Carole Brown notes, the wishes expressed by a child in the context of a residence dispute do not necessarily reflect their own best interest: ‘[they] may state a preference that reflects the loyalty bind

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845 s68G(2)(a)
846 s68G(2)(b).
847 s68(H).
848 In the Marriage of Harrison and Woollard (1995) 18 Fam LR 788, 797.
849 Ibid 800.
they are in, or their perception of one of their parents as needing them or the coaching by one parent or alienation. 851

The Family Court’s submission to the *Every Picture Report* inquiry noted the skill that was required in conveying children’s interests: ‘[i]n some cases a bald description of what a child said may result in a breakdown in the child's relationship with the non-preferred parent, or some form of reprisal’. 852 A qualitative study involving young adults who were subject to contested proceedings as children by the Australian social work academic, Yvonne Darlington, highlights the consequences for children of not being listened to. Participants in her study who had residence or contact arrangements made that were contrary to their expressed wishes ‘described feelings of anger and frustration’: ‘[a]lready strained relationships were further stressed by this sense of compulsion, that they were “made” to see or live with this parent’. 853

The issues surrounding children’s wishes are particularly complex in cases involving violence. The way children may be used as tools in patterns involving violence and control was referred to briefly in chapter four. 854 They may be subject to manipulation by the abusive parent which impairs their relationship with the other parent. 855 Moreover, the ‘abused parent may be seen by the children as weak and “ineffectual,” and children may wish to align themselves with the “stronger”, more powerful abusive parent’. 856 My analysis of the empirical data revealed a

852 FCA Submission, above n 17, 46.
853 Yvonne Darlington, ‘“When All is Said and Done”: The Impact of Parental Divorce and Contested Custody in Childhood on Young Adults’ Relationships with Their Parents and Their Attitudes to Relationships and Marriage’ (2001) 35 (3/4) *Journal of Divorce and Remarriage* 23, 31.
854 See text accompanying fn 625 and 627.
855 Bala, above n 626.
856 Ibid.
Rae Kaspiew  
Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Family Court Decision Making

A strong interconnection between a history of violence, disputes over the meaning of children’s wishes and also allegations of ‘alienation’.

Alienation 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, alienation has been labelled as a syndrome, Parental Alienation Syndrome (PAS), in the work of the late child psychiatrist Dr Richard Gardner. 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).

PAS has not however been recognised as a formal psychiatric diagnosis and it is subject to significant controversy. In the UK, ‘the majority view’ seems to be that the syndrome does not exist. The theory is said to confuse reactions in children to their parents’ separation that are developmentally normal, with psychosis. It is also seen to overstate the frequency with which false allegations are made of abuse. 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.

The role that allegations of PAS play in unjustifiably discrediting mothers are increasingly being recognised. Referring to its role in the

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858 Ibid.
860 See eg Carol Bruch, 'Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases' (2001) 35 Family Law Quarterly 527
861 Herring, above n 598, 99.
862 Bruch, above n 860, 530.
863 Ibid 532.
864 Ibid 532.
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’.\(^{865}\)

PAS has been accepted in Australia by the Family Court as a ‘real psychological phenomenon’\(^{866}\) but the Court is seen to be reluctant to accept allegations of its presence in specific cases at face value.\(^{867}\) 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, in almost equal numbers.\(^{868}\) 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 promotion of the allegation as a ‘silver bullet’ in family law proceedings on fathers’ rights groups’ websites\(^{869}\) and focuses attention on the tactical role these arguments play. The study also noted the overlap between a history of violence and allegations of alienation.\(^{870}\)

The following analysis of the way that allegations of alienation serve to complicate the meanings of the wishes that the children expressed in my sample is broadly consistent with these findings. My analysis also suggests alienation claims are related to the application of the friendly parent criterion discussed in chapters three and four. When raised strategically by fathers, they 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

\(^{865}\) Meier, above n 623, 688.
\(^{866}\) Johnson and Johnson (1997) 22 Fam LR 141.
\(^{867}\) Berns (2001) above n 121, 208.
\(^{868}\) Ibid 207.
\(^{869}\) Ibid 197.
\(^{870}\) Ibid 100.
relationship. The possibility that contact may not be a positive experience for the child potentially remains obscure.

There are two related aspects to the overlap between violence and alienation claims in the sample. First, alienation is a tactic of violent fathers. The discussion in the next section highlights how some of the most violent fathers in the sample also alienated their children against their mothers. This stems from the propensity of violent fathers to use manipulation and litigation over children to maintain control as discussed in chapter four. Secondly, a history of violence may create ambivalence about the violent father in the children, triggering a claim of alienation against the mother by the father. Even in some cases where violence was not relevant, alienation claims are raised against mothers to impugn their motivation for opposing fathers’ claims for increased contact.

Two broad patterns emerged in relation to the way that alienation claims arose and were dealt with in litigation. There was a ‘severe’ group and a less ‘severe’ group. The former group comprised five cases in which ‘alienation’ was a major theme and was overtly dealt with, to varying extents, in the litigation. The latter group comprised 20 cases where claims of alienation by one parent or another 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. The following sections examine these two groups in turn.

A ‘Alienation’: the ‘severe’ group

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871 See text accompanying footnotes 625 and 627.
872 A7, A15, A1, A3, A12.
873 T2, T1, T23, T3, T7, T8, T5, T10, T6, T21, T19, A5, A9, T4, T9, T17, T12, T15, T18, A8.
The five cases in the severe group included four cases where violence was a significant issue. The fifth case, A7, was discussed extensively in chapter three. It involved the mother who lost residence of her daughter on the basis of her ‘wilful and irrational’ attitude to the child’s father. The other four cases involved circumstances where extreme patterns of physical violence and control, or in one instance, changeover conflict and extreme control were involved. In each of the cases mothers raised the allegations against fathers, although in one instance the claim was mutual. In these four cases, the suggestion that emerges on the basis of the material as a whole is that the children were being subject 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 alienation for children are illustrated particularly powerfully in A12, a case where the father had been relentless in his pursuit of residence of his son (aged 10) and daughter (aged 8), 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. The father had previously breached court orders in overholding the children, forcing the mother to obtain recovery orders. The mother’s material noted that an order under FLA s118 made against the father ‘appear[ed] to have had little impact on the father and he continues to issue applications on a regular basis’.

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874 A15, A1, A3, A12.
875 See text accompanying fn 532 and 538.
876 A15.
877 A3.
878 A12.
879 These were explained in chapter two at text accompanying fn 232 and 233.
880 Affidavit (m) 23/9/1999.
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.\(^{881}\)

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’.\(^{882}\)

The Family Report’s descriptions of the children involved in the case highlight the implications of being subject to such intense emotional pressure. The 10-year-old son’s behaviour in the interview with the Family Report author was described 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.\(^{883}\)

This child’s ability to communicate his true feelings was nullified by the pressure he was placed under by his father’s manipulation. His only permissible expression was of longing for his father. 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

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\(^{881}\) Ibid.
\(^{883}\) Ibid.
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’. 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.

This boy’s eight-year-old 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’. 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.

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’. This comment acknowledged that the children’s expressed views were inconsistent with their real feelings and implied

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884 Affidavit by child psychiatrist filed on 16/9/1999.
885 Ibid.
887 Ibid.
that pressure exerted by the father was responsible. Rather than being explicitly stated, evidence of the father’s manipulation was inferred from the descriptions of the children’s behaviour. The Report recommended that contact between the father and children should resume, because otherwise their unrequited longings to be with the father would become ‘a burdensome, unresolvable issue’.  

This recommendation underlines the difficult balance to be struck in deciding whether children’s interests are best served by severing or maintaining contact: the former would involve depriving the children of an ‘affectionate’ relationship with their father but the latter would release them from being subjected to his ongoing emotional pressure and denigration of their mother. Given that the father’s manipulation occurred in the context of an extreme history of violence and control, it is concerning that a connection between the two issues was not made in the report. 

While the impact on the 10 year old boy in A12 was the most serious indication of distress experienced by the children in the ‘severe’ group, it was judicially accepted that all children in these cases were subject to serious levels of pressure and manipulation by their fathers. However, despite these findings, ongoing contact was nonetheless held to be in the children’s best interests in three of the four cases.

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888 Ibid.
889 This possibly reflects the restrictions on pre-empting findings of fact discussed in chapter one (see text accompanying fn 177).
890 Supervised in A1; unsupervised in A15 and A3.
891 In A12, orders reflecting the mothers’ application were made after the father withdrew from proceedings, so a full hearing of his application did not occur: judgment 9/1999. It appeared that the Children’s Representative was prepared to support unsupervised contact: Children’s Representative Outline of Case Document filed on [date illegible]. As noted above, see text accompanying fn 831 and 834, the Children’s Representative did not oppose consent orders under which the children became resident with the father.
These outcomes further illustrate the double standard that exists in relation to what type of parenting behaviour is ‘adequate’ in relation to mothers and fathers. Ongoing contact with the fathers was accepted as being in the children’s best interests, despite the backgrounds of violence and or control accompanied by pressure and manipulation. The ‘alienating’ mother ‘lost’ residence of her daughter, whose entitlement to ongoing contact with her mother was subject to reformation of the mother’s ‘wilful and irrational’ attitude.892

Another important aspect of the outcomes in this group is a disparity between the trends indicated in the empirical data and those reflected in the jurisprudence on alienation. The empirical material indicates that the fathers engaged in alienating behaviour as part of a campaign to maintain control over the family after separation against a background of violence. In contrast, the reported decisions focus on alienating mothers, emphasising the role of mothers in determining children’s attitudes to their fathers.

*In the Marriage of R (Children’s Wishes)*,893 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 was upheld. 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.894 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’.895

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894 Ibid 235.
The role of the mother in creating the situation was emphasised by the
Appeal Bench, which held that if the mother changed her attitude ‘the
problem would cease to exist’. Underlining the ‘penalising’ function of
judicial determinations, it referred to the fact that a residence order in
favour of the father, subject to the child’s best interests, ‘would seem to
be one of the only realistic sanctions remaining’ if this did not occur.896
The mother was said to have ‘manipulated’ the family law system to
engineer the father’s ‘deprivation of contact in circumstances [where
there was no] fault on the part of the father’.897

The rhetorical stereotype of the ‘no-contact mum’ discussed in chapter
three898 dominates public discussion of alienation. Rhoades’ research,899
together with the evidence in relation to alienation and violent fathers in
this study and in that by Berns900 suggests that the stereotype of the
alienating mother requires further scrutiny. The following analysis of the
‘less severe’ group of cases where alienation allegations were raised
provides further evidence that they are used tactically by fathers to show
that mothers breach the friendly parent criterion.

B The ‘less severe’ group

Among the ‘less severe’ group of 20 files, 14 fathers901 and five mothers
made claims suggesting their relationship with the child was being
undermined by the other parent.902 Such allegations were mutual in one
further case.903 Violence was relevant in nine of the files where fathers

896 In the Marriage of R [2002] 29 Fam LR 230.
897 Ibid 250. The decision reinforces the obligation on resident parents to take ‘all
reasonable steps to ensure contact occurs’ enunciated in the 1997 decision in Re David
22 Fam LR 489.
898 See text accompanying 517 and 518.
899 Rhoades (2002), ‘The No-Contact Mother’ above n 137.
900 Berns (2001), above n 121.
901 T2, T1, T23, T3, T7, T4, T8, T5, T10, T6, T21, T19, A5, A9.
902 T17, T12, T15, T18, A8.
903 T9.
raised the allegations904 and in two of the cases where mothers raised them.905 Rather than being central to the litigation, the claims of alienation and manipulation remained underlying issues in these cases. They were raised in the context of ‘explanations’ about the wishes expressed by children in Family Reports.

The differences between the way alienation claims are raised in mothers’ and fathers’ material are qualitative as well as quantitative. Mothers were not only less likely to raise alienation allegations, but were less likely to raise them spuriously.906 Further, some of the cases where mothers raise the allegations suggest alienating behaviour on the part of fathers is also part of a pattern of violence and control in this group of files.907

In contrast, alienation allegations were predominantly raised by fathers in a tactical way.908 They implied that the mother’s 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 father’s parenting capacity and onto the attitude of the mother.

In the violence cases, this appears 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. This has already been illustrated to some extent in the discussion of T7 in chapter four.909 This file involved a father who engaged in intensive

904 T2, T1, T3, T7, T8, T5, T10, T19, T22.
905 T12.
906 Mothers’ allegations of manipulation were judicially accepted in all cases.
907 This was evident in three cases: T12, T15, A8.
908 In the cases where they were raised that didn’t involve violence, they were found to be invalid: T4, T21, A5.
909 See text accompanying footnotes 768 and 780.
litigation to ‘disprove’ the parental fitness of the mother. The mother was accused of undermining the father’s relationship with the children, but the converse was in fact the case. 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. Illustrating judicial reluctance to question the bona fides of fathers’ claims, my analysis highlights the characterisation of this father as ‘loving’ but ‘abusive’.  

Other cases in the sample exemplify a further aspect of the overlap between violence and alienation claims, specifically the way that fathers blame mothers for children’s attitudes, rather than accepting responsibility for their own actions. This is illustrated clearly by T10, 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.

The father argued that it was unnecessary for the mother to relocate and 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:

910 Ibid.
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.\textsuperscript{911}

Notwithstanding his former wife’s alienation attempts, 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.\textsuperscript{912} 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’. 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’. The Report noted that both boys wanted to go to live in Queensland.\textsuperscript{913}

The evidence referred to in the previous paragraph was emphasised in the judge’s decision.\textsuperscript{914} In considering the implications of the move for contact, the judge noted that ‘although the children’s relationship with their father must not be severed, it is not without problems’. 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’.\textsuperscript{915} 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,

\textsuperscript{911} Affidavit, 23/2/99.
\textsuperscript{912} Family report, 6/5/99.
\textsuperscript{913} Ibid.
\textsuperscript{914} Judgment, 6/99.
\textsuperscript{915} Ibid.
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 unjustifiably blame mothers for their children’s attitudes to them. These claims were usually contradicted by the evidence provided by Family Reports and rejected at 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. This is demonstrated by the judge’s findings in T15, in which a mother alleged that the father was influencing their children against her. 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 Honour’s decision to return 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 the wish to remain resident with her father. The

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916 This was not invariably the case. In two files, T9 and T18, the Family Reports de-emphasised the mothers’ concerns about manipulation. In both cases the judges affirmed the mothers’ concerns.
917 Above n 906. Cf T12.
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.\(^\text{919}\)

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 things about myself’ in an interview with the author of the Family Report.\(^\text{920}\) 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:

at 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.\(^\text{921}\)

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’.\(^\text{922}\) This occurred against a background of violence in the file that was inaptly characterised by the judge as mutual. The judgment ordered the two older children in this file to join their two

\(^{919}\) Ibid.
\(^{920}\) Affidavit (m) 3/2000.
\(^{921}\) Ibid.
younger siblings in the care of their mother. Contact with their father was maintained in an alternate weekend pattern.\textsuperscript{923}

In summary, this analysis of how alienation claims complicate the issue of children’s wishes has explored the way that in giving children a voice, the legal process creates pressures that also silence them. The wishes expressed by the children in the sample were marginalised by their parents’ claims as to what they should feel.

The analysis of the ‘severe’ group highlighted how actual alienation occurred in just a few cases in the sample and was a tool predominantly used by violent fathers. However, even the use of such tactics was not seen to impact upon the children’s ‘right’ to contact. The analysis of the ‘less severe’ group illustrated the way spurious alienation claims against mothers were raised tactically to establish the mothers’ ‘deviance’ in relation to the requirement to be a friendly parent.\textsuperscript{924} 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.

This is another area where mothers’ attitudes and behaviour are subject to a greater level of regulation than those of fathers. This is consistent with the more stringent standard of ‘adequate’ parenthood applied to residence parents (mothers) in the sample. The reported decisions on alienation place an onus on mothers to adjust their attitudes and behaviour to ensure that their children receive fathering. Yet there is little evidence of a corresponding onus on contact parents (fathers) to adjust their attitudes both to their former partners and their children. Children’s ‘need’ for fathering is construed as so significant that even

\textsuperscript{923} Ibid.

\textsuperscript{924} Hart, above n 144, has drawn a similar connection: 186.
part of the community and the court. Mothers in contrast were again concerned with security, stability and the workability of day-to-day routines. Secondly, there was a tendency for fathers’ claims to place their children in positions of stress which raised loyalty conflicts for them, particularly in relation to the older children in the sample. Thirdly, the outcomes in most cases reflected an approach that emphasised the

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925 Eriksson and Hester above n 746.
926 These issues arise under: FLA s68F(2)(b) which requires the Court to consider the nature of the child’s relationship with each parent and ‘other persons’ and ss(c) which directs attention to the likely effect of any changes in the child’s circumstances, including the likely affect on the child of any separation from (i) either parent or (ii) any other child or person, with whom he or she has been living.
child’s ‘needs’ rather than their ‘rights’. There were exceptions to this which are also discussed.

The underlying theme in this discussion is the tension between functional and biological constructions of parenthood referred to in chapter three. In the sample, this tension is raised by fathers’ assertions that parental ‘equality’ is in their child’s best interests in arguments that conflate biological relationships with affective ones. The issues raised by such claims are clearly illustrated in file A5. This case involved a 10-year-old girl whose father and his de-facto partner were applying to have residence of her during alternate weeks. After her parents had separated when she was six, she initially resided with each parent for a fortnight at a time.

A Family Report prepared for proceedings that were eventually settled by consent when she was seven described her as ‘very quiet and rather withdrawn’. She appeared to have ‘little of the sparkle expected of a normal seven and half year old and was ‘clearly under a great deal of pressure’. She manifested sadness, in particular over the fact that her father had stopped allowing her mother to visit her on nights she was at his house. Even at that age, she ‘appeared to be quite afraid of showing any preference between either parent’ because she was worried about how her father would feel and whether he might get upset. She ‘appeared to be parenting her own parent’.

The Report concluded that the alternating fortnightly arrangement was ‘no longer tenable’. The child was depressed. An arrangement involving residence with her mother and blocks of contact with her father from Thursday night to Monday morning in alternate fortnights, with an

927 FLA s68F(2)(b) and (c).
overnight stay in the second week would better suit her needs. Consent orders reflecting this recommendation were subsequently made.\textsuperscript{929}

After this arrangement had been in effect for over two years, her father and his de-facto applied for orders reflecting week about residence. The father told the Court he was applying for ‘exactly equal custody’ (sic) of his daughter because ‘that is what the best interests of my daughter are.’ He argued that the child flourished under the care provided by him and his de-facto, because the mother was too absorbed with her work to provide adequate care and supervision:

\begin{quotation}
[The mother] has pursued her own career with such vigour as to totally forget the concerns which she previously had for [the child] and now finds very little time in her busy schedule for [the child].\textsuperscript{930}
\end{quotation}

He attributed the mother’s application for a reduction in contact, and a specific issues order allowing her to enrol the child, who had been assessed as being gifted, in a private school, to a desire to ‘sever the paternal bond in the most unscrupulous way’\textsuperscript{931} He opposed the mother’s school proposal, arguing that it was financially not viable. Further, he wanted to be ‘fully involved in the school curriculum’, which would be ‘possible only in an equally shared residence arrangement’.\textsuperscript{932}

The mother argued that the father’s application for shared residence, and his opposition to sending the child to a private school, was based on his reluctance to pay increased levels of child support. She argued that the child was emotionally stressed by the extended contact arrangement. The care provided by the father and his de-facto was inadequate, physically and emotionally:

\begin{itemize}
\item \textsuperscript{929} Consent orders 11/1996.
\item \textsuperscript{930} Affidavit (f) 21/9/1998.
\item \textsuperscript{931} Ibid.
\item \textsuperscript{932} Affidavit (f) 8/12/1998.
\end{itemize}
When the child returns to me from contact, she is like a deflated balloon. She is wound up and anxious and it takes a day or two to unwind. When she is returned to me after contact, it is as if she has insulated herself from what is going on around her and I give her a lot of comfort to help the protective blanket to dissolve. When she is so uptight, I generally run her a warm bath and gently wash her back and rub her toes to help her relax.\textsuperscript{933}

The father’s lack of insight into the child’s needs was also an important theme in the Family Report prepared for the trial. As with the first Report, quoted above, it was noted that the child was reluctant to convey her true wishes to her father:

[the child] had clearly thought about what arrangements she would like for her care and said that week about was not what she wanted at all…Initially when interviewed [the child] was quite fearful of her father discovering what she wanted particularly as she felt that she would be punished for this.\textsuperscript{934}

The report noted that the father appeared ‘to be totally unable to separate out his needs from those of his daughter’, seeing his half-time proposal in terms of ‘fairness’ based on his previous input into her:

It appeared at times that [the father] saw this work as being some sort of investment from which he expected a return rather than the normal inputs of parenting from which no parent can really expect anything although they may hope for the best.\textsuperscript{935}

The mother’s proposals for residence/contact and the child’s education were reflected in the orders made by the judge, who placed emphasis on the account of the child’s wishes in the Family Report. The judgment was sceptical about the father’s lack of frankness about his financial

\textsuperscript{933} Affidavit (m) 10/11/1998.
\textsuperscript{934} Family Report 24/12/1998.
\textsuperscript{935} Ibid.
position and was highly critical of his attitude towards the mother. He lost his claim for ‘equal parenthood’ on this basis, but the child’s ‘need’ for contact remained unquestionable.\footnote{936}{Judgment 1/1998.}

This case exemplifies four significant points that show how issues in relation to relationship quality are dealt with in the sample. First, the arguments of the father and mother in this case illustrate the gendered differences in approaches to litigating about children referred to earlier in this section.\footnote{937}{T8, T4, A6.} The father’s claims focussed on abstract arguments about the child’s ‘needs’ that implied her symmetrical biological connection to her father and mother mirrored her affective relationships with them. Equality and fairness, issues that relate to the parents rather than the child, were emphasised in the father’s material. In contrast, the mother’s concerns were focussed on the impact that the Court orders would have on the child’s everyday routines and her emotional health. The child’s emotional and physical state and her educational needs were at the centre of the mother’s argument. The differences between mothers’ and fathers’ arguments reflect that in most cases, mothers carry most of the day-to-day responsibilities of practical parenthood as discussed in chapter three.\footnote{938}{See text accompanying fn 437 and 516.} They illustrate the distinction between the masculine prerogative of ‘caring about’ and feminine obligation of ‘caring for’.\footnote{939}{Smart (1991) above n 384.}

Secondly, the case study illustrates the consequences for children of being the subject of fathers’ claims for ‘equal’ rights. The psychological evidence about the child revealed how being the long term subject of her father’s claims for ‘equality’ had a detrimental impact on the child, who at the age of seven experienced depression. In another of the shared care cases, a four-year-old girl was found to be ‘operating under a certain...
amount of stress’ as a result of being at the centre of an intense competition between her parents that ‘placed an obligation on the child to meet each parent’s expectations…[to an extent that would] become a heavy load as the child gets older’.\(^{940}\) Like the children that were subject to claims of alienation discussed in the previous part of this chapter, the children in this part of the sample were adversely affected by being at the centre of their fathers’ claims for ‘equality’.

Thirdly, the psychological evidence tended to undermine the fathers’ claims that their ‘equality’ was in the children’s best interests, particularly in relation to the shared care cases in the sample. It highlighted the implications for children of being placed in positions where their loyalties were subject to scrutiny and question. Further, this evidence emphasised that the mothers’ previous history of caregiving meant that the mother/child relationship had greater substance than the father/child relationship and was of more significance in maintaining the day-to-day security and stability of the children.\(^{941}\) These findings were consistently supported by the preferences expressed by the children.\(^{942}\) The psychological approaches rejected the proposition that ‘equal time’ arrangements were necessary to ensure a substantial father-child relationship but reinforced the children’s needs for ongoing, substantial contact.\(^{943}\)

\(^{940}\) A6, Family Report, 2/1999.

\(^{941}\) This was generally the case in relation to relocation applications also. However, an exception was T16, a relocation case where the father had exercised contact from Friday night to Sunday morning each week, in addition to two evening periods each week. Both the Family Report and judgment found that as a result of this arrangement the child’s relationship with his father and paternal relatives was of great significance (judgment 6/1999). Relocation was denied for this reason and because of a lack of substance in the mother’s proposals.

\(^{942}\) In A6 the father had taken full responsibility for caring for a four-year-old child in a half-time arrangement that was imbued with conflict. The child’s own expressed preference to spend more time with her mother, together with the history of conflict, underpinned the Family Report recommendation and judicial determination to change the half-time arrangement to a situation where the father had contact from Friday afternoon to Sunday evening on three out of four weekends (judgment 6/2000).

\(^{943}\) This point is made in other studies see eg Christy Buchanan, Eleanor Maccoby and Sanford Dornbusch, *Adolescents after Divorce* (1996) 179.
A further issue emphasised in judicial comment in the equal care cases was that shared care arrangements are dependant on high levels of communication and co-operation if they are to work in the children’s favour.\textsuperscript{944} Conflict is widely acknowledged\textsuperscript{945} to be a factor militating against the success of such arrangements and this was consistently referred to in psychological evidence and judicial determinations. UK research on children brought up in shared care households has highlighted the emotional cost for children even when such arrangements involve parents who are ‘loving and attentive’.\textsuperscript{946} In this light, the conservative approaches of the psychologists and judges in this sample accord with a caution issued by Bren Neale, Jennifer Flowerdew and Carol Smart:

\begin{quote}
[P]arents who use their children as pawns or who treat them as matrimonial property when the children are 8 or 9, will not necessarily change when the children are 14 or even 18. We should perhaps be careful that, in seeking to solve a compelling problem at the time of divorce or separation, we do not create much bigger problems for children in the future.\textsuperscript{947}
\end{quote}

While there was an overall consistency in the way the factors discussed in the preceding paragraphs were emphasised across the sample, there

\textsuperscript{944} See eg Foster and Foster [1997] FLC 90 281, Family Court of Australia at ¶76,511. The fathers’ applications in the four shared care cases in the sample were all unsuccessful. Other research findings vary on this point. The First Three Years Report, above n 72 found evidence of shared care arrangements being ordered where there was disagreement and conflict: 4.52. In contrast, Parenting Planning and Partnership confirmed judicial scepticism that such arrangements were feasible in cases where litigation took place because of lack of any evidence of ability to co-operate. One judicial respondent however suggested that such arrangements may be ordered at interim level to give ‘both parents the same rights’ ahead of the final determination: 28-29.


\textsuperscript{946} Bren Neale, Jennifer Flowerdew and Carol Smart, ‘Drifting Towards Shared Residence’ (2004) 17 (2) Australian Family Lawyer 15.

\textsuperscript{947} Ibid 16.
were two cases where a substantially different view was taken of the significance of the father-child relationship. These cases, A9 and A7, were discussed in chapter three and involved the ‘deviant’ mothers who breached the friendly parent standard. In both of these cases, the judicial determination reflected an emphasis on the ‘child’s right to know and be cared for by both parents’, in addition to a concern to penalise the mothers’ deviant behaviour.

In penalising the deviant mothers in these files, the orders made had serious implications for the children’s relationships with other important people in their family circles. File, A9, provides a particularly clear illustration of the complex issues raised in such circumstances. This file involved a dispute over the mother’s relocation to Brisbane with her husband and three children. The child subject to the application was a four-year-old boy, whose father lived in Melbourne. The judge found the mother to have been insufficiently supportive of her son’s relationship with his biological father. This resulted in orders requiring her to live in Melbourne with her son, so contact could occur, although her husband and two other children were resident in Brisbane. The initial relocation to Brisbane took place on the initiative of the child’s stepfather and was in breach of interim orders prohibiting relocation.

The fact situation in this file raises particularly strikingly a conflict over the meaning of two different ‘families’ to the child. In Melbourne, the father lived with his de facto partner, her adult son and her 80 year old mother, who owned the house they lived in. The child’s mother lived in Brisbane with a 7 year old daughter from a previous relationship, her husband and their 18 month old daughter. The child had lived in a household with his step father from the age of one, and it was this step

948 The mother A7 appealed against the trial judgment. One ground of appeal was that the trial judge had failed to properly apply FLA s68F(2)(b) and (c). Because the appeal was successful (see above, text accompanying fn 538) on the basis of procedural unfairness, this point was not decided.

949 FLA s60B(2)(a).
father’s application to adopt the child that appeared to motivate his biological father to re-establish contact with him at the age of about two. The biological father had only ever lived with the child for two separate periods of eight weeks during the child’s first year.\(^{950}\)

Whilst an appeal against the trial judgment was unsuccessful,\(^{951}\) the issues were again opened up for judicial scrutiny when the mother applied for orders permitting the boy to reside in Brisbane a year later. She argued that she was pregnant with her fourth child and that it had become untenable for her to live in Melbourne with the boy, away from her husband and two other daughters. She claimed she had resided in Melbourne in a caravan park with the boy in compliance with the Court orders, although her mother had cared for him at times when she was in Brisbane.\(^{952}\)

The father claimed that for most of the time, both the mother and the boy had lived in Brisbane, in breach of court orders.\(^{953}\) At all times however, contact had taken place according to the requirements of the orders. An interim decision suspended orders requiring the mother and child to reside in Melbourne and a subsequent decision ordered that a new hearing of the residence and contact matters be expedited.\(^{954}\)

A core issue in the material filed for the new hearing focussed on the child’s place in two different households, particularly in that of the mother. The step-father, for example, deposed that:

> During 1996 while the [father] was not interested in seeing [the child], I fulfilled the role of father figure and provider to the [child] and [his sister]. Although the

\(^{950}\) Case Outline (m) 25/7/2000.
\(^{952}\) Affidavit (m) 22/5/2000.
\(^{953}\) Affidavit (f) 1/8/2000.
\(^{954}\) The matter was eventually settled by consent with orders allowing the boy to live in Brisbane with his mother and have contact with his father in Melbourne (orders made 8/2000).
child understands that I am not his natural father, I still continue as male role model and provider for him.\textsuperscript{955}

This man’s role in his son’s life was clearly a significant concern to the biological father, who argued that if the boy remained resident in Brisbane, his own relationship with him would dwindle: ‘The [stepfather] …will become the most significant influence in my son’s life’.\textsuperscript{956}

An additional factor emphasised in the stepfather’s material was the child’s relationship with his siblings and the strain the court orders had placed on this:

I don’t think [the father] or [his girlfriend] fully understand the nature of brothers and sisters. I don’t think [the child] would be very happy without his sisters for companionship…during 1999 [at the times the child lived in Melbourne] [his sisters] were constantly asking when they would see their brother next. [The oldest sister] was especially frustrated at not being able to see her brother more often.\textsuperscript{957}

The Family Report also cast a spotlight on the significance of these issues. It noted that when asked to draw his family, the boy first of all drew his older sister, and then everyone else in his mother’s household:

It was very clear that he views his family unit as his mother, stepfather, whom he calls ‘dad’ and his sisters, including the new baby…There is a clear difference for [the child] in the strength of the feelings of attachment to the family unit he lives in. He said that when he is down here in Melbourne he misses his family…His expression regarding missing his father, when not here was not strong at all.\textsuperscript{958}

\textsuperscript{955} Affidavit (step-father) 19/6/2000.  
\textsuperscript{956} Affidavit (f) 1/8/2000.  
\textsuperscript{957} Affidavit (step-father) 19/6/2000.  
In light of this Report, it appears the original trial outcome had the effect of completely side-lining the child’s interests. In the wake of the original trial judgment, the five-year-old child endured some 18 months of being shifted between a caravan park in Melbourne and his mother’s home in Brisbane. This took place during his first year at school, which he commenced in Melbourne but then continued in Brisbane. When resident in Brisbane, he was taken to Melbourne for contact with his father on a fortnightly basis.

The trial judgment prioritised the child’s biological connection with his father. This connection assumed added importance in the context of his mother’s ‘deviance’ as a litigant disregarding court orders and a step-father usurping the fatherly role. Emphasis was placed on the father’s aspiration to be more than a mere ‘contact parent’ but not a primary caregiver.

The judge’s approach centralised *FLA s60B(2)* and treated the child as an autonomous individual whose relationships with each parent were ‘equally’ important. It prioritised his need, and, ‘right’, to have regular and frequent contact with his biological father. This ‘need’ was seen to be equal, if not superior, to his need to live with his mother, sisters and step father. Further, the needs of these individuals were seen to be of little relevance in the decision.

It was only when the Family Report for the subsequent proceedings was prepared that the salience of the child’s other connections was revealed. In recognising that the attachments within his mother’s family unit were of greater significance to the child, the Report highlighted a disjunction between the ‘needs’ imputed by *FLA s60B(2)* and those experienced by the actual child. It acknowledged that other connections, such as those with siblings and step-parents, raised in *FLA s68F(2)(c)*, may be of greater significance to children’s emotional lives. Such an approach
recognised a hierarchy of relevant relationships, with the father-child bond coming well behind others, particularly in the context of a tenuous relationship.

The importance of sibling relationships for children experiencing separation and divorce has been reinforced by an Australian study by Grania Sheehan and her co-authors. The study compared the quality of sibling relationships between a group of 137 divorcing families and 165 intact families. It found relationships of greater depth and intensity among the siblings in the divorcing group. It concluded that the ‘natural support system existing among certain groups of siblings may serve to strengthen children against the adverse consequences of parental conflict and parental absence’.

The outcome of A9 shows how an emphasis on children’s ‘rights’ may conflict with discovery of what is in their interests. In centralising the child’s ‘right’ to contact with his biological father, the trial judgment failed to appreciate that the child’s interests required greater consideration of what impact the effectuation of this right would have on the child’s connection in his wider family unit. As Sheehan et al observe, in determining residence and contact applications, ‘facilitating siblings’ access to one another and maintaining the quality of the sibling bond are important considerations’.

In summary, the analysis in this part has examined how children’s relationships with their parents and other family members are treated in

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960 Ibid 90.
961 This observation is applicable to the other deviant mother case, A6. See text accompanying fn 543 and 545. Issues in relation to different family forms and kinship structures are particularly pertinent to indigenous people and lesbian and gay families. See eg In the Marriage of B and R (1995) 19 Fam LR 594; Burns in Boyd, Rhoades and Burns, above n 74, 253; Kelly above n 372.
962 Above n 959, 90.
the legal process. It has shown how father’s assertions of ‘equality’ were in the main found to be inconsistent with their children’s best interests when relevant issues in the FLA s68F(2) checklist were taken into account. This reflects that in the sample, mothers were functional parents to a greater extent than fathers, leading to significant differences in the nature of the mother-child and father-child relationship. The discussion has also shown that an approach that emphasised the child’s ‘right to know and be cared for by both parents’ was present to a lesser extent in the sample. It is suggested that such approaches prioritised the father-child relationship at the expense of the child’s other relationships.

The differences in these approaches flow from the underlying conceptual incoherence within the contemporary family law framework discussed in chapter one. The individualistic image of a ‘rights-bearing’ child ‘free of other relationships or connections’ is produced by an approach that emphasises the rights-based elements of the legal framework. A functionalist emphasis evident to a larger extent in this section of the sample, in contrast, emphasises a greater interconnection between the interests of the child with those of her or his caregivers. Each of these constructions implies a different approach to the way that the best interests question is considered. This issue is discussed in the next part.

PART 4 THE CONSTRUCTION OF ‘BEST INTERESTS’

As noted in part one of this chapter, the child’s best interests are of paramount importance in Family Court decision making under FLA s65E. Rather than being a free-floating inquiry, the analysis developed throughout this thesis suggests that this question is determined by the litigation strategies adopted by the parties. In particular, the analysis has identified the tactical pressures fathers’ claims created for the mothers in

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963 See text accompanying fn 104 and 119.
965 Ibid.
the sample. Two significant issues in relation to these claims were highlighted in the analysis in chapter three. First was the way that the ‘negative father’ construct in psychological theory provides a base-line rationale for the ongoing involvement of even the most impaired fathers with their children. The second issue was the application of the friendly parent criterion in relation to mothers’ attitudes to fathers, evident in mutually-reinforcing litigation strategies and judicial approaches.

The analysis in chapter four indicated that the operation of the friendly parent criterion meant that mothers were subject to a restriction on the extent to which they could problematise contact between children and violent and impaired fathers. It suggested that links between parenting capacity and a history of violence were only drawn in the most extreme cases. The discussion of children’s wishes in part two of this chapter further developed the analysis of the operation of the friendly parent criterion and the way family violence is dealt with in litigation. It showed that in the sample, violent fathers alienated children against their mothers. Furthermore, allegations of alienation were raised by fathers in a tactical way to establish that mothers breached the friendly parent criterion.

Overall, the analysis has indicated that the tactical pressures referred to in the preceding paragraphs shaped the Court’s inquiry into whether contact was in the best interests of the children in the sample. The Court’s consideration of whether contact should occur was truncated by the discursive inhibition placed on mothers by the application of the friendly parent criterion. In circumstances where mothers acceded to contact, even though it may be supervised contact, to avoid the label of ‘no-contact’ mum, the possibility that contact may be harmful to the child was not raised. The validity of the ‘negative father’ construct as

966 The discursive power of the ‘negative’ father construct was established in chapter four (see text accompanying fn 414 and 436) and five (see text accompanying 736 and
a rationale for the maintenance of relationships with violent and impaired fathers thus remained unchallenged.

This is evident from the fact that contact, albeit in some cases supervised, was maintained between children and fathers who had beaten them, manipulated them and were on occasion, delusional. In one case, supervised contact was maintained with a father who one welfare authority concluded had sexually abused, and continued to manipulate, his daughter.

Moreover, children in the sample continued to be exposed to the dynamics of violence and control through being the subject of litigation. In most of these cases the issue of whether ongoing unsupervised contact was in their best interests was not even questioned. This was because the violence fell into the ‘simple’ category in relation to the level of physical severity and the availability of evidential support. Yet these children were exposed to verbal or physical conflict at changeover. They witnessed epithets such as ‘slut’ and ‘prostitute’ being cast at their mothers. Some were told their mothers were abusive, no good and did not love them. However, the implications of this remained unexamined. Furthermore, as the analysis in chapter four indicated, there was little evidence that any of the violent fathers had taken responsibility

745). It underlies the arguments of fathers, psychologists and some judges for ongoing contact with impaired fathers. Its concern is to avoid the potential future harm resulting from idealisation of an absent father figure or confusion about identity in teenage years. Adelaide-based research (Hart, above n 144) has highlighted how children in disputed contact cases involving violence are subject to clinical interventions to improve the possibility of contact between the child and the non-resident parent: 181.

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for their actions or demonstrated insight into their impact on their families.\footnote{See text accompanying fn 731 and 780.}

This data indicates there is little scope in Family Court proceedings for a substantial inquiry into the question of whether ongoing contact will ‘advance and promote the welfare of the child’\footnote{Treyvaud J in Re A [1982] FLC ¶91-284 at 77,612 approved by the Full Court in Brown and Pederson [1992] FLC ¶ 92-271.} even though this is said to be the Court’s task in its official jurisprudence. In Brown and Pederson,\footnote{[1992] FLC ¶ 92-271. This judgment was upheld in the post Reform Act 1995 decision B and B: Family Law Reform Act 1995 21 Fam LR 676.} the leading Full 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’,\footnote{Following M and M (1988) 166 CLR p 76.} the Court’s obligation was to make an ‘independent investigation of what the welfare of each child requires’.\footnote{Following Nygh J in Cotton and Cotton [1983] FLC 91-330.} Yet as a result of the tactical pressures that shape the Court’s consideration of the contact question that have been identified in this thesis, it appears that orders for no contact were really only made in ‘exceptional circumstances’.\footnote{Ibid 745.} This produces a situation where, consistent with the view taken in dissent by Kay J in In the Marriage of D Koutalis and CJ Bartlett,\footnote{(1994) 17 Fam LR 722.} ‘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’.\footnote{Ibid 746. Kay’s J’s extensive discussion on the rationale for maintaining contact was referred to by the Full Court In the Marriage of PA and DA Irvine (1995) 19 Fam LR 374, 386. The Court explicitly acknowledged the differences between Kay J’s approach in Koutalis and that of the Full Court Brown and Pederson, but declined to rule which was correct because resolution of the case at hand did not require it to do so. Other recent judicial statements have been made that are akin to Kay J’s stance. Recently in the High Court decision in (U and U (2002) 29 Fam LR 74) 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: ‘some cases of abusive relationships’ (emphasis added): 113. In a recent unreported judgment dealing with the unacceptable risk test,
1996 by the former Family Court judge, Peter Nygh, that FLA s60B(2)(b) would create a ‘rebuttable presumption in favour of contact’ has been 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’?

A significant problem with this approach in the current litigation environment is that consideration of any possible ‘cogent reasons’ is inhibited by the operation of the friendly parent criterion. Attention is focused on preserving the father-child connection, but the possibility that this may threaten the healthy development of the child/ren receives little consideration. In these circumstances, the content of the father-child relationship remains obscure. These fathers do indeed need no ‘licence for parenting’. The child’s ‘right’ to contact is protected and maintained in all but the most extreme circumstances, but functionalist concerns in relation to their ‘need’ for adequate fathering receive little attention. This approach enforces the child’s ‘right’ to contact but imposes no corresponding obligation on the parent to provide quality parenting. I do acknowledge that in the context of a history in which connections between children and parents, particularly amongst the indigenous population, were severed in the pursuit of a culturally-specific version of ‘welfare’, it is appropriate to be protective of those
connections. A cessation of the father-child relationship altogether may not necessarily be the answer in these situations. However, the way that the issues for determination in Court proceedings are defined means that insufficient attention is paid to the complexity of the needs of both children and mothers in these cases. As McIntosh has observed:

To think about the child’s experience and to move at the child’s pace is the only way in which such cases can ever succeed. To push ahead in a manner that thinks about parents’ legal rights rather than children’s psychological needs is to perpetuate the violence that children experience, doing untold damage not only to the child but to the potential for the parent-child relationship to re-form in a more healthy manner. 987

SUMMARY AND CONCLUSIONS

This chapter has presented an analysis of the construction of children’s interests in Family Court litigation in light of the data in the empirical sample. Three key points are made in this analysis. Each sheds light on the way that children are affected by their fathers’ claims for greater involvement within an equality-based legal framework that is applied in a social context where parenting practices remain gendered.

First, children’s interests are in practice marginalised in Family Court litigation. 988 The analysis concerning the overlap between violence, children’s wishes and allegations in relation to alienation highlight how children’s feelings become contested in an adversarial battle between their parents. The system offers little scope for children to exercise agency. The very capacity to express wishes results in them being subject to manipulation and pressure.

987 McIntosh, above n 660, 240.
988 This is consistent with the suggestion in the Parenting, Planning and Partnership report, above n 100, that the Reform Act 1995 had occluded the introduction of the child’s perspective on the arrangements being made by making it easier to achieve ‘distributive justice’ between the parents: 85.
The tactical use of alienation allegations by fathers means that both mothering behaviour and the basis of wishes expressed by children are subject to intense levels of scrutiny. In contrast, even when mothers’ allegations of alienation are found to be valid, the worth of an ongoing father-child contact relationship remains unquestioned. This is consistent with the lack of visibility of the dynamics of power and control in family law proceedings as discussed in chapter four. More generally, it reflects the failure to make connections between a history of violence and parenting capacity.

Secondly, fathers’ claims to be recognised as ‘equally’ important to their children as their mothers raised a direct conflict between the normative FLA s60B(2) objects and the FLA s68F(2) provisions directing attention to relationship quality. In most instances, fathers’ claims for ‘equality’ were found to be inconsistent with their children’s best interests as a result of the mothers’ more substantial caregiving histories and the quality of their relationships with their children. It was also evident that in instances where s60B(2) considerations were emphasised in judicial approaches, children’s relationships with their fathers were prioritised over and above sibling and step-parent relationships.

Thirdly, in relation to contact, the best interests consideration has become skewed as a result of the litigation strategies adopted by the parties. The discursive inhibition placed on mothers by the operation of the friendly parent criteria means that the possibility that contact with violent and impaired fathers may be damaging for children receives little consideration. The implications of this discursive inhibition assume greater significance in an environment where fathers are seeking legal ‘equality’ despite a dubious track record as parents. Reported decisions such as Brown and Pederson989 indicate that the quality of the relationship being sustained is a highly relevant concern in relation to

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contact determinations. There is little evidence in the sample that a consideration of this issue takes place. As Rhoades observes in relation to contact enforcement proceedings, the system ‘marginalizes the child’s entitlement to be cared for …during contact periods’. 990

The lack of scrutiny of the relationship between children and contact fathers in the sample reinforces the differential definitions of adequate parenthood that are applicable to residence parents and contact parents. It also maintains obscurity in relation to the nature of the relationship between contact fathers and children. This means that sources of potential harm for children remain invisible.

990 Rhoades, The 'No Contact Mother', above n 137, 79.
CHAPTER 6

SUMMARY AND CONCLUSIONS

This study has examined an empirical sample of 40 Family Court files involving children’s matters to assess the role played by key provisions of the Reform Act 1995 in litigation and judicial determinations. An overarching theme in the analysis has been the tension continually faced by legal decision makers in balancing the objects provisions in FLA s60B(2) against the s68F(2) checklist. The analysis has drawn on a range of secondary sources to produce an informed consideration of the implications of the way these tensions arise and are resolved. These sources include Family Court jurisprudence, theoretical accounts of the operation of family law, together with legal, socio-legal and social science research on issues related to separation, children and violence.

In this chapter, I draw together the threads of the analyses set forth in the preceding chapters to present the overall findings of the study by first providing a summary of the findings and then considering these in light of likely future developments.

PART 1 FINDINGS

In keeping with the exploratory and reflexive nature of this study, my findings are in the nature of tentative conclusions drawn on the basis of my qualitative analysis of Family Court files and a wide range of secondary sources. My findings are consistent with earlier studies, although their applicability across decision making in children’s matters generally would have to be subject to verification through further research. These findings flow from the three key themes that were explored in each of the chapters that presented the substantive empirical
analysis. The first theme is the different standard of parental capacity manifested in the resident parents (mainly mothers) and the contact parents (mainly fathers). The second theme is the virtual invisibility of all but the most extreme violence in the empirical sample. The third theme is the marginalisation of the interests of the children in the sample.

An issue central to each of these themes is the extreme nature of the fact situations in the files in the sample. As explained in chapter one, only six per cent of parenting disputes proceed to trial.991 These are the intractable disputes that could not be settled through the Court’s three stage dispute resolution process.992 Two further features of this extremity relate to the parent-child relationship history and the parent-parent relationship history. In a number of cases the parent-child, usually father-child, relationship history was tenuous. In almost all cases, the parent-parent relationship history was severely conflict ridden.

Such backgrounds of extremity are the context for the Court’s application of the legislative framework. This framework establishes the legislature’s expectation that parents will share the care of the children993 and imposes on the Court an obligation to promote the ‘right’ of children to know and be cared for by both their parents.994 It further articulates in FLA s68F(2) a series of considerations for the Court to apply to determine what outcome is in the child’s ‘best interests’. This is the paramount consideration under FLA s65E. The analysis in this thesis has examined what factors influence how the Court implements the ‘rights’ in FLA s60B(2) against the ‘needs’ considered in the s68F(2) checklist.

991 See text accompanying fn 92.
992 FCA Submission, above n 17, 13.
993 FLA s60B(2)(c).
994 FLA s60B(2)(a).
In particular, the analysis presented in chapter three explored the way claims by the mothers and fathers in the sample reflected their differential positioning as litigants and their different parenting histories. It highlighted how, in keeping with wider social patterns, the mothers in the sample had fulfilled a practical parenting role to a much greater extent than the fathers. In the context of the factual backgrounds to the cases in the sample, many of the fathers’ claims for increased involvement occurred despite a history of violence, drug abuse, mental illness or entrenched conflict. Biological connections, reflecting an emphasis on the normative s60B(2) provisions, rather than a history of caring, were the basis for these claims.

The legal decision making process however, particularly the emphasis placed on the s68F(2) provisions related to parental capacity, resulted in mothers experiencing a greater degree of ‘success’ than fathers in their applications. Mothers had fulfilled a primary caregiving role, leading to the establishment of highly salient emotional and psychological relationships with their children. In contrast, many relationships between fathers and children, were less substantial, and in some cases were tenuous or non-existent. However, an emphasis on maintaining contact between even significantly impaired fathers and children was evident in the sample.

Three concepts were found to be of particular relevance in understanding the outcome patterns in the sample, in the context of the factual backgrounds in the files. First, the psychological concept of attachment directed attention to the depth and quality of the relationships between the respective parents in the sample and their children. The mothers’ histories as primary caregivers meant that the mother-child attachment relationship was qualitatively different to the attachments between fathers and children.
The second concept was the ‘negative father’ construct. It arose in considering whether contact should be maintained between violent, abusive or mentally ill fathers and their children. In the sample, it provided a base-line rationale for the maintenance of contact between such fathers and children, particularly in the Family Reports. It reflected a concern to ensure that children did not sustain long-term psychological harm from a lack of knowledge of their fathers. However, it was argued that the emphasis placed on this factor obscured the possibility that contact with such fathers may be damaging for children by exposing them to inappropriate behaviour.

The third concept germane to the outcome patterns was the friendly parent criterion which was relevant to considering the attitudes to parenthood and to the child under FLA s68F(2)(h). The analysis indicated that mothers’ attitudes to fathers have become an important consideration in litigation involving children’s matters. This was evident in two ways. First, mothers’ affidavits were generally drafted to ensure that the Court understood that they supported relationships between their fathers and children even in circumstances where there had been a history of violence or abuse. Secondly, there were two case outcomes where mothers lost their applications on the basis of an insufficiently positive attitude to the father-child relationship.

The analysis showed that whilst mothers were required to conform to the friendly parent criterion in order to be sure of retaining residence of their children, even severe levels of denigration against mothers did not militate against the making of contact orders in favour of fathers. This reinforced the existence of a different standard of care and behaviour applicable to residence parents (mainly mothers) and contact parents (mainly fathers). Across the sample, mothers were in the main found to be able to provide a much higher standard of care and manifested greater commitment in their parenting than fathers. Residence parents carried
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The responsibility for the day-to-day care and nurture of the children, while much lower expectations applied to contact parents.

These lower expectations underscored a practical difference in the way that residence parents and contact parents operated. In the sample, a substantive difference in these roles was reflected in some cases in restrictions on the degree to which contact parents could exercise parental responsibility. As discussed in chapter two, orders curtailing this aspect of parental involvement were made in situations where the parent-parent relationship was highly conflictual. 995

The substantive difference between the capacities and functions of residence parents and contact parents reflected in the sample is at odds with the equality-based construct of parenthood in the legal framework. In its construction of parental responsibility, the FLA treats residence and contact parents, as prima facie, the same. Yet, as the analysis of the sample demonstrated, there was a substantial difference in the level of parenting capacity and commitment demonstrated by the mothers and fathers in the files. Indeed, the analysis highlighted the divergent definitions of ‘adequate’ parenthood applicable to residence and contact parents. This was manifested most clearly in the application of the friendly parent criterion. ‘Unfriendly’ behaviour in a resident parent demanded a legal response but equivalent conduct on the part of contact parents was acceptable.

Chapter four examined the way that violence was dealt with in the sample and specifically analysed the way that the balance was struck between the s60B(2) normative objects in the FLA and the violence related provisions in the s68F(2) checklist. 996 More than half the cases in the sample involved a history of violence, reflecting again the extreme factual backgrounds to the cases in the sample. This also indicated that

995 See text accompanying fn 330 and 350.
996 FLA ss68F(2)(g), (i) and (j).
in some instances, litigation over children’s matters was related to attempts to perpetuate the dynamics of violence and control after separation. However, violence was seen to be relevant to parenting capacity only in very extreme cases.

Links between violence and parenting capacity were made only in cases where very strong evidentiary support for the allegations of violence was present and there was a high level of physical severity – these pre-conditions established the existence of ‘real’ violence in the sample. Such pre-conditions were absent in relation to ‘simple’ violence which consequently was relevant only to negating fathers’ suitability to be residence parents (unsuccessfully in some instances) but not contact parents. Even in extreme cases, very serious consideration was given to maintaining connections between fathers and children due to the emphasis placed on the need to avoid prospective harm (the negative father construct) from an absence of contact.

The operation of the friendly parent criterion discouraged women from arguing against contact between children and violent fathers except in very extreme cases. This meant it was the potential for damage ensuing from not seeing impaired fathers that received most emphasis in psychological and some judicial considerations. Patterns involving less severe violence and significant control were overlooked in the sample cases. There was little acknowledgement that in some cases, litigation over children’s matters was part of an attempt to maintain control over former partners. In part, this may be referable to the narrow definition of violence contained in the FLA, although control has been recognised in previous reported decisions. However, it is also related to the inability of many legal decision makers to recognise and take into account power imbalances that stem from issues relating to gender. This is reflected in an approach that emphasises physical manifestations of violence and

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997 In the Marriage of JG and BG (1994) FLC 92-515.
This lack of understanding may be relevant at several stages in the process, not just at the judicial level. These stages include points at which litigation strategies are formulated, decisions on legal aid funding are made and in the preparation of Family Reports. A further consideration is the reticence that women experience in talking about violence. This may be exacerbated by a lack of understanding among the professionals that they encounter.

The analysis in chapter five examined how children’s interests were constructed, in light of the differing definitions of ‘adequacy’ applied to residence and contact parents, and the invisibility of all but the most extreme forms of violence in the sample. It focussed on the construction of ‘best interests’ under FLA s65E, the way children’s ‘rights’ under s60B(2) are implemented and the considerations that arose in the application of the child-focussed provisions of the s68F(2) checklist. Four key points were made in the analysis.

First, despite the centrality of children’s interests in the legal framework, they were marginalised in practice in the sample files. Argument centring on parental attributes and capacity were dominant in the material rather than child-focussed considerations. The parents’ arguments largely determined the parameters of the Court’s consideration even when a Child Representative was involved.

Secondly, the marginalisation of children’s interests in the sample was further evident in the way their wishes and feelings became the subject of dispute through the deployment of allegations concerning ‘alienation’. There were two aspects to the way these allegations arose in the sample.

998 ss68F(2)(a), (b), (c) and (f).
First, violent fathers in the sample did alienate their children against their mothers. This was part of an ongoing campaign to maintain control of the children after separation. Despite alienation occurring, ongoing contact was still seen to be in the children’s interests. The second aspect was the way that spurious claims of alienation against mothers were raised by fathers to establish a breach of the friendly parent criterion. This consolidated the way argument in the litigation focussed on the behaviour of mothers rather than fathers.

Thirdly, children in the sample were placed under pressure by being the subject of their fathers’ claims for recognition of their parenting ‘equality’. It was particularly evident in the shared care and relocation cases in the sample that children were adversely affected by being placed at the centre of their fathers’ claims for acknowledgement that they were ‘equally’ as important as mothers to their children. In most cases, consideration of the child-focussed provisions of s68F(2) resulted in rejection of the fathers’ claims in this regard. However, in two cases where significant emphasis was placed on the children’s right to contact and to know and be cared for by both parents, the children’s relationships with siblings were inappropriately given less emphasis than they warranted.

Fourthly, in relation to contact, the Court’s consideration of the ‘best interests’ question had effectively become skewed as a result of the tactical positions adopted by the parties. The analysis showed how the Family Court was faced with a greater number of fathers seeking to increase their levels of involvement with their children, despite a tenuous relationship history. In these circumstances, the combined operation of the negative father discourse and the friendly parent criterion produced a situation where in some circumstances an argument for ongoing contact with impaired fathers is put before the Court but

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999 s60B(2)(b).
1000 s60B(2)(a).
countervailing considerations were not raised. This meant that litigated outcomes potentially exposed children to emotional, psychological and possibly physical harm through the maintenance of contact with violent and impaired fathers.

These findings are consistent with other research on the impact of the Reform Act 1995. Such research has highlighted effects that include the increase in litigation, the changed power balance between men and women as litigants, and the lack of effectiveness of the FLA provisions in relation to violence. My study however is unique in that it deepens our understanding both of the concepts that underlie judicial determinations and the strategic pressures that contribute to these effects. The ways in which the study does this are summarised in the following paragraphs.

First, my study has identified the divergent bases for ‘parenthood’ claims that are supported by the legislative framework and relevant psychological concepts. Biological understandings of parenthood underpin claims for contact that reflect an emphasis on FLA s60B(2) in the fathers’ material, especially in the more extreme cases in the sample. These claims, in turn, found evidentiary support in the psychological theory of identity formation on which the negative father discourse is founded. In contrast, the psychological theory of attachment underpinned residence determinations made in favour of mothers — largely on the basis of s68F(2) considerations — but only when the hallmark feature of the ‘adequate’ residence parent, the friendly parent criterion, was satisfied. The need to be a friendly parent operated to

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1001 In two cases, residence orders were made in favour of violent fathers. See text accompanying footnotes 694 and 696 and 831-834.
1002 The First Three Years Report, above n 72, 1.7, Parenting Planning and Partnership above n 100, 29.
1003 Parenthood, Planning and Partnership, above n 100, 83.
1004 The First Three Years Report, above n 72 1.21, Parenthood Planning and Partnership 83, Kay, Stubbs and Tolmie above n 141, Hart, above n 144.
inhibit the degree to which contact with violent and impaired fathers could be problematised.

Secondly, the study highlighted the stringent evidentiary standard that instances of violence must meet in order to be accepted as ‘real’ violence, and consequently a breach of even the lower standard of adequate parenthood applicable to contact parents. Again, the role of the negative father construct and the friendly parent criterion were identified as relevant to these issues. ‘Simple’ violence — instances where the evidentiary standard required for ‘real’ violence was absent — remained unproblematised as an incident of contact parenthood as a result of the operation of the friendly parent criterion. This was also relevant to the way that the dynamics of violence and control remained hidden. As a result, there was little appreciation that children become directly caught in patterns of violence and control through the use of litigation over their living arrangements.

The significance of these insights is twofold. First, my study has shown how consideration of issues related to ‘best interests’ are skewed. In the context of the tactical pressures that are exerted in an adversarial contest, there is little scope for a consideration of the possibility that harm may be sustained by ongoing contact (even residence) with violent and impaired fathers. Some of the empirical examples considered in this thesis suggested a real possibility that Court orders may have exposed children to such harm when considered in the context of broader social science research on the impact of exposure to conflict and impaired parenting. Further, there was little recognition of a nexus between the interests of mothers and children particularly in the more extreme cases. This was despite the fact that these children were virtually solely reliant on their mothers for ongoing care. Moreover, the impact of contact on mothers in these cases was a virtually irrelevant consideration in all but the most extreme circumstances.
Secondly, the study reveals the implications for children of the de-stabilisation of parental expectations, particularly among fathers, of what ‘their entitlements’ are under the law. An increased number of children are being subject to the pressures involved in being at the centre of litigation. Children may undergo intense levels of scrutiny about their needs and wishes. However, the meanings of children’s utterances are obscured by allegations of alienation and the operation of the friendly parent criterion. In these circumstances, discovery of what they really want and need (these two issues may not necessarily be co-extensive) is rendered highly problematic. Further, in some instances, engagement in litigation on the part of fathers may be motivated by a desire to maintain control rather than by a genuine desire to effectuate arrangements that meet children’s needs. Recognition of this is negligible in a system where patterns of control remain invisible and ‘caution and reserve’ guide the Court’s exercise of its power to curtail litigants’ rights to have their claims heard. 1005

As the analysis in chapters three and four indicated, the main concern in the psychological evidence and many of the judgments in the sample was the avoidance of future harm from the absence of the father. The pre-occupation with the potential damage from lack of a relationship even with impaired fathers was pre-eminent, rather than a concern to explicitly consider the implications for children of maintaining relationships with such fathers.

The degree of emphasis placed on this factor is questionable in light of social science research on outcomes for children affected by separation. Meta-analytic research published 1006 in the past five years has refined

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and codified our knowledge of the way that separation affects children. Such research has examined findings on outcomes for children of separated families across a range of studies and challenges the prevalent claim that children need maximum father involvement for optimum development.

A leading analysis by Jan Pryor and Bryan Rodgers has brought together the findings of an extensive range of studies from the UK, the US, Australia and New Zealand on how divorce and separation affect children. It concludes that the ‘assumption that contact per se is measurably good for children does not stand up to close scrutiny’. Rather, the link between contact with fathers and outcomes for children was complicated by a range of factors, including the quality of the father-child relationship and the type of parenting enacted on contact, and the levels of conflict the child was exposed to as a result of contact occurring. Other research also confirms that contact that brings children close to conflict, substance abuse or parents with psychological or psychiatric illness may be positively harmful.

The damaging nature of continuing exposure to conflict has been illustrated most clearly in an analysis of a range of studies by the US family researcher, Mavis Hetherington. This analysis shows that such exposure is a key factor leading to poor outcomes for children in high conflict intact families and especially in high conflict separated families where the conflict continues after separation. Such children

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1007 Pryor and Rodgers, above n 1006.
1008 Ibid 214.
1009 See eg Phares (1996), above n 459; see also the discussion in chapter four at text accompanying footnotes 660 and 668.
experience a range of difficulties, including lack of self-regulation, low
social responsibility and cognitive agency, poor self esteem and,
potentially, long term problems in relationships with peers, teachers and
intimate others.\textsuperscript{1011} Most harmful is conflict in which the child feels
cought in the middle or is physically threatened.\textsuperscript{1012} Problems
experienced by children in these circumstances can be exacerbated by
the fact that conflict adversely affects parenting skills: they are likely to
experience less warmth and monitoring from parents, and a higher
degree of coercion, negativity and inconsistency in relation to
control.\textsuperscript{1013}

The strong connection between the quality of fathering enacted on
contact and long term outcomes for children has been clearly established
by another meta-analysis by leading US fatherhood researchers Paul
Amato and Joan Gilbreth.\textsuperscript{1014} This study collated and analysed data from
63 studies on non-resident fathers and children’s well-being published
between 1970 and 1998. It identified the payment of child support and
the quality of the father-child relationship as the key influences on
outcomes for children of separated families. Children in families where
fathers continued to contribute financially fared better academically\textsuperscript{1015}
and had fewer behavioural difficulties. Further, fathers who engaged in
authoritative parenting practices such as assisting with homework and
discussing children’s personal problems made a significant contribution
to their children’s development. Children with this type of support also
had better academic achievement levels and fewer behavioural
problems.\textsuperscript{1016}

\textsuperscript{1011} Ibid 96.
\textsuperscript{1012} Hetherington, above n 1010, 98.
\textsuperscript{1013} Rossman and Ho, above n 1010, 103.
\textsuperscript{1014} Amato and Gilbreth, above n 1006.
\textsuperscript{1015} Ibid.
\textsuperscript{1016} Ibid. Such parents show warmth and nurturance to their children, along with age
appropriate limit setting which is explained meaningfully: Phares (1996) above n
459, 28; see also Pryor and Rodgers, above n 1006, 48-50 and Whiteside and
Becker, above n 1006, 5.
In contrast, contact with fathers who maintained recreational relationships in the absence of authoritative practices offered few significant benefits: ‘nonresident fathers who are not highly motivated to enact the parental role or who lack skills to be effective parents are unlikely to benefit their children, even under conditions of regular visitation’. In the absence of authoritative parenting practices there was no link between frequent contact between children and non-resident fathers and improved outcomes.

The research discussed in the preceding paragraphs indicates that if children’s welfare is the key concern of legal policy, then the maintenance of contact at all costs should not be the primary objective. In the UK, recent case law developments suggest a retreat from the strong pro-contact approach that accompanied the introduction of the UK Children Act 1989. Similar issues are also being addressed at the level of Government policy, with the recent Parental Separation Green Paper recommending changes to the way the system operates but not to the legislation. The potential risks in maintaining contact between children and impaired fathers have been summarised in a UK report commissioned by the Official Solicitor in relation to several cases involving contact and domestic violence that were being heard by the UK Court of Appeal. The report notes that contact in situations where there has been a background of violence has the potential to undermine children’s development and even to cause

\[1017\] Amato and Gilbreth, above n 1006.
\[1018\] Ibid.
\[1019\] See Boyd (2003), above n 58, for a similar argument, 132-137.
\[1020\] Re L; Re V; Re M; Re H (Contact: Domestic Violence) (2000) (2) FLR 334, Court of Appeal (UK). The decision upheld four trial judgments refusing fathers’ applications for contact against a proven background of family violence.
\[1021\] See eg Smart and Neale, (1997) above n 56, 332; Bailey-Harris et al, above n 53 115.
\[1022\] Felicity Kaganas and Shelley Day Sclater, 'Contact and Domestic Violence - the Winds of Change' (2000) Family Law 630; see also Herring, above n 598, 99.
\[1023\] Above n 3.
\[1025\] Re L; Re V; Re M; Re H (Contact: Domestic Violence) (2000) 2000 (2) FLR 334, Court of Appeal (UK).
An escalating climate of conflict around the child may undermine their stability and emotional well-being, by creating loyalty conflicts and a sense of responsibility for the conflict.\textsuperscript{1027} Further, potentially harmful situations are acknowledged to arise when children on contact visits:

- Are exposed to abuse of a physical, sexual or emotional nature including situations where a parent has delusional beliefs or is affected by drugs or alcohol.
- Are exposed to denigration of the child’s resident parent.
- Experience the continuation of unhealthy relationships characterised by inappropriate control, domination or bullying.
- Experience different moral standards and rules of behaviour from those enacted by their resident parent.
- Experience treatment where their needs are not prioritised and they are not endorsed as a valued individual.\textsuperscript{1028}

The Experts’ Report stresses that contact between children and fathers who have perpetrated domestic violence is unlikely to be in the child’s best interest unless the perpetrator has acknowledged the violence, taken responsibility for it, and shown an understanding of its impact on the ex-partner and the child.\textsuperscript{1029} In addition, a genuine interest in the child’s welfare and a full commitment to the child should be evident on the part of the applicant for contact.\textsuperscript{1030}

\textsuperscript{1026} The Experts’ Report, above n 1024, 617. The report has been criticised for being insufficiently specific about when contact may not be beneficial; John Eekelaar, ‘Contact - over the Limit’ [2002] \textit{Family Law} 271
\textsuperscript{1027} The Experts’ Report, above n 1024, 617.
\textsuperscript{1028} Ibid 618.
\textsuperscript{1029} Ibid 624.
\textsuperscript{1030} Ibid 624.
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The Experts’ Report, and other research,\(^{1031}\) indicates that an approach that constructs contact as inevitably in the best interests of children, particularly where the contact parent is impaired, is substantially flawed. The perpetuation of conflictual relationships around children, particularly when they are the focus of conflict, compounds the potential difficulties they may experience as a result of divorce.\(^{1032}\) As the UK family law scholar John Eekelaar notes, the conclusion to be drawn from social science research is that ‘[i]t is at least possible that the absence of contact could often have no adverse effects and that it [contact] could often be detrimental to children’.\(^{1033}\)

As the analysis presented in this thesis has shown, the tactical pressures that shaped the Court’s consideration of whether contact was in the child’s best interests meant that mothers’ attitudes and parenting skills were scrutinised more closely than those of fathers. The different definitions of ‘adequacy’ that were applied to resident mothers and contact fathers as a result of those tactical pressures indicated that a number of issues received insufficient attention. These included: the possibility that contact may undermine the children’s sense of safety and security by exposing them to overt conflict and criticism of their primary caregiver mothers, the possibility that the healthy development of the children, particularly the boys in the sample, would be impaired by exposure to negative and violent male role models and the potential for emotional manipulation to continue, even under supervision.

A further issue that received insufficient consideration in the sample was the impact that contact with violent and impaired fathers would have on

\(^{1031}\) Michael Lamb suggests that the research indicates that between 15 and 25 per cent of children affected by divorce ‘would not benefit – and might perhaps be harmed – by contact with their non-custodial parents’. He also argues that relationship quality is a crucial issue ‘when making decisions about the amount of interaction to encourage’: ‘Noncustodial Fathers and Their Impact on the Children of Divorce’ in Ross Thompson and Paul Amato (eds), The Postdivorce Family: Children Parenting and Society (1999) 105.

\(^{1032}\) E Mavis Hetherington, above n 1010, 93.

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the parenting capacity of the primary caregiver mothers. Consistent with concerns expressed in the *Parenting, Planning and Partnership* report,\(^{1034}\) this is another area in which the empirical material suggests a departure in practice from pre-Reform Act 1995 approaches. Reported Family Court decisions have previously made clear that primary caregivers’ concerns about children’s safety on contact were a relevant consideration when making contact orders.\(^{1035}\) These decisions recognise that genuinely held fears about safety on contact may impact upon the mothers’ caregiving capacity and thus affect the interests of the child.

As the analysis presented in chapter four shows, the emphasis placed on the friendly parent criterion suggests that mothers are not only inhibited from problematising contact except in very extreme circumstances but are also prevented from raising their own interests. In the ‘simple’ violence cases in the sample, the issue of the implications for mothers of maintaining connections with violent and impaired ex partners received even less consideration than the issue of potential detriment for children.\(^{1036}\)

Ongoing contact between the children and the violent and/or impaired fathers in the cases referred to in chapter four, meant that the mothers in all but the most extreme cases also had to maintain connections with men with whom they endured difficult, even traumatic, relationships. Such relationships are acknowledged to leave a psychological and emotional legacy that has the potential to undermine women’s capacity to function to a significant extent.\(^{1037}\) This may in turn impair the quality of parenting they are able to deliver.

\(^{1034}\) Above n 100, 70.


\(^{1036}\) Only in a few cases involving extreme situations was a particular nexus between mothers’ and children’s interests recognised: see discussion in chapter five in text accompanying fn 747 and 762.

\(^{1037}\) Cathy Humphreys and Christine Harrison, 'Squaring the Circle' [2003] Family Law 419-423, highlights how women who have experienced domestic violence show an incidence of depression and post traumatic stress disorder well above that of the
However, this issue remained largely unexamined in the consideration of children’s interests in the sample. The prevalent emphasis on the need to maintain contact between fathers and children served also to ensure that women were unable to put their own interests forward. The application of the friendly parent criterion circumscribed mothers’ ability to express reservations about contact. As the discussion of A1 in chapter four highlighted even where the background of violence was sufficiently provable and severe to warrant a no-contact argument, there was no guarantee that mothers’ arguments would be accepted.

The lack of consideration of the impact contact decisions may have on mothers implies a significant separation between the interests of mothers and children. It not only inhibits the mothers’ ability to ensure the protection of their children, but prevents them from safeguarding their own well-being. This point is especially important in the context of the factual backgrounds to the cases in the sample. As the analysis in chapter three showed, the mothers were functional parents to a greater extent and greater effect than the fathers in the sample. Indeed, many of the children in the sample realistically had only one viable caregiver, the mother. Those children were wholly dependent on that caregiver for the fulfilment of their emotional, psychological, physical and often financial needs.

In such circumstances, the need to protect the parenting ability of the primary caregiver should be given greater emphasis. The quality of the relationship between the residential parent and the child is acknowledged to have a profound influence on outcomes for children in the general population: 421. See also Pepler, Debra, ’Consider the Children: Research Informing Interventions for Children Exposed to Domestic Violence’ in Geffner et al, (eds) above n 626, 37.

1038 See text accompanying fn 735 and 761.

1039 Hart (above n 144) makes a similar observation: 186.
A further issue stemming from the operation of the friendly parent criteria was that mothers were, to an extent, disenfranchised as sources of knowledge and insight into their children’s well-being in Family Court proceedings. Chapter four explored the double bind that faced the mothers in the sample who adopted positions in favour of contact despite there being a history of violence. This double bind meant that while they raised issues in relation to violence to oppose residence, they nonetheless supported ongoing contact. In this way, genuine insights into the impact contact may have had on the children, from the people best positioned to provide those insights, remained suppressed.

Yet research from the US indicates that mothers’ attitudes to contact have relevance to the issue of whether or not contact is beneficial. A quantitative study by US sociologists Valarie King and Holly Heard examined the connection between mothers’ attitudes to contact and outcomes for children. It found that children who saw their fathers frequently but whose mothers were unhappy about this had poorer outcomes than children whose mothers were happy with either high

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1040 Pryor and Rodgers, above n 1006, 243. See also, Hart above n 144, for a similar discussion on these points: 186.
1043 Pepler above n 1037.
1044 See text accompanying fn 787 and 801.
contact or low contact patterns.\textsuperscript{1045} They were also worse off than children with low amounts of contact but whose mothers were unhappy with this.

The authors of the study suggest that this connection is not attributable to the mothers’ views per se, but that the mothers’ dissatisfaction is related to the quality of the relationship being sustained in the high contact pattern. Mothers were particularly dissatisfied in relation to fathers who had little influence and rarely discussed children.\textsuperscript{1046} Mothers’ attitudes reflected concerns about the quality of the fathering that occurs on contact, a factor that is acknowledged to be highly relevant to children’s well-being as established by my earlier discussion of social science research on outcomes for children affected by separation.\textsuperscript{1047}

Overall, the pressure placed on children highlighted by this analysis is consistent with insights from recent work by the UL sociologist Carol Smart.\textsuperscript{1048} Smart argues that the contemporary era is characterised by a growing sense of impermanence in intimate adult relationships. Against the background of increasing divorce rates, ‘children are becoming increasingly valued for the meaning they give to the emotional lives of both mothers and fathers’.\textsuperscript{1049} When relationships between adults disintegrate, children are placed at the centre of a conflict which is fundamentally about the meaning of their parents’ lives, rather than the children’s needs and interests. Family law conflicts turn children ‘into “things” through which men can become (proper) fathers and women can stay (proper) mothers when faced with divorce’.\textsuperscript{1050}

\textsuperscript{1045} King and Heard, above n 1042, 387.
\textsuperscript{1046} Ibid 393.
\textsuperscript{1047} See text accompanying fn 787 and 801.
\textsuperscript{1049} Ibid.
\textsuperscript{1050} Ibid 31.
As objects at the centre of a struggle over the meaning of adults’ lives, children are subject to two contradictory tendencies. On the one hand, the importance of the child becomes elevated, particularly as fathers increasingly pursue claims to maintain an active fathering relationship after divorce. Yet, along with this process of elevation also occurs a ‘silencing’ tendency resulting from the ‘more powerful clamour of adult disputes and the clash of rights claims’.

This paradoxically coincides with an increasing emphasis on the need for children to be heard in family law proceedings, a development that may be rendered meaningless if policy makers confuse ‘the intensity of adult expression with the welfare of the child’. If this happens, it becomes almost impossible for ‘children to express views which may not meet the needs of vociferous parents nor the tenets of current child welfare doctrines’. Thus children have a reduced capacity to exercise agency at the time they most need it.

In Australia, there is some evidence emerging of the recognition of a need to make the family law system more child-focused. This and other recent developments are considered in the next part of this chapter.
Since this research was conducted, developments have occurred that have the potential to address some of the issues raised in this thesis. The most significant of these is the trialling of an inquisitorial method of handling children’s matters by the FCA. Additionally, the Court has overhauled its Rules and is reviewing its processes for handling family violence. At a socio-political level, reform proposals for the family law system are yet again on the agenda following the Federal Government’s release of its response to the *Every Picture Inquiry*. Each of these developments is discussed briefly in the following sections.

A FCA Initiatives

In the past year, the Family Court has introduced initiatives to improve the handling of children’s cases. The most important of these is the Children’s Cases Program, which is trialling an inquisitorial method of dealing with matters involving children in the Sydney and Parramatta Registries of the Court. The program applies to cases which have not settled by mediation.

The program places control of proceedings in the hands of the judge, who decides the issues to be determined, the way the evidence is received and the way the hearing will be conducted. Opportunities for children’s involvement will be available, subject to their wishes, developmental level and the circumstances of the case. Family Reports and Court Experts will be the usual avenue for this, but subject to the consent of the child, they may also be interviewed by the

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1057 *The Children’s Cases Program*, 1.6.
1058 Ibid 1.7.
1059 Ibid 5.20
1060 Ibid 5.21
Specific guidelines for the preparation of Family Reports require that children’s responses to the proposal of each parent be recorded, along with the child’s independent views. Comments that they may wish to be directed to the judge are also to be recorded.

This program has the potential to address the issues raised in the analysis presented in this thesis in several ways. In moving to an inquisitorial model, the process may alleviate the tactical pressures that are highlighted in my analysis of the operation of the ‘negative father’ construct, the ‘friendly parent’ criterion and claims in relation to alienation. The analysis suggests that these pressures arise as a result of the necessity to adopt a ‘winning’ strategy in adversarial contest. These tactical pressures may be dissipated by placing control of the proceedings in judges’ hands. This inquisitorial structure may achieve a greater focus on the children’s interests.

It is less certain how the concerns raised by this analysis in relation to violence will be addressed under this program. While some departures from the requirements of the Evidence Act 1995 (Cth) are to be permitted under this process, the visibility of violence still remains dependent on the willingness of the women involved to disclose it, and the level of sensitivity shown by legal decision makers to those disclosures. In this regard, another Family Court strategy will be of significance: the Court is developing a Family Violence Strategy that will be implemented over the next two years.

Court processes are to be reviewed in a number of areas under this strategy, though for the purpose of this analysis, three areas are
particularly pertinent. First, the processes by which legal decision
makers are alerted to the issue of family violence are to be reviewed.1065
This will cover the way this issue is dealt with in Family Reports and
includes a review of the Guidelines for the preparation of such Reports.
Also subject to the review process is the appointment of expert witnesses
and the function and structure of their reports. Case management
processes are also to be scrutinised, specifically in relation to the
desirability of adopting specific guidelines in relation to family violence
and to ensure that ‘serious allegations’ are identified early in the process
and specially managed.1066

Secondly, conferencing and mediation processes are to be reviewed to
consider how best to ensure that family violence issues surface and are
dealt with appropriately at this level.1067 Thirdly, staff training programs
are to be reviewed in order to ensure that Court staff at all levels are
equipped to understand and deal with family violence issues.1068

Depending on what measures are implemented as a result of this
examination, this review has the potential to address the issues in
relation to violence raised in this thesis. The insights from this study
suggest a particular need for a review of the emphasis placed on the
‘negative father’ construct, the issues raised by the ‘friendly parent
criterion’ and the way that allegations in relation to alienation are
treated.

A further significant Family Court initiative is a complete review of the
Family Law Rules which establish procedures for the conduct of
litigation. The review was the most comprehensive overhaul for 20 years

1065 The new Family Court Rules 2004 discussed more fully below (see text
accompanying fn 1069 and 1075) require copies of family violence orders affecting
either party or a child of the party to be filed with the Court: r2.05(1).
1067 Ibid 11.
1068 Ibid 10.
and refined Court process in most key areas. For the purpose of this thesis, there are two particularly significant changes. The first is the exclusion of cases involving family violence and child abuse from the Pre-Action Procedures that must be complied with before an application can be filed. This means that parties in such cases are not obligated to participate in alternative disputes resolution processes.

Secondly, the new rules discourage ‘ambit’ claims by imposing obligations on the parties to: apply for orders that are ‘reasonable’ in the circumstances of the case, identify the issues genuinely in dispute in a case, ensure that disputed issues have a ‘reasonable’ factual basis and limiting evidence, including cross-examination, to that which is relevant and necessary. Depending on how effectively these rules are implemented, broad claims of the type made particularly by fathers in the sample may be limited.

B The Federal Government’s Response to the Report of the Every Picture Inquiry

In December 2003, the House of Representatives Standing Committee on Family and Community Affairs handed down a series of recommendations for a far-reaching reform of the family law system. The Committee’s most widely publicised reference, and the one most relevant to this thesis, was to inquire into and make recommendations on

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1070 Family Court Rules 2004 r1.05(2)(a). In addition case-management procedures trialled successfully in the Magellan Pilot program (Brown et al above n 166) are being implemented on a national level: Family Court Submission, above n 17, 38.
1071 Family Court Rules 2004 r1.05(1).
1072 Family Court Rules 2004 r 1.08(a).
1073 Family Court Rules 2004 r 1.08(h).
1074 Family Court Rules 2004 r 1.08(i).
1075 Family Court Rules 2004 r 1.08(j).
1076 See text accompanying fn 284 and 303.
the desirability of a presumption that children would spend 50 per cent of their time with each parent after separation.\(^{1077}\)

In its *Every Picture Report*, the Committee recommended against the introduction of such a presumption. Instead, it made a range of recommendations aimed at clarifying the *Family Law Act 1975* and proposed the introduction of a Families Tribunal. A key concern behind the Tribunal plan was to make the system ‘child inclusive, non-adversarial [and to introduce] simple procedures that respect the rules of natural justice’.\(^{1078}\) A priority for the new system was to have ‘built in opportunities for appropriate inclusion of children in the decisions that affect them’.\(^{1079}\)

The Federal Government’s response to the Report rejected the Families Tribunal plan.\(^{1080}\) Instead, the Government proposes to establish 65 Family Relationship Centres where parenting disputes would be resolved with the assistance of a ‘parenting advisor’ and without the involvement of legal representatives. While it is proposed that cases involving child abuse and violence would be referred to the Court system rather than being subject to mediation, the efficacy of this safeguard would depend on the state of knowledge about child abuse and domestic violence among the professionals doing the screening. Given the findings of the study by Kaye, Tolmie and Stubbs,\(^{1081}\) there is significant cause for concern about this issue.

The Committee’s recommendations in relation to amendments to the *FLA* found greater favour with the Government than its Families Tribunal proposal. As noted above, it rejected the idea of a rebuttable

\(^{1077}\) These concerned the circumstances in which orders for contact should be made with other persons, including grandparents and whether the child support formula works fairly for both parents.

\(^{1078}\) *Every Picture Report*, Recommendation 12.

\(^{1079}\) Ibid, recommendation 13.


\(^{1081}\) Above n 141.
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presumption in favour of ‘equal custody’. However, its alternative recommendation shifted the locus of parental ‘equality’ from the issue of time to the dimension of responsibility. The Report proposed a rebuttable presumption in favour of ‘equal parental responsibility’ in addition to a requirement to consult on ‘major’ decisions, specified to be ‘issues relevant to the care, welfare and development of children including but not confined to education (present and future), religious and cultural upbringing, health, change of surname and usual place of residence’. No such duty to consult would be attached to day-to-day care of the child.\textsuperscript{1082}

This recommendation was adopted in the Government’s response. The New Approach Discussion Paper proposes two rebuttable presumptions in relation to parental responsibility. The first would be in favour of equal shared responsibility. The second would be against it ‘where there is evidence of violence, child abuse or entrenched conflict’.\textsuperscript{1083} While the Committee’s recommendations were intended to clarify confusion over the issue of parental responsibility, both they, and the Government’s response, underline the extent of such confusion. The notion of rebuttable presumption in favour of ‘equal parental responsibility’ does little to change the existing position, since under the present regime such responsibility is automatically vested in each parent irrespective of marital status unless varied by a court order.\textsuperscript{1084} As the Australian legal academic Patrick Parkinson points out, the existing Australian framework goes further than ‘joint custody’ regimes in the US.\textsuperscript{1085}

However, in combination with other changes proposed in the New Approach Discussion Paper, the introduction of a rebuttable ‘equal

\textsuperscript{1082} Every Picture Report, above n 3, 2.84.
\textsuperscript{1083} Above n 6, 10.
\textsuperscript{1084} FLA s61C.
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parental responsibility’ presumption would exacerbate the problems identified in this thesis. The analysis has shown how the existing framework supports fathers’ claims for increased involvement even in the context of tenuous parenting histories. This reflects the differential positioning of men and women as litigants. In making a clear public statement that ‘equalises’ the authoritative aspects of parenthood, the proposed changes may increase this tendency by boosting legal recognition of the validity of ‘caring about’ and consolidating the lack of visibility of ‘caring for’. 1086 Making parental authority the centrepiece of ‘equal parenthood’ may simply give fathers who are inclined to be litigious more scope, since their claims for authoritative involvement may be made regardless of affective history.

This trend would be exacerbated by four further changes canvassed in the *New Approach Discussion Paper*. First, there is a proposal to require the Court to consider ‘substantially shared parenting time’ where each parent wants to have ‘half or more of the time with their child’1087 in cases that do not involve violence, child abuse or entrenched conflict. Secondly, the introduction of an explicit friendly parent provision is being proposed.1088 Thirdly, the introduction of a punitive disincentive to raising issues related to child abuse and violence, through the imposition of costs orders against parties who make false allegations, has been put forward.1089 Fourthly, a change of residence of the child (subject to best interests) as a sanction when court orders have been breached deliberately and intentionally more than once is being considered.1090

On the basis of the trends identified in this study and other research, these four measures in addition to the rebuttable presumption in favour of ‘equal’ parental responsibility would further strengthen the bargaining

1086 Smart (1991) above n 384.  
1088 Ibid 14. See also discussion in chapter three at text accompanying fn 518 and 530.  
1089 Ibid 6.  
position of non-residential parents. Existing impediments to making family violence visible would be consolidated through the explicit operation of a friendly parent criterion and the punitive disincentives to raising issues related to family violence without evidential support of the kind identified in the ‘real’ violence cases in the sample. This would nullify the impact of the ‘reverse’ rebuttable presumption against equal parental responsibility in cases involving ‘violence, child abuse or entrenched conflict’.

A further area where the *Every Picture Report Inquiry’s* recommendations for reform have been adopted by the Government is in relation to amendments to the objects provisions of the *FLA*. The *New Approach Discussion Paper* outlines a plan to amend these provisions to refer to a ‘the right of children to spend time on a regular basis, and communicate on a regular basis, with both parents (and other people significant to their care, welfare and development)’. The paper says the provisions would also refer ‘to the need to protect children from physical or psychological harm’. Given the lack of information about the precise wording of this provision, it is not possible to comment on its possible impact.

### C Alternative reform agendas

The Federal Government proposals outlined in the previous section remain oriented toward improving the position of fathers, further ‘equalising’ parenthood and consolidating the role of non-legal methods in resolving family law disputes.

These measures fall far short of addressing the concerns raised by this and other research about the way that the existing system handles children’s disputes, and indeed, would even exacerbate these problems.

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1091 Ibid 10.
1092 Ibid.
As noted earlier in this chapter, this study provides further support for the conclusion that the existing framework is jeopardising the healthy development of children and compromising the safety of their caregivers.

These problems stem from the mixed messages in the legislative framework and the way that various system players have responded to them. There is little indication, for example, that \textit{FLA} s60B(2) has encouraged more fathers to have greater involvement in caring for their children. Rather, the research evidence suggests that the children’s ‘rights’ to contact and to know and be cared for by both their parents have acted as an ‘invitation’ for violent fathers to use the legal system in their attempts to maintain control of their families. The anti-violence provisions in the legislation have been ineffective in countering this tendency, so that in practice the ‘right’ to contact has come to outweigh the child’s ‘need’ for safety and quality parenting.

The research on the way that this effect has come about raises complex theoretical questions about the purpose and effect of family law legislation. In discussing these questions, I return to the two theoretical themes outlined in chapter one. The first is the dual purpose of the legislation, which is designed to fulfil both a normative function and a regulatory purpose. The second is the mixed philosophical basis of the legislation which contains elements of both a ‘rights’ based approach, evident in \textit{FLA} s60B(2)(a) and (b), and a ‘functional’ one, evident in the \textit{FLA} s68F(2) checklist.

The analysis in this study suggests that both the ‘normative’ goals and the ‘rights’ based elements of the legislation have combined to compromise its regulatory effectiveness and overwhelm the impact of its functional provisions in significant ways. This is evident in the empirical analysis in the way that the Court’s consideration of the ‘best interests’ question has been curtailed in relation to the question of whether contact
with violent and impaired fathers is to the advantage of children. My analysis supports other research indicating that the normative ‘right to contact’ has had such an impact on the attitudes of system players that functional concerns about children’s safety receive little consideration even when the legislation is called upon to fulfil its regulatory purpose. This is symptomatic of the way that discretion is playing a lesser role in family law decision making generally as part of an increased shift toward rule-based regimes for regulating family disputes.

These theoretical issues have significant implications for the possible format of future family law reform proposals. In canvassing such proposals, I assume a policy goal of protecting children from harm and promoting their healthy development. The theoretical issues referred to in the preceding paragraph suggest two alternative reform strategies. The first is aimed at unscrambling the mixed messages in the existing scheme. The second involves changes of a more far-reaching, and less politically attractive, nature. Given that reform in the area of family law raises a range of very complex theoretical and practical issues and as detailed consideration of these is beyond the scope of this project, the following discussion raises these two possible strategies in a fairly brief and general way.

The first alternative would involve three relatively simple amendments to the FLA. The first change would involve expanding the objects provisions in s60B(2) to refer to the child’s ‘right’ to safety. This would be consistent with existing normative philosophy of the legislation and would extend the ‘rights-based’ notions in the scheme. Like the child’s ‘right to contact’, the ‘right to safety’ is recognised in the UNCROC. Article 19 requires all State Parties to take ‘all appropriate legislative,
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administrative, social and educational measures’ to protect children from ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parent(s), legal guardians of any other person who has the care of the child’. In elevating the importance of the ‘safety’ message, such an approach may widen the focus of parents, solicitors and counsellors and reinforce the fact that the ‘right to contact’ is not the only dimension of the ‘best interests’ question. In this way, questions about the safety of the child and the quality of the care they receive from their parents may assume greater importance in family law decision making.

Secondly, the definition of violence in the FLA should be widened to encompass non-physical forms of abuse and to recognise the largely gendered nature of family violence. A definition similar to that adopted by Partnerships Against Domestic Violence, referred to in chapter four, 1095 would assist in making violence that is part of a control-type pattern more visible.

Thirdly, in order to minimise the use of litigation to perpetuate control tactics, orders made to curtail vexatious claims under FLA s118 in children’s matters should be subject to the child’s best interests. This would make the question of the whether the litigation serves the interests of the child a central concern in decision making in relation to these orders. As the analysis in chapter five showed, litigation over children may expose them to repeated psychological assessments, intensify the level of conflict around them and exacerbate the loyalty conflicts they experience. Litigation also has economic consequences which impinge on children’s interests, since financial resources that would otherwise be used for the benefit of the family may be used in fighting vexatious applications. 1096 Further, as some cases in the sample indicated, 1097 the

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1095 See text above n 616.  
1096 Paxton, above n 625, 7.
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strain imposed by the need to respond to repeated applications and  
attend for court appearances presents a significant drain on the personal  
resources of the children’s primary caregivers. In this context, there is  
justification for placing less emphasis on the litigants’ rights and more  
emphasis on the interests of those directly affected by the litigation. This  
point is particularly pertinent in an environment where the Court is faced  
with rising numbers of self-represented litigants and the evidence that  
litigation is being used to perpetuate control tactics is mounting. One  
commentator has even suggested that:

> [t]here is a currently unexplored possibility that, by assisting self-represented  
litigants, the Family Court may be unwittingly drawn into assisting an abusive  
partner to harass and maintain control over a former wife or de facto partner.  

As noted in chapter four, the Australian Law Reform Commission  
suggested a need for a more robust use of FLA s118 orders before the  
Reform Act 1995 was introduced. The need for such an approach has  
become even more acute in the post-Reform Act 1995 era.

From a strategic perspective, the approach outlined in the preceding  
paragraphs has several advantages. It leaves the basic framework intact.  
Rather than focussing on the position of either mothers or fathers, it  

can encourage focus on the needs of children. It is politically  
expedient in that it promotes a message — children’s safety — that is  
difficult to argue with.

But at a theoretical level, this alternative raises some problematic issues.  
It persists with a normative legislative model which is dependent on  
messages being efficiently radiated and effectively received. However,  
as Dewar and Parker observe in Parenting, Planning and Partnership  
there is reason to question the assumptions that underlie this model in

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1097 See text accompanying footnotes 724 and 730 and 752 and 757.  
1098 Paxton, above n 625, 12.  
1099 Above n 232.
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the wake of the effects that have been shown to have resulted from the implementation of the Reform Act 1995. In the context of a family law ‘complex’, multiple interpretations of what the law ‘says’ exist among different system players. As a result, ‘outcomes are unpredictable and are the effect of multiple causes’. 1100

This diffusion of meaning in normative legal frameworks and the consequent lack of predictability in the results it produces suggest the need for a revision of the way legislative policy is expressed to eliminate scope for ‘unintended consequences’ 1101 of the type that have occurred under the Reform Act 1995. These unintended consequences indicate that the content of the ‘best interests’ standard should be defined with greater specificity in the context of a legislative scheme that acknowledges social realities, rather than attempting to ‘set incentives for socially desirable intimate behaviour’. 1102 As this study has shown, the litigating parents in the sample neither shared the care of their children prior to separation nor behaved in a ‘reasonable, self-denying and conciliatory’ 1103 way afterwards.

In this context, closing the gap between the legislative ideal and the social reality may be a more appropriate aim for legislators. As noted in chapter one, the overwhelming majority of residence orders are made in favour of mothers both by consent and by adjudication. This reflects the fact that the day to day work of parenting remains substantially the preserve of mothers, a point that was reinforced by my analysis of the parenting roles and capacities of the litigating parents in my sample in chapter three. As other commentators have pointed out, the answers to increasing father involvement in families are more complex than making a symbolic statement in a legislative scheme, the primary function of

1100 Above n 100, 89.
1102 Ellman, above n 93, 701.
which is to determine what living arrangements are best for children after separation.\textsuperscript{1104} This point is illustrated by the fact that the ‘right to contact’ has led to an obligation on mothers to facilitate father-child relationships, as the analysis in this thesis has shown, but the law appears powerless to enforce any reciprocal obligation on fathers to exercise contact. As a consequence, contact fatherhood remains a prerogative rather than an obligation, reflecting the law’s lack of power to replace the ‘faded ties of affection’.\textsuperscript{1105}

In this regard, it is significant that family law reform agendas in the US are reflecting a pragmatic approach that aims for greater certainty in the context of the realisation that the child’s best interests ‘are not an administrable legal standard’.\textsuperscript{1106} As noted briefly in chapter one The American Law Institute has adopted an ‘approximation standard’ in its Principles of the Law of Family Dissolution.\textsuperscript{1107} Under this standard, custody determinations\textsuperscript{1108} are guided by past caretaking patterns with exceptions that include mechanisms to guard against fathers being ‘penalised’ for fulfilling a breadwinner role and to provide protection from family violence.\textsuperscript{1109} This standard is oriented toward maintaining stability in the child’s living arrangements.\textsuperscript{1110} It also recognizes ‘gross disparities in parental abilities and the comparative strength of each parent’s emotional connection to the child’.\textsuperscript{1111} As my analysis in chapter three showed, these are core issues in existing decision making patterns in Australia and are supported by the functionalist provisions in the \textit{FLA} s68F(2) checklist that require the court to consider the nature of

\begin{itemize}
\item\textsuperscript{1104} \textit{The First Three Years Report}, above n 72, 2.24-2.6.
\item\textsuperscript{1105} Ellman, above n 93, 700.
\item\textsuperscript{1106} Bartlett ‘US Custody Law’, above n 44, 17.
\item\textsuperscript{1107} Above n 46.
\item\textsuperscript{1108} The concept of legal custody (ie physical custody and decision making power) is replaced by decision making responsibility’: ALI Principles, ibid: 2.03(3). This is shared when both parents have been exercising parenting functions responsibly: Bartlett, ‘US Custody Law’ above n 44, 17.
\item\textsuperscript{1109} Bartlett above n 44, 17.
\item\textsuperscript{1110} This factor has been a significant consideration in Australian family law decision making particularly at interim level: \textit{Cowling v Cowling} (1998) FLC 92-801.
\item\textsuperscript{1111} Bartlett, above n 44, 17.
\end{itemize}
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the child’s relationships with each parent, the effect any change in circumstances would on the child and the capacity of each parent to provide for the child’s needs.

The issues raised by the adoption of an ‘approximation standard’ as a desirable law reform goal are complex, particularly in terms of the way such a standard should be expressed and the way it would accommodate diverse family forms. More significantly however, the socio-political environment in Australia, as described in chapter one, is far from fertile ground for even a debate about such a proposal. As Rhoades observed in relation to a primary caregiver presumption five years ago, there is ‘dim prospect’ of any momentum developing for serious consideration of legislative changes that challenge the Federal Government’s established commitment to improving the position of fathers.

D Further research

This study has shed light on the pressures that underlie litigated outcomes under the Reform Act 1995. The findings of the study raise further questions that require investigation, both at an empirical and theoretical level. A key issue raised relates to the relationship between the 4 per cent of litigated outcomes and the 96 per cent of disputes that settle by consent.

At an empirical level, there is a dearth of knowledge about the issues that inform consent-based outcomes in Family Court proceedings. As observed in the Every Picture Report, ‘little is known of the basis for decision making in the majority of cases’ that settle by consent.

Other than a skeletal amount of information about how many

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1112 ss(b).
1113 ss(c).
1114 ss(e).
1115 See eg Boyd, Rhoades and Burns, above n 74.
1116 Ibid 250.
1117 Every Picture Report, above n 3, 1.23.
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mothers\textsuperscript{1118} and fathers\textsuperscript{1119} get residence under consent orders and the amount of contact ordered\textsuperscript{1120} little concrete information on this topic is available. Yet the majority of children from separated families have their living arrangements determined in this way.

A central concern raised by the findings in this study is that children may be being exposed to contact and even residence arrangements that may jeopardise their healthy emotional development because of the tactical pressures that apply to litigants, particularly mothers, as a result of the way the legislative provisions are applied in the current socio-political environment. A key question for further research is the extent to which similar concerns may arise as a result of non-litigated outcomes. As noted in chapter four, violence is not an exceptional circumstance among the divorcing population – it can more aptly be seen as a common occurrence.\textsuperscript{1121} The Family Court’s Submission to the Every Picture Inquiry notes that anecdotal accounts from judges, registrars and counsellors indicated that violence was relevant across the full gamut of consent and contested cases:

\textquote{The primary carer parent may also feel intimidated and fearful as a result of an imbalance of power in their relationship, and may agree to shared parenting arrangements in order to try to appease the child’s father or to satisfy legal aid requirements.}\textsuperscript{1122}

Despite recognition at a theoretical level that mediation is inappropriate for cases involving violence because of the resultant power imbalance,\textsuperscript{1123} other Australian research confirms that alternative

\textsuperscript{1118} 78 per cent: \textit{FCA Submission Parts B and C}, above n 30, 2.3
\textsuperscript{1119} 9 per cent: Ibid.
\textsuperscript{1120} Patterns amounting to between 51 and 108 days were most common: Ibid 2.5.
\textsuperscript{1121} See text accompanying fn 681 and 683.
\textsuperscript{1122} Ibid 35.
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dispute resolution mechanisms are often used in such cases. The Parenting Planning and Partnership Report suggests that the dynamics of violence may be taken into account to an even lesser extent in mediation than in litigation. Dewar and Parker argue that the diffusion of understandings about what the legislation requires, and the multiplicity of interpretive sites, indicate that the relationship between primary and secondary dispute resolution may be becoming increasingly tenuous. They suggest this means that ‘the mere fact that a judge would weigh violence as a factor is no guarantee that it will carry weight in a mediation conference’.

Further empirical research is required to establish the extent to which the safety of women and children is being jeopardised under arrangements made by consent and the implications this may have for children’s development. As Hart observes, there is little knowledge about the role of the relationship between the child victim and the father perpetrator of violence. Four issues require investigation. First, what are the characteristics of parties that reach consent agreements and what factors influence their choice of mediation pathways? Secondly, what understandings of the ‘law’ inform consent-based outcomes? Thirdly, how are issues such as violence and parental capacity taken into account in reaching these outcomes? Fourthly, how are children’s interests taken into account in reaching these outcomes?

Research examining these issues has the potential to shed further light on the theoretical question of whether the metaphor of ‘bargaining in the shadow of the law’ is indeed no longer apt. Such research would provide a means of comparing litigated and non-litigated outcomes and would therefore enable the relationship between the legislation’s

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1124 Hunter (1999), above n 215, 71; The First Three Years Report, above n 72, 96-7; Kaye, Stubbs and Tolmie, above n 141, 101.  
1125 Parenting, Planning and Partnership, above n 72, 75.  
1126 Ibid.  
1127 Hart, above n 144, 189.  
1128 Parenting, Planning and Partnership, above n 72, 75.
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normative and regulatory functions to be assessed with greater accuracy. Deeper insight into this issue would assist in testing the assumptions that underlie current legislative policy in relation to the efficacy of frameworks that rely on ‘radiated messages’ to influence the behaviour of disputants. Such insight would assist in refining our theoretical understanding of how law operates and facilitate the development of law reform proposals that avoid ‘unintended consequences’ of the type that have occurred under the Reform Act 1995.
CHAPTER 6

SUMMARY AND CONCLUSIONS

This study has examined an empirical sample of 40 Family Court files involving children’s matters to assess the role played by key provisions of the Reform Act 1995 in litigation and judicial determinations. An overarching theme in the analysis has been the tension continually faced by legal decision makers in balancing the objects provisions in FLA s60B(2) against the s68F(2) checklist. The analysis has drawn on a range of secondary sources to produce an informed consideration of the implications of the way these tensions arise and are resolved. These sources include Family Court jurisprudence, theoretical accounts of the operation of family law, together with legal, socio-legal and social science research on issues related to separation, children and violence.

In this chapter, I draw together the threads of the analyses set forth in the preceding chapters to present the overall findings of the study by first providing a summary of the findings and then considering these in light of likely future developments.

PART 1 FINDINGS

In keeping with the exploratory and reflexive nature of this study, my findings are in the nature of tentative conclusions drawn on the basis of my qualitative analysis of Family Court files and a wide range of secondary sources. My findings are consistent with earlier studies, although their applicability across decision making in children’s matters generally would have to be subject to verification through further research. These findings flow from the three key themes that were explored in each of the chapters that presented the substantive empirical
analysis. The first theme is the different standard of parental capacity manifested in the resident parents (mainly mothers) and the contact parents (mainly fathers). The second theme is the virtual invisibility of all but the most extreme violence in the empirical sample. The third theme is the marginalisation of the interests of the children in the sample.

An issue central to each of these themes is the extreme nature of the fact situations in the files in the sample. As explained in chapter one, only six per cent of parenting disputes proceed to trial.\textsuperscript{991} These are the intractable disputes that could not be settled through the Court’s three stage dispute resolution process.\textsuperscript{992} Two further features of this extremity relate to the parent-child relationship history and the parent-parent relationship history. In a number of cases the parent-child, usually father-child, relationship history was tenuous. In almost all cases, the parent-parent relationship history was severely conflict ridden.

Such backgrounds of extremity are the context for the Court’s application of the legislative framework. This framework establishes the legislature’s expectation that parents will share the care of the children\textsuperscript{993} and imposes on the Court an obligation to promote the ‘right’ of children to know and be cared for by both their parents.\textsuperscript{994} It further articulates in _FLA s68F(2)_ a series of considerations for the Court to apply to determine what outcome is in the child’s ‘best interests’. This is the paramount consideration under _FLA s65E_. The analysis in this thesis has examined what factors influence how the Court implements the ‘rights’ in _FLA s60B(2)_ against the ‘needs’ considered in the s68F(2) checklist.

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\textsuperscript{991} See text accompanying fn 92.
\textsuperscript{992} _FCA Submission_, above n 17, 13.
\textsuperscript{993} _FLA s60B(2)(c)_.
\textsuperscript{994} _FLA s60B(2)(a)_.
In particular, the analysis presented in chapter three explored the way claims by the mothers and fathers in the sample reflected their differential positioning as litigants and their different parenting histories. It highlighted how, in keeping with wider social patterns, the mothers in the sample had fulfilled a practical parenting role to a much greater extent than the fathers. In the context of the factual backgrounds to the cases in the sample, many of the fathers’ claims for increased involvement occurred despite a history of violence, drug abuse, mental illness or entrenched conflict. Biological connections, reflecting an emphasis on the normative s60B(2) provisions, rather than a history of caring, were the basis for these claims.

The legal decision making process however, particularly the emphasis placed on the s68F(2) provisions related to parental capacity, resulted in mothers experiencing a greater degree of ‘success’ than fathers in their applications. Mothers had fulfilled a primary caregiving role, leading to the establishment of highly salient emotional and psychological relationships with their children. In contrast, many relationships between fathers and children, were less substantial, and in some cases were tenuous or non-existent. However, an emphasis on maintaining contact between even significantly impaired fathers and children was evident in the sample.

Three concepts were found to be of particular relevance in understanding the outcome patterns in the sample, in the context of the factual backgrounds in the files. First, the psychological concept of attachment directed attention to the depth and quality of the relationships between the respective parents in the sample and their children. The mothers’ histories as primary caregivers meant that the mother-child attachment relationship was qualitatively different to the attachments between fathers and children.
The second concept was the ‘negative father’ construct. It arose in considering whether contact should be maintained between violent, abusive or mentally ill fathers and their children. In the sample, it provided a base-line rationale for the maintenance of contact between such fathers and children, particularly in the Family Reports. It reflected a concern to ensure that children did not sustain long-term psychological harm from a lack of knowledge of their fathers. However, it was argued that the emphasis placed on this factor obscured the possibility that contact with such fathers may be damaging for children by exposing them to inappropriate behaviour.

The third concept germane to the outcome patterns was the friendly parent criterion which was relevant to considering the attitudes to parenthood and to the child under FLA s68F(2)(h). The analysis indicated that mothers’ attitudes to fathers have become an important consideration in litigation involving children’s matters. This was evident in two ways. First, mothers’ affidavits were generally drafted to ensure that the Court understood that they supported relationships between their fathers and children even in circumstances where there had been a history of violence or abuse. Secondly, there were two case outcomes where mothers lost their applications on the basis of an insufficiently positive attitude to the father-child relationship.

The analysis showed that whilst mothers were required to conform to the friendly parent criterion in order to be sure of retaining residence of their children, even severe levels of denigration against mothers did not militate against the making of contact orders in favour of fathers. This reinforced the existence of a different standard of care and behaviour applicable to residence parents (mainly mothers) and contact parents (mainly fathers). Across the sample, mothers were in the main found to be able to provide a much higher standard of care and manifested greater commitment in their parenting than fathers. Residence parents carried
the responsibility for the day-to-day care and nurture of the children, while much lower expectations applied to contact parents.

These lower expectations underscored a practical difference in the way that residence parents and contact parents operated. In the sample, a substantive difference in these roles was reflected in some cases in restrictions on the degree to which contact parents could exercise parental responsibility. As discussed in chapter two, orders curtailing this aspect of parental involvement were made in situations where the parent-parent relationship was highly conflictual.995

The substantive difference between the capacities and functions of residence parents and contact parents reflected in the sample is at odds with the equality-based construct of parenthood in the legal framework. In its construction of parental responsibility, the FLA treats residence and contact parents, as prima facie, the same. Yet, as the analysis of the sample demonstrated, there was a substantial difference in the level of parenting capacity and commitment demonstrated by the mothers and fathers in the files. Indeed, the analysis highlighted the divergent definitions of ‘adequate’ parenthood applicable to residence and contact parents. This was manifested most clearly in the application of the friendly parent criterion. ‘Unfriendly’ behaviour in a resident parent demanded a legal response but equivalent conduct on the part of contact parents was acceptable.

Chapter four examined the way that violence was dealt with in the sample and specifically analysed the way that the balance was struck between the s60B(2) normative objects in the FLA and the violence related provisions in the s68F(2) checklist.996 More than half the cases in the sample involved a history of violence, reflecting again the extreme factual backgrounds to the cases in the sample. This also indicated that

995 See text accompanying fn 330 and 350.
996 FLA ss68F(2)(g), (i) and (j).
in some instances, litigation over children’s matters was related to attempts to perpetuate the dynamics of violence and control after separation. However, violence was seen to be relevant to parenting capacity only in very extreme cases.

Links between violence and parenting capacity were made only in cases where very strong evidentiary support for the allegations of violence was present and there was a high level of physical severity – these pre-conditions established the existence of ‘real’ violence in the sample. Such pre-conditions were absent in relation to ‘simple’ violence which consequently was relevant only to negating fathers’ suitability to be residence parents (unsuccessfully in some instances) but not contact parents. Even in extreme cases, very serious consideration was given to maintaining connections between fathers and children due to the emphasis placed on the need to avoid prospective harm (the negative father construct) from an absence of contact.

The operation of the friendly parent criterion discouraged women from arguing against contact between children and violent fathers except in very extreme cases. This meant it was the potential for damage ensuing from not seeing impaired fathers that received most emphasis in psychological and some judicial considerations. Patterns involving less severe violence and significant control were overlooked in the sample cases. There was little acknowledgement that in some cases, litigation over children’s matters was part of an attempt to maintain control over former partners. In part, this may be referable to the narrow definition of violence contained in the FLA, although control has been recognised in previous reported decisions. However, it is also related to the inability of many legal decision makers to recognise and take into account power imbalances that stem from issues relating to gender. This is reflected in an approach that emphasises physical manifestations of violence and

997 In the Marriage of JG and BG (1994) FLC 92-515.
fail to appreciate the way these operate to reinforce gendered inequities in power.

This lack of understanding may be relevant at several stages in the process, not just at the judicial level. These stages include points at which litigation strategies are formulated, decisions on legal aid funding are made and in the preparation of Family Reports. A further consideration is the reticence that women experience in talking about violence. This may be exacerbated by a lack of understanding among the professionals that they encounter.

The analysis in chapter five examined how children’s interests were constructed, in light of the differing definitions of ‘adequacy’ applied to residence and contact parents, and the invisibility of all but the most extreme forms of violence in the sample. It focussed on the construction of ‘best interests’ under FLA s65E, the way children’s ‘rights’ under s60B(2) are implemented and the considerations that arose in the application of the child-focussed provisions of the s68F(2) checklist. Four key points were made in the analysis.

First, despite the centrality of children’s interests in the legal framework, they were marginalised in practice in the sample files. Argument centreing on parental attributes and capacity were dominant in the material rather than child-focussed considerations. The parents’ arguments largely determined the parameters of the Court’s consideration even when a Child Representative was involved.

Secondly, the marginalisation of children’s interests in the sample was further evident in the way their wishes and feelings became the subject of dispute through the deployment of allegations concerning ‘alienation’. There were two aspects to the way these allegations arose in the sample.

\[998\] ss68F(2)(a), (b), (c) and (f).
First, violent fathers in the sample did alienate their children against their mothers. This was part of an ongoing campaign to maintain control of the children after separation. Despite alienation occurring, ongoing contact was still seen to be in the children’s interests. The second aspect was the way that spurious claims of alienation against mothers were raised by fathers to establish a breach of the friendly parent criterion. This consolidated the way argument in the litigation focussed on the behaviour of mothers rather than fathers.

Thirdly, children in the sample were placed under pressure by being the subject of their fathers’ claims for recognition of their parenting ‘equality’. It was particularly evident in the shared care and relocation cases in the sample that children were adversely affected by being placed at the centre of their fathers’ claims for acknowledgement that they were ‘equally’ as important as mothers to their children. In most cases, consideration of the child-focussed provisions of s68F(2) resulted in rejection of the fathers’ claims in this regard. However, in two cases where significant emphasis was placed on the children’s right to contact and to know and be cared for by both parents, the children’s relationships with siblings were inappropriately given less emphasis than they warranted.

Fourthly, in relation to contact, the Court’s consideration of the ‘best interests’ question had effectively become skewed as a result of the tactical positions adopted by the parties. The analysis showed how the Family Court was faced with a greater number of fathers seeking to increase their levels of involvement with their children, despite a tenuous relationship history. In these circumstances, the combined operation of the negative father discourse and the friendly parent criterion produced a situation where in some circumstances an argument for ongoing contact with impaired fathers is put before the Court but

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999 s60B(2)(b).
1000 s60B(2)(a).
countervailing considerations were not raised. This meant that litigated outcomes potentially exposed children to emotional, psychological and possibly physical harm through the maintenance of contact\textsuperscript{1001} with violent and impaired fathers.

These findings are consistent with other research on the impact of the Reform Act 1995. Such research has highlighted effects that include the increase in litigation,\textsuperscript{1002} the changed power balance between men and women as litigants,\textsuperscript{1003} and the lack of effectiveness of the FLA provisions in relation to violence.\textsuperscript{1004} My study however is unique in that it deepens our understanding both of the concepts that underlie judicial determinations and the strategic pressures that contribute to these effects. The ways in which the study does this are summarised in the following paragraphs.

First, my study has identified the divergent bases for ‘parenthood’ claims that are supported by the legislative framework and relevant psychological concepts. Biological understandings of parenthood underpin claims for contact that reflect an emphasis on FLA s60B(2) in the fathers’ material, especially in the more extreme cases in the sample. These claims, in turn, found evidentiary support in the psychological theory of identity formation on which the negative father discourse is founded. In contrast, the psychological theory of attachment underpinned residence determinations made in favour of mothers — largely on the basis of s68F(2) considerations — but only when the hallmark feature of the ‘adequate’ residence parent, the friendly parent criterion, was satisfied. The need to be a friendly parent operated to

\textsuperscript{1001} In two cases, residence orders were made in favour of violent fathers. See text accompanying footnotes 694 and 696 and 831-834.
\textsuperscript{1002} The First Three Years Report, above n 72, 1.7, Parenting Planning and Partnership above n 100, 29.
\textsuperscript{1003} Parenthood, Planning and Partnership, above n 100, 83.
\textsuperscript{1004} The First Three Years Report, above n 72 1.21, Parenthood Planning and Partnership 83, Kay, Stubbs and Tolmie above n 141, Hart, above n 144.
inhibit the degree to which contact with violent and impaired fathers could be problematised.

Secondly, the study highlighted the stringent evidentiary standard that instances of violence must meet in order to be accepted as ‘real’ violence, and consequently a breach of even the lower standard of adequate parenthood applicable to contact parents. Again, the role of the negative father construct and the friendly parent criterion were identified as relevant to these issues. ‘Simple’ violence — instances where the evidentiary standard required for ‘real’ violence was absent — remained unproblematised as an incident of contact parenthood as a result of the operation of the friendly parent criterion. This was also relevant to the way that the dynamics of violence and control remained hidden. As a result, there was little appreciation that children become directly caught in patterns of violence and control through the use of litigation over their living arrangements.

The significance of these insights is twofold. First, my study has shown how consideration of issues related to ‘best interests’ are skewed. In the context of the tactical pressures that are exerted in an adversarial contest, there is little scope for a consideration of the possibility that harm may be sustained by ongoing contact (even residence) with violent and impaired fathers. Some of the empirical examples considered in this thesis suggested a real possibility that Court orders may have exposed children to such harm when considered in the context of broader social science research on the impact of exposure to conflict and impaired parenting. Further, there was little recognition of a nexus between the interests of mothers and children particularly in the more extreme cases. This was despite the fact that these children were virtually solely reliant on their mothers for ongoing care. Moreover, the impact of contact on mothers in these cases was a virtually irrelevant consideration in all but the most extreme circumstances.
Secondly, the study reveals the implications for children of the de-stabilisation of parental expectations, particularly among fathers, of what ‘their entitlements’ are under the law. An increased number of children are being subject to the pressures involved in being at the centre of litigation. Children may undergo intense levels of scrutiny about their needs and wishes. However, the meanings of children’s utterances are obscured by allegations of alienation and the operation of the friendly parent criterion. In these circumstances, discovery of what they really want and need (these two issues may not necessarily be co-extensive) is rendered highly problematic. Further, in some instances, engagement in litigation on the part of fathers may be motivated by a desire to maintain control rather than by a genuine desire to effectuate arrangements that meet children’s needs. Recognition of this is negligible in a system where patterns of control remain invisible and ‘caution and reserve’ guide the Court’s exercise of its power to curtail litigants’ rights to have their claims heard.\textsuperscript{1005}

As the analysis in chapters three and four indicated, the main concern in the psychological evidence and many of the judgments in the sample was the avoidance of future harm from the absence of the father. The pre-occupation with the potential damage from lack of a relationship even with impaired fathers was pre-eminent, rather than a concern to explicitly consider the implications for children of maintaining relationships with such fathers.

The degree of emphasis placed on this factor is questionable in light of social science research on outcomes for children affected by separation. Meta-analytic research published\textsuperscript{1006} in the past five years has refined

\textsuperscript{1005} In the Marriage of Vlug and Poulos (1997) 22 Fam LR 324 at 349 following O’Sullivan (1991) 104 FLR 45.

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and codified our knowledge of the way that separation affects children. Such research has examined findings on outcomes for children of separated families across a range of studies and challenges the prevalent claim that children need maximum father involvement for optimum development.

A leading analysis by Jan Pryor and Bryan Rodgers has brought together the findings of an extensive range of studies from the UK, the US, Australia and New Zealand on how divorce and separation affect children. It concludes that the ‘assumption that contact per se is measurably good for children does not stand up to close scrutiny’. Rather, the link between contact with fathers and outcomes for children was complicated by a range of factors, including the quality of the father-child relationship and the type of parenting enacted on contact, and the levels of conflict the child was exposed to as a result of contact occurring. Other research also confirms that contact that brings children close to conflict, substance abuse or parents with psychological or psychiatric illness may be positively harmful.

The damaging nature of continuing exposure to conflict has been illustrated most clearly in an analysis of a range of studies by the US family researcher, Mavis Hetherington. This analysis shows that such exposure is a key factor leading to poor outcomes for children in high conflict intact families and especially in high conflict separated families where the conflict continues after separation. Such children
experience a range of difficulties, including lack of self-regulation, low social responsibility and cognitive agency, poor self esteem and, potentially, long term problems in relationships with peers, teachers and intimate others.1011 Most harmful is conflict in which the child feels caught in the middle or is physically threatened.1012 Problems experienced by children in these circumstances can be exacerbated by the fact that conflict adversely affects parenting skills: they are likely to experience less warmth and monitoring from parents, and a higher degree of coercion, negativity and inconsistency in relation to control.1013

The strong connection between the quality of fathering enacted on contact and long term outcomes for children has been clearly established by another meta-analysis by leading US fatherhood researchers Paul Amato and Joan Gilbreth.1014 This study collated and analysed data from 63 studies on non-resident fathers and children’s well-being published between 1970 and 1998. It identified the payment of child support and the quality of the father-child relationship as the key influences on outcomes for children of separated families. Children in families where fathers continued to contribute financially fared better academically1015 and had fewer behavioural difficulties. Further, fathers who engaged in authoritative parenting practices such as assisting with homework and discussing children’s personal problems made a significant contribution to their children’s development. Children with this type of support also had better academic achievement levels and fewer behavioural problems.1016

1011 Ibid 96.
1012 Hetherington, above n 1010, 98.
1013 Rossman and Ho, above n 1010, 103.
1014 Amato and Gilbreth, above n 1006.
1015 Ibid.
1016 Ibid. Such parents show warmth and nurturance to their children, along with age appropriate limit setting which is explained meaningfully: Phares (1996) above n 459, 28; see also Pryor and Rodgers, above n 1006, 48-50 and Whiteside and Becker, above n 1006, 5.
In contrast, contact with fathers who maintained recreational relationships in the absence of authoritative practices offered few significant benefits: ‘nonresident fathers who are not highly motivated to enact the parental role or who lack skills to be effective parents are unlikely to benefit their children, even under conditions of regular visitation’. In the absence of authoritative parenting practices there was no link between frequent contact between children and non-resident fathers and improved outcomes.

The research discussed in the preceding paragraphs indicates that if children’s welfare is the key concern of legal policy, then the maintenance of contact at all costs should not be the primary objective. In the UK, recent case law developments suggest a retreat from the strong pro-contact approach that accompanied the introduction of the UK Children Act 1989. Similar issues are also being addressed at the level of Government policy, with the recent Parental Separation Green Paper recommending changes to the way the system operates but not to the legislation. The potential risks in maintaining contact between children and impaired fathers have been summarised in a UK report commissioned by the Official Solicitor in relation to several cases involving contact and domestic violence that were being heard by the UK Court ofAppeal. The report notes that contact in situations where there has been a background of violence has the potential to undermine children’s development and even to cause

1017 Amato and Gilbreth, above n 1006.
1018 Ibid.
1019 See Boyd (2003), above n 58, for a similar argument, 132-137.
1020 Re L; Re V; Re M; Re H (Contact: Domestic Violence) (2000) (2) FLR 334, Court of Appeal (UK). The decision upheld four trial judgments refusing fathers’ applications for contact against a proven background of family violence.
1021 See eg Smart and Neale, (1997) above n 56, 332; Bailey-Harris et al, above n 53 115.
1022 Felicity Kaganas and Shelley Day Sclater, 'Contact and Domestic Violence - the Winds of Change' (2000) Family Law 630; see also Herring, above n 598, 99.
1023 Above n 3.
1025 Re L; Re V; Re M; Re H (Contact: Domestic Violence) (2000) 2000 (2) FLR 334, Court of Appeal (UK).
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emotional damage.\textsuperscript{1026} An escalating climate of conflict around the child
may undermine their stability and emotional well-being, by creating
loyalty conflicts and a sense of responsibility for the conflict.\textsuperscript{1027}
Further, potentially harmful situations are acknowledged to arise when
children on contact visits:

- Are exposed to abuse of a physical, sexual or emotional nature including
  situations where a parent has delusional beliefs or is affected by drugs or
  alcohol.
- Are exposed to denigration of the child’s resident parent.
- Experience the continuation of unhealthy relationships characterised by
  inappropriate control, domination or bullying.
- Experience different moral standards and rules of behaviour from those
  enacted by their resident parent.
- Experience treatment where their needs are not prioritised and they are
  not endorsed as a valued individual.\textsuperscript{1028}

The Experts’ Report stresses that contact between children and fathers
who have perpetrated domestic violence is unlikely to be in the child’s
best interest unless the perpetrator has acknowledged the violence, taken
responsibility for it, and shown an understanding of its impact on the ex-
partner and the child.\textsuperscript{1029} In addition, a genuine interest in the child’s
welfare and a full commitment to the child should be evident on the part
of the applicant for contact.\textsuperscript{1030}

\textsuperscript{1026} The Experts’ Report, above n 1024, 617. The report has been criticised for being
insufficiently specific about when contact may not be beneficial; John Eekelaar,
‘Contact - over the Limit’ [2002] \textit{Family Law} 271
\textsuperscript{1027} The Experts’ Report, above n 1024, 617.
\textsuperscript{1028} Ibid 618.
\textsuperscript{1029} Ibid 624.
\textsuperscript{1030} Ibid  624.
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The Experts’ Report, and other research, indicates that an approach that constructs contact as inevitably in the best interests of children, particularly where the contact parent is impaired, is substantially flawed. The perpetuation of conflictual relationships around children, particularly when they are the focus of conflict, compounds the potential difficulties they may experience as a result of divorce. As the UK family law scholar John Eekelaar notes, the conclusion to be drawn from social science research is that ‘[i]t is at least possible that the absence of contact could often have no adverse effects and that it [contact] could often be detrimental to children’.

As the analysis presented in this thesis has shown, the tactical pressures that shaped the Court’s consideration of whether contact was in the child’s best interests meant that mothers’ attitudes and parenting skills were scrutinised more closely than those of fathers. The different definitions of ‘adequacy’ that were applied to resident mothers and contact fathers as a result of those tactical pressures indicated that a number of issues received insufficient attention. These included: the possibility that contact may undermine the children’s sense of safety and security by exposing them to overt conflict and criticism of their primary caregiver mothers, the possibility that the healthy development of the children, particularly the boys in the sample, would be impaired by exposure to negative and violent male role models and the potential for emotional manipulation to continue, even under supervision.

A further issue that received insufficient consideration in the sample was the impact that contact with violent and impaired fathers would have on

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1031 Michael Lamb suggests that the research indicates that between 15 and 25 per cent of children affected by divorce ‘would not benefit – and might perhaps be harmed – by contact with their non-custodial parents’. He also argues that relationship quality is a crucial issue ‘when making decisions about the amount of interaction to encourage’: ‘Noncustodial Fathers and Their Impact on the Children of Divorce’ in Ross Thompson and Paul Amato (eds), *The Postdivorce Family: Children Parenting and Society* (1999) 105.
1032 E Mavis Hetherington, above n 1010, 93.
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the parenting capacity of the primary caregiver mothers. Consistent with concerns expressed in the *Parenting, Planning and Partnership* report, this is another area in which the empirical material suggests a departure in practice from pre-Reform Act 1995 approaches. Reported Family Court decisions have previously made clear that primary caregivers’ concerns about children’s safety on contact were a relevant consideration when making contact orders. These decisions recognise that genuinely held fears about safety on contact may impact upon the mothers’ caregiving capacity and thus affect the interests of the child.

As the analysis presented in chapter four shows, the emphasis placed on the friendly parent criterion suggests that mothers are not only inhibited from problematising contact except in very extreme circumstances but are also prevented from raising their own interests. In the ‘simple’ violence cases in the sample, the issue of the implications for mothers of maintaining connections with violent and impaired ex partners received even less consideration than the issue of potential detriment for children.

Ongoing contact between the children and the violent and/or impaired fathers in the cases referred to in chapter four, meant that the mothers in all but the most extreme cases also had to maintain connections with men with whom they endured difficult, even traumatic, relationships. Such relationships are acknowledged to leave a psychological and emotional legacy that has the potential to undermine women’s capacity to function to a significant extent. This may in turn impair the quality of parenting they are able to deliver.

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1034 Above n 100, 70.
1036 Only in a few cases involving extreme situations was a particular nexus between mothers’ and children’s interests recognised: see discussion in chapter five in text accompanying fn 747 and 762.
1037 Cathy Humphreys and Christine Harrison, 'Squaring the Circle' [2003] Family Law 419-423, highlights how women who have experienced domestic violence show an incidence of depression and post traumatic stress disorder well above that of the
However, this issue remained largely unexamined in the consideration of children’s interests in the sample. The prevalent emphasis on the need to maintain contact between fathers and children served also to ensure that women were unable to put their own interests forward. The application of the friendly parent criterion circumscribed mothers’ ability to express reservations about contact. As the discussion of A1 in chapter four highlighted even where the background of violence was sufficiently provable and severe to warrant a no-contact argument, there was no guarantee that mothers’ arguments would be accepted.

The lack of consideration of the impact contact decisions may have on mothers implies a significant separation between the interests of mothers and children. It not only inhibits the mothers’ ability to ensure the protection of their children, but prevents them from safeguarding their own well-being. This point is especially important in the context of the factual backgrounds to the cases in the sample. As the analysis in chapter three showed, the mothers were functional parents to a greater extent and greater effect than the fathers in the sample. Indeed, many of the children in the sample realistically had only one viable caregiver, the mother. Those children were wholly dependent on that caregiver for the fulfilment of their emotional, psychological, physical and often financial needs.

In such circumstances, the need to protect the parenting ability of the primary caregiver should be given greater emphasis. The quality of the relationship between the residential parent and the child is acknowledged to have a profound influence on outcomes for children.
A further issue stemming from the operation of the friendly parent criteria was that mothers were, to an extent, disenfranchised as sources of knowledge and insight into their children’s well-being in Family Court proceedings. Chapter four explored the double bind that faced the mothers in the sample who adopted positions in favour of contact despite there being a history of violence. This double bind meant that while they raised issues in relation to violence to oppose residence, they nonetheless supported ongoing contact. In this way, genuine insights into the impact contact may have had on the children, from the people best positioned to provide those insights, remained suppressed.

Yet research from the US indicates that mothers’ attitudes to contact have relevance to the issue of whether or not contact is beneficial. A quantitative study by US sociologists Valarie King and Holly Heard examined the connection between mothers’ attitudes to contact and outcomes for children. It found that children who saw their fathers frequently but whose mothers were unhappy about this had poorer outcomes than children whose mothers were happy with either high

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1040 Pryor and Rodgers, above n 1006, 243. See also, Hart above n 144, for a similar discussion on these points: 186.
1043 Pepler above n 1037.
1044 See text accompanying fn 787 and 801.
contact or low contact patterns. They were also worse off than children with low amounts of contact but whose mothers were unhappy with this.

The authors of the study suggest that this connection is not attributable to the mothers’ views per se, but that the mothers’ dissatisfaction is related to the quality of the relationship being sustained in the high contact pattern. Mothers were particularly dissatisfied in relation to fathers who had little influence and rarely discussed children. Mothers’ attitudes reflected concerns about the quality of the fathering that occurs on contact, a factor that is acknowledged to be highly relevant to children’s well-being as established by my earlier discussion of social science research on outcomes for children affected by separation.

Overall, the pressure placed on children highlighted by this analysis is consistent with insights from recent work by the UL sociologist Carol Smart. Smart argues that the contemporary era is characterised by a growing sense of impermanence in intimate adult relationships. Against the background of increasing divorce rates, ‘children are becoming increasingly valued for the meaning they give to the emotional lives of both mothers and fathers’. When relationships between adults disintegrate, children are placed at the centre of a conflict which is fundamentally about the meaning of their parents’ lives, rather than the children’s needs and interests. Family law conflicts turn children ‘into “things” through which men can become (proper) fathers and women can stay (proper) mothers when faced with divorce’.

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1045 King and Heard, above n 1042, 387.
1046 Ibid 393.
1047 See text accompanying fn 787 and 801.
1049 Ibid.
1050 Ibid 31.
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As objects at the centre of a struggle over the meaning of adults’ lives, children are subject to two contradictory tendencies. On the one hand, the importance of the child becomes elevated, particularly as fathers increasingly pursue claims to maintain an active fathering relationship after divorce. Yet, along with this process of elevation also occurs a ‘silencing’ tendency resulting from the ‘more powerful clamour of adult disputes and the clash of rights claims’\(^{1051}\). This paradoxically coincides with an increasing emphasis on the need for children to be heard in family law proceedings,\(^{1052}\) a development that may be rendered meaningless if policy makers confuse ‘the intensity of adult expression with the welfare of the child’\(^{1053}\). If this happens, it becomes almost impossible for ‘children to express views which may not meet the needs of vociferous parents nor the tenets of current child welfare doctrines’\(^{1054}\). Thus children have a reduced capacity to exercise agency at the time they most need it.

In Australia, there is some evidence emerging of the recognition of a need to make the family law system more child-focussed.\(^{1055}\) This and other recent developments are considered in the next part of this chapter.

\(^{1051}\) Ibid.
\(^{1053}\) Smart, above n 1048, 31.
\(^{1054}\) Ibid.
\(^{1055}\) This has been the subject of scrutiny in some overseas countries for some time; see eg Mervyn Murch, Gillian Douglas, Margaret Robinson, Lesley Scanlan, Ian Butler, ‘Children’s Perspectives and Experience of the Divorce Process’ (2001) *Family Law* 373, Barbara Atwood, ‘Hearing Children’s Voices: The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform’ (2003) 45 (Fall) *Arizona Law Review* 629. In Australia, the focus so far has been on child inclusive mediation practices: see eg Commonwealth Department of Family and Community Services, Child Inclusive Practice in Family and Child Counselling and Family and Child Mediation (2002). *The Out of the Maze Report*, above n 7, noted the lack of focus on children in the system: 4.2.Research in progress includes: 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*, above n 820, 6. As noted in chapter one, the *Every Picture Report’s* main recommendation for large-scale reform of the system was also oriented toward increasing the focus on children in relation to residence and contact decision making.
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PART 2 RECENT DEVELOPMENTS

Since this research was conducted, developments have occurred that have the potential to address some of the issues raised in this thesis. The most significant of these is the trialling of an inquisitorial method of handling children’s matters by the FCA. Additionally, the Court has overhauled its Rules and is reviewing its processes for handling family violence. At a socio-political level, reform proposals for the family law system are yet again on the agenda following the Federal Government’s release of its response to the *Every Picture Inquiry*. Each of these developments is discussed briefly in the following sections.

A FCA Initiatives

In the past year, the Family Court has introduced initiatives to improve the handling of children’s cases. The most important of these is the Children’s Cases Program, which is trialling an inquisitorial method of dealing with matters involving children in the Sydney and Parramatta Registries of the Court. The program applies to cases which have not settled by mediation.

The program places control of proceedings in the hands of the judge, who decides the issues to be determined, the way the evidence is received and the way the hearing will be conducted. Opportunities for children’s involvement will be available, subject to their wishes, developmental level and the circumstances of the case. Family Reports and Court Experts will be the usual avenue for this, but subject to the consent of the child, they may also be interviewed by the

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1057 *The Children’s Cases Program*, 1.6.  
1058 Ibid 1.7.  
1059 Ibid 5.20  
1060 Ibid 5.21
Specific guidelines for the preparation of Family Reports require that children’s responses to the proposal of each parent be recorded, along with the child’s independent views. Comments that they may wish to be directed to the judge are also to be recorded.

This program has the potential to address the issues raised in the analysis presented in this thesis in several ways. In moving to an inquisitorial model, the process may alleviate the tactical pressures that are highlighted in my analysis of the operation of the ‘negative father’ construct, the ‘friendly parent’ criterion and claims in relation to alienation. The analysis suggests that these pressures arise as a result of the necessity to adopt a ‘winning’ strategy in adversarial contest. These tactical pressures may be dissipated by placing control of the proceedings in judges’ hands. This inquisitorial structure may achieve a greater focus on the children’s interests.

It is less certain how the concerns raised by this analysis in relation to violence will be addressed under this program. While some departures from the requirements of the Evidence Act 1995 (Cth) are to be permitted under this process, the visibility of violence still remains dependent on the willingness of the women involved to disclose it, and the level of sensitivity shown by legal decision makers to those disclosures. In this regard, another Family Court strategy will be of significance: the Court is developing a Family Violence Strategy that will be implemented over the next two years.

Court processes are to be reviewed in a number of areas under this strategy, though for the purpose of this analysis, three areas are

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1061 Ibid 5.21
1062 Ibid 7.11.
1063 The Family Law Council’s ‘Best Practice Guidelines for lawyers doing family law work’ also aim to raise practitioner awareness of family violence and how it should be dealt with: (Part 10). These are available at http://152.91.15.12/aged/WWW/flcHome.nsf/Page/Publications accessed 03/11/2004.
particularly pertinent. First, the processes by which legal decision makers are alerted to the issue of family violence are to be reviewed. This will cover the way this issue is dealt with in Family Reports and includes a review of the Guidelines for the preparation of such Reports. Also subject to the review process is the appointment of expert witnesses and the function and structure of their reports. Case management processes are also to be scrutinised, specifically in relation to the desirability of adopting specific guidelines in relation to family violence and to ensure that ‘serious allegations’ are identified early in the process and specially managed.

Secondly, conferencing and mediation processes are to be reviewed to consider how best to ensure that family violence issues surface and are dealt with appropriately at this level. Thirdly, staff training programs are to be reviewed in order to ensure that Court staff at all levels are equipped to understand and deal with family violence issues.

Depending on what measures are implemented as a result of this examination, this review has the potential to address the issues in relation to violence raised in this thesis. The insights from this study suggest a particular need for a review of the emphasis placed on the ‘negative father’ construct, the issues raised by the ‘friendly parent criterion’ and the way that allegations in relation to alienation are treated.

A further significant Family Court initiative is a complete review of the Family Law Rules which establish procedures for the conduct of litigation. The review was the most comprehensive overhaul for 20 years

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1065 The new Family Court Rules 2004 discussed more fully below (see text accompanying fn 1069 and 1075) require copies of family violence orders affecting either party or a child of the party to be filed with the Court: r2.05(1).
1067 Ibid 11.
1068 Ibid 10.
For the purpose of this thesis, there are two particularly significant changes. The first is the exclusion of cases involving family violence and child abuse from the Pre-Action Procedures that must be complied with before an application can be filed. This means that parties in such cases are not obligated to participate in alternative disputes resolution processes.

Secondly, the new rules discourage ‘ambit’ claims by imposing obligations on the parties to: apply for orders that are ‘reasonable’ in the circumstances of the case, identify the issues genuinely in dispute in a case, ensure that disputed issues have a ‘reasonable’ factual basis and limiting evidence, including cross-examination, to that which is relevant and necessary. Depending on how effectively these rules are implemented, broad claims of the type made particularly by fathers in the sample may be limited.

B The Federal Government’s Response to the Report of the Every Picture Inquiry

In December 2003, the House of Representatives Standing Committee on Family and Community Affairs handed down a series of recommendations for a far-reaching reform of the family law system. The Committee’s most widely publicised reference, and the one most relevant to this thesis, was to inquire into and make recommendations on

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1070 Family Court Rules 2004 r 1.05(2)(a). In addition case-management procedures trialled successfully in the Magellan Pilot program (Brown at el above n 166) are being implemented on a national level: Family Court Submission, above n 17, 38.
1071 Family Court Rules 2004 r 1.05(1).
1072 Family Court Rules 2004 r 1.08(a).
1073 Family Court Rules 2004 r 1.08(h).
1074 Family Court Rules 2004 r 1.08(1).
1075 Family Court Rules 2004 r 1.08(j).
1076 See text accompanying fn 284 and 303.
the desirability of a presumption that children would spend 50 per cent of their time with each parent after separation.1077

In its Every Picture Report, the Committee recommended against the introduction of such a presumption. Instead, it made a range of recommendations aimed at clarifying the Family Law Act 1975 and proposed the introduction of a Families Tribunal. A key concern behind the Tribunal plan was to make the system ‘child inclusive, non-adversarial [and to introduce] simple procedures that respect the rules of natural justice’.1078 A priority for the new system was to have ‘built in opportunities for appropriate inclusion of children in the decisions that affect them’.1079

The Federal Government’s response to the Report rejected the Families Tribunal plan.1080 Instead, the Government proposes to establish 65 Family Relationship Centres where parenting disputes would be resolved with the assistance of a ‘parenting advisor’ and without the involvement of legal representatives. While it is proposed that cases involving child abuse and violence would be referred to the Court system rather than being subject to mediation, the efficacy of this safeguard would depend on the state of knowledge about child abuse and domestic violence among the professionals doing the screening. Given the findings of the study by Kaye, Tolmie and Stubbs,1081 there is significant cause for concern about this issue.

The Committee’s recommendations in relation to amendments to the FLA found greater favour with the Government than its Families Tribunal proposal. As noted above, it rejected the idea of a rebuttable

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1077 These concerned the circumstances in which orders for contact should be made with other persons, including grandparents and whether the child support formula works fairly for both parents.
1078 Every Picture Report, Recommendation 12.
1081 Above n 141.
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presumption in favour of ‘equal custody’. However, its alternative recommendation shifted the locus of parental ‘equality’ from the issue of time to the dimension of responsibility. The Report proposed a rebuttable presumption in favour of ‘equal parental responsibility’ in addition to a requirement to consult on ‘major’ decisions, specified to be ‘issues relevant to the care, welfare and development of children including but not confined to education (present and future), religious and cultural upbringing, health, change of surname and usual place of residence’. No such duty to consult would be attached to day-to-day care of the child.1082

This recommendation was adopted in the Government’s response. The New Approach Discussion Paper proposes two rebuttable presumptions in relation to parental responsibility. The first would be in favour of equal shared responsibility. The second would be against it ‘where there is evidence of violence, child abuse or entrenched conflict’.1083 While the Committee’s recommendations were intended to clarify confusion over the issue of parental responsibility, both they, and the Government’s response, underline the extent of such confusion. The notion of rebuttable presumption in favour of ‘equal parental responsibility’ does little to change the existing position, since under the present regime such responsibility is automatically vested in each parent irrespective of marital status unless varied by a court order.1084 As the Australian legal academic Patrick Parkinson points out, the existing Australian framework goes further than ‘joint custody’ regimes in the US.1085

However, in combination with other changes proposed in the New Approach Discussion Paper, the introduction of a rebuttable ‘equal

1082 Every Picture Report, above n 3, 2.84.
1083 Above n 6, 10.
1084 FLA s61C.
parental responsibility’ presumption would exacerbate the problems identified in this thesis. The analysis has shown how the existing framework supports fathers’ claims for increased involvement even in the context of tenuous parenting histories. This reflects the differential positioning of men and women as litigants. In making a clear public statement that ‘equalises’ the authoritative aspects of parenthood, the proposed changes may increase this tendency by boosting legal recognition of the validity of ‘caring about’ and consolidating the lack of visibility of ‘caring for’. Making parental authority the centrepiece of ‘equal parenthood’ may simply give fathers who are inclined to be litigious more scope, since their claims for authoritative involvement may be made regardless of affective history.

This trend would be exacerbated by four further changes canvassed in the New Approach Discussion Paper. First, there is a proposal to require the Court to consider ‘substantially shared parenting time’ where each parent wants to have ‘half or more of the time with their child’ in cases that do not involve violence, child abuse or entrenched conflict. Secondly, the introduction of an explicit friendly parent provision is being proposed. Thirdly, the introduction of a punitive disincentive to raising issues related to child abuse and violence, through the imposition of costs orders against parties who make false allegations, has been put forward. Fourthly, a change of residence of the child (subject to best interests) as a sanction when court orders have been breached deliberately and intentionally more than once is being considered.

On the basis of the trends identified in this study and other research, these four measures in addition to the rebuttable presumption in favour of ‘equal’ parental responsibility would further strengthen the bargaining

\(^{1086}\) Smart (1991) above n 384.  
\(^{1087}\) New Approach Discussion Paper, above n 6, 11.  
\(^{1088}\) Ibid 14. See also discussion in chapter three at text accompanying fn 518 and 530.  
\(^{1089}\) Ibid 6.  
\(^{1090}\) Ibid 13.
position of non-residential parents. Existing impediments to making family violence visible would be consolidated through the explicit operation of a friendly parent criterion and the punitive disincentives to raising issues related to family violence without evidential support of the kind identified in the ‘real’ violence cases in the sample. This would nullify the impact of the ‘reverse’ rebuttable presumption against equal parental responsibility in cases involving ‘violence, child abuse or entrenched conflict’.\textsuperscript{1091}

A further area where the \textit{Every Picture Report Inquiry}’s recommendations for reform have been adopted by the Government is in relation to amendments to the objects provisions of the \textit{FLA}. The \textit{New Approach Discussion Paper} outlines a plan to amend these provisions to refer to a ‘the right of children to spend time on a regular basis, and communicate on a regular basis, with both parents (and other people significant to their care, welfare and development)’. The paper says the provisions would also refer ‘to the need to protect children from physical or psychological harm’.\textsuperscript{1092} Given the lack of information about the precise wording of this provision, it is not possible to comment on its possible impact.

\textit{C Alternative reform agendas}

The Federal Government proposals outlined in the previous section remain oriented toward improving the position of fathers, further ‘equalising’ parenthood and consolidating the role of non-legal methods in resolving family law disputes.

These measures fall far short of addressing the concerns raised by this and other research about the way that the existing system handles children’s disputes, and indeed, would even exacerbate these problems.

\textsuperscript{1091} Ibid 10.
\textsuperscript{1092} Ibid.
As noted earlier in this chapter, this study provides further support for
the conclusion that the existing framework is jeopardising the healthy
development of children and compromising the safety of their
caregivers.

These problems stem from the mixed messages in the legislative
framework and the way that various system players have responded to
them. There is little indication, for example, that \textit{FLA} s60B(2) has
encouraged more fathers to have greater involvement in caring for their
children. Rather, the research evidence suggests that the children’s
‘rights’ to contact and to know and be cared for by both their parents
have acted as an ‘invitation’ for violent fathers to use the legal system in
their attempts to maintain control of their families. The anti-violence
provisions in the legislation have been ineffective in countering this
tendency, so that in practice the ‘right’ to contact has come to outweigh
the child’s ‘need’ for safety and quality parenting.

The research on the way that this effect has come about raises complex
theoretical questions about the purpose and effect of family law
legislation. In discussing these questions, I return to the two theoretical
themes outlined in chapter one. The first is the dual purpose of the
legislation, which is designed to fulfil both a normative function and a
regulatory purpose. The second is the mixed philosophical basis of the
legislation which contains elements of both a ‘rights’ based approach,
evident in \textit{FLA} s60B(2)(a) and (b), and a ‘functional’ one, evident in the
\textit{FLA} s68F(2) checklist.

The analysis in this study suggests that both the ‘normative’ goals and
the ‘rights’ based elements of the legislation have combined to
compromise its regulatory effectiveness and overwhelm the impact of its
functional provisions in significant ways. This is evident in the empirical
analysis in the way that the Court’s consideration of the ‘best interests’
question has been curtailed in relation to the question of whether contact
with violent and impaired fathers is to the advantage of children. My analysis supports other research indicating that the normative ‘right to contact’ has had such an impact on the attitudes of system players that functional concerns about children’s safety receive little consideration even when the legislation is called upon to fulfil its regulatory purpose. This is symptomatic of the way that discretion is playing a lesser role in family law decision making generally as part of an increased shift toward rule-based regimes for regulating family disputes.

These theoretical issues have significant implications for the possible format of future family law reform proposals. In canvassing such proposals, I assume a policy goal of protecting children from harm and promoting their healthy development. The theoretical issues referred to in the preceding paragraph suggest two alternative reform strategies. The first is aimed at unscrambling the mixed messages in the existing scheme. The second involves changes of a more far-reaching, and less politically attractive, nature. Given that reform in the area of family law raises a range of very complex theoretical and practical issues and as detailed consideration of these is beyond the scope of this project, the following discussion raises these two possible strategies in a fairly brief and general way.

The first alternative would involve three relatively simple amendments to the FLA. The first change would involve expanding the objects provisions in s60B(2) to refer to the child’s ‘right’ to safety. This would be consistent with existing normative philosophy of the legislation and would extend the ‘rights-based’ notions in the scheme. Like the child’s ‘right to contact’, the ‘right to safety’ is recognised in the UNCROC. Article 19 requires all State Parties to take ‘all appropriate legislative,
administrative, social and educational measures’ to protect children from ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parent(s), legal guardians of any other person who has the care of the child’. In elevating the importance of the ‘safety’ message, such an approach may widen the focus of parents, solicitors and counsellors and reinforce the fact that the ‘right to contact’ is not the only dimension of the ‘best interests’ question. In this way, questions about the safety of the child and the quality of the care they receive from their parents may assume greater importance in family law decision making.

Secondly, the definition of violence in the FLA should be widened to encompass non-physical forms of abuse and to recognise the largely gendered nature of family violence. A definition similar to that adopted by Partnerships Against Domestic Violence, referred to in chapter four, would assist in making violence that is part of a control-type pattern more visible.

Thirdly, in order to minimise the use of litigation to perpetuate control tactics, orders made to curtail vexatious claims under FLA s118 in children’s matters should be subject to the child’s best interests. This would make the question of the whether the litigation serves the interests of the child a central concern in decision making in relation to these orders. As the analysis in chapter five showed, litigation over children may expose them to repeated psychological assessments, intensify the level of conflict around them and exacerbate the loyalty conflicts they experience. Litigation also has economic consequences which impinge on children’s interests, since financial resources that would otherwise be used for the benefit of the family may be used in fighting vexatious applications. Further, as some cases in the sample indicated, the

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1095 See text above n 616.
1096 Paxton, above n 625, 7.
strain imposed by the need to respond to repeated applications and
attend for court appearances presents a significant drain on the personal
resources of the children’s primary caregivers. In this context, there is
justification for placing less emphasis on the litigants’ rights and more
emphasis on the interests of those directly affected by the litigation. This
point is particularly pertinent in an environment where the Court is faced
with rising numbers of self-represented litigants and the evidence that
litigation is being used to perpetuate control tactics is mounting. One
commentator has even suggested that:

[t]here is a currently unexplored possibility that, by assisting self-represented
litigants, the Family Court may be unwittingly drawn into assisting an abusive
partner to harass and maintain control over a former wife or de facto partner.1098

As noted in chapter four, the Australian Law Reform Commission
suggested a need for a more robust use of FLA s118 orders before the
Reform Act 1995 was introduced.1099 The need for such an approach has
become even more acute in the post-Reform Act 1995 era.

From a strategic perspective, the approach outlined in the preceding
paragraphs has several advantages. It leaves the basic framework intact.
Rather than focussing on the position of either mothers or fathers, it
further encourages focus on the needs of children. It is politically
expedient in that it promotes a message — children’s safety — that is
difficult to argue with.

But at a theoretical level, this alternative raises some problematic issues.
It persists with a normative legislative model which is dependent on
messages being efficiently radiated and effectively received. However,
as Dewar and Parker observe in Parenting, Planning and Partnership
there is reason to question the assumptions that underlie this model in

1097 See text accompanying footnotes 724 and 730 and 752 and 757.
1098 Paxton, above n 625, 12.
1099 Above n 232.
the wake of the effects that have been shown to have resulted from the implementation of the Reform Act 1995. In the context of a family law ‘complex’, multiple interpretations of what the law ‘says’ exist among different system players. As a result, ‘outcomes are unpredictable and are the effect of multiple causes’.\footnote{1100}

This diffusion of meaning in normative legal frameworks and the consequent lack of predictability in the results it produces suggest the need for a revision of the way legislative policy is expressed to eliminate scope for ‘unintended consequences’\footnote{1101} of the type that have occurred under the Reform Act 1995. These unintended consequences indicate that the content of the ‘best interests’ standard should be defined with greater specificity in the context of a legislative scheme that acknowledges social realities, rather than attempting to ‘set incentives for socially desirable intimate behaviour’.\footnote{1102} As this study has shown, the litigating parents in the sample neither shared the care of their children prior to separation nor behaved in a ‘reasonable, self-denying and conciliatory’\footnote{1103} way afterwards.

In this context, closing the gap between the legislative ideal and the social reality may be a more appropriate aim for legislators. As noted in chapter one, the overwhelming majority of residence orders are made in favour of mothers both by consent and by adjudication. This reflects the fact that the day to day work of parenting remains substantially the preserve of mothers, a point that was reinforced by my analysis of the parenting roles and capacities of the litigating parents in my sample in chapter three. As other commentators have pointed out, the answers to increasing father involvement in families are more complex than making a symbolic statement in a legislative scheme, the primary function of

\footnote{1100}{Above n 100, 89.}
\footnote{1102}{Ellman, above n 93, 701.}
\footnote{1103}{Dewar (1998) above n 94, 483.}
which is to determine what living arrangements are best for children after separation. This point is illustrated by the fact that the ‘right to contact’ has led to an obligation on mothers to facilitate father-child relationships, as the analysis in this thesis has shown, but the law appears powerless to enforce any reciprocal obligation on fathers to exercise contact. As a consequence, contact fatherhood remains a prerogative rather than an obligation, reflecting the law’s lack of power to replace the ‘faded ties of affection’.

In this regard, it is significant that family law reform agendas in the US are reflecting a pragmatic approach that aims for greater certainty in the context of the realisation that the child’s best interests ‘are not an administrable legal standard’. As noted briefly in chapter one The American Law Institute has adopted an ‘approximation standard’ in its Principles of the Law of Family Dissolution. Under this standard, custody determinations are guided by past caretaking patterns with exceptions that include mechanisms to guard against fathers being ‘penalised’ for fulfilling a breadwinner role and to provide protection from family violence. This standard is oriented toward maintaining stability in the child’s living arrangements. It also recognizes ‘gross disparities in parental abilities and the comparative strength of each parent’s emotional connection to the child’. As my analysis in chapter three showed, these are core issues in existing decision making patterns in Australia and are supported by the functionalist provisions in the FLA s68F(2) checklist that require the court to consider the nature of

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1104 The First Three Years Report, above n 72, 2.24-2.6.
1105 Ellman, above n 93, 700.
1107 Above n 46.
1108 The concept of legal custody (ie physical custody and decision making power) is replaced by decision making responsibility’: ALI Principles, ibid: 2.03(3). This is shared when both parents have been exercising parenting functions responsibly: Bartlett, ‘US Custody Law’ above n 44, 17.
1109 Bartlett above n 44, 17.
1110 This factor has been a significant consideration in Australian family law decision making particularly at interim level: Cowling v Cowling (1998) FLC 92-801.
1111 Bartlett, above n 44, 17.
the child’s relationships with each parent,\textsuperscript{1112} the effect any change in circumstances would on the child\textsuperscript{1113} and the capacity of each parent to provide for the child’s needs.\textsuperscript{1114}

The issues raised by the adoption of an ‘approximation standard’ as a desirable law reform goal are complex, particularly in terms of the way such a standard should be expressed and the way it would accommodate diverse family forms.\textsuperscript{1115} More significantly however, the socio-political environment in Australia, as described in chapter one, is far from fertile ground for even a debate about such a proposal. As Rhoades observed in relation to a primary caregiver presumption five years ago, there is ‘dim prospect’\textsuperscript{1116} of any momentum developing for serious consideration of legislative changes that challenge the Federal Government’s established commitment to improving the position of fathers.

D Further research

This study has shed light on the pressures that underlie litigated outcomes under the Reform Act 1995. The findings of the study raise further questions that require investigation, both at an empirical and theoretical level. A key issue raised relates to the relationship between the 4 per cent of litigated outcomes and the 96 per cent of disputes that settle by consent.

At an empirical level, there is a dearth of knowledge about the issues that inform consent-based outcomes in Family Court proceedings. As observed in the Every Picture Report, ‘little is known of the basis for decision making in the majority of cases’ that settle by consent.\textsuperscript{1117}

Other than a skeletal amount of information about how many

\textsuperscript{1112} ss(b).

\textsuperscript{1113} ss(c).

\textsuperscript{1114} ss(e).

\textsuperscript{1115} See eg Boyd, Rhoades and Burns, above n 74.

\textsuperscript{1116} Ibid 250.

\textsuperscript{1117} Every Picture Report, above n 3, 1.23.
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mothers\textsuperscript{1118} and fathers\textsuperscript{1119} get residence under consent orders and the amount of contact ordered\textsuperscript{1120} little concrete information on this topic is available. Yet the majority of children from separated families have their living arrangements determined in this way.

A central concern raised by the findings in this study is that children may be being exposed to contact and even residence arrangements that may jeopardise their healthy emotional development because of the tactical pressures that apply to litigants, particularly mothers, as a result of the way the legislative provisions are applied in the current socio-political environment. A key question for further research is the extent to which similar concerns may arise as a result of non-litigated outcomes.

As noted in chapter four, violence is not an exceptional circumstance among the divorcing population – it can more aptly be seen as a common occurrence.\textsuperscript{1121} The Family Court’s Submission to the Every Picture Inquiry notes that anecdotal accounts from judges, registrars and counsellors indicated that violence was relevant across the full gamut of consent and contested cases:

\begin{quote}
[t]he primary carer parent may also feel intimidated and fearful as a result of an imbalance of power in their relationship, and may agree to shared parenting arrangements in order to try to appease the child’s father or to satisfy legal aid requirements.\textsuperscript{1122}
\end{quote}

Despite recognition at a theoretical level that mediation is inappropriate for cases involving violence because of the resultant power imbalance,\textsuperscript{1123} other Australian research confirms that alternative

\textsuperscript{1118} 78 per cent: FCA Submission Parts B and C, above n 30, 2.3
\textsuperscript{1119} 9 per cent: Ibid.
\textsuperscript{1120} Patterns amounting to between 51 and 108 days were most common: Ibid 2.5.
\textsuperscript{1121} See text accompanying fn 681 and 683.
\textsuperscript{1122} Ibid 35.
dispute resolution mechanisms are often used in such cases.\textsuperscript{1124} The 

*Parenting Planning and Partnership Report* suggests that the dynamics of violence may be taken into account to an even lesser extent in mediation than in litigation. Dewar and Parker argue that the diffusion of understandings about what the legislation requires, and the multiplicity of interpretive sites, indicate that the relationship between primary and secondary dispute resolution may be becoming increasingly tenuous.\textsuperscript{1125} They suggest this means that ‘the mere fact that a judge would weigh violence as a factor is no guarantee that it will carry weight in a mediation conference’.\textsuperscript{1126}

Further empirical research is required to establish the extent to which the safety of women and children is being jeopardised under arrangements made by consent and the implications this may have for children’s development. As Hart observes, there is little knowledge about the role of the relationship between the child victim and the father perpetrator of violence.\textsuperscript{1127} Four issues require investigation. First, what are the characteristics of parties that reach consent agreements and what factors influence their choice of mediation pathways? Secondly, what understandings of the ‘law’ inform consent-based outcomes? Thirdly, how are issues such as violence and parental capacity taken into account in reaching these outcomes? Fourthly, how are children’s interests taken into account in reaching these outcomes?

Research examining these issues has the potential to shed further light on the theoretical question of whether the metaphor of ‘bargaining in the shadow of the law’ is indeed no longer apt.\textsuperscript{1128} Such research would provide a means of comparing litigated and non-litigated outcomes and would therefore enable the relationship between the legislation’s

\textsuperscript{1124} Hunter (1999), above n 215, 71; *The First Three Years Report*, above n 72, 96-7; Kaye, Stubbs and Tolmie, above n 141, 101.
\textsuperscript{1125} *Parenting, Planning and Partnership*, above n 72, 75.
\textsuperscript{1126} Ibid.
\textsuperscript{1127} Hart, above n 144, 189.
\textsuperscript{1128} *Parenting, Planning and Partnership*, above n 72, 75.
normative and regulatory functions to be assessed with greater accuracy. Deeper insight into this issue would assist in testing the assumptions that underlie current legislative policy in relation to the efficacy of frameworks that rely on ‘radiated messages’ to influence the behaviour of disputants. Such insight would assist in refining our theoretical understanding of how law operates and facilitate the development of law reform proposals that avoid ‘unintended consequences’ of the type that have occurred under the Reform Act 1995.
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Appendix 1  Explanation of terms

1 Legal Terms

Parenting order: is an order made by the Court under s65D which determines issues relating to residence, contact, financial provision or any other aspect of parental responsibility. These orders may be made by consent or judicial determination. At times throughout this thesis I refer to consent orders in order to distinguish these from orders that have been made by judicial determination. Orders made by consent or judicial determination remain subject to the best interests principle: s65E.

Residence orders: determine the person or persons with whom a child is to live (s64B(2)(a)).

Contact orders: determine contact arrangements between the child and any other person or persons (s64B(2)(b)).

Specific issues orders: determine any other aspect of parental responsibility (s64B(6)).

Parental Responsibility: s61B provides that this ‘means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. It is automatically vested in each parent (s61C) and is only varied by parenting orders to the extent allowed for in a specific order (s61D).

Interim orders: are made by the Court after an interlocutory hearing and determine matters subject to the application on a temporary basis. Such orders do not not address long-term rights and obligations and are made after a hearing that is limited in duration (usually two hours) on the basis of affidavit evidence that is usually not cross-examined. These are distinct from Final Orders and are made after a contested hearing. They determine the long term rights and obligations of the parties.
2 Terms arising from the empirical analysis

Negative father construct: this term encapsulates the argument that children are better off having a relationship even with fathers who are significantly impaired (for example because of a history of violence or mental health illnesses) than not knowing them at all. As explained in greater depth in chapter three, this argument is based in the psychological theory of identity formation. My descriptive phrase reflects the fact that the fathers are negative figures and that it is a ‘negative’ argument in the sense that is concerned with avoiding potential harm rather than incurring positive benefit.

Friendly parent criterion: this refers to the emphasis placed in psychological and judicial accounts on one parent’s attitude to the other. While it is not a formal legal rule, it is a pervasive and influential consideration throughout many of the files, particularly in relation to mothers’ attitudes to fathers. The criterion favours the parent who is best able to promote the child’s relationship with the other parent.
Appendix 2A: Case overview data collection sheet

Case name (coded):
Children (subject to application, age and month/year of birth):
Others:
Parents:
Year of Birth:
OCCUPATION:
Place of Birth:
Legal Aid:

<table>
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<tr>
<th>Case Stage</th>
<th>Interim Proceedings</th>
<th>Trial</th>
<th>Appeal</th>
<th>Re-hearing</th>
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<tr>
<td>Date</td>
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<td>Judge/registrar</td>
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<td>Legal Reps (m)</td>
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<td>Orders sought (m):</td>
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<td>Provisions relied on: (m):</td>
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<td>Arguments made: (m):</td>
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<td>Orders made: Basis:</td>
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Brief summary; issues and themes.
Appendix 2B: Parents’ Material Data Collection Sheet

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<th>Case:</th>
<th>mother</th>
<th>father</th>
<th>comment</th>
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<tbody>
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<td>(1) Role argument:</td>
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<td>my care is best’</td>
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<td>my role is important:</td>
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<td>Stand back de factos:</td>
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<td>Proxy carers:</td>
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<td>(2) Right argument</td>
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<td>Care</td>
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<td>Biology</td>
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<td>Payment</td>
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<td>(3) Superiority argument</td>
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<td>Mental health issues</td>
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<td>Addiction</td>
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<td>Sexual abuse/ other abuse</td>
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<td>Violence</td>
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<td>Violent and controlling</td>
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<td>Morally dubious</td>
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<td>Manipulates</td>
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<td>Inadequate facilities</td>
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<td>Alienating</td>
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<td>Work commitments</td>
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<td>DHS notification</td>
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<td>Lacks insight</td>
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<td>Uncooperative</td>
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<td>Lacks care skills</td>
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<td>Discipline problems</td>
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## Appendix 2C: Family Report Data Collection Sheet

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### Appendix 2D: Judgment Data Collection Sheet

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Author/s:
KASPIEW, RAE

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