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Journal of Family Studies

ISSN: 1322-9400 (Print) 1839-3543 (Online) Journal homepage: https://www.tandfonline.com/loi/rjfs20

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To cite this article: Amanda Shea Hart & Dale Bagshaw (2008) The idealised post-separation family in Australian family law: A dangerous paradigm in cases of domestic violence, Journal of Family Studies, 14:2-3, 291-309, DOI: 10.5172/jfs.327.14.2-3.291

To link to this article: https://doi.org/10.5172/jfs.327.14.2-3.291

 Journal of Family Studies (2008) **14**: 291–309.

The idealised post-separation family in Australian family law: A dangerous paradigm in cases of domestic violence

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ABSTRACT

This article presents the findings of an in-depth discourse analysis of 20 First Instance unpublished judgments, delivered over a five-and-a-half-year period from one registry of the Family Court of Australia, in contested contact cases where the presence of domestic violence was acknowledged by the Court. A number of dominant themes from the judgments intersected to show how many judicial determinations about children's 'best interests' were underpinned by conservative values that emphasised the importance of the fathers' presence for children's future wellbeing and development. In most of the judgments analysed, the fathers' history of violence was readily excused or ignored, mothers were blamed for failing to support father–child contact, the voices of the children involved were often discounted and a dominant paradigm of the idealised post-separation family took precedence over the special needs of the children. There was little visible consideration of the potential or current effects of domestic violence on the children concerned.

Key words: gender; post-separation parenting; child protection; domestic violence; family law; children's best interests

The research outlined in this paper focused on how the best interests of children who have been exposed to domestic violence are being served in the Family Court of Australia (FCA). It was assumed that through identifying how definitions and understandings of domestic violence are constructed within the family law system it would be possible to understand how notions of parental rights and responsibilities operate (Featherstone & Trinder 1997). In particular, in-

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formation about how Judges construct children's 'best interests' is needed to refine socio-legal thinking and improve processes that influence judicial determinations in cases where children have been exposed to domestic violence.

The FCA deals with significant numbers of parenting disputes of which the highest and increasing percentage are applications for contact (Family Law Council 2002). Family law is not simply law about separation and divorce, as a significant number of families reflect complex interfamilial relationships, including exposure to violence and abuse (Nicholson 2000). However, as no reliable statistics are kept by the Family Court on cases involving domestic violence, such cases remain undifferentiated from parenting disputes where domestic violence is not an issue (Shea Hart 2004). While there has been increasing awareness by the Australian Commonwealth Government of domestic violence as an issue that is frequently raised before courts in family law jurisdictions (Attorney General's Department 2006), it is important to understand and make transparent how domestic violence, and the impact of exposure to domestic violence on children, is understood by the judicial officers and expert witnesses who provide evidence to the Family Court about the best interests of the child.

One of the most controversial aspects of the *Family Law Reform Act 1995* ('Reform Act') was the introduction of the child's right to know and be cared for by both parents and to have direct, regular contact with both parents.[1] Along with the introduction of the first explicit statutory recognition in Australian family law of the relevance of family violence to decision-making about children (Dewar & Parker 1999), a dominant discourse has emerged on the 'rights of the child' to know both parents (Armstrong 2001). This has led to an emphasis on shared parenting, which in turn has fuelled disputes in the area of family law (Collier 1999) and made contesting father–child contact a difficult process (Kaspiew 2007; Raitt 2005).

Separation often occurs because of domestic violence (Sheehan & Smyth 2000). However, within the context of family law violent perpetrators continue to exercise power and control over their ex-partners and children through ongoing litigation over parenting (Jaffe, Lemon & Poisson 2003) and use tactical strategies to manipulate the Court's pro-contact decisions (Kaspiew 2007). Contemporary Australian feminist research provides consistent information to support concerns about the current pro-contact orthodoxy within the Australian family law jurisdiction, which can over-ride the legislative right of the child to safety (Kaye, Stubbs & Tolmie 2003; Rhoades 2000). The 'ambitious normative guideline' (Byas 2003: 1) creates complexity in cases where domestic violence is an issue in reaching determinations that are not detrimental to children's wellbeing (Sheehan & Fehlberg 2000). There can be concerning outcomes for children who are required to spend time with their violent fathers following separation, as this contact creates opportunities for children to be exposed to violence, indirectly or directly (Brown 2002). The safety and psychological needs of these children must be recognised and understood for their best interests to be served (Jaffe et al 2003).

There are consistent international research findings on the short- and long-term adverse effects on children from exposure to domestic violence (Wolfe et al 2003). This can include serious physical, psychological, cognitive, behavioural, developmental, emotional and relational problems affecting the children's life satisfaction, self-esteem and future relationships (Eisikovits & Winstok 2002) and can disrupt the normal tasks of childhood (Wolfe et al 2003). Their problems resemble those of children who have been directly abused by their parents, are similar to the problems of children who have witnessed other traumatic events and are significantly different from

1. Sections 60(B)(a),(b) & 68F(2)(d) Family Law Reform Act 1995 (Cth).

the problems children experience from non-violent homes (Blanchard 1993). Australian and international research shows that children who have been exposed to domestic violence often sustain fear and dread of recurring violence (Sturge & Glasser 2000) and fear the perpetrator's unpredictable management of anger (Mullender et al 2002). Up-to-date research information is highly necessary for decision-making about post-separation parenting arrangements to be made in the best interests of the child. However, despite the emerging knowledge available, the needs of child victims of domestic violence continue to receive less attention than the needs of their abusive parent (Jouriles et al 2002).

There is some evidence that there may be a lack of specialist knowledge held by legal and social science professionals involved in Family Court proceedings in Australia about the full range of violence to which children can be exposed (Family Violence Committee 2003). Traditionally the law has relied heavily on narrow definitions of domestic violence (Walby 1990) which is reflected in Section 60D of the 1995 Reform Act that defined 'family violence' as:

> conduct, whether actual or threatened by a person towards, or towards the property of, a member of a person's family that causes that or any other member or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well being or safety. FCA (1997: 7)

The word 'reasonably' has been added in the 2006 amendments to the Act. All forms of violence need to be explicitly named and understood, along with the central issue of power and control, which can be subtle and hard to detect (Cook & Bessant 1997). This research study therefore used the feminist definition of domestic violence emerging from the National Domestic Violence Summit:

> Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women both in relationship and 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 commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.
>
> (COAG 1997: 1)

It is only through the recognition and naming of all forms of dominance and oppression that attention is drawn to the significance of judicial responses that perpetuate the social entrapment of adult and child victims of domestic violence (Ptacek 1999). Proof of domestic violence must also be seen as evidence of compromised parenting practices (Harne 2004) and must be taken into account and given considerable weight when making an order for a child to spend time with his or her violent parent.

Family Court Judges hold powerful and widely discretionary positions (Dickey 1997) and make coercive determinations that 'impact upon the lives of litigants to an extent not often encountered in the general courts' (Elias 2002: 298). Judges are involved in the shaping and reshaping of what constitutes the needs and interests of children in their post-separation family life. However, how socio-legal discourses shape the construction of the best interests principle has not been widely investigated. Two prior Australian studies by Berns (1991) and Moloney (2002), which used content analysis to examine judicial determinations of parenting disputes before the Family Court, focused on the role of gender in influencing judicial determinations and did not include domestic violence as a criterion for selection of the judgments analysed.

Aim of the research

The aim of this study was to identify how Judges constructed children's best interests following the introduction of the 1995 Reform Act in cases where children had witnessed domestic violence,

by identifying dominant and competing discourses in the Judges written judgments. The analysis identified dominant discourses on childhood, family, parenting and domestic violence, and whose voices were privileged, whose voices were marginalised, and whose voices were silent or marginalised in informing the judicial constructions of the best interests of the child.

From a post-structuralist perspective, it is recognised that it is through powerful official discourses that the law regulates and constructs family relationships. Legal discourses are sated with 'stock stories' that reflect 'scientific truths' and common sense understandings that are presumed to have universal application (Graycar & Morgan 2002). These can influence the values and assumptions Judges make about the lived experiences of litigants, and the best interests of the child subjects of disputes, thus making their decisions subjective (Elias 2002).

Method

Research process

The research study was retrospective and non-intrusive and was undertaken in two stages. The first stage involved a small quantitative analysis of First Instance judgments made pre- and post-Reform Act by Judges in the Adelaide registry of the Family Court. Initially 109 judgments were purposefully selected from all 785 judgments of parenting disputes from 1 January 1991 to 31 December 2001. In all of the cases selected contact was disputed, a final determination had been made by a Judge, both biological parents were parties to proceedings and the presence of domestic violence was acknowledged in the judgment. The quantitative findings have been previously published (Shea Hart 2004) and revealed that, since the introduction of the Reform Act, there has been a significant increase in the numbers of contested contact cases that reached the stage of a judicial determination where domestic violence was an issue. In the majority of selected cases, both prior to and after the introduction of the Reform Act, the analysis showed ongoing patterns of unsustainable consent agreements between the separated parents about contact and orders being made by the Judges for parent–child contact. The judgments revealed the presence of the full range of behaviours which constitute domestic violence and there were also a significant number of cases that included allegations of direct child abuse (60% pre-Reform Act; 73% post-Reform Act). Domestic violence that was acknowledged by the judges was perpetrated mainly by fathers towards mothers (84% pre Reform Act; 79% post Reform Act) and the violence varied in frequency and severity. Violent acts reported in the judgments included physical and verbal aggression, property damage, assault with or without use of weapons, threats to kill, stalking, harassment, and various forms of social control. In a comparatively small number of cases (16% pre Reform Act; 21% post Reform Act) both parents were found to be violent. However, overall the fathers were described as perpetrating the more serious violence.

The second stage of the research applied a feminist poststructuralist framework (Weedon 1987) and Foucauldian approach (Parker 1992; Potter & Wetherell 1989) to a qualitative, in-depth discourse analysis of 20 post-Reform Act judgments from the same Family Court registry. The sample for the qualitative analysis was drawn from the purposefully selected judgments. The study confined itself to judgments in which the judges had acknowledged that at least one act of domestic violence had occurred.

In analysing statements about how the Judges constructed the best interests of the child, the aim was to use a transparent process, free from researcher bias, and one that could be replicated if necessary (Marshall & Rossman 1995). This study required the selection of 'information rich cases for study in depth' (Caulley 1994: 7). The process used to select cases which were relevant to the focus of the research was crucial to the validity of the analysis process and to the testing of developing ideas that emerged from the data

(Maxwell 1992). Stratified random sampling was used to achieve proportional representation in the final sample profile of 20 judgments. This method is often applied in qualitative research to identify variation within the population being studied (Maxwell 1992). The sample was divided according to the year that each judgment was made so that the changing socio-political environment could be taken into account (Marshall & Rossman 1995).The maximum sample number of cases analysed from any one year was five and these were from the years 2000 and 2001 where there were increasing numbers of these cases. The proportional representation more accurately reflected the actual pattern and range of cases that received a final judicial determination in each year and minimised the undue influence of unknown events occurring in any one year. Also there was a proportionate representation of all Judges from the Family Court registry involved. This contributed to the accuracy and representativeness of the findings (Sarantakos 1998). Out of five judicial positions at the Adelaide registry, there were a total of eight judges who presided for periods during the years from which the sample judgments were taken. All but one Judge, who had suffered from a fatal illness, were represented in the sample of judgments selected for analysis. The changing population of Judges contributed to the variation in the number of judgments made by each Judge in the final sample. The 20 judgments that formed the final sample were delivered by three female and four male Judges. The anonymity of the Judges and the clients was ensured by the use of coding. The overall purpose of the study was to identify the dominant knowledge and beliefs that informed normative decision making by Judges as a profession within one registry of the Family Court of Australia, not to analyse the statements made by Judges as individuals.

It is acknowledged that the sample size for the qualitative study was relatively small, but this allowed for in-depth analysis (Sarantakos 1998). The researcher recognised that reaching judicial determinations about children's best interests involved Judges using an interpretative, non-presumptive process that addressed the individuality of each case and the multiple factors that have to be considered under the legislative guidelines (Dickey 1997). The length and richness of the texts provided sufficient content for the researcher to identify repeated statements, which were clear indicators of dominant judicial constructions of the best interests of the child. As the sample analysed was taken from all of the purposefully selected sample of unpublished delivered judgments from one registry over a five-and-a-half-year period (11 June 1996 to 31 December 2001 inclusive), the trustworthiness of the data was enhanced (Fossey et al 2002). The time frame was considered to be sufficient to identify the dominant knowledge, attitudes and beliefs held by Judges when making decisions during this post-Reform Act period.

A systematic approach to data collection, storage and retrieval, which is important in the analysis of texts (Fossey et al. 2002), was assisted through the use of the qualitative software computer package NVivo (Bazeley & Richards 2000). A cyclical process of analysis was undertaken that required a rigorous approach to classifying and analysing the data (Strauss 1987). Because rigorous and prolonged engagement is a central part of post-structuralist research (Heslop 1997), self-reflexive practice was adhered to in order to make the influences on the researcher's perspectives transparent (Shimahara 1990), along with peer review and supervision to enhance the analytic trustworthiness in qualitative research (Caulley 1994).

Data gathered from the repeated statements made in the judgments were organised around coded themes. This involved numerous readings of the entire judgments to identify the dominant judicial discourses (Parker 1992) on childhood, post-separation family life, the gendered construction of parenting and the effects on children of exposure to domestic violence. It was also important to code clusters of statements that

showed the influence of different social actors – social science and legal professionals, mothers, fathers and so forth (Coffey & Atkinson 1996). The relevance of the statements was determined from an inter-contextual perspective (Crichton & Barrett 2005), which involved focusing on units of written texts that were larger than single words or sentences and that were understood as part of the whole text; highlighting the power of language as an influence on social action; placing textual accounts within the context within which they were used and interpreted; and focusing on the analysis of the inter-relationship between the discourse and the context. Through a rigorous process of deconstruction, patterns of regularity and variability emerged to reveal the dominant as well as the competing themes from the discourses contained within the full judgments.

Sample profile

In the 20 judgments analysed there were 33 child subjects of proceedings who ranged in age from 2 to 16 years at the time of the final hearing, the majority of whom were aged between 5 and 11 years. In 18 judgments (90%) Family Report assessments had been conducted, 13 of which had multiple Family Reports. In 16 judgments (80%) a Children's Representative was present at the final hearing. Also in 8 judgments (40%) the Child Protection authorities had been involved.

In 13 of the 20 judgments (65%), face-to-face parent–child contact was ordered and no final orders included supervised contact. Across all cases, judicial statements indicated that the full range of violence acts had occurred, ranging in severity and frequency including: 'poured lighter fluid on the wife and threatened to set it on fire', 'threat to kill', 'ruled the household with an iron fist', 'punching a hole through the door', 'abusive and aggressive while under the influence of alcohol', 'stalked', 'harassed', 'obsessive about the wife and the children mixing with other people', 'broke [wife's] ribs', and 'pulled from the car'. In none of the judgments had the violence occurred only at the point of separation. It was clear that in each judgment the judges acknowledged that the fathers had been the perpetrators of at least one incident of violence, and there were references in most judgments to repeated and ongoing violent acts, some of which were accepted as having occurred and some of which were said to have been 'fabricated' or 'exaggerated' by the mothers. In some instances it was unclear as to which episodes of violence were accepted by the judges as having occurred, as references were made to one party being 'more credible' in 'some instances' in regard to the alleged violence. In 4 judgments (20%) it was stated that the fathers had been convicted of assaulting the mothers. In 3 other judgments (15%) the fathers had been convicted for breaches of domestic violence restraining orders and in 6 judgments (30%) the fathers had been convicted for crimes against others including: 'assault and grievous bodily harm'; 'rape', 'housebreak', 'larceny', and 'criminal contempt'. In 2 judgments (10%) the mothers were seen to be the more violent parent and had been found guilty of assaulting the fathers. In 12 judgments (60%) violence was referred to by the judges as having occurred between both parties but there was no differentiation between retaliatory or defensive and primary forms of violence (Bagshaw & Chung 2000b).

Findings

An analysis of the dominant intersecting discourses highlighted which principles were given most weight by the Judges when determining what was in the best interests of the child. The findings support a concern previously articulated by feminist researchers and academics that, since the introduction of the Reform Act in 1996, the marginalisation of the issue of domestic violence in family law in Australia has placed an imperative on women and children to cooperate with a pro-father contact ideology and has ignored the potential risks for women and child victims of domestic violence post separation (Rhoades, Graycar & Harrison 2000). The findings also strongly suggest that it is crucial for professionals

in the Family Court of Australia to listen to the lived experiences of children who have been exposed to domestic violence, and to individualise and differentiate their needs from those of children who have not been exposed to violence.

A. Gendered roles

Traditional gendered roles and responsibilities

In the judgments analysed, dominant gendered discourses that privileged the roles and relationships of a normative, heterosexual, two-parent 'traditional' family were central to the constructions of the best interests of the child. This finding contravenes the principle of 'gender neutrality' which underpins the *Family Law Act 1975* (Cth) and the FCA's ongoing efforts to present a 'neutral' position in relation to mothering and fathering (Moloney 2002). An expectation of parental compliance with traditional gendered roles shaped the judicial definitions of what was acceptable and unacceptable parenting. In every judgment analysed, the fathers had, on at least one occasion, perpetrated violence against the mothers and the vast majority of violent 'incidents' that were alleged, admitted and found to have occurred were perpetrated by the fathers.

Role of mothers

In 15 of the 20 judgments (75%), Judges' statements implied that they were critical of mothers' departures from a normative, gendered expectation that they should be compliant, self-sacrificing, loyal and responsible for family relationships (Berns 1991). A powerful dominant discourse, which categorised 'alienating' mothers as 'implacably hostile', was consistently evident in the judicial statements whenever mothers were perceived to have failed in their caretaking role by not supporting and facilitating ongoing father–child contact. In 7 of these judgments (46.6%), the Judges acknowledged that serious violence by the fathers toward the mothers had occurred.

One major concern repeatedly expressed by the Judges related to their perception that resident mothers misused their power over the non-resident fathers. Mothers were portrayed as victimising the fathers. Strong emotive statements were used to indicate their disapproval of the mothers' 'punishing' attitudes. For example, one mother was described as having 'poisoned the child's mind against his father', another was described as 'relentlessly undermining' and others were described as 'hostile', 'self-interested' and as 'destroying' the father–child relationship. Mothers' legitimate concerns about the potential influence of violence on their children appeared to be discounted in the majority of cases. However, in three judgments where contact was not ordered, the Judges did acknowledge that the children's exposure to their fathers' violence had caused 'depression, fear and anxiety' and had adversely affected the mothers' parenting capacity. Despite these acknowledgments, in these same judgments qualifying statements downplayed the legitimacy of the mothers' fears for their children's safety. For example, one mother was described as having 'genuine albeit enlarged fears' about the father–child contact. The inappropriate use of power and control by violent fathers through repeated litigation (Jaffe et al 2003) was referred to in only one case – in this judgment the Judge stated that the father had a mental health problem and encouraged that father not to engage in 'more litigation to involve the family'. The possibility that fathers may be falsely denying that they were continuing to be violent, or were minimising reports of their violent behaviours, which violent men are prone to do (Bagshaw & Chung 2000a; 2000b), did not emerge as a dominant theme.

In the majority of the judgments analysed there was a strong and consistent judicial focus on the attitudes and behaviours of the mothers towards the fathers; the parenting capacities of violent fathers and the special needs of the child victims of domestic violence were marginalised or ignored. Overall, the dominant judicial narratives supported an ideology of cooperative, ongoing, shared parenting. This finding supports the views

of others who are concerned about how entrenched the construct of 'alienating mothers' is in the family law field in Australia and the United Kingdom, and how powerful this is in influencing case law and the beliefs of social science and legal professionals (Fletcher, Fairbairn & Pascoe 2004; Smart & Neale 1997). Mothers were expected to maintain the caring and emotional ties between fathers and children, while at the same time ensuring the protection of their children. These competing demands placed those mothers who were victims of domestic violence, and who were concerned about risks to their children from contact with their violent fathers, in a 'Catch 22' situation. Repeated statements in the judgments revealed that a failure to adhere to both of these imperatives rendered the mothers victims of domestic violence as 'incompetent' parents. Their 'no win' situation can be illustrated by critical statements made in 4 judgments (20%) about mothers who had co-operated and entered into 'consent' agreements in relation to father–child contact that were deemed by Judges not to be in the best interests of the children. These mothers were cast as not fulfilling the 'responsibilities of parenthood' and having a 'poor history' in protecting their children as they had 'full awareness' of the violent behaviour of the fathers. The statements were based on an assumption that the mothers had freely entered into the agreements, despite the Judges having knowledge of the fathers' abusive and controlling behaviour and the research findings that show how perpetrator threats, fear and the power of the dominant ideology of the post-separation family can pressure mothers into agreeing to their children's contact with violent fathers (Kaye et al 2003).

Role of fathers

In relation to fathers, the influence of powerful social norms was demonstrated in Judges' statements that down-played the issue of father violence and its impact on the children and emphasised fathers as being essential to their children's post-separation wellbeing. This was in spite of research evidence to suggest that some children are better off when they have no contact with their violent fathers and that abusive fathers can use the issue of child contact to continue their harassment of the mother after separation and divorce (Bagshaw, 2007; Bagshaw & Chung 2001; Bagshaw, Quinn & Schmidt 2006; Dewar & Parker 1999; Harne 2002; Rhoades et al 2001). Research on violent fathers in the United Kingdom has also illustrated how commonly accepted constructions of fathering can deny or ignore the significant problems identified in the fathering practices of violent men (Harne 2002).

In all of the 20 judgments analysed, the Judges expressed concerns about the effects of the absence of the fathers on their children's lives. A 'protectionist' discourse, used by the psychologists and psychiatrists who informed the Judges, was evident in judicial statements about 'risk' or 'long-term harm' to children from the loss of their fathers, loss of fathers' 'input into children's development', or from children being 'deprived of' contact with their father'.

The fundamental themes emphasised repeatedly in judicial statements in the majority of cases were not the emotional, physical and psychological safety of the children, nor the children's wishes for no contact with their fathers, but instead focused on fathers as being deserving parents, and mothers as having the responsibility to overcome their 'hostility' or 'resistance' and to 'facilitate' and 'co-operate' to enable the children's 'rights' to father–child contact. In 7 judgments (35%) Judges expressed sympathy for fathers' 'disadvantaged', 'regrettable' or 'tragic' situations and for the 'much sorrow' and 'hurt' caused by the mothers who were described as powerful in achieving 'unjust' and 'unfair outcomes' for violent fathers who had lost contact with their children. This finding supports the concerns of other researchers that the needs and interests of non-resident parents, usually fathers, have been prioritised over the rights and welfare of children in family law cases in Australia (Altobelli 2000).

In 15 of the 20 judgments (75%) analysed,

common statements referred to fathers as having a 'rational attitude', 'stoicism', 'insight' and 'capacity to change'. These qualities are commonly linked to stereotypical, gendered presumptions about men (Berns 1991). There was scant reference to or information about fathers' parenting skills or their capacity to parent. Significantly, nothing was said about what responsibilities fathers would or should undertake for their violent behavior and for protecting, or meeting the special needs of their child victims of violence. The analysis of gendered statements about masculinity and fatherhood revealed that in 13 of the judgments (65%), violent husbands were described as 'loving' fathers. In 12 of these judgments (60%) the binary construct of loving-father/violent-husband was consistently repeated. This demonstrates how a reliance on generalised normative, gendered assumptions can marginalise or ignore the considerable research evidence of the negative effects of witnessing domestic violence, and other forms of child abuse, on children (Laing 2000).

There were competing discourses in 5 of the judgments (25%) where fathers failed to demonstrate stereotypical male qualities and were described as displaying 'no insight', lacking in rationality, displaying 'emotion and intensity' and as taking 'no responsibility' for their behaviour. These fathers attracted strong judicial disapproval and in four cases did not succeed in obtaining a final order for contact. These 'undeserving' fathers were described as having unacceptable 'attitudes' to the 'responsibilities of parenting'. It is important to note that in these cases, denial of father–child contact did not appear to be solely related to the severity of the perpetrated violence, but instead was related to the fathers' departure from a gendered male stereotype and their lack of moral intent, or their inability to change their violent 'irresponsible' behaviours due to mental illness. In two cases of serious violence, the fathers' offending history included a range of physical assaults, property damage and threats to kill, but contact was ordered. Statements displaying little knowledge of the research on violent men (Bagshaw & Chung 2000a; 2000b) were made about these fathers having 'insight' by having come 'to the realisation that it was his fault' and having 'modified' behaviours.

B. Children's incompetence

In the broader society, the concept of childhood and the patterns of control over children are changing (Trinder 1997). However, the dominant judicial discourses identified in this study suggested that the Judges were slow to move away from patriarchal conceptions of children. At some stage, in all of the 20 judgments, there was reliance on questionable and outmoded psychological theories of child development that constructed the children and adolescents as 'developing beings' in need of adult management. This categorised and positioned children at the lowest level of influence in the Judges' determinations of what constituted the children's best interests. Children and adolescents were variously labeled as 'immature', 'incompetent', 'unreliable' beings, who were vulnerable to the deliberate coercion of their 'hostile' mothers to 'reject' their fathers. Repeated statements normalised and generalised children's need for an ongoing relationship with both parents and rendered children to a powerless status in separated families.

Children's wishes were clearly reported to the Court by Child Representatives and by social science professionals. Whenever children stated that they would spend time with the parent who had been violent, this was accepted by the Judges. There was no evidence that questions had been asked about why a child wanted or agreed to be in the company of his or her violent parent or whether it would be in the child's best interests to do so (Jaffe et al 2003). Where children's stated wishes were in competition with their fathers' needs, the former would often lose. Children who opposed contact with their parent were constructed as being incompetent to know what was in their own best interests, even in their adolescence. Their own accounts of compromised par-

ent–child relationships in the violent families were often discounted. However, in 8 judgments (40%) at the stage of final hearing, acceptance or qualified acceptance was given by the judges to the wishes of the child. This occurred only after the children (including those who were described as 'stubborn' or as being 'steadfast' in their 'refusal' to cooperate with imposed father–child contact) were required by the Court to be involved in a number of interventions including counselling, supervised contact and repeated assessments that involved face-to-face interaction with their violent fathers. The failure to listen to the voices of the children concerned at the early stages of proceedings, and the imposition of these processes, could be seen as contravening children's rights and best interests. One exception was found in the one judgment where the child psychiatrist had investigated the children's exposure to domestic violence, linked their problems to this exposure and made a strong argument to the Court to accept the children's wishes for no contact. This argument was supported by a diagnosis of the father as having a psychiatric 'syndrome', which the Judge accepted.

In 5 of the 8 judgments (62.5%) where children's wishes for no contact were accepted, their wishes were only accepted after the social science 'experts' acknowledged the deterioration of the children's wellbeing from repeated attempts by the Court to successfully impose father–child contact orders. Following this acknowledgement, competing discourses emerged. Psychologists, psychiatrists or social workers provided evidence for their changed professional perspectives (or in one case, for having different opinions to the professionals who had conducted prior assessments) and described the children as being 'quite mature', and having 'unchanged' 'reliable' wishes for no contact. Where these professionals succeeded in redefining the children as competent to make a decision, and where children's stated wishes for no contact with their violent fathers had been accepted, a marked improvement in the children's overall wellbeing was noted in the final judgments. Statements included the children: having 'peace of mind', 'improved social/emotional and behavioural functioning', 'achieving well academically', being 'considerably happier' and 'much less anxious, 'no longer requiring medication', and having made 'progression to a normal state'. This demonstrated how important it is for family law professionals to move beyond the embedded practice of perceiving children to be incompetent in relation to their needs and wishes, which can result in children being 'seen and not heard' in family law, particularly where children have been exposed to domestic violence.

C. Children's exposure to violence

Links between children's problems and exposure to violence

The children in the judgments analysed presented with a wide range of non-age related social, emotional, learning and behavioural problems including: being 'violent', 'confused', 'wished to die', 'anti-social', 'problems sleeping', 'impulsive moods', 'emotionally fragile', 'learning difficulties', 'problems soiling' and 'hitting, teasing and showing no remorse' etc. Some described symptoms of 'increased arousal', 'irritability', 'difficulty concentrating', 'disorganised or withdrawn behavior', 'internalising emotions', 'anger outbursts' and 'resistance', which are consistent with criteria for the trauma-related condition of Post Traumatic Stress Disorder (PTSD) (Jaffe et al 2003). Recognition that these behaviours may have been symptoms of PTSD would have alerted Judges and other professionals to the possibility that witnessing parental violence and/or spending time with a violent father may pose further risks to the children concerned. However, the possible links with PTSD were not mentioned in any of the judgments analysed. In all but one case, the aetiology of children's problems was not consistently or clearly linked by social scientists to their exposure to domestic violence, despite an acknowledgement by the Court in 9 out of the 20 judgments (45%) that the children, on at least

one occasion, had been 'present' at or had 'witnessed' a 'violent' event. In 7 of these judgments (78%) the children were found to have been exposed to violence perpetrated by their fathers. In one judgment the child was found to have witnessed the mother's violence and in another judgment it was found that the child had witnessed both the mother's and stepfather's violence towards the father. In 3 judgments (15%) the judges stated uncertainty about whether or not the children had witnessed particular acts of violence that were accepted by the Judges as having occurred.

In the judgments where it was acknowledged by the Judge that the child was a 'witness to violence' a statement about the negative reactions of the child was usually present, such as the child experiencing 'upset' or 'fear'. However, the reported effects of this exposure to violence failed to reflect an understanding of the complex dynamics of domestic violence (Bagshaw & Chung 2000b). Domestic violence was often referred to in limited ways that relied on recording objective facts and was often described by Judges as isolated 'incidents' that occurred in the past. There was little evidence of an understanding of the recent research on children who witness domestic violence (Laing 2000). The adverse effects on the children were predominately described as 'intermittent' stress responses or 'fear' that occurred at the time of 'the incident', or the child was perceived to be immature and therefore as having only limited 'recall' of the violence.

In 17 judgments (85%) there were allegations or descriptions of child abuse and in 8 cases (40%) the Child Protection authorities had been involved. However, no findings were made by the Judges that either parent had abused the child. Domestic violence and child abuse were commonly referred to as separate issues, and there appeared to be a poor understanding of the findings of contemporary research that have shown high rates of co-occurrence of domestic violence and child abuse (Edleson 2002).

The possible enduring and serious adverse effects on children from exposure to violence were largely overlooked, with one notable exception where the Judge made the connection between the child's behavioral and emotional difficulties and exposure to domestic violence. In this case, the mother was perceived to be the more violent parent and had departed from the traditional gendered nurturing role. The 'detrimental effect' that the mother's 'unacceptable' violence had on the child's deteriorating behaviour was repeatedly commented on by the Judge, reinforcing research which suggests that men's violence tends to be downplayed and women's violence exaggerated (Bagshaw & Chung 2000b).

Counter stories used to explain children's problems

Within legal systems 'stock stories' that reflect embedded 'truths' are supported by 'counter stories' to socially construct stereotypes that reinforce the positioning of the disadvantaged (Graycar & Morgan 2002). In the judgments analysed, the 'stock story' on the essential need for developing children to have ongoing relationships with both parents, especially with their fathers, following family dissolution interplayed with a range of 'counter stories' that came to the fore and redefined children's victimisation. These created barriers to linking the problem behaviours of the children and their wishes for no contact with their violent fathers to the issue of children's exposure to domestic violence in the considerations of their best interests. Alternative explanations for the children's problems that either normalised their behaviour or problematised the children were often provided by 'expert' social scientists and accepted by the judges.

Normalisation of children's exposure to violence

When examining repeated statements in the judgments about children's right to protection and children's right to participate in decisions that affect them, a hierarchical system of inclusion and exclusion (Henriques et al 1998) was

apparent, with children placed in the least powerful position. Judges privileged the opinions of professionals (primarily psychologists and some psychiatrists and social workers), who supported dominant beliefs about children's incompetence, relied on generalised knowledge about children's adjustment to family breakdown and supported the politically sanctioned concept of the importance of children's ongoing relationships with both parents (Jaffe et al 2003). Numerous references were made by judges and social science professionals to the concept of childhood 'resilience', which supported expectations that the children would be able to 'cope' or learn to 'deal with' the 'ramifications' of time spent with their violent fathers, or in one judgment with the violent mother. Social science professionals predominantly failed to draw the Judges' attention to the risks of exposing children to domestic violence. The Judges appeared to rely on 'common sense' knowledge, based on culturally accepted norms, and did not mention any requirement for specialist assessments of the children to be made.

The failure to focus on the effects of exposure to domestic violence on children in the determination of children's 'best interests' created a culture wherein Judges could avoid having to make ethical and moral judgments (Hansen 2004).and reinforced the dominant, untested belief that father absence was the dominant factor contributing to poor adjustment of children, rather than their exposure to parental violence.

Renaming 'violence' as 'conflict'

In the judgments analysed, violence was often reconstructed and relabelled as conflict. This reconstruction was present in 14 judgments (70%), including 8 of the judgments where statements were also made that acknowledged an adverse effect on the children from exposure to violence. In these judgments the children were described as being 'vulnerable' to alienating parental influences, in particular to their 'over-reactive' mothers, 'affecting the memories' and the development of the children, and as having their 'emotional welfare' placed at risk from exposure to conflict that resulted in the disruption of the potential for a 'caring', 'positive', 'loving' father–child relationship.

The dynamics associated with domestic violence were either not understood or were overlooked, and therefore the requirement for perpetrators to take responsibility for their violence was often not addressed. In spite of the Judges being aware that violence had been present in each case, they primarily focused on the right to contact principle and the resolution of interparental conflict in the name of children's best interests. This revealed a narrow and distorted conceptualisation of the nature of domestic violence and its effects on children and highlighted the dominance of the ideal of ongoing shared cooperative parenting.

There was scant evidence referred to in the judgments about provision of information by expert psychologists, psychiatrists and social workers about the effects of exposure to domestic violence on each child, the risks and the protective factors and how individual children were coping with these effects. There was only one judgment where it appeared that a specialised assessment had been made of the effects of children's exposure to violence. Very clear statements were made by the psychologist and psychiatrist in this case that the children had 'genuine fear' and ongoing 'memories from the past' of the father's 'violence' and that their exposure to the father's violence had caused ongoing, serious adverse effects. Numerous references to the opinions of these two experts were made by the Judge in this case and these finally overrode a competing description of parental conflict provided by another psychologist. This case demonstrated that expert information is essential to inform Judges' understanding of the safety needs and risks to a child's wellbeing, and each child's individualised response to violence (Mullender et al 2002).

Prior research has identified similar practice oversights in Australian family law, in particular where comprehensive, appropriate screening for

domestic violence has been absent or has failed at various stages of proceedings before the Family Court (Kaye et al 2003). As Graycar and Morgan (2002: 40) stated 'naming a problem accurately assists in its resolution'. In the judgments analysed, the failure to focus on the effects of children's exposure to domestic violence and to distinguish interparental conflict from the systematic, intentional, coercive nature of domestic violence, meant that the children's lived experiences of violence were not effectively acknowledged or dealt with in the judicial determinations. The failure of Judges to enact the legislative provision to call for additional evidence, or to seek information directly from the child (Australian Law Reform Commission & Human Rights and Equal Opportunity Commission 1996) about their lived experiences of domestic violence, also suggested that the decision-making process acted as an instrument of social regulation that reflected a politicised agenda within the Australian family law jurisdiction.

Stigmatisation of child victims of violence

Social and institutional structures that are dominated by patriarchal attitudes and beliefs can 'stigmatise and pathologise those who have been victimised' by domestic violence, usually women and children (Laing 2000: 22). This was evident in 9 judgments (45%) where the Judges' used problematising discourses in relation to children who resisted contact with their violent fathers, assuming that all children wanted and needed a father presence. Psychological discourses categorised these non-compliant children as incompetent, problematic beings. Emotive statements described them as displaying 'bad behavior' and as 'troublesome', 'hostile', 'petulant', 'self-centered', or 'disrespectful', signifying the Judges' disapproval of their resistance.

Descriptions in the judgments of the children's conflicting emotions, behavioural problems and resistance to father–child contact were decontextualised and they and their mothers were described as alienating the fathers, reflecting the questionable assumptions underpinning the discredited Parental Alienation Syndrome. Children who resisted contact with a violent parent were described as having 'unreasonable' negative feelings and responses towards that parent (Jaffe et al 2003), demonstrating an ignorance of research that indicates that children exposed to violence can have strong reactions to a non-resident, violent parent and their responses may not have been disproportionate to their actual lived experiences (Johnston 2004).

In 5 judgments (25%) children were described as having a pathological 'condition' – for example, as being mentally unwell, emotionally fragile, psychologically vulnerable, or as having an 'adjustment' problem. These labels constructed these children as being in need of individual treatment for their 'condition', including medication and therapy, but masked the social factors that contributed to or caused their symptoms or problem behaviours. Children who resisted contact with a violent parent (usually fathers) were labelled as 'difficult' or 'disturbed'. However, the judgments failed to indicate that an adequate assessment of each child's behaviour had been made in the context of parental violence, wherein their behaviours may have been recognised as appropriate, or even positive, given the trauma that they may have experienced (Jaffe et al 2003). The imposition of interventions to correct the behaviors of these children involved disempowerment and 'coercion … of the errant child' (Johnston 2004: 228), masked their lived experiences and needs and reflected a dominant patriarchal belief about children's 'proper' subject position within an idealised post-separation family.

Discussion and conclusions

In the 20 judgments analyzed for this study, an uncritical reliance on the object and principles of the Australian *Family Law Reform Act 1995* (Cth) legislation of ongoing, cooperative parenting and the right of the child to contact with both parents, formed a strong foundation for judicial

determinations of children's best interests. The repeated judicial statements, which revealed dominant discourses on the 'best interests' of the child, reflected patriarchal values and traditional notions of family. Dominant and repeated statements reflected an assumption that fathers' presence was required for children's future wellbeing and development, in spite of evidence that the fathers had been violent toward the other parent and that some children repeatedly stated that they did not want contact with them.

This study has demonstrated the use of judicial discretionary power to privilege the traditional patriarchal concept of family and the right of violent fathers to contact with their children, over the special needs of children who were exposed to domestic violence. The primary focus of the application of the children's 'best interests' principle was on reinstating the role of the fathers in the lives of their children and achieving the cooperation of the mothers, in spite of there being a history of domestic violence. The idealised notion of 'loving' father–child, post-separation relationships through 'reformulated relationships of domination' (Williams 1998: 92) overshadowed concerns about the risks related to children's exposure to domestic violence, blamed mothers for failing to support father–child contact and downplayed the fathers' history of violent behaviors.

In Australian family law a heavy reliance on the orthodoxy of an idealised post-separation family, constructed by politics, social welfare and the state, has created an illusion that all children's needs are met under this paradigm. The findings from this study show that in one Family Court registry, Judges' attempts to work within this paradigm, in the children's best interests, potentially compromised the wellbeing of the children involved. This was demonstrated by reports of the deterioration in some children's wellbeing following attempts by the Court to reinstate or increase their contact with their violent fathers. The consistent pattern of children's improved wellbeing following the cessation of contact with their violent fathers revealed that compliance with the dominant paradigm was not in those children's best interests.

Moving forward: Centralising the issue of children's exposure to domestic violence in family law matters

The extent and seriousness of domestic violence is not abating in Australia (Troeth 2000) and cases involving domestic violence are core business of the Family Court of Australia (Brown et al 1998, Moloney et al 2007). As this study has demonstrated, the FCA needs active encouragement and support to address the problem of children's exposure to domestic violence. Dominant discourses identified in this study readily excused fathers for their violent behaviours, blamed mothers for their departure from normative gendered role expectations and marginalised the voices of children and the special needs of child victims of violence. It is essential for Judges, and the professionals who inform them about children's best interests, to move beyond an agenda that is circumscribed by dominant patriarchal beliefs about an idealised reconstituted family and to learn from the findings of contemporary research.

The findings of this study have important implications for the legislative reforms that were introduced in Australian family law under the more recent *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), where there is a more distinct focus on supporting the ongoing and shared parenting roles of both parents. Within this legislation there are two competing primary principles – the importance of the child having meaningful relationships with both parents and at the same time being protected from abuse or family violence.[2] These competing principles are similar to those in the 1995 Reform Act legislation that specified a child's right to

2. S60CC(2) *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

have direct, regular contact with both parents[3] and the right to be protected from harm.[4] As this research has demonstrated, the child's right to safety did not compete well with the principle of ongoing cooperative parenting in one Family Court registry. This finding has more recently been supported by Kaspiew's (2007) research in the Melbourne registries of the FCA that identified the litigation strategies adopted in Family Court proceedings in cases where violence is an issue and the prevailing pro-father contact ideology within the Court, even is cases of severe violence. Therefore, substantial steps urgently need to be taken to ensure that the safety of children is prioritised.

The 2006 legislative reform does include a number of provisions to ensure protection for children and adults in cases involving family violence, and the presumption of shared responsibility and children spending substantial time with both parents does not apply in such cases (Attorney-General's Department 2006). However, the findings of this research, and other recent research (see Moloney et al 2007) show how trivialising violence by redefining it as conflict and the dominant ideology of shared parenting can influence constructions of children's best interests. Significant steps need to be taken to educate the legal and social science professionals involved in decision making processes about children's best interests in cases where domestic violence is an issue. The misuse of power displayed by the continuing harassment of mothers and children by violent fathers during and after separation, and the high rates of ongoing litigation over parenting disputes, can continue to place adult and child victims at further risk (Jaffe et al 2003).

In order to improve court practices in cases of domestic violence, normative assumptions about all children needing to spend time with their fathers must be challenged. Dominant 'truths' about children and their needs and interests ignore contemporary research findings, inappropriately regulate the subjectivities and rights of children, and misconstrue their needs in cases where domestic violence is an issue. Entrenched constructions of mothers as inappropriately exercising power to alienate fathers and of violent fathers as being 'loving' and 'responsible' parents mask the issue of domestic violence and its potentially serious adverse effect on children's well-being. It is essential to challenge these discourses and expand the research knowledge base that informs Judges and other experts in the Court by introducing continuing education based on sound research in the area of domestic violence and its effects on children as a requirement for all family law professionals. Alternative understandings to the accepted authoritative knowledge may then gain acceptance (Danaher, Schirato & Webb 2000) and new official discourses may emerge and influence the law's regulation of the post-separation parenting arrangements that impact on the lives of children who have been exposed to domestic violence.

Within a highly discretionary Court, where there is a history of patriarchal ideology, it is questionable that under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) the child's right to safety will ever compete successfully with the powerful legislative principle of equal shared parental responsibility[5] and the benefit to the child of having a meaningful relationship with both parents.[6] To create an imperative for prioritising the child's right to safety, legislative change is required that adopts a rebuttable presumption of no contact between the perpetrator and the child in all cases where domestic violence is alleged (Jaffe et al 2003). The aim of such legislative change is to specifically bring any risk factors to the fore before any order is made for a child to spend time with the alleged perpe-

3. S68F(2)(d) *Family Law Reform Act 1995* (Cth). 4. S68F(2)(g)(i),(ii); and (j) *Family Law Reform Act 1995* (Cth).
5. S61DA *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
6. S60CC(2) *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

trator of domestic violence (Jaffe et al 2003). Other countries including New Zealand, Ireland and some states in the United States of America have taken this important step (Jaffe et al 2003).

There is also a need for early identification and differentiated, specialist case management within the FCA that includes a range of strategies for managing cases involving domestic violence (Dewar 2002). The aim of a streamlined case management process is to address the complexities of domestic violence and parenting disputes in a holistic way (Jaffe et al 2003). Case management needs to include a focus on the potential co-occurrence of domestic violence and child abuse, as there are significant numbers of such cases in the jurisdiction of family law in Australia (Brown 2003). As part of an early intervention strategy, comprehensive assessments of family violence and the evaluation of risks to the children are essential (Jaffe et al 2003). The courts should closely examine how the child has coped with exposure to violence in each individual case, and how any child's wish for contact with a violent parent can be reconciled with a decision that is in the child's best interests (Jaffe et al 2003). In-depth assessments conducted by social science professionals with specialist assessment skills in this area should be required in each case.

Another essential step is for the Court to empower child 'victims' of domestic violence who, as child 'subjects' of court proceedings, are often cast as 'problem' or 'incompetent' beings. Opportunities need to be created for children to improve their status within the court system, to participate in litigation or pre-litigation processes and contribute to decisions that are made in their own best interests. Only then can children be seen as citizens with the same right to be heard and defended as any other citizen. This is important in making the concerns, needs, interests and rights of children visible (Roche 1999), particularly in cases where children have been exposed to domestic violence, and judicial decisions need to be made that truly reflect each individual child's best interests.

The new child-focused approach that is currently being introduced into the FCA will provide an important window of opportunity for the concerns raised in this paper to be addressed. We acknowledge the growing realisation by Family Court professionals of the value of a child-focused process. As an outcome of a successful pilot of the Children's Cases Program, the FCA is gradually moving from a traditional common law approach to one that is more inquisitorial, closer to the European civil law system (Harrison 2007). The control of contested children's cases is now in the hands of the Judges, assisted by the Court's social science Family Consultants. Together with appropriate continuing professional education, this new case management approach will provide an opportunity for Family Court Judges to require timely, specialised assessments to identify and prioritise the special needs of children who have been exposed to domestic violence.

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