



# FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

EDITION 4  
DECEMBER 2016



FAMILY COURT OF AUSTRALIA



FEDERAL CIRCUIT COURT OF AUSTRALIA

ISBN: 978-1-920866-02-0

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**EDITION 4 – DECEMBER 2016**

(edition 3.2 revised in December 2016 to include vulnerable witnesses content)

First published – March 2009

Revised – July 2011; October 2012; April 2013; December 2015

## FOREWORD – FOURTH EDITION

### FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

It is with great pleasure that we release the fourth edition of the *Family Violence Best Practice Principles*.

Protecting families, and particularly children, who are affected by family law proceedings from the effects of family violence is a priority for the Family Court and the Federal Circuit Court.

The revised *Family Violence Best Practice Principles* assists in this critically important task by providing a checklist of matters to which judges, court staff, legal professionals and litigants may wish to refer at each stage of the case management process in disputes involving children.

This publication was first released by the Attorney-General in March 2009. A revised version, encompassing both the Family Court and the Federal Circuit Court, was launched in July 2011. A third edition came into effect in June 2012 to take into account amendments made by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). It was again revised in April 2013 as a result of the Federal Circuit Court of Australia Legislation Amendment Bill 2012.

The latest amendments highlight the fact that victims of family violence are often traumatised and vulnerable witnesses – and explain the various means of protection available to judges hearing those cases. The updates reflect the extensive powers of the judiciary in regard to the cross-examination of vulnerable witnesses by alleged perpetrators of family violence.

These updates follow a number of reports and events related to family violence, including: the Family Law Council's final report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*; Women's Legal Services Australia's *Safety First in Family Law*; COAG's *Third National Plan to Reduce Violence Against Women and Their Children* and the COAG National Summit on Reducing Violence against Women and their Children, held in Brisbane in October 2016.

The courts are committed to improving the way in which they deal with issues relating to family violence. The enhanced focus on cross-examination of vulnerable witnesses is an important improvement in this area. We thank the Family Violence Committee for their ongoing commitment to these best practice principles.

We hope you find the revised *Family Violence Best Practice Principles* a practical and useful guide to responding to family violence or abuse when it arises in children's cases.

December 2016



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## BEST PRACTICE PRINCIPLES FOR USE IN PARENTING DISPUTES WHEN FAMILY VIOLENCE OR ABUSE IS ALLEGED

### *Introduction*

These Best Practice Principles are designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise.

After significant changes were made to the *Family Law Act 1975* (Cth) in 2006, the Family Court introduced a suite of Best Practice Principles<sup>2</sup> to assist decision makers. It was later recognised that the Best Practice Principles could be a valuable tool for all individuals and agencies involved in these cases. The notion that the Best Practice Principles could assist a wider audience was informed by a series of reports<sup>3</sup> in which recommendations were made about how courts exercising jurisdiction under the FLA and others should address issues of family violence and abuse.

### *Statement of principle*

These Best Practice Principles have been developed by the Family Court of Australia and the Federal Circuit Court of Australia. They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the place accorded to the issue of family violence in the FLA, and
- the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.

The Best Practice Principles are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the FLA<sup>4</sup>. They provide useful background information for decision makers, legal practitioners and individuals involved in these cases.

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1 The words "Family Law Act 1975 (Cth)" will be abbreviated to "FLA".

2 First edition published by the Family Court of Australia on 6 March 2009; second edition published by the Family Court and Federal Circuit Court on 20 July 2011, third edition published October 2012.

3 Professor Richard Chisholm, "Family Courts Violence Review" (27 November 2009); ALRC/NSWLRC Consultation paper, "Family Violence: Improving Legal Frameworks" (November 2009); Australian Institute of Family Studies, "Evaluation of the 2006 Family Law Reforms" (December 2009); Family Law Council, "An Advice on the Intersection of Family Violence and Family Law Issues" (December 2009); Jennifer McIntosh, Bruce Smyth, Margaret Kellaher, Yvonne Wells & Caroline Long, "Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children" (May 2010); Dr Lesley Laing, "No Way To Live" (June 2010).

4 Where we refer to courts we mean the Family Court of Australia and Federal Circuit Court of Australia.



The Best Practice Principles are a voluntary source of assistance to judicial officers and legal practitioners and are not a fetter to a court's discretion (*Cameron & Walker* (2010) FLC 93-445). These Best Practice Principles are not a substitute for evidence in individual cases.

Ensuring the safety of a child is central to all determinations of what is in a child's best interests.

The courts aim to protect children and family members from all forms of harm resulting from family violence and abuse.

All persons attending courts exercising family law jurisdiction are entitled to be safe and the courts will take all appropriate steps to ensure the safety of their users. This includes the creation of an individually tailored safety plan where appropriate.

A safety plan is a document that can be varied at any time and which includes a variety of options available to a person to ensure their safety at court. These include attendance by electronic medium, attendance with support persons, staggered attendances, use of security entrances and, where necessary, security personnel. All court staff are able to prepare a safety plan. Safety planning is one of the strategies that may be implemented to ensure that a person who fears for their safety remains protected from harm. A safety plan for attendances at court events is but one component of safety planning that needs to be incorporated into the individual's overall plan for their safety.

## HOW IS FAMILY VIOLENCE DEFINED IN THE FAMILY LAW ACT?

The term ‘family violence’ has been defined in different ways. To appreciate the context in which courts exercising family law jurisdiction approach this issue, it is important to know how the definition used in the FLA.<sup>5</sup>

The FLA definition is contained in section 4AB. This definition came into effect on 7 June 2012 and is significantly broader than the definition that formerly appeared in the Act.

Section 4AB states:

1. For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.
2. Examples of behaviour that may constitute family violence include (but are not limited to):
  - a. an assault, or
  - b. a sexual assault or other sexually abusive behaviour, or
  - c. stalking, or
  - d. repeated derogatory taunts, or
  - e. intentionally damaging or destroying property, or
  - f. intentionally causing death or injury to an animal, or
  - g. unreasonably denying the family member the financial autonomy that he or she would otherwise have had, or
  - h. unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support, or
  - i. preventing the family member from making or keeping connections with his or her family, friends or culture, or
  - j. unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.
3. For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
4. Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
  - a. overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family, or
  - b. seeing or hearing an assault of a member of the child's family by another member of the child's family, or
  - c. comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family, or
  - d. cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family, or
  - e. being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

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5 Unless stated differently, all sections are from the Family Law Act 1975 (Cth).





While the definition includes examples of particular behaviour, it is not an exhaustive list. Even though conduct may not be specifically mentioned in the FLA definition, the courts (through section 60CC(3)(m)) may still take such conduct into account.

Unlike the earlier definition, there is no requirement that any fear experienced by the victim of the violence is reasonable. Thus the new definition has objective and subjective elements.

The courts understand that family violence is not homogeneous in its qualities and can arise in a variety of contexts. It is recognised that family violence is widespread and can occur in all socioeconomic and ethnic groups.

The definition of family violence in the FLA is expressed in gender neutral terms. It encompasses abusive acts committed by men and women in heterosexual and same-sex relationships. The courts recognise that women and men can experience family violence. Nevertheless data suggests that women are more often victims of personal violence than men. For example, the Australian Bureau of Statistics' *Personal Safety Survey* (2005) found that of women who had reported being physically assaulted in the 12 months prior to interview, 73,800 or 31 per cent reported being assaulted by a current and/or previous partner. This compares to 21,200 or 44 per cent of men who reported being assaulted by a current and/or previous partner in the 12 months prior to interview. The *Personal Safety Survey* also found that 16.6 per cent of women had experienced violence by a partner (including physical threat, physical assault, sexual threat and sexual assault by a current and/or previous partner) since the age of 15 as compared to 5.7 per cent of men.

Importantly, the FLA does not require independent verification of allegations of family violence (such as police or medical reports) for a court to be satisfied that it has occurred. As the Full Court of the Family Court said in *Amador & Amador* (2009) 43 Fam LR 268:

*Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.*

*The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.*



## HOW IS ABUSE DEFINED IN THE FAMILY LAW ACT?

The definition of ‘abuse’ in the FLA was amended and came into effect on 7 June 2012. ‘Abuse’ is defined as follows:

**abuse**, in relation to a child, means:

- a. an assault, including a sexual assault, of the child, or
- b. person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person, or
- c. causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence, or
- d. serious neglect of the child.

The expanded definition of ‘abuse’ would appear to be intended to reflect current understandings of the diverse ways in which children can be damaged by violence and serious neglect.

## DIFFERENT TYPES OF FAMILY VIOLENCE

Family violence takes many forms and, when framing parenting orders, it is important to differentiate between the types of violence. Because individual families and relationships are dynamic and unique, care is required when any system of classification is applied.<sup>6</sup> One well known classification system holds<sup>7</sup> that violence can generally be defined as being within four categories. These are:

- coercive controlling violence
- violent resistance
- situational couple violence, and
- separation instigated violence.

**Coercive controlling violence** is an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control, and does not always involve physical harm.

6 Australian Institute of Family Studies, Submission to the Family Violence Committee of the Family Court and the Federal Circuit Court, May 2011.

7 JB Kelly, MP Johnson, “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 Family Court Review 476.

**Violent resistance** occurs when a partner uses violence as a defence in response to abuse by a partner. It is an immediate reaction to an assault and is primarily intended to protect oneself or others from injury.

**Situational couple violence** is partner violence that does not have its basis in the dynamic of power and control. Generally, situational couple violence results from situations or disputes between partners that escalates into physical violence.

**Separation instigated violence** is violence instigated by the separation where there was no history of violence in the relationship or in other contexts.

## CULTURAL CONTEXT

The way in which we attempt to understand the dynamics of family violence and abuse is informed by the diverse cultural context in which it occurs and by the experience of people from different ethnicities, backgrounds and language groups.

It is important to recognise that the concept of culture<sup>8</sup> is not fixed and immutable. Attempting to ascribe certain characteristics to particular cultural groups may lead to erroneous generalisations based on racial or ethnic identification.<sup>9</sup> Making assumptions or generalisations about racial, ethnic or religious groups ignores the intersection between, for example, culture and socio-economic status, age, disability, sexual orientation, place of residence, immigration status and homelessness.

Nevertheless, insofar as broad statements can be made about violence and culturally and linguistically diverse communities, research has tended to suggest that cultural values and immigration status increases the complexities normally associated with family violence and abuse. In a summary of the available research, the Australian Institute of Criminology stated that women from culturally and linguistically diverse backgrounds are generally less likely to report cases of family violence.<sup>9</sup> The factors that may influence this can include:

- being excluded from their community
- the limited availability of appropriate translator/interpreter services and access to support services
- limited support networks
- reluctance to confide in others
- lack of awareness about the law
- continued abuse from immediate family
- cultural and/or religious shame, and
- religious beliefs about divorce<sup>10</sup>

Policy and service responses, including those of family courts and allied agencies, need to be developed within an understanding of complex cultural dynamics and the inter-relationship between violence, cultural and religious identity and social marginalisation.

8 Sujata Warriar, "It's in Their Culture: Fairness and Cultural Considerations in Domestic Violence", (2008) 46 Family Court Review 537, p. 539; Kerrie James, "Domestic Violence Within Refugee Families: Intersecting Patriarchal Culture and the Refugee Experience" (2010) 31 The Australian and New Zealand Journal of Family Therapy 275, p. 276.

9 Dr Lorana Bartels, "Emerging Issues in Domestic/Family Violence Research", Research in Practice report no10, Australian Institute of Criminology, April 2010, p. 5.

10 Ibid and references cited therein.

## STATUTORY FRAMEWORK

Orders concerning parental responsibility, with whom a child will live and with whom a child will spend time (and how much time), are parenting orders. The child's best interests are the paramount consideration for the courts when making a parenting order. In deciding the arrangements that will promote the best interests of a particular child, the courts must consider the factors set out in Part VII of the FLA. These factors comprise a series of statutory objects and principles, two primary and 14 additional considerations. The first primary consideration is the benefit to the child of having a meaningful relationship with both of the child's parents. The second primary consideration is the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence. There is sometimes tension between these concepts in cases involving allegations of family violence. However, as a result of the recent legislative amendments, a new provision has been inserted into the FLA (section 60CC(2A)) that requires greater weight to be given to the safety of the child than to the benefit to the child of having a meaningful relationship with both parents.

As part of the additional considerations, judicial officers have to consider the inferences that can be drawn from a family violence order made in relation to a child or a member of the child's family (section 60CC(3)(k)). This applies to all family violence orders irrespective of whether they are or were interim or final, or whether they were made by consent. In so doing, judicial officers are obliged to consider the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, any findings made by the Court in proceedings for the order and any other relevant matter'. Section 60CC(3)(m) of the FLA permits the courts to take into account any other fact or circumstance that the court thinks is relevant. This ensures that the infinite variety of individual children's circumstances can be addressed.

It is important that people seeking assistance from the courts know **IT IS NOT COMPULSORY** for parties to participate in family dispute resolution processes prior to the commencement of court proceedings, in cases where the Court is satisfied there are reasonable grounds to believe:

- a. **there has been** family violence or abuse, or
- b. **there is a risk** of family violence or abuse.<sup>11</sup>

Parties to children's proceedings have certain obligations under the Act. These include informing the courts of any family violence order that applies to the child or a member of the child's family (section 60CF), informing the courts if a child or member of the child's family is under the care of a child welfare law (section 60CH) and informing the courts of any notifications to, or investigations by, prescribed child welfare authorities (section 60CI) that relate to an allegation, suspicion or risk of abuse.

Courts exercising jurisdiction under the FLA also have certain obligations.

The former section 60K of the FLA required courts to take prompt action in parenting proceedings in which allegations of family violence or abuse are made that may be relevant to the outcome. That section has now been repealed.<sup>12</sup> In its place are sections 67ZBA and 67ZBB.

11 For example, a person is exempted from participation in pre-filing family dispute resolution upon production of a current family violence order (s60(9)(b)) FLA.

12 However, it does continue to apply where a prescribed form, being a *Notice of Child Abuse, Family Violence or Risk of Family Violence* in the Family Court of Australia or a *Notice of Risk* in the Federal Circuit Court of Australia has been filed in accordance with section 60K prior to the commencement of Schedule 1 of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) (ie. 7 June 2012).

Cumulatively, they provide that where an 'interested person'<sup>13</sup> has alleged that there has been family violence or the risk of family violence, they must file the prescribed form<sup>14</sup> (Notice); which is a *Notice of Child Abuse, Family Violence or Risk of Family Violence* in the Family Court of Australia and a *Notice of Risk* in the Federal Circuit Court of Australia. Once the Notice has been filed, the courts are required to take prompt action in response to the allegations to protect the child and to enable evidence about the allegations to be gathered as expeditiously as possible.

Cases in which a Notice have been filed will be directed expeditiously to the appropriate decision maker – duty registrar or other judicial officer – for consideration of what steps or type of hearing is necessary for the courts to discharge their obligations pursuant to section 67ZBB of the FLA.

Section 67ZBB requires these obligations to be discharged as soon as practicable and within eight weeks if appropriate.

As a result of the amendments, courts are also required to ask each party to the proceedings whether they consider that the child has been or is at risk of being exposed to child abuse, neglect or family violence (section 69ZQ(1)(aa)(i)). The courts must also ask whether either party to the proceedings considers that they or another party to the proceedings have been or are at risk of being subjected to family violence (section 69ZQ(1)(aa)(ii)).

Formerly, the courts were obliged to make an order for costs when satisfied that a party had knowingly made a false allegation or statement in the proceedings. This included circumstances in which a party had knowingly made a false allegation of family violence. That provision has now been removed from the FLA.

## BEST PRACTICE PRINCIPLES

### A. CHECKLIST OF LEGISLATIVE REQUIREMENTS TO FOLLOW IN ALL PARENTING CASES IN WHICH ISSUES OF FAMILY VIOLENCE OR CHILD ABUSE ARE RAISED.

**In every case, a party or parties MUST:**

1. If a party to proceedings is aware a family violence order applies to a child or a member of a child's family, they must advise the Court and file a copy of the family violence order.

[Section 60CF(1), Rule 2.05(1)]

2. Where a copy of the family violence order is not available, file a written notice containing:
  - an undertaking to file the order within a specified period of time
  - the date of the order
  - the Court that made the order, and
  - the details of the order.

[Rule 2.05(2)]

13 Sections 67Z(4) and 67ZBA(4) define an "interested person" as a party, an independent children's lawyer or any other person prescribed by the regulations. At present no other person has been prescribed by the regulations.

14 For proceedings in the Family Court of Australia the form to be used and filed is located in Schedule 2 of the Family Law Rules 2004. For proceedings in the Federal Circuit Court of Australia the form to be used must be in accordance with Form 1 in Schedule 2; see rule 2.04(1B) of the Federal Circuit Court Rules 2001.

3. If a party to proceedings is aware that the child or a member of the child's family is under the care of a person under a child welfare law, inform the Court of the matter.

*[Section 60CH(1)]*

4. If:

- a party to proceedings is aware that the child or a member of the child's family has been the subject of:
  - a. notification or report to a prescribed state or territory agency, or
  - b. an investigation, inquiry or assessment by a prescribed state or territory agency, and
- the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse that party must inform the Court of the matter.

*[Section 60CI(1)]*

5. If a party, an independent children's lawyer or other interested person (see definition at footnote 14) makes an allegation of family violence by one of the parties to the proceedings, or of risk of family violence by one of the parties to the proceedings, and that allegation is relevant to whether or not the Court should make or refuse to make an order, file a Notice and supporting affidavit setting out the evidence upon which the allegations in the Notice are based and serve the notice and affidavit upon the person against whom the allegation is made.

*[Section 67ZBA(1) and (2), Rule 2.04D(1), Rule 2.04D(2)]*

6. Where a party to the proceedings, an independent children's lawyer or any other interested person alleges that a child to whom the proceedings relate has been abused or is at risk of abuse, they must file a Notice and supporting affidavit setting out the evidence upon which the allegations in the Notice are based and serve the notice and affidavit upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

*[Section 67Z(1) and (2), Rule 2.04D(1), Rule 2.04D(2)]*

**In every case, the decision maker *MUST*:**

7. In performing duties and exercising powers in relation to child-related proceedings and in making decisions about the conduct of child-related proceedings, give effect to the principle that the proceedings are to be conducted in a way that will safeguard the child concerned from being subjected to, or exposed to, abuse, neglect or family violence and safeguard the parties against family violence.

*[Section 69ZN(5)]*

8. In giving effect to the principles for the conduct of child-related proceedings, ask each party to the proceedings:
  - whether the party considers that the child concerned has been, or is at risk of being, subject to, or exposed to, abuse, neglect or family violence,
  - whether the party considers that he or she, or another party to the proceedings, has been or is at risk of being subjected to family violence.

*[Section 69ZQ(1)(aa)]*



9. Where an exception has been granted from attendance at family dispute resolution because of issues of family violence and abuse having been raised, consider whether to order the parties to attend at family dispute resolution nonetheless.

*[Section 60I(10)]*

10. Consider whether the urgency of the situation dictates that a parenting order should be made, notwithstanding the parties have not attended family counselling.

*[Section 65F(2)]*

11. Where a Notice has been filed:

- consider what orders (interim or procedural) need to be made to obtain evidence about the allegations or to protect the child or a party
- consider whether to make an order directed to a state welfare authority, pursuant to section 69ZW of the FLA, to require from the authority production of a report or records in respect of notifications of child abuse
- consider whether to make an injunction for the personal protection of a child or any person with whom the child is involved
- make any such order the Court considers appropriate, and
- do so as expeditiously as possible.

*[Sections 60B(1), 67ZBB, 69ZN, 69ZW]*

12. In determining a child's best interests, have regard to the matters in section 60CC(2) and 60CC(3).

*[Section 60CC(1)]*

13. In having regard to the matters in section 60CC(2), give greater weight to section 60CC(2)(b) than to section 60CC(2)(a).

*[Section 60CC(2A)]*

14. Where a family violence order applies or has applied, draw any relevant inferences from the order, taking into account:

- the nature of the order
- the circumstances in which the order was made
- any evidence admitted in the proceedings for the order
- any findings made by the Court in the order or in proceedings for the order, and
- any other relevant matter.

*[Section 60CC(3)(k)]*

15. In considering what parenting order to make, ensure any order, subject to the consideration of the best interests of the child, is consistent with any family violence order and does not expose any person to an unacceptable risk of family violence.

*[Section 60CG]*

16. If making a parenting order or injunction which is inconsistent with an existing family violence order, specify in the order that this is the case and explain to the parties affected why the order was made and the interaction between the order and the family violence order.

*[Section 68P]*



Matters that decision makers **MAY** consider in cases involving family violence and abuse:

17. Whether a family dispute resolution practitioner has granted a certificate to a party and the type of certificate granted.

[Section 60I(8)]

18. Whether an exception should be granted to the requirement to attend family dispute resolution prior to the issue of proceedings because there are reasonable grounds to believe there has been abuse of the child or the risk of abuse, or there has been family violence by one of the parties to the proceedings or there is a risk of family violence.

[Section 60I(9)(b)]

19. Where an exception is granted under section 60I(9)(b), whether there are reasonable grounds to believe there would be a risk of family violence or there would be a risk of abuse of a child if there were to be a delay in applying for any relevant order.

[Section 60J(2)]

20. Whether to direct a party or the parties to file an affidavit or updating affidavit that addresses this issue.

[Part 15.2 FLR, <sup>15</sup> Rule 10.01 FCCR <sup>16</sup>]

21. Whether the matter should be allocated a date in the duty list, and if so, with what degree of urgency.

[Rule 114 FLR, Rule 10.01 FCCR]

22. Whether a state or territory family violence order is in force that applies to the child or a member of the child's family and the terms of that order. The Court may include in any order it makes safeguards for the safety of any person affected by the order.

[Section 60CF, 60CG]

23. Whether one or both of the parties should be ordered to attend family counselling or family dispute resolution, or an appropriate course, perpetrator of domestic violence program, or another program or service.

[Section 13C]

<sup>15</sup> The letters 'FLR' refer to the *Family Law Rules 2004* (as amended) being the applicable rules for the Family Court.

<sup>16</sup> The letters 'FCCR' refer to the *Federal Circuit Court Rules 2000* (as amended) being the applicable rules for the Federal Circuit Court.



24. If one or more of the parties is directed to attend such a course or program, what orders are necessary to protect the safety of any person subject to such an order?  
[Section 13C(4)]
25. Whether any safety plan is in place for court events and whether a safety plan needs to be formulated. In particular, should consideration be given to the party being housed in a secure room during a court event or giving evidence by video link? Should arrangements be made to escort a party to and from court? What security is necessary for any given event?  
[Section 69ZN(5)]
26. Should a case started in the Federal Circuit Court be transferred to the Family Court, with or without a request for inclusion in the Magellan List?
27. Whether there are unresolved criminal or state welfare proceedings and, if so, whether the family law proceedings should be adjourned until finalisation of those proceedings or whether the person against whom proceedings have been instituted should be invited to apply for a certificate under section 128 of the *Evidence Act 1995* (Cth).
28. Whether the address of the party making the allegations should be suppressed.  
[Section 69ZN(5)]
29. Whether any person not currently a party to the proceedings should be joined as a party.  
[Rule 6.02(1) FLR, Rule 11.05 FCCR]
30. Whether the child or children should be independently represented.  
[Section 68L]
31. Whether to request a child welfare officer to intervene in the proceedings.  
[Section 91B]
32. Whether it would be appropriate to make either an interim parenting order or a procedural order without notice to the other party and in the absence of a party.  
[Section 69ZN(5); Parts 5.3 and 54 FLR, Rule 5.01 FCCR]
33. Whether a family report should be ordered.  
[Section 62G]
34. Whether a person with expertise and clinical experience in family violence or abuse should be appointed to prepare a report.  
[Part 15.5 FLR, Rule 15.09 FCCR]
35. Whether a person should be required to make the child available for an examination for the purpose of preparing a report about the child for use by an independent children's lawyer.  
[Section 68M(2)]
36. Whether subpoenas should be issued to compel the production of documents.  
[Part 15.3 FLR, Part 15A FCCR]
37. Whether the person alleging family violence or abuse should be permitted to give evidence by electronic means from another location.  
[Section 102D(1)]
38. Whether to transfer the matter to another court.  
[Section 33B, Rules 1117 and 1118 FLR, Section 39 FMA, Rule 8.02 FCCR]

## B. VULNERABLE WITNESSES AND MANAGING THE COURTROOM

Victims of family violence are often traumatised and vulnerable witnesses. To ensure parties are afforded fair and equal access to justice and those at risk of harm are not re-traumatised by the court process, it is essential that judicial officers and practitioners utilise the courts powers to achieve a fair hearing<sup>17</sup>

In addition to the courts general powers to regulate its own processes, courts exercising jurisdiction under the FLA:

1. May direct or allow a person to give testimony and/or appear by video or audio link (for example from another location or in the same court facility).

*[Sections 102C–102D FLA]*

2. Must forbid the asking of offensive, abusive and hectoring questions unless it is essential to the interests of justice.

*[Section 101(1) and (2) FLA]*

3. May disallow questions asked in a manner or tone that is inappropriate or based on stereotype.

*[Section 41 Evidence Act 1995 (Cth)]*

4. Disallow misleading or confusing questions.

*[Section 41 Evidence Act 1995 (Cth)]*

5. A child cannot be called as a witness or be present in court unless the Court makes an order to the contrary.

*[Section 100B(2) FLA]*

6. May change the venue of a hearing to a safer location.

*[Section 27A FLA, Section 52 FCCA, Rule 1.117 FLR, Rule 8.01 FCCR]*

### **In child related proceedings:**

7. The Court is to actively direct, control and manage the conduct of proceedings and is to conduct proceedings in a way that will safeguard parties to proceedings against family violence.

*[Section 69ZN FLA]*

8. The Court can give directions or make orders about how particular evidence is to be given.

*[Section 69ZX(1)(c) FLA]*

9. Make orders limiting, or not allowing, cross-examination of a particular witness.

*[Section 69ZX(2)(i) FLA]*

10. Receive into evidence the transcript of evidence in any other proceedings before the court or another court or tribunal, and draw from that transcript any conclusions of fact that it thinks proper, and adopt any of the recommendations, findings, decisions or judgment of those bodies.

*[Section 69ZX(3) FLA]*

**In the exercise of its general powers to control proceedings the Court may:**

11. Require that an alleged perpetrator be shielded from view while the victim is giving evidence.
12. Allow the victim can have a support person near them while giving evidence.
13. Close the Court to the public or exclude specific persons from the courtroom.
14. With forewarning refuse permission to continue cross-examination.
15. With forewarning determine the proceedings be concluded without further input from a party.

Evidence of an admission is not admissible unless the court is satisfied that the admission was not influenced by violent, oppressive, inhuman or degrading conduct whether towards the person who made the admission or towards another person; or a threat of that kind. *[Section 84 Evidence Act 1995 (Cth)]*

Judicial officers should also consider the possible impact of family violence on the victim's ability to give evidence. For example, coping strategies to deal with the violence and memories **may** mean that a victim has:

- difficulty giving testimony about the violence in a linear, time-ordered sequence
- difficulty recalling collateral detail surrounding the violence
- emotional detachment such that testimony can be given in an unemotional, flat, detached manner
- inability or difficulty offering complete information about abuse and violence (by virtue of the tendency to minimise memories), and
- exaggerated startled and defence responses resembling anger, hostility and aggression<sup>18</sup>

## C. FAMILY AND OTHER EXPERT REPORTS

Family and other expert reports can provide the Court with an independent forensic assessment of particular issues. Commonly these include the children's relationships with the parties, the children's views and the parties' parenting capacity. It may include the emotional and psychological effects of exposure to family violence, the effect upon a child or partner victim of contact with the perpetrator and whether therapeutic intervention may assist a perpetrator to live without violence. The expert appointed should have specialised knowledge based on his or her training, study or experience. The expert's role is to assist the Court in an impartial way with matters within his or her knowledge and capability.

*[Rule 15.59 FLR, Division 15.2 FCCR]*

Reports from experts, counsellors and social workers who have seen either of the parties over a period of time can also provide the Court with a valuable source of information on particular issues.

If the Court makes findings of fact about the allegations of family violence or abuse or the risk of family violence or abuse prior to the report process, the report writer is to be provided with a copy of the findings and the report is to proceed on that basis.

18 Neilson, Dr L (2009) Domestic Violence and Family Law in Canada: A handbook for Judges, Ottawa National Judicial Institute

In considering the appointment of an expert witness to prepare a family report or other report, the Court may wish to satisfy itself that the expert witness has appropriate qualifications and experience to assess the impact and effects (both short and long term) of family violence or abuse, or of being exposed to the risk of family violence or abuse, on the children and any party to the proceedings

In the framing of orders for a family report or other expert report, the judicial officer may wish to consider the following matters<sup>19</sup> and, where appropriate, direct the reporter to:

1. Specifically address the issue of family violence or abuse or the risk of family violence or abuse.
2. Assess the harm the children have suffered or are at risk of suffering if the orders sought are or are not made.
3. Consider whether or not there would be benefits, and if so, the nature of those benefits, if the child spent time with the person against whom the allegations are made.
4. Assess whether the physical and emotional safety of the child and the person alleging the family violence or abuse can be secured before, during and after any contact the child has with the parent or other person against whom the allegations are made.
5. Ascertain the views of the child or children in light of the allegations of family violence or abuse or the risk of family violence or abuse when it is safe to do so.
6. Where family violence or abuse is established, report on:
  - the impact of the family violence or abuse
  - whether the person acknowledges that family violence or abuse has occurred
  - whether the person accepts some or all responsibility for the family violence or abuse
  - whether, and the extent to which, the person accepts that the family violence or abuse was inappropriate
  - whether the person has participated or is participating in any program, course or other activity to address the factors contributing towards his or her violent or abusive behaviour
  - whether there is a need for the child and the other parent or carer to receive counselling or other form of treatment as a result of the family violence or abuse
  - whether the person has expressed regret and shown some understanding of the impact of their behaviour on the other parent in the past and currently, and
  - whether there are any indications that a person who has behaved violently or abusively and who is seeking to spend time with the child can reliably sustain that arrangement and how it will occur so that the child feels safe.

The reporter also needs to be informed whether the whereabouts of the party making the allegations has been suppressed and that those whereabouts not be revealed in the reporting process.

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<sup>19</sup> Adapted from the “Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence”, prepared by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law, April 2002.



## D. THE INTERIM HEARING STAGE

The interim hearing stage is a critical time for families where there is family violence and often takes place in a context of urgency. It is unlikely the Court would be able to make findings about disputed facts because not all relevant evidence is available or tested. However, the urgency of the situation and the serious nature of allegations, particularly in terms of a child being exposed to family violence or abuse, requires the Court to consider whether to make interim orders. Even though the evidence available is limited, the Court must still assess risk in such cases in considering what interim orders to put in place pending a final hearing.

The 'PPP' screening tool is a useful mechanism in the assessment of risk.<sup>20</sup> This screening tool analyses risk by reference to three factors: the potency, pattern and primary perpetrator (PPP) of the violence. The screening tool is not a predictive device but does give a useful framework of factors to look for when considering the risk of family violence.

### **Potency of violence (level of severity, dangerousness or risk of lethality)**

1. Are there any threats or fantasies of homicide and/or suicide? If so, does the person have a specific plan to act on them?
2. Are weapons available (guns, knives, etc.) indicating the means are accessible?
3. How extreme was any prior violence? Were injuries caused, and if so, how serious?
4. Is the person highly focused upon/obsessed with the specific victim as a target of blame?
5. Is there a history of mental illness – especially thought disorder, paranoia, or severe personality disorder?
6. Is the person under the influence of drugs or alcohol, indicating diminished capacity to inhibit angry impulses? Is there a history of substance abuse?

20 Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks & Nicholas Bala, "Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans" (2008) 46 Family Court Review 500.

7. Does the person express a high degree of depression, rage, or extreme emotional instability (indicating a propensity to act irrationally and unpredictably)?
8. Is the party recently separated or experiencing other stressful events such as, loss of job, eviction from home, loss of child custody, or severe financial problems?

### **Pattern of violence and coercive control**

9. Is there a history of physical violence including destruction of property? Threats (to hurt self or loved ones)? Assault or battery? Sexual coercion or rape?
10. Has there been disregard or contempt for authority (e.g. refusal to comply with court-ordered parenting plans, violation of protective orders, a criminal arrest record)?
11. How fearful and/or intimidated is the partner?
12. Is there a history of emotional abuse and attacks on self-esteem?
13. Does one party make all decisions (e.g. about social, work and leisure activities; how money is spent; how children are disciplined and cared for; household routines and meals; personal deportment and attire, etc.)?
14. Has the partner been isolated/restricted from outside contacts (e.g. with employment, friends and family)?
15. Is there evidence of obsessive preoccupation with sexual jealousy, and possessiveness of the partner?
16. After separation, have there been repeated unwanted attempts to contact the partner (e.g. stalking, hostage-taking, threats or attempts to abduct the partner or child)?
17. Have there been multiple petitions/litigation that appear to have the purpose of controlling and harassing?

### **Primary perpetrator indicators: Who is the primary aggressor, if either?**

18. Who provides a more clear, specific and plausible account of the violent incident(s)? Who denies, minimises, obfuscates, or rationalises the incident? (The victim more likely does the former; the perpetrator the latter).
19. What motives are used to explain why the incident(s) occurred? (Victims tend to use language that suggests they were trying to placate, protect, avoid, or stop the violence, whereas perpetrators describe their intent being to control or punish).
20. What is the size and physical strength of each party relative to the amount of damage and injury resulting from the incident(s)? Does either party have special training or skill in combat? (Perpetrators who are better equipped are able to cause the greater damage).
21. Are the types of any injuries or wounds suffered likely to be caused by aggressive acts (the perpetrators) or defensive acts (the victims)?
22. If the incident(s) involved mutual combat, were the violent acts/injuries by one party far in excess of those of the other? (Violent resisters tend to assert only enough force to defend and protect; when primary perpetrators retaliate, they are more likely to escalate the use of force aiming to control and punish).
23. Has either party had a prior protective order issued against them – whether in this or a former relationship (indicating who was determined to be the primary aggressor in the past)?

## E. FRAMING INTERIM ORDERS

The following considerations are likely to be important in framing interim orders in cases in which there are disputed allegations about family violence and abuse and where the fundamental task for the Court is an assessment of the degree of risk involved in the making of an order.

1. What is the likely risk of harm to the child if an interim order is made for the child to spend time with a person against whom allegations of family violence or abuse have been made?
2. Given the nature of the allegations against the person and the extent of the evidence to hand, is it in the best interests of the child to spend any time or communicate with that person and, if so, what orders should be made to ensure the safety of the child pending further investigation. In particular:
  - Should any time between the person and child be supervised?
  - If so, should the time be professionally supervised, for example at a children's contact centre?
  - Who should pay the costs of supervision?
  - If not, where should the time take place and who should supervise it?
  - How long should the visits be and where should the child be exchanged between the parties?
  - Are arrangements required for a secure place for changeover?
  - Should other persons effect the exchange of the child or be permitted to attend handovers with one or other of the parents?
  - What safeguards should be put in place to secure the safety of the child and of the parent with whom the child lives before, during and after any time the child spends with the other parent?
  - Is the order made consistent with any applicable family violence order and does it ensure that the parent concerned is not exposed to an unacceptable risk of family violence?
  - Will the order expose the parent affected by the family violence to continuing emotional and/or physical abuse?
3. Should the party seeking to spend time with the child, as a precondition to that time, be ordered to attend:
  - a post-separation parenting course. *[Section 65LA]*
  - an appropriate course, program, or other therapeutic intervention, e.g. as may be recommended by a family consultant or other expert? *[Section 13C]*
4. If the Court makes an interim order, should compliance with any order for the child to spend time with the parent be supervised by a family consultant? *[Section 65L]*
5. If the Court makes an order precluding contact between a child and one parent, should contact between the child and extended family members be considered?



## F. THE FINAL HEARING

Decision makers need to consider closely the circumstances of each alleged incident of family violence in terms of its context and characteristics and the nature of the relationship between the persons affected by it, particularly the balance of power between them.

Of critical importance to decision makers are considerations of how children have been affected by exposure to family violence and what measures can be taken to ensure their future safety by any order that the court makes.

Some of the effects on children who are aware of family violence, or who witness family violence, or are aware of actual threatened family violence towards a parent include the following:

- physical and emotional damage occasioned by attempts to intervene in incidents of family violence arguments
- psychological damage evidenced by aggression and anxiety; lower self-esteem and other behavioural problems
- anxiety and apprehension at separation from a parent whom they perceive needs their protection
- fear and insecurity while in the care of a parent whom they have observed to have harmed someone else, and
- poor role modelling with consequences for their own future behaviour leading them to become either the perpetrator or victim or both of family violence.

The brain is at its most plastic (that is, most developmentally receptive to environmental input via neural pathways) in early childhood. Thus the younger the child the more likely the child is to suffer residual and pervasive problems following traumatic experiences such as witnessing family violence or being abused or neglected.<sup>21</sup> Exposure to such experiences can alter a developing child's brain in ways that can result in a range of inter-related psychological, emotional and social problems including: depression and anxiety; post traumatic stress disorder; problems with emotional regulation; substance misuse; relationship difficulties; and physical problems including cardiovascular disease, diabetes and stroke.<sup>22</sup>

The effects of family violence on the abused adult and the abuser also requires consideration. Factors to consider include:<sup>23</sup>

- Although in the majority of cases the risk of future family violence diminishes after separation, where there has been coercive controlling violence the intensity may escalate.
- Perpetrators of coercive controlling violence are more likely to have difficulties parenting. Common features include lack of warmth, coercive tactics and rejection of the children.<sup>24</sup>
- Individuals who have a pattern of partner abuse and who resolve conflicts using physical force are likely to be poor role models for their children.
- Abusive ex-partners are more likely to undermine the victim's parenting role.
- Diminished parenting capacity for adult victims of family violence is not uncommon.

21 Perry B., "Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children", (2006) in *Working with Traumatized Youth in Child Welfare*, Ed. by Nancy Boyd Webb, Guilford Press NY, 40.

22 National Scientific Council on the Developing Child, "Excessive Stress Disrupts the Architecture of the Developing Brain" (2005), Working Paper No3, p. 2.

23 Kelly and Johnson, above n 7, 489-490.

24 Jaffe, Johnston, Crooks, & Bala, above n 18.



Jaffe and Johnston comment:

*For the majority of victims, separation from the perpetrator of domestic violence may provide an opportunity for improvement in both general functioning and parenting capacities. However, those who have been victimized by prolonged abuse and control are likely to suffer sustained difficulties – like anxiety, depression, substance abuse, and posttraumatic stress disorder – all of which can compromise their parenting for some time... During the court process, these parents may present more negatively than they will in the future once the stress of the proceedings and life changes have attenuated.<sup>25</sup>*

At the final hearing, the decision makers would ordinarily consider the following matters:

1. Whether the rules of evidence should apply to the issue of family violence. The Full Court in *Maluka v Maluka* (2011) FLC 93-464, at paragraphs 122 and 123, said:

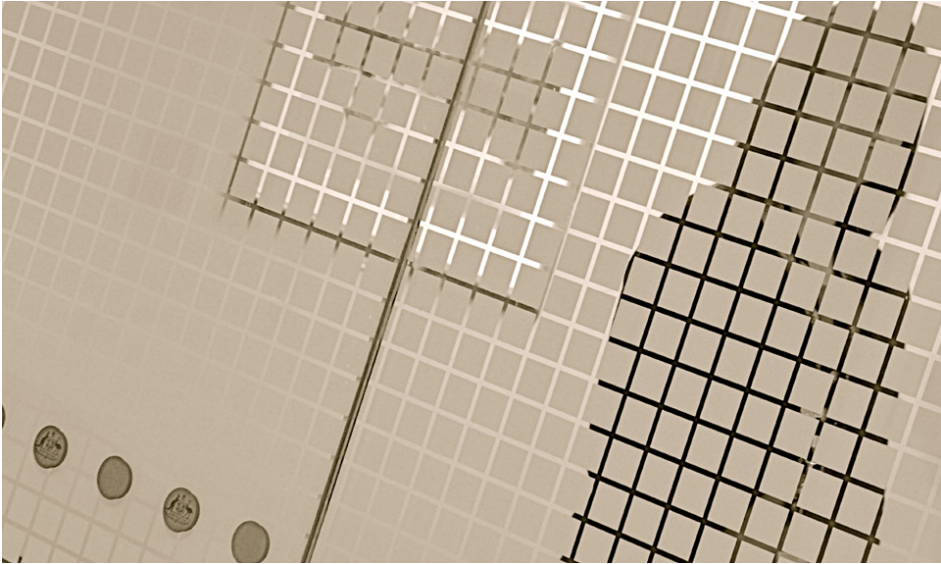
*122. The Full Court decisions in Johnson v Page (2007) FLC 93–344 and Amador v Amador (2009) 43 Fam LR 268 adopt a common approach to s 69ZT. Namely, that the decision to apply sub-section (3) is discretionary which discretion is to be exercised in accordance with the factors contained therein. Application of the sub-section is discussed in terms of its application to issues, and not the entire hearing, although the later course is permissible.*

*123. We do not accept ... that the effect of s 69ZT is to establish a rule of general application that in cases where a court is asked to terminate a child's relationship with a parent, a judge would err if he or she failed to apply the rules of evidence excluded by s 69ZT(1) of the Act to an issue or to the entire hearing. It must be remembered that it is not uncommon for such cases to involve, in effect, a risk assessment exercise which may not include consideration of whether to make positive findings of sexual abuse or consider conduct which would constitute criminal offences in the upper range of seriousness. There are sound reasons associated with the protection of children and victim partners why, notwithstanding an order is sought to terminate a child's relationship with a parent, a judge might determine the risk issue by reference to ss 69ZT(1) and (2) of the Act.*

*[Section 69ZT(3)]*

2. Is it possible to make findings of fact on the balance of probabilities regarding the nature and degree of family violence between the parties and its effect on the child and the parent with whom the child is living?
3. If the Court determines that it cannot or should not make a positive finding that there has been violence or abuse, the Court must determine whether there is an unacceptable risk of it.  
(see *M v M* (1988) 166 CLR 69)
4. If it was found that one party has perpetrated family violence on the other party, consider the extent to which the violence features:
  - coercive controlling violence
  - violent resistance
  - situational couple violence, or
  - separation instigated violence.

25 Ibid p 503.



Does the violence include:

- the use of coercion and threats
- intimidation
- emotional abuse
- financial control
- the use of children as means of controlling one party
- the use of tactics to isolate one party, or
- has the perpetrator attempted to minimise or deny the violence, which has occurred, or blame the other party for the violent behaviour?

Findings on these questions will assist the Court to identify violence that represents a real threat to the wellbeing of children, including in relation to appropriate role modeling. This may require specific attention in the design of orders which will keep the victim and child safe.

## **G. MATTERS TO CONSIDER WHERE FINDINGS OF FAMILY VIOLENCE OR ABUSE, OR AN UNACCEPTABLE RISK OF FAMILY VIOLENCE OR ABUSE, HAVE BEEN MADE**

The ability of the Court to determine the future impact and magnitude of risk of exposure to family violence on children is likely to be influenced by the categorisation of the violence to which any child has been exposed in the past. As stated by the Family Law Council in 2010, 'It is no longer scientifically or ethically acceptable to speak of domestic violence without specifying loudly and clearly, the type of violence to which we refer'.

It is important for decision makers and service providers to stay informed of current research and information about the nature and impact of family violence.

Courts may be assisted by evidence about current research from fields of psychology, psychiatry and social work in determining the likely impact of family violence on child development, child health and parental capacity.<sup>26</sup>

26 As to admissibility of academic opinion, see *McGregor & McGregor* [2012] FamCAFC 69.

The following factors<sup>27</sup> are likely to be central to the determination of whether the Court should order that a child does or does not spend time with a parent against a specific finding has been made of family violence or abuse (or whom the Court considers poses a risk to the child of future exposure to family violence or abuse):

1. The effect of the family violence or abuse on the child.
2. The effect of the family violence or abuse on the parent with whom the child is living.
3. The degree of insight or motivation of the parent against whom a finding of family violence or abuse has been made. In particular, is that parent motivated by the child's best interest or a desire to either intimidate or control the other parent?
4. Where a parent who has been found to have exposed a child to family violence and wishes an order to be made to spend time with that child:
  - the degree of acknowledgement by that parent that family violence has occurred
  - whether that parent has accepted some or all of the responsibility for the violence
  - the extent to which that parent accepts that family violence was inappropriate and the degree of insight exhibited of the likely ill-effects on the child of such behaviour
  - has the parent concerned expressed regret or remorse for his or her behaviour?
  - does the parent concerned recognise that he or she has been an inappropriate role model for the child concerned?
  - has the parent concerned participated, or are they willing to participate, in any program or course of treatment designed to prevent a recurrence of family violence by him or her in future?
  - does the parent concerned have the capacity to sustain an ongoing arrangement to spend time with the child and is he or she genuinely interested in the child's welfare?
  - does the parent have any understanding of the impact of his or her behaviour on the other parent concerned, both in the past and currently?
  - the capacity of the parent found to have been the perpetrator of family violence to provide adequate care for the child, and
  - the nature of the relationship between the child and the parent found to have been the perpetrator of family violence.
5. In cases where the Court is considering that the child have limited or no time with the parent concerned:
  - what will be the effects on the child of a deprivation of relationship with that parent?
  - what will be the consequences for the child of losing the opportunity to know that parent at first hand?
  - what will be the consequences for the child of losing the opportunity to know grandparents and other relatives on that parent's side of the family?
  - what will be the consequences for the child of losing the opportunity to interact with a parent who loves him or her and is able to provide some benefits for the child concerned?
  - what will be the consequences for the child and parent concerned of being deprived of the opportunity to repair their relationship and undo the harm done as a result of the parent's violent behaviour?

<sup>27</sup> See the Sturge & Glaser report, which discusses the effect on children of being exposed to domestic family violence and the circumstances in which a child should have no contact with a parent who has used or exposed the child to family violence, referred to in *Re L Contact: Domestic Violence* [2000] 2 FLR 334 (UK case).

- will such an outcome diminish the prospect of the parent and child reconnecting when the child is older and more able to make a mature and personal decision about whether he or she wishes to have a relationship with that parent in future?
6. What are the views of any child concerned in respect of spending time with a parent who has been found to be violent and what weight should be given to those views?

## H. OTHER MATTERS TO CONSIDER

Cases involving findings of family violence or abuse pose real difficulties. The essential task for the Court is to determine the extent of risk which violent and abusive conduct poses for the child concerned and to fashion orders which are commensurate with the degree of risk involved.

In some cases, the degree of risk will be determined to be unacceptable and, therefore, it is in the best interests of the subject child that no orders be made for the child to interact directly or indirectly with the parent who presents that risk.

In other cases, the Court may consider a range of strategies which would protect the child and family in the context of the possible benefits to the child in maintaining some form of relationship with the parent concerned. In particular, the court may consider the following in determining what the best outcome is for the child concerned:

1. Should time spent between the child and the parent be supervised, and if so, by whom and under what conditions, particularly:
  - who should be the supervisor
  - how should the supervisor be chosen
  - should it be a professional supervisor
  - is it feasible to commit the parties to long term professional supervision
  - how long and frequent the visits should be
  - the appropriateness and limits of using a childrens contact centre. If so, does the policy of the centre accommodate the order envisaged
  - should others, such as siblings or relatives, attend the supervised visits
  - how should changeover occur
  - who should pay the cost of the supervisor
  - whether telephone contact with the child is permitted and under what conditions, including the time of such contact, the duration of such contact and the number of times per week, and
  - whether contact via other electronic means, such as email, SMS and webcam, is permitted.
2. The form and limits of communication between the parent and child.
3. Should the parent concerned undergo treatment or attend a course of counselling or education as a precondition of spending any time with the child?
4. Should the Court make an order under section 68B for the personal protection of the child or the parent with whom the child lives?
5. What are the terms of any existing family violence order?
6. Is the proposed order consistent with a family violence order?

7. Should the order be supervised by a family consultant for a limited period?
8. If the Court makes a final order, should the parties be referred to an external Parenting Orders Program for supervision and support?<sup>28</sup>
9. Should the Court make orders that allow the ongoing wellbeing of the child to be monitored in circumstances where strategies to protect the child are deemed necessary when orders support some sort of relationship between the child and the perpetrator of the family violence?
10. If the Court makes an order precluding contact between a child and one parent, should contact between the child and extended family members be considered?

## I. CONSENT ORDERS

When a court is asked to make consent orders which would result in a child spending time with a parent or other person against whom allegations of family violence or child abuse have been made, the parties to the proposed orders must provide an explanation of how the order attempts to deal with those allegations.<sup>29</sup> In addition to section 60CC factors, the decision maker may consider the following before deciding whether to make such an order:

- the seriousness of the allegations
- the extent of the involvement of the child in any incidents of violence or abuse
- how the orders address the violence and abuse issues
- where provision is made for supervision, the matters referred to in Part F of these Best Practice Principles
- whether there is any reason to believe the orders would be used to continue to control or maintain contact with the parent with whom the child lives
- whether there are other issues such as mental illness, drug and alcohol abuse or serious parental incapacity which would present a risk to the child
- whether the parties have had legal advice
- whether the Court can be satisfied that the parties have agreed to the orders without pressure
- whether the party who alleged the violence or abuse is genuinely satisfied the orders do not present an unacceptable risk to the child or any other person, and
- if an independent children's lawyer has been appointed, whether he or she agrees to the consent orders.

<sup>28</sup> Where separating families are in high conflict over parenting arrangements, Parenting Orders Programs are available to help parents focus on their children. These programs are provided by a number of community based organisations funded under the Family Relationships Services Program.

<sup>29</sup> See Rule 101.5A FLR and Rule 13.04A FCCR.

In the event the Court is not satisfied about any of these matters, consideration may be given to the following:

- ordering the appointment of an independent children's lawyer
- ordering a family report or other expert report
- ordering a section 69ZW report
- hearing evidence to determine the nature and extent of any violence or abuse and whether or not there is an unacceptable risk to the child if the orders are made, and
- ordering the parties to participate in a therapeutic intervention prior to the making of orders.

If the Court is satisfied it is in the best interests of the child to make the proposed consent orders and those orders provide for a child to spend time with a person against whom allegations of family violence or abuse have been made, the Court may wish to give consideration to delivering a short judgment explaining why the Court has agreed to make the orders sought.<sup>30</sup>

## J. TIME STANDARDS FOR COURT EVENTS

In hearing and determining applications for parenting orders in which allegations of family violence or abuse, or the risk of family violence or abuse, are put forward as a reason to make or refuse to make a parenting order, the courts aim to achieve the following time standards between court events, while recognising that matters that require urgent attention will be accorded priority:

1. Where a Notice was filed with an initiating application or in response to an initiating application, the proceedings should be listed before a judicial officer within eight weeks from filing the notice or within six weeks if an abridgment of time has been granted.
2. In the Family Court, if during a Case Assessment Conference or a Registrars' Procedural Hearing List the registrar considers it appropriate for interim orders to be made, the matter should be listed in a Judicial Duty List within four weeks.
3. Where an independent children's lawyer is ordered, the matter should come back before a judicial officer no later than eight weeks from the date of order.
4. Where family counselling or family dispute resolution is ordered, the matter should come back before a judicial officer no later than eight weeks from the date of order.
5. Where parties are ordered to attend an appointment with a family consultant, the matter should come back before a judicial officer no later than eight weeks from the date of order.
6. Where a family report is ordered, the report is to be completed no later than 12 weeks from the date the report was ordered or not later than two weeks prior to the hearing for which it is required.
7. Where a section 69ZW report is ordered, the matter will be listed 10 to 12 weeks later.

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30 See "Parenting orders – what you need to know", prepared by the Attorney-Generals Department with the assistance of Professor Richard Chisholm AM, October 2016.



