Risk of harm to children from exposure to family violence: Looking at how it is understood and considered by the judiciary

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To date, there is a paucity of research that focuses on the extent to which witnessing or exposure to family violence is considered and weighted by the judiciary compared to other forms of violence, such as the direct abuse of a child. Children exposed to violence have similar long-term negative health and social outcomes to children who are a direct target of abuse. We look at how specifically the Family Law Act 1995, 2005 and 2012 amendments have defined and included exposure as a harm. We examine 60 judgments made since the 2006 amendments came into force in which the facts included alleged family violence, and exposure and/or child abuse. We find that unsupervised time was the determination in most (70%) of our sample but was less likely in matters which involved only allegations of direct child abuse. Having identified the complexities of the unacceptable risk test, judicial indeterminacy and a legislative emphasis on maintaining a meaningful relationship with both parents, we look at whether and how exposure to violence has been understood, considered and weighted and how judicial officers attempt to minimise potential risk of harm to the child. For a number of reasons — including the importance of corroborating expert evidence that we found in our analysis — we recommend that the Magellan List be expanded to include family violence matters in which there is the risk of exposure harms.

Introduction

Family violence has been known to be a serious issue within Australian families for many years.¹ Both measuring its incidence and the extent of children’s exposure to it are problematic.² Research has shown fairly definitively though that ‘violent households are significantly more likely to have children than non-violent households. . .and that violent households have a significantly higher proportion of children aged five years and under’.³ A 2011 survey of 2077 children in New Zealand found that 63% of children had experienced violence during their life and that 36% of this violence was

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¹ L Young & G Monahan, Family Law in Australia, 7th ed, LexisNexis Butterworths, Sydney, 2009, 747. In this paper we use the terms ‘family violence’ and ‘domestic violence’ interchangeably.
³ Ibid.
reported to have occurred at home. It is estimated that 10–20% of children in the United States are exposed to domestic violence each year. Children who reside in homes in which family violence occurs are 40% more likely to be abused. In Australia, the likelihood of the co-occurrence of experiencing physical abuse and being exposed to domestic violence is estimated at 55%.

What exactly are we meaning by ‘exposed to domestic violence’? It is now recognised both in Australia and overseas that exposure to violence is a broader category than witnessing violence and includes hearing, seeing and playing a role either at the time of the violence or in the aftermath. Exposure is a form of child abuse. This is shown by children exposed to violence having similar long-term outcomes to children who are a direct target of abuse. The greater the seriousness and incidence of family violence, the more children are adversely affected, suffering from higher rates of depression and poorer physical health. In fact, with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence. Exposure means living with the constant threat of violence being perpetrated against them. Neither just passive observers of family violence nor

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14 Carroll-Lind et al, above n 4; With the exception of sexual abuse.
resilient, the child witnesses ‘are actively involved in seeking to make meaning of their experiences and in dealing with the difficult and terrifying situations which confront them’ and, not surprisingly have poorer long term outcomes compared to other children. In addition, children who see their mother being abused may learn to dominate interpersonal relationships using violence and are at increased risk of becoming perpetrators of domestic violence. Violence in the family can also undermine the relationship between the child and mother, which then leaves the former particularly vulnerable without any parental protective relationship. Not surprisingly, half of the children in one sample reported feeling unsafe post parental separation.

Turning to those matters that engage with the Australian family law pathway, one study found that about two-thirds of separated mothers and about one-half of separated fathers reported having experienced violence from the other parent, in the forms of emotional or physical abuse. Post separation, 49% of parents reported being subjected to controlling behaviour by the other parent while 32% indicated that they had been physically hurt. Separated parents, 21% of mothers and 17% of fathers, indicated they had ongoing safety concerns due to contact and shared parenting responsibility. Further, 72% of mothers and 63% of fathers who reported they were victims of violence indicated that their children had witnessed the violence. It seems that some adults are separating because of family violence and are seeking assistance from services including the courts.

Given the prevalence of family violence and evidence that growing up in a violent family and exposure to violence is as harmful to children as direct child abuse, having negative physical, emotional and social impacts, how does the Family Law Act 1975 (Cth) (FLA) protect children from these harms in

23 Ibid, at [27].
24 Ibid, at [28].
statute and how do those who interpret the legislative provisions assess the potential level of risk?

**Exposure/witnessing and family law**

In 1994, in *JG v BG*\(^{26}\) it was recognised that exposure to family violence is highly relevant in children’s matters.\(^{27}\) This case held that violence was a relevant consideration in determining the best interests of the child, ‘whether or not they were the direct recipient of abuse’.\(^{28}\) This judgment seemed to be far from the norm though, with social research criticising courts for failing to recognise the harm suffered due to family violence.\(^{29}\) For instance, in a 1976 judgment violence by a man against his wife was held to be irrelevant when considering how he might treat his children.

\[\ldots\] there is no suggestion that Mr H has ever mistreated his children with the violence with which he has treated his wife. \[\ldots\] Mr H’s affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband.\(^{30}\)

The 1995 reforms to the FLA\(^{31}\) introduced exposure to violence to the list of factors relevant to determining a child’s best interests in sections 68F(2)(g) and (i).\(^{32}\) This sub-section (g) became one of the two ‘primary’ best interest considerations via the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth): protection from ‘physical and psychological harm. \[\ldots\] [due] to abuse, neglect or family violence’.\(^{33}\) The other primary consideration is ‘the benefit to the child of having a meaningful relationship with both parents’. Labelled as the legislative ‘twin pillars’ by Chisholm,\(^{34}\) there was a tension between these factors since neither primary factor was accorded more weight under the 2006 law. That tension, along with other 2006 changes, which emphasized shared parenting and possibly deterred people from reporting violence, have been assessed as promoting the importance of parent/child contact over a child’s need for a loving and nurturing relationship.\(^{35}\)

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32 (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.
33 Ibid, s 60CC(2)(b).
However, lawyers and relationship service professionals both expressed much greater confidence in the ability of the family law system to ensure that children had meaningful involvement with each parent than in its ability to ensure that children are protected from harm, family violence, child abuse and neglect.\textsuperscript{36}

These reviews, commissioned by the Commonwealth Attorney General, cited too the social science research as provided above that emphasize that the harms to children of exposure to violence ‘clearly jeopardise children’s wellbeing’.\textsuperscript{37}

In the 2006 legislation, the line between abuse and exposure was also blurred with one of the Objects in Pt VII of the FLA stating that ‘children need to be protected not only from direct harm but also harm caused by being exposed to abuse or family violence that is directed towards, or affects, another person’.\textsuperscript{38} In the 2012 amendments\textsuperscript{39} the definition of family violence was extended and family violence is now defined as conduct that coerces or controls a family member, or causes them to be fearful; this could be considered to be a subjective definition having deleted the 2006 ‘objective’ element to the definition ‘that the fear or apprehension of violence must be reasonable’.\textsuperscript{40} Further, these latest definitional changes may directly affect outcomes for children exposed to family violence because ‘exposure’ is now defined to include the provision of assistance,\textsuperscript{41} cleaning up after the incident,\textsuperscript{42} or being present while emergency services attend an incident involving an assault.\textsuperscript{43} Due to these two definitional changes children should not, therefore, need to be present at the time of the violent conduct to be found to have been exposed to it. Courts must continue to consider the risk of family violence and not make orders that expose people to an unacceptable risk of family violence or make orders inconsistent with a family violence order.\textsuperscript{44} The word ‘person’ has been used in the new legislation, not child, so this consideration may be extended to parents of children.

Although the most recent amendments appear to encapsulate a far broader range of family violence behaviour, the examples provided in the new s 4AB(2)\textsuperscript{45} are predominantly related to physical acts.\textsuperscript{46} Further, two of the three sub-sections\textsuperscript{47} relating to controlling or coercive behaviour contain an element of ‘unreasonableness’, so this may be either a subjective or objective test. And, it is yet to be determined from whose point of view the behaviour must be unreasonable: victims, witnesses or judicial officers. Indeed, judicial

\textsuperscript{36} Ibid, Kaspiew et al at 3.9.
\textsuperscript{37} Ibid, at 3.10.
\textsuperscript{38} Section 60B(1)(b). Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [36].
\textsuperscript{39} Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).
\textsuperscript{40} Family Law Act 1975 (Cth) s 4AB(1). The definition of abuse was altered by the amendments in 2012 to include assaults, sexual activity, and serious psychological harm caused by exposure to family violence or serious neglect.
\textsuperscript{41} Ibid, s 4AB(4)(c).
\textsuperscript{42} Ibid, s 4AB(4)(d).
\textsuperscript{43} Ibid, s 4AB(4)(e).
\textsuperscript{44} Ibid, s 60CG.
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid, ss 4AB(2)(a)–(c), (e)–(f).
\textsuperscript{47} Ibid, ss 4AB(2)(g)–(h).
officers carry a heavy burden when considering allegations of violence and abuse because it is not ‘easy to arrive at clarity on the extent, severity and nature of that violence, and then match that information with appropriate child-focused action’.\footnote{I. Moloney, B Smyth, R Weston & E Hall, ‘Different Types of Intimate Partner Violence? Reply to Wangmann’s comments on the AIFS report’ (2008) 22 Australian Journal of Family Law 279.}

It is important to note too that s 60CC(2A), as inserted in June 2012, requires greater weight to be given to the primary consideration of protection of children over the promotion of child/parent contact. The 2012 amendments only apply to cases where the application was filed on or after 7 June 2012.

**Aims of the research**

To date, there is a paucity of research that focuses on the extent to which witnessing or exposure to family violence is considered and weighted by the judiciary in Australia compared to other forms of violence, such as the direct abuse of a child. This paper will contribute to filling that gap. In the following article, we look at case law to examine how judicial officers have regarded children witnessing family violence since the 2006 amendments came into force. We also ponder — in a speculative fashion — whether the 2012 amendments are likely to affect any change in how judicial officers approach children’s exposure to violence.\footnote{Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth). We can only ‘speculate’ since few of the cases in our sample were filed after the amendments took effect. See Methodology section.}

When judicial officers make decisions, including those about violence, they consider the evidence and arguments in court in light of the legislation at the time and their ‘own understanding of what is and is not good for children’.\footnote{P Parkinson, ‘The Values of Parliament and the Best Interests of Children — A response to Professor Chisholm’ (2007) 21 Australian Journal of Family Law 213.}

According to Chisholm: ‘exposure to parental conflict is always relevant to an assessment of the child’s best interests, because of the damage it can cause.’\footnote{R Chisholm, ‘The Harmful Impact of Parental Conflict on Children (and the Harmful Impact of Legislative Complexity on People Trying to Help Children) — A Brief Reply to Max Wright’ (2008) 22 Australian Journal of Family Law 152.} However he also notes elsewhere that allegations of child abuse are particularly difficult either to substantiate or refute because the alleged act usually ‘happens in private, the evidence is typically circumstantial and often ambiguous’.\footnote{R Chisholm, ‘Child Abuse Allegations in Family Law Cases: A Review of the Law’ (2011) 25 Australian Journal of Family Law 1.} Primarily this is due to the significant difficulties in establishing that child abuse has occurred. In many instances, the child is the only witness and there is no corroborating evidence\footnote{Ibid 6.} although it is not strictly necessary to find that past violence occurred to show there is an ‘unacceptable risk’ of harm to a child in permitting parent/child contact.\footnote{R Chisholm, ‘Recent Cases: How to Treat Allegations of Violence and Abuse: Amador v Amador’ 2010 (24)(2) Australian Journal of Family Law 276 looking at Amador v Amador (2009) 43 Fam LR 268; [2009] FamCAFC 196; BC200950937, at [96]: ‘In parenting cases, judicial officers should not shrink from making findings of abuse and violence when those}
in which the ‘unacceptable risk’ test was applied, Chisholm found that courts focused more on the general consequences of separating parents from children rather than on the specific circumstances of the particular case and whether there was an unacceptable risk to the child.\(^{55}\)

The complexities of the unacceptable risk test\(^{56}\) are only a part of the picture of decision-making in these types of matters. Research conducted over the past 15 years looking at the efficacy of legislative amendments designed to better protect children have found that there is a prevalent reluctance by the family law system to sever relationships between fathers and children, even against backgrounds of severe violence and ongoing manipulation and control’.\(^{57}\) Post 1995, unsupervised contact became far more common for fathers, despite allegations of family violence; supervised contact was ordered for increasingly serious levels of violent and abusive conduct.\(^{58}\) Unless there was strong corroborative evidence, overnight contact was most commonly ordered by the courts, ‘irrespective of the apparent severity of the allegation and the apparent weight of evidence that supported these allegations’.\(^{59}\) The importance of parent/child contact was promoted over a child’s need for a loving and nurturing relationship and this has continued following the 2006 amendments.\(^{60}\)

It is within this context of judicial indeterminacy and emphasis on parental ties that we are asking how exposure to violence is being considered and weighted.

\(^{55}\) Chisholm, above n 52, states that in making decisions about child (sexual) abuse, courts determine the risk of the abuse occurring and the magnitude of that risk (\textit{M v M} (1998) 197 CLR 250; 158 ALR 379; [1998] HCA 68; BC9805921) in the context of sexual abuse and essentially requires that where abuse of a child is a risk, the court not make an order that would expose a child to an ‘unacceptable risk’ of abuse or harm.


\(^{57}\) R Kaspiew, ‘Violence in Contested Children’s Cases: An Empirical Exploration’ (2005) 19 \textit{AJFL} 112 at 138. Kaspiew concludes that the 1995 inclusion of the child having a right to know both parents (s 60B(2)(b)) appeared to create a rebuttable presumption favouring contact.


Methodology

The 60 most recent first instance matters from mid-September 2012 that involved family violence and children’s exposure and/or experiencing child abuse were identified from the Australasian Legal Information Institute (AUSTLII) online database. We restricted our analysis to these judgments rather than drawing a random sample in order to minimise the time difference between the matters being examined, thereby reducing the confounding effects of variables that may change over time. Seventy two per cent of the judgments were from the Federal Magistrates Courts while 28% came from the Family Court of Australia with the bulk of the matters coming from registries in New South Wales. The majority of the judgements (82%) involved women making allegations of family violence or abuse and in 83% the alleged perpetrators were male.

Factors that were recorded, considered and cross-tabulated in an initial analysis of the judgments included the following: background variables that might potentially affect outcome; the type of family violence or abuse alleged; whether the Order was no time, supervised time with alleged perpetrator or unsupervised time with alleged perpetrator; and how the judicial officer discussed (and seemed to weight) the alleged exposure and/or abuse when going through the best interest list. We used a thematic analysis with both authors independently examining the cases. Having identified the important theme of unacceptable risk, we undertook a second analysis of the judgment material in which we identified and explored the facts and variables that appeared to influence judicial officers’ assessment of risk of harm. Any relevant comments were recorded.

Caveats

We neither claim nor aim to produce a comprehensive overview of judicial officers’ decision-making and measurement of harm in exposure to violence and direct child abuse matters. Judgment material is limited in providing the full picture of judicial reasoning; findings should be seen as indicative but not as definitive.

AUSTLII does not contain all first instance judgments. The 60 cases may be reflective of particular registries due to the large number of registries relative to the number of cases and because of differences in how registries report cases to AUSTLII over time. The outcomes of the 30 child abuse cases might not reflect determination of child abuse matters in general since it happens that none of the 30 was on the Magellan list, which handles the more serious cases of physical and sexual abuse.

The sampling timeframe/model was created to provide a yardstick for comparison between pre-June 2012 reform and post-June 2012. However of

61 Australasian Legal Information Institute, AUSTLII (12 September 2012) Australasian Legal Information Institute Web Site <http://www.austlii.edu.au/>. A full list of the cases sampled is available on request.

the 60 matters, only four were identified in which the judicial officer applied the FLA as amended in June 2012 — not a large enough sample with which to make a valid comparison. Where relevant, their facts, outcomes and judicial reasoning are referred to below. Note that our findings, minus these four cases, could provide a baseline for future comparison of the effects of the June 2012 legislation.

Perception of risk of harm

The question of whether children will spend unsupervised, supervised, or no time with the alleged violent parent appears to be correlated with whether judicial officers find there is an acceptable or unacceptable risk of harm to children.64

If the allegations of abuse and family violence are rejected by the court, then it is obvious that little or no risk of harm is identified. Ogden v Ogden is an example: a mother throwing objects at a father was held not to be family violence as the father was not fearful.65 Similarly in Geston v Geston a father’s allegation of abuse was discounted due to insufficient evidence and a failure to put allegations to the mother in cross-examination.66 Allegations in Carr v Carr that a mother abused a child were not substantiated, as the child was found to be likely the victim of parental alienation.67

Unsupervised time might be the determination too if the responsibility for the violent behaviour was attributed to both parents.68 For instance, in Henty v Sullivan the evidence of the abuse alleged was held not to present an unacceptable risk to the child, as the allegations were made in an atmosphere of ongoing parental mistrust. Justice Dessau stated that she hoped the parents appreciated that ‘they have a beautiful daughter, an innocent in the midst of their conflict, and one who cannot blossom...if their hostility continues to override her needs’.70

Other matters turned on the specific circumstances of the case. For example, in Hashim v Hashim the level of risk was found to be acceptable and unsupervised contact was ordered due to a parent obtaining professional assistance with anger management. In that case, there was also judicial recognition that abuse had occurred only during separation. This appeared to


64 Ibid, at [107].
65 West v West [2012] FamCA 362; BC201250478.
66 Morgan v Morgan [2012] FamCA 394; BC201250518.
Serious a trend which has been evident for at least the last 15 years.

Unsupervised contact was the determination in 70% of the judgments; this is
determination in

negatively that even supervised contact would have on the mother which
contribute to a finding that there was a reasonably low level of risk to the

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Risk of harm and type of violence

Unsupervised contact was the determination in 70% of the judgments; this is
a trend which has been evident for at least the last 15 years. Orders for no
time or for supervised time (both indicative of judicial concern about the
caring capacity of that parent) were less likely with exposure (33%) than with
direct abuse (57%). However, as Table 1 shows, an order of no time was the
determination in only eight of the 60 matters; three of these included a
determination of serious assaults and/or child (sexual) abuse. In three of the
other five, the child(ren) expressed strong views about not seeing the parent;
in another the judge was concerned about the father’s exhibitionism and the
negative impact that even supervised contact would have on the mother which
he found could have ‘vicariously unfortunate effects on [the child]’. In the
other matter with a no time order, the judge appeared to be most influenced by
the Family Consultant who considered the child had an ‘ambivalent
attachment’ with the mother.

<table>
<thead>
<tr>
<th>Type of Violence</th>
<th>Unsupervised</th>
<th>Supervised</th>
<th>No Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violence between adults</td>
<td>15</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Child exposure</td>
<td>10</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Exposure and direct child abuse</td>
<td>14</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Child Abuse</td>
<td>3</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>42</td>
<td>10</td>
<td>8</td>
</tr>
</tbody>
</table>

‘Couples violence’ appears to be seen as less harmful to children and
constituting the lowest level of unacceptable risk to children. Judicial officers
accordingly discussed the primary considerations differently in cases that
involve children (potentially) witnessing family violence as compared to cases
with allegations of direct child abuse. For instance, in Henty v Sullivan, in
which the relationship between the parents was extremely conflicted, Dessau
J commented that a meaningful relationship needed to be weighed equally

71 Hashim v Hashim [2012] FamCA 135; BC201250172 at [212], [206], [226].
72 Rhoades et al, above n 58.
73 Note that when the age, gender and number of children in the household were
cross-tabulated with the outcomes ordered for children, there was no statistically significant
effect. The serious abuse cases were: Corlis v Pepy [2012] FamCA 247; BC201250323;
BC201250398.
74 Bower v Bower [2012] FMCAfam 515; BC201204727; Daplyn v Ness [2012] FMCAfam 959; BC201206793; Francis v Imaktiv [2012] FMCAfam 873; BC201206419. The facts of
these cases are discussed further below.
75 Marsden v Winck [2012] FamCA 557 at 117; BC201250491.
76 Lolley v Lolley [2012] FamCA 380; BC201250493.
77 Family Law Act 1975 (Cth) ss 60CC(2)(a)–(b).
with the need to protect the child from harm or abuse. In ordering sole parental responsibility for the mother but time spent with the father, the judge noted:

The reality for the child is that, although her parents love her, they have only negative views of each other. I hope that with the conclusion to these proceedings, the parents might find the mental and emotional space, and the insight, to appreciate that they have a beautiful daughter, an innocent in the midst of their conflict, and one who cannot blossom into the healthy, happy adult that both would wish for, if their hostility continues to override her needs.78

In contrast, in matters that involved child abuse allegations, the weight attributed to the primary consideration of maintaining a meaningful relationship may be diminished as illustrated by the matter of Corlis v Pepy in which the father had been charged with indecent assault on his youngest child who was only five years old at time of the offence. Three years later, while still serving a prison sentence, the father sought orders to reinitiate contact with his two children. As observed by Cleary J:

It is important in my view for the father to understand that the most important thing he can do for his children is to respectfully stay away from them. His presence in their lives would be disruptive and adverse, even if there was no risk of further offending.79

Thus, the protection of the children best interests ‘pillar’ is emphasised when child abuse has been determined to have occurred. For example, in Jenkins v McInnes, a father who had sexually assaulted his daughter was prevented from having contact with his son, even though he was at a lower risk of sexual assault.80 In that matter, Altobelli FM applied the unacceptable risk test and made an order that put the son at ‘least risk’.81

Only five of the 34 judgments that included allegations of exposure resulted in no time being ordered. The violence in these five generally involved very serious assaults. For instance, in Sheenan v Sheenan, the judge was ‘satisfied that he was a violent man,’ — that the father had seriously assaulted the mother with an axe in front of his six-year-old child. Given this incident, it was held there was an unacceptable risk of harm to the children and no time with the father was ordered.82 Supervised contact was held to be inappropriate due to exposing the ‘wife to heightened anxiety, which was a concern for her parenting capacity’.83

Francis v Imaikop involved a father’s violent conduct towards the mother causing their twelve-year-old child to be so fearful of contact as to say, ‘I hate myself. I hate everything. I want to kill myself’.84 The father’s reaction was simply to state, ‘She’ll be right. She will come or I’ll make her come. She’s a kid and she’ll do what I say’.85 In the words of Scarlett FM:

78 Henty v Sullivan [2012] FamCA 470; BC201250563 at [165].
79 Corlis v Pepy [2012] FamCA 247; BC201250323 at [62].
80 Jenkins v McInnes [2012] FMCAfam 477; BC201204846.
81 Ibid, at [54].
83 Ibid, at [104]–[105].
84 Francis v Imaikop [2012] FMCAfam 873; BC201206419 at [23].
85 Ibid, at [100].
At this time in her life, X’s best interests will not be served by remaining in contact with a father who has a history of violence against women, including her mother. X is female, and she needs to live in an environment where violence by men towards women will not be tolerated by society.  

In Bower v Bower, five children aged 11 to 16 years of age had become fearful of their mother who was alleged to have abused them. The court did not determine whether the allegations were founded since the ‘children do not wish to see her and should not be made to do so’. The report prepared by the Family Consultant explained why supervised contact was not appropriate:  

... compelling [the children] to spend time with the mother is not in their best interest. In fact, to do so at this time is likely to cause them distress and further emotionally alienate them from their mother.  

The father in Marsden v Winch habitually masturbated, which his ten-year-old daughter had witnessed. No contact was ordered as he was unable to control this behaviour, was unlikely to do so in the presence of teenage girls, and the mother had developed post-traumatic stress disorder.  

In relation to the mother, Watts J stated that:  

the real problem however with the father denying what the mother says she witnessed. ... is that it feeds into and exacerbates the mother’s fears that the father’s treatment has been based on a flawed history and has been insufficient to protect the child from being exposed to the consequences of a recurrence of that behaviour by the father.  

Although such relatively infrequent determinations of no time in matters that include exposure suggest that witnessing may not be considered to represent the same degree of harm to children, individual judicial officers do appear to understand its gravity (at least in theory). In Lauder v Doran for example, Murphy J, discussing family violence, described the potential effect on children as insidious, ‘affecting both parenting and outcomes for children’.  

A number of decisions did reflect a broad understanding of violence. For instance, as stated by Brown FM, violence can range from:  

[I]mpulsive behaviour that arises as a result of a stressful situation such as a relationship breakdown and is instantly regretted or it can be more systematic and deliberate arising from a clear power imbalance between the parties concerned.  

Other federal magistrates agree that family violence does not necessarily

86 Ibid, at [104].  
87 Bower v Bower [2012] FMCAfn 515; BC201204727 at [133].  
88 Ibid, at [78].  
89 Marsden v Winch [2012] FamCA 557; BC201250491 at [73]–[91]. The father’s behaviour was attributed to mental health issues.  
90 Ibid, at [82].  
91 Ibid, at [117].  
92 Ibid, at [91].  
93 [2012] FamCA 452; BC201250552.  
94 Ibid, at [1].  
95 Alley v Alley [2012] FMCAfn 895; BC201206723 at [100].

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involves physical aggression. In *Marcus v Jeffries*, Bender FM noted that the father had failed to recognise that ‘arguing and continuous acrimony is a form of family violence’.96

*Barnett v Ackerman* also shows judicial understanding of family violence. The children were ordered to spend two hours supervised contact with their father on four occasions a year. Even though the mother was not a good witness,98 Terry FM accepted that behaviour contradictory to allegations of violence is common for victims of violence.99 The father was viewed as ‘simply not credible’100 due to inconsistent accounts of violent incidents.101 He had attempted to mitigate his violent acts by defining them as ‘couple violence’, which the federal magistrate did not accept.102 This was also true in a decision made under the June 2012 law: in *Francis v Imaikop* Federal Magistrate Scarlett found the father not to be a credible witness due to down-playing his violent behaviour.103

However, exposure to physical violence does seem to be perceived as more harmful than exposure to verbal or emotional abuses. As stated by Coakes FM, where children are exposed to verbal abuse and physical assaults, the protection of children from psychological harm is paramount.104 Thus, unsupervised time was ordered in all three cases in which the adult violence was controlling behaviour and in six of the seven with verbal abuse between the adults; this suggests that witnessing non-physical violence is seen as representing the least risk to children. When the alleged violence that the child witnessed included physical violence, unsupervised time orders were less common. For example, in one of the four cases heard after the June 2012 amendment took effect, Scarlett FM indicated that courts were not only interested in the immediate protection of children but also in preventing them from being exposed to ‘frightening episodes’ of family violence.105 In this matter, the order required any time with the violent father to be supervised.106

**Quality of corroborative evidence and assessment of risk of harm**

The quality of corroborative evidence appears to be a crucial deciding factor in making an order of no time or supervised time. In particular, as found in

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97 **Ibid.** at [25] per Bender FM.
98 *Barnett v Ackerman* [2012] FMCAfam 286; BC201201804 at [23].
99 Ibid, at [44]. This meant that the mother was not a good witness but the Magistrate understood her poor performance was due to the violence she had suffered.
100 Ibid, at [27].
101 Ibid, at [33].
102 Ibid, at [106] per Terry FM: ‘The violence was perpetrated by the father, it was serious and it was accompanied by accusations of unfaithfulness and attempts to control the mother’s movements’.
103 *Francis v Imaikop* [2012] FMCAfam 873; BC201206419 at [111]. The violent father was not allowed to have contact with his daughter, primarily because of a family violence order protecting the mother and child, at [65].
104 *Cavill v Jessop* [2012] FMCAfam 784; BC201206107 at [282].
105 *Wyatt v Wyatt* [2012] FMCAfam 907; BC201206727, at [10].
106 Maintaining a meaningful relationship remained an important consideration despite s 60CC(2A).
earlier research, expert opinion from the Family Consultant and by medical specialists such child psychiatrists seems important in influencing judicial officers. For instance, the Family Report evidence in one of the exposure cases with the atypical order of no time, emphasized the harm of exposure:

Each of the parties needs to be cognizant of the research that suggests that children exposed to on-going family conflict and violence are prone to suffer adverse consequences in their emotional and cognitive development. Depression, anxiety, as well as other cognitive and temperament problems are commonly seen in such children. X is already showing signs of mental health distress especially anxiety, self harm and hypervigilance which will only exacerbate if she becomes further implicated in the adult dispute or is exposed to further conflict between her parents.

In another example, Sheenan v Sheenan, strong corroborating evidence included remarks by a judge in sentencing the father for assault of his ex-wife. Further, the father stated to a psychologist that ‘[referring to the mother] I wish I’d shot her in the head’. The evidence provided by the Family Consultant indicated that the father had limited parenting capacity, which Cronin J found to be ‘powerful and persuasive’.

Indeed such expert evidence concerning the effects of exposure can be very important. Field v Bowers involved the father repeatedly making unfounded allegations of sexual abuse by the mother, including the children kissing her pregnant stomach. A psychiatrist assessed the father’s behaviour and stated that his allegations truly represented a desire to re-partner with the mother. Three psychologists discussed the father’s negative impact upon the children resulting in the discounting of the father’s contradictory assertions. Justice Cronin ordered the father to have no contact, otherwise than agreed by the wife, because ‘the husband’s obsession, appalling negative behaviour and lack of insight’ would prevent the children from having the opportunity to become well-rounded adults.

Medical evidence was also relied upon in Daplyn v Nessa. A father was ordered to have no contact with his ten-year-old child due to on-going litigation and parental conflict to which the child had been exposed. A deciding factor in the judge’s reasoning seemed to be the evidence of two medical practitioners that the child was ‘acutely aware of the dysfunctional

107 T Brown, L Hewitt, R Sheehan, M Frederico, Violence in Families: Report No 1: The Management of Child Abuse Allegations in Custody & Access Disputes before the Family Court of Australia, Department Social Work, Monash University, Melbourne, 1998. Note that this research used a purposive non-probability sample and cannot therefore depend upon the rationale of probability theory.

108 See for example Gaylard v Cain [2012] FMCAfam 501; BC201203671 at [9] in which Federal Magistrate Altobelli accepted the child and family psychiatrist’s expert’s opinion that there was, in his opinion, no unacceptable risk of sexual abuse by the father, the mother had alienated the children from the father but that she would provide the better care.

109 Francis v Imaikop [2012] FMCAfam 873; BC201206419 at [45].

110 Sheenan v Sheenan [2012] FamCA 383; BC201250398 at [49].

111 Ibid, at [82].

112 Ibid, at [108].

113 Ibid, at [94].

114 Ibid, at [107].

115 Ibid, at [146]–[147].
dynamic and conflict between the parties which has adversely affected him’. The child had expressed his view to the doctor that he would be ‘unsafe if he spent time with the father’.116

In Langley v Camp, a matter that used the new June 2012 provisions also heard by Scarlett FM, a mentally ill father was given supervised contact with his son even though he (the father) had a number of psychotic episodes117 and an apprehended violence order had been in place protecting the mother.118 The Family Consultant indicated that the father was ‘...attentive, gentle and affectionate’.119 This expert opinion, combined with a community treatment order,120 may have contributed to Scarlett FM’s decision:

I am satisfied that there is a benefit to the child in having a meaningful relationship with his father, but the avoidance of risk of harm to the child must take priority’.121

Minimising potential risk with unsupervised time orders

The analysis of the judgments shows that some orders for unsupervised time contained specific stipulations. For instance, Scott v Ross involved an order that the children live with their maternal grandparents and both parents only have supervised time with their children. These orders were made despite there being concerns that the grandfather abused alcohol and had assaulted the father in front of the children.122 Justice Ryan made orders requiring the grandfather to attend alcohol counselling as well as to keep within a 0.05 blood alcohol level while looking after the children.123 This judgment illustrates the use of court orders to mitigate the risk of harm to children by attempting to control potentially risky behaviour.

Abstinence from alcohol featured in other matters with one father allowed to have unsupervised time so long as he complied with court orders to limit his alcohol consumption.124 And, in Cavill v Jessop, the over-consumption of alcohol and the use of drugs were closely linked with the escalation of violence where controlling behaviour and verbal and physical abuse were alleged:

Each parent is restrained from consuming alcohol or illicit substances for the period 12 hours prior to and during the time [X] is in the care respectively of either parent.125

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116 Daplyn v Nessa [2012] FMCAfam 959; BC201206793 at [80]–[82].
117 Langley v Camp [2012] FMCAfam 778; BC201205710 at [20].
118 Ibid, at [39].
119 Ibid, at [40].
120 Ibid, at [22].
121 Ibid, at [41].
122 Scott v Ross [2012] FamCA 193; BC201250271 at [41].
123 Ibid, at [75]. While attendance at a program can be monitored, one might question whether it is realistic to regularly confirm a blood alcohol limit, other than through self-reporting.
125 Cavill v Jessop [2012] FMCAfam 784; BC201206107 at [11]. Similarly in Watt v Nelson [2012] FMCAfam 751; BC201205870 at [8]: ‘By consent each party be restrained, without admission, from consuming illicit substances, or being under the influence of illicit substances, twelve (12) hours prior to and whilst any time the children are in that parties care’. In that case, the child, whose mother had been in a series of violent relationships,
Risk to children in some cases was controlled by the court too in other ways such as not allowing children to travel overseas with the father.\footnote{Fredericks v Carrigan [2012] FMCAfam 663; BC201205231.}

In *Matson v Matson* Federal Magistrate Coakes decreased the chance of physical abuse by ordering that:

Each parent is restrained from physically punishing Y by any physical means including but not limited to smacking, slapping, pushing, grabbing, holding, using a slipper, or spoon or any other instrument, including the threatened use of any such instrument, and each parent is further restrained from causing or permitting any other person to administer such form of punishment or threaten to use such form of punishment to Y.

The harms of exposure were also mitigated by the Federal Magistrate with each parent ordered not to denigrate the other, including making rude comments, making insulting comments, swearing at, shouting at and making obscene gestures.\footnote{Matson v Matson [2012] FMCAfam 790; BC201206197 at [331] and [215].}

**Conclusion**

Orders of no time or even for only supervised time are not the norm in cases involving allegations of either child abuse or exposure. Those parents who were ordered to have no time with their children were either extremely violent towards their partners, had abused their children, or were mentally unwell. It appears that these parents’ behaviour was so extreme that judges considered that court orders prohibiting the behaviour would have been ineffectual and so posed an unacceptable risk. Supervised time with the child(ren) appears to be ordered if the parent appears to accept responsibility for their actions and seeks treatment, thereby showing the risk of harm to their children has been mitigated.\footnote{Langley v Camp [2012] FMCAfam 778; BC201205710.}

Indeed as these cases have shown, the critical question that the judicial officers are responding to is whether there is an unacceptable risk of harm to the child in seeing the parent. As recently stated by Deputy Chief Justice Faulks, ‘children cannot be an experiment’\footnote{Deputy Chief Justice John Faulks, ‘Children’s Matters in the Family Court: LAT, Div 12A & Response to Violence’, Lecture delivered at the University of Canberra, Australian Capital Territory, 18 October 2012.} Orders cannot be made on the basis of ‘let’s see what happens’.\footnote{Ibid.}

\footnote{Chisholm, above n 52, 21.}
Risk of harm to children from exposure to family violence

risk of harm the alleged behaviour presents to a child.132

However, when judicial officers make findings of fact and weigh those findings in the exercise of their discretion within the FLA framework: ‘ultimately, the weight attached to each factor as set out at s 60CC is a matter of discretion’.133 In the recent matter of Lauder v Doran, Murphy J agreed, stating that ‘best interests are values not facts’134 in deciding that there was potential for an emotional relationship despite the father’s criminal behaviour. His decision to order supervised contact even though one of the medical reports indicated that ‘the mother’s problems diminish her ability to buffer [the child from] the father’s issues’135 highlights the importance of individual judicial officers’ discretion. Thus to some extent their individual understanding and views about the harms of family violence may act as a filter in assessing the ‘facts’ — even those provided by the experts.

Exposure to family violence, or its after effects, does not seem to be attributed the same level of potential harm to children as direct abuse, especially sexual interference with a child. In two thirds of the 15 matters with child exposure, unsupervised time was ordered as compared to 43% of the matters involving child abuse alone. This is despite research clearly showing that exposure to family violence is extremely harmful to children and that family violence is correlated with a heightened risk of child abuse. The latter is illustrated in our sample with about one third of child abuse allegations also including allegations of exposure or violence occurring between adults.

As discussed earlier, the 2012 amendment prioritised the primary consideration of protection of the child over the promotion of child/parent contact and broadened the definition of exposure. Is legislative change enough though? The outcomes in the four post amendment cases were varied. One resulted in an order of no time until the child turned 13 and then she could see her father if she wished to.136 In both Wyatt and Langley and Camp discussed earlier Scarlett FM ordered supervised time, stating that, ‘The Family Law Act has recently been amended to give greater weight to concerns about family violence’.137 In the fourth, the Federal Magistrate decided that the father could not file a Notice of Child Abuse, Family Violence or Risk of Family Violence since the father would need to be coerced, controlled or in fear when the mother kept the child from him for such an act to constitute family violence.138

The small number of cases is of course too limited to allow for any conclusions about the effect of legislative prioritising of child protection. It does allow us though to conclude that decision-making in these types of cases continues to involve judicial assessment of coercion, control, fear, violence

132 Moloney et al, above n 56, at 102. This study found that unless allegations of violence were accompanied by strong corroborating evidence, outcomes for children were not affected.
133 Wyatt v Neilson [2012] FMCAfam 751; BC201208570, at [157].
135 Lauder v Doran [2012] FamCA 452; BC201250552 at [37].
and measurement of harm and risk. Therefore, the crucial question is how do judicial officers define and grade harm and how do they understand the dynamics and manifestation of family violence? Chisholm has recommended:

That whatever steps are taken in relation to the future of the Family Court of Australia and the Federal Magistrates Court, the Government should ensure that the federal court or courts administering family law have judicial officers with an understanding of family law and a desire to work in that field, and procedures and resources specifically adapted to the requirements of family law, and particularly to the requirements of cases involving issues of family violence.¹³⁹

Engendering discussion amongst judicial officers about subjectively held definitions of harm and risk might help to bring about practical changes in outcomes for children. It is likely that there is variation in understanding of the realities of family violence. Judicial officers could no doubt benefit from learning more about the seriousness of exposure to violence; that exposure is far broader than witnessing;¹⁴⁰ and the correlation of abuse with adult violence. They could learn about the potential risk to the child if unsupervised time is ordered since the couple violence may persist in various ways after separation¹⁴¹ and/or a violent partner may repeat such behaviour with a new partner.¹⁴²

‘Programmes involving a consistent coordination of police, court staff and human service providers...’ could play an important role in changing attitudes.¹⁴³ To this end, it is likely that policy directions such as the Family Violence Best Practice Principles and initiatives such as the Magellan Program work in conjunction with legislation to better protect children. It is interesting though that none of the 30 child abuse cases in our sample were on the Magellan list. Evidently the abuse was not deemed as serious enough or the party or lawyer did not facilitate the process by completing the requisite Form 4.¹⁴⁴ With Magellan, ‘the Court orders expert investigations and assessments from the respective state/territory child protection agency and/or

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¹³⁹ Chisholm, above n 34.
¹⁴⁰ For instance, in 2011 case of Palmer v Palmer [2010] FMCAfam 999; (2010) 244 FLR 121; BC201007281, Federal Magistrate Brewster did not believe that the father’s violence towards the mother posed a significant impact on the children: ‘I am satisfied that the violence which I found was perpetrated by the husband had a specific impact on the wife. I do not believe that there is an unacceptable risk that the children will be directly exposed to violence’ at [10].
¹⁴⁴ Notice of Child Abuse, Family Violence, or Risk of Family Violence.
Risk of harm to children from exposure to family violence  
the Court family consultant’. 145 Perhaps seriousness of physical abuse is a measurement or assessment best left to Family Counsellors and child protection workers who would be better able to investigate thoroughly allegations if these matters were routinely put on the Magellan List without the lodgement of a form 4.

The guidelines for Magellan also do not consider exposure as an injury that qualifies the matter for inclusion on the List:

The parameters of the Magellan project are quite clear. Emotional abuse is not included, nor is the child being a witness to domestic violence. There must be a clear allegation that a child has been sexually abused or seriously physically abused. 146

Yet as we write above, the psychological research has shown that ‘with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence’. Witnessing is mentioned in the recommendations of the National Council’s Plan for Australia to Reduce Violence against Women and their Children, suggesting that Commonwealth and State and Territory governments need to work together to ensure that the National Framework for Protecting Australia’s Children meets the needs of children who witness and/or experience domestic and family violence. 147 This includes State and Territory child protection agencies working with Commonwealth agencies or Courts.

Therefore, we recommend that in addition to the word ‘serious’ being deleted, that the Magellan program should be expanded to include family violence matters in which the harms of exposure are an issue. A uniform integrated response would better ensure that informed investigation of individual cases would take place, translating into more in-depth and uniform child welfare expert evidence to better inform judicial perceptions of risk of harm. There are resource issues for the State, Territory and Commonwealth Governments in implementing this recommendation; however we believe such a multi-disciplinary response would be a most worthwhile investment in promoting family law processes and reasoning that are in harmony with the National Child Protection Framework’s aim to ensure that ‘Australia’s children and young people are safe and well’. 148

146 George, above n 62.