1. Introduction

Running family violence cases is hard work. Deciding family violence cases is hard work. All participants in this process are concerned about the impact of family violence on victims, and on children. Everyone is conscious about the possibility of false denials and false allegations. In the maelstrom of daily practice it is a constant challenge to keep up with changing legislation, case law and procedures, let alone to access the social science research and literature which is so helpful when applied to the daily practice of family law.

Family violence is one of the greatest challenges confronting those who practise in and around family law – the judiciary, the legal profession, family consultants, family dispute resolution practitioners, psychiatrists, psychologists, and many other experts who are involved in the field. This group is united in some respects, but deeply divided in other respects. There is a common concern about the insidious impacts of family violence on victims and their children. There are deep differences, sometimes based on politics and ideology, about the causes, incidence and most appropriate responses to family violence.

In February 2007 two major representative organisations representing those who practice in the field of family violence convened a conference bringing together 37 experienced practitioners and researchers to identify and explore conceptual and practical tensions that have hampered effective work with families in which family violence has been identified or alleged. The conference has become

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2 The National Council of Juvenile and Family Court Judges, and the Association of Family and Conciliation Courts

known as the Wingspread Conference. The purpose of this paper is to present some of the findings of that conference and some of the research that is associated with it and to explore some implications of these findings in the daily practice of family law.

Before doing so the paper will also briefly review what is known about family violence allegations in Australia, and why family violence is so important in parenting cases.

2. Family Violence in Family Law Cases in Australia

What is the prevalence and nature of allegations of family violence in Australia today?

We actually known quite a lot as a result of recent research undertaken by Moloney, Smyth and their colleagues at the Australian Institute of Family Studies. Their 2007 report provides some very interesting and in some respects disturbing data. They found that over half of the cases sampled in both the Family Law Courts in Australia (i.e. Family Court of Australia and Federal Magistrates Court of Australia) contained allegations of adult family violence and/or child abuse. For allegations of spousal abuse there was an average of not less than 4-5 allegations per case, most of which were characterised as severe. The most common forms of alleged spousal abuse were physical abuse (actual or threatened), emotional/verbal abuse, and property damage. Allegations were most likely to be made by mothers, whether applicant or respondent. In at least 25 percent of cases, but as high as 68 percent of cases requiring judicial

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4 This paper is therefore based on articles that have been published since the conference. Firstly there is the Ver Steegh and Dalton article cited above, henceforth referred to as Ver Steegh. Secondly there is the Jaffe, Johnston, Crooks and Bala article (Jaffe, PG, Johnston, JR et al, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans’ 46 Family Court Review 2008 henceforth referred to as Jaffe and Johnston. Thirdly there is the Kelly and Johnson article (Kelly, JB, Johnson, MP, ‘Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions’ 46 Family Court Review 2008) henceforth referred to as Kelly and Johnson).

determination, it is alleged that children saw or heard spousal violence\(^6\). It is possible that many readers of this paper will find this unsurprising.

What is perhaps more surprising is the very poor level of evidentiary material to either support or respond to these allegations. There was very little evidentiary material to support allegations, high non-response rates to allegations, and generally low levels of detail in either the allegations or responses. In those cases sampled that actually proceeded to adjudication, the quantity and quality of evidence improved. The report observes that the scarcity of supporting evidentiary material suggests that legal advice and legal decision-making may often be taking place in the context of widespread factual uncertainty\(^7\).

The impact of all of this on outcomes in parenting cases is perhaps not surprising. Unless there was strong probative evidence about family violence, allegations did not seem to be formally linked to outcomes, and in particular the level of contact was uninfluenced by the allegations. In another article written separately Moloney describes this as “when in doubt, courts are more likely to privilege the parent-child relationship over safety of the other parent or safety of the child”\(^8\).

But why is there such a very poor level of evidentiary material to either support or respond to allegations of family violence? Moloney suggests as follows:

> As noted above, the material presented to the courts in the AIFS study, much of which was affidavit material, contained little detail or corroborative evidence. The reasons for this are not clear. Anecdotal evidence from legal practitioners who attended seminars on the Report’s findings suggests that it may reduce itself to a cost-benefit exercise. Some felt, for example, that the expense of obtaining additional material was unlikely to be ‘rewarded’ by a significantly different interim outcome. The circularity of

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\(^6\) *Ibid*, Key Findings at vii and viii

\(^7\) *Ibid* Key Findings at vii and ix

\(^8\) Moloney, L, ‘Violence allegations in parenting disputes: Reflections on court-based decision making before and after the 2006 Australian family law reforms’ 14 *Journal of Family Studies* 2008 p257
this approach is obvious. Judicial officers with poor quality information do the best they can.⁹

It may well be that this view is overly simplistic. The report itself acknowledges what the authors described as “layers of ambiguity” in the context of poor evidentiary material to support allegations and conclude that the “dynamics underlying these apparent ambiguities are clearly complex and somewhat puzzling”¹⁰. Puzzling and complex indeed. At the point of taking instructions and preparing evidence any number of factors may be interacting. A victim of family violence may not disclose the same for any number of complex and legitimate reasons. The victim may not be ready to disclose at that time. The lawyer taking instructions may, in some cases, be able to facilitate disclosure by sensitive and appropriate questioning. In other cases there may be nothing the lawyer can do to facilitate this disclosure under any circumstances. If the victim makes a disclosure it may only be partial, and again there could be many complex and legitimate reasons for this happening. If a disclosure is made the lawyer might ask for more information that might or might not be provided. The lawyer might assess the evidence in their own mind, develop and test hypotheses about the evidence, and then form a judgment about the probative weight of the evidence about family violence, and whether (and if so how) to present that evidence. The lawyer might give advice to the victim about the possible implications of a disclosure that is not found to be true, or which might not be perceived to be relevant in the context of the case. The dynamic process of taking instructions about family violence, assessing the evidence, developing hypotheses and then forming a judgment about its probity, and then giving advice about the evidence is a process itself fraught with multiple layers of complexity and ambiguity. Relevant factors might include the age, gender, training and experience of the lawyer taking instructions. Context might be important e.g. public or private law, country, suburban or city practice – any one of which might impose artificial boundaries of time, cost and accessibility to legal services.

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⁹ Ibid pp264-265
¹⁰ Moloney and Smyth op cit p96
So why is there such a very poor level of evidentiary material to support or respond to allegations of family violence? It is puzzling, and the reasons are complex. It depends on the victim of family violence. It depends on the lawyer to whom a disclosure is made. It depends on the context in which victim and lawyer engage. And it is a dynamic process. However, whatever the reasons may be, from a professional perspective it is simply not good enough. Lawyers simply must do more, and courts must do more in response.

Could the law itself be a reason contributing to the phenomenon of lack of disclosure, or poor level of evidentiary material about family violence? There may be a perception in the community, and perhaps even in the legal profession, that if allegations of violence are made that are not proved, the alleging parents will be categorised as unfriendly (s.60CC(4)) or may be ordered to pay costs (s.117AB).

If that is a perception, it appears not to be based on reality. Anecdotally there appears little evidence to suggest these sections are being used as feared. And yet the law also actually facilitates the provision of evidentiary material as a result of Division 12A of Part VII of the Act, and in particular s.69ZT which excludes the application of certain rules of evidence e.g. hearsay and opinion rule. On one view, at least from an historical perspective, it has never been easier to adduce evidence of family violence.

3. A Refresher: Why is Family Violence So Relevant?

Whilst this is probably familiar territory for some it is nonetheless important to reconsider why family violence is so significant in determining post-separation parenting arrangements. Jaffe and Johnston provide a comprehensive discussion of this issue. Their main points are set out below in italics, and then each point is briefly discussed:

- Spousal abuse does not necessarily end with separation. Jaffe and Johnston suggest, and indeed experience tends to indicate, that in a majority of cases family violence diminishes on separation, but that is
not always the case. In particular in the cases where the violence can be categorised as abusive controlling violence (this will be discussed below) there is a risk that the intensity and lethality of violence actually escalates. Indeed it may be best to pay even greater attention to those cases where family violence continues after separation because of this increased risk. Hence a useful tool for those who practice in family law is to prepare a chronology of facts and events that highlight family violence. Where that violence continues after separation this may be a diagnostic factor indicating increased risk to the victim. Post-separation parenting arrangements in these cases runs the risk of not only exposing the victim to further violence, but the children as well.

- **In extreme cases, family violence after separation is lethal, especially in the case of the more abusive relationships.** The research referred to by Jaffe and Johnston evidences the increased risk of intimate partner homicide, escalating from the time of separation.

- **Perpetrators of family violence are more likely to be deficient if not abusive as parents.** Again Jaffe and Johnston refer to the research evidencing this. Whilst they recognize that there is a wide range of capacity to parent among high-conflict and violent families, common features are lack of warmth, coercive tactics and rejection of the children. But this is not always the case and, indeed, it depends on being able to satisfactorily differentiate how specific types of violence have had an impact on specific families. It is not uncommon for reports that have been prepared to assist in determining parenting cases to observe very positive and warm, appropriate relationships between children and their violent parent. From a judicial perspective, and having regard to the provisions of s.60CC of the *Family Law Act 1975*\(^\text{12}\) the nature of the relationship between a child and parent, even a violent parent, it an important consideration.

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\(^{11}\) Jaffe et al *op cit* pp501-504

\(^{12}\) Henceforth referred to as ‘the Act’. 
• **Individuals who have a pattern of abuse of their partners and those who commonly resolve conflicts using physical force, are poor role models for their children.** Jaffe and Johnston make the following poignant comments about this factor:

> Poor role modeling occurs even after the parental separation, whether or not parents mistreat their children directly, because when children witness one parent assaulting the other, their sibling, or other family member, and using threats of violence to maintain control, their own expectations about relationships tend to emulate these observations. Moreover, often very frightened by these scenes, young children tend to identify more intensely with the violent parent (i.e., "I will become powerful and mean like my dad and everyone will be scared of me"). To the extent that there is potential for the abusive parent to be violent in subsequent intimate relationships, children’s exposure to poor modeling will continue.\(^{13}\)

This is a well-established principle that is already reflected in Australian family law cases\(^{14}\).

• **Abusive ex-partners are likely to undermine the victim’s parenting role.** At one end of the spectrum Jaffe and Johnston identify attempts to alienate the child from one parent’s affection, but it can also be very subtle and yet equally insidious eg sabotaging plans, continuing criticism, competitive bribes, undermining parental authority etc. It should be noted, however, that the presence of these factors may also indicate a high-conflict but nonetheless non-violent separation. There does seem to be similar adverse impacts on children in high conflict separations whether or not there is family violence. Nonetheless these are important diagnostic factors for those who practice in family law to consider and explore. It is possible, for example, that a spouse who

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\(^{13}\) Jaffe et al *op cit* pp502-503

has reported undermining behaviours has not yet disclosed family violence.

- **Diminished parenting capacities among victims of family violence often occurs.** Jaffe and Johnston’s powerful comments about this factor need to be reproduced here:

  Preoccupation with the demands of their abuser, a conflict-ridden marriage, or a traumatic separation may render parents physically and emotionally exhausted, inconsistently available, overly dependent upon, or unable to protect their children from the abuser. 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. Female victims may have been brainwashed by the abuser into accepting their own and their children’s abusive treatment, and intimidated and embarrassed male victims tend not to protect the children from their abusive mother’s rages. Poor self-esteem, lack of confidence in their parenting, and inability to control their children, especially their older sons, makes the female victim an obvious target of blame by the abusive ex-spouse and may raise the suspicions of family court professionals as to her fitness to parent. 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.\(^{15}\)

Even in the less adversarial context in which parenting cases are decided in Australia there is always scope for the weaknesses of the

\(^{15}\) *Ibid* p503
spouse victim to be exploited, especially when the allegations of family violence are contested. All who practice in this area need to be especially sensitive to this factor. In presenting the spouse victim’s case it is sometimes the case that deficiencies in parenting capacity are minimised, perhaps in the hope that the court will overlook the same. One wonders whether a more appropriate strategy in some cases is in fact to explicitly recognise deficient parenting capacity, whilst also leading evidence to link the same to the experience of surviving family violence, as well as evidence about what has been done to seek and/or obtain support.

- **Victim’s behaviour under the stress of the abusive relationship and during the aftermath of a stressful separation should not inappropriately prejudice the residential or access decision.** The authors provide examples of victim behaviour that will resonate with anyone practicing in this jurisdiction. Consider the parent who has refused to permit contact or communication between the children and the other parent after separation. Consider the parent who left the home, leaving the children behind. Is the first parent one who refuses to facilitate and encourage an ongoing relationship between the children and the other parent, or is it a parent who has survived family violence and is in fear? Is the second parent one who has abandoned and neglected their children in a demonstrable example of inadequate parenting capacity, or is it a parent escaping the violence in the only way that their partner will allow? The very structure of s.60CC of the Act permits all of these scenarios to be played out in the evidence. For those who prepare and present this evidence there is a particular responsibility to confront these alternate hypotheses in the evidence. For those who adjudicate on this evidence, there is the responsibility to be aware of the alternate hypothesis, but ultimately to adjudicate on the evidence.
Victims of abusive relationships may need time to re-establish their competence as parents and opportunity to learn how to nurture and appropriately protect themselves and their children. The authors recognise that for the majority of victims of family violence, time, protection and support is effective in restoring parenting capacity. For a small minority of survivors of violence, perhaps those who have psychiatric or psychological issues, even time cannot have a restorative effect.

So why is family violence so relevant? All of the factors referred to above explain the long and dark shadow that family violence potentially casts on post-separation parenting arrangements. Kelly and Johnson also explore this issue and refer to the research about violence and children’s adjustment. In serious cases children suffer from behavioural, cognitive and emotional problems including aggression, conduct disorder, delinquency, truancy, school failure, anger, depression, anxiety, low self-esteem, poor social skills, peer rejection, problems with authority figures and parents, and an inability to empathise with others.

But what is especially important to note is that Ver Steegh, Jaffe and Johnston, and Kelly and Johnson all assert the central importance of differentiating among families experiencing family violence, a topic that will be discussed next in this paper. And it is not necessarily the case that the factors catalogued and discussed above will arise in all or even some of the cases. It all depends on the type of family violence and the family context itself.

5. Five central sets of issues
The Wingspread onference identified five central sets of issues which were then discussed and reported on.

1. Differentiation among families experiencing family violence.

2. Screening and triage.

16 Kelly et al op cit pp489-490
3. Participation by families in processes and services.


5. Family Court roles and resources.

The first four will be explored in this paper. The fifth issue may be dealt with here, and in short measure. Family Courts across the western world are experiencing almost identical challenges: increasing caseloads, greater complexity, fewer resources, greater frequency of self-represented litigants and a role that has evolved from pure adjudication to managerial judging. There is a real risk that as our understanding about family violence and the most appropriate responses to it increase, expectations about what the family courts can achieve may become unrealistic. The warning was expressed in Van Steegh:

*A note of caution repeatedly sounded in these discussions was the danger of resting increasing responsibility on family court professionals to make sophisticated and nuanced judgments about levels of risk and the appropriateness of specific interventions and determinations without providing the resources to ensure that these professionals are adequately qualified and trained.*

6. Differentiating Families and Differentiating Violence: Is All Violence the Same?

Ver Steegh uses a simple but effective case study to demonstrate the need for differentiation:

*Consider a situation where partner A slaps partner B. First imagine that when the incident takes place there is no prior history of physical violence or of other abusive behaviors between A and B. Then imagine that, although this incident is the first instance of physical violence, A has previously undermined B’s efforts to seek employment, denigrated B’s parenting in front of the children, and isolated B from her family and*

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17 Ver Steegh et al *op cit* p23
friends. Then imagine a situation where A broke B’s nose the week before and A is threatening to kill B and harm their children. The act of slapping is the same in each situation but the impact and consequences are very different.\textsuperscript{18}

All of the writers at the Wingspread Conference make the point in their own way that families who experience family violence differ from one another in different ways. Ver Steegh describes this in these terms:

\textit{Violent behavior may range from an isolated incident to pronounced patterns that recur over time, often escalating in intensity and frequency. Infrequent or occasional physical violence may or may not be accompanied by other forms of abuse, including threats, sexual coercion, verbal abuse, isolation, and financial control. The level of prior physical violence may or may not be a reliable indicator of future risk or lethality. The violence may be complicated by other problems such as mental illness or substance abuse. Finally, while researchers agree that exposure to domestic violence is harmful to children’s development, not all children are equally affected; there are multiple factors that influence children’s well-being and contribute to decisions about their best interests.\textsuperscript{11}}

Frequently the law of any given state or jurisdiction imposes a definition of domestic violence that is both under- and overinclusive and demands uniform treatment of families that fit the definition, despite growing recognition that they are not all alike.\textsuperscript{19}

There is a real danger in approaching family violence on a “one size fits all” basis. This occurs, even in the Australian family law courts, where allegations and denials are so prevalent and the level of evidence in support so inconsistent. For one thing family violence is often mainly identified by evidence of physical violence, even though statutory definitions are much broader and the reality is that family violence is much more diverse. There is, therefore, a real danger of

\textsuperscript{18} Ver Steegh \textit{op cit} p6
\textsuperscript{19} Ver Steegh et al \textit{op cit} pp4-5
making *assumptions* in cases where what really needs to happen is *differentiation*.

Moreover, *context* is critical, as the case study referred to above demonstrates. The failure to consider context undermines the quality of decision making. Of course it might endanger victims and children, but it might also unnecessarily impede post-separation parenting relationships. Context is thus vitally important in responding to family violence allegations in the family law courts. Whilst this might sound obvious to readers of this paper, in reality the evidence advanced on behalf of both victims and perpetrators in so many cases is scant and incomplete. Evidence about context provides the bench with a much deeper understanding about the family violence, and how best to respond. Evidence about context should preferably not come out in cross-examination or re-examination, it should be in the evidence-in-chief.

The participants in the Wingspread Conference agreed that there are some defining characteristics and variables that are particularly significant when working with families in which family violence is alleged. Ver Steegh notes:

> There was consensus among conference participants that each domestic violence situation must be closely examined to determine the potential for lethality, the risk of future violence, and the presence of other forms of intimidation. Critical variables identified by conference participants included: the frequency, intensity, and recency of the violence; the presence of sexual coercion or abuse; the existence of nonphysical coercive strategies including verbal abuse, threats, isolation, and financial control; the presence of an established history of violence, criminal activity, substance abuse, or mental health issues; the determination of "who is afraid of what"; the needs, interests and well-being of children; any history of child maltreatment; and the extent to which the violence is consistent with a recognized pattern with proven implications for ongoing risk or the utility or impact of particular interventions or determinations.
Family strengths and protective factors should also be taken into account and supported.\(^{20}\)

This is a potentially useful checklist to use when obtaining instructions and drafting and presenting evidence, and for the bench when analysing and assessing this evidence.

The Wingspread Conference identified typologies of family violence i.e. recurring patterns of family violence that enables cases and responses to be appropriately differentiated. These typologies are, it is submitted, of great use in practice. Kelly and Johnson describe these patterns as:

- Coercive controlling violence
- Violent resistance
- Situational couple violence
- Separation-instigated violence

**Coercive Controlling Violence**

This is the description used by Kelly and Johnson\(^{21}\) but Jaffe and Johnston describe it as abusive controlling violence, and it has been described elsewhere as battering or intimate terrorism\(^{22}\). Coercive controlling violence is an ongoing pattern of use of threat, force, emotional abuse, and other coercive means to unilaterally dominate one partner and induce fear, submission and compliance in the other. Its focus is on control by e.g. intimidation, emotional abuse, isolation, minimizing, denying, blaming, using children, asserting male privilege, economic abuse, coercion and threats. A selection of Kelly and Johnson’s comments about coercive controlling violence are extracted below:

- *Abusers do not necessarily use all of these tactics, but they do use a combination of the ones that they feel are most likely to work for them. Because these nonviolent control tactics may be effective without the use of violence (especially if there has been a history of violence in the*

\(^{20}\) *Ibid p7*

\(^{21}\) *Kelly et al op cit pp481-484*
past), Coercive Controlling Violence does not necessarily manifest itself in high levels of violence.\textsuperscript{23}

- Although Coercive Controlling Violence does not always involve frequent and/or severe violence, on average its violence is more frequent and severe than other types of intimate partner violence.\textsuperscript{24}

- The combination of these higher levels of violence with the pattern of coercive control that defines Coercive Controlling Violence produces a highly negative impact on victims.\textsuperscript{25}

- It is not unusual for victims of Coercive Controlling Violence to report that the psychological impact of their experience is worse than the physical effects. The major psychological effects of Coercive Controlling Violence are fear and anxiety, loss of self-esteem, depression, and posttraumatic stress.\textsuperscript{26}

- There is considerable evidence establishing the effects of Coercive Controlling Violence on self-esteem, much of it derived from the qualitative data collected from women using the services of shelters.\textsuperscript{27}

- Depression is considered by many to be the most prevalent psychological effect of Coercive Controlling Violence.\textsuperscript{28}

Coercive controlling violence is possibly the most insidious form of family violence that will be encountered in family law practice. Physical violence may not be the main presenting feature and it may not even be recent in terms of the chronology of events. It may be the psychological impacts that present foremost in the victim and this may well reflect in deficient parenting. Obviously these clients need caring and support as well as forceful advocacy. Some of the potential psychological impacts of coercive controlling violence need to be

\textsuperscript{22} Jaffe et al \textit{op cit} p501
\textsuperscript{23} Kelly et al \textit{op cit} p481
\textsuperscript{24} \textit{Ibid} p482
\textsuperscript{25} \textit{Ibid} p482
\textsuperscript{26} \textit{Ibid} p483
\textsuperscript{27} \textit{Ibid} p483
\textsuperscript{28} \textit{Ibid} p483
identified and assessed by an appropriately qualified expert. This is very important in proceedings at the stage where an experts’ or family consultants’ report is being identified. It is essential that the person preparing the report has the appropriate qualifications to make the necessary diagnosis otherwise the weight of the report will be greatly diminished, if it is renewed into evidence.

**Violent Resistance**

Violent resistance occurs when a partner uses violence to defend in response to abuse by a partner. It is sometimes described as female resistance, resistive/reactive violence and self defence\(^{29}\). It is violence that takes place as an immediate reaction to an assault and that is intended primarily to protect oneself or others from injury. There is a real risk, however, that violent resistance to coercive controlling violence leads to more serious injury for the resister. The importance of evidence about context in these situation in self-evident.

**Situational Couple Violence**

Situational couple violence is partner violence that does not have its basis in the dynamic of power and control\(^{30}\). Jaffe and Johnson describe this as conflict instigated violence\(^{31}\) and it is also called situational or common couple violence.

Kelly and Johnson make the following comments about this type of family violence:

*Situational Couple Violence is the most common type of physical aggression in the general population of married spouses and cohabiting partners, and is perpetrated by both men and women. It is not a more minor version of Coercive Controlling Violence; rather, it is a different type of intimate partner violence with different causes and consequences. Situational Couple Violence is not embedded in a relationship-wide pattern of power, coercion, and control. Generally, Situational Couple Violence results from situations or arguments between partners that escalate on occasion into physical violence. One or both partners appear to have poor*
ability to manage their conflicts and/or poor control of anger. Most often, Situational Couple Violence has a lower per-couple frequency of occurrence and more often involves minor forms of violence (pushing, shoving, grabbing, etc.) when compared to Coercive Controlling Violence. Fear of the partner is not characteristic of women or men in Situational Couple Violence, whether perpetrator, mutual combatant, or victim. Unlike the misogynistic attitudes toward women characteristic of men who use Coercive Controlling Violence, men who are involved in Situational Couple Violence do not differ from nonviolent men on measures of misogyny.

Some verbally aggressive behaviors (cursing, yelling, and name calling) reported in Situational Couple Violence are similar to the emotional abuse of Coercive Controlling Violence, and jealousy may also exist as a recurrent theme in Situational Couple Violence, with accusations of infidelity expressed in conflicts. However, the violence and emotional abuse of Situational Couple Violence are not accompanied by a chronic pattern of controlling, intimidating, or stalking behaviours.

Situational Couple Violence is less likely to escalate over time than Coercive Controlling Violence, sometimes stops altogether, and is more likely to stop after separation.\(^{32}\)

In terms of the chronology of events usually encountered in families before the family law courts, this is probably the most prevalent form of family violence in the period before separation. Whilst it is serious, and clearly has the potential to become even more serious, it possibly allows for greater flexibility when developing post-separation parenting arrangements.

**Separation Instigated Violence**

Separation instigated violence is violence instigated by the separation where there was no prior history of violence in the intimate partner relationship or in other settings. These are unexpected and uncharacteristic acts of violence

\(^{31}\) Jaffe et al *op cit* p501  
\(^{32}\) *Ibid* p485-486
perpetrated by a partner with a history of civilized and contained behaviour\textsuperscript{33}. Often it is an isolated act in reaction to stress during separation\textsuperscript{34}. This is clearly a category of violence familiar to those who practice in the family law courts as this passage from Kelly and Johnson demonstrates:

...this is not Coercive Controlling Violence as neither partner reported being intimidated, fearful, or controlled by the other during the marriage. Separation-Instigated Violence is triggered by experiences such as a traumatic separation (e.g., the home emptied and the children taken when the parent is at work), public humiliation of a prominent professional or political figure by a process server, allegations of child or sexual abuse, or the discovery of a lover in the partner's bed. The violence represents an atypical and serious loss of psychological control (sometimes described as "just going nuts"), is typically limited to one or two episodes at the beginning of or during the separation period, and ranges from mild to more severe forms of violence.

Separation-Instigated Violence is more likely to be perpetrated by the partner who is being left and is shocked by the divorce action. Incidents include sudden lashing out, throwing objects at the partner, destroying property (cherished pictures/heirlooms, throwing clothes into the street), brandishing a weapon, and sideswiping or ramming the partner's car or that of his/her lover. Separation-Instigated Violence is unlikely to occur again and protection orders result in compliance.

Unlike perpetrators of Coercive Controlling Violence, men and women perpetrating Separation-Instigated Violence are more likely to acknowledge their violence rather than use denial and are often embarrassed and ashamed of their behaviors. Some have been caring, involved parents during the marital relationship, with good parent–child relationships. Their partners (and often the children) are stunned and frightened by the unaccustomed violence, which sometimes leads to a

\textsuperscript{33} Kelly et al \textit{op cit} p487
new image of the former partner as scary or dangerous. Trust and cooperation regarding the children become very difficult, at least in the shorter term.\textsuperscript{35}

Not all families experience family violence in the same way, and not all family violence is the same. Being able to differentiate families and differentiate violence leads to the rejection of a “one-size-fits-all” approach to these cases. It also means that judicial responses to family violence can be more nuanced and more sophisticated. This will be explored in greater detail in the next two sections of this paper.

**Dangers in Differentiation**

It needs to be recognised that there are inherent dangers in the differentiation process. Not only does accurate differentiation depend on the existence of clear evidence but also on the skills and experience of the one undertaking the differentiation. The consequences of inaccurate differentiation are potentially serious. At one end of the spectrum there is the risk of endangering victims and their children. At the other end there is the danger of unnecessarily restricting parental contact with children. More differential approaches to violence are looked upon with a degree of apprehension by some womens’ groups\textsuperscript{36}. Bailey, writing on behalf of the Domestic Violence and Incest Resource Centre suggests that differentiation may lead to the most serious allegations being scaled down\textsuperscript{37}. An example of this might be where family violence occurs at separation, but is of a very serious nature. Moloney\textsuperscript{38} recognizes that even responding to evidence about differentiation brings with it the risk that waters may be muddied, and the consequential ambiguity is exploited to the detriment of victims of violence and their children.

\textsuperscript{34} Jaffe et al *op cit* p501
\textsuperscript{35} *Ibid* p487
\textsuperscript{36} Moloney and Smyth *op cit* p259
\textsuperscript{37} Bailey, A, ‘Separating safety from situational violence. Responses to Allegations of family violence and child abuse in family law children’s proceedings: A pre-reform exploratory study’ 2006 *Family Matters* 77 in Moloney & Smith *ibid* at p269
\textsuperscript{38} *Ibid* p261
It is possible though that concerns about differentiation of family violence are misplaced in the family law context. Differentiation does not attempt to either scale up or dumb down the intensity of violence, it merely seeks to understand family violence in context, and to then use this as a guide to crafting parenting arrangements. Family violence is family violence. It is plainly unacceptable in any situation or circumstance. Perpetrators must be made accountable. Victims must be protected. Differentiation of family violence is not meant to be used as a factor in determining punishment of perpetrators, or the nature and extent of protection of victims. The primary purpose of differentiation is family law is to assist with crafting parenting arrangements which are child-focused but also protect victims and their children.

7. Screening and Triage

It is trite that identifying family violence is perhaps the single most important component to appropriately responding to it. This involves screening and triage from the perspective of the family law courts, but this in itself depends on applications filed in the court. The form of application needs to flag that family violence is an issue, and the evidence in support must be clear and persuasive.

From the perspective of the legal profession this means that the application, notice of abuse and affidavits need to be concise but cogent. In practice the problem is lack of particularity about family violence allegations, not too much detail.

From the perspective of the family law courts, screening and triage depends, at least for the time being, on which court the case is filed in. In the Family Court of Australia (FCoA), unless the application is urgent and has been listed early and directly before a judicial officer, the first contact with the court’s screening and triage is a conference with a Registrar and Family Consultant. In the Federal Magistrates Court of Australia (FMC), the first contact is the Federal Magistrate before whom the matter is listed. Thus, in the FMC, for all practical purposes screening and triage is undertaken by the Federal Magistrate. This is an onerous
responsibility given that the FMC is a high-volume court, and the context of first presentation of cases involving family violence is a busy duty list.

The Wingspread Conference endorsed a number of key principles about screening and triage\(^{39}\). Screening procedures must be culturally and socioeconomically sensitive. Screening instruments must be sufficiently complex and nuanced to provide accurate information, but they must also be simple enough to be administered by people with diverse backgrounds and experience levels. Screening protocols should include feedback loops and opportunities for additional input as well as formal challenge.

Jaffe and Johnston have developed a screening tool called the PPP screening that considers three basic factors about family violence: potency, pattern and primary perpetrator\(^{40}\). They describe these factors as follows:

First, level of potency—the degree of severity, dangerousness, and potential risk of serious injury and lethality—is the foremost dimension that needs to be assessed and monitored so that protective orders can be issued and other immediate safety measures taken and maintained. Prior incidents of severe abuse and injuries inflicted on victims are an important indicator of the capacity of an individual to explode or escalate to dangerous levels. In some cases, explosive or deadly violence can erupt with little or no history of abuse, but other warning signs are often evident.

Second, the extent to which the violence is part of a pattern of coercive control and domination (rather than a relatively isolated incident) is a crucial indicator of the extent of stress and trauma suffered by the child and family and the potential for future violence. It also suggests what kind of protective, corrective, and rehabilitative measures to take (e.g., high-security supervision of visits, substance abuse or psychiatric treatment). A history of using physical violence and power assertion are obvious indicators of a pattern of abuse. However, overt acts are often

\(^{39}\) Ver Steegh et al op cit p15
mere tips of the iceberg in a deeply embedded pattern of coercive control that can be long hidden from public scrutiny. It is also important to consider the degree of submission induced in the victim, the control asserted by a partner's insistence on unilateral authority in multiple domains, and after separation the more subtle harassment and control exerted through manipulation of the children and/or continued litigation. See Table 1, Part B for a list of indicators of the pattern of violence and coercive control. There may be circumstances where the level of violence is related to the perpetrator's history of mental illness or substance abuse and these factors will have to be considered in regards to both assessment and intervention strategies.

Third, whether there is a primary perpetrator of the violence (rather than it being mutually instigated or initiated by one or the other party on different occasions) will indicate whose access needs to be restricted and which parent, if either, is more likely to provide a nonviolent home, other things being equal. Accounts of the violent incident(s) by the participants themselves should be assessed with caution, because victims may tend to assume more blame, and abusers usually minimize or deny their conduct. Moreover, the motivation to conceal or admit violent behavior varies depending upon the aggressor's views of the consequences of doing so (i.e., he is unlikely to admit abusive behavior to a judge, but may do so in an appropriate therapeutic intervention). Nevertheless, it is helpful to obtain a detailed account of the violent incidents—within the context of the relationship—from each party separately. However, professionals need to be wary of differentiating the abuser from the victim based on who claims to be the victim; who is more charming, charismatic, and likeable; who appears more organized, reasonable, and sensible; and who feels more entitled and morally outraged. Sociopaths, narcissists, and chauvinists—who use violence for

40 Jaffe et al op cit p504-506
interpersonal control—can make a very smooth presentation whereas the victim can appear emotionally distraught and disorganized.\textsuperscript{41}

The Table that is referred to in this extract is also particularly useful to practitioners because of the suggested questions set out therein.

Table 1\textsuperscript{42}

The PPP Screening

**Part A: 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?
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 like loss of job, eviction from home, loss of child custody, severe financial problems, etc.?\textsuperscript{4}

**Part B: Pattern of Violence and Coercive Control**

\textsuperscript{41} Ibid pp504-506
\textsuperscript{42} Ibid p505
1. 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?

2. 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)?

3. How fearful and/or intimidated is the partner?

4. Is there a history of emotional abuse and attacks on self-esteem?

5. 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.)?

6. Has the partner been isolated/restricted from outside contacts (e.g., with employment, friends and family)?

7. Is there evidence of obsessive preoccupation with, sexual jealousy, and possessiveness of the partner?

8. 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)?

9. Have there been multiple petitions/litigation that appear to have the purpose of controlling and harassing?

**Part C: Primary Perpetrator Indicators: Who is the primary aggressor, if either?**

1. Who provides a more clear, specific and plausible account of the violent incident(s)? Who denies, minimizes, obfuscates, or rationalizes the incident? (The victim more likely does the former; the perpetrator the latter).

2. 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).

3. 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).

4. Are the types of any injuries or wounds suffered likely to be caused by aggressive acts (the perpetrator's) or defensive acts (the victim's)?

5. If the incident(s) involved mutual combat, were the violent acts/injuries by one party far in excess of those of the other? (Violent resistors [VR] 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).

6. 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)?

This is a very useful resource to use in taking instructions and preparing and presenting evidence about family violence. For the bench too it is a useful aide in order to undertake screening and triage. However the authors emphasise that this is a screening tool that enables a working hypothesis to be developed about the type of violence present in a case – it is not a definitive, predicative device. The working hypothesis must then, by definition, be constantly tested and amended by reference to the evidence itself as it so often evolves between evidence-in-chief, cross-examination and re-examination. However, the presence of multiple indicators or factors clearly signal the need for care. Jaffe and Johnston warn:

*Furthermore, multiple indicators, especially those that are more potent, signal the more difficult and high-risk cases where full measures of protection are needed for the victim and child, and highly restricted access orders are warranted. For example, multiple indicators of potency and a*
clear pattern of using coercive-controlling tactics by a primary perpetrator indicate a probable high-risk abusive controlling relationship (ACV). Several indicators of moderate severity or potency and use of violent tactics to resolve conflict with neither party as the primary perpetrator suggest moderate-risk common couple violence (CIV). Levels of potency commensurate with the threat posed by a violent partner suggest a violent resistor (VR); and few indicators of potency with acts of violence only around the time of separation instigated by one or both parties suggest an isolated incident related to the separation (SIV). The latter types of case may require few, if any, restrictions on custody and access arrangements in the longer term.43

It must be acknowledged that there are inherent limitations in even sophisticated and validated screening instruments such as PPP when implemented by unqualified professionals. The risk of misdiagnosis must always be there.

The Credibility Issue

No discussion about screening and triage of family violence can be complete without considering the issue of credibility of allegations. This is a vexed, complex issue for the bench in particular, but also for all who practice in the family law courts.

Jaffe and Johnston44 refer to the findings of the very few studies on the issue of substantiation of claims which tend to indicate that a significant proportion of family violence (50-70 percent) and child abuse allegations (22-53 percent) in family law matters can be subsequently substantiated in some manner. Whilst this is no doubt interesting for those who practice at the coal face, it offers little comfort. Jaffe and Johnston emphasise the importance of systematic inquiry from multiple sources:

Systematic inquiry from the following multiple sources can yield direct or circumstantial information that supports or refutes the parents’ respective

43 Ibid p506
44 Jaffe et al op cit p506
claims. Each corroborating piece of information then needs to be weighed and aggregated by a neutral screener who has been trained to avoid common errors in human perception. First, objective verification of specific incidents can be provided by police and medical reports, self-admissions, or eye witness accounts. Second, corroboration of aspects of an allegation by neutral third parties—like neighbors, teachers, or babysitters—is important. Relatives may offer useful information, but their allegiance and potential bias must be considered. Conversely, the absence of denials of violence by credible others who are alleged to have observed the violence (older teenagers, adult children, and nonrelatives sharing the family home) may be a curious omission that needs to be explored. Third, the psychological status of the alleged abuser and victim may affect credibility assessment. For the alleged abuser, a diagnosis of a severe sociopathic or mental illness like bipolar disorder, major depression, panic disorder, schizophrenia, obsessive-compulsive disorder, or substance abuse problems may be relevant. For the alleged victim, the presence of reality testing problems, psychotic, paranoid, or histrionic personality disorders are pertinent. 45

The preparation and presentation of evidence about family violence, and its subsequent assessment by the bench, must emphasise corroboration as the cornerstone of credibility. Even though this is self-evident for many readers of this paper, it is both surprising and disenchancing to observe how poorly implemented this principle is in many cases. Evidence–in-chief often seems to have been prepared with little or no consideration about the need for corroboration. Corroboration does not happen by itself – it must be made to happen by the person making the allegation. This is often achieved by the timely issue of subpoenae, or the filing of corroborating evidence-in-chief.

In the family law courts allegations of family violence occur so frequently and are often of such a serious nature, that there is a risk that those undertaking assessment, intake and triage of allegations become hardened and perhaps

45 Ibid p507
even insensitive about allegations made. Perhaps even trivialisation can occur. Jaffe and Johnston warn about the need to understand an allegation in its emotional context for the complainant.

*The specific abuse complaints need to be examined in terms of their logical and emotional meaning for the complainant: Did the abuse involve deep shaming and humiliation? Was the victim made to feel responsible? Was the abuse normalized, that is, seen as justly deserved punishment or discipline? How an abusive incident is perceived needs to be understood in terms of the family and cultural context in which it is made. Particular behaviors may be deemed especially insulting and offensive in some minority ethnic families in ways that may not be understood by most others (e.g., slapping with shoes in an Islamic culture). Moreover, a victim might have multiple abusers (e.g., her spouse and mother-in-law in some Indian families); or the violence to which the children are exposed is between family members other than the parents (e.g., between father and mother's new boyfriend or involving older siblings).*

An important factor in assessing credibility is the timing of the allegation and disclosure of violence. Jaffe and Johnston argue that this is both relevant and difficult to interpret. An allegation made for the first time in the context of family litigation may appear to be quite self-serving, until one explores whether there are valid reasons for delaying disclosure. For example disclosure may have been avoided due to fear of the consequences (emotional, physical, financial etc), or with a view to avoiding conflict, or because of a lack of understanding that behaviour is not violence or unacceptable. Timing is an important consideration, but all hypotheses must be tested, including the possible reasons for non-disclosure.

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46 *Ibid* p507
47 *Ibid* p507
**False Allegations?**

Jaffe and Johnston recognise the reality of false allegations – that a notable proportion of allegations cannot be substantiated. However, they warn against misunderstandings about false allegations. It is possible that some of the allegations of violence are valid disclosures, but there was no corroborative evidence to support findings. The fact is that family violence does occur behind closed doors. Perhaps sometimes allegations are not established because of the poor quality of advice, representation and advocacy that the victim received. Jaffe and Johnston argue that the research indicates that false allegations occur much less than false denials of family violence. Finally they warn that the psychological vulnerabilities of parents may also play a role in unfounded allegations.

8. Participation by Families in Processes and Services

The problem with a one size fits all approach to family violence is that families may be referred to services that are inappropriate or, perhaps worst still, are excluded from services that may be helpful. Consider, for example, the fairly common example in the FMC of parents being ordered to attend a post-separation parenting assessment with one of the community-based organisations (CBOs) or a parent ordered to attend an anger management course. In general terms the former is a course that encourages co-parenting, ongoing contact, reducing conflict and increasing communication. The latter is, of course, designed to assist participants to deal more effectively with their anger. Once it is possible to differentiate how families experience violence, and the type of violence they experience, it is possible to adopt a more nuanced approach to participation in the most appropriate processes and services. It is highly unlikely, for example, that a family experiencing coercive controlling violence, or where there has been violent resistance, will benefit from a parenting after separation course. Indeed there is potential risk that participation in such a course increases the level of trauma and victimisation. And perhaps an anger management course

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48 *Ibid* p508
is not necessarily helpful where the violence is an isolated act of situational couple violence, or separation instigated violence. Inappropriate attendance at such a course could breed resentment and a reluctance to engage in more helpful processes.

Kelly and Johnson’s discussion about appropriate processes and services is very useful\textsuperscript{49}.

\textit{Given that these different approaches appear to be targeted to the major types of intimate partner violence, it seems reasonable to develop an effective triage system by which different types of violent men and women would be provided different types of interventions. It may be useful to differentiate even more finely. For example, for some men and women involved in Situational Couple Violence, the problem is poor communication skills, impulsivity, and high levels of anger, while for others it may be alcohol abuse. Similarly, for some involved in Coercive Controlling Violence the problem is rooted in severe personality disorders or mental illness and may call for the inclusion of a more psychodynamic approach to treatment. For others the problem is one of a deeply ingrained antisocial or misogynistic attitude that would be more responsive to a feminist psycho-educational approach. In all cases, of course, holding violent men and women accountable for their violent behavior in the criminal justice system and family courts provides essential motivation for change. Many perpetrators and victims would benefit if all courts mandated and implemented reporting requirements regarding attendance and completion of violence and substance abuse treatment programs.}\textsuperscript{50}

- Kelly and Johnson’s discussion about mediation and family violence is excellent and challenges many long-standing beliefs about the appropriateness of mediation in family violence cases. The orthodox view was that victims of family violence should not be compelled to participate in family dispute resolution because the power imbalance created by

\textsuperscript{49} Kelly et al \textit{op cit} p490-494
family violence cannot be remedied. Notwithstanding this orthodox view the FLA prescribes mandatory pre-filing family dispute resolution in section 60I, but recognises exceptions in s.60I(9) including where there has been family violence or is the risk thereof.

Section 60I does not differentiate between different types of family violence thus reflecting an inherent deficiency in the treatment of family violence in the Act. The response of those who provide family dispute resolution (The Courts, CBOs and private practitioners) to the issue of the suitability of these processes in cases involving family violence is diverse eg use of separate sessions, staggered arrival/departure times, different entrances/exits, enhanced security, presence of support persons etc. As commendable and effective as these responses may be, it is possible that the provision of family dispute resolution does not respond adequately to the type of violence involved.

Provided, therefore, that screening and triage is effective, and that family violence can thus be differentiated, it is possible that family dispute resolution can be used effectively in certain types of cases. Kelly and Johnson state:

> Based on the research descriptions of different types of partner violence (and the reported experiences of many mediators in family courts), it is likely that the majority of parents who have a history of Situational Couple Violence are not only capable of mediating, but can do so safely and productively with appropriate safeguards. These men and women appear to be quite willing to express their opinions, differences, and entitlements, often vigorously. It is also likely that parents with Separation-Instigated Violence will benefit from mediation, again, with appropriate safeguards and referrals to counseling for the violent partner to help restabilize psychological equilibrium. What is needed, in addition to appropriate screening, are mediators whose domestic violence training has included attention to differentiation among types of intimate partner violence (rather than an exclusive focus on battering…). A model of mediator behavior that

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50 Ibid p491
employs good conflict management skills to contain parent anger and rules describing contained and civilized communications between the parties is also essential. It is anticipated that, with Situational Couple and Separation-Instigated Violence, parents would engage in mediation with protection orders in place and that transfers of the children between parents would take place in either neutral and public settings or using supervised exchanges until there was no further risk of violence.

The use of custody mediation where Coercive Controlling Violence has been identified is more problematic. When screening indicates fear for one's safety, a history of serious assaults and injuries, police intervention, or severe emotional abuse, including control and intimidation, alternatives to mediation should be considered. If both parties prefer that mediation proceeds, it should be in caucus, with separately scheduled times, a support person present, and protection orders in place. This increases opportunities to discuss safety planning, what type of parenting plans and legal decision making will protect the parent and children (e.g., supervised access and exchanges, no contact), and referrals to appropriate treatment interventions and educational programs for both parents.\textsuperscript{51}

The other process and intervention that is commonly ordered in family violence cases is either a family report or an expert’s report. Depending on whether the case is filed in the FCoA or FMC the family report might be provided by an internal court family consultant, or an external private family consultant. What is the significance of differentiating family violence in these reports, and how can the courts and the profession become more discerning consumers of these reports, particularly in these difficult cases? Kelly and Johnson’s treatment of this topic is excellent\textsuperscript{52} but is too long to extract in full. They emphasise the need for careful empirically-based assessments that distinguish between types of violence, and which explore multiple hypotheses, free from any gendered

\textsuperscript{51} \textit{Ibid} p492
\textsuperscript{52} \textit{Ibid} p494
assumptions or misunderstandings about what legislation intends to achieve.\textsuperscript{53} Kelly and Johnson conclude:

\textit{The issues are complicated and differ depending on the type of violence, but one thing is clear: The assessment of the violence must include information about its role in the relationship between the contesting parties. A narrow focus on acts of violence will not do. There is a need to err on the side of safety in these matters, particularly when information about the parents' violence is limited and the court's response is inadequate because of lack of appropriate personnel and screening procedures. Once sufficient court resources are invested in individual cases, more nuanced responses can be considered.}\textsuperscript{54}

They endorse the PPP screening tool suggested by Jaffe and Johnston (referred to above), as well as the suggested most appropriate outcomes for children discussed in the next section.

\textbf{9. Outcomes for Children: Safety and Contact}

Having regard to all of the matters set out above, how then should post-separation parenting arrangements be fashioned in cases where family violence has been identified or credibly alleged? Ver Steegh argues that court processes should operate cautiously and take a long view of the process commencing with short term temporary or urgent orders, longer term parenting arrangements after a fuller investigation, and in some cases even longer term monitoring and follow-up.\textsuperscript{55}

Jaffe and Johnston promulgate five principles for making parenting arrangements in family violence cases

\textit{In most domestic violence cases there are multiple factors to consider. What is needed is a risk–benefit analysis of different kinds of parenting plans that are in the best interests of the particular child and family. What

\textsuperscript{53} C & B [2007] FMCAfam 539 gives an example of misunderstanding by a family consultant as regards the aims of legislation
\textsuperscript{54} Ibid p494
\textsuperscript{55} Ver Steegh op cit p18}
are some guiding principles for undertaking this kind of analysis? It is submitted that the goals of any plan should be prioritized in the following order:

1. Protect children directly from violent, abusive, and neglectful environments;

2. Provide for the safety and support the well-being of parents who are victims of abuse (with the assumption that they will then be better able to protect their child);

3. Respect and empower victim parents to make their own decisions and direct their own lives (thereby recognizing the state’s limitations in the role of loco parentis);

4. Hold perpetrators accountable for their past and future actions (i.e., in the context of family proceedings, have them acknowledge the problem and take measures to correct abusive behavior); and

5. Allow and promote the least restrictive plan for parent–child access that benefits the child, along with parents' reciprocal rights.

Premised on the notion that the goal of protecting children must never be compromised, the strategy is to begin with the aim of achieving all five goals and to resolve conflicts by abandoning the lower priorities. This approach provides a pathway to just and consistent resolution of many common dilemmas. For example, in principle, if a parent denies engaging in his or her substantiated violence and does not comply with court-ordered treatment, Priority 5 should be dropped or modified by suspending or supervising access. Furthermore, the victim should be allowed to relocate upon request (forgoing Priorities 4 and 5). If the victim is subsequently abused by a new partner, these principles imply an alternative safer place to live can be offered along with a choice: Live with your violent mate or have the care and custody of your child (Priorities 3, 4, and 5 are dropped, and Priority 2 may have to be dropped as well). Note that Priority 5, as stated, implies that access may need to be
suspended in some cases even though a violent parent has sought and benefited from corrective treatment (e.g., if a child, traumatized by the parent's past abusive tirades, continues to be highly distressed and resistant to supervised visits despite reasonable efforts to alleviate that distress).\textsuperscript{56}

These are useful principles, but also quite problematic because they are both reflected in and directly opposed by Part VII of the Act. The authors advocate, for example, that the third principle justifies a victim of family violence being allowed to relocate on request. It is unlikely that this is reflected in Part VII of the Act. The authors advocate for the resolution of conflicts by abandoning the lower priorities, but s.60CC(2) and (3), with its distinction between primary and additional considerations, may not lend itself to the same priorities as set out above. Perhaps the most problematic aspect of these five principles is that they make no overt differentiation between the types of family violence that the authors themselves identify in their own paper. Thus, e.g., do these principles apply as much to situational couple violence and separation instigated violence, as they do to coercive controlling violence or violent resistance? And yet the fundamental premise of these principles – that children and victims need to be protected – is axiomatic. Perhaps it is the suggestion that conflicts are resolved by abandoning the lower priorities that is likely to cause the most confusion unless the violence has been differentiated.

If one puts aside some of the limitations in the principles referred to above, Jaffe and Johnston’s discussion about differential parenting arrangements is enormously useful to all who practice in the family law courts\textsuperscript{57}. They commence by identifying and describing the five most common categories of parenting arrangements. These will be immediately familiar to most readers of this paper. They then go on to discuss when such arrangements are appropriate or inappropriate particularly having regard to the type of family violence that might be involved. Each will be discussed below.

\textsuperscript{56} Jaffe et al \textit{op cit} p509
\textsuperscript{57} Jaffe \textit{op cit} pp510-518
Co-parenting

Jaffe and Johnston describe this on the following terms:

Co-parenting refers to an arrangement in which parents cooperate closely postseparation in all significant aspects of raising their children. This arrangement approximates the preseparation ideal for the children, where both parents are actively involved in the lives of their children, share information, and problem solve the normal challenges of parenting as they arise. Within the broad definition of co-parenting, there may be a range of divisions of time spent in each parent's home and flexibility in scheduling, taking into account the distance between homes and the children's changing needs and stages of development, as well as changes in the parents' schedules.  

In Australia this might be described as shared parenting or perhaps equal shared care in an appropriate case. The authors assert that co-parenting is not appropriate for family violence cases in general, where there is chronic conflict and an inability to jointly problem solve or an inability to communicate, or for cases involving mental illness or substance abuse. They concede that co-parenting may be appropriate in families where there are low ratings on potency, pattern and primary perpetrator eg separation instigated violence, provided that violence is in the past and has been followed by a history of successful parenting, good communication and joint problem-solving. It may also be appropriate in some cases where there has been rehabilitation from mental illness and substance abuse.

Parallel Parenting

Jaffe and Johnston describe this in the following terms:

In contrast to the cooperative nature of a co-parenting arrangement, parallel parenting is an arrangement where each parent is involved in the children's lives, but the relationship is structured to minimize contact between the parents and protect the children from exposure to ongoing
parental conflict, typically by having each parent make day-to-day decisions independently of each other when the children are in his or her care, and responsibility for major decisions (e.g., education) is assigned to one parent. There is limited flexibility in a parallel parenting arrangement, and the parents typically abide by a very structured and detailed schedule. Parallel parenting developed in recognition of high-conflict separations in which both parents appear sufficiently competent. Rather than encourage co-parenting, the goal of this plan is to disengage the parents from each other and their long-standing hostilities.

Parallel parenting will typically involve a child spending more time in the care of one parent, who will be the primary residential parent, though there can be roughly equal time in the care of each parent. The hope is that, over time, parental hostility may decline and parallel parenting may evolve toward some form of co-parenting, but this may take years and in some cases will never occur.\(^\text{59}\)

They suggest that parallel parenting is inappropriate for infants, very young children, and special needs children who require consistent and coordinated care across two family homes. It is inappropriate for a child experiencing ongoing symptoms of trauma and distress, or in cases where there is a finding that a parent poses a threat of abuse to a child.

Moreover it is inappropriate where there is any ongoing threat of violence to one parent by the other.

It may be appropriate where there has been situational couple violence, or post-crisis separation instigated violence provided there are only moderate-low ratings on potency and pattern and no primary perpetrator.

It may be appropriate where, notwithstanding that potential parenting conflict provokes acrimony, each parent nonetheless has a positive contribution to make.

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\(^{58}\) Ibid p116

\(^{59}\) Ibid p516
in time spend with children. It may even be appropriate for the other types of violence where there is clear credible evidence of rehabilitation.

**Supervised exchange**

Jaffe and Johnston describe this as follows:

*Supervised or monitored exchange involves transferring children from one parent to the other under the supervision of a third party. The supervision can be informal, through the use of a responsible third party (e.g., by a family member, neighbor, or volunteer) who uses a specified venue for the exchange. The supervision can also be formalized through a supervised access center or use of a designated professional, such as a child care worker or a social worker. The underlying premise is that, by either staggering arrival and departure times or having third-party witnesses, the parents will be on their best behavior (or at least avoid direct confrontation) or will not come into physical contact. An important caveat is that using the police station for exchanges, while a popular arrangement for some professionals, is not a preferred solution. Although a police station may offer a parent a sense of security, it is not a child-centered environment and may cause undue anxiety in the child.*

In Australia we call this supervised change-over. It is interesting to note their comments about police stations. Supervised exchange is clearly inappropriate where there are any threats of violence or ongoing concerns about the safety and wellbeing or a child with either parent alone. It is also inappropriate where there is inadequate monitoring or a non-neutral monitor.

Supervised exchange may be appropriate in most cases of family violence subject to assessing problematic behaviour or distress at transition by either a parent or a child. It may therefore be appropriate in cases where there is past situational couple violence, past violent resistance, and separation instigated violence even during the crisis period. It may even be appropriate in abusive controlling violence where there is credible evidence of rehabilitation.
Supervised Access

Jaffe and Johnston describe this as follows:

Supervised visitation is a parenting arrangement designed to promote safe contact with a parent who is a risk due to a range of behavior from emotional or physical abuse to possible abduction of the child. It may also be appropriate where a child has fears of a parent, for example, because of having witnessed that parent perpetrate abuse or because of having been directly abused by that parent. Although supervised access is a long-accepted practice in the child protection field, it has emerged more recently in the parental separation context with parents who pose a risk to the children and/or the other parent. Similar to supervised exchanges, supervised access varies in structure, with supervisors ranging from extended family or volunteers to a specialized center with professional staff with expertise in these issues.61

In Australia we call this supervised contact. It is interesting to note that the authors clearly regard supervised contact as a temporary measure which, depending on change in a parent and a child’s adjustment, is varied either by dropping the requirement for supervision, or terminating contact altogether. Supervised contact is inappropriate for:

- Children demonstrating ongoing distress
- Cases where there is lack of any apparent benefit in contact
- Inadequate supervision
- Child or parent needing more intensive therapeutic intervention
- Cases where the custodial parent remains distrustful and wants supervision where no basis is found for the same.

Supervised contact may be appropriate in family violence cases where there are high ratings on potency alone, or moderate-high ratings on potency, pattern and

60 Ibid p517
61 Ibid p517
primary perpetrator. Thus it may be appropriate for abusive controlling relationships, or any form of violence which is current or recent. It may be appropriate as a temporary measure during assessment of family violence. It may be appropriate for mentally ill or substance abuser parents whose treatment is in progress, and for parents where there is an established risk of abuse to a child. It may even be appropriate for children who have been traumatized by violence or abuse but who want contact or stand to gain from a parent’s continued involvement in their lives.

**Suspended Contact**

Jaffe and Johnston discuss this as follows:

> Contact between a child and parent may be suspended in the short term or long term for a host of reasons. When the decision to suspend contact is made based largely on a child's vehement refusal to see a parent, it is extremely challenging to disentangle the factors leading to this resistance. Differentiating between estrangement for valid reasons and pathological alienation can be a formidable challenge and should be done by a mental health evaluator with expertise in both child alienation and domestic violence. When there is a reasonable basis in fact for a child to be fearful of a parent due to exposure to domestic violence, it is inappropriate to label the nonoffending parent as engaging in alienation. When a parent has engaged in alienating behavior, appropriate attempts at therapeutic intervention should be implemented in an attempt to restore the damaged parent–child relationship.

There is in law a presumption that the best interests of the child will be promoted by a child having a relationship with both parents, thus requiring significant evidence of risk of harm to the child before terminating access (Shaffer & Bala, 2003). In cases where it is established that a parent presents an ongoing risk of violence to the child or parent, emotional abuse to the child, or abduction, however, no meaningful parent–child
relationship is possible. In these cases, the court may be forced to suspend all access.\textsuperscript{62}

It is, of course, the last resort. It should not be used just because supervision is not conveniently available, or because a parent refuses to cooperate with supervisors or does not comply with an order. However suspension may be appropriate in the following situations:

- No meaningful parent-child contact seems possible
- An abusive controlling parent shows no remorse or willingness to change
- Persistent distress or refusal of child to supervised contact
- Violent parents who won't comply with orders for supervision
- Family violence where very high ratings on potency, pattern and primary perpetrator eg abusive controlling violence with threats or attempts to abduct, hurt, kill, harm to child, harass other parent, conviction of assault or homicide.
- Child estranged due to past abuse or violence
- Untreated or untreatable severe current substance abusers and acute mentally ill parents?

9. Does the Family Law Act differentiate family violence?

The term 'family violence' is defined in s.4(1) of the Act as follows:

"family violence" means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if

\textsuperscript{62} Ibid p518
a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

Sections 4(IAB) and 4(IAC) considerably expand on the meanings of who is a member of a family, and who is a relative.

The term family violence is used extensively in Part VII of the Act, and indeed the only reference to family violence outside of the Act is in s.43 which states relevantly:

(1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

   (ca) the need to ensure safety from family violence;

Thus the definition of family violence in the Act characterizes it as conduct having a certain effect, irrespective on context. Matters of potency, pattern and primary perpetrator are seemingly irrelevant.

It is possible to make an unconvincing argument that when ‘family violence’ is used in Part VII of the Act, the context is quite different, and thus differentiation of violence is possible.

The argument, at its highest, points to the wording of s.60B(1)(b) and s.60CC(2)(b) and asserts that family violence is differentiated by reference to whether children have been harmed or are at risk of harm. The argument might assert, for example, that an isolated act of separation instigated violence may in certain cases neither harm a child nor place that child at risk. The argument is unconvincing, however, because it over-simplifies the dynamic of violence and suggests, for example, that even an isolated act might not have an impact on a child. The impact on the victim, however, might be potent and this may affect the child. The perpetrator of separation instigated violence is, arguably, no less a poor role model than a perpetrator of situational couple violence.

The better view is that the Act does not differentiate family violence. The use of the term in s.60CC(3)(j) and (k), 60CF, 60I, 60J and 60K all confirm this quite
clearly – family violence as defined has certain clearly stated consequences. This is most clearly apparent in s.61DA, the presumption of equal shared parental responsibility. The circumstances where the presumption does not apply are set out in s.61DA(2):

(2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

(a) abuse of the child or another child who, at the time, was a member of the parent’s family (or that other person’s family); or

(b) family violence.

The context of the reference to family violence in s.61DA(2)(b) makes it very clear that any family violence falling within the s.4(1) definition has the consequence of rebutting the presumption.

Is this a strength or weakness of the Act? On one view it is a strength of the Act because of the powerful signals it sends about the total unacceptability of any family violence. And yet it is also a weakness of the Act if its effect is to fetter the ability of the judiciary to craft the most appropriate parenting orders in the best interests of children. Indeed, to fail to differentiate family violence can be as harmful to victims of violence, and their children, as it could be to children who are denied otherwise safe and meaningful relationships with parents who have perpetrated certain types of violence. Moreover it would be most unwise for family lawyers (judiciary and practitioners alike) to ignore important, relevant developments in the social sciences, particularly when so much consensus supports these developments. Family law has long since abandoned any notion of presumptions or quasi-presumptions applying in parenting cases (e.g. maternal preference, tender years, status quo). Family law has long since abandoned any one-size-fits-all approach to determining what is in the best interests of children. The same must surely apply to family violence. Thus, even if the Act itself does not admit of differentiation of family violence, a common sense application of the Act to the facts of individual cases must allow for differentiation
to take place. Ultimately that is the role of discretion – to ensure that when hard law is applied to the soft facts of a case, the result is an order that is in the best interests of a child.