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When is Parenthood Dissoluble?

*Patrick Parkinson**

I. INTRODUCTION

Across the western world, there has been a major shift in the law concerning parenting after separation in the last thirty years. The notion that following the breakdown of a marriage, the court simply allocated the children to one parent or the other has given way to an emphasis on the importance of having both parents involved in children's lives following separation. This typically involves joint parental responsibility even if the parents never married, and, where geographical proximity allows, some level of shared parenting. Whereas once family law was premised on the indissolubility of marriage, now a defining feature of family law in Western societies is the notion that parenthood is indissoluble.

Women's groups and feminist scholars have long resisted this transformation in family law, and one of the arguments used in recent years is that laws that promote the indissolubility of parenthood place women and children at risk from violence and abuse.

This article proceeds first by reviewing trends in the Western world concerning the transformation of post-separation family life, and then considers how the issue of domestic violence can and should be dealt with in the context of an acceptance that for the most part the 'family' continues after parental separation.

The article explores different legislative models for how the issue of domestic violence should be dealt with in an era of indissoluble parenthood, using illustrations from the laws of Australia, California, Massachusetts, New York, New Zealand, Oregon and Wisconsin as examples of different approaches. Its premise is that an absolute priority must be given to the safety of women and children from a risk of serious harm and this means that parenthood must be dissoluble in some instances. However, many laws cast the net too wide by focusing on a history of violence rather than current safety concerns. The argument of the article is that there are not two irreconcilable choices—greater involvement of non-resident fathers on the one hand and protection from domestic violence on the other. There is also a need to differentiate between types of family violence in assessing the risk of violence or abuse in the future.

II. THE INDISSOLUBILITY OF PARENTHOOD

In the last thirty years, profound changes have occurred in family law all around the western world. The model on which divorce reform was predicated in the late 1960s and early 1970s has irretrievably broken down. Jurisdictions across the western world have come to the sometimes painful conclusion that while marriage may be dissoluble, parenthood is not. Children generally benefit from the involvement of both parents in their lives, and that means the parental relationship must often continue after separation. That has significant implications for legal processes, rules and principles.¹

Yet there are situations where parenthood needs to be dissolved, in particular where there are serious concerns about the safety of women and children. This Article explores when sole parenthood after separation is, or ought to be, the best option. However, the policy issues cannot properly be understood without setting the context of the transformation that has occurred in the legal regulation of the post-separation family all over the western world.

A. Divorce as the Dissolution of the Family

The model on which divorce reform was predicated in the late 1960s and early 1970s was built upon a consensus that dead marriages should be given a decent burial and that it should be possible for the parties to get on with their lives and start afresh once decisions had been made about financial matters and custody.² In the divorce law at that time, issues about property and custody were dealt with by a once-for-all process of allocation.³ If the parties could not reach their own agreement, then the court allocated the property. The aim in some jurisdictions was to achieve a clean break in terms of the financial affairs of the parties, apart from child support.⁴ The court also allocated the children.⁵ Typically, the courts would award “custody” to one parent, usually the mother, and grant “access” or “visitation” to the other.⁶ There was little difference in this respect between common law countries and the civil

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1. These international trends are reviewed in PATRICK PARKINSON, *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD* (2011). This Article draws heavily upon material published in that book, especially ch. 6.

2. *Id.* at 21.

3. *Id.* at 22.

4. The clean break philosophy in financial matters was explicit in the 1975 reforms in Australia. See *Family Law Act 1975* (Cth) s 81 (Austl.).

5. ANDREW I. SCHEPARD, *CHILDREN, COURTS AND CUSTODY* 3–4 (2004).

6. PARKINSON, *supra* note 1, at 22.

law countries of Western Europe.⁷ “Custody” included virtually all the rights and powers that an adult needed to bring up a child, including the right to make decisions about a child’s education and religion.⁸ Both parents were legal guardians at common law, but this meant little, because the powers which were classified as powers of “guardianship” were few and far between.⁹ They included such matters as consent to marriage, consent to issuance of a passport, and inheritance rights on the death of the minor. Since maternal custody was the predominant pattern, fathers were frequently relegated to a peripheral role in their children’s lives.

Custody law was thus binary in character.¹⁰ The assumption that was universally held at that time was that custody decisions involved a definitive choice between one home and another.¹¹ This understanding of the meaning of custody was not, of course, a product of the divorce revolution.¹² Rather, the law, as it then stood, provided a context in which it was possible to hold out to parents a promise of post-divorce autonomy once the custody issue had been settled.¹³

In this traditional conceptualization of what was involved in custody decision-making, visitation (or “access”) was simply a “legal concession to the loser.”¹⁴ Once this allocation had occurred, then people could get on with their lives with the past behind them.¹⁵ The old marriage was dead and they could begin anew, repartner, and build a new family life with only residual ties to their former spouses.¹⁶ Those ties were through child support obligations (which were poorly enforced), spousal maintenance where ordered, and ongoing visitation with the children.

The consequence of this view of custody decision-making was that divorce involved a clean break in terms of parental responsibility once the issue of custody allocation was decided. In a perceptive article written in 1986, Irène Théry, the French sociologist, characterized the original divorce reform model as the substitution model of post-divorce parenting.¹⁷ Under the substitute family model, the parents’ legal divorce

7. *Id.*

8. *Id.*; see, e.g., *Lerner v. Superior Court of San Mateo Cnty.*, 242 P.2d 321, 323 (Cal. 1952) (“The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion.”).

9. PARKINSON, *supra* note 1, at 22.

10. *Id.* at 23.

11. *Id.*

12. *Id.*

13. *Id.*

14. LYNNE HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 213 (1980).

15. PARKINSON, *supra* note 1, at 24.

16. *Id.*

17. Irène Théry, *The Interest of the Child and the Regulation of the Post-Divorce Family*,

necessarily required a divorce between them not only as partners but also as parents.¹⁸ Only one of the two parents could continue in that role after the divorce, and the other's role would be no more than a visiting one in most cases.¹⁹ The future upbringing of the child depended on a choice between two alternatives, the home of the mother or the home of the father.²⁰ It followed that the marriage breakdown marked the dissolution of the nuclear family.²¹ Parental authority was awarded to the sole custodial parent and there was a strong differentiation between the role of the custodial and non-custodial parent. This way of seeing divorce was expressed pithily by the New York Court of Appeals in 1978: "Divorce dissolves the family as well as the marriage"²²

B. *The Emergence of the Enduring Family*

It was not long after the first flush of the divorce revolution that this idea of post-separation parenting began to change. Théry argued, in her 1986 article, that the substitution model of the post-separation family was gradually being displaced and that a new concept of post-separation parenting was emerging.²³ This, she called the idea of the "enduring family."²⁴ In this conceptualization, divorce is a "transition between the original family unit and the re-organisation of the family which remains a unit, but a bipolar one."²⁵ She noted that this conceptualization of post-separation parenting implies the refusal of a choice between parents in favour of joint parental authority.²⁶

Change has occurred only very gradually in family law around the western world, but the relentless march of progress has been in the direction that Théry anticipated. The history of family law reform in the last 20 years has seen the abandonment of the assumption that divorce could dissolve the family as well as the marriage when there are children. As Emeritus Prof. Margo Melli has written: "Today, divorce is not the end of a relationship but a restructuring of a continuing relationship."²⁷

14 INT'L. J. SOC. L. 341, 350-51, 354-55 (1986).

18. *Id.* at 350-51, 356.

19. *Id.*

20. *Id.*

21. *Id.* at 354-55.

22. *Braiman v. Braiman*, 378 N.E.2d 1019, 1022 (N.Y. 1978).

23. Théry, *supra* note 17, at 355.

24. *Id.* at 356-57.

25. *Id.* at 356.

26. *Id.*

27. Marygold S. Melli, *Whatever Happened to Divorce?*, 2000 WIS. L. REV. 637, 638 (2000); see also Bren Neale & Carol Smart, *In Whose Best Interests? Theorising Family Life Following Parental Separation or Divorce*, in UNDERCURRENTS OF DIVORCE 33, 35-37 (Shelley Day Selater & Christine Piper eds., 1999).

Marriage may be freely dissoluble, but parenthood is not.

C. The Transformation in Custody Law

The indissolubility of parenthood is seen in many different ways in modern family law. One aspect of it is financial. Child support is now vigorously enforced in many countries,²⁸ and in some jurisdictions spousal maintenance is experiencing a revival.²⁹ However, the main way in which the indissolubility of parenthood is expressed is in terms of the law of parenting after separation.

Reforms began in a relatively mild and largely semantic way with the shift in the USA in particular from the notion of sole custody to joint legal custody in the early 1980s.³⁰ Pressure for a legal presumption that the court should award joint legal custody was particularly strong in North America,³¹ but it was also experienced in other western countries.

However, in Europe, the law reform process took a different form from the joint custody movement in the United States. Rather than making joint custody (in the sense of joint legal responsibility) an option, or even establishing a presumption in favour of this, other countries made joint parental responsibility the default position in the absence of a court order to the contrary.³²

In Britain, for example, a radical reconceptualization of post-separation parenting occurred in 1989.³³ On the recommendation of the Law Commission of England and Wales, the language of custody, guardianship, and access was abolished.³⁴ In its place, the Children Act of 1989 provided that each parent has “parental responsibility” and retains that responsibility after the marriage breakdown.³⁵ Instead of making a custody order giving to one parent, to the exclusion of the other, a bundle of rights and powers to make decisions about the welfare of the child, the new law provided that court orders should focus on the practical issues.³⁶ Where will the child live? What contact arrangements need to be put in place? These orders are known as residence and contact

28. For a review of policies in the United States and other countries, see CHILD SUPPORT: THE NEXT FRONTIER (J. Thomas Oldham & Marygold S. Melli eds., 2000).

29. In Canada, see *Moge v. Moge*, [1992] S.C.R. 813 (Can.); see also AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 5 (2002).

30. PARKINSON, *supra* note 1, at 45.

31. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 701-02 (1985).

32. PARKINSON, *supra* note 1, at 50.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

orders. They say nothing about parental responsibility—that is, they do not carry with them a bundle of parental powers and responsibilities to the exclusion of the other parent, except to the practical extent required in the terms of the order.³⁷ When a child is living primarily with one parent, that diminishes the non-resident parent’s rights, powers, and responsibilities in a practical sense, to the extent that those rights, powers and responsibilities depend on the child living physically with that parent, but they are in all other respects unaffected by the parental separation.³⁸ The philosophy of the Children Act 1989 is that parental responsibility continues after separation as it existed before the relationship breakdown, subject to any orders to the contrary by the Court.³⁹

Similar developments have also occurred in France, where the law is based upon a principle of “*coparentalité*.”⁴⁰ By legislation passed on January 8, 1993,⁴¹ the Civil Code was amended to remove the language of “custody.”⁴² It was replaced with the language of “parental authority.”⁴³ The legislation provided that parental authority is to be exercised in common⁴⁴ and that parental separation does not change this.⁴⁵

In many other jurisdictions, the law has also been amended to encourage or provide for continuing joint parental responsibility after divorce. A common legislative approach which has had the effect of encouraging joint custody has been one of non-intervention.⁴⁶ Instead of allocating custody as one of the matters to be dealt with in granting a divorce, joint custody is deemed to continue after separation unless one parent seeks a court order to the contrary.⁴⁷ This was how joint custody became the norm in Sweden⁴⁸ and Finland⁴⁹ from the early 1980s

37. *Id.*

38. *Id.*

39. Carol Smart, *Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy*, 26 J. SOC. POL’Y. 301, 315 (1997).

40. Frédéric Vauvillé, *Du principe de coparentalité*, 209 LES PETITES AFFICHES 4 (2002). The “*coparentalité*” principle is also examined by Hugues Fulchiron in *L’autorité Parentale Renouée*, REPERTOIRE DU NOTARIAT DEFRENOIS 959 (2002).

41. Loi 93-22 du 8 janvier 1993 modifiant le code civil relative à l’état civil, à la famille et aux droits de l’enfant et instituant le juge aux affaires familiales [Law 93-22 of January 8, 1993 Amending the Civil Code Relating to Civil Status, Family and Children’s Rights, and Establishing the Family Court Judge], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 9, 1993, p. 495.

42. In French, “la garde.”

43. PARKINSON, *supra* note 1, at 52.

44. C. CIV. art. 372 (Fr.).

45. C. CIV. art. 373 2 (Fr.).

46. PARKINSON, *supra* note 1, at 54.

47. *Id.*

48. FÖRÄLDRABALKEN [FB] [Code Relating to Parents, Guardians, and Children] (Swed.).

onwards,⁵⁰ and is now the position in the other Scandinavian countries as well.⁵¹ A similar approach has been adopted in Germany by the Gesetz zur Reform des Kindschaftrechtes, 1997,⁵² which amended the Civil Code to provide that the parents have joint parental responsibility during the marriage and unmarried parents may agree to joint parental responsibility by formal declaration.⁵³ This joint responsibility continues after separation unless the court orders otherwise on the application of one of the parties.⁵⁴

In all these jurisdictions, the effect of the legislative reforms is to reject the idea that there can be a parental divorce, except in cases where the court specifically orders that one parent will have sole parental responsibility. The legal divorce ends their relationship as spouses but not as parents. Indeed, it is now irrelevant in most jurisdictions whether the parents had been married at all. Biological parenthood, rather than marriage, is what gives rise to joint parental responsibility and enduring rights and obligations.⁵⁵

Whether or not parenthood is in practice indissoluble for primary caregivers (predominantly women) under these statutes depends to a great extent on the attitude of the non-resident parent. If a non-resident father desires to remain closely involved with his children, the new ideas on post-separation parenting give him much leverage.

With the changes in legislative language about custody has come a profound change also in the nature of the question that courts are asked to decide in custody disputes. This new approach towards post-separation parenting would have seemed radical to the family lawyers of previous generations, who assumed that divorce required a clear differentiation between the rights of the custodial and non-custodial parent. The consequence of this major shift in the focus of family law is that the promise of freedom to begin afresh that was held out as the meaning of

49. Custody of Children and Rights of Access Act 1983 (Lag angående vårdnad av barn och umgängesrätt 8.4 1983/361).

50. Kirsti Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interest of the Child in a Critical and Comparative Perspective*, 14 INT'L J. L. POL'Y & FAM. 183, 188 (2000).

51. For Denmark, see the Custody and Access Act 1995, Lov nr 387 af 14 juni 1995 om forældremyndighed og samvær. For Norway, see the Children and Parents Act 1981, Lov 1981-04-08 nr. 7 om barn og foreldre.

52. This legislation came into force on July 1, 1998. The provisions on parental responsibility are found in Book 4, chapter 5 of the Bürgerliches Gesetzbuch.

53. Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1626. This article provides that the declaration needs to be publicly recorded, either before the Youth Welfare Department (Jugendamt) or a notary, subpara (d)(1). *Id.*

54. Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1671. The applicant may seek that only part of the parental responsibility be conferred on them alone. *Id.* The change from joint parental responsibility to sole parental responsibility must be in the best interest of the child. *Id.*

55. See PARKINSON, *supra* note 1, at chapter 3 for a review of the law in different jurisdictions.

divorce in the divorce reform movements of the late 1960s and 1970s has proved to be somewhat empty where children are involved.

D. Encouraging the Involvement of Both Parents

The demise of the concept of sole custody was, however, only the beginning of the transition that has occurred in the law of parenting after separation. Increasingly, legislation around the western world is emphasizing the importance of both parents being involved in children's lives. Whereas under the old substitution model of custody decision-making, the choice was typically a binary one—a choice between the mother and the father as the custodial parent—now a spectrum of choices is available to the courts. In most cases, there will still be a primary custodian, a parent with whom the child lives for the majority of the time. However, the significance of that allocation to one parent or the other is not as great as it once was. The question has changed from being about which parent the child will live with to being about how the child's time will be shared between the parents.

One way that involvement of non-resident parents has been supported has been by giving content to the notion of the “best interests of the child” by legislative findings or directions, or the statement of principles. An example of such a legislative direction is in the law in Missouri:

The general assembly finds and declares that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child, except for cases where the court specifically finds that such contact is not in the best interest of the child⁵⁶

The formula of “frequent, continuing and meaningful contact” has echoes in the laws of a number of other jurisdictions in the United States, and is a recurring theme in statements of objects and principles.⁵⁷

In most jurisdictions, legislatures have resisted the temptation to be too prescriptive about what time allocation between the parents will promote meaningful involvement.⁵⁸ Courts have retained the flexibility to try to discern what will be in the best interests of the child in each case.⁵⁹ Nonetheless, a common thread in legislation across America, and in other parts of the western world, has been towards the encouragement

56. MO. ANN. STAT. §452.375 (West 2011).

57. See, e.g., CAL. FAM. CODE § 3020 (West 2011).

58. PARKINSON, *supra* note 1, at 97.

59. *Id.*

of shared parenting after divorce. A number of jurisdictions now have legislation which gives some encouragement to consider shared parenting arrangements, and the trend in terms of law reform is strongly in that direction in situations where there are no issues of violence or abuse.⁶⁰

France offers one example. The principle of “*coparentalité*,” established in 1993, was strengthened by legislation enacted in 2002.⁶¹ In particular, this legislation made clear that alternating residence (where the child spends an approximately equal amount of time with each parent) is an option. The background to this reform is that while amendments made in 1993 established the principle of joint parental authority after separation, the legislature, at that time, rejected the idea of alternating residence.⁶² However, some judges were persuaded to fix a primary residence, while allowing contact with the non-resident parent so extensive that the arrangements were equivalent, in practice, to an alternating residence system.⁶³

Two commissions were established to advise the Government concerning possible reforms to the law of parental authority in the 1990s.⁶⁴ One took a sociological view, under the presidency of Irène Théry.⁶⁵ The other focused more on legal issues under the presidency of Françoise Dekeuwer-Défossez.⁶⁶ The consequence of their proposals for reform, and subsequent governmental consideration, was legislation on parental authority passed in 2002.⁶⁷ Article 373-2-9 of the Civil Code now provides that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them.⁶⁸ The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option.⁶⁹

In Belgium, the law was amended in 2006 to provide encouragement

60. *Id.* at 97-99.

61. Loi 2002-305 du 4 mars 2002 relative à l'autorité parentale [Law 2002-305 of March 4, 2002 on Parental Authority, 2002], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 5, 2002, p. 4161.

62. This was implicit in the text, since the principle of a primary or usual residence was maintained, but explicit in the legislative debates. Hugues Fulchiron, *supra* note 40, at 959.

63. See Hugues Fulchiron & Adeline Gouttenoire-Cornut, *Réformes Législatives et Permanence des Pratiques: à Propos de la Généralisation de L'exercice en Commun de L'autorité Parentale par la Loi du 8 Janvier 1993*, 1997 RECUEIL DALLOZ CHRONIQUES 363 and the cases cited therein.

64. PARKINSON, *supra* note 1, at 102.

65. IRÈNE THÉRY, COUPLE, FILIATION ET PARENTE AUJOURD'HUI: LE DROIT FACE AUX MUTATIONS DE LA FAMILLE ET DE LA VIE PRIVÉE (1998).

66. FRANÇOISE DEKEUWER-DEFOSSEZ, RENOVER LE DROIT DE LA FAMILLE: PROPOSITIONS POUR UN DROIT ADAPTE AUX REALITES ET AUX ASPIRATIONS DE NOTRE TEMPS (1999).

67. PARKINSON, *supra* note 1, at 102.

68. *Id.* at 103.

69. *Id.*

for alternating residence—indeed that emphasis was expressed in the title of the legislation.⁷⁰ The law provides that when parents are in dispute about residency, the court is required to examine “as a matter of priority”, the possibility of ordering equal residency if one of the parents requests it to do so.⁷¹ The proviso is that if the court considers that equal residency is not the most appropriate arrangement, it may decide to order unequal residency.⁷²

This is not the same as saying that there is a presumption in favour of equal time.⁷³ An equal time arrangement is not presumed to be in the best interests of the child; nonetheless, according to Belgian law, it is the first option that ought to be considered when parents cannot agree on the arrangements.⁷⁴ In Australia, there have also been significant legislative reforms to encourage shared parenting, through the Family Law Amendment (Shared Parental Responsibility) Act 2006.⁷⁵ One of the objectives of the Family Law Act, as amended by that legislation, is to ensure that “children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.”⁷⁶ This is importantly balanced by another object of the legislation, the need to protect children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence which may necessitate restraints on contact by one parent.⁷⁷

The emphasis on the meaningful involvement of both parents in the absence of violence or abuse does not translate into a presumption of shared parenting, and still less, equal time.⁷⁸ The most that the legislation imposes by way of presumed outcome is a presumption in favour of equal shared parental responsibility.⁷⁹ This presumption is not applicable in cases where there is a history of violence or abuse.⁸⁰ If there is equal shared parental responsibility, parents have a duty to consult, and to try to reach agreement, on major decisions such as education, health, religion and changes in children’s living arrangements, at least when that

70. The Act of 18 July 2006 is entitled “*Loi tendant à privilégier l’hébergement égalitaire de l’enfant dont les parents sont séparés et réglementant l’exécution forcée en matière d’hébergement d’enfant.*” (“Law tending to favour equal residency for children of separated parents and regulating enforcement in child residency matters”).

71. PARKINSON, *supra* note 1, at 104.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Family Law Act 1975* (Cth) s 60B (Austl.).

77. *Id.*

78. PARKINSON, *supra* note 1, at 105.

79. *Family Law Act 1975* (Cth) s 61DA (Austl.).

80. *Id.*

has a significant impact upon the ability of the other parent to spend time with the child.⁸¹

While equal shared parental responsibility says nothing, per se, about how time is allocated between parents—because the circumstances of separated families are so varied—there is at least strong encouragement in the legislation to consider shared parenting, and to do so positively.⁸² First of all, the court has a duty to consider whether an equal time arrangement is in the best interests of the child and reasonably practicable.⁸³ If equal time is not appropriate, then the court must consider what is termed “substantial and significant time,” which is defined in the following way:

A child will be taken to spend substantial and significant time with a parent only if:

- (a) the time the child spends with the parent includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
- (b) the time the child spends with the parent allows the parent to be involved in:
 - (i) the child’s daily routine; and
 - (ii) occasions and events that are of particular significance to the child; and
- (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.⁸⁴

The best interests of the child remains the court’s paramount concern.⁸⁵ Furthermore, the arrangement must be ‘reasonably practicable’.⁸⁶ Australia’s final court of appeal, the High Court of Australia, has indicated that unless the court makes a finding of fact that the arrangement for equal time or substantial and significant time is reasonably practicable, the court has no power to make such an order.⁸⁷

The message of such legislative directions in these different jurisdictions are clear. Contact, visitation or access, howsoever it is described, is no longer the order a parent receives as a consolation if he or she loses the prize of custody. Nor is it to be the right only of a visitor,

81. PARKINSON, *supra* note 1.

82. *Id.*

83. *Id.*

84. *Family Law Act 1975* (Cth) s 65DAA (Austl.).

85. *Family Law Act 1975* (Cth) s 60CA (Austl.).

86. *Family Law Act 1975* (Cth) s 65DAA (Austl.).

87. *MRR v GR* (2010) 240 C.L.R. 461 (Austl.).

as the language of “visitation” might suggest. Rather, the assumption is that the time that the secondary parent has with the child will be such as to allow him or her a meaningful, continuing involvement in the life of the child. Fathers, in particular, are no longer to be marginalised by post-separation parenting arrangements.

III. PARENTING AFTER SEPARATION AND THE ISSUE OF DOMESTIC VIOLENCE

This transformation in the law of parenting after separation around the Western world has not been without controversy and has not occurred without serious resistance. In the main, that resistance has come from women’s groups and feminist advocates for whom the sole custody model represented an optimal post-separation parenting arrangement—a kind of winner-takes-all, with the winner being almost invariably the mother.⁸⁸

A. Custody and the Gender Wars

The resistance to paternal involvement in parenting after separation—except to the extent that the mother wishes it—has had a long history. Over the years, various arguments have been made against joint custody and shared parenting time, or in favour of a primary caregiver presumption, when determining where the child will live.⁸⁹ Changes to the law have been attacked as a reassertion of patriarchy,⁹⁰ or as being motivated by fathers’ rights rather than children’s interests.⁹¹ A

88. See, e.g., Susan Boyd, *Autonomy for Mothers? Relational Theory and Parenting Apart*, 18 FEMINIST LEGAL STUDIES 137, 150 (2010) (“The responsibility cast upon mothers to ensure contact between children and fathers can be both a burden and a constraint on maternal autonomy.”).

89. See, e.g., CHILD CUSTODY AND THE POLITICS OF GENDER, (Carol Smart & Selma Sevenhuijsen eds., 1989); MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLES AND WHAT WE CAN DO ABOUT IT (1999); Jonathan Cohen and Nikki Gershbain, *For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact* 19 CAN. F.L.Q. 121 (2001); SUSAN B. BOYD, CHILD CUSTODY, LAW, AND WOMEN’S WORK (2003).

90. CAROL SMART, THE TIES THAT BIND: LAW, MARRIAGE, AND THE REPRODUCTION OF PATRIARCHAL RELATIONS (1984); Anne Marie Delorey, *Joint Legal Custody: A Reversion to Patriarchal Power*, 3 CAN. J. WOMEN & L. 33 (1989); Dawn M. Bourque, “Reconstructing” the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada, 10 CAN. J. L. & SOC’Y. 1 (1995).

91. Miranda Kaye & Julia Tolmie, *Fathers’ Rights Groups in Australia and Their Engagement with Issues in Family Law*, 12 AUSTL. J. FAM. L. 19 (1998); Miranda Kaye & Julia Tolmie, *Discoursing Dads: The Rhetorical Devices of Fathers’ Rights Groups*, 22 MELB. U. L. REV. 162 (1998); FATHERS’ RIGHTS ACTIVISM AND LEGAL REFORM (Richard Collier & Sally Sheldon eds., 2006); Richard Collier, *Fathers’ Rights, Gender and Welfare: Some Questions for Family Law*, 31 J. SOC. WELFARE & FAM. L. 357 (2009); Leora N. Rosen, Molly Dragiewicz, & Jennifer C. Gibbs, *Fathers’ Rights Groups: Demographic Correlates and Impact on Custody Policy*, 15 VIOLENCE AGAINST WOMEN 513 (2009).

perennial argument is that men just want to have more time with their children in order to reduce child support—an argument for which there is plenty of anecdotal evidence in relation to the motives of some men, but which is also grossly overstated and demeaning to many devoted fathers.⁹²

Family law has thus become heavily politicised and children have been caught in the middle of this gender war. Around the western world, the conflict between the different lobby groups has eventuated in huge territorial battles that are, rightly or wrongly, perceived as having some strategic value. Every gain by men's groups in altering the language of legislation—however symbolic or trivial—is seen as a loss by women's groups. Conversely, gains by women's groups are mourned as a loss to fathers.

In recent years, the fierce arguments against laws that encourage and support paternal involvement have focused not so much on attacking the motives of fathers, but on a concern that laws which support greater paternal involvement in children's lives put the safety of women and children at risk.⁹³ The need to protect women and children from violence and abuse is a powerful and highly emotive argument. Indeed, it is the nuclear weapon of the gender war concerning parenting arrangements after separation.

It deserves to be taken very seriously as an issue. Many women and children are at risk from male violence and abuse before, during, and after separation.⁹⁴ It is appropriate that an absolute priority be given to the safety of victims of violence and their children when there is a serious risk of harm. Whether that safety is best achieved by restricting the involvement of non-violent fathers and by opposing any encouragement of shared care, is another question.

How can the protection of victims of violence be given an absolute priority when the law in general promotes the indissolubility of parenthood? Is there an irreconcilable tension between them that requires a reversal of the trends of the last thirty years and a reversion to a norm of sole female custody? Is there a case for a presumption against fathers having contact with their children where there has been a history of violence? Put differently, when is parenthood dissoluble?

Exploration of these issues requires first of all an examination of the nature and prevalence of family violence, or intimate partner violence, as

92. PARKINSON, *supra* note 1, at 40.

93. For a review of the debates in four countries, see Peter G. Jaffe & Claire V. Crooks, *Partner Violence and Child Custody Cases: A Cross-National Comparison of Legal Reforms and Issues*, 10 VIOLENCE AGAINST WOMEN 917 (2004). See also Michael Flood, "Fathers' Rights" and the Defense of Paternal Authority in Australia, 16 VIOLENCE AGAINST WOMEN 328 (2010).

94. See PARKINSON, *supra* note 1, at 121–128.

it is otherwise called, and then consideration of the legislative strategies which have been advanced to address the problem in the age of the enduring family. One of the greatest problems in developing sensible policy in this difficult area is that there is a discordance between the simplistic rhetoric surrounding domestic violence in public policy and the more complex picture derived from social science research. To develop sound policy, it is necessary to move beyond the rhetoric and to differentiate between types of violence within intimate personal relationships. There is a consensus on this amongst leading experts in the field in the USA and elsewhere, but it is not a consensus which has, to date, been translated into good legislative policy in most jurisdictions.⁹⁵

IV. THE NATURE AND PREVALENCE OF INTIMATE PARTNER VIOLENCE

Violence is a pervasive and common problem in all intimate relationships. A general population survey in Canada, for example, found that 8.6% of women and 7% of men reported some kind of physical abuse from a current or ex-partner within the last five years.⁹⁶ Women reported much more severe abuse.⁹⁷

Levels of abuse and violence are particularly high in intimate relationships between those under 30. In one major study in New Zealand, domestic conflict was present in 70% of the intimate relationships of 25 year olds, with this conflict ranging from minor psychological abuse to severe assault.⁹⁸

It is unsurprising therefore that histories of violence and abuse should be common amongst families who have separated. The pervasiveness of violence and abuse among parents who have separated is evident in Australian research. Sheehan and Smyth, reporting on interviews with a general population of separated parents, found that 65% of women and 55% of men indicated that they had experienced violence against them within the criminal law definition of assault.⁹⁹ Fifty-three percent of women and 24% of men reported violence or

95. Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Court*, 46 FAM. CT. REV. 454 (2008).

96. Sarah Romans, et al., *Who is Most at Risk for Intimate Partner Violence? A Canadian Population-Based Study*, 22 J. INTERPERSONAL VIOLENCE 1495, 1495 (2007).

97. *Id.*

98. These were findings from the longitudinal Christchurch Health and Development Study. David M. Fergusson, L. John Horwood & Elizabeth M. Ridder, *Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort*, 67 J. MARRIAGE & FAM. 1103, 1103 (2005).

99. Grania Sheehan & Bruce Smyth, *Spousal Violence and Post-separation Financial Outcomes*, 14 AUSTL. J. FAM. L. 102, 109 (2000).

threats of violence that induced fear.¹⁰⁰ Fourteen percent of women, and 3% of men reported injuries resulting from violence that required medical treatment.¹⁰¹

Parents who need the assistance of the courts and related services to resolve their disputes are likely to report particularly high levels of violence and abuse. This is evident, for example, in a study of 864 former couples using free, court-mandated mediation in Arizona.¹⁰² Asked about that relationship in the last twelve months, 58% of women and 54% of men reported some physical abuse, such as pushing, shoving, punching, biting or scratching perpetrated against them.¹⁰³ Sixty-two percent of women and 50% of men reported escalated abuse perpetrated against them.¹⁰⁴ Escalated abuse included such violence as broken bones, choking, and threats of, or actual use of weapons, strangling or suffocating.¹⁰⁵ Fifty-six per cent of women and 29% of men reported sexual abuse.¹⁰⁶ Ninety-eight per cent of women and 97% of men reported at least one incident of psychological abuse in the last 12 months.¹⁰⁷ That was defined by such items as putting the person down, or insulting them or shaming them in front of others.¹⁰⁸ While respondents did not indicate that this abuse was a frequent or regular occurrence, the high incidence of complaints of abuse in a court-mandated cohort indicates how commonly litigants in family law disputes may be able to point to behavior which falls within the definition of violence or abuse in family law statutes—and particularly in those that have a broad definition that includes emotional abuse, verbal abuse, economic abuse and social isolation within the definition of “violence.”

There has been a very strong tendency in the past, especially in the academic legal literature, to define domestic violence in a homogenous way as being perpetrated mainly or entirely by men, and characterised by a desire to control and oppress women. The statistics on the prevalence of violence, and the extent to which men report victimisation (albeit that the violence tends to be less serious) do not sit comfortably with such a one-size-fits-all characterization.¹⁰⁹ The problem with treating domestic

100. *Id.*

101. *Id.*

102. Connie J. A. Beck, Michele E. Walsh & Rose Weston, *Analysis of Mediation Agreements of Families Reporting Specific Types of Intimate Partner Abuse*, 47 FAM. CT. REV. 401 (2009).

103. *Id.* at 401, 407.

104. *Id.* at 401.

105. *Id.* at 406.

106. *Id.* at 401.

107. *Id.*

108. *Id.* at 407.

109. The research evidence from general population studies make it clear that both women and men engage in physically aggressive altercations in intimate relationships. In a meta-analysis of 82 studies, it was found that women were slightly more aggressive than men. John Archer, *Sex*

violence as homogenous is that it leads to one-size-fits-all responses in terms of legislation and public policy.

Reflection on the social science evidence has led to an emerging consensus about the need to distinguish between different patterns of violence. That differentiation is also significant in terms of assessing the risk to parents and children and the likelihood that parent-child contact can be made safe for the future.¹¹⁰

Thirty years of research on domestic violence has now established that there is a variety of different patterns of violent conflict between intimate partners.¹¹¹ The terminology used by researchers varies, but broadly they describe similar categorizations of violence within intimate relationships. The research also includes both heterosexual and same-sex relationships.¹¹² There are differences of view as to whether intimate partner violence is best explained by typologies, or should rather be seen as a continuum from mild conflict to severe controlling violence and homicide.¹¹³ These differences of conceptualizations do not diminish the

Differences in Aggression Between Heterosexual Partners: A Meta-analytic Review, 126 PSYCHOL. BULL. 651 (2000). While many of these studies rely on use of the Conflict Tactics Scale (Murray Straus, *Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales*, 41 J. MARRIAGE & FAM. 75 (1979)), the same patterns are discerned using other measures. This research has proven highly controversial for those committed to a single causal factor theory of domestic violence centred in patriarchy and male control. For a discussion of this topic, see Murray A. Straus, *Future Research on Gender Symmetry in Physical Assaults on Partners*, 12 VIOLENCE AGAINST WOMEN 1086 (2006). A single causal factor theory of domestic violence also does not take account of the perspectives of women from positions of difference, including indigenous women and lesbians. See Rosemary Hunter, *Narratives of Domestic Violence*, 28 SYD. L. REV. 733, 744-49 (2006).

110. Peter Jaffe et. al., *Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans*, 46 FAM. CT. REV. 500 (2008); Bruce Smyth et. al., *Allegations of Family Violence and Child Abuse in Children's Proceedings: A Pre-reform Empirical Snapshot*, 21 AUSTRALIAN J. FAM. L. 252 (2007); Janet Johnston, *Domestic Violence and Parent-Child Relationships in Families Disputing Custody*, 9 AUSTL. J. FAM. L. 12 (1995).

111. Janet Johnston & Linda Campbell, *A Clinical Typology of Interparental Violence in Disputed-custody Divorces*, 63 AM. J. ORTHOPSYCHIATRY 190 (1993); Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476 (2008); Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379 (2005); Stacy Williams & Irene Fricze, *Patterns of Violent Relationships, Psychological Distress, and Marital Satisfaction in a National Sample of Men and Women*, 52 SEX ROLES 771 (2005).

112. For discussion on violence in gay and lesbian relationships, see, for example, Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intra-Lesbian Violence*, in MARTHA FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 195 (1994); CLAIRE RENZETTI & CHARLES MILEY, *VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS* (1996); Gail Mason, *Boundaries of Sexuality: Lesbian Experience and Feminist Discourse on Violence Against Women*, 7 AUSTRALASIAN GAY & LESBIAN L. J. 41 (1997); Dena Hassouneh & Nancy Glass, *The Influence of Gender Role Stereotyping on Women's Experiences of Female Same-Sex Intimate Partner Violence*, 14 VIOLENCE AGAINST WOMEN 310 (2008). There are some indications that rates of domestic violence in same-sex relationships may be higher than in heterosexual relationships. Lee Vickers, *The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective* 3(4) ELAW JOURNAL: THE MURDOCH U. ELECTRONIC J. L. (1996) ¶¶ 17-22.

113. Michael Johnson, *Domestic Violence: It's Not About Gender—Or is it?*, 67 J. MARRIAGE

level of consensus amongst social science researchers concerning the heterogeneity of what is termed "family violence."

Four types of violence are commonly described in the literature, sometimes under different names. These are: coercive controlling violence, violence driven by conflict, violent resistance, and separation-instigated violence. While these categorizations are useful for understanding the dynamics of individual family relationships and identifying the degree of risk involved in proposed arrangements for parenting after separation, it should not be thought that they are entirely discrete categories. Each intimate partner relationship has its own unique features and there is some continuity between types.¹¹⁴

A. Coercive Controlling Violence

When domestic violence first emerged into public and professional consciousness through the efforts of the women's movement, domestic violence was primarily understood in terms of wife-battering, and was associated with a variety of forms of intimidation and control which extended beyond physical violence or the threat of it. Women who report coercive controlling violence report a pattern of intimidation, social isolation, and control as well as assault.¹¹⁵ Behaviours include economic control, verbal abuse and emotional abuse.¹¹⁶ This form of coercive controlling violence,¹¹⁷ or "intimate terrorism", as Johnson has called it,¹¹⁸ involves male perpetrators and female victims almost without exception. The period around separation can be a particularly dangerous time for women who are victims of coercive, controlling violence.¹¹⁹

Such coercive controlling violence certainly justifies sole custody to

& FAM. 1126 (2005); David Fergusson, John Horwood & Elizabeth Ridder, *Response to Johnson*, 67 J. MARRIAGE & FAM. 1131 (2005).

114. Janet Johnson, *Response to Clare Dalton's "When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System"*, 37 FAM. & CONCILIATION CTS. REV. 422, 426 (1999).

115. PARKINSON, *supra* note 1, at 125.

116. *Id.*

117. Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743 (2005).

118. Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003 (2006) [hereinafter Johnson, *Conflict and Control*]. He used to call it "patriarchal" terrorism. See Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283 (1995) [hereinafter Johnson, *Patriarchal Terrorism*]. The use of the language of "terrorism" in relation to domestic violence may be traced to LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* (1986), who used the term "conjugal terrorism."

119. Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3 (1993); PATRICIA EASTEAL, *KILLING THE BELOVED: HOMICIDE BETWEEN ADULT SEXUAL INTIMATES* 85-87 (1993); Holly Johnson & Tina Hotton, *Losing Control: Homicide Risk in Estranged and Intact Intimate Relationships*, 7 HOMICIDE STUD. 58 (2003).

the other parent and in the most serious cases, a denial of contact with the non-resident parent at all.¹²⁰

B. Intimate Partner Conflict and Violence

While the patterns of violence most often seen by police, women's refuge workers, and hospital emergency wards is coercive controlling violence, in general community studies, the patterns of violence in families often involve different dynamics.¹²¹ The majority of the violence revealed in such community studies is not coercive controlling violence, but what researchers have variously classified as "conflict instigated violence,"¹²² "common couple violence,"¹²³ "situational couple violence"¹²⁴ or, in the language of the US Wingspread Conference, "violence driven by conflict."¹²⁵ The Wingspread Conference defined this as follows:

This type of violence takes place when an unresolved disagreement spirals into a violent incident, but the violence is not part of a larger pattern of coercive control. It may be initiated by either the male or female partner. However, female victims are more likely to suffer negative consequences, including injury, than are men.¹²⁶

Violence driven by conflict typically involves intimate partners losing control, rather than using violence to assert it.¹²⁷ In their anger, either partner or both may use verbal abuse or emotional abuse.¹²⁸ Arguments may escalate into hitting, punching and throwing things,¹²⁹ but the incidence of injuries resulting from this is not nearly as great as would be seen in coercive controlling violence.¹³⁰ Nor are the relational dynamics the same. Women who report coercive controlling violence report a pattern of intimidation, isolation, and control as well as assault.¹³¹ For

120. Helen Rhoades, *The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father'*, 16 INT'L J. L. POL'Y & FAM. 71 (2002).

121. PARKINSON, *supra* note 1, at 126.

122. Jaffe et al., *supra* note 110.

123. Johnson, *Patriarchal Terrorism*, *supra* note 118, at 283.

124. Kelly & Johnson, *supra* note 111.

125. Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Court*, 46 FAM. CT. REV. 454 (2008).

126. *Id.* at 458.

127. MICHAEL JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE 60–71 (2008).

128. PARKINSON, *supra* note 1, at 126.

129. Michael Johnson & Kathleen Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAM. 948, 949 (2000).

130. Nicola Graham-Kevan & John Archer, *Physical Aggression and Control in Heterosexual Relationships: The Effect of Sampling Procedure*, 18 VIOLENCE AND VICTIMS 181 (2003); Kelly & Johnson *supra* note 111, at 481.

131. PARKINSON, *supra* note 1, at 126.

this reason, Ellis and Stuckless have drawn the fundamental distinction between *conflict-initiated* and *control-initiated* violence.¹³²

While violence driven by conflict predominates in general community studies, coercive controlling violence is much more common in cases that go to court and for women in domestic violence shelters.¹³³ Michael Johnson, reviewing Frieze's U.S. data from the 1970s¹³⁴ derived from the general community, courts, and women's shelters, classified the patterns of violence within that study in accordance with four categorizations: mutual violent control, intimate terrorism, violent resistance and situational couple violence.¹³⁵ Focusing on wives' reports of violence by husbands, he reported that 89% of the violence in a general community sample was best characterised as situational couple violence, and 11% was intimate terrorism. In the court sample, only 29% of the violence was situational couple violence and 68% was intimate terrorism. In the sample of women who had been in shelters, 19% of the violence was situational couple violence and 79% was intimate terrorism.¹³⁶

C. Other Patterns of Intimate Partner Violence

Coercive controlling violence and violence driven by conflict are not the only patterns of violence identified in research.¹³⁷ Violent resistance and separation-instigated violence have also been identified.¹³⁸ Violent resistance is most commonly seen when women respond to coercive controlling violence by male partners.¹³⁹ It is force used in self-defence.

Separation-instigated violence was identified by Johnston and Campbell who observed, in their studies of ongoing and entrenched disputes over post-separation parenting, that there was a group of parents where uncharacteristic acts of violence were precipitated by the separation or were reactions to traumatic post-divorce events.¹⁴⁰ In these cases, violence occurred only during or after the separation period and

132. DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* (1996).

133. PARKINSON, *supra* note 1, at 127.

134. Irene Frieze, *Investigating the Causes and Consequences of Marital Rape*, 8 *SIGNS* 532 (1983); Irene Frieze & Angela Browne, *Violence in Marriage*, in *FAMILY VIOLENCE* 163 (Lloyd Ohlin & Michael Tonry eds., 1989); Irene Frieze & Maurcen McHugh, *Power and Influence Strategies in Violent and Nonviolent Marriage*, 16 *PSYCHOL. WOMEN Q.* 449 (1992).

135. Johnson, *Conflict and Control*, *supra* note 118, at 1003.

136. *Id.* at 1011.

137. PARKINSON, *supra* note 1, at 128.

138. See Kelly & Johnson, *supra* note 111.

139. *Id.*

140. Johnston & Campbell, *supra* note 111, at 196-97.

was not present during the marriage itself.¹⁴¹ They noted that physical violence was perpetrated by the partner who felt abandoned.¹⁴²

D. *Implications for Policy*

These different patterns of violence in families require a differentiated response in considering the relevance of violence to parenting arrangements. In particular, there is a need to differentiate conflict-driven violence from control-driven violence. The language of “victim” and “perpetrator,” “abused parent” and “violent parent” does not easily fit with the nature of violence driven by conflict and nor does an analysis that insists that only one gender is responsible, even if the patterns of female violence within intimate partnerships are different from male violence.¹⁴³ This is important in thinking about whether a history of using violence should give rise to a presumption against having primary care or even allowing parent-child contact. Such laws have potential for vast overreach because so many women and men may be caught in the net. Laws which assume there is just one ‘perpetrator’ and one ‘victim’ are not well-suited to deal with conflict-driven violence.

V. INTIMATE PARTNER VIOLENCE AND LEGISLATION ON POST-SEPARATION PARENTING

Legislatures around the western world have addressed the issue of violence and its relationship to decision-making about children, in a variety of different ways.¹⁴⁴ At one end of the spectrum are legislatures which have given very little guidance to courts at all, concerning how to determine the best interests of children; or, if they have a list of factors to consider, do not mention domestic violence as an issue.¹⁴⁵ One example of this is the Children Act 1989 in Britain. In determining the welfare of the child, courts are required to consider a range of factors, and while harm to the child is a consideration, the violence of one parent towards another is not listed as a specific matter to which the court should direct its attention.¹⁴⁶ Guidance has nonetheless been given by case law¹⁴⁷ and

141. *Id.*

142. *Id.*

143. See, e.g., Russell Dobash & Rebecca Dobash, *Women's Violence to Men in Intimate Relationships: Working on a Puzzle*, 44 BRIT. J. CRIMINOLOGY 324 (2004); MARIANNE HESTER, WHO DOES WHAT TO WHOM? GENDER AND DOMESTIC VIOLENCE PERPETRATORS (2009), available at <http://www.bristol.ac.uk/sps/research/projects/reports/2009/rj4843/whodoeswhat.pdf> (last visited March 3, 2012).

144. PARKINSON, *supra* note 1, at 133.

145. *Id.*

146. The factors listed in the Children Act, 1989, c.41, § 1(3) (Eng.), are: the ascertainable

by a Practice Direction issued by the President of the Family Division of the High Court.¹⁴⁸

Other jurisdictions have sought to identify violence as a specific consideration in legislation, with a focus on acts of violence that can be proven. In some states, there is just a general requirement to take acts of violence into account. The law in New York illustrates this:

Where either party to an action concerning custody of or a right to visitation with a child alleges . . . that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction.¹⁴⁹

Three features of this legislation are noteworthy. First, the legislation does not specify how the act of domestic violence is to be taken into account other than that the court must consider what effect the violence has on the wellbeing of the child. Secondly, it focuses attention on a history of domestic violence rather than current safety concerns. Thirdly, it defines domestic violence in terms of incidents of assault, rather than in terms of the impact of that assault on the victim and the relational context within which that physical violence occurs. For female victims of coercive controlling violence, physical abuse is just one dimension of an oppressive relationship which subjugates, entraps, and disempowers.

wishes and feelings of the child concerned (considered in the light of his age and understanding); his physical, emotional and educational needs; the likely effect on him of any change in his circumstances; his age, sex, background and any characteristics of his which the court considers relevant; any harm which he has suffered or is at risk of suffering; how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and the range of powers available to the court under this Act in the proceedings in question.

147. The English Court of Appeal reconsidered its approach in *Re L (a child) (contact: domestic violence)*, [2001] Fam. 260 in response to a great deal of criticism that the courts were insensitive to the victims of domestic violence. For criticisms in Britain of the failure to recognise adequately the problem of domestic violence and other situations in which shared parental responsibility and regular contact is contra-indicated, see John Eekelaar, *Rethinking Parental Responsibility*, 31 FAM. L. 426 (2001); John Eekelaar, *Contact – Over the Limit?*, 32 FAM. L. 271 (2002); JANE FORTIN, *CHILDREN'S RIGHTS AND THE DEVELOPING LAW* 401–413 (2d ed. 2003).

148. *Practice Direction: Residence and Contact Orders: Domestic Violence and Harm*, FAMILYLAWWEEK.CO.UK, <http://www.familylawweek.co.uk/site.aspx?i=ed31300> (last updated Jan. 14, 2009).

149. N.Y. DOM. REL. LAW § 240(1) (2010).

A. Domestic Violence as Incidents

Characterising domestic violence in terms of incidents of assault places the focus on provable incidents of assault, each as a discrete crime, rather than the ongoing experience of coercive controlling violence of victims of this pattern of family violence. Evan Stark's observations are apposite:

With a few exceptions, our field has been dominated by a definition adapted from criminology that equates abuse with discrete episodes of force designed or likely to hurt or injure a partner. One result of the *incident-specific violence* definition is that criminal justice intervention has failed to affect the problem. Because the vast majority of domestic violence involves "minor" assaults (e.g., pushes, shoves), when the law requires police and the courts to view abuse through the prism of discrete acts of violence, woman battering is downgraded to a second-class misdemeanor The emphasis on discrete acts of violence contrasts markedly with experience-based accounts where battered women report abuse is "ongoing"; includes a pattern of intimidation, isolation, and control as well as assault; and exacts high levels of fear and entrapment even when violence has stopped. Nor does the paradigm account for the duration of abusive relationships. A related issue is that the harms victims identify are more often the cumulative result of ongoing "entrapment" than of discrete assaults, a fact that makes injury a poor way to assess risk.¹⁵⁰

The treatment of domestic violence in terms of provable events has a number of deficiencies. First, if the assaults were intermittent and not at the most serious end of the spectrum of violence in terms of physical injury, a court which is focused on discrete and provable incidents of criminal conduct may minimise the significance of the assaults in terms of the woman's overall experience of victimisation.

A second issue with the focus on provable incidents of violence derives from the binary nature of fact-finding. Either an assault is proven or it is not. The abuse happened, or it did not. In law, a finding of "not guilty" is equated with innocence. Domestic violence occurs behind closed doors. Victims may not be able to recall many incidents of violence with the specificity concerning dates and circumstances needed to prove an incident to the satisfaction of a court. The police may only have been called on two or three occasions out of many. The laws of evidence may constrain what evidence is admissible.¹⁵¹ It follows that

150. Evan Stark, Commentary, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1019, 1019-20 (2006) (internal citations omitted).

151. See generally, Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L. Q. 43 (2000).

where the focus is on provable events rather than the experience of oppression in its relational context, what is recorded as the violent events may well understate the significance of that history in terms of decision-making about parenting after separation.

While these considerations go to the risk that a history of power and control, backed up with the threat of or occurrence of violent assaults, will not be given sufficient weight by the courts, there is also a concern of a different kind about this focus on a provable event of violence. It may cast the net too wide. If the majority of both women and men who have been separated or divorced report physical assaults in the course of their previous relationship, albeit in many cases assaults such as pushing and hitting that did not occasion physical injury, then a substantial proportion of the population, both men and women, may be covered by legislation that requires courts to respond in certain ways to any proven history of assault.

Like driftnets in ocean fishing, laws on family violence may capture a lot of fish within them which are not the targets of the operation. A pattern of coercive controlling violence is highly relevant to the question of post-separation parenting arrangements; so too are other threats to the ongoing safety of parents and children following separation. But laws designed to address these patterns of violence and ongoing safety concerns, if drafted in too wide a way, can catch up in the net any case where there has been a provable history of physical altercation within the relationship, by either mothers, fathers, or both. That is, it catches in the net any incidents of violence driven by conflict, at any stage of the relationship.

B. Presumptions Against Custody

In some U.S. states, there is a presumption against custody being awarded in favour of someone who has been proved to have committed an act of violence against the other parent or one of the children.¹⁵² In these states, the failure to differentiate between types of family violence and the focus on individual incidents may well lead to over-inclusive presumptions. The issue may be illustrated by the law in California, which has a presumption against any form of legal custody, including joint legal custody, if a parent has perpetrated a domestic assault in the last five years. Section 3044 of the California Family Code provides:

- (a) Upon a finding by the court that a party seeking custody of a child

152. On the effectiveness of these provisions, see Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076 (2005).

has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

- (b) In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors:
- (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents . . . may not be used to rebut the presumption, in whole or in part.
 - (2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.
 - (3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.
 - (4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.
 - (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.
 - (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.
 - (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.¹⁵³

If both men and women have used violence in the course of the relationship, (whatever the context), a presumption against having sole or joint custody may well apply to both parents, with the outcome of the case influenced by the extent to which either parent can prove particular incidents of assault to the satisfaction of the court.

153. CA FAM. CODE § 3044 (2004).

If this approach were applied only to the more severe cases of coercive, controlling violence, an outcome that was both just to the victim and likely to be in the best interests of the children, would result. Coercive, controlling violence against an intimate partner is a window to the soul. It reveals much about the character of a person. It is likely to be indicative of a tendency to dominate and control the children rather than to nurture and empower them. There is a strong likelihood of ongoing issues about the safety of the mother and of high levels of conflict between the parents.

However, laws which are really targeting men who engage in coercive, controlling violence, where any form of joint parenting is likely to be contra-indicated, may apply to very different patterns of conflict which do not give rise to ongoing safety concerns. The legislation in California is particularly problematic because it appears that even one physical assault triggers the presumption, and it may be applied of course to both genders whenever a physical assault can be proven to occur, whatever the circumstances and whether or not any harm has resulted. Presumptions of this kind are blunt instruments for dealing with mutual aggression.

C. Presumption Against Unsupervised Visitation

New Zealand goes further than other jurisdictions in having a presumption against unsupervised contact when a parent has committed an act of violence.¹⁵⁴ Sections 60 and 61 of the Care of Children Act 2004 provide that if the court is satisfied that a party to the proceedings has used violence against the child or a child of the family, or against the other party to the proceedings, then “the court must not make an order giving the violent party the role of providing day-to-day care for the child . . . or any order allowing the violent party contact (other than supervised contact) with that child,” unless “the court is satisfied that the child will be safe” with the violent party. “In considering . . . whether a child will be safe, . . . the court must . . . have regard to: the nature and seriousness of the violence used; how recently the violence occurred; the frequency of the violence; the likelihood of further violence occurring; the physical or emotional harm caused to the child by the violence; whether the other party to the proceedings—considers that the child will be safe while the violent party provides day-to-day care for, or has

154. For the origins of these provisions, and early experience, see Ruth Busch & Neville Robertson, *Innovative Approaches to Child Custody and Domestic Violence in New Zealand*, 3 J. AGGRESSION, MALTREATMENT & TRAUMA 269 (2000). For a critical view, see Ian Freckelton, *Custody and Access Disputation and the Prediction of Children's Safety: A Dangerous Initiative*, 2 PSYCHIATRY, PSYCHOL. & L. 139 (1995).

contact with, the child, and consents to the violent party providing day-to-day care for, or having contact (other than supervised contact) with, the child; any views the child expresses on the matter; any steps taken by the violent party to prevent further violence occurring; all other matters the court considers relevant.¹⁵⁵

The court also has discretion to order supervised contact if the judge is unsure about whether the child will be safe in a parent's care.¹⁵⁶ New Zealand takes a "safety first" approach to post-separation parenting.

A presumption against unsupervised contact where there is any history of violence certainly has the benefit of erring on the side of safety, but by catching all cases in which any violence or abuse is alleged to have occurred any time in the past, it casts the net very wide. Indeed there may be an inquiry about safety in relation to both parents in cases of mutual aggression. However, a proven act of violence is only a catalyst for further inquiry, not a disqualifying factor in itself. It leads to a focus on safety, requiring the court to examine specifically the question of whether the child will be safe in that parent's care, with a starting point being that unsupervised contact will not be permitted.

There are nonetheless significant resource implications in adopting this approach, and legislation without adequate resourcing will not be effective. One issue is the resourcing needed to make a proper risk assessment. An evaluation of these provisions a few years after their introduction found that frequently the courts had very little information on which to make a proper risk assessment, and in most cases did not make orders restricting contact.¹⁵⁷ The court made orders for supervised access in only 18% of the cases where violence or abuse was an issue and there were orders for no access in another 12% of cases.¹⁵⁸

A presumption against unsupervised contact, where there is any history of violence, also requires either that the government invests in an adequate network of supervised contact centers, or that public policy countenances a significant number of parents being denied any face to face contact with their children. New Zealand has apparently struggled with having enough supervised contact places across the country to meet the need.¹⁵⁹

155. Care of Children Act 2004, s. 61 (NZ).

156. Care of Children Act 2004, s. 61A (NZ).

157. PARKINSON, *supra* note 1, at 139.

158. ALISON CHETWIN ET AL., THE DOMESTIC VIOLENCE LEGISLATION AND CHILD ACCESS IN NEW ZEALAND 15-17 (1999).

159. Judge Rosemary Riddell, *Protecting Children from Family Violence*, Paper presented at the International Conference on Child Labour and Child Exploitation, at Cairns, Australia, (Aug. 3-5, 2008), available at <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/protecting-children-from-family-violence>. She wrote: "New Zealand had 31 centres, leaving many areas unserved. The lack of adequate resources can pose a challenge to Judges who are mandated to keep the welfare and best interests of the child as the paramount consideration in any

How often are supervised contact orders made in New Zealand, and against whom? Of 4068 final contact orders made in favour of parents in 2007, 252 supervised contact orders were made in relation to fathers and 94 in relation to mothers.¹⁶⁰ This represents 8.8% of all contact orders made in favour of fathers and 7.8% of all contact orders made in favour of mothers.¹⁶¹ Just over 2% of orders made in relation to fathers were indirect contact orders only (that is, the orders did not allow for face to face contact) and exactly the same percentage of contact orders in relation to mothers were also for indirect contact.¹⁶² It appears therefore that even in a jurisdiction with a presumption against unsupervised contact where there is any history of violence or abuse, in only a small minority of cases is such an order actually made. The New Zealand experience also demonstrates the extent to which such orders may be made against mothers as well as fathers.¹⁶³ Laws which are designed to protect women and children from violent men are necessarily gender neutral in their application.

VI. THE IMPORTANCE OF DIFFERENTIATING BETWEEN KINDS OF FAMILY VIOLENCE

Clare Dalton has observed how professionals with different theoretical orientations tend to “see” violence and abuse in different ways:

At the level of research and theory, there are at least three separate bodies of learning that describe problematic intimate relationships One set of literature deals with conflict, another with violence, and a third with abuse. A prime source of tension between specialists in partner abuse and the majority of mental health professionals who work within the family court system is that where the former see abuse, the latter tend to see conflict. A second difference that contributes to this tension is that before taking a relationship out of the conflictual category and putting it into the abusive category, the mental health professional looks for significant evidence of a one-sided pattern of physical violence. Those who specialize in abuse, on the other hand, understand abusive relationships as being first and foremost about power and control. They know that physical violence, while usually a

proceedings. Enabling a child to maintain a safe relationship with his or her father can be stymied where sufficient formally supervised options do not exist.” *Id.*

160. ROY WYATT, MINISTRY OF JUSTICE, FAMILY COURT STATISTICS IN NEW ZEALAND IN 2006 AND 2007 32 (2009).

161. PARKINSON, *supra* note 1, at 139.

162. *Id.* at 140.

163. Indeed, the legislation may have an adverse impact on victims of violence. *See, e.g., De Leeuw v Edgecumbe*, [1996] NZFLR 801 (DC), 1996 NZFLR Lexis 122.

potent residual source of power within the relationship, may play only a small part in the overall dynamic of control. A third related difference is that abuse specialists will always suspect that violence in a relationship indicates the presence of a power and control dynamic, whereas the mental health professional is quicker to associate violence with conflict between relatively evenly matched partners.¹⁶⁴

These conflicting paradigms lie at the heart of the problem in responding to violence and abuse in the context of parenting after separation. Whenever professionals in the family law system view violence through a theoretical lens of “one-size-fits-all,” the dynamics of inter-parental relationships within a particular family are prone to being misunderstood. This can have deleterious outcomes for those affected by the decisions reached. A similar problem of taking a “one-size-fits-all” approach applies to drafting legislation.

Peter Jaffe and his colleagues have suggested that as a means of differentiating between types of violence for the purposes of making decisions in parenting disputes, it is important to consider three factors: the potency, pattern, and primary perpetrator of the violence.¹⁶⁵ They refer to this as PPP screening and describe these three 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. . . . 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.¹⁶⁶

Certain of these factors can be found in the legislation of various

164. Clare Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION CTS. REV. 273, 275 (1999); see also Janet Johnson’s response to this article, *supra* note 114.

165. Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 504 (2008).

166. *Id.* (citations omitted).

jurisdictions. For example, in Massachusetts, where a pattern of abuse or serious incident of abuse has occurred, there is a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent.¹⁶⁷ A “serious incident of abuse” is defined as “the occurrence, between a parent and the other parent or between a parent and child, of (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress.”¹⁶⁸ The requirement to identify a pattern of violence rather than sporadic incidents goes some way to addressing the problem of how to deal with violent incidents that occur only in the context of separation without a previous or subsequent history of violence. However in order to properly differentiate between types of family violence it is also important to focus on the context and severity of the violence, as well as the existence of a pattern. There may be a pattern of violence by both men and women where the violence erupts out of conflict.

A. Determining the Primary Aggressor

Wisconsin has addressed the issue of mutual violence by requiring the court to try to identify the primary aggressor. There is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to a party if the court finds by a preponderance of the evidence that the party has engaged in a pattern or serious incident of interspousal battery or domestic abuse.¹⁶⁹ Where the court finds that both parties engaged in a pattern or serious incident of interspousal battery or domestic abuse, the presumption against joint or sole legal custody applies only to the party who was the “primary physical aggressor.”¹⁷⁰ If one, but not both, of the parties has been convicted of a crime of domestic abuse, he or she must be determined to be the primary aggressor.¹⁷¹ Otherwise, the court is required to consider:

- (a) Prior acts of domestic violence between the parties.
- (b) The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of domestic violence

167. MASS. GEN. LAWS ch. 208, § 31A (1998).

168. *Id.*

169. WIS. STAT § 767.41(2)(d)1 (2011).

170. *Id.*

171. *Id.*

- (c) The likelihood of future injury to either of the parties resulting from acts of domestic violence.
- (d) Whether either of the parties acted in self-defense in any of the prior acts of domestic violence
- (e) Whether there is or has been a pattern of coercive and abusive behavior between the parties.
- (f) Any other factor that the court considers relevant¹⁷²

It is nonetheless open to the court to find that both parties engaged in a pattern or serious incident of violence or abuse and that neither party was the primary physical aggressor.¹⁷³

The Wisconsin legislation does seem to represent a sensible legislative model that requires courts to examine the three factors of potency, pattern, and whether or not there is a primary aggressor.

VII. CURRENT SAFETY CONCERNS

Another approach to the issue of mutual violence is to focus attention on current safety concerns. This is the focus, for example, in Oregon. In Oregon, the court is required to give “primary consideration to the best interests and welfare of the child.”¹⁷⁴ One of the factors to consider is “the abuse of one parent by the other.”¹⁷⁵ Furthermore, while Oregon has a version of the friendly parent rule¹⁷⁶—namely that the court must consider the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child—this does not apply where the other parent has engaged in a pattern of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.¹⁷⁷ The legislation defines abuse as:

- (a) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury.
- (b) Intentionally, knowingly or recklessly placing another in fear of imminent bodily injury.
- (c) Causing another to engage in involuntary sexual relations by force or threat of force.¹⁷⁸

172. *Id.* § 767.41(2)(d)2.

173. *Id.* § 767.41(2)(d)4.

174. OR. REV. STAT. § 107.137(1) (2009).

175. *Id.* § 107.137(1)(d).

176. *Id.* § 107.137(1)(f). For criticism of this rule see Margaret Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41 (2004).

177. OR. REV. STAT. § 107.137(1)(f) (2009).

178. *Id.* § 107.705.

The law in Oregon further provides that when reviewing a proposed parenting plan, the court must ensure the safety of the parties, but not deny parenting time to the noncustodial parent unless the court finds that parenting time would endanger the health or safety of the child. If the court awards parenting time to a noncustodial parent who has committed abuse, the court has to make “adequate provision for the safety of the child and the other parent.”¹⁷⁹

A focus on current safety concerns rather than a history of violence during the course of the relationship per se, is important to allow a concentrated focus of resources on the parents and children who are at most risk as a result of post-separation parenting arrangements. A much smaller number of parents have concerns about either their own safety or the safety of their children a year or two after separation than report a history of violence or emotional abuse during the course of the relationship. The Australian Institute of Family Studies found that 26% of mothers and 17% of fathers reported being physically hurt by their partners.¹⁸⁰ A further 39% of mothers and 36% of fathers reported emotional abuse defined in terms of humiliation, belittling insults, property damage and threats of harm during the course of the relationship.¹⁸¹ Yet in interviews which were conducted on average fifteen months after separation, a much smaller number of parents had current safety concerns either for themselves or their children than had reported a history of violence or emotional abuse. Four per cent of fathers and 12% of mothers were concerned about their personal safety; 15% of fathers and 18% of mothers expressed concerns about the safety of their child—either alone or in addition to concerns about personal safety.¹⁸²

The researchers found that a history of family violence did not necessarily impede friendly or cooperative relationships between the parents. Sixteen per cent of mothers who reported being physically hurt by their ex-partner during the course of the relationship reported friendly relationships at the time of the interview and a further 23.5% reported

179. *Id.* § 107.105. OR. REV. STAT. § 107.718(6) (2009) states that the order of the court may include: (a) That exchange of a child between parents shall occur at a protected location. (b) That parenting time be supervised by another person or agency. (c) That the perpetrator of the abuse be required to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or any other counseling program designated by the court as a condition of the parenting time. (d) That the perpetrator of the abuse not possess or consume alcohol or controlled substances during the parenting time and for 24 hours preceding the parenting time. (e) That the perpetrator of the abuse pay all or a portion of the cost of supervised parenting time, and any program designated by the court as a condition of parenting time. (f) That no overnight parenting time occur.

180. PARKINSON, *supra* note 1, at 144.

181. RAE KASPIEW ET AL., AUSTRL. INST. OF FAMILY STUDIES, EVALUATION OF THE 2006 FAMILY LAW REFORMS 26 (2009).

182. *Id.* at 28.

having a cooperative relationship.¹⁸³ While others reported distant or conflictual relationships, only 18.5% reported a continuing fearful relationship.¹⁸⁴ Fifty-five per cent of mothers and 50% of fathers who reported emotional abuse by their ex-partner during the course of the relationship reported friendly or co-operative relationships by the time of interview.¹⁸⁵

By way of contrast, where a parent had current safety concerns either for themselves or for their child, it was much more likely that they would report difficult relationships with the other parent. Forty-nine per cent of fathers and 54% of mothers with concerns about their own or their child's safety indicated that their current inter-parental relationship was marked by either conflict or fear.¹⁸⁶

Parents who had concerns about the safety of their children reported that the children had a significantly lower level of wellbeing than those parents who did not have such concerns, while a history of family violence was no longer statistically significant in terms of child wellbeing once socio-demographic characteristics and family dynamics were controlled for.¹⁸⁷

VIII. THE RELEVANCE OF INTIMATE PARTNER VIOLENCE TO DECISION-MAKING ON PARENTING AFTER SEPARATION

In order to avoid the problem of overreach in statutes concerned with parenting after separation, it is necessary to focus on why it is that a history of violence is relevant to decision-making about parenting after separation. Violence may be an issue for a range of reasons.¹⁸⁸

183. PARKINSON, *supra* note 1, at 144.

184. *Id.*

185. KASPIEW ET AL., *supra* note 181, at 31–32.

186. *Id.* at 32–33.

187. *Id.* at 269.

188. There is now extensive literature on the relevance of domestic violence to decision-making on post-separation parenting. *See, e.g.*, Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7 MEDIATION Q. 347 (1990); MARIANNE HESTER & LORRAINE RADFORD, DOMESTIC VIOLENCE AND CHILD CONTACT ARRANGEMENTS IN ENGLAND AND DENMARK (1996); Carol Smart & Bren Neale, *Arguments Against Virtue Must Contact be Enforced?*, 27 FAM. L. 332 (1997); Martha Fineman, *Domestic Violence, Custody, and Visitation*, 36 FAM. L. Q. 211 (2002); PETER JAFFE, NANCY LEMON & SAMANTHA POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY (2003); Miranda Kaye, Julie Stubbs & Julia Tolmie, *Domestic Violence, Separation and Parenting: Negotiating Safety Using Legal Processes*, 15 CURRENT ISSUES IN CRIM. JUST. 73 (2003); Prentice L. White, *You May Never See Your Child Again: Adjusting the Batterer's Visitation Rights to Protect Children from Future Abuse*, 13 AM. U. J. GENDER, SOC. POL'Y & L. 327 (2005).

A. Safety

First and foremost, there may be ongoing and serious safety concerns for a parent, the child or both. The safety of those involved from serious harm ought to be the highest priority. In Australia, this priority is expressed in terms of the test of “unacceptable risk.”¹⁸⁹ The legislation provides that judges, in deciding what parenting orders to make, “must, to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration, ensure that the order: . . . does not expose a person to an unacceptable risk of family violence.”¹⁹⁰ Protection of children from harm is also deemed to be the most important consideration for courts in determining what is in the best interests of the child.¹⁹¹

While the risk of intimate partner violence may be lessened when the parents are no longer living together, and may indeed be living some considerable distance apart, the history of violence is nonetheless relevant to the logistics of any changeover arrangements. Where there is a risk of violence towards the primary caregiver, measures need to be put in place as far as possible to ensure that the parents do not meet, or meet only in a public place where the risk of violence is lessened. The growth of contact centers to facilitate handovers is one way in which this can occur.

B. Violence and Children’s Well-being

A history of violence is also an important issue to explore in terms of the children’s attitudes towards living with, or going on visits to, a violent parent. A child’s fear of the violent parent, or concern about his unpredictability, are relevant matters to explore in a custody evaluation

189. The test of unacceptable risk was first devised by the High Court of Australia in *M v M* (1988) 82 A.L.R. 577, 583, in dealing with allegations of child sexual abuse. The Court held that “a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.” *Id.* at 583. The test was included in legislation in 1995 to address the issue of family violence more generally. Evidence Act 1995 (Cth) s. 140 (Austl.). In *M v M*, the High Court affirmed the decisions of the trial judge to deny access entirely even though he was not satisfied on the balance of probabilities that the father was guilty of sexual abuse of the child. 82 A.L.R. 577, at 583. He could not say that the father had not sexually abused the child, and expressed himself in terms of “lingering doubts” about the child’s safety if access were to be allowed. *Id.* at 580. The test of “unacceptable risk” therefore did not require affirmative findings either that the child had been abused or that, if she had, the father was responsible. *Id.* at 582.

190. *Family Law Act 1975* (Cth) s 60CG (Austl.). On problems in the courts’ handling of cases involving domestic violence in Australia, see Miranda Kaye et al., *Domestic Violence and Child Contact Arrangements*, 17 AUSTL. J. FAM. L. 93 (2003); KATHRYN RENDELL ET AL., AN UNACCEPTABLE RISK: A REPORT ON CHILD CONTACT ARRANGEMENTS WHEN THERE IS VIOLENCE IN THE FAMILY (2000).

191. *Family Law Act 1975* (Cth) s 60CC(2) (b) and (2A) (Austl.).

or other expert report, as are the ways in which witnessing the violence has affected the children's love for, and trust in, the parent.¹⁹² The sensitive discussion of children's fears concerning conflict between their parents may bring out continuing fears about safety in visiting or living with one parent which would otherwise not be revealed.

A tendency to violence also raises issues about the risk of child abuse. The overlap between violence and physical abuse is such that where a pattern of domestic violence has been demonstrated in the course of the parental relationship, there must be concerns about the possibility that the children will be physically abused as well.¹⁹³ A parent's tendency to be violent may well represent an unacceptable risk to the safety of the child.

C. *Assessing Maternal Care and Attitudes to the Violent Parent*

Understanding a history of coercive controlling violence may also be relevant to other kinds of assessment in determining parenting arrangements after separation, including the mother's capacity for parenting and her attitude towards contact between the child and the other parent. For many women who experience this kind of subjugation and control, the psychological effects may have a greater lasting impact than the physical abuse.¹⁹⁴ These effects include fear and anxiety, loss of self-esteem, depression and posttraumatic stress.¹⁹⁵ They may impact significantly on a mother's capacity to parent,¹⁹⁶ particularly in the context of coping with the stresses of the relationship breakup and the litigation about the parenting arrangements. Mothers may be

192. Honore M. Hughes, *Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims*, 58 AM. J. ORTHOPSYCHIATRY 77 (1988); PETER JAFFE, ET AL., CHILDREN OF BATTERED WOMEN (1990); N. Zoe Hilton, *Battered Women's Concerns About Their Children Witnessing Wife Assault*, 7 J. INTERPERSONAL VIOLENCE 77 (1992); Patrick Parkinson, *Custody, Access and Domestic Violence*, 9 AUSTRALIAN J. FAM. L. 41 (1995); Patrick Parkinson & Cathy Humphreys, *Children Who Witness Domestic Violence – The Implications for Child Protection*, 10 CHILD & FAM. L. Q. 147 (1998); Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839 (1999); CHILDREN EXPOSED TO DOMESTIC VIOLENCE: CURRENT ISSUES IN RESEARCH, INTERVENTION, PREVENTION AND POLICY DEVELOPMENT (Robert Geffner et al. eds., 2000); David A. Wolfe et al., *The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique*, 6 CLINICAL CHILD & FAM. PSYCH. REV. 171 (2003); Marian Brandon & Ann Lewis, *Significant Harm and Children's Experiences of Domestic Violence*, 1 CHILD & FAM. SOCIAL WORK 33 (2007); Stephanie Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE & NEGLECT 797 (2008).

193. MARIANNE HESTER ET AL., MAKING AN IMPACT: CHILDREN AND DOMESTIC VIOLENCE: A READER, 41–60 (2d ed. 2007).

194. Kelly & Johnson, *supra* note 111, at 483–84.

195. *Id.*

196. See, e.g., Alytia A. Levendosky & Sandra A. Graham-Bermann, *Behavioral Observations of Parenting in Battered Women*, 14 J. FAM. PSYCH. 80 (2000).

misdiagnosed as suffering from various psychopathologies,¹⁹⁷ even though their deficiencies and problems are situational and reactive to the experience of abuse.¹⁹⁸

The experience of coercive controlling violence may also explain a parent's resistance to regular contact between the children and the father even if it can be made safe through contact handovers, or her desire to relocate a long way from the other parent when there is not a convincing rationale for the move other than to get away.

It would be a mistake nonetheless to see any history of violence within intimate partnerships as being in some way a disqualification to parent or a reason to prohibit parent-child contact. There are certainly cases of serious violence when contact should be denied entirely, not just because of continuing physical risk, but because the mother's psychological wellbeing requires it. Yet violence is, regrettably, such a common feature of intimate partnerships that there has to be a realistic differentiation of cases along the spectrum of family violence. This is something that is not easily translated into legislation, where the tendency has been to treat family violence as homogenous and based upon incidents of physical assault.

D. When Familial Relationships Can No Longer Endure

What are the limitations on the efforts that should be made to support the enduring family? Recognition of the notion that families endure beyond the separation of the parents does not necessarily involve an assumption that all families can or should endure. Nor does it mean that the goal of interventions in all cases ought to be to try to build a cooperative co-parenting relationship.

Because there is such a reluctance to sever face-to-face contact between a parent and a child entirely, the use of contact centers, where available, is often an attractive compromise position. Contact centers allow for supervised handovers of children in order to avoid the parents meeting, and supervised visitation in cases where there is an ongoing concern about abuse of a child. However, where there are ongoing issues of violence, abuse or serious dysfunctionality requiring professional interventions to sustain the parent-child relationship, questions need to be asked about the purpose of those interventions.¹⁹⁹ In some cases,

197. For an analysis, see Nancy S. Erikson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us*, 39 FAM. L. Q. 87, 88–89 (2005).

198. *Id.*

199. For discussion in the American context, see Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J. LAW & FAM. STUD. 201 (2007).

therapeutic work with parents may be helpful where, by improving the level of co-operation and trust between the parents, the primary carer can build enough trust and confidence in the other parent that she feels safe to move beyond the security of using the contact handover service.²⁰⁰ Where, however, the reason for the use of the center is because of ongoing concerns about safety, the notion that the parents can be assisted towards a healthy enough co-parental relationship is, for the most part, likely to be unrealistic. In contact centers, there can be a conflict between an institutional imperative to help the parents to 'self-manage' to the extent that they no longer need the services of the center, and the need for ongoing protection from violence or abuse.²⁰¹ Services which have high levels of demand will want to move people off their books in order to place others on them.

While some parents will move on to self-management, with the handover center providing an important half-way house in terms of building trust, in other cases, the threat of violence, controlling behaviour or abuse may be ongoing.²⁰² Services should provide life-support to a parent-child relationship only for a relatively limited period. After that, if serious safety issues have not been and cannot be resolved, then the hard decisions need to be taken, with the priority being the safety and the wellbeing of the primary caregiver.

IX. DOMESTIC VIOLENCE: THE NEED FOR A BIFURCATED RESPONSE

So what of the 'nuclear' argument that any encouragement of shared parenting puts women and children at greater risk? The argument essentially is that the more that legislation supports and encourages the involvement of non-resident parents, the more it exposes women to the risk of violence and abuse. The problem of domestic violence has thus taken center stage in campaigns against changes to the law which promote joint custody, shared parenting and greater contact between non-resident parents and children. Typically, in the criticisms of a pro-contact culture which exposes women and children to a risk of violence, there is no differentiation between patterns of intimate partner violence, and only violence against women is addressed as an issue.

As a rhetorical device, there is no doubt as to the political influence

200. Grania Sheehan et al., *Moving On: The Challenge for Children's Contact Services in Australia*, in PARENTING AFTER PARTNERING: CONTAINING CONFLICT AFTER SEPARATION 147 (Mavis Maclean ed., 2007).

201. PARKINSON, *supra* note 1, at 146.

202. Christine Harrison, *Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence*, 14 VIOLENCE AGAINST WOMEN 381 (2008); Tracee Parker et al., *Danger Zone: Battered Mothers and Their Families in Supervised Visitation*, 14 VIOLENCE AGAINST WOMEN 1313 (2008).

of such arguments. No-one wants to promote laws which make women and children less safe; however, there are not two irreconcilable choices: greater involvement of non-resident fathers on the one hand and protection from domestic violence on the other. As Dalton argues, what we need to do is to focus on “outcomes that will protect abused parents and their children from further violence and trauma, while continuing to foster strong relationships between children and those parents who can be counted on to treat their former partners and their children with respect, even if sources of conflict remain.”²⁰³

Diminishing the emphasis on the meaningful involvement of both parents will do little to ensure the safety of women and children, since it will at the most lead to many non-resident parents having less time with their children rather than no time at all. Conversely, strengthening the family law system’s capacity for better risk assessment and evidence-gathering in relation to family violence will do nothing at all to diminish the law’s support for children to maintain meaningful relationships with both parents where there are no significant safety concerns.

It is difficult to see any linear relationship between the amount of time fathers spend with their children and the risk of violence to the mother. That is, a father who sees the children for four nights every two weeks is not more likely to engage in violence towards the other parent than a father who has the children for only three nights every two weeks. Certainly, the more frequent the handovers between the parents the more opportunity there is for interaction, but increased duration of contact does not necessarily equate with increased frequency of handovers. Contact between parents during school term-time can in any event be avoided by structuring the arrangements to involve collection after school, with a return to school.

Issues about the mother’s safety in the light of serious concerns about ongoing violence either have to be addressed by denying contact entirely, by organising the handover of children through contact centers or other third parties, or by allowing a relocation of the mother to a distant place.

The position is different where there are safety concerns for the children, since the more time the father spends with the children, the more opportunity there is for harm to occur. The linear relationship between time and safety is therefore in terms of threats to the wellbeing of children, rather than to the primary caregiver. Having said this, where there is a history of serious and ongoing violence in an intimate partnership, the risk of abuse to the children ought to be presumed.

What is needed therefore, is a bifurcation in terms of policy. There

203. Dalton, *supra* note 164, at 287.

are families in which contact between the non-resident parent and the children presents serious safety issues for mother, children or both and given the history of violence, ongoing contact could bring little conceivable benefit to the children. There are other families where at least for a period of time, contact needs to be supervised. There are many other families where the history of violence by one parent towards the other ought to have a decisive impact on choice of primary caregiver, and where the evidence of violence has implications for the assessment of the character of the non-resident parent and his capacity to meet the children's emotional and other needs, leading to consequential decisions about the amount of contact that is appropriate in the circumstances.

A bifurcation in terms of policy reflects the natural demographic of post-separation families, with some fathers dropping out of children's lives within a few months or years after separation, while others continue with regular contact for many years.²⁰⁴ By no means all father-child relationships survive parental separation or should survive, and family law systems need to come to terms with that. As the poet Arthur Clough once wrote: "Thou shalt not kill; but need'st not strive/officiously to keep alive."²⁰⁵ Sometimes, perhaps, family law systems around the world try too hard to keep alive relationships which are not sufficiently healthy to survive without intensive care.

A bifurcation in terms of policy can be achieved without diminishing the importance given to the role of non-resident parents in children's lives, as long as there is a recognition in a "pro-contact" culture that an absolute priority must be given to the safety of women and children from a risk of serious harm, and clear messages are given to the community that a history of violence and abuse may lead courts to deny contact.²⁰⁶

204. Jacob E. Cheadle et al., *Patterns of Nonresident Father Contact*, 47 DEMOGRAPHY 205 (2010).

205. ARTHUR HUGH CLOUGH, *The Latest Decalogue*, in POEMS OF ARTHUR HUGH CLOUGH 184 (1903).

206. Having a bifurcation in terms of policy is different from having a bifurcation in the factors that are used to determine what is in the best interests of the child. A risk of violence is not the only factor that ought to be taken into account in determining parenting arrangements. As Prof. Richard Chisholm has observed: "Good parenting can be compromised by other things in addition to violence and abuse. A parent may be disabled from responding properly to a child's needs by reason of adverse mental health, or physical health. A parent may be indifferent to a child, and leave the child unattended for long periods; or seriously neglect the child. A parent may lack the necessary dedication and skills to respond to the special needs of a severely handicapped child. Parents may each be capable and willing parents in many ways, but the conflict between them might be such as to distress and damage the children. In these and many other situations, difficult issues may arise in determining what arrangements will be best for children, even though the problems might not fall within categories such as 'violence' or 'abuse'. For these reasons it may not help in the identification of the child's best interests if the law appears to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse." Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department, Canberra, 2009) at 128.

The values of the family law system must be consistent with the kinds of decisions that are made in child protection cases in determining whether it is safe to leave a child in the care of his or her parents, and should not offer less protection than would be made in a child protection case. Making that decision is often an agonizing judgment call – and one that without the benefit of prophetic foresight, is not always made correctly in either the child protection system or in the context of family law disputes. However, the issues are similar, and therefore a similar balance needs to be struck between the recognition of the importance of parent-child relationships to both parents and children, and the need to ensure as far as possible, that children are protected from harm.