Unacceptable risk and best interests

The central tenet of Part VII of the *Family Law Act 1975* (Cth) and Part 5 of the *Family Court Act 1997* (WA) is to ensure that the best interests of children are met. Section 60CA *FLA* and Section 66A *FCA* require a court making a parenting order to regard the best interests of the child as the paramount consideration. In determining what is in a child's best interests, Section 60CC(2)/(2A) *FLA* and Section 66C(2)/(3A) *FCA* stipulate the primary considerations as the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm due to family violence or abuse, with greater weight to be given to the need to protect the child from harm.

Depending on the facts and circumstances of the particular case, the court may order (pursuant to Section 11F *FLA* or Section 65 *FCA*) that the parties to child-related proceedings take part in an assessment conducted by a Family Consultant to assist the court in understanding the children's needs and in making short-term decisions about arrangements for the children. Central to all of these assessments is screening for family violence and risk assessment. The court may order that the Family Consultant prepare a Family Report based on their observations during these appointments. The best interests of the children are the main focus of the report. The Family Violence Best Practice Principles set out the range of matters the Court may determine the Family Report to address.

When considering what order to make, Section 60CG *FLA* and Section 66G *FCA* provide that the court must (where possible to do so consistently with the child's best interests as the paramount consideration), ensure that the order is consistent with any family violence order, and does not expose a person to an unacceptable risk of family violence.

The exercise of determining unacceptable risk requires the court, in the first instance, to identify the risk/s with specificity, and then to consider the steps or orders that can and should be made to minimise the specific risk/s. The High Court of Australia has considered the meaning of unacceptable risk in cases of child sexual abuse. This decision has subsequently been applied in cases of family violence and non-sexual abuse. To assess for unacceptable risk is to identify the nature and degree of the risk and whether, with or without safeguards, it is acceptable. The presiding court is not required to make a finding about whether a person has perpetrated violence or abuse; rather, it must determine whether orders for residence or contact create an unacceptable risk of harm for the child. The court must consider any risk to the child based on the facts, and balance this risk against the desirability of the child maintaining contact with both parents. The facts may include evidence of past violence or abuse proven on the balance of probabilities [Higgins & Kaspiew 2011], but there may also be a range of other factors not proven to that standard that support a conclusion of unacceptable risk. It is appropriate for the court to rely on expert opinion evidence to assist in determining the child's best interests. The High Court also acknowledged that the magnitude of the risk may be less if contact is supervised, however even supervised contact may present a risk of physical, emotional or psychological disturbance to the child.

Section 67ZBA *FLA* and Section 162A *FCA* provide that where a party to child-related proceedings, or any other interested person as defined, alleges that there has been family violence or there is a risk of family violence by one of the parties to the proceedings, that person must file a 'statutory notice' with the court. In the Federal Circuit Court of Australia any party seeking parenting orders must file with their application or response, a 'notice of risk' (Rule 22A.02 of the *Federal Circuit Court Rules 2001*). The notice of risk (in the form prescribed by section 67Z *FLA*) requires answers to specific questions directed at eliciting information about child abuse, family violence and a range of other risks.

Where a statutory notice or notice of risk is filed, Section 67ZBB *FLA* and Section 162B *FCA* require the court to make the necessary interim orders and to act as expeditiously as possible to enable evidence of the allegations to be obtained, to protect children and any party to the proceedings, and to deal with the issues raised by the allegations. The Family Violence Best Practice Principles recognise that the interim hearing stage is critical in matters involving serious allegations of family violence as it often occurs in a context of urgency, and yet the court may not be able to make findings about disputed facts because not all relevant evidence is available or tested. When considering appropriate interim orders pending a final hearing, the court must assess the risk of future family violence. A screening tool often used by the court (known as 'PPP') analyses risk by reference to three factors: the potency of the violence (level of severity, dangerousness or risk of lethality); the pattern of violence and coercive control; and indicators of who is the primary perpetrator. [Family Violence Best Practice Principles – December 2016] Where an Independent Children's Lawyer (ICL) is involved in the proceedings at this stage, the relevant court guidelines [FCCA/FCA/FCWA ICL Guidelines 2013] indicate that to assist the court in dealing with allegations of unacceptable risk, the ICL should, where possible, issue subpoenas to relevant agencies and be in a position to tender relevant material. The court must consider whether the evidence provided in support of any allegations satisfies the relevant standard of proof, the balance of probabilities [Higgins & Kaspiew 2011].

Research [Faulks 2014] acknowledges the complexity of the concept of unacceptable risk. If the court is satisfied that the alleged events (involving a parent perpetrating violence or abuse) did occur, there must necessarily be some risk for the child spending time with that parent, at least unsupervised. The position is complicated where the court does not or is not able to make a determination about the alleged events. For the court in these circumstances to disallow contact between parent and child would certainly protect the child from any risk of violence or abuse from the parent, but it may cause other difficulties for the child in the development of their relationship with that parent and perhaps other people. If, on the other hand, the court allows unsupervised contact, and the parent had in fact perpetrated violence or abuse, the child may be at risk and not adequately protected.

A 2015 evaluation by the Australian Institute of Family Studies [Kaspiew et al Synthesis Report 2015] identifies a heightened emphasis by courts and practitioners on identifying family violence issues and safety concerns. It observes that parents self-select into disclosing family violence based on their view of the behaviour, the consequences of disclosure and its implications for parenting arrangements. It also conveys the views of professionals in the family law system indicating that the screening and assessment of family violence and safety concerns remain challenging, particularly in assessing how these issues impact on parenting arrangements. Section 67ZBB *FLA* and Section 162B *FCA* are critical to the court's powers in responding to these issues.