



## Article

# Child sexual abuse allegations and s 60CC(2A): A new era?

Lisa Young,\* Sandeep Dhillon† and Laura Groves‡

*This article argues that the unacceptable risk test, as applied in cases where there are allegations of child sexual abuse against a parent, deserves reconsideration in light of the introduction of s 60CC(2A). The article sets out briefly the judicial exposition of the 'unacceptable risk' test and then provides a snapshot of the four predominant categories of child sexual abuse cases that present to family courts and identifies where the application of the unacceptable risk test presents particular problems. Prior critique of the test is then considered and it is argued that the test is fundamentally flawed (in theory) and in practice poses significant dangers for abused children. The relevant amendments to Pt VII are then outlined and the interpretation of s 60CC(2A) is discussed, including considering the impact of s 60CG. It is argued that s 60CC(2A) demands a reconsideration of the unacceptable risk test in the context of child sexual abuse cases and changes the statutorily mandated process of decision-making — it should not be 'business as usual'.*

## Introduction

One of the most difficult decisions a family court judge can face is determining an application for parenting orders where there is an unproven allegation of child sexual abuse (CSA) against a parent. The paramountcy principle applies when making any parenting order; consequently, the overriding consideration is the best interests of the child.<sup>1</sup> The case law has long established the key question in the context of CSA is whether there is an 'unacceptable risk' to the child of sexual abuse if an order is made permitting the child to spend time with that parent: *M v M*.<sup>2</sup>

The 'unacceptable risk' test has been the subject of rigorous academic and judicial critique, both as to its content and its application. Notwithstanding this, in 1996 s 60CG(1)(b) (then s 68K) was added to Pt VII of the Family Law

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\* Associate Professor, Murdoch University, School of Law.

† LLB BA; graduate of Murdoch University School of Law; presently working in the public sector.

‡ Graduate of Murdoch University School of Law; presently working in private practice.

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<sup>1</sup> Under the Family Law Act 1975 (Cth) (FLA) the court can make any parenting order it considers appropriate (s 65D(1)). The paramount consideration in the exercise of this discretion is the best interests of the child (s 60CA) and in determining what is best for the child, the FLA sets out mandatory considerations (s 60CC).

<sup>2</sup> (1988) 166 CLR 69; 82 ALR 577; [1988] HCA 68; BC8802632.

Act 1975 (Cth) (FLA);<sup>3</sup> this section relates to protection from family violence, which includes CSA, and adopts the phrase ‘unacceptable risk’. On 7 June 2012 another important amendment to Pt VII came into force;<sup>4</sup> protection of children from violence and abuse has been legislatively prioritised over the promotion of meaningful relationships between children and their parents in determining the best interests of a child: s 60CC(2A). The most recent amendment only applies to matters filed after 7 June 2012 and to date there has been little detailed judicial discussion of this provision.<sup>5</sup>

In this article we consider whether the unacceptable risk test deserves reconsideration in light of the impact of these statutory amendments, most particularly the introduction of s 60CC(2A).<sup>6</sup> This is a complex and very important issue, and deserves detailed consideration, not least because of the documented difficulties in the family law context of decision-making addressing harm in a ‘shared parenting’ environment. First, the article sets out briefly the judicial exposition of the ‘unacceptable risk’ test. A snapshot is then provided of the four predominant categories of CSA cases that present to family courts<sup>7</sup> and we identify where the application of the unacceptable risk test presents particular problems. Next, we discuss prior critique of the test, and go on to argue the test is fundamentally flawed (in theory at least) and in practice poses significant dangers for abused children. We then outline the relevant amendments to Pt VII and consider how s 60CC(2A) might be interpreted, including a discussion of the impact of s 60CG. We argue s 60CC(2A) has the potential to provide a catalyst for a reconsideration of the unacceptable risk test in the context of CSA cases and changes the statutorily mandated process of decision-making — it should not be ‘business as usual’. This discussion necessarily considers the existence, and impact, of widely held myths as to how the family courts deal with CSA allegations.

### The Unacceptable Risk Test: *M v M*

The unacceptable risk test set out in the High Court case of *M v M*<sup>8</sup> purports to balance the risk of detriment to a child from sexual abuse against the possible benefits that child may gain from spending time with the parent

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3 Family Law Reform Act 1995 (Cth). Part VII deals with parenting disputes. All section references in this article are to the FLA, unless indicated otherwise.

4 Family Law Legislation Amendment (Family Violence and Other Measures) Act (Cth) 2011.

5 We discuss judicial interpretation of this section below. Note at least one judge has taken the view that, while s 60CC(2A) may not technically apply to a case, the same approach must nonetheless be applied ‘as a matter of child protection and common sense’: *Gabel & Meltzer* [2014] FCCA 604; BC201403680 at [268] per Harman J.

6 Of course, there is no reason why the same issues would not arise where an allegation of abuse is made against a non-parent, however, the special treatment of parents under the FLA gives rise to particular issues which are the focus of this article.

7 In this article we will often refer to the ‘family courts’ as in Australia there are a number of different courts which hear parenting disputes. In the main, however, these courts specialise in family law matters.

8 (1988) 166 CLR 69; 82 ALR 577; [1988] HCA 68; BC8802632.

accused of abuse.<sup>9</sup> The basic premise of this deceptively simple test is that a court should not make orders that will expose a child to an ‘unacceptable risk’ of abuse.

In *M v M*, the evidence included the mother’s claims in relation to what the 4 year old child had said, inconclusive medical evidence and statements made by the child to a police officer and a child psychologist consistent with sexual abuse and with the mother’s evidence. The child psychologist formed the view the child had been abused, although not necessarily by the father. It was accepted the mother held a genuine belief the child had been sexually abused by the father; the father denied the allegations. Gun J suspended contact, considering there was a possibility the father had abused the child and it would be best for the child to eliminate any future risk. A majority of the Full Family Court of Australia dismissed the father’s appeal,<sup>10</sup> however, Nicholson CJ dissented on the ground that parent/child contact should not be denied simply because there was a *possibility* that time with the father would expose the child to sexual abuse. His Honour considered there must be ‘a real or substantial risk of such abuse occurring as a practical reality’.<sup>11</sup>

The father’s High Court appeal was unanimously dismissed. Importantly, the High Court rejected the father’s argument that if the court fails to find, on the balance of probabilities, that a parent has abused a child in the past, then this is the end of the matter. *M v M* also indicates that although a finding that a person has sexually abused the child would strongly suggest a future risk, such a finding is not a necessary precondition for a finding of unacceptable risk.<sup>12</sup> Furthermore, even though there may be a finding a person has abused a child, there could also be evidence which would lead the court not to make a finding of unacceptable risk.<sup>13</sup> Fogarty J has summarised the principles that emerge from *M v M* as follows:<sup>14</sup>

1. The decisive issue is and always remains the best interests of that child.
2. All other issues are subservient.
3. The nature of the risk is best expressed by the term ‘unacceptable risk’. It is an evaluation of the nature and degree of the risk and whether, with or without safeguards, it is acceptable.
4. Where past abuse of a child is alleged it is usually neither necessary nor desirable to reach a definitive conclusion on that issue. Where, however, that is done the *Briginshaw* civil standard of proof applies.

9 See the discussion of this case in J Fogarty AM, ‘Unacceptable risk — A return to basics’ (2006) 20 *AJFL* 249; indeed this is the very heart of the test as expressed by the High Court (see *M v M* (1988) 166 CLR 69 at 78; 82 ALR 577; [1988] HCA 68; BC8802632). Note the test has a broader application than child sexual abuse cases; this is discussed below.

10 *In the Marriage of PM and KM* (1988) 12 Fam LR 249; 93 FLR 72; (1988) FLC 91-958.

11 *Ibid* at Fam LR 262.

12 *M v M* (1988) 166 CLR 69 at 76–7; 82 ALR 577; [1988] HCA 68; BC8802632.

13 *Ibid*, at CLR 77; see also the discussion in R Chisholm, ‘Child abuse allegations in family law cases: A review of the law’ (2011) 25 *AJFL* 1 at 4.

14 Fogarty, above n 9, at 255–6.

5. The circumstance, if it be so, that the allegation of past abuse is not proved in accordance with *Briginshaw*, does not impede reliance upon those circumstances in determining whether there is an unacceptable risk.
6. The concentration in these cases should normally be upon the question whether there is an unacceptable risk to the child.
7. The onus of proof in reaching that conclusion is the ordinary civil standard.
8. But the components which go to make up that conclusion need not each be established on the balance of probabilities. The court may reach a conclusion of unacceptable risk from the accumulation of factors, none or some only of which, are proved to that standard.

The test in *Briginshaw* is now set out in s 140(2) of the Evidence Act 1995 (Cth), which requires the court to take into account, among other things, the 'gravity of the matters alleged'.<sup>15</sup> The effect is that the standard of proof in relation to the finding of past abuse is at the high end of the civil scale; this is crucial if, as we later suggest, a finding as to whether a risk is unacceptable is in practice often determined by whether there is a finding of past abuse.

In *In the Marriage of N and S*,<sup>16</sup> Fogarty J posed a number of questions which his Honour said provide a structure or framework for assessing whether there is an unacceptable risk of abuse:

What is the nature of the events alleged to have taken place? Who has made the allegations? To whom have the allegations been made? What level of detail do they involve? Over what period of time have the allegations been made? Over what period of time are the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of the allegations? Are the allegations reasonably based? Are the allegations genuinely believed by the person making them? What expert evidence has been provided? Are there satisfactory explanations of the allegations apart from sexual abuse? What are the likely future effects on the child?<sup>17</sup>

These questions are frequently utilised by decision-makers.<sup>18</sup>

While some commentary suggests the unacceptable risk test only applies when a finding cannot be made either way as to the happening of the alleged abuse,<sup>19</sup> that is not consistent with the clear words of *M v M*.<sup>20</sup> It should also be noted that the unacceptable risk formulation is applied, though not universally, to cases that do not involve CSA allegations.<sup>21</sup> In *Johnson v*

<sup>15</sup> Evidence Act 1995 (Cth) s 140(2).

<sup>16</sup> (1995) 19 Fam LR 837; 129 FLR 243; (1996) FLC 92-655.

<sup>17</sup> Ibid, at [139]; approved by the Full Court in *W and W (Abuse allegations: unacceptable risk)* (2005) 34 Fam LR 129; (2005) FLC 93-235; [2005] FamCA 892.

<sup>18</sup> For recent examples see *Manziati v Manziati* [2011] FamCA 277; BC201150348; *Langmeil v Grange (No 4)* [2011] FamCA 605; BC201150441 and *Wetherill v Finchley* [2013] FCCA 1197; BC201312684.

<sup>19</sup> See, eg, the discussion of this topic by Justice Faulks in 'Justice and the protection of children', in A Hayes and D Higgins (Eds), *Family, policy and the law: Selected essays on contemporary issues for Australia*, at <<http://www.aifs.gov.au/institute/pubs/fpl/fpl116.html>> accessed (4 December 2014). See also B Fehlberg, R Kaspiew, J Millbank, F Kelly and J Behrens, *Australian Family Law: The contemporary context*, 2nd ed, Oxford University Press, 2015, at [8.4.1.3.5].

<sup>20</sup> *M v M* (1988) 166 CLR 69; 82 ALR 577; [1988] HCA 68; BC8802632 at p 77.

<sup>21</sup> See *A v A* [1998] FLC 92-800; 22 FamLR 756 at [3.15].

*Page*,<sup>22</sup> the Full Court said the test also applies to allegations of ‘serious abuse’ of the child, and when ‘it is asserted there is an unacceptable risk of harm to the child if the child spends time with a parent’.<sup>23</sup> The High Court in *M v M* framed its test in terms of sexual abuse, however, this was in the context of determining what level of risk, more generally, was such that a parent would be denied access to their child.<sup>24</sup> Moreover, as is discussed later, s 60CG requires that decision-makers ensure, to the extent possible, that parenting orders do not expose any person to ‘an unacceptable risk’ of family violence. However, not all cases involving allegations of violence, or even serious violence, overtly refer to this phrase.<sup>25</sup> In this article, we focus specifically on CSA cases, where the ‘test’ is routinely applied.<sup>26</sup>

### Predominant factual matrices

By their very nature, disputes involving allegations of parental CSA are destined to be overrepresented in the population of cases that require judicial determination. A very common feature of such cases is that the parent making the allegation (or bringing forward an allegation by a child) seeks an order that the other parent’s contact with the child be suspended or supervised. With such high stakes, and given neither guilty nor innocent parents are likely to concede the matter, compromise is difficult to achieve. However, not every case involving an allegation of parental CSA presents the same degree of difficulty for a decision-maker. While all cases are different, these cases naturally fall into a number of distinct factual matrices. As we shall see, *M v M* fell into the category of case that presents the most difficulty for decision-makers;<sup>27</sup> though somewhat trite, we might ask ourselves whether ‘hard cases make bad law’.

### Substantial evidence of past sexual abuse of the child

As Carmody J said, ‘[p]ositive findings of sexual abuse are uncommonly rare in family proceedings’.<sup>28</sup> It is notoriously difficult to prove child sexual assault. Medical evidence may be inconclusive<sup>29</sup> (and may fail to identify an abuser), children can be reluctant to disclose,<sup>30</sup> their statements may lack

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22 (2007) FLC 93-344; (2007) FLC 93-344; [2007] FamCA 1235 .

23 Ibid, at [62]. See, eg, for *Akston & Boyle* (2010) FLC 93-436; [2010] FamCAFC 56; BC201050409.

24 Ibid, at [25].

25 For a recent example see *Fern & Lumsden* [2014] FamCA 7; BC201451260. For further discussion of this, see *Simmons & Kingsley* [2014] FamCAFC 47; BC201451112, discussed later in this article.

26 There are some instances in the past where cases involving CSA allegations have not applied this test: see R Carson, ‘Supervised Contact: A Study of Current Trends and Emerging Tensions since the Introduction of the Family Law Reform Act 1995 (Cth)’, unpublished PhD thesis, December 2011, p 160.

27 See the High Court’s comment to this effect in *M v M* (1988) 166 CLR 69; 82 ALR 577; [1988] HCA 68; BC8802632 at p 77.

28 *Murphy & Murphy* [2007] FamCA 795; BC200750675 at [210].

29 It is not uncommon for medical evidence to leave open a finding of sexual abuse, but also to be consistent with other possibilities. Moreover, it will not establish the perpetrator, unless there is DNA evidence.

30 L Malloy, S Brubacher and M Lamb, ‘Expected consequences of disclosure revealed in

contextual detail and be viewed with more scepticism than those of adults,<sup>31</sup> abused children may recant confessions,<sup>32</sup> appear keen to have contact even with an abusive parent, and there are rarely any witnesses. Moreover, where disclosure is made to a trusted adult, which might well be a primary carer mother in a separated family, the mother faces being seen to have a vested interest in bringing forward a disclosure as a basis for curtailing contact.<sup>33</sup> As one would expect, where there *is* significant evidence of sexual abuse by a parent the case is unlikely to result in a trial; certainly few such cases are reported.<sup>34</sup> However, there are some cases that end in trial where the evidence by an older child is very compelling<sup>35</sup> or there is sufficient corroboration of the evidence.<sup>36</sup> In such a case, a finding of abuse may well eventuate and it is not difficult for the conclusion to be reached that there is an unacceptable risk of abuse and suspended contact may well follow.<sup>37</sup>

### Substantial evidence of 'external' risk factors

In a few cases, there is evidence that points towards the potential for a parent to be an abuser, though there is no specific allegation in relation to the children of the parents. In *Nikolakis v Nikolakis*<sup>38</sup> the allegations were that the father

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investigative interviews with suspected victims of child sexual abuse' (2011) 15(1) *Applied Developmental Science* 8; L Malloy, D Lyon and J Quas, 'Filial Dependency and Recantation of Child Sexual Abuse Allegations' (2007) 46(2) *Journal of the American Academy of Child & Adolescent Psychiatry* 162.

- 31 J Myers, 'New era of skepticism regarding children's credibility' (1995) 1(2) *Psychology, Public Policy, and Law* 387.
- 32 K London, K, M Bruck, M, S Ceci and D Shuman, 'Disclosure of child sexual abuse: What does the research tell us about the ways that children tell?' (2005) 11(1) *Psychology, Public Policy and Law* 194; I Hershkowitz, O Lanes and M Lamb, 'Exploring the disclosure of child sexual abuse with alleged victims and their parents' (2007) 31 *Child Abuse & Neglect* 111.
- 33 That this is so, is emphasised by the comments of Kent J in *Thistle & Thistle (No 2)* [2014] FamCA 67 at [7], who identified one 'troubling' feature of the case being the fact that the allegation of abuse by the child was made before there was 'anything untoward in the relationship as between the Mother and Father . . .'. For a recent article emphasising this issue, see D Fryer, 'False allegations in family law proceedings: Using the Family Court as a sword, not a shield' (2013) 3 *Fam L Rev* 137.
- 34 For a recent example, see *Auburton & McGuinness* [2013] FamCA 492; here the father had been convicted of sexually abusing one of the children, another child of the mother and accessing child pornography. The mother was given sole ESPR with no order for contact; the father was also restrained from initiating contact with the children. See also *Fadel & Jarrah* [2014] FamCA 85; BC201451143.
- 35 See, eg, *Hassam & Hassam* [2014] FamCA 7; BC20145126059. The child was 10 at the time of trial and had made repeated, consistent and detailed disclosures of sexual abuse by the father to various professionals, in addition to the mother. No contact was ordered.
- 36 See, eg, *Akif v Ahmadi* [2011] FamCA 958; BC201150766 (the corroboration was referred to as 'indirect' in this case, at [76]) and *El Kazemde & Hanif* [2013] FamCA 197; BC201350205 respectively. For a decision where the judge was asked to make consent orders permitting only supervised contact in circumstances where a child had made disclosures about the father prior to parental separation, see *Thistle & Thistle (No 2)* [2014] FamCA 67.
- 37 This was the outcome in the first two cases referred to in n 36; in the third the mother consented to supervised contact.
- 38 [2010] FamCAFC 52; BC201050147. See also *Tate v Ralph* [2012] FMCAfam 279; BC201202947 where a father convicted of six counts of indecent acts with a child under the age of 16 and two counts of indecent assault, was denied contact with his 5 year old son.

had engaged in “predatory sexual behaviour” with other children<sup>39</sup> and accordingly the parties’ children were at risk of similar abuse if they spent unsupervised time with the father. The father was accused on two separate occasions of drugging and sexually assaulting children in his care. The father was charged in relation to one incident and later convicted of indecent assault of a child under the age of 10 though this was overturned on appeal. The trial judge concluded that the evidence of those two incidents alone fell short of satisfying the court to the requisite standard that the father posed an unacceptable risk of abuse to the children. However, prior to the parties’ separation the children were aware the father was having an affair; the father instructed them not to tell their mother, and they complied. The trial judge cited evidence from an expert witness that, given the children’s silence on this issue, the children may not disclose to the mother if they were sexually abused by the father in the future. Referring to *M v M*, the trial judge concluded that *in combination* the evidence satisfied the court to the requisite standard that there was an unacceptable risk of sexual abuse of the children if they were to spend unsupervised time with the father in the future.<sup>40</sup> The court did not have any confidence that the children could confide in their mother if they felt uncomfortable about the father’s conduct towards them which in most cases would likely minimise the risk of inappropriate conduct occurring or reoccurring.<sup>41</sup> This shifted the balance in favour of finding there was an unacceptable risk of sexual abuse by the father. The father’s appeal was unsuccessful, the Full Court acknowledging that external risk factors might well lead to a finding of an unacceptable risk of abuse.

Of course, external risk factors may also weigh in combination with evidence of the sexual abuse of the child of the parents (in circumstances where that alone would not suffice) to give rise to a finding of an unacceptable risk. This was the finding of Austin J in *Hasset v Weader*<sup>42</sup> where quite

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Bender FM held that the father’s alleged history of abuse of family members over the years and his denial of such abuse despite the convictions meant that he presented an unacceptable risk of abuse towards the child. Supervised time was refused in part because it was found such an order would cause stress and anxiety for the mother which would in turn impact on the child. In *Jenkins v McInnes* [2012] FMCAfam 477; BC201204846 there was evidence the father had sexually abused his daughter from a previous relationship; the father did not challenge the allegations. The father sought supervised contact with the 13 year old male child in this case; the mother sought no contact. It was held that due to the past allegations of sexual abuse and the father’s failure to complete any offender programs, there was an unacceptable risk of sexual abuse and supervised time was ordered. See also *Boccard v Boccard* [2013] FamCA 63 (no contact); *Staker v Temay* [2013] FMCAfam190 (no contact).

39 [2010] FamCAFC 52; BC201050147 at [18].

40 *Ibid*, at [26].

41 There is a disturbing tendency of some decision-makers to weigh into the mix the possibility that a child will exhibit protective behaviours and so reduce the chances of abuse. Note the Full Court’s comments at [95] in this case. For another example see *Kerrison v Kerrison* [2013] FamCA 31 at [122] and [126] and the comments of the trial judge recited at [62] in *Partington & Cade (No 2)* (2009) 42 Fam LR 401; (2009) FLC 93-422; [2009] FamCAFC 230; BC200951133. While the logic of this argument is obvious (given one is talking about risk), one would have thought that, if a child is having to engage in protective behaviours against a predatory parent, then that parent is a danger to that child, at least unsupervised. Nor is that parent exhibiting a proper attitude towards parenting. This arguably evidences a higher priority being placed on parent/child contact than protection from abuse.

42 [2011] FamCA 319; BC201150897 at [96]ff.

compelling disclosures by a young child were not sufficient on their own, but when weighed together with the father's abuse of alcohol led to an overall finding of an unacceptable risk of harm to the child.<sup>43</sup>

### Insubstantial evidence of sexual abuse of the child

In some cases a parent — more usually a mother<sup>44</sup> — will hold a strong conviction that a child has been abused by the other parent, but the supporting evidence is weak.<sup>45</sup> In such cases, even if the belief is found to be genuinely held, this conviction may be found to be 'unreasonable' on the part of the mother.<sup>46</sup> If the court finds the mother is unlikely to change her attitude and beliefs concerning the father (whether because she is unwilling or unable to do so) and considers this will impact on the time the child spends with the father, the court may well find no unacceptable risk of abuse by the father exists and even place the child in the father's care.<sup>47</sup>

43 See also *Oscar & Austen* [2012] FamCA 220; BC201250292; *Oscar & Delaware* [2012] FamCA 211; BC201250293; *Lett & Lett* [2014] FamCA 529; BC201451489 though it is difficult to ascertain the weight attributed to the factors weighed in combination with the evidence of abuse (in this case a history of excessive drug use and current adverse psychiatric findings).

44 It is to be expected that mothers feature more in this role, given their greater societal role as primary caregivers to children both in intact and separated families. For an example involving a father in this role, see *Farrelly v Kaling* [2012] FMCAfam 210; BC201204340 where the father argued that the child's mother posed an unacceptable risk of CSA towards the parties' 4 year old son. The father alleged the child had made numerous allegations against the mother. However, in this case Willis FM found the allegations were unfounded and that the father had groomed the child and recorded him. It was ordered that child live primarily with his mother and that she have sole parental responsibility and that the child spend limited (unsupervised) time with his father. See also *Wetherill & Finchley* [2013] FCCA 1197; BC201312684 though the father in this case accepted the mother's behaviour was not intended to be abusive but rather was a result of her cultural beliefs. See also *Lackey & Mae* [2013] FMCAfam 284. See also *Carden & Hillard* [2014] FamCA 43; BC2014513138; BC201451391 where a father found to have deliberately coached the children to make false allegations of sexual abuse against the mother was permitted only supervised contact with his children. Note, the fact that fathers are far more likely than mothers to sexually abuse their children would also contribute to women more commonly finding themselves in the situation of being concerned, but unable to prove, sexual abuse; see K Richards, 'Misconceptions about child sex offenders', Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No 429 September 2011.

45 See, eg, *Northcote v Northcote* [2012] FMCAfam 82; BC201205098; *Fielding v Mason* [2011] FMCAfam 1137; BC201110900; *Gennaro v Giavana* [2011] FamCA 910; BC201150768; *Jets v Maker (No 2)* [2011] FMCAfam 1473; BC201110770; *Biggins v Brown* [2011] FamCA 1027; BC201150783; *Houston v Houston* [2011] FamCAFC 178; BC201150540; *Tripp v Tripp* [2011] FamCA 598; BC201150529. However, note *Gaylard v Cain* [2012] FMCAfam 501; BC201203671 where despite the mother holding an implacable, but unsupported belief in abuse, no order for time with the father was made.

46 *Meinhardt v Santos* [2012] FamCA 255; BC201250340; *Northcote v Northcote* [2012] FMCAfam 82; BC201205098; *Fielding v Mason* [2011] FMCAfam 1137; BC201110900; *Jets v Maker (No 2)* [2011] FMCAfam 1473; BC201110770; *Biggins v Brown* [2011] FamCA 1027; BC201150783; *Houston v Houston* [2011] FamCAFC 178; BC201150540; *Smeeden v Wulandri* [2011] FamCA 619; BC201150538; *Tripp v Tripp* [2011] FamCA 598; BC201150529.

47 *Steel v Galloway* [2012] FamCAFC 25; BC201250073; *Krach v Krach* [2009] FamCA 507; BC200950413; *Dalziel v Belladonna* [2009] FamCA 254; *Mackillop v Jell* [2009] FamCA 191; *Stapleton v Hayes* [2009] FamCA 437; BC200950336; *Jets v Maker (No 2)* [2011]



Moreover, if a mother is considered to be an anxious and overprotective parent, to have fabricated or significantly exaggerated the evidence of abuse,<sup>48</sup> or otherwise to be imparting her view that the child was sexually abused onto the child, the court may conclude the mother poses an unacceptable risk of psychological harm towards the child. Then, not only may the child be placed in the father's care, but the mother may only be permitted supervised time with the child.<sup>49</sup>

In *Steel v Galloway*,<sup>50</sup> the mother, along with the father's brother and his wife, alleged the child had been sexually abused by the father. The child demonstrated aggressive behaviour towards other children and also exhibited signs of sexualised behaviour. However, the expert psychologist<sup>51</sup> concluded that 'the child demonstrated a secure attachment with the father and an

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FMCAfam 1473; BC201110770; *Biggins v Brown* [2011] FamCA 1027; BC201150783; *Matthews v Bender (No 2)* [2013] FamCA 740; BC201352519; *Kelso & Finch (No 2)* [2013] FamCA 875 (the mother here had dropped the allegation at trial); *Howard & Lipschitz* [2014] FamCA 272; *Capetto v Capetto (No 3)* [2011] FamCA 345; *Ganley & Ganley* [2009] FamCA 641; BC200950539; *Lindsay v Baker* [2010] FamCA 421; BC201050492 (note in a later appeal, after care was in fact reversed to the father, the Family Consultant and ICL recommended only four periods of supervised contact per year with the mother, which suggestion was rejected by the father as inadequate: see the discussion in *Lindsay v Baker* [2012] FamCAFC 189; BC201250689 at [30]). Not all cases see care reversed of course, eg, *Welchman-Rudie & Zawada* [2013] FamCA 862 and *Fulton & Packer* [2013] FamCA 555. Note *Ehrasheed v McGrieve* [2014] FamCA 11; BC201451263 where Forrest J, though finding no basis in the mother's claims, left the child in the mother's care (the father's behaviour did warrant some concern though apparently not sufficient to interfere with contact with his child), with a quick move to a 'normal' contact regime. His Honour seemed satisfied the mother would comply, though there was a notable caution in the judgment that her future primary care of the child could be compromised were she to persist with her claims: at [146].

48 *Grandhouse v Grandhouse* [2012] FamCAFC 13; BC201250039; *Wylie v Wylie* [2011] FMCAfam 1344; BC201110169; *Biggins v Brown* [2011] FamCA 1027; BC201150783; *Jets v Maker (No 2)* [2011] FMCAfam 1473; BC201110770; *Howard & Lipschitz* [2013] FamCA 75; BC201350126; *Ruth (aka Hutton) and Hutton* (2011) 45 Fam LR 399; [2011] FamCAFC 99; BC201150259.

49 *Langmeil v Grange (No 4)* [2011] FamCA 605; BC201150441 (note the unsuccessful appeal by the mother, who was unrepresented, in this matter: *Langmeil v Grange* [2012] FamCAFC 39; BC201250129); *Steel v Galloway* [2012] FamCAFC 25; BC201250073; *Manziati v Manziati* [2011] FamCA 277; BC201150348; *Muldoon v Channing* [2012] FMCAfam 161; BC201201994; *Howard & Lipschitz* [2013] FamCA 75; BC201350126; *Ruth (aka Hutton) and Hutton* (2011) 45 Fam LR 399; [2011] FamCAFC 99; BC201150259. In *Carpenter & Carpenter (No 2)* [2012] FamCA 1005; BC201250758 care was reversed in favour of the father however the mother was given substantial unsupervised time with the children despite adverse findings about the mother's truthfulness as to the sexual abuse allegations (the mother's appeal was dismissed: *Carpenter & Carpenter* [2014] FamCAFC 100; BC201451247.

50 [2012] FamCAFC 25; BC201250073.

51 Psychiatrists or child psychologists may be appointed in parenting disputes, under Pt 15.5 of the Family Law Rules 2004. Experts are to be appointed only where it is reasonably necessary to resolve significant issues before the court: r 15.42. The parties may agree to jointly appoint a single expert and may tender a report or adduce evidence from a single expert without leave of the court: r 15.44 It is important to note that the primary duties of the single expert are owed to the court, rather than to the parties: Divs 15.5.2 and 15.5.5. It is also possible for the court to appoint a single expert, either on application by one of the parties or on its own motion: r 15.45

insecure and anxious attachment to the mother'.<sup>52</sup> Further, the trial judge considered the uncle and his wife were all but personally obsessed with sexual abuse. Relying on the expert's conclusions the trial judge ordered care be reversed, the child live with the father and spend supervised time with the mother, with provision for the mother to have unsupervised time after a year. This was primarily due to the mother's potentially adverse psychological impact on the child as it was found to be unlikely the mother could change her views on the question of CSA.<sup>53</sup> In *Grandhouse v Grandhouse*,<sup>54</sup> the mother held a strong belief the father had sexually and physically abused the child. Le Poer Trench J found the mother had fabricated and significantly exaggerated the evidence. Orders were made that the child live with the father and spend supervised time with the mother.

Of course, whether evidence of abuse is substantial or not is a matter of interpretation for the judicial officer. In *Kirby & Holmes*,<sup>55</sup> the child was alleged to have made graphic disclosures to the mother, some of which were repeated to a number of third party professionals, and the father agreed the child had exhibited some of the less extreme behaviours alleged by the mother. However, external investigation concluded there was insufficient evidence to establish any risk of abuse. In this case, Tree J left the child in the mother's primary care, set up a contact regime and ordered the mother to undergo treatment, which was to be reviewed at a later point; there was a clear warning however that a failure to change her approach to the issue of sexual abuse could threaten the mother's long term care of the child.<sup>56</sup>

CSA is difficult to prove, even when it *has* occurred. When there has not been any abuse, then it will be all but impossible for a parent to lead sufficient evidence to establish the allegation. Such cases may involve a genuine, but mistakenly held belief of abuse, or a deliberately false allegation.<sup>57</sup> What is clear is that where CSA is unsupported by any credible evidence, and the parent making the allegation is implacable in their opposition to contact with the other parent, then the court may very well reverse care with the possibility of limited contact with the parent making the allegation.

As has been argued elsewhere,<sup>58</sup> and as is further supported by the cases cited in the next section of this article, there is therefore little to support the claim that CSA is 'easy to allege but difficult to disprove' in family court.<sup>59</sup>

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52 [2012] FamCAFC 25; BC201250073 at [25].

53 *Langmeil v Grange (No 4)* [2011] FamCA 605; BC201150441; *Fielding and Mason* [2011] FMCAfam 1137; BC201110900; *Jets v Maker (No 2)* [2011] FMCAfam 1473; BC201110770; *Biggins v Brown* [2011] FamCA 1027; BC201150783; *Houston v Houston* [2011] FamCAFC 178; BC201150540; *Smeeden v Wulandri* [2011] FamCA 619; BC201150538; *Tripp v Tripp* [2011] FamCA 598; BC201150529.

54 [2012] FamCAFC 13; BC201250039.

55 [2013] FamCA 75; BC2013501262.

56 *Ibid.*, at [88].

57 For an example where the court was satisfied an allegation was deliberately false, see *Newberry v Newberry (No 2)* [2013] FamCA 462; BC201350257. Of course, it is technically possible that in some of these cases there was in fact CSA.

58 L Young, 'Child sexual abuse allegations in the Family Court of Western Australia: An Old Light on an old problem' (1998) 3 *Sister in Law* 98.

59 This is a phrase no longer allowed in rape trials, but which still surfaces from time to time in family law cases involving CSA; indeed note the High Court's statement to this effect in

Indeed, it is difficult to imagine a lawyer advising a parent to persist with CSA allegations for which there was little supporting evidence; at the very least they would have to warn of the significant risk such a position entailed.<sup>60</sup> As shown below, judicial officers are acutely aware of the possibility of, and dangers arising from, false allegations.<sup>61</sup> Again, in terms of application of the unacceptable risk test to CSA allegations, these cases do not provide significant difficulty for judicial officers.<sup>62</sup>

### Inconclusive evidence of sexual abuse of the child

On some occasions, the court will find itself confronted with evidence which it considers is inconclusive either as to the fact of abuse or as to the perpetrator. This is precisely how *M v M* presented and so was the context in which this test was developed; but is the outcome of this now rather old decision indicative of judicial decision-making generally today, particularly in light of the pro-shared parenting reforms of 1996<sup>63</sup> and 2006?<sup>64</sup>

Even before those reforms, there were judicial decisions (perhaps the best known, and most critiqued,<sup>65</sup> is *Re W (Sex Abuse: Standard of Proof)*)<sup>66</sup> indicating the balance had already tipped in favour of preserving contact. Carson, in the research for her unpublished PhD thesis, concluded that a consideration of a sample of pre-2006 cases involving CSA allegations showed a focus on establishing the truth or otherwise of the allegation and conceiving the primary potential harm to children being the potential loss of parental contact, rather than abuse.<sup>67</sup>

The degree of evidence required to prove past abuse is high and the cases indicate that even where the child has made disclosures (and note that children

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*M v M* (1988) 166 CLR 69; 82 ALR 577; [1988] HCA 68; BC8802632 at p 77. See its recent use in *Kerrison v Kerrison* [2013] FamCA 31 at [50] citing *M v M*; see also *Fulton & Packer* [2013] FamCA 555 at [15] and *Simpson & Hahn* [2014] FamCA 674; BC201451436 at [64].

60 In *Stevens & Stevens* [2014] FamCA 192; BC201451230 at [26]–[27] it is recounted that the mother said she changed her position as to the orders she sought, on legal advice to the effect that the evidence would not support a finding leading to supervised contact. It is difficult to imagine the mother was not equally warned of the dangers of a ‘hardline’ position, and not seeming to accept the possibility of unsupervised contact.

61 There is no doubt the court is on the ‘qui vive’ for false allegations and routinely relies on prior judicial statements emphasising the risks of false positives. See, eg, *Mother and Father* (2006) 36 Fam LR 519; [2006] FCWA 89 at [12]–[15]. In this case, Thackray CJ relied on an amicus brief prepared for a US case which presented evidence relevant to the reliability of children’s evidence in particular where poor interviewing techniques were adopted.

62 That is not to say that other difficulties may not arise. For example, if a parent fabricated an allegation, and drew the child into the fabrication, the child may be unwilling to see the accused parent. If this has persisted for some time then the case may become extremely difficult. But this is not *because* of the sexual abuse allegation per se. This is no different to the situation that presented, for example, in the sad saga of *Peter v Elspeth* [2009] FamCA 551; BC200950342. There may be a variety of situations which lead to a child being estranged from a parent; even where the truth as to the ‘blame’ for that estrangement is clear, the difficulty arises because of the child’s unwillingness to have contact with the parent: see, eg, *Barzetti & Barzetti* [2014] FamCA 233.

63 Family Law Reform Act 1995 (Cth).

64 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

65 Fogarty, above n 9, at 251; Chisholm, above n 13.

66 *Re W (Sex Abuse: Standard of Proof)* (2004) 32 Fam LR 249; (2004) FLC 93-192; [2004] FamCA 768.

67 Carson, above n 26, at 162–4.

rarely give direct evidence in Australian family courts)<sup>68</sup> some corroborative evidence will usually also be required before any finding of abuse is made.<sup>69</sup> The Full Court in *Nikolakis* quoted Carmody J in *Murphy & Murphy*<sup>70</sup> saying:

without the alleged victims giving direct evidence, the forensic investigation of the sexual abuse issue may well be inadequate, and the evidence insufficiently exact, definite or precise enough to meet the requisite standard. Without any independent source of substantiation or corroborative confirmation of the alleged abuse, secondary evidence of untested disclosures of alleged child victims, will *rarely* satisfy the court on the balance of probabilities of anything . . .<sup>71</sup>

In *Nikolakis*, the Full Court said the trial judge had been mindful of cases which cautioned first instance judges against falling back on a finding of unacceptable risk where they had insufficient evidence of abuse but were left with an ‘uncomfortable or uneasy feeling’.<sup>72</sup>

In *Hemiro and Sinla*,<sup>73</sup> Brown J listed a common set of factors which contribute to the inability to find abuse established including: inconsistent statements made by the child with regards to the abuse,<sup>74</sup> inconclusive medical examinations,<sup>75</sup> perceived contaminated interviewing,<sup>76</sup> perceived maternal preoccupation with the potential for sexual abuse,<sup>77</sup> an absence of any, or any sustained, sexual themes in the child’s play, a child’s lack of fear of their father<sup>78</sup> and any perceived pressure on a child to make disclosures, by the mother or any other person.<sup>79</sup> As many of these factors might be present in a case where there *was* sexual abuse, these ‘factors’ highlight the cautious approach that is taken to assessing allegations of CSA.

While it is possible (though difficult) to locate cases where a finding of unacceptable risk has resulted on the basis of uncorroborated disclosures by a child and resulted in limited contact,<sup>80</sup> there are, conversely, many such cases

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68 See M Fernando, ‘What do Australian family law judges think about meeting with children’ (2012) 26 *AJFL* 51; M Fernando, ‘Conversations between judges and children: An argument in favour of judicial conferences in contested children’s matters’ (2009) 23 *AJFL* 48; E Ryrstedt, L Young and A Nicholson, ‘The Voice of the Child in Swedish Law’ (2012) 3 *FLP* 29.

69 A case that highlights this is *Hasset v Weader* [2011] FamCA 319; BC201150897, where very clear disclosures by a young child, repeated with consistency, in circumstances where the mother was found not have coached the child (indeed she was uncertain herself) were insufficient to result in a finding of abuse.

70 [2007] FamCA 795; BC200750675. Carmody J provides a very detailed, and interesting, discussion of the unacceptable risk test in CSA cases.

71 [2010] FamCAFC 52; BC201050147 at [89] (emphasis added).

72 *Ibid*, at [84].

73 [2009] FamCA 181 at [355].

74 See, eg, *Carbine & Jetton* [2013] FamCA 310; BC201350375 and *Gahen & Gahen* [2013] FamCA 730.

75 See, eg, *S & S* [2001] FMCAfam 185.

76 See, eg, *Richards v Brown* [2011] FamCA 662; BC201150813.

77 See, eg, *Steel & Galloway* [2012] FamCAFC 25; BC201250073.

78 Note earlier in the decision it was accepted by experts that abusers and victims could present with a positive relationship: at [296].

79 See, eg, *Stamos v Mariakis* [2008] FamCA 727; BC200850568.

80 See, eg, *S & S* [2001] FMCAfam 185. Here contact was limited to four times a year because the evidence satisfied the Federal Magistrate that the child had in fact made the disclosures and this was having very significant adverse effects on the mother.

where the finding is that there is no unacceptable risk of abuse.<sup>81</sup> The shared parenting reforms of 2006 increased the emphasis on maintaining child-parent relationships; those amendments have been criticised for shifting the balance too far in favour of shared care in cases where violence is concerned. Thus, one might well predict that cases heard post-2006 may not reflect the outcome in *M v M*, but rather tend to favour preserving contact, in line with the thinking in *Re W (Sex Abuse: Standard of Proof)*.

In *Knibbs v Knibbs*,<sup>82</sup> the two children, a male aged 11 (N) and a female aged 6 (S), both made several disclosures to several persons regarding the father. The disclosures made to the mother by S included disclosures where she described her father touching her inappropriately at a swimming pool. Disclosures were also made by N to his mother where he described in detail being touched inappropriately by the father on a number of occasions while spending overnight time with him. These were repeated to an interviewing police officer. S then made further statements which were indicative of abuse by the father.

Despite detailed disclosures, the trial judge did not make any positive findings of abuse. This was partly because he believed the children had been influenced by their mother as a result of her questioning them in regard to the incidents. He also found that the father seemed genuinely shocked when faced with the allegations of abuse and overall the father impressed him as a frank and candid witness.<sup>83</sup> Despite the various disclosures made by the children, the trial judge held the father to be a man ‘incapable of sexually abusing’ his children,<sup>84</sup> and found there was no unacceptable risk if the children were to spend unsupervised time with him. Cases such as these indicate that, despite the outcome in *M v M*, a mere ‘lingering doubt’ or vague suspicion of sexual abuse is unlikely, without more, to be sufficient to result in suspended contact with a parent (though it might be said that the evidence amounted to more in this case). Further, even if there is found to be a risk of sexual abuse of a child, a decision-maker may well conclude that by putting in place protective measures, the risk is rendered acceptable.<sup>85</sup>

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81 See, eg, *Young and Young* [2010] FMCAfam 931; BC201010339; *Knibbs v Knibbs* [2010] FamCA 446; BC201050512; *Hemmingway v Holmes* [2012] FamCA 17; BC201250022; *Hemiro v Sinla* [2009] FamCA 181; *Lavery v Lavery* [2012] FamCA 126; BC201250174.

82 [2010] FamCA 446; BC201050512.

83 It is difficult to understand how much weight can be placed on a parent’s denial in such cases. Innocent parents will deny abuse; but so will perpetrators. If detecting the truth of the matter was possible simply from viewing the demeanour of the alleged abuser in a witness stand then these (and indeed criminal) cases would not be so difficult. While uncommon, note the recognition of this by Carmody J in *Murphy & Murphy* [2007] FamCA 795; BC200750675 at [157].

84 [2010] FamCA 446; BC201050512 at [76]. It is difficult to understand how the judge felt qualified to draw such a conclusion.

85 See, eg, *W v W (Abuse allegations: unacceptable risk)* (2005) 34 Fam LR 129; (2005) FLC 93-235; [2005] FamCA 892 and *Murphy & Murphy* [2007] FamCA 795; BC200750675 (note the first mentioned case was decided before the shared parenting reforms of 2006 and resulted in supervised contact). In *Murphy* supervised contact was really just a precursor to reintroducing unsupervised contact. See also *Young and Young* [2010] FMCAfam 931; BC201010339 where contact was to be ‘monitored’ by family members, and certain restrictions imposed, as a result of graphic disclosures by the children. This case is interesting as the (then) Federal Magistrate at [142] seems to limit himself to the proposals

Moreover, it is quite possible in this category of case for there to be an order that the child spend substantial and significant time with the father against whom the allegation has been made.<sup>86</sup> Care is unlikely to be reversed, as there is at least sufficient evidence to render the mother's concerns 'reasonable'. For this reason, in this difficult category of case, it may be strategically important for mothers to 'let go' of their fears, notwithstanding the evidence presented, or the danger of a reversal of care may materialise. Once a finding of no unacceptable risk is made, then contact is very likely to be ordered, and the parent bringing forward the allegation will be compelled to facilitate contact. That is, a parent may be expected to approach their parenting in a way we would not tolerate for intact families; if abuse is not proved they may be expected to behave as if it did not happen, regardless of the evidence presented.

The unacceptable risk test is not challenged by the cases in the first three categories set out above; one would not need to be so careful in choosing the parameters of the test if confronted only with the relatively 'easy' cases. It is precisely because of concerns about 'getting it wrong' in the last category that a case such as *M v M* reached the High Court. As we can see from the above, there is every chance that if abuse is not proved (and abuse is rarely proved), there will be a finding of no unacceptable risk, and (if the mother can manage it) the ultimate outcome may be some degree of shared parenting; if the mother cannot acquiesce convincingly, a reversal of care is possible. Moreover, as discussed below, judicial officers are acutely aware of the potential for false allegations and regularly refer to the serious dangers associated with curtailing contact with a parent.<sup>87</sup>

It might be argued that the picture presented above is inaccurate, as outcomes in final decisions may be misleading due to the impact of interim orders suspending contact.<sup>88</sup> There is an absence of data in this regard,<sup>89</sup> however, case law does not suggest that interim orders invariably suspend contact where CSA allegations emerge.<sup>90</sup> *Farina v Farina*<sup>91</sup> involved an

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put by the parents in relation to the protection of the child, notwithstanding the emphatic statements by superior courts (see Hayne J in *U v U* (2002) 211 CLR 238; 191 ALR 289; [2002] HCA 36; BC200205110 and *Sampson v Hartnett (No 10)* (2007) 215 FLR 155; 38 Fam LR 315; [2007] FamCA 1365; BC200750077) to the effect that the court is not limited by the parties' proposals and must rather seek the arrangement that best promotes the child's welfare.

86 See, eg, *Hemmingway v Holmes* [2012] FamCA 17; BC201250022; *Hemiro v Sinla* [2009] FamCA 181; *Lavery v Lavery* [2012] FamCA 126; BC201250174.

87 See, eg, Brewster FM's detailed consideration of the impact of curtailing contact in *S & S* [2001] FMCAfam 185 at [97]–[102].

88 We note the comments in this regard in Fryer, above n 33, where it is suggested that contact is routinely suspended at an interim stage after an allegation is made and that there can be lengthy periods of no contact as matters proceed toward trial. However, it is difficult to assess this claim as Fryer provides no supporting evidence for this claim.

89 One of the authors sought to test this quite some years ago with research in the Family Court of Western Australia however the ethics committee of that court refused access to court records on the basis of the 'sensitive' nature of these cases.

90 See, eg, the following cases where it appears contact was ordered (or agreed) pending trial: *Harry & Harry* [2007] FMCAfam 616; BC200712031; *Maxwell & Cross* [2014] FamCA 170; BC201451217; *Tyler & Sullivan* [2014] FamCA 178; BC201451092; *Pollock & Breen-Pollock* [2014] FamCA 171; BC201451218; *Hoffman & Barone* [2014] FamCA 52;

interim decision where the evidence was such that the judicial officer found there was a possibility of abuse by the father (in light of disclosures and sexualised behaviour), but refused to suspend contact pending a further report, opting instead for supervised contact. In quoting the Full Court in *Re W (Sex Abuse: Standard of Proof)*,<sup>92</sup> this judicial officer evidenced the very high priority placed on guarding against the consequences of a false positive at this stage:

A false negative finding accompanied by appropriate safeguards as to the future relationship between parent and child, such as adequate supervision to guard against possible abuse, may be far less disastrous for the child than an erroneous positive finding that leads to a cessation of the parent-child relationship. The court needs to remain conscious of this imperfection at all times . . .<sup>93</sup>

### Critique of the ‘unacceptable risk’ test

In *M v M*, the High Court noted that previous attempts to ‘define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child’ had ‘resulted in a variety of formulations . . .’ and that ‘[t]his imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding’.<sup>94</sup> And yet it selected one of those formulations, with little discussion as to the reason for its choice.<sup>95</sup> *M v M* is just 27 paragraphs long. It very firmly sets the task of considering CSA allegations within the broader context of the application of the best interests principle, though the High Court did not give detailed consideration to precisely what that involves. However, it highlighted the fundamentally different nature of this process from that of most civil trials, which very often focus on liability for past actions, and thus whether or not those actions can be proved:

After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, *if they come about*, will have a detrimental impact on the child’s welfare.<sup>96</sup>

But herein lies the conundrum. The test was developed *because* of the category of ‘hard’ cases — and yet that is precisely where its weakness is

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BC201451136; *Gabel & Meltzer* [2014] FCCA 604; BC201403680; *Langmeil & Grange (No 4)* [2011] FamCA 605; BC201150441; *Tranmere & Clever* [2014] FCCA 1827; *Ruth (aka Hutton ) and Hutton* (2011) 45 Fam LR 399; [2011] FamCAFC 99; BC201150259; *Simen & Simen (No 2)* [2014] FamCA 7; BC20145126052; *Hibberd & Banner* [2014] FamCA 320; BC201451397; *Simpson & Hahn* [2014] FamCA 674; BC201451436; *Tranmere & Cleaver* [2014] FCCA 1827; *Helbig & Rowe* [2014] FamCAFC 179; BC201451445. See also *Enmore & Smoother* [2014] FamCAFC 131 where there was no supervision arrangement pending trial. In *Howard & Lipschitz* [2014] FamCA 272 it was noted at [5] that at an interim stage care was reversed in favour of the father.

91 [2012] FMCAfam 666; BC201205587.

92 (2004) 32 Fam LR 249; (2004) FLC 93-192; [2004] FamCA 768 at [19].

93 *Ibid*, at [8], quoting *Re W (Sex Abuse: Standard of Proof)* (2004) 32 Fam LR 249; (2004) FLC 93-192; [2004] FamCA 768 at [19], referring to *WK v SR* (1997) 22 Fam LR 592; (1997) FLC 92-787 at [18]–[19].

94 (1988) 166 CLR 69; 82 ALR 577; [1988] HCA 68; BC8802632 at [25].

95 *Ibid*.

96 *Ibid*, at [24] (emphasis added).

revealed. The test rests on an assessment of the *probability* of future abuse;<sup>97</sup> when usually the only fact that could provide the basis for assessing the *risk* of future abuse is the *fact* of past abuse, the determination of that fact inevitably becomes the central — and potentially determinative — issue. As Parkinson has noted in this context:

There is no such thing in law as an unestablished fact, for if it is unestablished, then in law it does not represent a fact at all. All findings of fact are binary in nature. Either a fact is proven or it is not. An event occurred, or it did not. The abuse happened, or it did not.<sup>98</sup>

Assessing risk rests on a calculation of the probability of future events happening.<sup>99</sup> However, the probability of an event *cannot* be determined if certain key facts are not known — if one does not know how many red and yellow balls there are in a container, then one simply cannot assess the probability of selecting either a red or yellow ball. There may be no yellow balls (ie, no abuse) or all yellow balls (ongoing abuse). Without ‘knowing’ that piece of the puzzle the court is *simply unable* to predict risk, other than on general factors that might predict the likelihood of anyone sexually abusing a child. The factors that go to proving whether or not abuse occurred in the past *cannot* assist in determining whether future abuse is likely, if no conclusion was able to be drawn about the happening of the past abuse; this is a fundamental problem with most of the factors outlined in *N and s and Separate Representative*, which are so routinely relied upon by the Family Court as relevant questions in deciding whether there is an unacceptable risk of future abuse. That list conflates the two processes of determining past abuse and assessing future risk.<sup>100</sup> For example, the level of detail of a disclosure by a child will be relevant to whether a finding of abuse can be made; however without knowing if the abuse occurred, that factor cannot help predict the future risk of abuse. If both proving the abuse and determining if there is an unacceptable risk of abuse depend on the *same* process of assessing the strength of the evidence of abuse, this will naturally lead to a conflation of those issues and increase the likelihood that a finding of no abuse will lead inexorably to a finding of no unacceptable risk. This creates something of a cliff effect, so that a finding of no abuse has the potential to shift the focus immediately to the question of how to promote contact.

But the High Court exhorts judges both to assess risk *and* to avoid making findings on the one matter that is crucial to the assessment of that risk (on the basis of unexplained ‘family’ considerations). It is little wonder the Full Court

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97 This was emphasised by Murphy J in *Harridge & Harridge* [2010] FamCA 445; BC201050510 at [73]ff.

98 P Parkinson, ‘Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse’ (1999) 23 *MULR* 345 at 353. See also Justice Carmody, ‘Removing Obstacles to Justice in Family Court Sex Abuse Cases’, March 2005, 4th World Congress on Family & Child Rights cited in Fogarty, above n 9.

99 We accept this is a very narrow explanation of the concept of probabilities, however, a more nuanced mathematically accurate analysis would only sharpen our point.

100 Murphy J in *Harridge v Harridge* [2010] FamCA 445; BC201050510 recast these questions somewhat, and this has been referred to in other decisions (eg, *Kirby v Holmes* [2013] FamCA 75; BC2013501262) however again this formulation rests on an assumption that the probability of risk can in fact be assessed.



has said that, despite there being no requirement to prove abuse and authority to support caution in doing so, invariably an investigation into the happening of that event will occur.<sup>101</sup>

In many cases it will not be possible to make a finding as to whether the abuse occurred, and so this crucial piece in the puzzle for assessing risk remains unavailable to the decision-maker. Of course, a finding that abuse is not proved is not a finding that abuse did not happen. As Faulks J noted in *Kings and Murray*,<sup>102</sup> this leaves the judge in a bind when trying to apply the unacceptable risk test:

. . . I do not derive any significant assistance from the concept of unacceptable risk. If, as I have suggested, I am unable conclusively to determine on the basis of the evidence before me whether something has happened or not, in my opinion, it seems to me that it is almost impossible for me then to say that there still might be a risk that it something [sic] may have happened and that therefore the child should spend no time with her father . . . Nor could I alternatively conclude that there is *no risk*, because I have not been able to find it and that therefore there should be unqualified time spent between the father and the child.<sup>103</sup>

This underlying flaw in the test is the genesis of the two different strands of critique that have evolved. One long standing and persistent strand rests on the fear that, where there is suspicion but no proof, judges will use the test to justify curtailing contact ‘just to be safe’.<sup>104</sup> This fear is well evidenced in a recent paper by Fryer<sup>105</sup> which recites the issue as seen by critics:

The knowingly false allegation is especially contemptuous. No allegation is easier to make or more difficult to refute. It reverses the presumption of innocence and places an almost impossible burden on an accused parent to disprove a non-event. The nature of the false allegation . . . is seen by the accusing parent as a tool, regarded as *de rigeur*, and alleged without any regard for the devastating consequences. The brutal reality for an accused parent is the cessation of any meaningful relationship between the child and themselves for the duration of any proceedings and, most likely, beyond. The malicious word of a former partner, or a coached word of an innocent child, is quite simply all that is needed to ruin lives . . . Because the court is only required to decide on the balance of probabilities, a cloud of doubt will forever linger over the accused and the court will invariably maintain a cautious approach when making a final order, due largely to the inconclusiveness of its own findings.<sup>106</sup>

This has a well-worn ring to it; that ‘the problem’ in sexual abuse cases is rampant false claims by malicious mothers. To support the claim that false allegations are ‘rife’ in Australian family courts, Fryer provides some statistics, however, there is no consideration of what that data says about the likelihood of actual abuse being detected by the court, nor of the statistics on prevalence rates of child sexual abuse.<sup>107</sup> The focus on mothers as the

101 *W and W (Abuse allegations: unacceptable risk)* [2005] Fam CA 892; (2005) FLC 93-235 at [111].

102 [2009] FamCA 565; BC200950461.

103 *Ibid*, at [43].

104 Young, above n 58.

105 Fryer, above n 33.

106 *Ibid*, at 141 and 152.

107 For a summary of the data that suggests high rates of child sexual abuse in the general

predominant claimants gives no consideration to the data on who primarily sexually abuses children<sup>108</sup> nor does it consider to whom children might be most likely to disclose. No consideration is given to false denials as a problem. Most notably, however, the statements in the above extract about what courts do (that is, how the unacceptable risk test operates), are not supported by reference to *any* actual case outcomes. Fryer's approach to this topic is heralded by his opening the paper with the surprising statement that the family court is well placed to, and deals well with, violence issues<sup>109</sup> — a claim in stark contrast to research findings which resulted in recent amendments to Pt VII.<sup>110</sup>

This preoccupation with false positives and false allegations is not a new phenomenon.<sup>111</sup> Others have complained in this vein that, based on *M v M*, '[u]ltimately, it may be a matter of a "gut feeling": "even intuition and guesswork"'.<sup>112</sup> But case law does not bear this out, and commentators and the judiciary have highlighted the countervailing strand of critique of this test,<sup>113</sup> namely, that it has resulted in an inappropriate judicial *over-concern* about 'false positives', with some disturbing judicial comments reflecting this,<sup>114</sup> in particular a suggestion that false positives are more concerning than false negatives. As Fogarty J notes:

It is a mistake for the Full Court to state the problem in a way that suggests that the adverse consequences of one wrong conclusion — a false finding that there has been sexual abuse (when the child has actually not been abused) — are necessarily more damaging than those of the other wrong conclusion — a finding that there has not been sexual abuse (when in fact the child was abused) . . . The gravity of such consequences has always been acknowledged. But to start with an entrenched view that the consequences 'cannot be overstated' or are 'too horrible to contemplate' warps the process explained by the High Court.<sup>115</sup>

The fear of the impact of 'lingering doubts' on decision-making has led some commentators to suggest a different approach should be adopted. Roebuck has argued that:

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population, see K Richards, 'Misconceptions about child sex offenders', Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No 429, September 2011.

108 For a discussion of the statistics on who commits child sexual abuse, see *ibid*. Notably, ABS statistics based on self-reports identified men as the predominant abusers, with 13.5% being fathers or step-fathers (rising to 16.5% where the victim was female) with only 0.8% being abused by mothers: Australian Bureau of Statistics, 2005, *Personal Safety Survey Australia*, ABS, Canberra.

109 Fryer, above n 33, at 137.

110 Family Law Legislation Amendments (Family Violence and Other Measures) Act 2011 (Cth). This is discussed further later in the article.

111 Young, above n 58.

112 Fogarty, above n 9, citing a phrase from *CJD v VAJ* (1998) 197 CLR 172; 159 ALR 138.

113 Young, above n 58; Fogarty, above n 9; Chisholm, above n 13.

114 *K v B* (1994) 17 Fam LR 722; (1994) FLC 92-478; *Re W (Sex Abuse; Standard of Proof)* (2004) 32 Fam LR 249; FLC 93-192; *WK v SR* (1997) 22 Fam LR 592; [1997] FLC 92-787. For a review of the research on the impact of sexual abuse on children, see J Cashmore and R Shackel, *The long term effects of child sexual abuse*, CFCA Paper No 11, 2013, at <<http://www.aifs.gov.au/institute/pubs/pubslatest.php>> accessed (4 December 2014).

115 Fogarty, above n 9, at 280 and 283.

In cases where allegations have been made and some evidence exists as to past sexual abuse, the court should make a decision based on the relevant facts as proved, on the balance of probabilities, as to whether abuse has taken place. In these cases the court should effectively 'level the playing field' in order to see clearly and objectively, without the influence of 'lingering doubts' or mere suspicion.<sup>116</sup>

Similarly, in Bates' view:

it may be all too easy to ignore traditional and appropriate legal safeguards in order to punish an alleged perpetrator, a course of action which can be justified or rationalised by the stated goal of the protection of the child's welfare or best interests. One, it is suggested, must be immediately disturbed by an articulated view that findings of fact are not central to any adjudication relating to serious allegations in family law proceedings.<sup>117</sup>

The advantage of the approach of Roebuck is that it does away with the fiction that the court can accurately assess the risk of future abuse in the absence of definite knowledge as to whether past abuse occurred.<sup>118</sup> However intuitively attractive, we would suggest there are potential dangers with this approach. The only impact such a change could have would be to weaken the protection of children. As it presently stands in terms of cases that are decided by the court, a likely outcome is that where there has not been abuse, children are still seeing their fathers, notwithstanding the allegation of abuse. We are not aware of any evidence that establishes otherwise and case reports (as discussed above) suggest this. Conversely, there must be a high likelihood that some abused children are falling through the gaps due to the difficulty of establishing abuse.<sup>119</sup> At least with the present test, there is the possibility that, due to uncertainty as to the existence of past abuse, measures will be put in place by the court to provide some protection for those cases where abuse has occurred but cannot be proved (supervision for example). Moreover, true allegations are more likely to be brought forward in this environment. Just as with family violence more generally, the spectre of some false allegations (which is a feature of all litigation) should not weaken the protection given to actual victims of violence. If the suggested alternative approach were adopted, it is possible the court would consider protective measures were not required as no abuse had been proved and no order should be made based on an unproved allegation. Thus, either outcomes would be the same, or they would be less protective. There is no possibility of such an approach providing greater protection for abused children.

At one level, this all makes a strong argument for retaining the unacceptable risk test in its present form; while it may not protect all children from real abuse, it has a greater chance of protecting some of them, even when abuse cannot be definitively proved, than an approach such as Roebuck suggests.

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116 J Roebuck, 'Allegations of Child Sexual Abuse: Should "Unacceptable Risk" be the Only Criterion for Refusal of Contact? An evaluation of *Re H & Ors (Minors)* (*Sexual Abuse: Standard of Proof* [1996] 1 All ER 1' (1996) 3 *JCULR* 116 at 128.

117 F Bates, 'New Developments in Child Sexual Abuse and the Fact-Finding Process' (1998) 5 (1&2) *Canberra Law Review* 111 at 112.

118 On the artificiality of a process that purports to assess risk on the basis of unproved facts, see also P Parkinson, 'Child Sexual Abuse Allegations in the Family Court' (1990) 4 *AJFL* 60 at 79.

119 Young, above n 58.

Reflecting this more protective approach, Chisholm considers the test, used in the context of the best interests principle, is sufficiently clear, and necessarily flexible.<sup>120</sup> Thus, the reason some continue to support the unacceptable risk test (and the reason for rejecting the suggested alternative approach) is that it is in keeping with the core function of the court. As its supporters rightly assert, the test must be looked at in the context of the general application of the best interests principle; it can hardly be in a child's best interests for a parenting order to expose them to an 'unacceptable' risk of abuse. The court is exercising a discretion based on the information it has before it; there is no 'right' answer even if a past fact is conclusively proved (and many are not) because ultimately the future is being predicted. The routine business of the court is to put weight on the evidence before it, and come up with the solution that it believes best promotes the future interests of the child in light of that evidence (and that will include trying not to make orders that expose children to unacceptable levels of risk). The court is very often in the position of trying to predict outcomes for children against a backdrop of evidence that points to conflicting outcomes. If there is evidence of sexualised behaviour by a child, the court *must* consider that evidence; it cannot be discounted as irrelevant because it does not conclusively prove CSA (which may happen to be the reason why that particular evidence is led). To do otherwise is to turn the case into a civil trial on the matter of CSA. While the unacceptable risk test may itself rely on a fiction, it makes some sense in light of the overall nature of the power being exercised.

There has been decision-making which reflects this approach. Indeed, in *In the Marriage of N and S*, and before setting out his list of questions and reverting to the unacceptable risk phraseology, Fogarty J said:

The High Court's decision must be read as taking a cautious approach to the issue, in light of the paramountcy of the welfare of the child, and the gravity of the possible effects of sexual abuse. Largely it means that if there is an ascertainable risk of harm the court must so mould its orders as to avoid exposure of the child to that harm.<sup>121</sup>

The test might be seen, therefore, as judicial shorthand for what the family court does all the time — look at the evidence as to what has happened in the past and try and predict what will be the best parenting option for the child in the future. The predictive nature of the exercise is the same whether CSA allegations are involved or not. The court has no doubt striven to formulate, and give content to, a test in this regard because of the perceived seriousness of CSA, both in terms of its potential effects on a child, and what it says about an abuser as a potential parent, and the consequences that flow therefrom.

However, it is difficult to articulate a logical rationale for developing a 'test' for what is simply one example of the application of the best interests principle.<sup>122</sup> Further, the current formulation is problematic. First, it leads to

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120 Chisholm, above n 13, at 23.

121 (1995) 19 Fam LR 837 at 859; 129 FLR 243; (1996) FLC 92-655.

122 Much the same could be said about relocation cases. They are very difficult parenting decisions with potentially severe consequences for family members, however, no test has been developed as such, simply the identification of facets of a case that may be particularly relevant where relocation is sought. If there is any doubt that judicial officers treat the 'unacceptable risk' formulation as a kind of legal test, see, eg, *Welchman Rubie & Zawada*

an (inevitably futile) attempt to describe whether a particular risk is acceptable or unacceptable, when in fact in (at least) the difficult cases the actual risk cannot be assessed. Second, it encourages outcomes that are all but predetermined depending on whether the abuse is proved or not due to the very high standard of proof in relation to a finding of abuse; that is, it is extremely difficult to secure a finding of an unacceptable risk of abuse in the absence of a finding of abuse and this leads to conflation of the issues.<sup>123</sup> Third, as Faulks J indicated, the sheer illogicality of the test in these hard cases creates obstacles, not assistance, to decision-making and has resulted in some judges adopting a stance which prioritises parent-child contact over the protection of children.

As the Full Court recently emphasised in *Simmons & Kingley*,<sup>124</sup> the legislation provides a pathway for resolving parenting disputes and this does not include any reference to ‘unacceptable risk’.<sup>125</sup> In the context of a different type of risk of harm to the child,<sup>126</sup> their Honours pointed to the words of s 60CC(2)(b) — which refers to the ‘need to protect’ the child from harm — as requiring only that ‘any relevant risk . . . be identified and assessed’.<sup>127</sup> In this case, the trial judge had on a few occasions used the expression ‘unacceptable risk’, however, on appeal it was argued she should have referred to ‘unacceptable risk authorities’, which she had not done; the appeal failed.

In addition, further thought needs to be given to the application of the *Briginshaw*<sup>128</sup> test in this context. This test was formulated in a divorce case, where proof of allegations of adultery was essential to the grant of the divorce. Dixon J famously said:

when the law *requires* the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of acts exists may be held according to indefinite gradations of certainty . . . [At common law] . . . it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer . . .<sup>129</sup>

This statement is accepted as forming the basis of s 140 of the Evidence Act 1995 (Cth), which relevantly says the following as to how a civil court is to

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[2013] FamCA 862 at [135]; *Matthews & Bender (No 2)* [2013] FamCA 74 at [19]–[21]; *Carbirne & Jetton* [2013] FamCA 310; BC201350375 at [26]; *Gilmore & Ray* [2013] FamCA 153 at [29]; *Farina & Farina* [2012] FMCAfam 666; BC201205587 at [93]ff.

123 See, eg, *Baldwin & Baldwin* [2014] FamCA 43; BC201451313. Having decided the evidence did not establish sexual abuse of the child (note this was not a case where the court found there was no abuse), the judge moved without further discussion to the conclusion that there was no unacceptable risk of abuse: at [109].

124 [2014] FamCAFC 47; BC201451112 at [20].

125 We leave aside for the moment the relevance of s 60CG.

126 The father had a history of alcohol abuse and associated driving offences.

127 [2014] FamCAFC 47; BC201451112 at [20].

128 (1938) 60 CLR 336.

129 *Ibid*, at 361–2 (emphasis added).

be satisfied on a balance of probabilities:

- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
  - (a) The nature of the cause of action or defence; and
  - (b) The nature of the subject-matter of the proceeding; and
  - (c) The gravity of the matters alleged.

A number of issues arise in relation to the application of this section in CSA cases in family court. First, when does this higher civil standard apply? Certainly it applies to a finding of sexual abuse by a parent. Some judges have also suggested that it may apply to a finding that a parent is making tactical false allegations of sexual abuse, as such a finding could result in limited or no contact with that parent.<sup>130</sup> If no finding of sexual abuse is made, the law requires the decision-maker to determine if there is an unacceptable risk of abuse. Does s 140 apply to this determination, so as to elevate the evidence required to meet the standard of proof? In *Johnson v Page*,<sup>131</sup> it was argued on appeal that the trial Judge had wrongly adopted such an approach. The Full Court, relying heavily on the analysis of Fogarty J,<sup>132</sup> concluded the ordinary civil standard of proof applies at this stage.<sup>133</sup> However, Fogarty J also made the following comment in *N v S*:

The notion of ‘unacceptable risk’ must be assessed *in light of the grave consequences* of sexual abuse to a child’s development, as well as the effects of future contact with the party.<sup>134</sup>

Unfortunately, the Full Court did not consider what this statement might mean, in terms of the application of s 140.

Section 140(2) has three subsections, all of which must be considered. The High Court in *M v M* considered the ‘nature of the proceedings’ when setting this test (before s 140 was enacted) by discussing the nature of the discretion in parenting decisions; however, only s 140(2)(c) (the gravity of the matters alleged) is referred to by the Full Court in *Johnson v Page*.<sup>135</sup> Little attention is now paid to the rest of s 140 in family court cases involving CSA allegations. Is it not arguable (and perhaps even more so since the introduction of s 60CC(2A)) that the *nature* of a parenting dispute under Pt VII and the subject matter of the proceedings are such that s 140 *does* apply to elevate the standard of proof required when making a finding of *no unacceptable risk*? In other words, shouldn’t the court have to be satisfied by very compelling evidence that a child will *not be* exposed to abuse?

It would be useful for the Full Court to consider in more detail how the burden of proof operates in these cases in light of the totality of s 140. It certainly seems there is some confusion on the issue of the standard of proof in these cases. In *Gahen & Gahen*,<sup>136</sup> the Full Court took no issue with the

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130 See, eg, *Lett & Lett* [2014] FamCA 52; BC201451489 at [52]–[53].

131 (2007) FLC 93-344; [2007] FamCA 1235.

132 Fogarty, above n 9.

133 (2007) FLC 93-344; [2007] FamCA 1235 at [64]–[77] (emphasis added).

134 *N and S and the Separate Representative* (1996) FLC 92-655 at 82,174; (1995) 19 FamLR 837.

135 (2007) FLC 93-344; [2007] FamCA 1235 at [77].

136 [2014] FamCAFC 122; BC201451326.

following statement of the trial Judge, who found both that the father had not sexually abused the child in question and that there was no unacceptable risk of abuse: ‘The facts in legal proceedings are binary. There’s a burden of proof, or a standard of proof. If the standard of proof is not met, the reverse is the probability’<sup>137</sup> and ‘if . . . a factual issue in a case has to be decided one way or another . . . if the burden is not met then the binary nature of the proceedings means that the reverse is probably correct’.<sup>138</sup> However, this makes no sense, particularly if a higher civil standard of proof is being applied to a finding — the failure to meet the standard of proof for a finding of sexual abuse cannot mean it is probably correct to say that a child was not sexually abused.

Finally, there is something disturbing about a test that is always phrased in the negative (and very often a double negative — ‘no unacceptable risk’). The power of language should not be overlooked. Although unconscious, what comfort does a decision-maker derive by being able to cast an order as ‘not giving rise to an unacceptable risk’ — rather than as an order that gives rise to an acceptable risk of abuse (particularly where there is evidence consistent with abuse)? At the very least, the potential for this formulation (which seems to run counter to s 60CC(2A)) to unconsciously impact on how decisions are made should be considered.

## The impact of legislative amendments

### Section 60CG

From the time of *M v M* to 1996 the unacceptable risk test was a common law creature. Section 60CG was inserted into the FLA in 1996,<sup>139</sup> and now comes after the various considerations set out in s 60CC:

60CG Court to consider risk of family violence

- (1) In considering what order to make, the court 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:
  - (a) is consistent with any family violence order; and
  - (b) does not expose a person to an unacceptable risk of family violence.
- (2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

This section resulted from a recommendation of the Second Report of the Senate Legal and Constitutional Legislation Committee, which considered the introduction of the 1996 reforms.<sup>140</sup> The committee received a submission from the Australian Law Reform Commission expressing concern about three sections, including proposed s 68K (now s 60CG), to the effect they did not take sufficient account of the fact that the safety of the resident parent could

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<sup>137</sup> Ibid, at [75].

<sup>138</sup> Ibid, at [84].

<sup>139</sup> By the Family Law Reform Act (Cth) 1995; it was originally s 68K.

<sup>140</sup> Recommendation 4; see the Supplementary Explanatory Memorandum, Family Law Reform Bill 1994, at <[http://www.austlii.edu.au/au/legis/cth/bill\\_em/flrb1994193/memo\\_4.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/flrb1994193/memo_4.pdf)> (accessed 2 June 2014).

not be separated from the issue of the safety of the child.<sup>141</sup> From the scant discussion, it seems the purpose of the revised s 68K was to ensure third parties (particularly the resident parent) were not exposed to an unacceptable risk of family violence by the making of a contact order between the child and the non-resident parent.<sup>142</sup> This is reinforced by the terms of s 60CG(2), which seems to be directed at those ‘affected’ by the order, as opposed to those the object of the order. Further, other sections deal directly with how the court takes account of violence in respect of the child the subject of proceedings; s 60CG is effectively redundant so far as the child is concerned. There was no recorded parliamentary discussion about the adoption of the terminology ‘unacceptable risk’, nor any apparent conscious legislative decision to give statutory force to the test. However, it is very likely the drafter drew on *M v M* in framing this section.

The Full Court has said nothing on the application or interpretation of this section,<sup>143</sup> however case law supports the conclusion it is predominantly being used to consider the safety of those other than the children the subject of proceedings.<sup>144</sup> Conversely, in relation to the appropriate test to be applied in CSA cases, and more generally in relation to violence, decision-makers still refer routinely to *M v M*.<sup>145</sup> While it seems s 60CG was not intended to act as a broad statutory codification of the principle laid out in *M v M*, the words of the section are quite clear. They apply to *all* persons (including the child) and they apply to family violence, which includes sexual abuse of children. We return to this section in our later discussion.

### Section 60CC(2A)

Until 2006 the FLA included one list of mandatory considerations relevant to the exercise of the best interests discretion; no legislative priority was

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- 141 Second Report of the Senate Legal and Constitutional Legislation Committee, at [1.30].
- 142 Note that Parkinson assumes this also: P Parkinson, ‘Violence, abuse and the limits of shared parental responsibility’ (2013) *Family Matters* 7 at 14.
- 143 Austlii reveals no Full Court consideration of s 68K and only three cases referring to s 60CG two of which do not in fact discuss the section: *Sigley & Evor* (2011) 44 Fam LR 439; [2011] FamCAFC 22; BC201150053 and *Kitsannis and Netopoulos* [2010] FamCAFC 214; BC201051078. First instance Family Court of Australia decisions reveal only one reference to s 68K (*Flanagan & Handcock* (2001) 27 Fam LR 615; (2001) FLC 93-074; [2000] FamCA 150) and that is a mere recitation of a whole string of sections. While many later first instance decisions cite s 60CG we have not been able to find any discussion of its interpretation.
- 144 *Robertson & Sento* [2009] FamCAFC 49; BC200950017 at [68]; *Poblano & Millard* [2007] FamCA 242 at [94]; *Addington & Koldsjor* [2008] FamCA 143; BC200851083 at [121]; *Sheldon & Weir (No 3)* [2010] FamCA 1138; BC201051272 at [571]; *Cleary & Cleary* [2013] FCCA 594; BC201310455 at [37]; *Eyton and Eyton* [2013] FamCA 657; BC201350490 at [59] and [119]. Compare *Eddy & Night* [2007] FamCA 1171; BC200750654 where this section seems to be cited in relation to the risk of violence vis a vis the child: at [113]–[115].
- 145 See, eg, *Richards v Brown* [2011] FamCA 662; BC201150813 where s 60CG is recited at the outset in laying out the relevant law but in the discussion of the CSA allegations it is the case law and *M v M* that is relied upon. In *Bosch & Rickard* [2011] FMCAfam 726, Turner FM was considering the dangers of the father’s alleged violent (non-sexual) behaviour and applied the unacceptable risk test referring first, however, to s 60CG: at [62].



accorded to any factor.<sup>146</sup> This best interests checklist was amended in 2006<sup>147</sup> so that the benefit to a child of a meaningful relationship with both parents, and protection of children from abuse and neglect, became 'primary' considerations with all other matters being assigned to a class of 'additional' considerations.<sup>148</sup> There was, however, nothing which explained how the two primary considerations were to be weighed when in conflict with each other, which they invariably will be where violence or abuse towards a child by a parent is alleged.

At the time of the 2006 amendments concern was expressed in some quarters that these provisions would weaken the protection of women and children from violence; that is, the pro-shared parenting provisions in combination with other new provisions would tend to outweigh protection from violence in favour of parent-child contact.<sup>149</sup> As the result of considerable evaluation and research into the effects of the 2006 amendments,<sup>150</sup> the legislature has accepted these concerns and amended the FLA, effective 7 June 2012.<sup>151</sup> A new section, s 60CC(2A), has been inserted which says that, when applying the two primary considerations, the court is to give greater weight to the primary consideration of the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>152</sup> There is no discussion in parliamentary debate about these amendments in relation to CSA allegations.<sup>153</sup>

What then has been the judicial interpretation of this new section? We argue that the judicial comment to date has not given sufficient weight to the significance of this amendment. For example, a number of decisions have suggested it is not material whether s 60CC(2A) applies to a case, as protection of a child from abuse must in any event take priority over maintaining parental ties.<sup>154</sup> Equally, in *Tyler & Sullivan*,<sup>155</sup> Watts J concluded, in the context of a case involving a CSA allegation against a parent, that neither the 2006 nor the 2012 changes affected the test set out in

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146 This was s 68F(2) at the time.

147 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

148 FLA s 60CC(2). Subsequent case law has confirmed that the circumstances may be such that additional considerations may outweigh primary considerations: see for example *Mulvaney & Lane* (2009) FLC 93-404.

149 C Banks, B Batagol et al, 'Review of the Exposure Draft of Family Law Amendment (Shared Parental Responsibility) Bill 2005' (2005) 19 *AJFL* 79.

150 See B Fehlberg, B Smyth, M Maclean and C Roberts, 'Legislating for Shared Time Parenting after Separation: A Research Review' (2011) 25(3) *Int Jnl of Law, Policy and the Family* 318 at 327ff.

151 Family Law Legislation Amendment (Family Violence and Other Measures) Act (Cth) 2011. The new provisions only apply to cases where the application was filed after 7 June 2012.

152 FLA, reading ss 60CC(2A) and 60CC(2)(b) together.

153 These can be found at <www.aph.gov.au>.

154 *Crisp v Crisp* [2012] FMCAfam 556; BC201204730 at [75]; *Knightley v Brandon* (2013) 272 FLR 332; [2013] FMCAfam 148; BC201300716 at [90]; *Halston v Halston* [2013] FMCAfam 16; BC201300096 at [194]; *Boccard v Boccard* [2013] FamCA 63 at [3]; *Gabel & Meltzer* [2014] FCCA 604; BC201403680 at [268].

155 [2014] FamCA 178; BC201451092 at [36].

*M v M*.<sup>156</sup> In *Sawyer v Clancy (No 2)*,<sup>157</sup> it was also assumed, though not in the context of CSA, that the unacceptable risk test continues to apply post the 2012 amendments. However, notwithstanding s 60CC(2A), the judicial officer said '[b]ecause the potential consequences of severing a worthwhile relationship, between the child and one of his or her parents is potentially so detrimental to the child concerned, the termination of such a relationship is in most cases the last resort'.<sup>158</sup> Much was made of the fact that this was an interim decision, however, there is nothing in the legislation to indicate that the approach is different for interim orders.

Concern over the judicial balancing of the two primary considerations was instrumental in leading to this amendment and so it cannot be said that s 60CC(2A) is simply codification of judicial practice; comments like that in *Sawyer* highlight the danger of not giving s 60CC(2A) any substance. The test in *M v M* hinges on the fact that there is a balancing process; prior to the amendment, the balancing of the two primary considerations was a matter for judicial discretion.<sup>159</sup> The amendment makes clear that 'the need to protect the child' must *always* be given greater weight than the other primary consideration. Thus, the relative weighting of the considerations is now *not* a judicial decision to be made based on the facts of a particular case, it is the way the case *must always* be approached.<sup>160</sup> Put bluntly, if the protection of the child is in any way compromised to maintain parent/child contact, then the most weight has *not* been given to protection from harm.

So, the amendment is not 'neutral' but that does not resolve the harder question of how it affects the decision-making process. In considering the general impact of this new formulation it has been said that protection from violence and abuse must be given 'priority over . . . the consideration of the benefit of a meaningful relationship with both parents'<sup>161</sup> and that 'the child's right to a meaningful relationship with a parent is subservient to the need to protect a child from physical or psychological harm',<sup>162</sup> In *Ackerman v Ackerman*,<sup>163</sup> Brown FM included in his analysis of this section reference to the relevant passages of the Explanatory Memorandum:

- 71 The recent changes . . . regarding family violence, are significant ones. The key amendments are designed to '*prioritise the safety of children in parenting matters*'.
- 72 This does not mean that allegations of family violence are to be uncritically accepted or anything other than closely scrutinised by the

<sup>156</sup> See also *Fulton & Packer* [2013] FamCA 555 at [14] and *Simpson & Hahn* [2014] FamCA 674; BC201451436 at [62].

<sup>157</sup> [2012] FMCAfam 1369.

<sup>158</sup> *Ibid*, at [137].

<sup>159</sup> See the discussion in *Marsden v Winch (No 3)* [2007] FamCA 1364; BC200750076 at [77]–[78].

<sup>160</sup> Of course, this does not mean that in a given case the court will decide there is any 'need to protect the child'.

<sup>161</sup> *Lander v Bartling* [2012] FMCAfam 1466; BC201210718 at [13].

<sup>162</sup> *Abney v Paris* [2013] FMCAfam 7; BC201300110 at [192].

<sup>163</sup> *Ackerman v Ackerman* [2013] FMCAfam 109; BC201300715; see also the earlier decision by Brown FM in *Labine & Labine* [2012] FMCAfam 1398; BC201210771 at [108]–[110] and the later decision by Brown J in *Wetherill v Finchley* [2013] FCCA 1197; BC201312684 at [142].

- court...Nor does it mean that the court must disregard the benefit of a child having a meaningful level of relationship with both parents, even in cases where there are concerns pertaining to family violence.
- 73 The rationale for the amendments is to safeguard children from coming to harm as a result of *exposure* to family violence. Section 60CC(2)(A) [sic] makes this the court's priority, in cases where the protection of children from harm, as a result of exposure to family violence, abuse or neglect is germane.
- 74 In the words of the relevant explanatory memorandum '*where child safety is a concern, this new provision will provide the court with clear legislative guidance that protecting the child from harm is the priority consideration.*' Future protective issues for a child are the court's priority . . .
- 76 Both of these considerations remain important, but neither is pre-eminent over the paramountcy principle . . . Although in appropriate cases, child safety is to be given pre-eminence over parental relationship, the best interests of the child concerned remain the most important consideration arising from the statutory framework. In my view, what was said by the Full Court in *B v B* remains apposite:
- '*Ultimately it is a question of applying in a common sense way the individual section so as to achieve the best interests of the children in a particular case.*'

In their recent research on judicial responses to the 2012 amendments, Strickland and Murray characterise Brown FM's comments<sup>164</sup> as confirming violence does not act as some kind of 'trump' such that the benefit of meaningful parent/child relationships can be ignored.<sup>165</sup> However, Brown FM's interpretation arguably overlooks the significance of s 60B(1)(b) which begins with the words '[t]he objects of this Part are to ensure that the best interests of the child are met by . . .' (emphasis added). This provides an interpretative context which, when read with s 60CC(2A), might be said to require that a court approaches matters on the basis that the child's best interests will be promoted, first and foremost, *by* protecting that child. Thus, a child's best interests are inextricably linked to, and cannot be divorced from, its safety; we would caution against reverting to pre-amendment sentiments about applying the sections in a 'common sense' way which may weaken the very obvious intent, and specific wording, of this new provision.

In *Elrashed & McGrieve*, Forrest J had this to say on the role of s 60CC(2A):

Where [sexual abuse] is found to have occurred or to be occurring, then the weight to be given to the need to protect a child or children from that abuse must, necessarily, be greater than the weight given to the benefit to the child or children of having a meaningful relationship with the parent who is the abuser . . .<sup>166</sup>

164 As expressed in *Labine & Labine* [2012] FMCAfam 1398; BC201210771 at [108]–[110].

165 Justice Strickland and K Murray, 'A judicial perspective on the Australian family violence reforms 12 months on' (2014) 28 *AJFL* 47 at 70.

166 [2014] FamCA 11; BC201451263 at [123] (emphasis added).

This formulation has the danger of limiting the application of the section, which is *not* predicated on a finding of abuse. In this context, we note the comment of Parkinson in discussing this new provision, that when there is a case with ‘*significant* child protection issues’ (emphasis added) protection of abuse should be prioritised.<sup>167</sup> We would caution against adding any gloss to the section; if, on the evidence, child protection is *an issue*, it must *always* be prioritised.

Prior to 2006 there was a legislative reluctance to constrain judicial discretion in relation to parenting orders; the fact of the creation of two tiers of relevant considerations was therefore a significant legislative shift. As Murphy J has noted, an allegation of CSA is relevant not only under the primary considerations, but also many of the ‘additional considerations’;<sup>168</sup> however, the fact that child safety *is* now a primary consideration is important as a matter of statutory interpretation.<sup>169</sup> Parliament has gone a step further and said, of the two primary considerations, protection from harm must *always* be given greater weight. If anything, this is a stronger legislative imperative than the creation of the two tiers, given that prior to this amendment the Full Court had accepted that, in the circumstances of a particular case, more weight could be given to an additional consideration than a primary consideration.<sup>170</sup> This amendment puts protection from violence and abuse in a special category as it were, as it surely follows from s 60CC(2A) that the need to protect children must be given greater weight than *all* additional considerations as well.<sup>171</sup> In the words of the explanatory memorandum noted above, it is now ‘the’ priority consideration; that is, *nothing* can take priority over this consideration. Unlike Parkinson, we do not consider that the introduction of s 60CC(2A) modifies the prior emphasis of the provisions ‘only a little’.<sup>172</sup>

On this point, we note Parkinson’s argument that the primary and additional considerations are different in kind, and so there is no hierarchy as such between them.<sup>173</sup> His position rests on the basis that the primary considerations in essence reflect and emphasise two of the objects of Pt VII; he argues the primary considerations are the destination and the additional considerations provide the route. Objects and principles sections are interpretive in function.<sup>174</sup> While the primary considerations may reflect two of the objects of Pt VII, there must logically be some substantive legal

167 P Parkinson, ‘The 2011 Family Violence Amendments: What difference will they make?’ (2012) 22(2) *Australian Family Lawyer* 1 at 11. Parkinson adopts the same terminology in Parkinson, above n 142.

168 *Carpenter v Carpenter (No 2)* [2012] FamCA 1005; BC201250758 at [22]–[25].

169 In *Marsden v Winch (No 3)* [2007] FamCA 1364; BC200750076 the Full Court said at [78] that particular emphasis must be placed on the primary considerations because they are identified as such in the legislation.

170 *Mulvany v Lane* (2009) 41 Fam LR 418; (2009) FLC 93-404; [2009] FamCAFC 76; BC200950209.

171 In this regard, we note the comments of Parkinson, above n 167, at 12.

172 Parkinson, above n 142, at 11.

173 P Parkinson, ‘Decision-making about the best interests of the child: The impact of the two tiers’ (2006) 20 *AJFL* 179 at 184; Parkinson, above n 167, at 12.

174 See the recent Full Court decision to this effect: *Maldera & Orbel* (2014) 287 FLR 283; [2014] FamCAFC 135 at [75].

significance in making some considerations ‘primary’, over and above emphasising the objects, which themselves are included to assist with the interpretation of *all* of the substantive provisions. The mandated considerations are simply that — considerations that *must* be taken into account when exercising this discretion. They determine the evidence that needs to be led in the case and now give some indication as to weight. By their very nature the two tiers of considerations are not different in kind; if anything, the fact of overlap between them argues against this (just as there can be overlap between additional considerations).<sup>175</sup> The categorisation of these factors, however, provides direction as to the weight that might generally be attached to the evidence that is led and this approach is evident in the decision-making of the court. This approach is further supported by the Explanatory Memorandum which says ‘[t]he intention of separating these factors into two tiers is to elevate the importance of the primary factors . . .’ and which then goes on to talk about the *weighting* of primary versus additional considerations.<sup>176</sup> However, even if Parkinson’s interpretation were correct, s 60CC(2A) has much to say about what the court’s destination should be.

There has been some judicial recognition of the important impact of s 60CC(2A). In *Rivas & Stephen*,<sup>177</sup> Brown J had this to say:

as a consequence of all the factors outlined above, it may be impossible, for a court, to determine definitively whether any abuse . . . has occurred . . . However, given the structure of Part VII of the [FLA], particularly its emphasis on protecting children from the consequences of any form of abuse, the court cannot disregard such allegations or disregard their seriousness because of evidentiary difficulties, which arise as a consequence of the court trying to establish the truth or otherwise of the allegations . . .<sup>178</sup>

A position that accommodates what the Full Court has said to date about the relationship of primary and additional considerations, and which incorporates s 60CC(2A), would be as follows. In exercising its discretion, where there is evidence of harm the court must:

- So far as is possible, make orders that seek to ensure the protection of the child from harm in light of the evidence of harm.
- Of the remaining factors, generally place most weight on the benefit to a child from having meaningful relationships with both parents but may, where the facts require it, place as much, or more, weight on an additional consideration, and
- Adopt the same approach whether the matter is an interim or final hearing.<sup>179</sup>

A case recently decided, though not subject to s 60CC(2A), which adopts this overall approach to the evidence before the court is *Tree J*’s decision in

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<sup>175</sup> Nor do we consider that because it may be useful to consider the additional considerations first, that this necessarily supports Parkinson’s interpretation.

<sup>176</sup> Family Law Amendment (Shared Parental Responsibility) Bill 2006 Explanatory Memorandum, at 49–51, at <[http://www.austlii.edu.au/au/legis/cth/bill\\_em/flaprb2006510/memo\\_0.html](http://www.austlii.edu.au/au/legis/cth/bill_em/flaprb2006510/memo_0.html)> (accessed 5 June 2014).

<sup>177</sup> [2014] FCCA 2144; BC201408425.

<sup>178</sup> *Ibid*, at [103]–[104].

<sup>179</sup> See *McAllister & Day* [2012] FMCAfam 863; BC201210751 at [38] and [42].

*Lett & Lett*.<sup>180</sup> Here, the judge decided the evidence did not reach the required standard for a finding of sexual abuse, but then made a clear, separate and detailed assessment of the evidence of sexual abuse with a view to deciding whether it was sufficiently strong to require protective measures be put in place. Naturally, those two assessments looked at the evidence in different ways:

Notwithstanding the grave nature of the finding and the consequences of doing so, I am nonetheless satisfied to the requisite standard that the father is an unacceptable risk of sexual harm to B. I so conclude principally because of the substantial likelihood of abuse having occurred, and because of the fact that the disclosures are consistent repeated behaviour, and because the impact of childhood sexual abuse is potentially so severe and long lasting.<sup>181</sup>

This is not a decision based on a ‘lingering doubt’ but an assessment of the true strength of the evidence of abuse, freed from any leaning toward a conclusion that, having found the abuse couldn’t be proved, parental contact should be given priority.

Thus, we argue the current legislative formulation creates a very clear hierarchy for weighting considerations and the evidence led in relation thereto. The first and pre-eminent question for the court is how to craft parenting orders that protect the child in light of the evidence of physical or psychological harm. The court cannot balance that against the benefit of contact — to do so would mean that the most weight was not accorded to protection from harm. Further, no additional consideration can outweigh the protection of the child.<sup>182</sup> The question for the decision-maker becomes: in light of the evidence relevant to physical or psychological harm, am I satisfied I have protected the child from future physical or psychological harm.

### **The impact of s 60CC(2A) on CSA cases**

One effect of the operation of s 60CC(2A) must be that an approach to a CSA case which treats false positives as equally concerning as false negatives will now result in an appealable error. The words of the section are clear. As the Family Court’s task is *not* to protect parental rights, the perceived problem of a false negative can only (legitimately) be that it may deprive a child of a full relationship with their parent. At the very least, therefore, this amendment can be seen to make the point that the court is not permitted to approach CSA cases with scepticism, on the ‘qui vive’ for false allegations and downplaying the very real dangers of false negatives.

The next question is what impact, if any, this amendment has on the unacceptable risk test (leaving aside for the moment the impact of s 60CG). We have argued that, regardless of this amendment, there are cogent reasons for abandoning this test. Section 60CC(2A) adds weight to that argument. The test espoused in *M v M* rests on the notion of ‘balancing’ the risk of abuse against the potential benefits of parent/child contact. As outlined above, this

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<sup>180</sup> [2014] FamCA 52; BC201451489.

<sup>181</sup> *Ibid*, at [175].

<sup>182</sup> So statements such as that in *Tadic & Cupic* [2013] FCWA 43 at [99] to the effect that both primary considerations can be outweighed by additional considerations are no longer permissible (it is not clear in that case if s 60CC(2A) in fact applied).

balancing task is no longer ‘at large’ as it was when that case was decided; the FLA now specifies how those competing considerations *must* be balanced. This arguably undermines the basis of the test as set out in *M v M*.

So, in the hard CSA cases, the question now demanded of the court is no more, or less, than this: *given the evidence of abuse*, what orders will best protect this child from being exposed or subjected to abuse in the future? The court must be satisfied, in making its orders, that it has so protected the child. This may seem a subtle shift, but we would argue it is an important one that has the potential to affect outcomes by shifting attention away from a ‘finding’ as to unacceptable risk or otherwise. This may very well be a more difficult decision to make than applying the unacceptable risk test. However, the required legislative process cannot be simplified by attaching to the proof of abuse such significance that it ultimately becomes the determinant of what orders are made. Rather, the court must take the evidence it has, give greatest weight to the evidence that indicates the child needs protection from abuse and if appropriate, frame orders with a view to protecting the child from abuse; then, if possible and appropriate, the court must try to ensure any benefit to the child through a relationship with the parent is preserved. However, if that is not possible, then protection from harm takes precedence.

In *N v S*, Fogarty J said:

Thus, the essential importance of the unacceptable risk question as I see it is in its direction to judges to give real and substantial consideration to the facts of the case, and to decide whether or not, and why or why not, those facts could be said to raise an unacceptable risk of harm to the child. Thus, the value of the expression is not in a magical provision of an appropriate standard, but in its direction to judges to consider deeply where the facts of the particular case fall, and to explain adequately their findings in this regard.<sup>183</sup>

That sentiment is not wholly inconsistent with what we are proposing, however, it possibly underestimates the dangers of the test, which his Honour has articulated elsewhere;<sup>184</sup> moreover, in light of s 60CC(2A) there is new direction as to the weight to be given to those crucial facts.

As the High Court all but predicted, by attempting to capture what is required in a ‘test’ the court has striven ‘for a greater degree of definition than the subject is capable of yielding’. No test is required in the first place. Further, s 60CC(2A) mandates a different process of decision-making and reinforces the inappropriateness of an unacceptable risk test.

Finally, how does s 60CG sit with this analysis? If that section gives statutory force to this test then that creates a rather confusing situation. If it is the case that this section was intended to apply to those other than the relevant child(ren), then the section should be reframed in that way. However, this raises an important issue: why would we afford any lesser priority to the protection of third parties from abuse than children? That is, should the protection from harm of *all* relevant persons be included in s 60CC(2A) and if that were done how would that sit with the paramountcy principle? This is

<sup>183</sup> *N and S and the Separate Representative* (1996) FLC 92-655; (1995) 19 FamLR 837 at [138].

<sup>184</sup> Fogarty, above n 9.

a very important question<sup>185</sup> beyond the scope of this article. Suffice it to say, our analysis above would suggest that s 60CG should be amended to clarify its application and to eliminate any reference to ‘unacceptable’ risk.

### Where to from here?

No doubt the first instinct of many will be to assume this article is arguing in favour of more readily suspending contact with fathers against whom allegations of CSA are made. However, that is not the case. First, we do not take the view that all children abused by a parent are better off having no contact with their abuser. Some abused children may welcome and benefit from being raised in an environment in which they can be safe *and* have a relationship with both of their parents. Nor do we assume that the hard cases necessarily involve abuse of a child by a parent. However, the seriousness of this matter, the hysteria it seems to generate, the myths that still gain traction in the ongoing debate and the no doubt traumatising effect of going to trial in these cases, all suggest something needs to change.

All of these cases involve families suffering from dysfunction. One option, as recently discussed by Faulks J,<sup>186</sup> is an alternative decision-making body. As his Honour rightly points out, proposals of this kind do not address a range of difficulties that would still exist precisely because, at the end of the day, the family is subjected to a decision-making process. However, his Honour concludes by saying ‘in the end, it is about justice’.<sup>187</sup> In fact, it is all about finding a way forward for these families that protects children and furthers their interests without discounting the rights and interests of other family members. A more fruitful solution, we suggest, would lie in thinking further about special case management and diversion of these cases, beyond that which is already offered,<sup>188</sup> to reduce the number of cases that end up at trial and to expedite those that do. If we could resist the appeal of the adversarial and move to a truly different model, there is the potential to provide much better solutions for these families, expensive though that may be. Like Parkinson, we lament the approach of government which focuses on amendment to the FLA to solve problems, rather than putting more resources into support processes and services for affected families.<sup>189</sup>

But some cases will proceed to a determination, and pre-trial processes need to be supported by a judicial decision-making climate that focusses first on child protection, not shared parenting. Abandoning the unacceptable risk test may make decision-making harder. While there are dangers in adopting an inappropriate test for resolving these disputes, we do not suggest that rectifying this judicial process will ‘solve’ the problems these families are facing, but it may result in more children being protected from sexual abuse.

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185 See R Chisholm, ‘How to treat allegations of violence and abuse: *Amador v Amador*’ (2010) 24 *AJFL* 276 where the broader question of whether there is any difference in approach required in relation to the making of findings of abuse against adults and children is considered and the discussion in Fehlberg, above n 19, at [8.4.1.3.5].

186 Faulks, above n 19.

187 *Ibid*, at 165.

188 We have not discussed the Magellan pathway for these cases; for discussion of that process, see Fryer, above n 33.

189 Parkinson, above n 167, at 1.



Further, it may help focus pre-trial negotiations on assessing the evidence of abuse and focusing on how a protective parenting arrangement can be structured through agreement, rather than driving towards a court battle to try and resolve the question of the fact of the abuse.

We particularly caution against the ongoing rhetoric that '*the* problem' in this area is false allegations, not protection of children from abuse; this unjustified fear has the potential to distort decision-making. Section 60CC(2A) *demand*s that decision-makers put first and foremost the protection of children. This is the court's remit. If the court is presently well placed to deal with anything, it is false allegations of sexual abuse. There is little evidence it is well placed to protect children from abuse; this is an intransigent problem societally. If a matter cannot be resolved and proceeds to a determination, the court must fulfil its obligations under the statutory regime and be wary of super-imposed 'tests' that undermine that role, however intuitively attractive they may seem.

Finally, it is vitally important that research be undertaken in this area, to inform decisions about how best to move forward. The sensitive nature of this topic may be part of the reason for the paucity of pertinent data, but given the prevalence of CSA, its serious consequences for victims and the consequences for all concerned where allegations are fabricated or misunderstood, it is imperative that myths are dispelled and some baseline data is obtained, which would both inform the development, and permit evaluation of, much needed reforms. While Magellan has been evaluated from a process point of view, we know nothing of what becomes of these families. Family law is one legal area where we have embraced the value of research data; for the sake of these families we need to turn our gaze to this difficult area.