

Review

In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the “Expert” Assessments That Guide Judicial Determinations

Samantha Jeffries

School of Criminology and Criminal Justice, Griffith Institute of Criminology, Griffith University, Brisbane 4122, Australia; s.jeffries@griffith.edu.au; Tel.: +61-7-373-51120

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Abstract: This paper outlines why domestic violence (or more specifically, coercive control) should be crucial to child custody proceedings. What is known about parenting in the context of coercively controlling violence, and what the legislation directs courts to consider, is juxtaposed with the actuality of court decision making. Current knowledge about the recognition of domestic violence in judicial practice is overviewed, drawing particular attention to the role of the “expert” family assessment in determinations of a child’s “best interests”. A comprehensive synopsis of the existing research on these “expert” reports in Australia, the United Kingdom and the United States is provided. It is concluded that, in court proceedings the reality of living with coercively controlling violence and the potential on-going risks it poses to children and non-abusive parents, is typically negated. Instead, “best interests” considerations prioritise the maintenance of perpetrator/child relationships, and thus “abuser’s rights” over victim safety. Judicial officers are not experts in domestic violence and they can only make decisions on the basis of the evidence before them, the assessments made by the “experts” likely play an important role in best interest considerations. Of concern is current research that calls into serious question the expertise of these “experts” when it comes to proceedings involving allegations of coercively controlling violence.

Keywords: domestic violence; coercive control; family law; family reports; family courts; custody evaluations; expert evaluations

1. Introduction

In this paper domestic violence, a gendered crime [1–5], is conceptualised as coercive control; a pattern of on-going intentional domineering tactics employed by (usually) male perpetrators with the intent of governing their female victim’s thoughts, beliefs or conduct and/or to punish them for resisting their regulation [6]. Coercive control, a term introduced by Stark in 2007 [6], has recently gained ground in western scholarly literature, public narratives, government policy and law. For example recent changes to the United Kingdom’s *Serious Crime Act 2015* created a new offence of controlling or coercive behaviour in intimate or familial relationships, which acknowledges this violence as “a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another” ([7], p. 3). Similarly, the Australian Government’s National Council to Reduce Violence against Women and their Children ([8], p. 13) states that, “a central element of domestic violence is that of an ongoing pattern of behaviour aimed at controlling one’s [ex]partner through fear (for example, by using violent or threatening behaviour)...the violent behaviour is part of a range of tactics used by the perpetrator to exercise power and control...and can be both criminal and non-criminal in nature”. The United States Department of Justice [9] also defines domestic violence as “a pattern of abusive behavior...that is used by one partner to gain or maintain power and control over another intimate partner”.

The tactics or behaviours exhibited by perpetrators of coercive control may include: emotional abuse (e.g., victim blaming; undermining the victim's self-esteem and self-worth; verbal abuse (e.g., swearing, humiliation and degradation); social abuse (e.g., systematic social isolation); economic abuse (e.g., controlling all money); psychological abuse (e.g., threats and intimidation); spiritual abuse (e.g., misusing religious or spiritual traditions to justify abuse); physical abuse (e.g., direct assaults on the body, food and sleep deprivation); sexual abuse (e.g., pressured/unwanted sex or sexual degradation) ([10], pp. 2–3).

In reality many perpetrators never use physical violence. Some may use what is best described as minor assaultive violence such as pushing, grabbing and/or getting “up in a victim's face”. Others may threaten physical violence. Some may follow through on these threats, but only when they are losing control over the victim. The largest predictors of intimate partner homicide, for example, are, in fact, emotionally abusive and controlling behaviours and victim-instigated relationship separation ([6], pp. 276–77). Universally, victims of domestic violence report that it is the non-physical elements of abuse that causes them the most pain and trauma both in the short and long-term [6,11,12].

In the past, domestic violence and child abuse were frequently treated as separate issues. More recently, there is growing recognition that domestic violence is a child protection issue. For example, child welfare legislation in most of Australia's states and territories now explicitly names exposure to domestic violence as constituting “harm” to children ([13], p. 460). This shift, also evident in child protection law in both United Kingdom and United States [14], owes much to a growing body of research demonstrating: (1) the high co-occurrence of domestic violence and child abuse; (2) the abusive nature and negative impact on children living with domestic violence ([8]; [15], p. 148; [16], pp. 50–51; [17–22]).

Domestic violence and child abuse frequently co-occur within the same families [21]. In the United States, it is estimated that between 30 and 60 per cent of children with mothers in abusive relationships are abused ([21], p. 1). Australian studies of child protection cases similarly support the co-occurrence of domestic violence and child abuse. For example, in Victoria (Australia), an investigation of actual or suspected child maltreatment cases found that child protection workers reported domestic violence in 31 per cent of cases ([16], pp. 5–6). More specifically, domestic violence was reported as present in 38% of child neglect cases, 37% of physical abuse cases, 68% of emotional abuse cases and 20% of sexual abuse cases ([20], pp. 5–6). Bedi and Goddard's [22] Australian research reported co-occurrence rates of 55% and 40% respectively for intimate partner violence and child physical and sexual abuse.

Children living with domestic violence are not only exposed to the violent events but may also: hear the violence; see its effects (e.g., blood, injuries, damaged property); be used as a tool in the abuse (e.g., being forced to spy on a parent by the abusive parent; used to send threatening messages); be blamed for the violence; be used as a hostage by an abusive parent to intimidate/scare their victim; as well as defend a parent against the violence and/or intervene to stop the violence [15,18,19]. As noted by Parkinson and Humphreys ([15], p. 148) domestic violence in families, “does not usually occur in a way which is separated from the lives of children”; it is not something that children simply witness at a distance. Rather, it is something that they acutely experience [23].

For example, utilising interviews with children living with domestic violence, recent research undertaken by Callaghan *et al.*, in the United Kingdom [23] established that children are directly entwined in the parental dyadic of coercively controlling violence. Children clearly expressed an awareness of the controlling behaviour and coercion being perpetrated within their families and described the negative impacts of this on their victimised parent, themselves and family life. They “narrated the disruption and distress that they experience[d] as a consequence of coercive control and abuse in the family” ([23], p. 13). Thus, Callaghan and colleagues [23] argue, the “victim” in domestic violence is not just the adult in the intimate dyad; children are also the direct victims of coercive control.

Indeed, children who live with domestic violence, “exhibit levels of emotional and behavioural problems, trauma symptoms, and compromised social and academic development comparable to

children who are the direct victims of sexual and physical abuse” ([22]; [24], p. 21). This includes, but is not limited to: feelings of sadness, anger, confusion, fear, low-self-esteem, anxiety and other internalised symptoms of distress (e.g., psychosomatic illnesses, fretful sleeping, nightmares, insomnia, eating disorders, repetitive self-harm, depression), externalised behaviour problems (e.g., aggression, antisocial behaviour), poor academic achievement, social withdrawal, poor social competence, low levels of empathy, and in more extreme cases, posttraumatic stress disorder [15,17–19].

Similar to adult victims, coercive control also imposes a sense of constraint on children’s lives. Callaghan *et al.* ([23], p. 14) reported that the children in their research were vigilant about monitoring space, perpetrator mood and learnt how to manage what they said and did around their abusive parent both prior to and post parental separation. As clear strategies for keeping themselves and other family members safe, the children reported monitoring their speech, their self-presentation, self-expression and social interactions. The psychological abuse and sense of constant fear that is associated with coercive control, was expressed by the children as being a regular feature of their lives—thus, “far from passive witnesses, [children] are not exposed to violence and abuse; rather, they live with it and experience it directly, just as adults do” ([23], p. 16).

Accordingly, living with domestic violence is itself a form of child abuse ([18], p. 799). This conjecture is supported, for example, by recent changes to Australian law (including family, child protection, and civil domestic violence protection order legislation) in which domestic violence is now included in definitions of child abuse [13]. Correspondingly, Einat Peled [25], one of the few researchers worldwide undertaking studies on abusive men as parents, contends that “all abusive men can be defined as psychologically abusive to their children by being responsible for the children’s exposure to domestic violence and its various negative emotional, cognitive and behavioural derivations”.

Unfortunately for children and their mothers, family dissolution does not inevitably mean that the coercive control will come to an end. Research shows that domestic violence frequently continues post-separation and often increases in severity ([18], p. 800; [21], p. 2; [26]). At its most extreme this may have lethal consequences for both adult victims and/or their children ([18], p. 800; [21], p. 2). When domestic violence ends in homicide, there is no doubt about the dangers of separation. Death reviews and inquests routinely point to the dramatic increase in risk to women and their children when trying to leave coercively controlling men [5,27–30]. This is consistent with the definition of domestic violence as coercive control. Separation sends a clear message to perpetrators that they are losing power over their victims ([31], pp. 8–9). It is against the backdrop of relationship dissolution and heightened risk that adult victims and their children enter into child custody proceedings.

In this paper I discuss utilising extant research and commentary, why domestic violence (or more specifically coercive control) should be crucial to child custody proceedings. What is known about parenting in contexts of domestic violence, and what family law legislation directs judicial officers to consider is juxtaposed with actual practice. While there is a relatively expansive literature on the apparent inconsequentiality of domestic violence in judicial assessments of the “child’s best interests”, less is known about the “expert” family assessors. The paper will therefore overview what is known with regard to the recognition of domestic violence in judicial practice, draw attention to the plausible significance of “expert” family assessments in judicial determinations of the child’s best interests, and provide a thorough synopsis of the research (in Australia, United States and United Kingdom) pertaining to these “experts” reports in cases of coercively controlling violence.

2. The Significance of Domestic Violence in Child Custody Proceedings

Cases involving allegations of domestic violence and child abuse are core business in child custody proceedings ([32], p. 32). In the United States, for example, it is estimated that up to 50% of disputed custody cases involve domestic violence ([33], p. 1078). Research undertaken by the Australian Institute of Family Studies similarly shows allegations of spousal violence occurring in over 51% of litigated family law cases, with the figure rising to over 70% of those cases that were not judicially determined ([34], p. 67). Although now over a decade old, analyses of court files undertaken

by Smart and colleagues in the United Kingdom ([35], pp. 2–3) revealed allegations of domestic violence in around 25% of disputed child custody cases.

Given the previously discussed impacts on adult victims and children, domestic violence should be highly relevant to child custody proceedings. Obviously the parental capacity of people who directly abuse their children and/or expose them to their abuse of others is questionable ([36], p. 192). As noted by Meier ([36], p. 705) with regard to the latter, “people who need to control and abuse their intimate partners are unlikely to be capable of the loving, nurturing and self-disciplined behaviour that good parenting requires. By definition, a father who abuses the mother has indicated that he cannot put the children’s interests first, since their mother’s abuse, by undermining her well-being, [is] inherently harmful to children.”

However, this is but one feature of the multifaceted problems that pervade the lives of children with a domestically violent parent [24,32,33]. Coercive control is often directed at both adult and child victims ([11], p. 3), a situation likely to continue post-parental separation. As noted above, separation is not a “vaccination against domestic violence” ([31], p. 29). Certainly, it is common for perpetrators to use child visitation as an occasion to persist with the abuse of their ex-partner. This is a manifestation of “child abuse as tangential spouse abuse...a particularly effective intimidation tactic during separation...when the offender’s access to [the victim], but not to the children, may be limited...the offender treats the child as an extension of the mother and as a way to hurt or control her” ([6], p. 251). In the process of course, children continue to live with and experience the negative consequences of domestic violence [23]. In addition, when coercively controlling fathers re-partner, research shows that many will then go on to abuse their new spouse [37].

Further, and in contrast to non-abusive men, domestic violence perpetrators tend to parent in ways that are less than positive for children ([38], p. 22). While not an exhaustive list, the following key concerns are highlighted in albeit limited extant literature/research:

Poor Role Modelling: The family is core to children’s socialisation. Here powerful lessons are taught including conflict resolution and how to cope in the “face of” frustrated needs and wants ([24], p. 22; [38], p. 22). When children witness domestic violence they may grow up believing that such behaviour is acceptable ([31], p. 30; [38], p. 22). This assumption is borne out in research showing that sons of domestically violent men have dramatically elevated rates of domestic violence perpetration in adulthood, while daughters often find themselves victimised by men like their fathers ([39], p. 61). Perpetrators also tend to be excessively patriarchal, believing in strict gender roles, the superiority of men and subordination of women. This teaches further negative lessons to children about gender-role expectations ([31], pp. 30–31).

Rigid Authoritarian/Coercive Parenting: To recover from the trauma of living with domestic violence children need a nurturing, loving environment that includes appropriate structure, limits and predictability. Yet domestic violence perpetrators are not only coercively controlling with intimate partners they also tend to utilise harsh and rigid discipline with their children ([24], p. 22; [38], p. 22). This parental approach may be especially intimidating as well as re-traumatising for children whose well-being is already compromised as a result of living with domestic violence ([18]; [25], pp. 28–29; [36], p. 706; [39], pp. 2–3; [40]).

Lack of Empathy and Respect: Men who perpetrate coercive control generally lack the empathy that allows parents to treat their children with respect and to validate their feelings, qualities that are important to raising emotionally healthy, conscientious and caring children ([36], p. 706).

Neglectful or Irresponsible Parenting: Perpetrators tend to be self-absorbed and this can result in negligent or irresponsible parenting. In addition, some may use intentionally neglectful parenting as a way to win children’s loyalty, e.g., allowing them to eat “junk” food all the time, permitting them to watch inappropriate violence or sexuality on the television ([39], p. 3).

Use of Psychological Abuse and Manipulation Tactics: Coercively controlling men have a tendency towards verbally abusive and manipulative parenting such as lying, providing false promises, drawing children in as agents of abuse against their mothers (e.g., asking

the children to give the mother threatening messages, demanding they report on her whereabouts, who she talks to and what she does) and/or trying to fracture the mother/child relationship ([25], pp. 28–29; [31], p. 29; [36], p. 706; [39], p. 3; [41], p. 102). These latter two behaviours, which appear to increase post-separation, are examples of what Evan Stark ([6], p. 292) refers to as “child abuse as tangential spouse abuse”. The literature suggests that more than any other factor, emotional recovery for children who have lived with coercive control is dependent on a positive and secure relationship with the non-abusive parent. As a consequence, domestically violent fathers who create tensions between mothers and children can sabotage the healing process ([39], p. 3).

Possessiveness: Perpetrators of coercive control perceive their partners as their property and this perception may extend to their children. Perpetrators have, for example, been found to seek custody at higher rates than non-abusive fathers even when they have shown little prior interest in parenting. Possessive parenting is also linked to an increased risk of child physical and sexual abuse ([39], pp. 15–17).

Sense of Entitlement: Perpetrators of coercive control often have difficulty focussing on their children’s needs due to their selfish and self-centred tendencies ([39], pp. 11–12). Many abusive men have an overinflated sense of entitlement, expecting children to meet their needs, rather than vice versa ([39], pp. 8–11). For example, they may expect their children to give up their interests to spend time with them, demand physical affection regardless of the child’s feelings and become blaming, tearful, or shout when their children fail to make them feel good ([36], p. 705; [39], pp. 11–12). This parent/child role reversal can make children feel that it is their responsibility to take care of the abusive parent, that they must meet their needs and ensure their well-being ([39], pp. 49–51). Such parenting weaknesses can be accentuated in the context of post-separation visitation where abusers have primary responsibility for their children for longer periods of time than was likely the case prior to parental separation ([36], p. 705).

In addition to concerns around abusive men’s capabilities as fathers, mothers who have been victimised often experience specific parenting challenges. They are often preoccupied and continue to be fearful of their abuser, physically and emotionally exhausted, economically strained (due to previous and on-going financial abuse) lacking in parenting confidence, anxious, depressed, paranoid (with logical reason), substance abusing (as a form of self-medication) and/or affected by post-traumatic stress ([24], p. 22). All these factors have the potential to impair maternal parenting and detrimentally impact the mother/child relationship ([38], p. 20; [42], p. 18). This is concerning because studies show that a positive relationship with the non-abusive parent can placate the negative impacts of domestic violence on children ([31], pp. 28–29). Research does nonetheless suggest that the adverse consequences of domestic violence may dissipate once mothers are safe. It is therefore critical that non-abusive parents be protected from on-going post-separation violence ([38], p. 20).

However, even if the domestic violence ceases post-separation, mothers and children still need time to heal. Similar to adult victims, it is not uncommon for children to remain fearful and anxious toward the perpetrator even when the domestic violence has ceased. This is especially so in contexts where the perpetrator and victim come together in the same physical space (e.g., at visitation “hand-over”). As noted by Jaffee, Lemon and Possion ([31], p. 29), “for the children, the past traumatic [events have] engendered such fear that any association with the past (e.g., the presence of both parents in the same place) can create significant anxiety and distress”.

3. Domestic Violence in Family Law and Judicial Practice

In the United States, British Isles and Australia, living with coercively controlling violence alongside a child’s right to maintain their relationship with both parents is now explicitly recognised in family law as crucial in the determination of the child’s best interests. However in each locale the research is unequivocal: contact with a parent with whom a child does not live (usually fathers) is almost always deemed by the family courts to be in the child’s best interests, regardless of whether the non-resident parent is a perpetrator of coercive control ([36], p. 1; [37], p. 13; [43], p. 11; [44], pp. 350–54).

In Australia, “ensuring that children have the benefit of both their parents having meaningful involvement in their lives” is noted to take precedence over “protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence” ([36,42,43]; [45], p. 182; [46–49]). Similarly, in Ireland, Naughton *et al.*’s [44] research (based on interviews with family court judges) revealed a “pro-access” narrative that negated the coercive control, future risk, and ensured continued contact between perpetrators and their children. Likewise, Holt’s [50] study, based on interviews with key family court stakeholders (including children), found that judicial decision making is dominated by the presumption that contact with abusive men is automatically in the child’s best interests even when children openly expressed aversion to this. Dragiewicz ([51], p. 122) in her overview of research in the United States, correspondingly concludes that despite concerns about domestic violence and state laws requiring its consideration at custody determination, maximum contact with fathers is still prioritized in the family courts. In practical terms, this has resulted in equivalent, substantial or significant time being afforded to perpetrators of coercive control [44–46,50].

In the United Kingdom a recent study revealed that notwithstanding histories of violence [including cases where a protection order was in place and fathers had criminal convictions for domestic violence related offences], unsupervised contact was commonly ordered to abusive fathers [33]. Concerning as this might be given what is known about the impacts on children, more problematic is research suggesting that domestically violent fathers are considered no differently or viewed more favourably than non-abusive men [52–55].

Australian research suggests that parenting orders in domestic violence and non-domestic violence are not substantially different (e.g., [54], p. 87). O’Sullivan’s [52] analysis of family court files in the United States found that fathers who had a domestic violence protection order out against them had a much high probability of being granted visitation compared with those fathers who never had a protection order against them. In the United Kingdom, 50% of disputed custody cases involving allegations of domestic violence resulted in orders of direct contact between children and abusive fathers [35].

The now growing body of research showing the inconsequentiality of domestic violence to child contact outcomes has led researchers (particularly in the United States) to suggest that gender bias, and failure to understand the nature of coercively controlling violence and its impact on women and children could be to blame [56–58]. These propositions are supported by research and the outcomes of government commissions of inquiries in the United States showing that the “credibility accorded to women in family court proceedings is less than that accorded to men” ([36], p. 687). This results from negative gender stereotyping (e.g., women are manipulative and prone to hysterical over-exaggeration) alongside cursory understandings of domestic violence and perpetrator tactics ([36], p. 680; [56,59,60]).

Studies show, for example, that while abusive men have a tendency to minimise or deny allegations of violence made against them, courts are more likely to view women’s accusations of violence as exaggerated, false or insufficient ([31], p. 17; [36], pp. 681–84; [42], p. 14; [44]; [56], p. 20; [61], p. 93). Likewise, though an attempt to fracture the mother/child relationship is a common tactic utilised by perpetrators to punish and control their victims (*i.e.*, child abuse as tangential spouse abuse), the prevailing court fiction is that women are at best more likely to be “unfriendly parents” and at worst responsible for paternal alienation¹ ([31]; [36], pp. 679–89; [56], pp. 22–23; [60], p. 39).

¹ The concept of parental alienation and/or Parental Alienation Syndrome has invoked much controversy and debate amongst social scientists, legal scholars, men’s rights activists and women’s groups ([39], pp. 168–73; [62,63]). Parental alienation is the process by which one parent, in the context of child custody disputes, psychologically manipulates a child into showing unwarranted fear, disrespect or hostility toward the other parent. This can result in the child refusing contact with and becoming estranged from the alienated parent [62,63]. Of concern, within the context of coercive controlling violence, is that claims of parental alienation can be used by perpetrators to mask their abuse and lay blame on the victim parent. Bancroft and Colleagues ([39], p. 168) have subsequently argued, that within the context of custody proceedings, “the use of parental alienation charges by alleged or confirmed abusers has become a national crisis for battered mothers”.

Common sense protective actions taken by mothers to shield themselves and their children from the perpetrator (e.g., not wanting to co-parent, reveal their residential address or support unsupervised visitation) are frequently construed as unreasonable, unfriendly and potentially alienating, as are associated claims by mothers that their children are at future risk from domestically violent fathers ([36], pp. 679–89; [60], p. 39).

Utilising case analyses of court outcomes in the United States, Meir ([36], p. 686) concludes the following with regards to victim's concerns for the safety of their children: "...it is highly unusual for a [victim]...to be recognised by a court to be sincerely advocating for her children's safety. Rather her status as a litigant, a mother, and [victim], seems to ensure that she will be viewed as, at best, merely self-interested, and at worst, not credible. Conversely, men's demands for access to their children are typically met with the presumption of good faith, even when those men are adjudicated [perpetrators of domestic violence]". In reality, men who perpetrate domestic violence frequently seek outcomes (e.g., sole or joint physical custody) in which they have no genuine interest ([31], p. 20; [36], p. 685).

The courts have a tendency toward over-valuing fathers' claims of desire for extensive access to their children. Rather than being "good faith", it is now well-established that litigation is primarily used by perpetrators as an extension of power and control. It provides an avenue through which they can continue to intimidate and incite fear in their victims ([31], p. 20; [36], p. 685).

Other instances in the research literature of judicial unawareness around domestic violence and/or gender bias include: (1) the reconstitution of coercive control as mutual violence or as indicative of a "high conflict" relationship, rather than the result of perpetrator dysfunction; (2) holding mothers to higher standards than fathers; (3) restricting child/mother contact (instead of providing mechanisms to support it) in cases where the effects of domestic violence (e.g., depression, anxiety, paranoia, anger, self-medicating substance abuse) call into question the victim's parental capacity; (4) treating domestic violence (past and present) as extraneous to perpetrators parenting or children's well-being ([36], pp. 697–702; [44]; [56], p. 19; [57]).

4. The "Expert" Evidence in Child Custody Proceedings: What does the Research Tell Us?

Judicial officers are not domestic violence experts and can only make decisions on the basis of the evidence that is before them. As noted by Retired Justice of the New York Supreme Court, Marjory Fields [61], in child custody proceedings involving domestic violence, even "the best trained judge cannot find or be persuaded by missing evidence". Given that domestic violence happens in the privacy of the home, and victims have likely experienced barriers to disclosure as a result of the perpetrators coercively controlling tactics, sparse evidence may be available to prove allegations of abuse. Without evidence and with limited knowledge about coercive control, there is a danger that judicial officers may overly rely on normative assumptions about gender and domestic violence ([32], p. 32). However, guidance can be sought from "experts" ([60], p. 38).

In Australia, the provision of this "expert" assistance frequently comes in the guise of the family report which can be ordered by the court or arranged privately by the independent children's lawyer and parties. Prepared by family consultants, who are usually social workers or psychologists, these reports provide independent "expert" evidence about the family's dynamics and guidance around how the best interests of the children might be served post-separation ([34], p. 91; [46], p. 72; [64], p. 16). The "expert" opinions of Australia's family consultants are argued to play "a significant role in informing judicial officers' understandings of children's best interests" ([28], p. 33). Indeed, studies suggest judicial officers likely privilege the opinions of these independent court appointed "experts" over others including non-abusive parents, children, children's regular therapists, child protection officers and the police ([32], pp. 33–37; [45]; [57], pp. 150–51). The concern, highlighted in the limited Australian research ($n = 2$ studies) to date, is the apparent lack of adequate consideration of domestic violence in these reports ([32]; [34], p. 91).

Forming part of a larger project examining allegations of domestic violence in family law proceedings; the first Australian study undertaken on this topic revealed that, “no views were generally expressed in family reports about specific allegations of domestic violence” ([34], p. 91). Analyses of evidentiary material about domestic violence in family reports in $n = 300$ family law court case files resulted in the conclusion that, “of all allegations raised, no more than 10% in any were fully or partially corroborated by a Family Report, and no more than 2% were fully or partially discredited” ([34], p. 91).

Shea Hart’s [32] qualitative analyses of $n = 20$ family court judgements sought to unpack the role of family reports in judicial constructions of the best interests of the child in cases where domestic violence was alleged. She found that the “context of violence within the family was not central to the family report assessments” ([32], p. 37). Further, family reports referred to in the judgments analysed “largely failed to address the children’s exposure to domestic violence, its impact on the child, and the potential future risk for the child and adult victim” ([32], p. 37).

Coercive control was frequently reconstituted as mutual parental “conflict”, and it was this, rather than exposure to what was often extreme acts of domestic violence by fathers against mothers, which impacted adversely on the children. While it is the case that children from high-conflict families can experience adverse effects, their experiences and needs are different from those living within environments characterised by coercive control. High conflict relationships are characterised by mutual distrust and disagreement. This is fundamentally different from contexts where a perpetrator’s intent is to wield power and control over their victim/s via numerous tactics aimed to intimidate and incite fear ([32], p. 37; [36], p. 191; [65], pp. 294–95).

Even in the few cases where coercive control was acknowledged as an issue, any adverse effects to children were commonly ignored, minimised or de-contextualised from the violence. Further, no reference was made to family reports having outlined the potential risks of ongoing exposure to violence if children were placed in the care of perpetrators ([32], pp. 35–37).

Judicial reference to family reports in the judgments analysed by Shea Hart [32] also tended to construct women within stereotypical gendered frameworks which negated their credibility. Further, report writers and in turn judges, appeared to have limited or no understanding of domestic violence and its impacts. Thus victim mothers were referred to as “hostile” and or “irresponsible in their parenting”. They were situated within a strong discourse of parental alienation; berated for interfering, destabilising and sabotaging relationships between violent men and their children. There was no recognition that maternal “hostility” could be symptomatic of victimisation and/or a mother’s reasonable fear for the safety of herself and her children. Neither was it suggested that “alienating behaviours” could be realistic actions taken by mothers to protect their children from further harm ([32], pp. 35–37).

The outcome was the potential re-exposure of children and adult victims to domestic violence through parenting orders that did not provide an adequate assessment of domestic violence allegations. Rather than prioritising child safety, the family report assessments referred to in the judgments examined tended to construct the child’s best interests in terms of maintaining the parent/child relationship, even if that parent was domestically violent ([32], p. 37).

Shea Hart’s [32] study is unique; it is the first in Australia to systematically consider the role of family reports in family court proceedings. However, given the small sample size and the fact that assessment of these reports was based on secondary judicial reference, we need to be careful before drawing definitive conclusions regarding the Australian situation. Her [32] findings are nonetheless supported by more rigorous research undertaken in the United States and United Kingdom.

An emerging body of research exploring custody evaluations in cases of domestic violence exists in the United States [24,56,66–71]. As summarised by Saunders *et al.* ([56], pp. 16–27), these studies generally consist of surveying/interviewing evaluators and/or undertaking content analyses of their reports to the court.

Results from this body of research show a tendency toward gender bias/stereotyping and misunderstanding about the nature of domestic violence and its impact on victims. More specifically,

custody evaluators frequently: (1) fail to document and understand the nature and risk of coercively controlling violence; (2) question the credibility of mothers by presenting them as having made false or inflated allegations of abuse; (3) label victims “unfriendly” or “alienating” parents; (4) de-contextualise trauma symptoms in victims from domestic violence. Each of these points is highlighted below.

As reported above, research suggests that judicial officers often fail to take domestic violence into account when making assessments of the child’s best interests in child custody proceedings. On a more positive note, studies from the United States do show that when judges possess information about domestic violence they are more likely to take protective action toward adult victims and their children, “though they failed to do so in the vast majority of cases” ([65], p. 299). This suggests that the proportion of judges who respond protectively in domestic violence cases could improve if abuse was reported to the family court, all allegations were properly investigated by evaluators, and their recommendations shaped in response to this ([65], p. 299). Unfortunately, however, evaluators frequently fail to discuss domestic violence in custody evaluations even when there is significant substantiating evidence that it has occurred. Further, it is documented that there is an apparent lack of understanding about the nature of coercive control, and the on-going risk this type of violence poses to adult victims and their children.

For example, in their examination of family court case files in one jurisdiction in the United States ($n = 102$ evaluations), Logan *et al.* [68] found few differences in the content of custody evaluations or subsequent recommendations between domestic and non-domestic violence cases. The majority of the domestic violence cases in this study had protection orders in place, yet evaluators still failed to investigate the nature and extent of the abuse. Even more concerning, for the authors, was the fact that the custody evaluators did not explore domestic violence as a “way of attending to the child’s safety needs” ([68], p. 735). They argue that, given the risk factors to children and adult victims in cases of domestic violence, the concept of “the best interests of the child” should suggest heightened attention to domestic violence in custody evaluations, especially given judicial reliance on evaluators’ reports and recommendations. By not addressing domestic violence as a clear risk factor for children’s safety, custody evaluators were subsequently failing “to meet the best interests of the child standard” ([68], pp. 735–37).

Evaluator failure to understand the nature of coercive control is highlighted in the research of Hans *et al.* [70], who undertook a survey of $n = 607$ custody evaluators from across the United States. Factorial vignettes were used to quantitatively examine evaluators’ assessment in hypothetical cases of coercively controlling *versus* mutual violence occurring in the context of a high conflict relationship. Results showed that most evaluators recommended joint custody regardless of the type of violence. Given that custody evaluators’ recommendations can have a large impact on judges’ final decision, this finding was “troubling given the greater risks associated with coercively controlling violence and the higher likelihood of that this type of violence will continue even after separation and divorce” ([70], pp. 963–64).

Davis, *et al.* [67] undertook statistical analyses of case files ($n = 69$) and interviews with evaluators ($n = 15$) to explore “outcomes of custody and visitation disputes when there is a history of domestic violence by examining the knowledge and beliefs about domestic violence that custody evaluators bring to their court-ordered task, how they investigate allegations, and how their recommendations influence court orders” ([67], p. ii). Whilst the conclusions and recommendations in the custody evaluators’ report had a determining influence on court outcomes, evidence of extreme domestic violence was not predictive ([67], p. 85).

The primary influence on the evaluators’ conclusions and recommendations and thus final court outcomes, was their assessment of the risk around on-going serious domestic violence. However, these risk assessments were predicated on evaluator knowledge of domestic violence, namely, whether or not it was understood as being an issue of power and control. Few evaluators understood domestic violence as coercive control. Most either saw it as mutual conflict, explained it as a problem of perpetrators’ poor impulse control/anger management or as a result of victim provocation. As a result,

most evaluations then went on to recommend custody and visitation arrangements that would not protect the mother and children from further abuse ([67], pp. vii, 85).

The reconstitution of coercive control in terms of victim blaming and claims of mutual conflict derives from the family systems/interaction approach to domestic violence ([31], p. 11). From this perspective domestic violence is seen as resulting from reciprocal interactions within the family ([61], p. 95). Violence within this context must therefore be analysed from “the perspective of family relationships, without there being a clear victim and perpetrator” ([31], p. 11). This blatantly contrasts with what is understood about coercively controlling violence and when utilised by custody evaluators it can put women and children at critical risk of harm ([61], p. 95).

Complementing the work of Davis *et al.* [67], Haselschwerdt *et al.* [69] conducted interviews with evaluators ($n = 23$) to determine more about their perspectives and the influence of this on their recommendations in cases of domestic violence. They found that custody evaluators tended to come from either one of the two perspectives (*i.e.*, family systems/interaction or coercive control) and that the theoretical approach taken aligned with beliefs about the relevance of domestic violence to custody decisions, the credibility of victim allegations and ultimately their recommendations to the court ([69], p. 1704).

The dominant discourse of evaluators ($n = 14$) expressing a family systems/interaction approach was that of domestic violence being stress induced, normative, mutual, the result of a “conflict” in the relationship and thus likely to end after separation. While acknowledging that coercively controlling violence did exist, they considered it to be rare in family court proceedings. Rather it was something that happened “out there” amongst a minority of particularly “violent, evil, and horrible people” ([69], p. 1708). Indeed, when faced with a scenario of coercive control, they appeared unable to recognise it and simply relabelled it as “conflict”. As such, it did not factor into their evaluations.

This group of evaluators did not believe that spousal abuse was relevant to child custody, largely viewing a father’s relationship with his partner as separate from his relationship with his children, all but one failed to acknowledge that perpetrators of domestic violence might lack positive parental skills and all implied that the abuser was able to co-parent “independently from the domestic violence” ([69], p. 1709). However, concern was expressed about the “emotional volatility of the victimized parent”, which called into question the parental capacity of abused mothers. In addition, all expressed “concerns about mothers making false or exaggerated domestic violence allegations—which were ‘common and purposeful’” ([69], p. 1709). This issue raised further apprehension around victims’ parental capacity and ability to co-parent effectively with the father. The resulting recommendations made to the courts prioritised co-parenting and the father/child relationship with little mention of safety concerns where domestic violence was alleged ([69], p. 1712).

Evaluators ($n = 9$) who utilised coercive control to understand domestic violence all stressed that “power and control by male partners” was “central to the dynamics of domestic violence in the majority of their cases” ([69], p. 1704). For these evaluators, identifying coercive control was crucial because it was highly relevant to child custody. They expressed concern about the ability of coercively controlling fathers to be good parents, the negative effects on children from living with domestic violence and the potential for concurrent direct child abuse to occur. They also asserted the view that false allegations in the context of custody disputes were rare amongst mothers, but estimated that over 50% of men falsely claim to be victims of domestic violence. Domestic violence was more “downplayed or underreported” by victims than “falsely alleged”. While they “considered ongoing father-child contact to be important for children, they prioritised victim safety” in cases of coercive control, recommending, for example, supervised visitation and exchanges. Joint custody or overnight visits with perpetrators were also discouraged ([69], pp. 1705–6).

The small sample sizes in Davis *et al.* [67] and Haselschwerdt *et al.* [69] research could lend itself to criticism; however, both analyses are corroborated by the results of a large scale quantitative study conducted by Saunders *et al.* [56,66]. Here a survey of $n = 465$ custody evaluators was undertaken to ascertain what factors were associated with their recommendations. It was found that belief in false

allegations of domestic violence was significantly related to other beliefs about this type of abuse and custody/visitation including that: (1) mothers alienate their children from the other parent; (2) mothers harm the children if they do not co-parent with the perpetrator; and (3) domestic violence is not important to consider in custody and visitation decisions. Arguably, these sets of beliefs are likely to come from evaluators taking a family systems approach. In contrast, evaluators who said they would explore hypotheses about coercive-controlling behaviour and the mental health consequences of living with this type of violence were more likely to believe that: (1) domestic violence is important in custody decisions; (2) mothers do not make false allegations; and (3) refusing to co-parent does not harm the child. Further, believing in false allegations of domestic violence was related to recommendations for custody/visitation arrangements that would increase abuser-child contact. In fact, the biggest predictor of custodial/visitation recommendations was beliefs held by evaluators about domestic violence. Those holding what presented as a family systems view were, for example, more likely to recommend abusive fathers have custody of their children ([66], pp. 479–80).

Finally, in Pence *et al.* [24] examination of domestic violence related custody reports and case files ($n = 18$), it was observed that evaluators did not “consistently describe or explain the nature and context of the violence occurring”. Instead, in the reports examined, evaluators “did just the opposite”—they obscured, discounted or explained the domestic violence away ([24], pp. 5–6). This silencing of domestic violence in evaluators’ reports came about as the result of one or more of the following:

- (1) Only mentioning domestic violence in a cursory way and/or limiting consideration to “one or two discrete incidents”. In this instance, violence was presented as an isolated event, without explaining what happened or considering whether or not it might form part of a larger pattern of coercive control. This approach fails to “explicate for the court how the domestic violence might affect”: (a) current and future health of children and the abused parent; (b) safety and wellbeing of children and the abused parent; (c) the parenting capacities of the parties, and (d) the ability of the parents to successfully share parenting responsibilities ([24], pp. 7–8).
- (2) Concentration on physical violence alone—The custody evaluation reports examined often focussed exclusively on physical violence without consideration of other features and characteristics of domestic violence, such as coercive control ([24], p. 8).
- (3) Subjective weighting of information—Another “reoccurring issue was the widespread practice among evaluators of deciding what ‘counts’ when it comes to domestic violence, without a thorough exploration of the circumstances and without regard to established research on risk factors associated with abuse” ([24], p. 9). Information was discounted, for example, from children’s long term therapists, and evaluators failed to explain how different sources and types of information were considered and weighed in formulating their opinions ([24], p. 10).
- (4) Violence was frequently “subsumed under alternative frameworks” including being: (a) described as “high conflict”, being “packaged up as a ‘communication problem or a case of mutual parental conflict’”; or (b) hidden when evaluators subsumed it under a mental health framework—there were several cases where the child and victim parent’s reaction to domestic violence was framed as evidence of mental illness or pathology without apparent justification or consideration of alternative explanations (*i.e.*, an indication of trauma resulting from victimisation). There was also evidence that evaluators administered psychological tests that were not designed to detect domestic violence or identify its impact on family members with results then being used to make future predictions about the parents; and (c) references to parental alienation by the victim of domestic violence were used to “explain away” domestic violence with some evaluators “quick to assume that a child’s attachments and/or aversions towards one parent were the product of manipulation, suggestion, or contempt by the adult victim” ([24], pp. 15–16).
- (5) Assumptions treated as fact—it was observed that, for example, “the nature and context of domestic violence was also hidden when evaluators’ assumptions and isolated observations stood in for the actual facts of the case. It was not uncommon for an evaluator to treat an

inference, observation or opinion as a factual finding and then draw a conclusion that did not represent what was actually going on" ([24], p. 19).

- (6) There was little evidence in the reports examined of any connection between the dynamics of domestic violence and parental or co-parenting capacity. Not once was an assessment made about how the experience of domestic violence impacts either the victim or offender's capacity to parent, either individually or together as co-parents ([24], p. 20).
- (7) The impact on children of living with domestic violence was rarely discussed. In fact, when it was raised the evaluators noted, "in a conclusory fashion, that the violence simply had not impacted on the children" ([24], p. 20).
- (8) Domestic violence was frequently constructed as being "a thing of the past" and something that adult victims and their children just needed to "get over" and "move past" ([24], pp. 26–27).

Unsurprisingly, given the ways in which domestic violence was obscured, discounted or explained away in the evaluations analysed by Pence *et al.* ([24], p. 30), the authors report recommendations being made by the courts that "seemed to bear little or no relationship to the problems that domestic violence created for children and their abused parents". Rather, "evaluators' recommendations seemed more tied to their own wishful thinking about the future than to the present realities of domestic violence." This was despite the fact that the violence reported in the case files involved ongoing coercively controlling violence.

Thus, evaluator misconceptions about domestic violence and the use of gendered stereotypes can place children at further risk of harm through consequent recommendations for perpetrators to have significant contact with their children. In the process, adult victims can also be exposed to further domestic violence. Evaluator misconceptions have been attributed to a lack of specialised domestic violence training around coercive control and pro forma regarding the methods and sources of information that should be gathered during evaluations [38]. Haselschwerdt *et al.* [69], for example, found that evaluators who utilised coercive control to understand domestic violence reported extensive domestic violence training and education. In contrast, those employing family systems theory reported little domestic violence training (*i.e.*, 1–3 seminars to no formal training in the past 5 years). Similar results around domestic violence misconceptions and training were also found by Saunders *et al.* ([66], p. 480).

It has also been argued that many evaluators over-rely on limited information sources to make assessments, *e.g.*, only interviewing the parents and children for short periods of time, failing to consult with extended family, teachers, psychologists, child protection workers, police and others involved in the children's lives [56]. Research by Bow and Boxer ([71], p. 1394), however, calls into question this claim as well as the lack of training arguments. Here results from a survey of ($n = 115$) custody evaluators revealed adequate training and the use of multiple sources of data collection. Yet, in spite of this, "robust, specialized domestic violence instruments, tests, and questionnaires were underutilized" ([71], p. 1400).

Bow and Boxer's [71] research is now over a decade old and was conducted prior to the mainstream conceptualisation of domestic violence as coercive control. Further, the level of information gathered lacked the nuance of more recent studies. For example, Bow and Boxer's ([71], p. 1400) claim that training was adequate was premised on the fact that evaluators, on average, over an undisclosed period of time, attended four seminars (median) and read a median of 18 articles/books. They did not consider the content of this training or explore the relationship between training, beliefs and recommendations. Indeed, a large proportion of evaluators still said that they would make recommendations for children to have extensive contact (*i.e.*, sole or joint custody) with perpetrators in cases where the violence was not considered mutual ([71], p. 1403).

Research exploring victim's experiences provides additional insight into the report writing process and its impact on adult victims and their children. To date two studies, one undertaken in the United Kingdom and the other in the United States, included interviews with female victims of coercively controlling violence [43,56]. The results of this research mirror those reported in studies of evaluators.

In the United Kingdom, “expert” reports play a vital role in ensuring outcomes that are safe for adults and children in British family law proceedings. After conducting $n = 34$ in-depth interviews with women who were victims of domestic violence, Coy *et al.* ([43], pp. 54–60) reported a generally negative perception of the report writing process and recommendations resulting in potentially risky outcomes for women and their children. All the women interviewed wanted their child(ren) to have contact with fathers and develop/maintain a strong relationship with them. However, these women also wanted assurances that both they and their children would be physically and emotionally safe. Nevertheless, the “expert” reports frequently failed to reflect these concerns. This situation had resulted from the inadequate amount of time report writers spent with the women and their children. The outcome as perceived by the women interviewed were recommendations that put adult and child victims at further risk of harm. More specifically, concerns were expressed that report writers: (1) minimised ex-partners’ violence; (2) down-played the impacts of living with domestic violence on children; (3) separated men’s violence from their fathering; (4) prioritised contact between domestically violent men and their children with subsequent inadequate attention to the consequential harms and risks; (5) paid inadequate attention to women’s on-going needs for safety and welfare; (6) failed to understand the impact of victimisation on women’s parenting; and (7) appeared to be convinced by abusive men’s accounts despite the fact that domestic violence perpetrators are highly skilled manipulators.

Similar issues with the custodial evaluation process and outcomes were noted by $n = 24$ women interviewed by Saunders *et al.* ([56], pp. 102–9) in the United States. Three themes related to negative outcomes resulting from inadequate custody evaluation reports emerged from victims’ interviews: (1) domestic violence was ignored or minimised in custody evaluations and thus subsequent decisions; (2) there was an overreliance on maternal mental health issues to assess survivors credibility and parenting capacity; and (3) negative child custody outcomes were attributed in part to limitations in the custody evaluation process, *i.e.*, the process was one-sided and incomplete because it relied on limited sources of information.

5. Summary and Discussion

Despite what is now known about coercively controlling violence, the negative impacts on children of living with it, the questionable parenting capacities of abusers, and legislative change suggesting that the best interests of the child are dependent on protecting them from this type of abuse, research from Australia, Ireland, the United Kingdom and United States, suggest that the family law system is likely failing children and adult victims of domestic violence.

Judicial determination of children’s best interests appear weighted more toward the parental rights of abusers than the safety of children. The inconsequentiality of domestic violence to judicial determinations of children’s best interests appears to stem from normative assumptions around gender and a poor understanding of coercive control. However, judicial officers are not experts in domestic violence and they can only make decisions based on the evidence before them. Given its private nature, corroborating domestic violence can be difficult. Fortunately or perhaps unfortunately, independent assessments of domestic violence can be provided to the court by “expert” family assessors.

Research and commentary suggest that judicial officers are likely influenced by the assessments and recommendations made by these “experts” [32,57,61,67,70]. Of deep concern is the emerging body of research outlined in this paper that calls into serious question the apparent expertise of these “experts” when it comes to understanding the nature of coercively controlling violence. It would seem that many of the views held by the judiciary with regard to domestic violence are reflected in the assessments and subsequent recommendations made by these “experts”. Here, maintaining abusive fathers’ relationships with their children are the primary consideration in determinations of a child’s best interests. Achieving this often in the face of overwhelming evidence to the contrary, the judiciary and the “expert” report writers need to make coercively controlling abuse and intimidation “disappear”. Coercive control is thus ignored or minimised, re-constructed as inconsequential (e.g., impacts and risks are ignored), re-constituted as something else (e.g., mutual violence) and subsumed under

alternative gendered narratives that call into question women's credibility but not men's (e.g., women manipulate and lie, men are to be taken at face value).

In the United States, Retired Justice of the New York Supreme Court, Marjory Fields ([61], p. 94), expresses concern with regards to the extant research showing that judges base their orders on the recommendations of custody evaluations. She notes, these "recommendations determine the extent and conditions of visits by fathers who were abusive to the mothers of their children. Thus, the safety of...victims and their children can be compromised by evaluators who recommend custody or unsupervised visits for...offenders...[and] there is an assumption among evaluators working with the courts that visits are to be allowed under all circumstances...of course, the judges are responsible for their decisions and improper delegation of their decisions to evaluators. Evaluators, however, must take responsibility for contributing to judicial misconceptions that [domestic violence] presents no risk of harm to children...this misconception is the reason for...dangerous orders [being put in place]".

Perhaps the first step, therefore, is to provide both judicial officers and court appointed "experts" with the understanding needed to more fully understand the significance of domestic violence to a child's best interests. Studies from the United States suggest that evaluator misconceptions around domestic violence are the likely consequence of inadequate training. Indeed, when evaluators receive training and have an understanding of coercive control, more thorough assessments are undertaken and they are less likely to possess erroneous beliefs about women and domestic violence and more likely to recommend parenting plans that reduce the risk of further harm to adult victims and their children [56].

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