Implications for family dispute resolution practice: Response from Relationships Australia (Victoria) to the Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings report

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Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings illustrates how prevalent family violence allegations are in court proceedings. It is argued that the family dispute resolution (FDR) sector is also experiencing increased family violence presentations, and that many family-violence-affected clients are now passing through FDR services on their way to the court system. It is therefore critical that FDR services and practitioners deliver high-quality assessment, referral and, where appropriate, dispute resolution services to this client group. It is concerning that the court outcomes are not responsive to cases where family violence allegations are not corroborated. In some cases, the non-adversarial and confidential nature of FDR may be better equipped to elicit acknowledgement of family violence and produce appropriately modified and safe outcomes. This will require FDR practitioners to be more advisory, less neutral and, at times, to take responsibility for the safety of outcomes. For the majority of cases where the court processes are the more appropriate arena to determine outcomes, the courts need to be equipped to properly respond to family violence allegations. This may require the forensic capacity of the courts to be enhanced and/or for a number of existing initiatives to be expanded and resourced.

A family dispute resolution

As stated in the report, family-violence-affected cases, or at least cases in which violence has been alleged, have come to be recognised as core business of the courts. This trend towards an increasing proportion of family-violence-affected cases is also being reflected within the community FDR sector. Clearly there are likely to be differences in the types and severity of family violence presenting to the community-based FDR sector and to the courts; however both, I would argue, are experiencing a concurrent increase. Clinical experience across a variety of service providers within the sector (as discussed in clinical forums) is clearly indicating an increasing proportion of clients presenting who are affected by family violence (Bickerdike, 2006). While this trend may be evident to practitioners (practice-based evidence), it must be acknowledged there is no independent research (evidence-based practice) that can conclusively confirm this shifting client base. While it is clear that the field has become more sensitive to detecting family violence (discussed below), it is proposed by the present author (FDR clinical supervisor across 10 FDR sites, including four Family Relationship Centres (FRCs)) that there is also a proportionate increase in family-violence-affected presentations. While perhaps not core business, family violence has certainly become common business within FDR services.

This proposed shift towards an increasing prevalence of family violence presentations to FDR is due to a number of related historical and contemporary factors. Firstly, however, it must be understood that FDR services have for many years been dealing with cases affected by family violence. There has been a prevailing myth in the wider community that FDR (or family mediation as it was known) screened out family violence cases. In reality, FDR has always provided services to clients affected by family violence (Gribben, 1994). In 1996 Keys Young’s research identified that almost three-quarters of a sample of 101 women reported that they had experienced some type of violence during their relationship (Keys Young, 1996). Unfortunately, practitioners only reported family violence in a third of cases, a disturbing finding that galvanised the FDR sector to improve its screening and assessment for family violence.
Since that time the practice of FDR has also improved its capacity to provide specialist FDR services to family-violence-affected clients (Bickerdike, 2005; Cleak, Bickerdike, & Moloney, 2006).

At the time of the Keys Young report, community-based FDR was voluntary and, in most cases, fee-based. As a consequence, many family-violence-affected clients chose not to present for FDR and/or encountered professionals who were reluctant to refer them to FDR (Cleak et al., 2006). In recent years FDR has been at first promoted, then encour-aged and now mandated for many disputing separating parents. From July 2007, all separating parents wishing to issue new proceedings in court must first attempt FDR. While there are exceptions to this rule, particularly in cases where there has been family violence, it is reasonable to assume that the expected increase in usage of FDR services by separating parents will also include a concurrent increase in presentations by clients affected by family violence. This is because FDR is increasingly available to all clients (whether they wish to proceed to court or not) and because these expanded FDR services are now free of charge and, most importantly, because the significant government-funded information programs have made both the nature and availability of FDR widely known in the community. Only time will tell whether there will be a continuing proportionate increase in family violence-affected presentations to community-based FDR.

Quality assurance and FDR

The FDR sector, and in particular the Australia-wide network of 65 FRCs, is regarded as the gateway into the family law system, including the court system. Despite a large community education campaign, many separating clients may remain under the impression that FDR is compulsory for all, not just for those who might want to proceed to court. Similarly, family-violence-affected clients may not be aware that they could be exempt from attending FDR. As a consequence, many of the cases that do end up in court are likely to pass through the community FDR system first. It is critical that the expanded FDR services are able to assess and screen for family violence, make quality decisions about the appropriateness of FDR, and provide timely and effective referrals to the courts and other support services for those cases deemed inappropriate. Most importantly, FDR services need to provide safe and effective processes to those affected by family violence but judged as capable of being assisted by FDR.

Considerable effort has gone into developing comprehensive tools for risk assessment, particularly in the new FRC services, to ensure that appropriate policies and procedures are implemented and adhered to. For example, a comprehensive screening and assessment framework has been developed and is compulsory under the operational guidelines of all FRCs (Attorney-General’s Department, 2006b). The FDR services offered in other approved organisations through the Family Relationships Services Program (FRSP) are also subject to a comprehensive performance framework that is designed to ensure that services adhere to quality standards of practice, including appropriate screening and assessment, supervision, professional development and ongoing training (Department of Family and Community Services and Indigenous Affairs, 2005). Despite these checks and balances, the rapid expansion of the FDR services will place enormous stress on the community sector to maintain quality standards. Although the appropriate tools for assessment and screening are available for all, they will need to be delivered by competent and skilled practitioners with appropriate training and supervision.

While these conditions will present challenges for the nationwide network of approved community providers of FDR (FRCs and FRSPs), it is not clear how these standards will be maintained in the private sector. Private FDR practitioners can now register themselves to be approved to provide FDR and issue certificates that a court will accept as evidence that FDR has been attempted (or indeed that someone has failed to attempt FDR). There are many highly skilled and experienced practitioners working privately. However private practitioners can currently be accredited under the old Family Law Regulations, which do not necessarily require any specific training in screening, assessment and/or family violence. Nor do they require any form of ongoing supervision of casework. A new competency framework is under development for all FDR practitioners and is planned to be introduced in 2009, but at this time it is not clear (at least to the current writer) how easy it will be for currently accredited private practitioners to be ‘grandparented’ once the new standards are adopted. If competencies around assessment of family violence are compulsory, as well as other important FDR competencies, then these concerns could be relieved. However, in the meantime one would hope that family-violence-affected clients will choose, or be referred to, approved organisations that are more likely to be equipped to deal with these issues.

Responsive outcomes

The most concerning finding of the report is the degree to which family violence allegations influence outcomes. Allegations of spousal violence and child abuse frequently lacked supportive evidence and specificity. In those cases where there is corroborative evidence, specificity and/or admissions, the parenting arrangements appear to take concerns about safety and wellbeing into account (for example supervised and limited contact). However, the outcomes of cases without such evidence or specificity were similar to cases in which there were no allegations. That is, the outcomes were not responsive to family violence allegations. If it is
assumed that most allegations are false, then this is of no concern. If it is assumed that some or the majority of allegations have partial or significant validity, particularly those with concurrent allegations of child abuse, then this finding is of considerable concern. Unfortunately, as the report itself outlines, research suggests that false allegations are relatively uncommon. If so, it is probable that some outcomes are putting parents and children at risk.

Recent Australian research into the long-term outcomes of 134 survivors of family violence demonstrates the detrimental effects of inappropriate contact arrangements (Evans, 2007). The participants in this study had left an abusive relationship at least 12 months prior – most for considerably longer (mean 10.6 years). The majority of participants (all mothers) reported ongoing abuse and control by the perpetrator that was exercised through contact arrangements with children. “As a result, the majority of participants in this study felt that ongoing contact was inappropriate, and often dangerous. Nevertheless, the women indicated that ideally they would prefer contact to continue, but only if safeguards, such as supervision and compulsory parenting courses, were put in place to ensure emotional and physical safety for all concerned” (p. 35).

**The issue is whether the courts are able to properly identify cases that are affected by family violence, so that they can respond appropriately and design safe outcomes.**

The study recommends that the courts develop protocols and practices to ensure the safety and quality of contact arrangements in cases where abuse is identified. These cases are reflective of outcomes that may have been determined many years ago, and it is arguable that court processes are now much better equipped to deliver safe outcomes in such circumstances. The issue is whether the courts are able to properly identify cases that are affected by family violence, so that they can respond appropriately and design safe outcomes.

The apparent absence of outcome responsiveness to family violence allegations in the courts is likely to be of concern to FDR practitioners. When family-violence-affected clients are assessed as inappropriate for FDR, practitioners need to feel confident they will be handled effectively by the legal processes. If the FDR sector is to experience increasing presentations of family-violence-affected cases, it is critical that there is a viable alternative referral system for resolving parenting disputes. Practitioners must not feel compelled to undertake FDR with clients who need a legal intervention simply because the courts are unable to provide a proper forensic assessment of family violence allegations. Both those who claim family violence allegations are false, and those who claim denials are more likely to be false, should be in support of the courts being able to examine the veracity of these allegations and denials. The courts need to be properly resourced to work in conjunction with state police, state courts and other relevant agencies to ensure the forensic examination of all cases where family violence is alleged.

A number of key objectives are identified in the report, The Family Law Violence Strategy (FLVS) (Attorney-General’s Department, 2006a). These include:

**Objective 1:** To gain a better understanding of how family violence and child abuse issues arise in family law proceedings and how these issues are dealt with (p. 2);

**Objective 2:** To work collaboratively with the States and Territories to ensure that family violence and child abuse allegations are properly investigated once they arise in family law proceedings (p. 7); and

**Objective 4:** Work with courts to improve processes for dealing with cases where allegations of family violence and child abuse are raised (p. 9).

The first objective would appear to have been well dealt with by the Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings report itself. The latter two objectives require urgent attention. The FLVS outlines a number of possible responses, including expanding a number of existing specialist court programs including Project Magellan (Brown, 2003) in the Family Court of Australia and the Columbus Project in the Family Court of Western Australia (Murphy & Pike, 2003). Mention is also made of the screening pilot in the Brisbane Registry and the ‘Child Responsive Model’ first piloted in the Melbourne Registry. Another promising proposal suggests expanding the scope of Family Reports to “explore the allegations of both parents in the context of the overall dynamics of their relationship and separation issues” (p. 9). All of these initiatives have the potential to improve court responses to family violence allegations if appropriately resourced and evaluated.

**FDR as an alternative to litigation**

Some cases included in this report may have achieved safer outcomes had confidential FDR been attempted before litigation. FDR processes may be better equipped to produce appropriate outcomes where there is no likelihood of corroborating evidence or admissions. Of course, the absence of evidence or admissions is not a criterion for deciding FDR is appropriate. That must only be determined via a careful assessment of safety, willingness and capacity, and it is likely that the majority of cases that were included in the report would have been assessed as inappropriate for FDR.
However, when such an assessment concludes FDR is appropriate, the FDR process itself may be better equipped to produce safe outcomes. In confidential FDR there is potential for parents to accept the invitation to take into account past family violence experiences when formulating a parenting plan. Since the report, the Family Court has changed its model such that all counselling and mediation carried out by the Court’s Family Consultants is reportable. The confidential or privileged counselling (mediation, conciliation, FDR) must be done outside the court (unless specifically ordered otherwise). While this change has brought about some significant benefits, including clarifying for clients the role and function of court processes, it has removed the possibility of clients discussing issues around family violence without those discussions being available to the court processes.

**Allegation versus disclosure**

Supporters of the adversarial process for these cases would argue that the level of conflict and bitterness between parties makes any cooperative decision-making impossible. Parties are caught up in battles about the time children are to spend with each parent and this conflict overwhelms any capacity to engage in constructive conversations about the wellbeing of the children. This may indeed be true for the most entrenched cases; however, it is likely that for some the adversarial experience has itself caused or at least amplified the antagonism between parties.

It is interesting to contrast the language of family violence in the courts and the FDR sector. In the courts, family violence is ‘alleged’ and can result in an ‘admission’, a denial and/or a counter-allegation by the other party. In FDR, family violence is ‘disclosed’, not alleged, and the other party may ‘acknowledge’, minimise or indeed deny. Obviously the language is shaped by the dispute context. Litigation is an adversarial process concerned with competitive arguments about the truth. Parties find themselves engaged in a combative process where moves are orchestrated for strategic effect. In this context, what is the benefit of making an admission of family violence if there is no corroborating evidence? If there are issues of shame and retribution there would seem minimal incentive for making a public declaration of guilt or responsibility.

FDR, in contrast, is a facilitated conversation designed to elicit both disclosure and acknowledgement of family violence. In FDR, practitioners are deliberately trying to elicit disclosure in order to inform decisions about the appropriateness of the process. FDR is for the most part confidential and privileged (with the exception of child abuse and safety issues) and thus clients can discuss events without fear of initiating some strategic disadvantage. This is a much more fertile ground for an informed discussion about the nature and impact of family violence. Most crucially, it is a more productive ground for a discussion about how a family violence incident or history needs to have an influence on the outcome. It may be surprising to those immersed in the legal system to hear how willing clients are to incorporate concerns about safety into a parenting plan. If there has been an incident where a party has been physically threatened and intimidated it can be discussed in FDR. One client may argue that the description ignores the degree of mutuality of the event but is still able to hear that it has had an effect upon the other and the need for that to be taken into account in the outcome. The practitioner can then be tailored to ensure the frequency and context of changeovers takes into account the impact of past family violence.

If such a case ended up in litigation, it may well become caught up in an allegation and denial cycle for which there is no corroborating evidence and hence take no account of the risk in the outcomes.

Of course, it may well be that such a case does not end up in FDR because the practitioner judges that the incident has made the recipient incapable of participating due to concerns about safety or trauma. On the other hand, a comprehensive assessment by an experienced practitioner, taking into account safety, capacity and willingness of each party, may conclude that a specialised FDR process is viable. Such a specialist service could include co-mediation, short multiple sessions, shuttle FDR (where the parties never meet or even attend on the same day), supportive coaching, legal representation in or between sessions, and safety planning. In these circumstances, family-violence-affected clients may benefit from FDR and reach outcomes that are more likely to be attuned to the needs of parents and children and take into account the carefully elicited ‘disclosure’ and ‘acknowledgement’ of past family violence.

**Acknowledgement of violence**

The capacity for FDR outcomes to be influenced by family violence presupposes both disclosure and acknowledgement. Critics of FDR are concerned that practitioners may not always be able to elicit disclosure and therefore will (a) incorrectly assess a couple as appropriate for FDR; and (b) fail to recognise the need to incorporate issues of safety and risk into the outcomes. Thus, quality screening and assessment is critical to ensure disclosure. For FDR practitioners to be able to ensure outcomes are influenced by family violence, there must also be acknowledgement. The degree of acknowledgement is particularly problematic. It is easy for policymakers, academics or other professionals to espouse crystal clear positions in regard to the requirement of acknowledgement of family violence.
violence, but for the practitioners who put themselves in the middle of parental disputes on a daily basis, the world frequently takes on a distinctly grey hue. Many couples will disagree on the seriousness, impact and mutuality of family violence. The FDR practitioner’s position cannot be neutral in this discussion. All family violence is serious and the impact is always of significant concern. In the end it is a matter of clinical judgement as to whether the acknowledgement of the violence is sufficient to allow for FDR to proceed and to allow for safe and appropriate outcomes. It needs to be remembered that acknowledgement is not an end in itself. FDR is not primarily concerned with restorative justice, nor is it designed to be a therapeutic process whereby one client is able to finally explain to the other the pain and suffering they have experienced due to the other’s behaviours. Clients are usually referred to other specialist services to deal with these issues. FDR is concerned with providing parents with a safe and effective environment for them to make decision about the future parenting of their children that is in their children’s best interests (and where possible made with direct consultation with the children). Acknowledgement of violence is a necessary means to that end.

**Practitioner neutrality**

If FDR is to provide effective services to family-violence-affected clients, the practitioners cannot be ‘neutral’ in the traditional sense. A practitioner must take an interest in, and perhaps hold some responsibility for, the quality and safety of outcomes. In FDR a practitioner carefully searches for the presence of all types of family violence and, if disclosed, takes both the description and perceived impact by the recipient as real. The subjective (not objective) experience of the recipient is the primary criterion that determines the course of action. The practitioner then looks to the other party (in a separate session) for acknowledgement of the violence. Can a practitioner remain neutral while deciding whether the degree of acknowledgement is sufficient to allow for FDR to proceed, while exercising some responsibility for the safety and quality of the outcome? I suggest not. It is true that practitioners have always seen their role as testing the viability of proposed outcomes. But this has usually involved a ‘What if?’ line of questioning to ensure clients are making informed decisions about their future. What if a parent is late for a changeover? What if a child becomes ill? In this type of questioning a practitioner usually takes a position of curiosity rather than advocacy. However if, for example, a practitioner feels that a couple is likely to be in conflict in front of their children when they meet in private to effect a changeover, should she or he suggest, advise, advocate for or insist upon a public or supervised changeover? A skilled practitioner will encourage the parents to consider the consequences of their proposed outcomes. If parents are unable to accept the risks to their children, then most practitioners would feel comfortable advocating for the children, to produce an outcome that is in the best interests of children. Partiality is easier to argue when it is framed as advocating for children.

It is more difficult to consider the responsibilities of a practitioner when the proposed outcome may put one parent at risk (for example, at changeover). If the process has been properly carried out, the ‘at-risk’ client would be assessed as being able to represent herself (or if not, an advocate or support person would have been involved in the process in some way). The conditions be set up to allow for a safe discussion (perhaps shuttle or co-mediation, with separate waiting rooms and exits) and there would be an acknowledgement of the family violence sufficient to allow for a discussion of the consequences of any proposed outcomes (Will it be safe? Is there any risk of a repeat incident?). However, it may be the practitioner who needs to initiate and sustain these discussions. Not all practitioners will be comfortable with taking such an active stance. Furthermore, what happens if the outcome is regarded as unsafe by the practitioner, despite efforts to influence that outcome? In property mediation, some mediators refuse to write up an agreement they consider to be too one sided (particularly if the disadvantaged party refuses to take legal advice). Should an FDR practitioner decline to assist in writing up a parenting plan that would put a parent or children at risk? When all else fails, an ethical practitioner with duty of care concerns may well feel the need to be less facilitative and more advisory in order to promote safe outcomes.

**Definitions of family violence**

The discussion in the report of the different types of family violence is of relevance to FDR practice. The typology approach is challenging for some because it can be used by those seeking to deny or minimise the very existence of gendered violence. If violence is categorised into types, there is concern that this implies a gradient of severity of violence, which in turn is interpreted as minimising or negating the impact of those judged by some to be at the less severe end of the spectrum. Emotional abuse can be just as debilitating and damaging as physical abuse. A single violent incident can be extremely dangerous. Mutual violence can be particularly dangerous and debilitating for the party who is weaker, and mutual violence is difficult to distinguish from aggressor–defender violence. For this reason, categorising violence is fraught with risk, as the type of violence does not identify the risk to the recipient. All categories of violence can be severe, and even apparently less severe violence can be highly traumatising if issues of control are involved.

FDR has always made distinctions around types of violence, but has largely done so in functional terms. The FDR practitioner is interested in the consequences of violence. Has there been violence in this relationship? If so, how recently, what transpired,
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what form did it take, how frequently, what was the affect on the client subject to the violence, were there other witnesses (particularly children), what are the current circumstances (e.g. separated under the one roof), is safety a current issue, and is there acknowledgement by the perpetrator? Questions about definition are only of interest if they can be employed to improve the assessment or to improve the proposed service. If the violence has been of the controlling terrorist type, characterised by deliberate and sustained control, intimidation and abuse by one parent, then an immediate referral to court and lawyers is appropriate (regardless of whether evidence or admission is likely). If, on the other hand, there has been emotional abuse issues in the past, where a parent has felt demeaned and constantly put down by the other over the years, but now feels able to speak freely with the support of third party in FDR (a welfare worker), and wishes to proceed with a suitably modified FDR process (two mediators, separate waiting rooms, separate arrival and departure times etc.), then FDR may take place. In this way, practitioners are constantly classifying the type, severity and effects of family violence. In FDR there are degrees of family violence – but the variance is made with reference to the FDR process rather than to some external objective criteria.

Conclusion

In the newly reformed family law system, family dispute resolution practitioners must ensure they have the capacity to properly assess and screen clients. This is a challenging objective in a rapidly expanding service system, particularly as part of that expansion includes a minimally regulated private sector.

The sector needs to maintain its focus on making sure the wrong people do not get into FDR, but not at the expense of neglecting what to do with the right people who do get into the process. This is particularly important if FDR is to fulfil its promise of being able to produce quality processes and outcomes for clients affected by family violence but capable of engaging in safe constructive decision-making about the future needs of their children.

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Endnotes

1. It is interesting to note that the Act has changed the definition of FDR from one facilitated by a neutral third party, to one facilitated by an ‘independent’ third party. It is also perhaps significant that FDR practitioners come under the category of ‘advisers’ in the Act – the same title given to family lawyers.

References


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