

A Presentation By

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Giving Children a Voice -
Empowering or Harmful?

Understanding the Needs of Children

The Family Law Context

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I have been asked to look at the implications of giving children more of a voice in legal proceedings directly involving them. I will focus on the area I know best – Family Court disputes over children. I aim only to scratch the surface and to hopefully raise issues which will remind us all of what a mine field we work in and how every child's situation needs to be considered individually and in context.

In children's matters involving Child Reps, children already have a say indirectly, through the Child's Representatives and report writers. But how far should we go in ensuring they are heard?

Currently, a special committee, convened by the Chief Justice, is looking at establishing Guidelines for Child's Representatives in the Family Court, with a view to their being one means of giving effect to Article 12 of the United Nations Convention on the Rights of the Child.

Article 12, states:

1. Parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and

administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This is reasonable isn't it? Robert Karolis doesn't think so. Who is Robert Karolis? He is a member of the Australian organization, The Constitutional Heritage Protection Society, and he states his views in a booklet entitled, "The Convention on the Rights of the Child – The Making of a Deception".

Karolis says that the claim that the Convention on the Rights of the Child is a treaty for the protection of children is "*a cynical misrepresentation of the facts*" and that it is actually designed to undermine and destroy all legitimate rights children have to the protection of parents and adults."

He goes on in more colourful style: "*Like the sleight of hand of the conjurer who leads us to think he holds an orange in his right hand when he really holds it in his left, we are being led to believe one thing is happening whilst, in reality , something quite different is being planned*".

"The destruction of childhood is happening right in front of our eyes. We are witnessing it, but because it is being induced within a web of deception we are failing to relate what we are witnessing to the deliberate destruction of childhood."

In a nutshell, the argument of Karolis and his ilk, rests on the belief that the adult champions of children's liberation, are cynically enlisting the support of genuine and caring individuals (like us and the Chief Justice, although I won't be suggesting this to him) in order to ultimately be able to exploit and abuse vulnerable children who are charged, as "mini-adults", with their own protection and representation.

I don't share this extreme view. However, I believe there are seeds of truth contained in it and that we have to be most vigilant that we do not, in a genuine attempt to ensure children are heard, give the already vulnerable, disadvantaged, and often abused, an even more onerous responsibility and burden to carry.

Needless to say, the Child Rep "Guidelines Committee" has an exceptionally difficult task, especially in relation to the two edged sword which is the issue of addressing children's undeniable right to be heard. I understand that they have received over 50 submissions commenting on their draft guidelines which were presented to interested stakeholders a few months ago.

Bearing in mind that "a special responsibility vests in the lawyer acting on behalf of a child in Family Law proceedings to promote the best interests of the child", some of the suggestions contained in the guidelines were:-

- The child should be involved in decision-making about the proceedings to the extent that is appropriate to the child in question.
- The Child's Representative must be aware that each child will have different emotional, cognitive and intellectual developmental levels.
- **I ask, "Who decides when it is appropriate for a child to be involved in the decision making and how?" If it is you, the lawyers, then you must decide if you are going to make these judgments as lawyers who like and act for kids, lawyers who happen to be experienced parents, lawyers who remember what it was like to be a kid, lawyers who also have degrees in social science or are you going to seek assistance from a so-called expert? If it's the latter, who's going to pay for it?**
- **Speaking as one such so-called expert, there is one child I know well and with whom I first became involved as the family report writer when he was two or three. Thereafter ensued an amazing saga of follow-up family reports, involvement of numerous other experts, allegations of sexual abuse which were unfounded in the eyes of the Family Court, and many experiences on my part of being rigorously cross-examined by a very persistent litigant in person who was also the father, and was dedicated to the cause of achieving contact with his child against the vehemently expressed wishes of an equally**

persistent mother. On one particularly memorable occasion I was in the witness box for a day and a half during a six week trial to consider access. That child is now seventeen and continues to see me. The father and he now have a relationship pursued by letter, e-mail, and most recently, telephone, which has taken years of work with the child, away from the gaze of the mother. However, father and son have not seen each other since the child was three or four. When he was about seven, I actually fought for him to have the right, which he was pleading for, to be relieved of having to deal with the conflict between his parents, as it was just too destructive to him. This child has had a good life, has grown up to be a wonderful, intelligent, well-educated, articulate and well socialized person. He is now reaching the stage where his independence allows him to risk the impact of his mother's probable displeasure, and we are working towards his having a real relationship with his father. He would insist that the decision which was made – that is, to allow no contact in person with his father – was the right one, for all sorts of reasons. Of course, we will never know what might have happened if this course of action had not been taken. Also, he was, as I argued at the time, an exceptional child. Normally, I would not advocate denying a child what we see as his inalienable right to contact with both parents during those

most important formative years, but this child convinced us that it was the conflict that he wanted to be relieved from and not necessarily the father per se.

- This case aside, it needs to be remembered that the issue of considering the child's wishes in decision making, is extremely complex. We must not forget their vulnerability to manipulation when we think they are expressing their own wishes. Taking children's stated wishes at face value is, in my experience, often foolish in the context of Family Court proceedings. Although sometimes they will express themselves freely and openly and without a sense of coercion, unfortunately this is usually not the case and I am often acutely aware of the presence in the room of other individuals – one or more of the parents, grandparents, aunts, uncles, friends or siblings – even when I am apparently speaking with the child alone.
- It is the right of the child to establish a direct professional relationship with his or her Child's Representative.
- The Child's Representative is not bound to act upon the wishes of a child. (However) even though the child is not a "client " in the usual sense of the term, the relationship between the lawyer and the child is to be treated and acted upon as a professional relationship.

- **Concepts and guidelines such as these are, of course, fraught with difficulty and obviously need to be defined carefully. For me, it is most concerning that children, and by association, Child's Representatives, could be at risk of becoming vehicles for unscrupulous or emotionally unstable parents or other interested parties, to enhance their cases. Far from giving the child a voice, in situations where a parent is deliberately alienating a child against the other parent, such a direct relationship between the child and his/her representative could serve to embroil the child even more in the proceedings.**
- **Unless there are exceptional circumstances, the Child's Representative should meet with the child as soon as possible**
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- **It seems to me that this is a very positive and workable goal, and that it is quite different from being in an ongoing professional relationship with the child, and certainly very different from taking instructions from the child. Although the guidelines do not suggest that the latter is what is envisaged, I would have to comment that in New South Wales there is a trend towards taking instructions from children in the Family Court in very much the same way as happens with adults.**
- **Even in situations where the child is merely being met and told what the role of the Child's Representative is, there are**

dangers. The most obvious one is the situation in which the child makes a disclosure to the Child's Representative. If there is nobody else present – such as a family report writer – then what does the lawyer do with that information? Does he or she then become a witness, pass the matter over to the Department of Families, or just bear it in mind, tell the report writer and hope that the child makes the same disclosure to the report writer?

- The Child's Representative must be aware that children are vulnerable to external pressures when involved in residence, specific issues and contact disputation.
- **A nasty case comes to mind. This was a case in which the father's new wife decided she would like to keep the two children, a dispute ensued and initially it was the mother who seemed to be the culprit. Before I became involved, whilst enjoying contact with her father, one of the children made allegations of the mother being abusive. She would actually quiver and curl up in a foetal position whenever brought into contact with her mother and it was only after a very courageous decision by Justice Bell which placed her into a transitional placement with a third party – one of her former teachers – that we were able to understand, through having her undergo therapy, that the father and his wife had been**

indoctrinating her with all sorts of fearful information. For instance, she even believed that when she came to see me for assessment, there were *cameras* in my ceiling which could film her every thought, the implication being that there could be dire consequences for her if she so much as thought something positive about her mother. We psychologists like to promote the myth that we can read minds, but this was ridiculous.

- The Child's Representative cannot guarantee the child a confidential relationship. In addition to explaining this limitation at the commencement of the relationship, it may be necessary to periodically remind the child. The Child's Representative should, however, strive to establish a relationship of trust and respect within this limitation.
- This is a tall order and it is something that report writers such as myself often struggle with. It is certainly my experience that far too often, I interview stressed and conflicted children. Frequently the relief on their faces is obvious when I tell them that their wishes are important and will be listened to and reported, but not necessarily followed. That is, that they are kids and so they are not expected to make really important decisions about what is best for them. Sometimes when given the opening they will say that they do not want to make the

decision or that they do not even want to discuss the relative benefits of being with each parent. Of course, the difficulty for report writers under these circumstances is that although we might be intuitively convinced that the child is telling us that the conflict is intolerable and that they want the decision made for them, they will rarely come right out and say this. Hence, under rigorous cross-examination, a firmly held professional opinion that the child is under duress and perhaps being alienated against one parent by the other, sometimes cannot be stated unequivocally or backed up with clear evidence which would withstand a challenge, because the child is too worried about the consequences of being frank.

- The Child's Representative must ensure that the child is aware that information provided by the child to the Child's Rep may have to be communicated to the Court, the child's parents or other persons or agencies. A strategy should be developed with the child as to the manner in which this is done in order to minimise the potential for any adverse reaction towards the child.
- The Child's Representative, in consultation with the Privileged Counsellor or Family Reporter, if any, should develop a strategy of disclosure with the child which minimises the potential for an adverse reaction towards the child.

- This is well and good and actually looks quite workable on paper. However, what about the situation in which I have found myself on a few occasions, whereby a child has reported negative behaviour suggesting the risk of abuse, and pleaded with me, "Please don't put this in the report. Please don't tell daddy/mummy". Often, there is no evidence of actual abuse. The Department of Families, quite rightly, is reluctant to become involved when the Family Court is involved, unless there is evidence of abuse, and a family report has to issue. Now with the new practice guidelines which aim to create greater efficiency in the court and certainly give report writers a "hurry up" and keep us to the task, there is no way that a report can be with-held until the last minute – certainly not before a trial in any case – and handed up to the judge with a comment by the Child's Representative that it contains sensitive material and that special measures might need to be taken to protect the child. For example, orders requiring the child to be brought into the precincts of the court so that measures can be taken to protect them during and after the proceedings. These are extremely difficult issues.

Just yesterday, I saw a little girl aged seven, who told me she had been awake all night dreading coming to my rooms because she would have to see her father, and she was frightened of him because she thought he

would be taking her away from her mother. She reported in great detail the various concerns that her mother had just reported to me. Whether or not there is validity to those concerns, this serves to demonstrate just how distressing it is for a young child to be burdened with these adult issues. In our well-intentioned efforts to protect their rights to self-expression, we must not forget to protect their rights to be children.

I refer now to a document which came to me by rather circuitous means. I am told that it actually dropped off the back of a truck belonging to the well-known magistrate and family lawyer, Barbara Tynan, and in this document there is a list of a child's rights:-

- A child has the right to love each parent without being subjected to the other parent's hurt or anger;
- A child has the right to develop an independent and meaningful relationship with each parent and to enjoy the uniqueness of each parent and each home;
- A child has the right to be free from involvement in parents' personal battles or being used as a spy, messenger or a bargaining chip;
- A child has the right to extended family relationships which include grandparents, aunts, uncles, cousins and others, and to appreciate the unique differences of each side of his/her

family, and not have these differences referred to as "better" or "worse".

- A child has the right to be free from questions about the other parent's private life.
- A child has the right to see his/her parents treat each other in a courteous and respectful manner.
- A child has the right to develop and maintain activities and friends without fear of losing time with a parent.

I think these are wonderful ideals, as is the ideal of the child's rights to freely express views – even in judicial proceedings. The issue for us is the inevitable tension which exists between these ideals. I would suggest that decisions need to be made on a case-by-case basis and that we need to enlist each others' assistance and counsel when we feel that we are out of our depth.

Finally, I would urge those of you who act for parties in Family Court litigation, as I assume most of you do from time to time, to be wary of the situation whereby your client brings along a child or children to sit in during their deliberations with you or, even worse, to tell you about their experiences with the parent from hell (that's the other one of course). They might even want you to prepare an affidavit stating their views. You need to be alert to the dangers of such behaviour and I would suggest that some timely advice to

your clients about the dim view taken by the court of inappropriate embroiling of children in proceedings, would be the way to go.