

POST SEPARATION PARENTING DISPUTES

We are living in changing times as far as marriage, relationships, separation and divorce are concerned. It has become so common as to be considered almost the norm for relationships to fail and for the children of those relationships to have to negotiate the many developmental tasks of childhood and adolescence in an unfamiliar environment they do not understand – whilst their parents are preoccupied with their own emotional issues and adjustment.

It is accepted in all well informed circles that – except in the most exceptional circumstances – children from separated families are more likely to become emotionally healthy and happy adults if able to maintain close attachments to both parents. We know that if children are denied contact with a parent or feel torn between loyalty and affection for each of their parents, they are likely to suffer negative emotional repercussions. Parents (and their lawyers) have an awesome responsibility to ensure that these innocents are damaged as little as possible by family breakdown.

I like the motto, *If we cannot make a success of our marriage let us at least make a success of our divorce...for the children's sake.* (Herbert, M., 1996)

Janet Johnston has further told us that, *A divorce can be considered successful if the parties are able to work through their anger, disappointment and loss in a timely manner and move on to establish new, separate lives that are free from the burdens of*

a failed relationship. (Johnston, J.R.;1998). This is where you and I come into the picture. It is our role to navigate for our clients and their children - through the distress and conflict following separation, towards closure and hopefully a fulfilling and harmonious life.

TRIGGERS OF POST SEPARATION PARENTING DISPUTES – SIGNS AND SOLUTIONS:

I do not propose to give you an exhaustive list of triggers – just some of those I commonly come across in the course of my work – with some anecdotal comments here and there.

- **There was a third party at the time of separation.** This is a common separation scenario and one of the most challenging for separating families. Feelings of betrayal and rejection are always difficult to handle and revenge can be a motive for disputing children's issues, anger disproportionate to the presenting issues being a danger sign. The opportunity to ventilate feelings in a non-judgmental environment, empathy and understanding from their lawyer, and gentle assistance to see the negative outcomes for their children of oppositional and obstructionist behaviour, are needed on the one hand. An injection of sensitivity – for example, "Don't send your girl/boyfriend to collect the children for contact " – would be excellent advice on the other.

- **The decision to separate was one sided.** If only one parent's grieving was done throughout the relationship then the other will be "out of sinc." in terms of the emotional work associated with detaching from the relationship. He /she might prefer **negative intimacy** to no intimacy at all and expressions of a wish to reconcile will often persist – sometimes for years. Separation counselling, time, and more of the abovementioned sensitive "lawyering" will all help. Making major life changing decisions when in the midst of dealing with grief and loss are not indicated, so this is one time when slowing down the process might be of more benefit than facilitating a speedy decision.
- **Claims of domestic violence** – whether genuine or vengeful, do not augur well for an amicable resolution. Even if the children have not been direct victims, they could well have been witnesses and thereby incidental victims. Protective parents will not be looking for ways to allow them to have ongoing relationships with the abusive parent – even if this is ultimately considered to be in their best interests. As we all know, fabrications and exaggerations are also possible when it comes to domestic violence. If one parent is angry enough to lie about the other being violent, then he or she is capable of lying about anything. If the parents' accounts are markedly different, you probably should consider applying for appointment of a Child's Representative who can obtain an expert's report as an early step towards unravelling the facts.
- **Personality disorder** can thwart even the most solution oriented lawyers. The classic intractable Family Law dispute involves one or more personality disordered parties – for example, narcissistic, paranoid, dependent or anti-social,

to name but a few. Such people have difficulty seeing the world through anybody's eyes but their own. To the narcissist, even severe physical abuse of their ex-partner might have been justifiable because the other in some way offended him/her. The paranoid person – as the name suggests – expects, sees, hears and therefore often receives, the worst. The dependent person can hang on to the ex-partner, refusing to give up the dream of the relationship – sometimes for years after it is clear to everyone else that there is no chance of reconciliation. As for those clients who have a lengthy criminal record, history of substance abuse, string of Domestic Violence Orders against their names and who threaten everybody including you – their lawyer – there is a good chance they have an anti-social personality disorder. Advice is difficult to give in relation to all of these people, other than to say that one should watch for obvious signs and be realistic about the degree of change of which they are capable.

- **Mental illness** creates difficulties for all concerned. If one parent is psychotic (for example, schizophrenic or bi-polar) their perception and conceptualization could be distorted. It is difficult to speak reason with someone who is not in touch with reality. Early signs are "strangeness", an odd, disconnected and tangential communication style and the relating of fantastic stories which conflict with your understanding of reality. Enquiry about the doctors they have seen in the past might be a first step. Depression can colour the past, present and future a hopeless shade of black and the account of the depressive can be believable because it is an honest account from that person's perspective, so you need to be careful to have depressed clients do some reality checking before embarking on protracted courses of litigation. The anxious client might well need a lot more

support and reassurance than others and will be at a distinct disadvantage during negotiation and litigation because of the power imbalance created by such a disorder. Care must be taken to ensure that decisions are not made on the basis of which party is thinking the clearest and is the least stressed when instructing their lawyer.

- **Intergenerational dysfunction** – for instance the sexually abusive family, the family which is into serial litigation, or the family that makes a habit of discarding in-laws, men, women, or perhaps just anyone who does not accept their family culture as the only way to live. When you take a history be open to this possibility. These families are quick to engage in what the term, "tribal warfare" (also used by Janet Johnston in her publications) depicts well. Such inter-familial conflict can escalate conflict enormously. Be suspicious of the client who attends with six of his/her extended family members and whose mother seems to want to care for the child/ren more than he/she does. An acquiescent client might need your skill in discerning manipulation and domination by an over-involved relative whose own agenda is inflaming the situation.
- **Drug and /or alcohol abuse** creates conflict and is one sign which should cause real concern for the child/ren. Denial is more common than admission. If both parents have a problem, there will often be concerned interveners such as grandparents. If accounts differ markedly, check the collateral information. Criminal records are helpful. A string of drink driving or even unlicensed driving convictions suggest alcohol abuse. Stealing, breaking and entering, and fraud charges suggest illegal drug abuse. This situation is another in which a child representative can be invaluable. If it is your client with the problem, suggest

rehabilitation. If it is the other side's demand it. However, remember that addicts have to be motivated to make changes for themselves and be open to the possibility that substance abusers go to great lengths to manipulate – even deliberately confounding the results of urine analysis by tactics such as excessive water intake and substituting someone else's urine for testing. Forensic controls are essential.

- **Children with special needs** – for instance, those who are handicapped, very young, sick or from multiple births - often create major stressors for separating parties. The parent who is left to care for the family is likely to feel used and abused and to want to punish the other parent. Ensuring that the parent who has left provides assistance with the problem child/ren and does not see only the other/s, might help to defuse such a situation.
- **New partners** - Often things are amazingly amicable after separation, until one or the other or both parties re-partner. There can be **realistic .or unrealistic fears** of the child/ren being abused or badly treated by the new partner, or of one or both parents being "replaced" by step parent/s. Be concerned if your client turns up with a new partner who talks more and has more issues in relation to the "ex" than the client does.
- **Absconding with the child/ren** can trigger one "child grab" after another. Sometimes both parents offend in this way and despite their protestations and justifications, the child/ren become destabilized and distressed. Obtaining orders early in the dispute in relation to interim residence and contact can help to ensure that both parents remain a part of the child/ren's lives and prevent such a pattern developing.

- **Contact parent exceeding role.** Contact parents are of course vital ingredients in the life of children from separated families. Sometimes, however, they fail to recognize that some parental duties are best left to the residence parent. Behaviours which are particularly inflammatory and should be discouraged include having a child's hair cut. This action is usually about the parent believing he or she owns the child and is almost never about the best interests of the child (unless head lice is the issue). Causing children to call new partners "Mummy" or "Daddy, enrolling them in day care or school, arranging surgery without consultation, changing names, and taking them on holidays outside the state or even the country without the other parent's knowledge, are also not positive signs. Your good sense is needed to deal with these people - to teach them the facts of life and to discourage such behaviour.
- On the other hand, **residence parents often have "God complexes"** – for example, stating that the contact parent is irrelevant to the child's healthy adjustment and development or is a nuisance, in that contact with him or her disrupts the household routine. Such parents typically say things like, "The children have the right to decide if and when they see their father/mother", and "I don't believe in forcing children to do anything" (only in relation to contact with the other parent).
- **Alienation of child/ren against one parent by the other.** The first signs of "parental alienation" might be comments about the child/ren not liking or wanting to see or talk to one parent; screaming on separation from one parent; writing

letters or producing drawings (whilst in the care of one parent) which indicate hatred, dislike for, or even abuse by the other parent; and .production of reports or letters from mental health professionals who have seen only the child and one parent but are nonetheless prepared to support that parent against the other in the parenting dispute. No matter which parent you are acting for, your client needs to be made aware of the dangers for their relationships with their child/ren. The alienator risks losing the children if he or she strikes a judicial officer with a robust approach to parental alienation, and the alienated parent risks losing contact altogether if the trend is not reversed quickly.

- One parent makes **extreme comments about the other** – for instance, that he or she is "evil", "psychotic", "schizophrenic", an "idiot" or a "manipulative genius", but has **no evidence** to support this assessment. This suggests a distorted perception of one parent by the other. A child's representative and a family report are probably indicated – as a first and possibly final step in establishing the truth of the matter and ensuring the child's needs are not lost in the barrage of accusations.
- **Allegations of child abuse** always alert to high risk of a protracted, conflictual dispute. Whether they are genuine, concocted or the claims of an excessively anxious and / or protective parent, they predict high levels of conflict and the likely need for judicial findings and orders. Such allegations are the common ploy of unscrupulous, alienating parents and you will probably need to call in the "experts" to try to resolve issues of fact, which are fundamental to whether there should be contact and if so whether or not it should be supervised.

- **When grandparents are in dispute with their own children for residence of the grandchildren** there is every chance of a protracted and bitter dispute. Old unresolved hostilities, pathological childhood attachments between the grandparent/s and parent/s and possibly even competition between them, can be motivating factors – apart from any genuine attempt to protect the child/ren. You need to remember that although most grandparents are benevolent figures for their grandchildren, not everyone with grey hair who claims to be a loving parent and grandparent is as they seem.
- The presence of **homosexuality, trans-sexualism, or cross dressing** will frequently add a dimension which complicates the dispute no end. **Cross-cultural and inter-racial issues** can do the same. You need to be careful not to feed your clients' biases and to ensure that their presenting focus – that is, the best interests of the child/ren - is not masking a more sinister agenda fuelled by discriminatory views and unsupported suspicion of lifestyles which are not understood and therefore distrusted. The **only** issue should be the child/ren's well-being, which may or may not be compromised as a result of these factors.

2. WHAT WE KNOW ABOUT PATHWAYS TO ENTRENCHED CONFLICT

AFTER SEPARATION:

All of the abovementioned triggers, can become entrenched and resistant to resolution. The following are just some of the ways by which this happens.

- **Establishment of a new "status quo"** can occur – often by default, as a result of delays in the system. A parent who has been in the wrong – for example, by absconding with a child or by prohibiting contact with the other parent can finish up with the child because of concerns about causing the child emotional distress through separation from the new residence parent. This is likely to lead to a messy and protracted dispute.
- **Lack of Legal Aid funding** – even when merit is easy to establish is a problem. Matters which should have had a good chance of settling will sometimes go all the way to trial, when funding for primary dispute resolution could have settled it with less residual bitterness.
- **Lawyers who would rather litigate than resolve disputes** are a worry. The family lawyer is a powerful resource in that in many instances he or she has the capacity to provide a buffer for their clients' raw emotions and to facilitate negotiation which can lead to resolution. However, some choose not to do so. There is a view that despite our adversarial system, as "Officers of the Court" they have an obligation to try not to pursue solutions which are likely to increase conflict and distress for the child/ren.
- **Lawyers whose clients are "always the goodies"** are also problematical since this suggest too much identification with clients and might allow the lawyer to be manipulated into taking a stance which is inappropriate and which prolongs or exacerbates the dispute. I call these lawyers "client clones".

- Alienation via the well worn path of **abuse allegations** which become increasingly serious (and sometimes bizarre) and seem to gather momentum as various genuine "helpers" come to the rescue of the parent convinced of the abuse, are another barrier to resolution of conflict. An expensive process of instituting supervised contact, going to trial to obtain abuse findings, and then trying to re-establish contact with the ousted parent often ensues. I have seen some outcomes with which I have agreed and others which have caused me to wonder what more I could have done – usually, but not always, to ensure the child's right to know and be known by both parents. Although it needs to be remembered that not all allegations are false and some children genuinely need protection from their parents, such allegations within a Family Law context should be viewed with some suspicion.
- **Litigants in person** are undoubtedly disadvantaged in our adversarial system. The children of these people are also disadvantaged because the absence of the moderating influence of lawyers increases the risk of children's issues being overborne by unresolved spousal issues. Nothing will ensure the entrenchment of conflict more than if the only time parents talk to each other is whilst cross examining or being cross examined across a court room. Unfortunately, if lawyers are engaged but they do not have a solution oriented approach, the outcome can be similar.
- **Conflicted custodial transitions** often flag the way to more and more serious conflict and litigation. Every fortnight, week, or more often in some cases, some children have to go from one parent to the other with little or no re-assurance (that they and the relinquishing parent will be "alright" or that the other parent is not in

fact a monster). They witness the trading of verbal abuse or even physical blows, squabbling over clothing and property to the extent of sometimes having to change clothes at the point of exchange, the incapacity of their parents to discuss them, and at worst are inveigled into becoming combatants in support of one or the other or both parents against each other. When the children react in a way which indicates their distress, this is usually taken as evidence that contact with one of the parents should cease – rather than being a sign that the reprehensible and inflammatory behaviour of a parent or both parents should cease. Each time there is an incident at a contact changeover, more evidence is gathered to prove that contact will not work. It is the children who are again the victims.

3. WHAT WE KNOW ABOUT THE IMPACT OF ENTRENCHED CONFLICT ON CHILDREN:

Children react to their parents' conflicted separations and to loss or severe restriction of contact with one parent in all manner of ways. The following are some of the most commonly seen responses and are based on my own observations as well as research and observations of others involved in this field (.Arnold, L E and Carnahan, J A, 1990; Johnston, J R, and Campbell, L E G, 1988 and Johnston, J R, 1998).

- **Helplessness**, the children opting out of family and school life as a way of "insulating" themselves against emotional pain. This is most often seen in boys – particularly in pre-adolescents and adolescents.
- On the other hand, **becoming over-conscientious and achievement oriented** as a means of escape, a way of seeking approval or simply as a relatively functional coping mechanism, is a common behaviour for older girls caught in the crossfire of their parents' dispute.
- **Aggression**, children of all ages often act out against the world with tantrums and excessive demands - as a way of dealing with their feelings of confusion, hurt and turmoil.
- **Substitution** of the father or mother with a surrogate parent – sometimes a step parent, but also possibly the parent/s of a friend, or even a teacher or other authority figure. The parental conflict has often rendered the parents emotionally inaccessible to the child.
- **Classic stress related symptoms**, such as tension, somatic symptoms, regression, and oppositional behaviour – particularly before, during and immediately after the transitions from one parent's care to the other's. Enuresis, encopresis, fears and phobias and even post-traumatic-stress disorder, when they have witnessed or been the direct victims of domestic violence, are commonly reported. Usually the parents find a way to hold the other parent responsible, failing to recognize that their poor children are more likely simply reacting to the tension and conflict around them.

- **Excessive vigilance and distrust around strangers** is noted especially in very young children (two to three) at the centre of high conflict and in transition between the care of their parents.
- **Pathological attachment** – often occurs as a result of inter-parental conflict. The attachment of young children to their parents is likely to become insecure or anxious, the child fearing loss of one or the other or both. Separation anxiety, might develop and might then be used by one or the other or both parents to "prove" their case/s.
- **Confusion and ambivalence towards their parents**– especially for the four or five year olds, who have trouble making sense of the conflicting and often variable claims of their parents about each other.
- **Sense of Responsibility for the Conflict** – blaming themselves for the disharmony, with associated loss of self esteem.
- Being **submissive** to one or the other parent and **rejecting** of the other, simply to reduce the stress and conflict of loyalties. This is common where there are abuse allegations – whether genuine or spurious. These children tend to present as serious, humourless and emotionally "flat".
- **Pseudomaturity** – such as taking on responsibility for the happiness and well-being of one or the other or both parents, or for the care of younger siblings whilst seeing their own needs as secondary or irrelevant.
- **Identity problems** can result when primary school age children side with the parent of the opposite sex.

- **Affect constriction or emotional shutdown** – occur at times as a protective mechanism in the face of extreme conflict and domestic violence. Dissociative states, depression and suicidal ideation can develop out of such self-protective responses.
- **Insecurity and fear of abandonment** can result from parental unavailability and pre-occupation with the dispute. Sometimes there is an attempt to seduce more attention through good behaviour. Sometimes efforts to keep everything "fair" (for the parents rather than the child) result in an obsession with giving equal time and equal emotional responses, this tactic also resulting in the child's becoming emotionally constricted and anxious.
- **Rapid shifts in allegiance** often occur, children trying to find favour with both parents by carrying stories about one to the other or possibly by dumping blame onto a step parent. Strategic alliances are made - with the parent perceived to be more powerful or the one less likely to love and accept them unconditionally. Sometimes, it is with the parent who can provide a way out of the dispute, this being the top priority. A way of avoiding the conflict is to "merge" with one parent or perhaps with whichever parent they are with at the time – displaying at all times good and compliant behaviour, but appearing joyless, withdrawn and lacking in spontaneity.

4. HOW WE CAN MOVE TO CHILD FOCUSED PRACTICES:

"How does a lawyer working within an adversarial system, maintain a child focus when representing clients who do the kinds of things I have already referred to?"

I shall attempt to address this and various other related questions in the following.

- My own observations as a result of interacting with all manner of **lawyers** in all jurisdictions - variously as colleague, counsellor and friend - has been that, without exception you are above average in intelligence, "worldliness" and conviviality, you are like any other group by virtue of your personal issues – with your spouses and partners, your children, your elderly parents, your friends and acquaintances, and in terms of your own health and well-being - and you vary enormously in your approach to handling matrimonial children's matters.
- Some of you seem, even when acting for parties, to see your role as assisting all concerned to achieve a resolution which is in the best interests of the children. Others seem to struggle with the tension between accepting your clients' instructions unreservedly and focusing on the needs of the children. Yet another group seems to become unreasonable in the extreme – much like the "client clones" referred to above. The *Changing the Face of Practice* program made similar findings. No doubt each of you has a philosophical basis for your approach.
- In considering child focused practice, apart from the obvious example of child representatives, I shall refer to a paper presented by Linda Kochanski to the Queensland Family Law Conference in September 2003. Linda reported on the ***Changing the Face of Practice* program**, a Federally funded national training

project run collaboratively by Relationships Australia and Griffith University, for legal practitioners engaged in Family Law.

- In searching for a **definition** of "Child focused Practice" for family law practitioners, I turn to the Kochanski paper and its outline of the "*Child Focused Charter*", developed by the lawyers involved in the program. That charter reads as follows:

As a Child Focused practitioner I will:

1. ***Assess** the individual needs and interests of the children.*
2. ***Inform** my clients about how they can support and assist their children during and after the separation process.*
3. ***Reality test** clients' proposals about arrangements for the children*
4. ***Negotiate** with all parties in a manner that prioritises the interests and needs of the children.*
5. ***Manage** disputes in such a way that endeavours to de-escalate conflict and improve the quality of post-separation relationships between parents.*
6. *Consider the **legal and ethical framework** (in which) I work and prioritise the issues by reference to my duties, roles and responsibilities*
7. ***Participate** in systemic change to address more positive outcomes for children.*

8. *Operate within a multidisciplinary system that provides a range of assistance and support services for families.*

- Some of you will be saying to yourselves that this is how you already try to practise, others will feel vaguely uneasy about resolving the frequently existing conflict between your clients' perceptions and instructions and the needs of the children, and still others will react with a sense that to practise as suggested violates your concept of what being a lawyer is all about.
- Child focused goals generated during the *Changing the Face of Practice* program included ***That all practitioners should have an understanding of the impact of high level conflict on children.*** My experience is that people such as myself – whether called social scientists, mental health professionals, or "touchy feely types", are increasingly sharing the lecturn with lawyers at seminars such as this, thereby increasing family lawyers' knowledge base regarding children's needs in the context of family law disputes. However, there should not be an expectation that every family lawyer can double as a child psychologist or psychotherapist. Team work is what was advocated.
- ***The importance of referral and resources*** was also recognized. In the time I have been practising in this area, I have certainly noticed a gathering of momentum in the trend towards resolution of disputes at the earliest stage possible. Although alternative dispute resolution was encouraged from the earliest days of the Family Law Act, and there was a great deal of priority given to the role of the Court Counselling Service in this regard, it seems to me that family lawyers are now more aware of and ready to use external resources in resolving

disputes than ever before. They are using people such as myself more and more creatively – to advise on children's issues, to counsel their clients about such issues, and to mediate or counsel towards a resolution which they can then formalize in draft orders. Even family reports are often seen as more valuable as a resolution tool than as a weapon in Court and, thankfully, they are used very positively in Queensland where we have a tradition of engagement of report writers early in the dispute resolution process.

- Family Lawyers are also finding roles for themselves **outside the traditional litigation model** – as mediators and co-mediators, arbitrators, referral sources, and most interestingly as "collaborative lawyers".
- I refer you to a comprehensive paper on **Collaborative Law** which was presented by Sue Purdon at the Queensland Family Law Conference in 2003. Collaborative Law as detailed by Sue, is a distinct conflict resolution process which was founded in Minneapolis by family lawyer, Stu Webb in 1990 as a response to his dissatisfaction with the adversarial matrimonial law system. It focuses on the settlement process as opposed to the court process and involves a "Collaborative Law Contract" by which the parties, their lawyers and jointly engaged independent experts commit to seeking a litigation free resolution through four way settlement meetings. A vitally significant difference between this type of practice and that already practised by solution-oriented family lawyers is that if there is no settlement, the lawyers are prohibited from continuing to act and must withdraw.
- This form of practice has a number of **advantages** – including, but not limited to those associated with other forms of early intervention alternative dispute processes. A major difference is that it removes a potential conflict of interest

between lawyers and their clients – that of the lawyer being rewarded financially for poor negotiation, by then becoming a litigator.

- There are also, arguably, **disadvantages as well as inherent limitations** – by virtue of the personality attributes and skills needed to act as a collaborative lawyer, the types of disputes which are amenable to such a process, and the personalities, motivation and mental health of each of the parties seeking resolution of a dispute. I suggest you try to access Sue's paper if you are interested in reading more about this style of practice.
- I have it from Sue Purdon that there has been some interesting research in the USA regarding the types of clients and lawyers who are using the Collaborative Law approach and it seems it might be satisfying a need for clients who are disillusioned with the current dispute resolution systems – that is, a new market. We will be hearing more about this approach and I am told there might even be a training programme mooted in the not too distant future. As a psychologist, it would certainly be challenging to work with lawyers who were committed to such a process.

5. HOW AND UNDER WHAT CIRCUMSTANCES WE CAN MOVE TOWARDS CHILD INCLUSIVE PRACTICES:

How much weight to give to children's wishes and how directly children should be involved in the decision making process, are extremely complex issues which usually concern child representatives more than family lawyers engaged by

parties. However, it is not inconceivable that, when representing parties in children's matters, you could be called upon to hear directly from the children in question.

- In Queensland, children do not appear in Court and are generally not heard directly unless there is a child's representative appointed. Even then, their comments are filtered through the family reports commissioned by the child's representative.
- As you would be aware, the new "Guidelines for Child Representatives" became operational in August 2003, after much deliberation and debate across the nation. These guidelines aim, among other things, to give effect to Article 12 of the United Nations Convention on the Rights of the Child and to bring the child into focus as having a right to be heard in the Family Court as never before (at least in Queensland). **Article 12 of the United Nations Convention on the Rights of the Child** 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.

- **The Guidelines for Child Representatives** are a good starting point for understanding the attitude of the Family Court to children's rights. They include a number of **principals** which I shall summarize.
 - The child has a **right to establish a professional relationship and have ongoing contact with the child's representative**. It is expected that they will meet in person and that the child representative will be accessible to the child.
 - Certain **information should be explained** to the child (**to the extent appropriate for the child**), including the role of the child's representative, the Court process, and the role of other involved persons or agencies, including report writers.
 - The child should be made aware that **information provided by them cannot be treated as confidential** and may have to be communicated to the Court, their parents, or other persons. Nonetheless the child should be encouraged to make his/her wishes known.
 - Children of sufficient maturity should be informed of the **possibility of applying to become a party** to the proceedings and of giving instructions to a legal representative through a next friend appointed by the Court.
 - Any **wishes expressed by the child**, as well as how the child would feel if the Court reached a conclusion different from that desired, should be **fully put before the Court**.

- If the child Representative makes **submissions contrary to the child's wishes**, the child should be fully informed of these intentions and given an explanation of why it was considered that the child's wishes were not in his/her best interests.
- Where appropriate (according to the age and degree of understanding of the child), the Child's Representative shall **seek and take into account the child's views before notifying other individuals and organizations of the appointment of a Child's Representative**.
- In addition, as would be expected, the guidelines include many **cautions and exceptions**, including:-
 - Each child will have **different emotional, cognitive and intellectual developmental levels, family structures, family dynamics, sibling relationships, and religious and cultural backgrounds**.
 - Children are **vulnerable to external pressures** when involved in residence, specific issues and contact disputation.
 - A strategy should be developed with any Child and Family Counsellor involved in the case and with the child, to **minimize the potential for any adverse reaction towards the child** (for example, resulting from the child's statements to the child's representative or to a report writer).

- The Child's Representative should guard against stepping beyond his or her professional role and should seek guidance from a counsellor or other professional when necessary.
- In addition to explaining the lack of confidentiality in his/her relationship with the child at the commencement of the relationship, it may be necessary to periodically remind the child.
- It is not the role of the Child's Representative to:-
 - conduct disclosure interviews;
 - become a witness in the proceedings; or
 - conduct therapy or counselling with the child.
- The Child's Representative should be alert and sensitive to the risk of a child becoming over dependent upon him or her and should consider seeking peer or professional advice in responding to such a situation.
- The Child's Representative should prepare the child for the end of the professional relationship before the end of the proceedings. They should discuss the fact that the Child's Representative's role will soon be over, and determine what contact, if any, they will continue to have.
- A child who is unwilling to express a wish must not be pressured to do so and must be reassured that it is his or her right not to express a wish.

- Prior to making submissions, it is appropriate for the child's Representative to consult with a relevant expert in relation to the context of the child's wishes, the contexts in which those wishes both arise and are expressed, the willingness of the child to express wishes; and any relevant factors associated with the child's capacity to communicate.
- I have to confess to being somewhat dubious about these guidelines for many reasons. Taking children's stated wishes at face value is, in my experience, often not advisable in the context of Family Court proceedings. Although they will sometimes express themselves freely and openly and without a sense of coercion, unfortunately this is too often not the case and I am often acutely aware of the presence in my consulting rooms 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. The danger of manipulation would be even greater were the child to be interviewed with one party present, without the other's knowledge.
- Even in situations where the child is merely being met and told about the role of their child's representative, there are dangers. The most obvious one is that the child might make a disclosure of abuse. If there is nobody else present – such as a family report writer or child and family counsellor – what does the child's representative do with the information? Does he or she become a witness in the proceedings, 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? What if you are acting for one of the parties and the disclosure involves your client?

Perhaps it arrives unsolicited in the form of a letter or phone message? Where do your responsibilities lie?

- I have found myself on a few occasions in the situation where a child has reported behaviour on the part of a party to the dispute suggestive of unacceptable risk of abuse, but has 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 and so the Department of Families is reluctant to become involved – especially considering the involvement of the Family or Federal Magistrate's Courts. We now have practice guidelines which aim to create greater efficiency and certainly keep report writers to the task. There is no way anymore that a report can be with-held until the last minute and handed up to the judge at the commencement of a trial, with a comment by the child's representative or the lawyers for the parties 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 whilst the matter is heard.
- Children and by association, child representatives, parties' representatives, report writers and other professional witnesses, as well as the Courts, are always at risk of becoming vehicles for unscrupulous or emotionally unstable parents or other interested parties. Far from giving the child a voice, in situations where a parent is deliberately alienating a child against the other parent, hearing directly from the child carries with it the risk that the child will become even more embroiled in the conflict and go on to suffer adverse emotional consequences. We must all be alert to this sort of dynamic if we are serious about our responsibilities to children.
- I urge those of you who act for parties in children's matters, 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 deliberations with you or, even worse, to tell you about their experiences with the parent from hell (that's the other one of course). You need to be alert to the dangers of being unduly influenced by such behaviour and I would suggest that some timely advice to your client as to the dim view taken by the Courts of inappropriate involvement of children in parental disputes, would usually be proper in such instances._

- We have to be 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. It is 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 opportunity, 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 really want a certain type of decision made for them, they might not come right out and say this – for fear of repercussions. 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, because the child is too worried about the consequences of being frank.

- In our well-intentioned efforts to protect their rights to self-expression, we must not forget to protect **children's rights to be children**. These rights are nicely summarized in a document which came to me by rather circuitous means, its authorship being attributed to well-known Queensland magistrate and family lawyer, Barbara Tynan.
 - 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.
- These are wonderful ideals, as is the ideal of the child's rights to freely express views – even in court proceedings. The issue for us is the inevitable tension which exists between these ideals. Decisions need to be made on a case-by-case basis and we should enlist each others' assistance and counsel when we feel that we are out of our depth.

CONCLUSION:

My experience is that the majority of those involved in Family Law – whether lawyers or from other disciplines – have a strong desire to make a difference and would be horrified if they thought their actions had, in any preventable way, made life more difficult for anyone – their clients, children involved in disputes, or even the party on the other side. So why do so many of those who have dealt with "the system" not see us that way? I quote an anonymous contributor to the investigation by the National Parliamentary Committee into shared custody.

My wife and I were relatively functional as a parenting team before the involvement of lawyers and the Family Court. We used even to have dinner together sometimes.

Now my child is traumatised and subject to psychological treatment to address her impression that her mother is stopping her from seeing me, and my wife has

become paranoid, depressed and utterly unreasonable to the extent that she is now seeing a psychologist on a voluntary basis

The fact that my daughter said she loved us both and wanted to spend time with us both was used to support the notion that I am trying to make her hate her mother.

Naturally, I have been trying to achieve the opposite knowing as I do that the better my wife's relationship with her daughter is, the happier she'll be and the more secure she'll be about letting her spend time with me.

My daughter has now been to five psychologists over the past four years. I've been to seven plus two psychiatrists. It's still going. We all have to go again next month...to the guy that thinks I'm brainwashing my daughter.

My daughter now believes that it is not her mother that is restricting her time with me, but that it is the courts.

I sincerely believe that all this could have been avoided with mediation and counselling...I thought the courts were supposed to support mediation but it has been denied time and time again.

It is the most destructive process imaginable and the expense is crippling. I have spent tens of thousands of dollars. My wife has spent much more.

It is my submission the Family Court is completely out of control.

Due to Section 121's stifling of any reporting on its decisions, it also is completely unaccountable.

(Brisbane Courier Mail, 3 January 2004)

We work in an area that makes us all extremely vulnerable to unjustified complaints and even to physical harm by people who are unable or unwilling to take responsibility for their own decisions and behaviour. Nonetheless, it is important that we do not lose touch

with the views of the people we are serving, and that we remember that children's matters are ultimately about the **best interests of the children.**

Whatever our roles within the system, we are all in a unique position to influence outcomes in children's matters - whether it be by reality testing our clients' claims, encouraging them to consider alternative and less destructive means of dispute resolution, applying for the appointment of a child's representative or even referring on.

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