Timing, and getting the orders right

While marriage breakups cannot generally be scheduled, if they’re going to occur, it might be best if they do so when children are between eight and 12, says Mark MacDiarmid.

Family law specialist MacDiarmid, who works half time for Coleman Greig and has his own family law practice in the Blue Mountains, is also on Legal Aid NSW’s Independent Children’s Lawyer and Mental Health Advocacy Panels, as well as holding several other positions in family law organisations.

A recent speaker at a Legalwise seminar on the topic “Getting the orders right in children’s matters”, he told LSJ that obviously lawyers first and foremost needed a clear understanding of the relevant law, in particular part 7 of the Family Law Act. The case law of most significance is Goode and Goode in 2006, which set up the “road map”, and Re K in 1996 which identified high-risk factors – mental health, drug or alcohol issues or where the child or young person expressed a strong view. All of which, if present, might prompt the court to consider the appointment of an independent children’s lawyer.

But the biggest issue, according to MacDiarmid, in the last decade, and one which had grown “enormous” in the last six years, is, “How do we engage with the social science literature?”

He says judicial officers in the Family Court and the Federal Magistrates Court are increasingly focused on the effects of orders and procedural interventions on child and adolescent development. The long-term sustainability of orders has a profound effect on the children, and on the containment of parental conflict, so it’s important that orders reflect the developmental trajectory of children, and address risk factors such as potential conflict.

Children, MacDiarmid says, are not miniature adults and family lawyers should be aware of developmental concepts such as attachment theory, which suggests that prolonged separation from the adults to us,” MacDiarmid said. Children for whom this attachment mechanism is consistently frustrated often register increased levels of the “fight or flight” hormone cortisol, which at high doses operates as a neurotoxin, potentially damaging cognitive, emotional and social development. Significantly, research suggests that parental conflict has a similar effect on the brains of all children and young people.

Between about eight and 12, he says, children are in the “golden age” – they have undergone some significant

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people most actively involved in a child’s care can be damaging to all children, but particularly to those between the ages of zero and four.

Non-social scientists often confuse attachment in this technical sense with more familiar concepts such as love, but the attachment system is in fact a deeply biological mechanism, and works almost like a thermostat, triggering a set of behaviours evolution has designed to bring adults who have a commitment to us physically close to ensure our needs are met.

“If as children we are distressed, hungry, sick, cold or insecure, we will come up with behaviours which include crying, to draw important developmental milestones, are well on their way cognitively, and are being thrown fewer “developmental curveballs” than younger children and adolescents. While still primarily concrete thinkers, abstract thinking has kicked in, and their capacity to understand the emotional responses of those around them is often very sophisticated. “Many kids in this age range are, from an adult perspective, the easiest they’re going to be in their childhood. If you’re going to inflict trauma on a child as a result of adult relationship issues, if it’s going to happen any time, they’re probably at their most resilient then.”

“There’s a certain acceptance and not as many devel-
orders right is crucial for children

Family lawyer Mark MacDiarmid says attachment is a deep biological mechanism which, if severed at the wrong time, can be very damaging for children.

opmental tasks are pitched at them then. When they reach adolescence, a huge brain remodelling program gets under way, with large swathes of neural connections in the grey matter areas of the brain being pruned, while others are strengthened,” MacDiarmid says.

“If young adults sometimes seem a bit brain damaged, it’s because they are. They’re managing monumental physical changes at the same time as this astonishing neural makeover takes place ... we are really expecting a lot of them if we simultaneously subject them to the traumas of adult relationship problems.”

Wake-up call

MacDiarmid, who in a previous life was a director in Gadens Lawyers’ commercial law section, was also for many years principal solicitor at the Elizabeth Evatt Community Legal Centre, which he says provides the only free legal services between Penrith and Orange and, with a couple of thousand clients a year, is very busy.

My children were so close to a bad result, it could have been disastrous,” he says.

“Just about every litigant gets a set of orders – what makes a big difference, though, is getting a set that works long term, reduces conflict and accommodates the ever changing landscape of children’s lives, the landscape they traverse developmentally, cognitively and in relationships.”

Family lawyers, MacDiarmid says, also need a very clear understanding of the four main kinds of family violence: coercive controlling violence, perpetrated predominantly by males, which can manifest as control of economic, social life and emotional life; reactive violence, usually perpetrated by women who are victims of coercive controlling violence – a woman perhaps who kills or stabs her partner after many years of coercive violence; situational violence that relates to people with poor impulse control, has men and women scoring fairly equally, and causes harm to children and each other; and finally, separation-instigated family violence, generally a one-off in a person’s life, for example, when someone has had a humiliating experience of separation, or walked in on a partner with someone else.

“It’s very important that lawyers understand the subtleties of family violence, because they affect our risk assessment processes and therefore our choice of the most appropriate intervention for the children who are caught in the crossfire.”

The best family lawyers of his acquaintance, MacDiarmid said, had a wide interest in human relationships.

“Another thing I bang on about is our skills in ‘relationship’. We need to be able to help our clients in relation to balancing conflict, to be genuine trusted advisers.

“And that’s not only about how we manage client problems, but also our own relationships with people we come into contact with. The key question here is how do we model the highest level of conflict resolution skills at every stage, with clients, judicial officers, and opposing lawyers.

“In Family Court, lawyers need to model high-level relationship skills. Twice recently, I’ve seen lawyers screaming at each other outside courtrooms. We can’t expect clients to manage their relationship breakdowns if we can’t manage our own. We can help our clients most directly and effectively by up-skilling ourselves.”

Always interested in the social sciences, his real wake-up call was about eight years ago when his own life went awry and his marriage to the mother of his two children, now 11 and eight, ended. There were “very complicated” family law issues.

Now, he works half the time at Coleman Greig, which is “incredibly supportive”, and has his independent children’s lawyer practice in the Blue Mountains so he can work from home in the weeks when his children are with him.

“Coleman Greig has bent over backwards to accommodate me – and that has earned them an enormous amount of loyalty from me.

“My interest in psychology has led me to be very focused on two things – children and their development, and making sure they get the best possible results from the family law system.

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