

Thinking laterally in parenting matters

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Introduction – Parenting disputes need more than just the law

The legal systems of the western liberal democracies comprise some of the great achievements of humanity. Nevertheless, the laws of our democracies in themselves do not guarantee just and appropriate dealings between citizens, and between governments and citizens. Consider the following:

1. the First Amendment to the US constitution (establishing the Bill of Rights) was ratified in 1791;
2. the Thirteenth Amendment (prohibiting slavery and involuntary servitude) was ratified in 1865;
3. the Fifteenth Amendment (prohibiting each government in the United States from denying a citizen the right to vote based on that citizen's ‘*race, color, or previous condition of servitude*’) was ratified in 1870.

But it was not until 1920 that women were enfranchised in the US, and African Americans were effectively prevented from voting in many jurisdictions in the US via the application of poll taxes until the Supreme Court decision *Harper v. Virginia Board of Elections* in 1966 (which declared that all state poll taxes were unconstitutional). I cite the plight of African Americans rather than Australian Aboriginals, as in Australia we lack the nominal constitutional protections that prevail in the US and that cast such a clear, though surreal, light

on the lived reality of so many African Americans in the century after the end of the Civil War. Plainly something needs to be present in addition to bare laws to ensure that a spirit of fair dealing and respect for human rights flourishes in a community. My suggestion is that these virtues must be present as features of the prevailing culture, and not just present in the statute books and cases.

So what has all of this to do with the conduct of parenting matters?

Firstly, Part VII of the *Family Law Act* ('FLA') self-consciously references and reflects the *International Convention on the Rights of the Child* and is manifestly human rights law.

Further, litigation in the family courts involving children is different to just about every other kind of litigation. This difference resides in at least two facts. One is that as the subject matter of parenting disputes we find not property or obligations or rights, *but people in the form of children who are themselves not parties to the litigation*. This means that human rights issues arise in parenting matters in a way that they do not arise elsewhere in our legal system.

Another key difference resides in the fact that, with greater frequency and intensity than other legal disputes (that turn on the establishment of a set of facts in the past that will, with the application of relevant legal principles, *lead to a judicial determination that will govern the human relationships in dispute from the conclusion of court proceedings*), parenting matters (whether implicitly or explicitly) engage Judicial Officers, Independent Children's Lawyers, Family Consultants, Chapter 15 Experts, the parties' legal advisers, and the parties themselves in interactions *that effect a change in the relational landscape during the period that the dispute is before the court*. This period can be anywhere from a few months to many years. Even at its simplest (that is, without the intervention of family therapy or other clinical devices), the series of formal interventions to which most parties are subject has the flavour of clinical intervention (in that they look to guide behaviour), though we rarely regard them as such.

One way of interpreting this difference between more common forms of litigation and parenting matters could be to observe that traditional litigation is a *quantitative* exercise; that is, an exercise in measurement: what are the facts, what is the law, how is justice to be done between the parties?

Whereas in parenting matters, very often we are asking far more *qualitative* questions: certainly, what are the facts, what is the law; but also: how are we to *change* the facts between the time of, say, an interim hearing and the time of final determination; how are we to ensure that the best interests of a person who is not a party to the proceedings are met; how are we to ensure that our orders accommodate the physical, emotional, cognitive and social

development of this non-participant through to their 18th birthday and hopefully beyond?

The courts are populated by judges, lawyers and social scientists who are acutely aware of these issues and who accommodate creative strategies to address them with great skill and wisdom in their daily practices. The purpose of this paper is, therefore, not to propose a fresh approach to parenting matters, so much as to articulate what is for many of us accepted current standard practice.

I believe there are three significant skill sets that are required in the practice of parenting litigation.

The **first** and most obvious of these is a clear understanding of the relevant law.

The **second** is an appreciation of what social science tells us about two significant spheres:

1. child and adolescent development; and
2. family conflict (although this must extend beyond the identification of various kinds of family violence into the ways in which conflict and violence may be addressed clinically and socially).

The **third** skill set that we need to nurture relates to communication, including our own functioning as human beings and as professionals.

Underpinning the entire enterprise must be a mature understanding of what we want for ourselves and for our clients out of this work. For most of us who stick it out in the challenging world of parenting litigation, the answer to that question is often gratifyingly similar: we want the best outcomes for children. It is this aspiration among senior practitioners that raises the key ethical dilemma posed by parenting disputes: how do I resolve conflicts between what my client wants (and my duty to that client) and my higher duty to a court that itself must hold the best interests of children as the paramount consideration? It is in the resolution of this common dilemma that the third skill set referred to above becomes most relevant: we must muster the interpersonal skills and the wisdom needed to navigate this complex landscape without alienating our clients, while at the same time guiding them to be the best people they can possibly be in the circumstances.

Taking the above into account, this paper is intended not to provide step-by-step legal guidance for conducting parenting matters, but to flag some of the less obvious factors that differentiate matters that support litigants to follow the high road to a useful post-separation parenting relationship, from matters that deteriorate tragically and irrevocably all the way through to the end of the adolescence and early adulthood of that somewhat powerless class of people known to us all as '*the subject children*'.

Maintaining the focus on purpose

I believe the first question we must ask in any parenting matter is a slightly unusual one, in that it seems very obvious, and yet we may find that a clear response is somewhat evanescent and illusive: *what is our purpose in engaging with this family?* Is it:

- because we are paid to do this;
- because our client wants a particular outcome;
- because there are laws that people are entitled to have recourse to;
- because something needs to be done to improve things for the children in the middle of this dispute;
- because we like working with people;
- because we are forced to by our circumstances?

Although I'm asking this question now and stressing that this is the first thing we must ask, I'm not suggesting that this is something we come up with an immediate answer to. This is something we need to bother and chew throughout every matter, and indeed throughout our careers as people working with children. Our answers will probably (indeed hopefully) be provisional, because things change during matters: our clients, ourselves, the children, the very facts themselves. But it is very important to keep asking ourselves throughout: *what on earth am I doing in this matter?* This question can then prompt us to consider our direction, our responses,

Top-down and bottom up

The primary model we work with in family courts is a top-down one, in that a court applies the principles of relevant legislation to individual cases via the exercise of judicial power. I'm not suggesting that this is a bad thing; on the contrary I believe that this is a very good thing and a very necessary thing. Nevertheless, top-down approaches cannot possibly fix all of the problems that we see in the family courts, and our particular model becomes highly problematic when we see it as the only important intervention in post-separation parenting crises.

In the discipline of social work there is a whole sub-discipline known as 'Community Development' or CD, pioneered by individuals such as Dr Jim Ife. The community development ethos is a bottom-up approach to improving social outcomes, and generally begins from an evaluation of how to build on existing strengths rather a focus on defects. From our perspective as lawyers, we need to be on the lookout for bottom-up approaches to

improve outcomes in separated families. Here is a list of areas of potential traction:

1. The conversations we have with our clients;
2. The referrals we make for clients to professionals and services that will support their parenting;
3. The relationships between ourselves and our colleagues in court that our clients actually see – this is a potential source of good modelling for our clients.
4. The way we conduct ourselves in correspondence and before the court, hopefully with dignity, respect and thoughtfulness – this also amounts to good modelling

The remainder of this paper will seek to unpack these and other areas. In addition, we have two very good ‘bottom-up’ guides in the following:

1. *Best Practice Guidelines For Lawyers Doing Family Law Work* (2nd edition) prepared by the Family Law Council and Family Law Section of the Law Council of Australia (available at <http://www.familylawsection.org.au/resource/BestPracticeGuidelinesv8FINAL.pdf>); and
2. National Legal Aid’s *Guidelines For Independent Children’s Lawyers* (6 December 2007) (available at <http://www.nationallegalaid.org/home/policies-and-papers/family-law/>)

Language and Story

Our system of dealing with disputes actually constrains the discourse that we engage in around parenting issues, in that we are compelled to think in terms of parties and disputes by the very nature of the activities we are engaged in. In other words, our familiar legal discourses tend to confine our thinking along the dual railroad tracks of rights and remedies.

No doubt the intervention of a court is not a therapeutic intervention. Nevertheless, for the reasons set out above, the unique nature of parenting matters means that it might be useful for us to frame our activities within a discourse that sees parenting disputes not as battles that must be won or lost, so much as epic poems that can play out colourfully, tragically, with hope, with despair, with joy, grief, with horror. I like to think of us not just as advocates or arbiters, but also as co-authors along with our clients and the children who pass before our eyes, and under our care.

The manifold authors of the *Family Law Act* have shown great awareness of the power of the language we use. You will know that we ceased using words such as *custody* and *access* many years ago and replaced those terms with the less proprietorial term *contact* and *residence*. Our current terms ‘*live with*’ and ‘*spend time with*’ seem grammatically awkward in comparison to the crisp terminology of the past. And yet that is only when we apply those

words grammatically from an adult perspective. It seems awkward for me to say that *'I'm the live with parent'* or that *'I'm the spend time with parent'*. And yet when I place myself in my child's shoes she can say very clearly and grammatically that *'I live with daddy'* or *'I spend time with Daddy.'* The current language used in the FLA therefore directs us to place ourselves in the shoes of the children whose lives we are affecting.

The source of interventions we are engaged in are not one-off point in time interventions on the whole. Generally, even the simplest of matters takes some months whether we end up in court or not. Proceedings are commenced and then typically the parties will be involved in the court process for at least 18 months unless they arrive at an earlier settlement. We generally see at least two significant interventions from the courts in the form of interim and final orders. Sometimes there are several sets of interim orders. In addition, most matters see repeated procedural interventions such as the appointment of experts, requirements on parties to attend family therapy family dispute resolution; requirements on parties to attend some form of clinical program, such as counselling drug and alcohol rehabilitation; parenting courses and anger management courses; requirements to file and produce documents and affidavit material; perhaps the joining of additional parties such as grandparents; the appointment of Independent children's lawyer's; the notification of child welfare authorities. Viewed from one perspective this paints a picture of repeated institutional intrusions into the private lives of parties. While this is certainly a clear danger presented by our system if wielded unconsciously and without thought or humanity, this is not generally how I see things playing out. From another perspective, these repeated interventions provide an opportunity for everybody involved with the families that pass through our hands to change the story.

Normally as lawyers, we think in terms of endings, be they good or bad. This is in the very nature of litigation itself which has a beginning a middle and an end. For parents and children however, the intervention of the law is an event that takes place at some point in the long story of life, and so endings are not particularly relevant. What matters, is whether the continuing story is unfolding well or tragically. If we think of ourselves as co-authors rather than as engineers of results we will be in a better position to participate in a functional way in our clients' stories.

Thinking systemically

This brings me to another significant challenge to mindset. One of the most powerful insights in social theory over the last 60 years has been that groups of people, and in particular, families, do not operate in ways that can be simply explained by looking at the individual psychology of each member; rather, human social groups are better understood *systemically*.

In very general terms this means that families have more in common with ecosystems and weather systems than they do with billiard balls dancing around on a table. We interact with each other in our family groups and we are changed by those interactions. For example, the conversation I am currently having with my wife is coloured by the conversation I have just had with my ex-wife; and I will take both of those interactions into my interactions with my daughters when I take them out to go shopping in a few minutes.

Understanding the subtleties of family systems has led to an appreciation of the nuanced and somewhat unpredictable nature of systemic responses to change. What tends to happen is not that one person changes their behaviour and everybody else in the family continues to operate in a business as usual fashion. Rather, what we see is that a change to the behaviour of one member of the system causes changes (often unpredictable changes) in other parts of the system. It's a little bit like pulling a thread in a piece of fabric: the thread may be pulled in one section of the fabric but there may be significant changes another section.

When we think systemically whole new avenues of intervention may open up for us. Whereas from a more mechanistic perspective we might have felt that a situation could only be improved if both parties came to the table and agreed to put into effect some change, when thinking systemically, we might have some confidence that if just one party does something significantly differently then that will have a knock-on effect throughout the system. If, for example, one party is able to pull back from conflict and find some alternative way of engaging with the other party, something new may happen. I'm hoping that most of the lawyers in the room will have had some experience of seeing changes in matters when, even just in the correspondence, some acknowledgement of the role the other party has been made. If one party is able to refrain from engaging in hostilities in correspondence and affidavit material, that can have a very positive effect on the matter. If the party is able to go further and actually express the positive aspects of the other party's parenting, it begins to be possible to re-story the parties' relationship in a more prospective way.

One important step toward thinking systemically is to develop clarity around the presenting family system. To this end, generating a genogram of the family can be very useful. A sample genogram is attached as annexure A. There are numerous commercial programs available that generate diagrams like this.

Strategic questioning

Very often when we are with our clients developing a case we are looking at what has happened in the past. We may make some limited projection into the future when we are crafting our client's preferred set of orders, but we may not probe our client's vision of the

future any deeper. I believe it is important for us to ask strategic questions about where our clients see the future of their relationship with their children. These questions might include the following:

- How does the other party experience your client in conflict?
- What does your client think the other party would say are your client's main faults?
- What are the good aspects of the other parent?
- How is this going to look in 2 years; in 4 years?
- How does your client want it to look?

It is important to focus clients on these issues, because they can so often be lost in the melee. Often, the dispute with the other parent looms so large that considering how the next five, ten or fifteen years might play out has not been a major concern, or if it has been a concern then it often has to take back seat. One approach I often take in mediation with parents is to ask them the following question: 'imagine that your child is now in their late 20s. If they were looking back to the present time what things do you think they would want you and the other parent to have sorted out? What would that young person say would be the most important things in their lives?'

The role of this line of questioning is to assist parents to move from their positions as co-combatants into the shoes of their children and to start thinking of the dispute from the children's perspective. This takes some work to do successfully; what I've noticed in mediation is that some parents will automatically put into their children's mouths what they themselves want. It is very important to challenge parents on this. We are in a unique position as trusted advisers to guide our clients to be the best they can possibly be as people, rather than the worst. Particularly as more senior practitioners we tend to develop the art of the steady hand and gaze, the calm head in the storm. I personally feel blessed to work in a profession where so many of my colleagues have these gifts in spades and use them to such good effect in the parenting matters that pass through their hands.

Risk assessment

Perhaps the biggest role the court plays in highly conflictual parenting matters is the assessment of risk. In order to properly risk assess, the court obviously needs data, the more accurate the better. Most commonly this comes from affidavit material and from subpoenas. Other sources include reports from contact centres and parole officers. Independent Children's Lawyers are able to have conversations with workers in programs such as Unifam's *Keeping the Contact* (even if the records of those programs are not able to be produced under subpoena – see below).

Confidentiality & admissibility of 'family counselling' & FDR:

A little used device is relying on s10H(4)(f) to have conversations with Family Dispute Resolution Practitioners who have conducted mediation with the parties. Under the *Family Law Act*, FDRPs are permitted (though not obliged) to disclose details of mediation to an Independent Children's Lawyer. While this material will never be placed before the court unless a child protection risk has been identified, it can nevertheless provide very useful data to an ICL about where potential problems might lie in the parties' relationship. Mediators and family consultants are in a unique position in the depth that they get to see the parties interacting, so it is worth looking in a little more depth at issues of confidentiality and admissibility in relation to FDR and family therapy.

S10H protects the confidentiality of communications with FDRPs, although s10H(4)(f) allows communication with ICLs:

(4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:

... (f) if a lawyer independently represents a child's interests under an order under section 68L--assisting the lawyer to do so properly.

Note, however, that this does not reduce the inadmissibility of those communications for the purposes of s10J.

Having the parties attend family therapy under section 13C can be an important intervention, but what is the status of that activity in the eyes of the FLA?

The *confidentiality* of communications made during the course of '*family counselling*' is treated by s10D of the FLA (a mirror section to s10H referred to above in relation to FDRPs), and s10D(4)(f) is in substantially similar form to the provisions of s10H(4)(f) already extracted above.

As with the admissibility of communications during the course of FDR dealt with under s10J, the *admissibility* of family counselling is treated separately, in this case by s10E(1), which (in mirror terms to s10J(1)) provides that:

- (1) Evidence of anything said, or any admission made, by or in the company of:
 - (a) a family counsellor conducting family counselling; or
 - (b) a person (the professional) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible...

S10C(1) tells us what a family counsellors is:

- (1) A family counsellor is:
 - (a) a person who is accredited as a family counsellor under the Accreditation Rules; or
 - (b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or
 - (c) a person who is authorised to act under section 38BD, or engaged under subsection 38R(1A), as a family counsellor; or
 - (d) a person who is authorised to act under section 93D of the Federal Magistrates Act 1999, or engaged under subsection 115(1A) of that Act, as a family counsellor; or
 - (e) a person who is authorised by a Family Court of a State to act as a family counsellor.

Here's an extract from *Family Counsellors in the Family Law System*¹

The professionals who provide family counselling are termed 'family counsellors'.

Family counsellors are individuals that have been authorised to act as a family counsellor under subsection 10C(1) of the Family Law Act. A person may be authorised to act as a family counsellor by: the Family Court of Australia; the Federal Magistrates Court; a Family Court of a State; being accredited under the Accreditation Rules; or acting on behalf of an organisation designated by the Minister.

Currently there are no Accreditation Rules for family counsellors. A list of designated family counselling organisations is available on the Attorney-General's Department website <<http://www.ag.gov.au>>.

Specifically, the Federal Government funds a number of programs under the Family Relationship Services Program via the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). I have attached what I understand to be the latest list of these services as a schedule to this paper². Leaving aside the authorisations referred to in s10C(1)(c) – (e) (which I believe are potential rather than actual at the moment), the benefit of the protections provided by s10D and 10E therefore appear to be available only to participants in programs conducted by organisations on that list *and their referrals*.

Professor Richard Chisholm expands upon this somewhat in the following answer to the question of whether counselling taking place with a private psychologist would be covered by s10D:

This question takes us back to s 10E. The inadmissibility provision applies to evidence of

¹ Prepared by the Family Law Branch of the Federal Attorney General's Department August 2012, available at www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/ (accessed 6/4/2013).
² <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyRelationshipServices/Documents/Family%20Law%20Branch%20-%20List%20of%20counselling%20organisations%20October%202012.pdf>

anything said, or any admission made, not only by or in the company of a family counsellor conducting family counselling, but also by

(b) a person (the professional) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person.

If the psychologist in private practice carries out services on referral from a family counsellor, and thus falls within paragraph (b), then the inadmissibility rule applies to the psychologist just as it does to the family counsellor.

If not, the admissibility of the evidence would be governed by the general law. As explained in the paper, under the general law it would normally be admissible, unless – as might often be the case – it is part of the parties' attempts to negotiate settlement of a legal dispute, in which case it might be inadmissible under s 131 of the Evidence Act 1995 (Cth).³

This all does tend to suggest that the pool of private psychologists and social workers who provide family therapy (often under orders pursuant to s13C) are not in fact providing *family counselling* in the technical sense, and, unless operating under a referral from one of the services noted in annexure 1 to this paper, are not providing a service that would be protected under ss10D or 10E from either disclosure or admission as evidence (although professional ethical constraints will plainly cover disclosure).

While ordinarily the wisdom is that therapeutic-like processes unfold best if confidentiality is protected, having a transparent process (from the court's perspective) can also be incredibly useful.

One of the hallmarks of Court based interventions is that they involve some coercion. In addition, there is transparency between all parties and the judicial officer. Accordingly, with some rare exceptions, the affidavit material of all parties is viewed by the other parties and the judicial officer, as are any expert reports and the material on subpoena. Parties are compelled to put their stories down in written form as affidavits and, should the matter proceed to hearing, they are compelled to undergo cross-examination. It is a fundamental assumption of our legal system that this level of transparency and compulsion is required in order effectively to adjudicate disputes.

In the family dispute resolution model of mediation that we apply in family law, we similarly find both compulsion and transparency. Compulsion appears via the *Family Law Act's* requirement for parties to obtain a section 60I certificate prior to commencing parenting

³ <http://aifs.govspace.gov.au/2013/03/07/confidential-family-counselling-in-a-family-law-context-mind-the-gap/> accessed on 6/4/2013. The actual transcript of Professor Chisholm's presentation can be accessed at <http://www.aifs.gov.au/cfca/events/chisholmriethmuller/audio.html>.

proceedings; it is generally a condition of a grant of legal aid that the legally aided party participate in (or at least invite the other party to) family dispute resolution; and it is a frequently ordered intervention by the courts whether through the mandatory participation of the parties in a child dispute conference or in some other form of family dispute resolution.

Transparency is a fundamental ingredient in mediation in that both parties are encouraged to put all of their cards on the table. The *Family Law Act* supports this transparency by rendering the transactions that occur between parties at mediation both confidential and inadmissible. As indicated above, there are exceptions to this confidentiality and inadmissibility, and they relate primarily to violence, abuse and neglect.

The traditional wisdom (well supported by empirical evidence) has it that the benefits available from counselling are reduced when parties do not participate voluntarily and when confidentiality cannot be assured. So on the surface, it appears that our formal legal interventions are at one end of a continuum with counselling interventions at the other. And yet the landscape is somewhat more complicated than simple analysis would suggest.

Firstly, as with mediation in the family law context, the professional ethical guidelines applied by most counsellors (whether they be members of the Australian Psychological Association or otherwise) provide that confidentiality cannot be guaranteed to counselling clients for all purposes. Risk of harm is a common exception in the ethical frameworks employed in most forms of counselling. What is required is that the limitations of confidentiality be explained to clients and that they willingly sign up to the process subject to those limitations.

The confidentiality of family therapy is one of the fundamental issues that we need to examine for present purposes. If someone is under the impression that their counselling is confidential then it seems a form of betrayal to have their process displayed in court. But if someone signs up to the same process knowing that it is not confidential this risk vanishes, but is replaced by the risk that they will only cautiously participate in the process and so compromise the potential benefits of that process. But confidentiality in itself does not guarantee meaningful engagement with either a mediation or counselling process. The fact that, anecdotally at any rate, many outcomes of both mediation and family therapy are not resilient and not long-lasting suggests there may be other factors at play. Furthermore, again anecdotally, the reports that I receive from many of my clients after mediation suggest that a party who does not wish to participate meaningfully, or who takes up a highly positional stance in mediation, is protected in their non-engagement by confidentiality.

Parties participating in the interviews preliminary to the preparation of a family report or a

Chapter 15 report know that their participation is neither voluntary nor confidential. Certainly, these reports are part of an evidence gathering process rather than a therapeutic process, but we nevertheless rely on parties' *bone fide* participation in the interview process when we use these reports. On the whole, we do not assume that what family report writers document is a tissue of lies and fantasy; in fact, a recent Full Court decision (*Wilson & Wilson [2013] FamCAFC 43*) indicates that there must be very good reasons indeed for not accepting the opinion of a family report writer based on their own observations. The *Makita* case makes it plain that expert opinion must be grounded in facts that are accepted as such by the court; *Wilson & Wilson* indicates that this is not a process that can be short-circuited by a judicial officer simply substituting their own opinion for that of the expert.

Is it necessary to take a polarised approach to family therapy occurring in the shadow of the court or might there be reasons why confidentiality in that process should be lifted other than for the protection a child. My view is that in certain cases lifting the confidentiality blanket can be extremely helpful. Parties are already participating in a highly structured process, namely the court proceedings. In contrast to many other forms of compulsory counselling, such as drug and alcohol and prison-based counselling, parties to family law proceedings are generally highly motivated to seek a particular result, namely the orders that they are seeking in their applications. It is this aspect of our process that removes family counselling taking place in the shadow of court proceedings from the territory that seems to apply to other forms of counselling. By the time family counselling becomes a court ordered intervention, the parties will have had the opportunity to voluntarily participate in counselling and to voluntarily participate in family dispute resolution. Parties will have had long and strong experiences of the immense difficulties they face in arriving at resolutions. In the matters where I experience family therapy being ordered I'm usually in the position of the Independent Children's Lawyer and so in these matters at least one of the *Re K* factors has been ticked off. These are matters that require strong medicine. They are generally characterised by high levels of conflict and low levels of cooperation between the parties, as well as potentially other significant issues. I actually believe it is important that people understand that they are being watched in this process. They will be held accountable for their level of participation in the process; their level and quality of participation will be assessed and it will have an effect on judicial decision-making. This in itself increases the likelihood of parties ramping up their motivation for what is generally a last-ditch attempt to find a non-litigated resolution. In these cases (and I again emphasise that these are not normal disputes between parents: these are high conflict disputes) if the counselling is not successful a judicial officer is then in a position

to have the records of family therapy placed before a family consultant. The family consultant is themselves then in a position to use this information to guide the formation of opinions that might previously and in the absence of this information have been based on mere hunches.

I am currently an Independent Children's Lawyer in a matter where the parties had been participating in family therapy and where at the request of one of the parties the judge heard an application for the family report to be prepared by the family therapist, who is also a Reg 7 report writer. His Honour was initially very reluctant to allow this to occur, primarily on the basis that it seemed to compromise the family therapists' therapeutic relationship with the parties. Nevertheless, both parties were very keen to have this particular family therapist prepare the report as she had established relationships with the children and with the parties themselves, and the family therapist herself believed she could add value to the process. The important ingredient here was that the family therapist was not being foisted on to the parties, but both parties were very keen to participate in the process with her and to have her conclusions reported.

Avoiding making children into quasi-litigants

Pursuing a systemic model has relevance not just to family therapy. Michel Foucault saw power not as a commodity but as the product of a field interaction between human beings. While this may seem somewhat arcane, it actually has a very real effect on interventions that we may choose to make. If we consider power as a commodity then we will be tempted to intervene in ways that take power from one person and listed in another. If we view power as a product of a field interaction then we may be a little more cautious. In particular, if we are thinking about children in a family context we will be cautious about interventions that may be experienced as unnecessarily punitive from a parent's perspective. Viewed in this way power generates a particular landscape through which children must walk. If we are not careful, we can make that landscape not only difficult to traverse but also unendurable to live in. It is for this reason that I am suspicious of an excessively rights-based approach to children's matters. The rights debate seems to be highly focused on children's views and their expression. While this seems to make logical sense, it does risk making children into quasi-litigants. Instead of increasing children's power in relationship and facilitating the protection of their rights, this intervention might actually increase the risk to children by shifting the apparent power in the litigation into their hands. It doesn't matter that they may have no actual power, what matters is that their views may be considered by their parents to be the primary factor. If this conception is underlined by those of us working in the system, then we're adding to the problems rather than reducing them.

To properly elicit and communicate children's views I believe that we need to use family consultants, psychologists and psychiatrists, not judges and lawyers. We are not trained for the job and my experience is that on the whole we do a pretty poor job of it when we engage in this activity.

In order to avoid systems abuse, it is important that we all understand it is essential that the number of interactions or formal interactions that I had with children be minimised. This means we should allocate the labour so that the people who are most equipped and trained to deal with particular issues are the ones who actually deal with them, not those with least training.

Accordingly, it is important that Independent Children's Lawyers do not over-interview children; really there should be no more than one or two interactions with an Independent Children's Lawyer. If it is necessary for there to be further interactions with children then they should be through a family consultant.

Stress

In thinking about issues such as development and resilience, it is essential to know that the subtlety of these issues makes the construction of hard and fast rules a risky enterprise. Nevertheless, in many of the matters passing through the courts there are quite spectacular risks flowing from conflict and the effect of that single fact throws many of the subtler issues into the shade.

That which reduces children's stress is good; that which increases it is bad. This is a pretty good rule of thumb to apply when evaluating any intervention we make it make. Having said this though, there are healthy levels of stress (which can increase resilience) and unhealthy levels, which can cause lasting harm. See PowerPoint display

Collaboration versus abdication or domination

I suspect that many of the differences in family lawyers' opinions around the relevance of social science are often a product of professional suspicion rather than genuine informed disagreement. If we are able to resist the temptation to defend our turf and move toward the establishment of a genuine team approach to the resolution of these issues then we will have made significant advances.

There are so many different factors that impact on the individual child or young person's development that we must be very careful not to slavishly follow normative models. Some of the risks are:

1. Genetic predispositions need to be taken into account;

2. The unique developmental trajectory of this child needs we taken into account;
3. The relationship history, and in particular the level of participation by each parent in parenting needs to be taken into account;
4. The complexity of the extended family and friendship network of both parents and the child needs to be taken into account;
5. The existence of particular vulnerabilities on the one hand and resilience-building factors on the other need to be taken into account; for example: is there a drug and alcohol issue, or mental health issue; are the parties involved in some form of strong community engagement for example through a church or other social body

It is for the above reasons that we must be very careful as lawyers not to jump the gun and assume that we alone can come with a resilient solution based upon our valuation of the child's age and the gender of the parties. This is why, although it is very important for all of us to understand basic principles of child development and the effects of factors such as family violence, mental health issues and drug and alcohol abuse and social isolation on children, we must engage with other professionals such as family consultants, psychiatrists, psychologists, social workers, community workers, so that the responsibility and work required to build good results does not solely rest with us. This requires not only humility, but a willingness to learn both new ways of seeing the world and the language used by other professional groups.



Australian Government
Attorney-General's Department

Access to Justice Division

**ORGANISATIONS (DEFINITION OF FAMILY COUNSELLOR) DESIGNATION
2012**

Item no	Name of Organisations	ABN	Trading Name
1	Agencies for South West Accommodation Inc	29 138 143 911	Agencies for South West Accommodation Inc
2	Anglican Community Care Inc	53 440 436 445	
3	Anglican Counselling Service Diocese of Armidale	96 445 877 662	Anglicare North Inland
4	Anglicare SA Inc	69 187 578 153	Anglicare SA Inc
5	Anglicare Tasmania Inc	90 979 742 836	Anglicare Tasmania Inc
6	Anglicare Victoria	97 397 067 466	Anglicare Victoria
7	Anglicare WA	32 797 454 970	Anglicare WA
8	Australian Greek Welfare Society Limited	82 005 11 0305	Australian Greek Welfare Society Ltd
9	Baptist Community Services - NSW & ACT	90 000 049 525	Baptist Community Services
10	Berry Street Victoria Inc	24 719 196 762	Berry Street Victoria
11	Bethany Community Support Inc	38 633 820 168	Bethany Community Support Inc
12	Bribie Island & District Neighbourhood Ctr Assoc Inc	16 964 931 314	Bribie Island and District Neighbourhood Centre
13	Brophy Family and Youth Services Inc	80 114 143 802	Brophy Family and Youth Services Inc.
14	Brotherhood of St Laurence	24 603 467 024	Brotherhood of St Laurence
15	CatholicCare Archdiocese of Melbourne	42795179778	CatholicCare
16	CatholicCare	67 561 712 586	
17	Catholic Care NT	49 861 718 108	CatholicCare NT
18	CatholicCare Social Services Hunter - Manning	44 568 352 340	CatholicCare Social Services Hunter-Manning
19	CatholicCare Victoria Tasmania	32 150 113 947	
20	Catholic Diocese of Port Piries Inc	59 649 630 183	CentaCare Catholic Family Services
21	Catholic Church Endowment Society	29 608 297 012	Catholic Church Endowment Society
22	Catholic Family Welfare Services	96 760 398 961	CatholicCare
23	Centacare Catholic Diocese of Ballarat Inc	51 857 084 361	Centacare
24	Centacare Diocese of Sandhurst	71 789 820 442	Centacare Diocese of Sandhurst
25	Centacare Gippsland	34 479 868 469	
26	Centacare Tasmania	79 984 899 862	Centacare Family Services Centacare Tasmania

27	Catholic Society for Marriage Education	34 997 449 773	Catholic Society for Marriage Education
28	Centacare Catholic Fam Services Diocese of Broken Bay	71 616 242 198	Centacare Broken Bay
29	Centacare New England North West	73 522 479 291	Centacare New England North West
30	Centacare Townsville	79 786 799 140	Centacare Catholic Family Services
31	Centrecare Inc	98 651 609 161	Centrecare
32	Child & Family Services Ballarat Inc	83 786 843 940	
33	Children Australia Inc	90 680 959 928	Oz Child
34	Childrens Protection Society Inc.	52 303 567 862	
35	Chrysalis Support Services	26 016 321 134	
36	Citizens Advice Bureau of WA Inc	60 748 943 170	
37	City of Greater Geelong	18 374 210 672	The Greater Geelong City Council
38	Community Connections (Victoria) Limited	23 083 100 118	
39	Community Link and Network Western Australia Incorporated	17 673 097 195	Clan WA Inc
40	Community Mediation Service Tasmania Inc	41 002 169 296	Positive Solutions: Mediation Counselling Training
41	Community Programs Incorporated	90 346 683 679	
42	Community Services Australia Ltd	72 119 058 301	
43	Community West Inc	75 989 153 699	Community West Inc
44	Deception Bay Neighbourhood Centre Incorporated	59 915 696 709	Deception Bay Neighbourhood Centre Inc
45	Drummond Street Services Inc	85 690 831 425	
46	EACH	46 197 549 317	
47	Family Relationships Institute Inc	26 497 501 316	Relatewell
48	FMC Relationship Services	54 090 993 810	Family Mediation Centre
49	Foundations Child and Family Support Ltd	47 121 568 885	
50	Gateway Community Health	47 953 170 663	Gateway Community Health
51	Geraldton Regional Community Education Centre Inc	51 660 768 327	Geraldton Regional Community Education Centre Association Inc
52	Geraldton Resource Centre Inc	51 226 545 854	Geraldton Resource Centre Inc
53	Glastonbury Community Services	98 057 582 733	Glastonbury Child and Family Services
54	Goulburn Valley Family Care Inc	99 572 820 584	Goulburn Valley Family Care Inc
55	Indigenous Wellbeing Centre Aboriginal Corporation	96 356 361 867	Indigenous Wellbeing Centre
56	Inner South Community Health Service Limited	74 711 038 580	Inner South Community Health Service Limited
57	Interrelate Family Centres Limited	43 932 956 053	Interrelate
58	Kullarri Indigenous Womens Aboriginal Corporation	45 665 723 940	KIWAC
59	Kyabra Community Association Inc	14 441 535 505	Kyabra Community Association Inc
60	Lifeline Darling Downs And South West Queensland Limited	97 075 403 959	Lifeline Darling Downs and South West Qld Ltd

61	LifeWorks Relationship Counselling and Education Services	50 071 373 950	LifeWorks Relationship Counselling and Education Services
62	Lutheran Church of Australia South Australia and Northern Territory District Incorporated	84 490 129 361	Lutheran Church of Australia South Australia and Northern Territory District Incorporated
63	Mackay Children's Contact Service Inc	52 767 326 203	
64	MacKillop Family Services Limited	79 078 299 288	MacKillop Family Services
65	Macquarie Legal Centre	81 963 193 626	Macquarie Legal Centre
66	Mallee Family Care Inc.	32 085 588 656	Mallee Family Care Inc.
67	Manning Support Services Inc	88 845 915 950	Manning Support Services Inc
68	Marriage Education Programme Inc	28 481 381 568	Marriage Education Programme Inc.
69	Mens Information and Support Association Inc	36 295 742 511	Mens Information and Support Association Inc
70	Men's Outreach Service Inc	24 744 105 088	Men's Outreach Service Inc
71	Midland Information Debt & Legal Advocacy Service Inc	63 193 638 422	Midland Information Debt and Legal Service
72	Midwest Mens Health Incorporated	27 645 771 728	
73	Multicultural Community Services of Central Australia Inc	90 639 917 989	
74	Newcastle Family Support Services Inc	37 539 393 582	Newcastle Family Support Services Inc
75	Ngala Community Services	35 129 500 223	Ngala Community Services
76	Northern Suburbs Community Legal Centre Inc	64 239 344 069	Northern Suburbs Community Legal Centre Inc
77	OzChild	90 680 959 928	Children Australia Inc
78	Peel Youth Services Incorporated	38 199 654 838	Peel Youth Services
79	Perth Central and East Metro Medicare Local Ltd	83 062 628 960	
80	Pine Rivers Neighbourhood Association Inc	87 944 092 271	Pine Rivers Neighbourhood Association Inc
81	Regional Community Association Inc.	91 076 047 780	Redcliffe Neighbourhood Centre Association
82	Relationship Counselling And Mediation Services Inc	88 890 705 424	Relationships Australia Tasmania
83	Relationships Australia Canberra & Region Incorporated	34 199 851 375	Relationships Australia Canberra & Region Inc
84	Relationships Australia Northern Territory Inc	61 874 389 726	Relationships Australia Northern Territory Inc
85	Relationships Australia (NSW)	73 000 509 982	Relationships Australia NSW
86	Relationships Australia (QLD)	38 110 021 755	
87	Relationships Australia (SA) Inc	31 274 929 883	Relationships Australia SA Inc
88	Relationships Australia (Victoria) Inc	51 263 215 677	Relationships Australia Victoria Inc
89	Relationships Australia Western Australia Incorporated	32 105 234 326	Relationships Australia Western Australia
90	Roman Catholic Archbishop of Perth Catholic Marriage Education	68 046 084 588	Catholic Marriage and Fertility Services

	Services		
91	Roman Catholic Church For The Archdiocese Of Canberra And Goulburn As Trustees For Catholiccare	90 046 512 373	CatholicCare Canberra & Goulburn
92	Roman Catholic Trust Corporation For The Diocese Of Cairns	12 506 083 505	Centacare Cairns
93	Roman Catholic Trust Corporation For The Diocese Of Rockhampton	50 979 741 889	Roman Catholic Trust Corporation for the Diocese of Rockhampton
94	Southern Communities Advocacy Legal & Education Service Inc.	57 402 785 794	SCALES Community Legal Centre
95	Southern Family Life Service Association Inc	37 712 782 209	Family Life
96	South West Counselling Incorporated	11 899 521 734	South West Counselling Incorporated
97	Spectrum Migrant Resource Centre Inc	38 080 845 787	Spectrum Migrant Resource Centre Inc
98	St Michael's Administration Pty Limited	31 085 120 369	St Michaels Administration Pty Ltd
99	Sunshine Coast Family Contact Centre Association Inc	69 517 663 915	Sunshine Coast Family Contact Centre
100	Sydney Anglican Home Mission Society Council	88 851 368 006	Anglicare NSW
101	Tamworth Family Support Service Inc	74 675 042 170	Tamworth Family Support Service Inc
102	The Cairnmillar Institute	27 005 085 423	
103	The Corporation Of The Roman Catholic Diocese Of Toowoomba Centacare	78 793 694 389	Centacare
104	The Corporation Of The Synod Of The Diocese Of Brisbane	55 966 095 680	Anglicare Southern Queensland
105	The Corporation Of The Trustees Of The Roman Catholic Archdiocese Of Brisbane	35 020 644 975	Centacare
106	The Corporation Of The Trustees Of The Order Of The Sisters Of Mercy In Queensland	94 710 251 744	Mercy Family Services Brisbane
107	The Family Centre Inc.	31 377 578 926	
108	GordonCare Inc	38 154 603 664	Gordoncare
109	The Patricia Giles Centre Inc	51 096 676 308	The Patricia Giles Centre Inc
110	The Roman Catholic Bishop of Geraldton Centacare Family Services	45 343 752 115	Centacare Family Services
111	The Roman Catholic Trust Corporation For The Diocese Of Cairns	12 506 083 505	Centacare Cairns
112	The Synod of the Diocese of the NT Inc	61 187 402 536	Anglicare N.T.

113	The Trustee for Centacare Catholic Family Services Trust Fund	83 010 518 873	Centacare Wagga Wagga
114	The Trustee for The Salvation Army Victoria Property Trust	64 472 238 844	The Salvation Army Victoria Property Trust
115	The Trustee for the Roman Catholic Church for the Diocese of Parramatta	52 853 598 050	CatholicCare Social Services
116	The Trustees of the Roman Catholic Church for the Diocese of Wilcannia-Forbes	50 528 718 035	CentaCare Wilcannia-Forbes
117	The University of Newcastle	15 736 576 735	The University of Newcastle
118	Toowoomba Community Access Assn Inc	12 280 540 576	Toowoomba Children's Contact Centre
119	Trustee of The Roman Catholic Church for The Diocese of Bathurst As Tre Fo	70 549 189 541	Centacare Bathurst
120	Trustees Of The Roman Catholic Church For The Archdiocese Of Canberra & Goulburn As Trustee For Marymead Child And Family Centre	90 677 510 841	Marymead Child & Family Centre
121	Trustees Of The Roman Catholic Church for the Diocese of Armidale	66 010 842 414	Trustees of the Roman Catholic Church of the Diocese of Armidale
122	UnitingCare Community	28 728 322 186	UnitingCare Community
123	Unitingcare NSW.ACT	78 722 539 923	Unitingcare NSW.ACT
124	UnitingCare Wesley Adelaide Incorporated	33 174 490 373	UnitingCare Wesley Adelaide Incorporated
125	Unitingcare Wesley Country SA Inc	32 415 186 787	UnitingCare Wesley SA Inc
126	UnitingCare West	75 467 729 203	
127	UnitingCare Wesley Port Adelaide Incorporated	29 335 570 988	UnitingCare Wesley Port Adelaide Incorporated
128	Upper Murray Family Care Inc	99 081 624 768	Upper Murray Family Care Incorporated
129	Wanslea Family Services Inc	36 660 171 727	Wanslea Family Services Incorporated
130	Windermere Child and Family Services Inc	63 066 828 936	Windermere Child and Family Services
131	Womens Health Resource Centre Inc	33 144 857 171	
132	Youth Connections North Coast Inc	91 265 105 689	Youth Connections North Coast Inc
133	Youth & Family Service (Logan City) Inc	58 239 250 649	Youth & Family Service (Logan City) Inc
134	Commonwealth Services Delivery Agency	29 468 422 437	Centrelink
135	Crisis Support Services Inc	33 185 295 654	Men's Line Australia

