

# Including Children's Views in Family Law Disputes

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## Introduction

Children are inevitably affected by litigation between their parents, and so in one sense they are always involved as somewhat silent participants. It is now generally accepted that this silence doesn't work well for children, and that finding appropriate ways for their parents and decision makers to hear their voices can help improve children's experiences of the cataclysms of separation and divorce. There are, however, various approaches to registering children's voices, and the purpose of this paper is to explore some of the issues that commonly arise in this area.

## Setting the scene: children are not mini adults

Children and adults differ significantly. At its simplest, this idea may be expressed in terms of children being smaller and more dependent, whereas adults are larger and more independent. But there are far more critical differences that we need to be aware of.

Most significantly, children are on an obvious developmental trajectory; of course adults continue to develop, but with greater subtlety over far longer time periods than we see in children and young people. The fact that at different ages children and young people are at different stages of development, means that at different ages the needs of children will differ, and it is reasonable to expect that constructive parenting-after-separation arrangements will

match the developmental needs of the children to whom they relate, and the establishment of children's views will similarly follow those needs in an appropriate manner. It is therefore important that as lawyers we have some familiarity with the body of literature that has been generated in the social sciences around child and adolescent development in the context of family breakdown. A good place to start is a paper by Dr Jen McIntosh entitled *Children's responses to divorce and parental conflict: A guide for Family Lawyers*, which can be downloaded at [http://www.flerproject.org/doc/000033-Model\\_Discussion\\_Guide\\_Family\\_Lawyers.doc](http://www.flerproject.org/doc/000033-Model_Discussion_Guide_Family_Lawyers.doc). This paper contains a number of useful further references.

A word of caution: you would no more expect to become a developmental psychologist from reading one introductory textbook or a few articles than you would expect to become a competent lawyer from reading a couple of cases. The debates that go on in the social sciences are vigorous and often subtle, and the art of working with vulnerable people is practical rather than theoretical. Accordingly, it is very important to seek the assistance of appropriately qualified social science professionals on significant issues. This is particularly important given that children at the same developmental stage will differ from each other depending on factors such as their family context, their history of care, and their inherent individuality. One size definitely does not fit all where children are concerned, and we must be alive to potential problems and be prepared to seek the assistance of appropriately qualified professionals if there is any doubt about the effect an arrangement might have on children. The Court itself is regularly informed by report writers, Part 15 experts and treating health professionals. The conduct of successful parenting matters, particularly where there are challenging issues, is therefore a collaborative effort not just between judicial officers and lawyers, but across professions.

## **Child and adolescent development**

Because children differ from adults and from other children across a number of variables including age and stage of development, it is important to have some understanding of child and adolescent development if we are considering incorporating children's views into family law proceedings.

The material in this section is adapted from the *NSW Child and Adolescent Mental Health Services (CAMHS) Competency Framework* (October 2011) ('the Competency Framework'), which can be downloaded in full from the NSW Health website [www.health.nsw.gov.au](http://www.health.nsw.gov.au). This is not intended as a primer of child and adolescent development (which is a very complex and

rich discipline in its own right), but as a very broad-brush, low-fi map of a continent many of us are only vaguely aware of.

This section looks at:

- the three areas in which human development occurs, or '*biopsychosocial development*';
- the three key relationship domains; and
- three significant developmental contexts.

## **Biopsychosocial development**

Human development occurs in the following areas:

### ***Biological development***

- Physical structure and function, including hearing, vision, normal or abnormal growth and development and any related disruptions (eg: operations or injuries)
- Autonomic, immunological, neuroendocrine and subcortical controls including allergies and intolerances
- Sensorimotor integration including fine motor, gross motor, speech and language , visual perceptual and sensory processing and modulation

### ***Psychological development***

- Information processing, cognition, memory and attention
- Communication
- Emotions, thoughts and attitudes about self, others and one's place in the world, curiosity
- Moral reasoning
- Development of gender identity and sexuality
- Methods of coping with stress (including defence mechanisms)

### ***Social development***

- Capacity for empathy – the capacity to understand and predict others' feelings or intentions
- Interactions – with significant others and peers in a competent manner and conduct a discourse
- Inter-personal problem solving

## **The three key relationship domains**

When working with clients and families/carers, the Competency Framework suggests that mastery should be considered within the following relationship domains:

1. **The person in relationship to *self*** – observed in *self care and self regulation* – responses to limit setting, participation in routines, managing emotions and behaviour
2. **The person in relationship to *others*** – *observed in relationships*, including attachment style in relation to parent/carer; siblings/other family members; significant others and peers
3. **The person in relationship to *the world*** – *observed in industry* – play, recreation and work; capacity for imagination, flexibility and creativity

### **Three significant developmental contexts**

#### ***Infant (0–4 years inclusive)***

Development in this age group occurs primarily in the context of the adult/child dyad so the child in relation to 'self' and 'others' is combined in this section.

#### 1. & 2. The child in relation to *self* and *others* (primarily primary caregivers)

- *Regulation* – feeding, sleep/wake cycles, crying/dyadic settling strategies (somatic and/or emotional regulation),
- *Relationship patterns* – primary caregiver/child relationship – response to care giving, separation and strangers, social seeking or avoidance, development of trust
- *Behaviour* – including attachment behaviour, responses to limit setting, participation in routines
- *Sensory adaptation responses* eg: to intense stimuli, loss of support and loud noises
- *Developing autonomy in self care* (eg: feeding, dressing, toileting)
- *Communication* – development of linguistic capacity to communicate
- *Play* – development of play skills and engagement with others

#### 3. The child in relation to *the world*

- Develops *sensory preferences* (eg: food, textures, sounds)
- *Play* – development of play preferences (eg: favourite toys and books) and development of symbolic play in making sense of the world
- *Emerging decision making* about self care and play choices

#### ***Child (5–11 years inclusive)***

Development in this age group occurs primarily in the context of peers, family and school.

### 1. The child in relation to *self*

- Developing a *sense of self*, acquiring a belief in self- constancy and in relatively permanent psychological traits, and learning to distinguish their thoughts and feelings from those of others
- Developing *self discipline* in behaviour and task completion (eg: homework, music/sporting practice)
- *Exercising choice and preferences* for activities, time frames, spending and social relationships

### 2. The child in relation to *others*

- *Relating with peers* according to more obvious social rules
- *Performance orientation* that includes not only task completion but also others' responses to their achievements
- *Belonging to a group*, participating as a group member
- Developing *cultural awareness*
- Maintaining *longer term friendships*
- *Negotiation skills*
- Managing *increasing responsibility* (eg: home duties)

### 3. The child in relation to *the world*

- Moving from free play to *more structured play* that may include elaborate rules and team work
- *Mastering physical co-ordination tasks* related to play (eg: sport, art) and school performance (eg: writing, cutting)
- *Mastering academic learning*

## **Adolescent (12–17 years inclusive)**

Development in this age group occurs primarily in the context of emerging identity and independence.

### 1. The young person in relation to *self*

- *Emerging self-determination* and independence from significant figures of attachment and authority
- *Coming to terms with own body* – perceived assets, strengths and limitations
- Maturing but not fully formed *judgement and insight*

- Heightened *interest in experimentation* and risk taking including drug and alcohol use
- Greater awareness and at times demonstration of *moral, ethical, spiritual and cultural preferences/choices*
- Developing *cultural identity*

## 2. The young person in relation to *others*

- Forming and maintaining *intimate relationships*
- *Learning to relate* to and rely on peers
- Sharing *advice and opinions*, offering others assistance and psychological support
- Developing ability to '*put themselves in another's shoes*', experience and demonstrate maturing empathy
- *Managing conflict* in relationships

## 3. The young person in relation to *the world*

- *Increasing independence* and autonomy in life roles, particularly as student, employee, team member
- *Greater mobility* with increasing capabilities for independent use of transport and community based facilities
- Taking on *increasing responsibility* for self and others. Some adolescents may become parents themselves, may be required to perform home duties and/or to provide care for others (eg: older adolescents caring for family members with a physical disability, mental health or drug and alcohol problem)
- Managing increasing responsibility related to *finance*
- Developing *cultural awareness* and participation

## Attachment

Attachment is of enormous significance in the first 4 to 5 years of life (although as a dynamic force it has lifelong significance), and since anxious or insecure attachment (as opposed to secure attachment) has been correlated with poor social and cognitive outcomes, we need to be alive to the possibility that an arrangement, even one that both parents agree with and that a child or young person supports themselves, may not be in a young child's best interests.

Here's one description of the attachment system<sup>1</sup>:

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<sup>1</sup> Judith Solomon and Zeynep Biringen, 'Another Look at the Developmental Research' (2001) 39(4) *Family Court Review* 355.

This system, which at the most concrete level functions to keep the immature young in proximity to care-givers, is believed to have evolved to provide protection from harm of many sorts, including illness, predators, and aggression from others. The analogy of a thermostat is frequently invoked to explain how the attachment system functions. Changes in ambient temperature relative to the setting of a thermostat turn on the furnace until the temperature setting is reached. Analogously, the child's experience of fatigue, illness, anything threatening or frightening, and most especially, separation from the attachment figure results in strenuous efforts to approach the attachment figure or to bring him or her close. *Chronic frustration of this cycle inevitably leads to feelings of anxiety and distress and over time can cause the child to develop both adaptive and maladaptive internal defenses and behavior, which are often described as differences in the security of attachment relationships.* [emphasis added]

An important thing to note is that attachment in the technical sense is not identical with concepts such as bonding or love in their lay or 'folk' sense. One can love a child and vice versa, without being the most significant attachment figure for that child (although Bowlby certainly saw our ideas and styles of love as having their roots in our attachment experiences). The attachment system is a *biological* feature of the child's relatedness to the world (in much the same way as imprinting occurs in some birds) and must be distinguished from less fixed, though nevertheless important, aspects of small children.

The controversy that plays out in the social science/separation and divorce literature relates to (among other things):

- the significance and hierarchy of different attachment figures;
- the effect of more regular, shorter periods of contact, as opposed to longer, less frequent periods of contact with a non residential parent;
- the interaction of innate temperament, context and attachment effects;
- the effect of high conflict;
- age effects;
- gender effects.

One of the few things that is clear in this debate, is that it is difficult to make generalisations. Nevertheless, there do appear to be a number of issues that we need to be on the lookout for and, if they arise, be prepared to think creatively or seek further assistance from an appropriately qualified professional. These are:

- the age of the child: the younger, the more caution should be exercised;
- signs of separation distress in the child (bear in mind here that children often display more distress when they are *returned* to an attachment figure after separation, rather than *during* the period of separation itself);
- the level of involvement each parent has had in the care of the child from a very early age: if a non-live with parent has been highly involved there may be less of a problem with, say, overnight time with a very young child than there would be with a less involved parent; similarly, it may be very important to maintain that relationship by providing for more frequent, shorter periods of time to be spent;
- the existence of violence or high levels of conflict;
- the existence of a pattern of substantially shared care since separation;
- the existence of other people such as half- or step-siblings and grandparents who have had significant involvement with the child from an early age;
- the physical proximity of the two parents' homes.

No matter what the relationship is like between the contact parent<sup>2</sup> and the child, understand that *time with* that parent equates to *time away* from the other parent. Much of the heat in the attachment debate as it applies to separated families is centred on the effect on young children of this unavoidable compromise. In acting for parents, particularly fathers who are seeking greater time with very young children, it is important to provide some reassurance that attachment issues are not the same as love, and that if this stage of a child's life can be managed well so that the child is able to build on a foundation of secure attachment, the chances that that child will have the capacity to relate well socially (including with both of their parents) are greatly increased.

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<sup>2</sup> This is less cumbersome to write, though also less correct, than 'the parent with whom the child is not living', or the 'spending time parent'.



## Why involve children at all?

Cashman and Parkinson note that:

various reasons have been put forward for taking children's views into account in family law and other arenas (Chisholm, 1999; Lansdown, 1995a, 1995b). These include the twin rationales of enlightenment and empowerment (Warshak, 2003). The enlightenment rationale is that children can provide important information about their perspectives and experience that can contribute to more informed decisions and potentially more positive and workable outcomes. The empowerment rationale is that children benefit from being involved in several ways: by learning to make decisions, by having a greater sense of control and self-esteem that comes from recognition and respect, and being acknowledged as people with interests in and perspectives on the decision rather than being the "object of concern" (Smart & Neale, 2000; Warshak, 2003). It has also been suggested that children, like adults, are more likely to feel that the process and outcome are fairer if they perceive that they have had a chance to have some control over the way in which the decision is made ("voice") or over the outcome ("choice") (Thibaut & Walker, 1975).<sup>3</sup>

So far as the actual data collected by Cashmore and Parkinson was concerned,

[m]ost children (91%) said that they should be involved, though not necessarily in making the decisions. Most of the children who expressed strong and unqualified views were involved in contested matters, whereas those who said that they wanted to be involved but did not want to make the decision themselves were more likely to be involved in non-contested matters without high levels of conflict or violence.

There were several themes in children's comments concerning the reasons they wanted to be involved—themes that have emerged in other studies: the need to be acknowledged, the belief that this would ensure more informed decisions and better outcomes, and the view that they had the right to have some say in the arrangements that would affect them most (Gollop, Smith, & Taylor, 2000; Parkinson, Cashmore, & Single, 2007; Smart & Neale, 2000). The need for some acknowledgement and recognition that "it is their lives" that are affected by the decisions made about them was the most commonly expressed reason for children wanting to have some say in what happened.<sup>4</sup>

These general ideas lie behind the legislative framework within which we practice, and this legislative framework is itself informed by our obligations under the *Convention on the Rights of the Child*, particularly Article 12. This Article and some relevant sections from the *Family Law Act* are set out below.

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<sup>3</sup> Judy Cashmore & Patrick Parkinson (2009) *Children's Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors* pp 15-16.

<sup>4</sup> *Ibid*, p18.

## Article 12 of The Convention on the Rights of the Child

1. States Parties shall assure 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.

## ss 60B(4), 60CC(3)(a), 60CD & 60CE of the *Family Law Act*

### 60B Objects of Part VII and principles underlying it

- (4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2011, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

### 60CC How a court determines what is in a child's best interests

#### *Additional considerations*

- (3) Additional considerations are:
  - (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

### 60CD How the views of a child are expressed

- (1) Paragraph 60CC(3)(a) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. This section deals with how the court informs itself of views expressed by a child.
- (2) The court may inform itself of views expressed by a child:
  - (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
  - (b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or
  - (c) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

*Note 1: Paragraph (a)—subsection 62G(3A) generally requires the person giving the report to ascertain the child's views and include those views in the report.*

*Note 2: Paragraph (b)—paragraph 68LA(5)(b) requires the independent children's lawyer for the child to ensure that the child's views are fully put before the court.*

## 60CE Children not required to express views

Nothing in this Part permits the court or any person to require the child to express his or her views in relation to any matter.

### What do we mean by 'views'?

The meaning of the word 'views' as we use it in the context of parenting proceedings is stretched out along what might be termed a '*continuum of participation*': from one perspective views might be interpreted as being synonymous with 'wishes'. On this interpretation, taking children's views will be a process of discovering *what they want* in interview. From another perspective, it might mean assessing the emotional and relational landscape the child is traversing, so that parents and decision makers can respond appropriately to what they discover of that landscape. This second perspective is less focussed on the child as a participant in their parents' dispute, and more focussed on the child's *display* of themselves as a participant in their own life. Approaches to children's voices that come from the first perspective suggest 'direct involvement'; those from the second might be considered to come from a less direct, 'protectionist view'.<sup>5</sup> Both perspectives are important, but both skill and wisdom are required to determine which path best suits which child for which purposes.

There are unique issues that arise in family law processes no matter what perspective is taken:

[L]istening to children's voices in the public sphere concerning issues such as the governance of their schools, the design of playgrounds or on issues of town planning, all carry obvious benefits with few risks. They do not involve the sort of emotional and relational issues that arise in disputes about post-separation parenting arrangements. Even when children are involved in decision-making about medical matters, the final decisions on treatment are likely to rest with their doctors and their parents.

Involving children in decision-making about post-separation parenting is different because the very process of so doing has the potential to be detrimental (Warshak, 2003). Children may experience loyalty conflicts or be subjected to pressure and manipulation by one or both parents. There are also issues about asking children to take the role of adult decision-makers, reversing the allocation of decision-making responsibility that is found in intact families.

Of course, children may be involved in various ways that do not involve them in "making the decision" and this is one of several distinctions that need to be drawn in understanding children's participation. Their influence may be direct or indirect, and is likely to differ at different times in the process, rather than being a "one-off" event. It might involve some input

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<sup>5</sup> Parkinson, P, & Cashmore, J, *The Voice of a Child in Family Law Disputes*, Oxford University Press: UK (2008) p60.

into the process (“voice” or having a say) at some stages and even some “choice” or control over some aspects of some decisions. It may take a number of forms, depending on the circumstances. Children may be consulted in the course of negotiations between their parents on contact arrangements where the issue of primary residence is not in dispute; they might be interviewed by a counsellor and their views fed back to their parents in the course of mediation; they might have their views included in a family report; and they might be involved in the trial process as well, at least through having an independent lawyer to represent them and also, uncommonly, by having the opportunity to talk with the judge.<sup>6</sup>

And of course the *purpose* that is motivating us is significant: are we wanting to involve the child as a forensic tool (which in many cases may be unavoidable due the intensity and nature of the parental conflict); or are we perhaps seeking to guide parents back from being firmly in the role of *the litigant* to a more appropriate role as *wise parent*. If at all possible, wooing parents back to being reflective and sensitive parents rather than reactive and hostile litigants must take on a high priority for those of us involved with the family courts. Consider the following description of what the research tells us of ‘parental presence’:

The research literature suggests that two properties of parental presence are important to children’s capacities to manage parental conflict and transition. At the psychological level, parental attunement is a concept upheld across the attachment and divorce literature as the cornerstone of a child’s security, in the face of all manner of trauma. At the behavioural level, sensitivity of parental response is the manifest expression of parent’s attunement to their children’s needs and experiences.

Parental attunement or, more specifically, parental reflective function, refers to a parent’s capacity to take their child’s perspective. Parental reflective function is a crucial human capacity that is intrinsic to the regulation of affect and to productive social relationships. It is the clarity and accuracy of the parent’s reflection on his or her own internal emotional states and ability to differentiate and process the child’s internal states that lead to security for the child in his or her attachment relationships and sense of self (Slade, 2005).

“Secure base parents” refers to parents who, despite their own current experiences, have the capacity to experience, hold and regulate emotion, for both themselves and their children. Their children need make only minor adaptations to their own internal experiences. These children do not have to modify what they feel in order for the parent to better cope (McIntosh, 2005). As Marvin, Cooper, Hoffman, and Powell (2002) describe, major and ongoing derailments of

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<sup>6</sup> Judy Cashmore & Patrick Parkinson (2009) *Children’s Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors*. This paper can be downloaded without charge from the Social Science Research Network Electronic Library at: <http://ssrn.com/abstract=1471693>.

parental reflection and sensitive response to children are powerfully disruptive to a child's development.<sup>7</sup>

## How children express themselves: more than mere words

Taking into account the remarkable developmental trajectory that children are on, it will be obvious that at different ages children will communicate in different ways. A conversation with a young person in mid-adolescence can certainly revolve around words and ideas; this is simply not possible in the same way with a much younger child. Younger children express themselves through play, through drawing, through relational styles.

What this means for us is that establishing the younger child's experiential landscape involves engaging with that child in a range of activities including play, drawing, stories and so on. The tools for this sort of engagement are well established in child developmental research and in play therapy. Dr Jen McIntosh alludes to some of those tools in the following extract from an article on child inclusive mediation. In discussing the child interview stage of a child inclusive mediation, Dr McIntosh notes that the following issues should ordinarily be addressed using a number of tools<sup>8</sup>:

- Children's understanding of their parents' separation and conflict:
  - family drawings and discussion;
  - Children's Perception of Inter-Parental Conflict Scale (Grych et al., 1992);
  - Security in the Interparental Subsystem scales (Davies, Forman, Rasi, & Stevens, 2002); and
  - Caught in the Middle Scale (Buchanan et al., 1991);
- Children's experience of the parent-child relationship:
  - Kvebaek Family Sculpture Technique (KFST; Cromwell, Fournier & Kvebaek, 1980);
  - Child-Parent Relationship Scale (McIntosh, 2003b);
  - clinical use of attachment story stems and interview extracts;
- How does the child see her/himself within the conflict?
  - card-based tools, such as *The Bears* (St Luke's Innovative Resources, 1992); and

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<sup>7</sup> McIntosh, J. (2007) *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*. AFRC Issues Paper No. 1  
<http://www.aifs.gov.au/afrc/pubs/issues/issues1.html>

<sup>8</sup> Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors

— Separation Story Stems (McIntosh, 2003d).

The interview covers the child's feelings about the current living and visiting arrangements and their hopes for the future, without placing them in a position of having to say or decide what they want. It is a highly skilled interview that needs to be paced well for each age and situation and in which signs of trauma are carefully monitored.

Plainly this is an area of practice that we don't want to barge in on unprepared and untrained; as lawyers we have to ask ourselves, '*are these skill-sets that we possess?*' If not we might need to consider how we might acquire these skills if we are involved in child interviews. As I indicate at the end of this paper, collaboration with the professions which actually possess that training is key to good outcomes in this area.

### Special risks

The most important principle to apply in any intervention that involves children is to *do no harm*. Plainly, the very fact that we are seeking to engage with children in the midst of a family law dispute involves some risk. It is important to have some idea of this landscape of risk so that appropriate steps can be taken to ensure that in any proceedings where children's voices will be heard, participation does not come at an unacceptable cost to those children. The following sections set out a few significant risks that we need to be particularly alert to.

### Systems abuse

Systems abuse refers to the harm done, in this case to children, by over-exposure to formal systems, be they governmental, curial or medical. For our purposes, over-interview of children by too many different professionals presents a significant risk of systems abuse. If at all possible, it is therefore desirable to limit the exposure of children to too many systemic interventions. One practical measure that can be taken in parenting matters is for an ICL to work with the family consultant or any family therapist to ensure that the process of interview or assessment is as streamlined as possible.

### Mental health issues

Without doubt the children of litigants who pass through the family law system are at grave psychological risk. As Dr McIntosh has pointed out,

in Australia, dependent children of divorced parents were twice as likely (25% versus 12%) as children from never-separated families to develop mental health difficulties in childhood (manifested in behavioural and emotional disturbances) (Sawyer et al., 2000). Early figures indicate that up to 40% of children involved in Family Court of Australia matters develop substantial mental health symptoms during the course of their childhood (McIntosh, 2006). Such findings reflect multiple strains inherent in this population of separating parents, including mental health issues together with the stresses of protracted litigation (McIntosh, 2006).<sup>9</sup>

It is obvious, then, that the children from whom views are taken in family law matters are likely to be far more vulnerable than children in the general population. Great care needs therefore to be taken in engaging with children, and, it would be hoped, the professionals who engage with children in these circumstances will be properly trained and adequately supervised.

### Children as quasi-litigants

In a legal environment where the expressed views of older children in particular can be highly influential, it is important that children do not become weapons in the hands of their own parents.

It appears to be a particular concern among children that while inclusion is a good thing, having a direct say in outcome is very challenging:

While only four children (9%) said they thought it was not fair to ask children what they want to happen in relation to the residence and contact arrangements, the majority (70%) indicated that “being asked” does put them in “a difficult position”. The main reasons for their discomfort were their unwillingness or inability to choose between their parents and their concern about the consequences of choosing—in particular being unfair to and upsetting one of their parents. For four children involved in highly contested matters, their concern was about more direct and immediate consequences—that a parent might “hit”, “hurt” or “not let them in the house”. Despite their fears about being hurt, these children still wanted to have a say and thought that it was appropriate that they should do so.<sup>10</sup>

Interestingly, Cashmore and Parkinson also found that there are different views held between lawyers on the one hand and family consultants and mediators on the other in relation to this risk. In relation to lawyers, they found the following:

While most lawyers were generally supportive of children “having a say” in the process, they consistently emphasised the risks of harm from children’s participation, especially in the

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<sup>9</sup> McIntosh, J. (2007) *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, p 3.

<sup>10</sup> Judy Cashmore & Patrick Parkinson (2009) *Children’s Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors*, p 18.

litigation process, rather than any benefits that might flow from it. The main benefit was expressed in terms of the workability of the arrangements, with children's views feeding into better decisions that children could be happy with and that might prevent older children and adolescents "voting with their feet". Like lawyers and judges elsewhere, most attached a great deal of importance to children's age and maturity, and their competence as "rational decision-makers" (Crosby-Currie, 1996; Murch et al., 1999; Felner et al., 1985; Piper, 1996).

By way of contrast,

Almost all the counsellors [***note: the authors used this term to refer to mediators and family consultants***] expressed support for children's participation in terms of one or both of Warshak's (2003) rationales—enlightenment and empowerment—in contrast to family lawyers' concerns with the "reliability" of children's views and the workability of arrangements. ...

However, for both the mediators and family consultants, the most important aspect of the involvement of children was to enlighten the parents. Their assumption was that parents did not know what their children really thought, whereas the lawyers were concerned about the extent to which parents talked with children and tried to influence them.

Counsellors expressed some concerns about loyalty conflicts, and children trying to "look after" their parents' needs above their own, particularly in the quest for fairness and looking after a vulnerable parent, as well as possible repercussions for children who are asked to choose. But they were less troubled than lawyers about children's age and maturity issues, and about parental pressure and manipulation. This is for three reasons. First, counsellors were less likely than lawyers to say that parents talked to children about the parenting dispute and less likely to say that this was inappropriate, as they considered it important for parents to know what their children thought. Only a small minority of the counsellors thought that most of the parents talked with their children in an attempt to influence them. Secondly, most counsellors thought they could identify situations where a child has been told what to say or has been strongly influenced by a parent. Unlike the lawyers, counsellors saw both parents in the course of their mediation or assessment processes. Where they were least confident was where children have been subject to such influence and pressure that they have internalised the parent's viewpoint so that it becomes their own, although this was not a commonly expressed concern. Thirdly, counsellors were less concerned with discerning the pure, uncontaminated voice of the child.<sup>11</sup>

The fact that there are risks involved in children's inclusion in family litigation is not in itself a reason not to listen to their voices; but it is a very good reason to ensure that our interventions are clearly thought out and put into effect consistently with best practice. This is not an area to stumble into untrained and unaware of the subtleties. As lawyers, to ensure that children get

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<sup>11</sup> Judy Cashmore & Patrick Parkinson (2009) *Children's Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors*, pp 19-20.



the best chance at good outcomes, we need to be open to collaborating with the professions that actually receive proper training in child development and counseling.

### **The bottom line: Collaboration rules!**

It is complex working with separated families toward the high, but tragically elusive, goal of establishing resilient parenting strategies that work in children's best interests. No one profession has all of the answers or all of the necessary skills that are required to achieve the best possible results. But collaboration is a challenging affair in itself.

I've reproduced below a table from a paper by Chris Huxham and Siv Vangen entitled *Ambiguity, Complexity and Dynamics in the Membership of Collaboration*<sup>12</sup>, which gives a very good summary of some of the key confounding issues that lead to what these two authors call 'collaborative inertia'. Not all of these items are relevant to the immediate environment of the court, but remember we're also frequently dealing with collaborations between government and community agencies such as FRCs, contact centre providers, and agencies providing courses and other support such as Unifam, Relationships Australia and Catholic Care.

#### **Summary of dimensions of ambiguity and complexity:**

##### **Ambiguity**

###### *Ambiguity in membership and status*

- Members' perceptions of who else is a member vary
- Members' perceptions of each other's status in the collaboration vary

###### *Ambiguity in representativeness*

- Members are confused over the degree to which an individual representative is representing an organization
- Members are confused over which organization, organizations or other constituency is being represented

##### **Complexity**

###### *Complexity in structure*

- There can be complex hierarchies of collaboration
- Individuals and organizations are often members of multiple partnerships with overlapping membership
- Departments of an organization may become involved in partnerships independently of each other
- Collaborations often have complex structures involving partnership staff, executive committees, working groups and so on

##### **Dynamics**

###### *Shifting membership*

- Government policies and other forces cause demise and reforming of organizations
- Individual representatives come and go or change their role within their organizations

###### *Shifting purpose*

- Government policies and other forces lead to refocusing of collaborative purpose (and hence of membership)
- Mismatches in members' agendas lead to continual negotiation of purpose (and hence

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<sup>12</sup> Chris Huxham, and Siv Vangen, 'Ambiguity, Complexity and Dynamics in the Membership of Collaboration,' (2000) 53 *Human Relations* 778.

the possibility of changing membership)

- Learning from past activity and completing agenda items also leads to continual negotiation

*The pace of change*

- Changes can take place frequently, rapidly and sometimes imperceptibly

As well as these issues of ambiguity, complexity and dynamics, the cultural, and to a large degree linguistic, differences between disciplines, professions and sectors can frustrate our attempts to work together. In addition, underlying apparently straightforward professional cultural issues there are often more complex, subterranean issues of power and trust operating<sup>13</sup>.

As lawyers we are very good at unpacking stories and providing structure; social scientists are good at providing developmental context, deciphering the puzzles of conflict, seeing a way through the woods of trauma; every profession active in the family law system potentially adds something unique and valuable to the improvement of outcomes. But these very differences can work against each other. Professional rivalries, misunderstandings and resentments can poison the well, so it is vital that we make the effort to understand each other and prioritise functional relationships. This involves finding out about what's going on outside our own patch and developing the interpersonal skills needed to work through differences.

A little like the skills we expect our clients to develop to help them work together toward better outcomes for their children.

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<sup>13</sup> For further detail, see Mark A MacDiarmid, and Tracey A Willow, 'To Coerce Or to Collaborate: Human Rights Lawyers Relating With Other Professions,' (2008) 33(2) *Alternative Law Journal* 86.