Involving Children in Family Dispute Resolution

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NEW RESPONSES TO THE FAMILY LAW ACT AMENDMENTS

The focus of this paper is child inclusive dispute resolution – especially that which is outside the litigation pathway. Current issues are placed in perspective in relation to their historical context. Techniques, practitioners, benefits to children and parents, contra-indications, risks and conundrums are discussed. Views expressed come from the perspectives of private family dispute resolution practitioners with extensive legal and psycho-social experience in helping families negotiate the rocky, treacherous and not always well worn paths of family law disputes.

Inclusion of Children through Reports to the Court

The concept of involving children directly in conflict resolution in family law disputes is not new. Long before the Family Law Amendment Act of 2006 ("The Act") – as far back as 1975 - family report writers (Regulation 7 or 8 Family Consultants) have traditionally interviewed children in the process of writing family reports and, more importantly, have always observed children interacting with their parents as a means of establishing levels of attachment, styles of interaction, risk factors and so on. In addition, there have also been "children's wishes reports" or "children's views reports" (as they are now known) which have focused only on the content of individual interviews with child subjects of family law disputes. These latter reports have always been more commonly requested for older children and adolescents who have been considered mature enough to hold and express well reasoned opinions.

Under The Act, family consultants directed to give the court reports on matters under subsection 62G(2) must:-

(a) ascertain the views of the child in relation to that matter: and

(b) include the views of the child on that matter in the report.

Inclusion of Children through Independent Children's Lawyers (ICLs)

Representatives for the children – variously known over time as "Separate Representatives", "Child Representatives" or "Independent Children's Representatives (ICLs)" - have for many years been appointed by the court to specifically present cases which focus on children's best interests. Part of their responsibility has traditionally been to ensure that children's voices are heard. The role of ICLs as included in the 2006 amendments to The Act is a powerful one and includes the following (Subsections 68LA(5) 3.2.2 and 3.6):

> 3.2.2 To inform the court of the views the child has expressed. There is no requirement that this be done by admissible means, consistently with the relaxation of the evidentiary rules in children's cases…..
>
> 3.6 It is suggested that the provisions of subsections 68LA(6), (7) and (8) place the ICL in a position of privilege which is stronger than the lawyer for a party, giving the ICL all of the privileges of client confidentiality but the freedom where necessary to disclose even against instruction. It is suggested that this provision should not be used lightly but will come into use in extreme circumstances such as where a child discloses abuse to the ICL.

Guidelines for ICLs (established when they were known as "Child's Representatives") include the following:

- The child has a right to establish a professional relationship with the Child's Representative.

- The child's representative is to explain to the child the role of the Child's Representative, the court process and other agencies that may be involved and the reasons for their involvement.

- The Child's representative should strive to establish a relationship of trust and respect and explain to the child how the child can: Have a say and make his / her wishes and views known during the process; Apply to become a party to the proceedings or give instructions to a legal representative through a next friend to be appointed by the Court; and indicate how the child can contact the Child's Representative.

These guidelines do, however, come with cautions and exceptions which highlight the potential pitfalls and risks to children of involving them and their views directly in proceedings. They include:-

- Each child will have different emotional, cognitive and intellectual developmental levels, family structures, family dynamics, sibling relationships, and religious and cultural backgrounds.

- Children are vulnerable to external pressures when involved in residence, specific issues and contact disputation.

- A strategy should be developed with any Child and Family Counsellor involved in the case and with the child, to minimize the potential for any adverse reaction towards the child (for example, resulting from the child's statements to the child's representative or to a report writer).

    - In addition to explaining the lack of confidentiality in his/her relationship with the child at the commencement of the relationship, it may be necessary to periodically remind the child.

- Prior to making submissions, it is appropriate for the child's Representative to consult with a relevant expert in relation to the context of the child's wishes, the contexts in which those wishes both arise and are expressed, the willingness of the child to express wishes; and any relevant factors associated with the child's capacity to communicate.

Children's Rights to become Parties and to speak to Judicial Officers

It is possible for children to apply for parenting orders under s 65C(b) of The Act and, under the Family Law Rules, for a judicial officer to interview a child who is the subject of a case under part V11 of "The Act".

The Less Adversarial Trial and the children's Cases Program (CCP)

The Less Adversarial Trial has been introduced and was modelled from March 2004 in the Children's Cases Program (CCP), this being a pilot study in the Parramatta and Sydney registries. The main features of the program were:

- The active role taken by the assigned judge/s;

- Greater focus on future arrangements which were going to be best for the children – rather than on who was going to win or lose; and

- Provision of direct and indirect assistance to enable the parties to parent more effectively in the long term.

Two follow up research studies by Dr Jennifer McIntosh of Latrobe University in Melbourne (McIntosh, 2006) and Professor Rosemary Hunter of Griffith University in Brisbane (Hunter, 2006) demonstrated positive outcomes for those involved in the CCP

as compared with a control group involved in traditional litigation. The studies supported the view that less adversarial trials result in benefits to the post separation co-parenting relationship of the litigants, greater satisfaction with the process and a faster court process.

The Child Responsive Dispute Resolution Program (CRP)

Following on from the CCP the Child Responsive Dispute Resolution Program (CRP) commenced in the Melbourne and Dandenong registries in 2006, being a pilot study in tandem with and focusing even more on the needs of children than the CCP (McIntosh and Long, 2007). This model proceeds as follows:

- Intake and assessment with each parent with clarification of all issues;
- Family conference with the school aged children, providing feedback to the parents;
- Feedback meeting with the parents and their lawyers;
- Preparation by the family consultant (social science specialist) of a preliminary report;
- Interviews with parents and children for a family report, including identification of the issues and external referral if necessary;
- Issue of the family report and discussion with the parents;
- Provision by family consultant of expert evidence as required; and

- Post determination review, assistance with implementation and external referrals as indicated.

The meeting with the children was designed to offer the children an "opportunity to debrief" and to help their parents to focus on the children's needs and interests in their negotiations, with a view to assisting some parents to resolve matters without proceeding to trial - with consequent benefits. In the event the matter does not settle during the pre-trial interventions, the Family Consultant's report is used to inform the judge about the issues, effectively bringing the children's needs and "unique views" into the court's earliest focus. Interviews with the children occur early in the pre-court assessment and "screen the developmental needs and emotional 'equilibrium' of each child with respect to their parents' dispute, and the child's views on the options available for resolution. Children are not placed in a decision-making role, nor are they expected to communicate directly with their parents. Rather, the brief assessment explores the psychological adjustment of each child, their attachment relationships and their feelings about different care options."

An evaluation study of the CRP by McIntosh and Long in the Melbourne and Dandenong Registries in 2006 showed "a striking increase in parents' willingness to attempt to cooperate with each other immediately following the CRP intervention and according to McIntosh and Long, "The majority of parents found the feedback they received about their children's needs and views to be a highly influential and insightful aspect of their Court process" and furthermore "parents reported high levels of satisfaction after CRP, with children's living and visiting arrangements decided during the process."

The follow up study by McIntosh and Long in July 2007 some four months after settlement, although not as positive as the earlier results, found that the CRP had "impacted significantly on parents' perceptions of their relationships with their children"

and that "the experience of hearing from their own children through the more objective person of the Family Consultant offered many parents lasting insights." The latter study also demonstrated the following:

- A greater percentage of parents reported adequate parental co-operation post Court (37%) than at intake (19%);

- Some decrease in acrimony between parents post Court, with a third of parents reporting that they had continued to manage their conflict better (although actual levels of conflict did not significantly decrease) and 37% reporting an improved relationship with the other parent as a result of the CRP;

- The report by the majority (67%) of participating parents that they had continued to protect their children better from the parental conflict post Court;

- The report by 76% of respondents that their relationships with their children had improved as a result of the CRP intervention; and

- A significant and dramatic increase overall in time spent with fathers as well as an increase in arrangements which brought about restoration of time with mothers (where there had been a break in the time being spent with mothers).

Although findings provided some encouragement for further development of such child inclusive interventions, McIntosh and Long refer in their report to the (not insignificant) limitations of the study, including:-

- Small sample size (77 parents and 128 children from only 54 cases);

- Follow up period confined to four months post settlement with a need existing for longitudinal studies to assess longer term durability of outcomes; and

- Lack of verification of the representative nature of the sample compared with the wider population of litigating families.

Child Inclusive Mediation

Current thinking in regard to best practice for resolution of disputes over children is also being informed by research into child inclusive dispute resolution / mediation in both the community and private sectors. We have a particular interest in this form of dispute resolution because of our roles as mediators / family dispute resolution practitioners.

STRATEGIES

The Impetus for Child Focused and Child Inclusive Dispute Resolution

There is a great deal of evidence to suggest "that the impacts of ongoing parental conflict run deep into children's developmental pathways" (Moloney & McIntosh 2004). According to Moloney and McIntosh "current research leaves us in no doubt about how vital it is that we find better means for addressing the psychological well-being of children caught within conflictual parental separation." It is easy to agree with this statement and it is likely that all responsible professionals engaged in helping resolve disputes over children hold a similar view. To suggest there is no scope for improvement of our current child related dispute resolution practices would be ridiculous.

Maloney and McIntosh note the critical question: "Where and how can we find the means to move beyond processes that are primarily adversarially driven and/or focused primarily on adult concerns at the expense of those of children, towards avenues of

dispute resolution that truly help to reconstruct parental alliances and children's well-being within them?"

Two main forms of child responsive mediation practice operate in Australia. The first is child focused practice, in which the focus is on the child's needs, but without their active participation. The second is child-inclusive practice, which encompasses child focused practice with additional component factors (AFRC Resource Sheet No. 1 – 2007).

Child Focused Mediation

Child focused mediation is an intervention which prioritises the psychological and relational elements of parental separation and the making of parenting arrangements that would best support the developmental needs of the children and includes the following goals (McIntosh & Long 2006):

- Creation of an environment that supports disputing parents in actively considering the unique needs of each of their children;

- Facilitation of a parenting agreement that preserves significant relationships and supports children's psychological adjustment to the separation, including recovery from parental acrimony and protection from further conflict;

- Support for parents to leave the dispute resolution forum on higher rather than diminished ground with respect to their post-separation parenting; and

- Ensuring that the ongoing mediation/litigation process and the agreements or decisions reached reflect the basic psycho-developmental needs of each child, to the extent that they can be known without the involvement of the children.

It is difficult to comment on the extent of current use of child focused mediation, but speaking from personal experience we believe that social scientist mediators (as well as many legal mediators) have been using it ever since mediation first became common in the family law arena in Queensland in the 1980s - when some of us were first trained by Legal Aid Queensland to conduct Legal Aid conferences. For instance, when Denise commenced as a LAQ conference chair person, a co-chairing model was standard practice. This model demanded a lawyer and social scientist mediation team. It was child focused and presumed that the social scientists had unique knowledge and skills to offer in guiding the parents to a resolution which would assist their children's adjustment to the separation in particular and their psycho-social development in general.

Over the years, the co-chair model for children's conferences at LAQ was gradually degraded - presumably because of funding constraints - and co-chairing became the exception rather than the rule. We revived it as our bench mark standard at Brisbane Mediations several years ago and promoted co-mediation (with a male/female and lawyer/social scientist mediating team recommended). We still prefer our panel of legal and social science mediators to co-mediate - for a host of reasons which all relate to better service and outcomes – but this often does not occur for various client based reasons.

The emphasis in facilitative mediation (the mediation model family lawyers are most familiar with) is on the mediator being an independent facilitator rather than an expert. As a result, it is quite likely (and some purists would argue desirable) that in the interests of achieving a resolution, children's needs are not always given the priority on the mediation agenda that they deserve.

In addition, it cannot be assumed that parents understand let alone pursue children's best interest's outcomes in mediation. To encourage and gently guide them towards doing so requires skills which are traditionally therapeutic in nature and which the social

scientist mediators amongst us have always employed in other aspects of our work (for example, couples counselling and family therapy).

Child Inclusive Mediation

It has been noted by Jennifer McIntosh in various publications in recent years, that Australia is on the practice forefront of child inclusive family law mediation. According to McIntosh, at its core, child inclusive practice is "a process of developmental consultation and therapeutic conversation", the primary goal of which is to "re-establish and maintain a secure emotional base for the child post separation". It requires the involvement "of two highly skilled professionals: the mediator, who works with the parents in the resolution of the dispute; and a specially trained child consultant, who meets with and assesses the child and provides the mediator and parents with feedback."

Child-inclusive dispute resolution (McIntosh & Long 2006) shares the abovementioned goals of child focused mediation, and also includes:-

- Consultation with children in a supportive, developmentally appropriate manner about their experiences of the family separation and dispute;

- Ensuring that the style of consultation avoids and removes any burden of decision-making from the children;

- Understanding and formulating children's core experience within a developmental framework;

- Validating children's experiences and providing basic information that may assist their present and future coping;

- Formation of a strategic therapeutic loop back to the children's parents by considering with them the essence of their children's experience in a manner that supports them to hear and reflect upon their children's needs; and

- Ensuring that the ongoing mediation/litigation process and the agreements or decisions reached reflect at their core the psycho-developmental needs of each child.

Child inclusive mediation shares the same intent and approach as the child focused model, but also involves a direct assessment of children's experiences of the separation and of their relationships with each parent. The children's material is considered with the parents and core themes incorporated into subsequent negotiations with the parents.

According to Moloney and McIntosh (2004), the aim of this model is "to create an informed and transformative dialogue with both parents about the unique developmental needs and psycho-emotional adjustment of each child within the family".

The process is a natural extension of the Child Responsive Program in the litigation pathway (discussed above) to the alternative dispute resolution arena of mediation. It is as follows (Moloney and McIntosh, 2006):-

- The parents attend individual intake sessions followed by a joint session on children's issues.

- The school aged children then attend a separate interview with a specially trained child consultant.
- Feedback from this session is given to the parents in the form of "a highly skilled conversation" with the parents about their children's responses and needs, the child

consultant functioning as both an ally for the children and a support for the parents' capacity to reflect sensitivity in relation to the needs of their children.

- Both "the mediator(s) and child consultant assist the parents to develop a clear view of the children's needs in light of the separation and conflict".

- The child consultant may continue to participate in the session and into further sessions to "support thought and decision making about the children".

- Children are offered a follow-up session with the child consultant (and with their parents, as appropriate) at the conclusion of the mediation, to share outcomes and messages from their parents.

Jennifer McIntosh and Caroline Long have conducted a study of outcomes from Child Focused and Child Inclusive post-separation Family Dispute Resolution entitled, "Children Beyond Dispute". The study was funded by the Commonwealth Government Attorney-General's Department and compared outcomes between two groups of separated parents, who attended mediation over parenting disputes. The parents engaged either in a Child Focused intervention, or in a Child Inclusive intervention at one of three Relationships Australia Services (Canberra, Melbourne and Adelaide).

Outcomes common to both groups included significant and enduring reduction in levels of conflict in the year following mediation, the majority of parents reporting improved management or resolution of the initial disputes that brought them to mediation.
Across all ages, children in both interventions perceived less frequent and intense conflict between their parents and better resolution of it, with a significant lowering of their own distress in relation to parental discord."

The Child Inclusive intervention also resulted in a number of effects not evident in the other group. According to the study's one year post intervention analysis, there were significantly better outcomes for the child inclusive group in the following areas:

- Lower acrimony in fathers in relation to their former spouses;
- Greater improvement in the parental alliance for fathers;
- Children's experience of improved emotional availability of their fathers and greater sense of closeness to them;
- Greater contentment by children with care and contact arrangements and less inclination to want to change them;
- Greater satisfaction of fathers with care and contact arrangements for their children, despite initially lower levels of overnight contact than the Child Focused fathers;
- Greater stability of care and contact patterns over the year; and
- Preservation or improvement of the mother-child relationship, from the perspectives of both mother and child.

Furthermore, agreements reached in the Child Inclusive intervention were found to be significantly more durable and workable over a year as rated by both mothers and fathers. Of those cases with no prior Court involvement, Child Inclusive parents were half as likely to instigate new litigation over parenting matters in the year after mediation than were the Child Focused parents.

Other factors to emerge from the study included the following:

- "The immediacy and intimacy of material created by the child consultation process meant that parents were frequently "moved" in a lasting way by the feedback they heard from and about their own children"; and there was a "wake up call" to parents to alter their behaviours and attitudes towards their previous partner around their children.

- The perceived "fairness" of the Child Inclusive intervention was notable for fathers and through the father's eyes the intervention often functioned to remove the mother from the psychological role of "gatekeeper" of the information about their children. "The Child Inclusive fathers and mothers appeared able to listen to views that sometimes did not support their own argument, when these views came from their children and were conveyed empathically by an independent specialist".

- It was found that "through a sharpened focus on each of their children's emotional and stage specific needs in the Child Inclusive treatment, parent's agreements tended to favour stability of residence, and improved attachment relationships."

- The Child Inclusive intervention seemed to assist parents to create "developmentally correct" agreements tailored to the core experiences of their children, and made it easier to resist arrangements tailored to any sense of adult entitlement.

- Most importantly, McIntosh and Long concluded that while both the Child Focused and Child Inclusive Dispute Resolution interventions led to reduction in parental conflict, the findings of the study suggested "an enduring level of relationship repair unique to the Child Inclusive approach."

- From the children's perspective the Child Inclusive intervention was associated with closer relationships with their fathers and more emotionally available care from their

mothers. The researchers concluded that data pointed to the potential of the Child Inclusive intervention to target the crucial public health issue of children's emotional well-being post-separation, through a consequent effect of improved parental relationships.

- In conclusion it was opined by the researchers that their results provided evidence to support the further development and application of "Child Inclusive" therapeutically oriented mediation offering separated families "a significant level of repair to the parental relationship, and to children's sense of their parents availability" and producing developmentally sensitive agreements with which both parents and children remained more content over the year following mediation.

- The researchers stress, however, that the findings of this study cannot be generalised to other models of Child Inclusive mediation and that there is a need for careful guidelines around training and practice competency "to ensure the ongoing fidelity of this intervention."

- Although there were concerns expressed by some of the children in the study that their parents may not have been able to hear their feedback, children often indicated that they got some benefit from the process. The following are some of the comments by children which the researchers recorded:

    - "It was good to talk to the mediator";
    - "It helps to get things off your chest";
    - "It helps to know why your parents are fighting";
    - "When you need to make it perfectly clear what you want from Mum and Dad, then the mediator can tell them for you";
    - "I came away knowing how my brother and sister felt and that they were sad and upset and how I could help them …"

Kids Talk

"Kids Talk" is another McIntosh inspired development whereby the Family Law Conferencing Program within Victoria Legal Aid has been transformed though a commitment to a child focused and unique child inclusive approach.

The mechanics of the program which was developed with Jennifer McIntosh as consultant, are detailed in a paper entitled 'Child Focused and Child Inclusive Practice; Transforming the Landscape of Victoria Legal Aid Conferencing', presented by Michele Harris and Walter Ibbs of Victoria Legal Aid to the recent Perth National Mediation Conference in September 2008.

Harris and Ibbs note that the model aims to be transformative in that as well as being settlement focused, it also attempts to shift parents' perspectives to consider their children's needs from a developmental and emotional perspective when reaching legal agreements.

In the preparation stage of the conference, questions have been developed that ask parents to reflect on their children's world views and reframe the dispute from the children's perspective. Examples of these child focused questions drawn from the Harris and Ibbs paper are as follows:

- *How do you think [childrens' names] are coping/managing at the moment?*
- *What do you think it is like to be him/her/them at the moment? What might be their biggest worries? (Note each child's perspective separately).*
- *We know that separation is a very difficult time and that often this can effect (sic) the way parents are with their children. Has this happened with you and*

(children's names)? How do you and the other parent communicate about [children's names]?

- *What level of communication as parents might be important for [children's names]? Do feelings about the past effect (sic) your communication with the other parent? In what ways?*
- *In years to come how do you think [children's names] will remember this time? How do you want them to remember this time?*
- *Do you have any other concerns regarding the children's safety and general well being?*
- *Tell me about your children.*

The case manager prepares a summary for the chairperson in which he or she assesses the parents' capacity for "parental alliance and attunement" to the child and makes suggestions as to what approach may assist child focused thought. The case manager also distils a child focused agenda centred on developmental concerns and the needs of the children and this is included in the chairperson's summary.

At the conference itself, the chairperson, who is a Family Dispute Resolution Practitioner, whiteboards the parties' underlying concerns and agenda, but also the 'child focused' agenda which is raised with the parties separately or together, depending on the conference format. The chairperson reality tests any emerging agreements against the issues assessed by the case manager as important to maintain the child focused outcome and positively promotes developmentally appropriate arrangements. Additionally, the parent communication strategies and resolution of underlying conflicts are promoted to maximize the possibility of developing the parental alliance. The goal is for parents, where possible, to leave the conference process better able to co-parent or at leas "encapsulate the conflict". This is clearly a therapeutic process.

Lawyers participating in the conference are encouraged by the chairperson to adopt a more conciliatory and child focused role, whilst at the same time representing their clients' interests.

As a follow up from the conference, the case manager refers the children and parents to other services that support the agreement reached. These might include parenting courses, counselling and other resources that will strengthen parental capacity, provide support for the family and assist in maintaining the agreements reached during the conference process.

Furthermore, ongoing professional development has included extensive training to all case managers and chairpersons in child attachment and development, child inclusive practice models, and assessment of parental capacity for child focused thought and alliance.

The Victorian Legal Aid program has been extended to provide for appropriate matters to directly involve children in the conference process, the program being aptly named 'Kids Talk'.

The goals of Kids Talk are to achieve procedures and outcomes which:

- Reflect the psycho-developmental needs of each child;
- 'Do no harm' and where possible, help improve the parental relationships;
- Enhance the parents' capacity for reflecting on their children's needs and experiences surrounding the separation;
- Increase the possibility that impasses to agreement can be bridged though the sensitive introduction of children's views and experiences into the adult decision making process;
- Assist parents to 'encapsulate conflict' after the Conference; and

- Ensure that lawyers representing parents will also have the opportunity to take account of children's perspectives when advising their clients during a conference'.

We will be following this initiative closely and presume that similar programs will be trialled and / or introduced in the other states over time.

OUTCOMES AND PROBLEMS FROM THE COALFACE

Child Inclusive Mediation – New or Repackaged?

As child focused practitioners in our own professional fields of family law and psychology, we are delighted to embrace any initiative which assists us in our dispute resolution work – especially if that initiative is child friendly and backed by evidence of efficacy.

We commend Jennifer McIntosh and her followers for formulating programs which draw on the professional knowledge and experience of all of us who have operated in this business for …..too long to mention. What Dr McIntosh has done for us "at the coalface" is to research and standardise techniques and demonstrate to us that they do work (when, she stresses, they are used in the recommended manner by appropriately trained social scientists).

We suggest that the McIntosh approach is, in effect, a polished packaging of the long existing child inclusive practices of a well executed family report assessment process

together with a facilitative/therapeutic child focused mediation process. At Brisbane Mediations we are using similar techniques with success, but we have not measured that success and are glad to know that we are clearly heading in a positive direction.

According to McIntosh, (McIntosh 2006) the previously accepted practice of dealing with separating couples in conflict over the parenting of children rarely gave children a voice other than through report writers engaged in determining the best interests of children, or through Independent Children's Lawyers (ICLs) appointed for the children.

We point out that this is not strictly correct, as for many years those same report writers and other qualified and skilled therapists (psychologists, social workers, psychiatrists and others) have engaged from time to time in both private and court ordered reportable or non-reportable "counselling / family therapy / mediation" with separating couples and / or their children. Children have, in these sessions, been encouraged to express their views and concerns to the therapist and also at times directly or indirectly through the therapist, to their parents. Many a court proceeding has been "put on hold" – sometimes indefinitely - for issues between children and parents to be dealt with.

We feel that the voice of children through report writers has always been and will probably remain a valid and valuable means of ensuring that children are heard – by the courts and, more importantly, by their parents and other significant carers . Despite the absence of programs such as the CCP or the CRP, the Family Court often took on judicial management of certain complicated matters – sometimes over periods of years. In these "intractable cases", usually ICL matters, there were often multiple family reports ordered.

In the "successful" matters, an evolutionary process occurred whereby the children's needs were first of all aired, strategies were then recommended and implemented to

resolve issues in as child focused a manner as possible and outcomes were later assessed, with the disputes eventually being resolved.

Our point is that for child focused practitioners, the children's voices have always been heard in cases where alternative interventions, appointment of ICLs and / or preparation of family reports have occurred. Those children's views have been duly conveyed to decision makers. Whether or not they have been acted upon has always been (and still remains) a matter for the litigating parties and / or the court. Unfortunately, for some post separation parenting couples, psycho-education, hearing from their children through the prism of the skilled social scientist / family consultant and being provided support and guidance with effecting child friendly solutions, has never been enough. For many who engage in a McIntosh type program, it will still not be enough.

We also suggest that in the end it will be funding issues which decide the future of child inclusive programs as packaged by McIntosh in the government and community sectors. Such constraints, are nonetheless real in the private sector. Although not prohibitive for all private clients, because of the professional labour intensive nature of the interventions, the risk exists for the services to become elitist as a result of their high initial cost (which we accept is warranted if it results in more matters being resolved early).

To quote McIntosh, "The new family law system is designed to address not only the emotional distress of the children involved in post-separation disputes, but to promote the psychological adjustment of separated families". (See AFRC Resource Sheet No. 1, 2007).

We say that this is an honourable goal and one that we wholeheartedly support. We add, however, that such lofty goals have always, in our experience, been espoused as primary tenets of family law practice for social science and legal practitioners and the

courts alike. The original concept of the Family Court of Australia from its inception in 1975 included reduction of the acrimony between separated couples, such acrimony having reached great heights under the old Matrimonial Causes Act, whereby divorce occurred only alongside the concept of fault on the part of one or both members of the separating partnership. The new order of 1975 was revolutionary in that it provided in house counsellors to counsel separating couples in the first instance and then to be on hand to assist the court throughout difficult children's proceedings. The best interests of the children were always promoted as the ultimate consideration of the court.

Care must be taken to ensure that whilst flushed with excitement over something "new", there is not a huge investment (financial and human) in processes which simply move pieces around the proverbial board in a different way and introduce new jargon for child inclusive practices which (subject to a wide range of variables) have been operating with a level of success for over thirty years.

Is Child Inclusion Always a Good Thing?

We agree with the notion of children having a right to be involved at some level in disputes which address their needs and views. Article 12 of the United Nations Convention on the Rights of the Child, which informed the latest amendments to the Family Law Act, states:

1. *Parties shall ensure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either*

> *directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

We point out, however, that such goals are not without controversy. Critics have claimed that moves towards children directly championing their own rights can be cynical attempts (not always deliberate) to contribute to "the destruction of childhood". Such detractors have claimed that "the adult champions of children's liberation, are … enlisting the support of genuine and caring individuals … in order to ultimately be able to exploit and abuse vulnerable children who are charged, as 'mini-adults', with their own protection and representation. We do not share such an extreme view. We do, however, believe that as family law practitioners and specifically family dispute resolution practitioners, we must be vigilant to ensure that we do not, in a genuine attempt to ensure children are heard, give the already vulnerable, disadvantaged, and often abused, an even more onerous responsibility and burden to carry. We were interested to note a small newspaper article in the Courier Mail in the last week of October 2008 which indicated changes to legislation in at least one state in relation to children being able to give permission for certain types of surgery. The new legislation in fact goes against the trend we are discussing and reduces children's decision making rights, thereby acknowledging their relative vulnerability and limited life experience.

From the 1975 starting point, we moved to the concept of the "successful divorce". Janet Johnston stated in 1998, "A divorce can be considered successful if the parties are able to work through their anger, disappointment and loss in a timely manner and move on to establish new, separate lives that are free from the burdens of a failed relationship". These goals are consistent with those espoused by McIntosh.

By trying to remove the blame and the need to stay in a relationship because it was simply too painful or difficult to leave it, the Lionel Murphy inspired era of "no fault divorce" was born. With it, however, a host of other problems inevitably also came. One

of the most obvious in the current era is that of hostile parents feeling somehow deprived when they are denied or discouraged from using the public forum of the court as a very effective vehicle for punishing the person they view as a recalcitrant and blame-worthy opponent. Although we agree wholeheartedly with the philosophy behind the new order child inclusive push, we posit that the more conciliatory and less adversarial our processes become, although to the advantage of the majority, for the recalcitrant minority they risk becoming triggers to finding alternative vehicles for effecting vengeance. What better way to inflict pain on a parent than to interfere with his/her relationships with the children of the relationship? In an obscure way then, non-adversarial means of resolving parenting disputes have, we say, the potential to increase the negative impact on children in some cases.

This leads to the obvious issue of needing to ensure that if children are involved in mediation (or other dispute resolution processes) it is through "safe" practices which do not further embroil them in the adult disputes of their parents. Some consider involving children is simply too dangerous - both for the children and for the mediator/s who may become involved in the crossfire between parents.

If children take part in family law mediation of children's issues, then this Can place the family / child consultant in a position where, should a child or children make a significant disclosure, they are called to give evidence if negotiations between the parents do not reach resolution. The solution for ICLs meeting children has, in Queensland at least, been for the ICL to have the "protection" of a report writer when they "meet with" children.

Similarly, some exponents of child inclusive mediations (for example, Jennifer McIntosh and the management of *Brisbane Mediations*) propose that children be interviewed by suitably qualified social scientist child consultants who then present the child/ren's views to the adults involved in the mediation, including the mediator.

At this stage, there is no consensus on how best to involve children in mediation and should there be child involvement without the benefit of a family consultant acting as intermediary between the child and the adults (parents and mediator), the potential exists in a failed negotiation for the very basis of mediation to be undermined and for the mediator to lose the role of independent dispute resolution facilitator.

Some reluctance to incorporate children's voices in mediation has also flowed from concerns about the skills and training of those who listen and interpret. This is understandable, as this is a highly specialised field. Traps are numerous and equally difficult to anticipate without appropriate skills, training and, most importantly, experience. For instance, children react to their parents' conflicted separations and to loss or severe restriction of contact with a parent in all manner of ways and only an expert has a chance of being able to accurately interpret children's comments so as to address their actual "best interests". Experience should, furthermore, protect against the tendency for "the pendulum" to swing too far too quickly. Experience and only experience can presume to have any chance of weighing up the relative impact of the many variables which interact to make every children's matter unique.

Contra-indications involving the Children's Reactions to Separation

McIntosh's model assumes that very young (under school age) children lack the maturity to take part in child inclusive mediation.

We suggest that there are many other factors as well which predispose children to harm if they are involved directly in processes (including family report and other more "traditional" child inclusive processes) which purport to address disputes between parents.

We provide the following as a non-exhaustive list of problematical responses to parental separation by children - based on our observations as well as research and observations of others involved in this field (.for example, Arnold, L E and Carnahan, J A, 1990; Johnston, J R, and Campbell, L E G, 1988 and Johnston, J R, 1998). These reactions make the children involved particularly vulnerable should the parents lack the maturity or psychological adjustment to handle their disclosures during the consultative segment of the dispute resolution process or should the children feel even more exposed because they perceive that their voices have not in fact been heard as judged by their parents' actions - rather than their words - at the time of or after the mediation.

- Helplessness, the children opting out of family and school life as a way of "insulating" themselves against emotional pain. This is most often seen in boys – particularly in pre-adolescents and adolescents.

- On the other hand, becoming over-conscientious and achievement oriented as a means of escape, a way of seeking approval or simply as a relatively functional coping mechanism, is a common behaviour for older girls caught in the crossfire of their parents' dispute.

- Aggression, children of all ages often acting out against the world with tantrums and excessive demands - as a way of dealing with their feelings of confusion, hurt and turmoil.

- Substitution of the father or mother with a surrogate parent – sometimes a step parent, but also possibly the parent/s of a friend, or even a teacher or other authority figure. Parental conflict often renders parents emotionally inaccessible to the child.

- Classic stress related symptoms, such as tension, somatic symptoms, regression, and oppositional behaviour – particularly before, during and immediately after the

transitions from one parent's care to the other's. Enuresis, encopresis, fears and phobias and even post-traumatic-stress disorder, when they have witnessed or been the direct victims of domestic violence, are commonly reported. Usually the parents find a way to hold the other parent responsible, failing to recognize that their children are more likely simply reacting to the tension and conflict around them.

- Excessive vigilance and distrust around strangers is often noted, especially in very young children aged two to three, at the centre of high conflict and in transition between the care of parents.

- Pathological attachment often occurs as a result of inter-parental conflict. The attachment of young children to their parents is likely to become insecure or anxious, the child fearing loss of one or the other or both. Separation anxiety might develop and might then be used by one or the other or both parents to "prove" their case/s.

- Confusion and ambivalence in attitudes towards parents.

- Sense of Responsibility for the Conflict – blaming themselves for the disharmony, with associated loss of self esteem.

- Being submissive to one or the other parent and rejecting of the other, simply to reduce the stress and conflict of loyalties. This is common where there are abuse allegations – whether genuine or spurious. These children tend to present as serious, humourless and emotionally "flat".

- Pseudomaturity – such as taking on responsibility for the happiness and well-being of one or the other or both parents or for the care of younger siblings, whilst seeing their own needs as secondary or irrelevant. These children also have the potential to

take on responsibility for resolving the parental conflict and are vulnerable to feeling guilt and a sense of failure should this not occur.

- Identity problems can result when primary school age children side with the parent of the opposite sex.

- Affect constriction or emotional shutdown – occur at times as a protective mechanism in the face of extreme conflict and domestic violence. Dissociative states, depression and suicidal ideation can develop out of such self-protective responses.

- Insecurity and fear of abandonment can result from parental unavailability and pre-occupation with the dispute. Sometimes there is an attempt to seduce more attention through good behaviour. Sometimes efforts to keep everything "fair" (for the parents rather than the child) result in an obsession with giving equal time and equal emotional responses, this tactic also resulting in the child's becoming emotionally constricted and anxious.

- Rapid shifts in allegiance often occur, children trying to find favour with both parents by carrying stories about one to the other or possibly by dumping blame onto a step parent. Strategic alliances are made - with the parent perceived to be more powerful or the one less likely to love and accept them unconditionally. Sometimes, it is with the parent who can provide a way out of the dispute, this being the top priority. A way of avoiding the conflict is to "merge" with one parent or perhaps with whichever parent they are with at the time – displaying at all times good and compliant behaviour, but appearing joyless, withdrawn and lacking in spontaneity. It can be intolerable for these children to find themselves “in the middle” of a negotiation process, no matter how sensitively conducted.

- An extreme reaction to conflict is what we have learnt to refer to as "parental alienation", which is where there is assumed to have been direct impact on the child by one parent (usually the parent spending the most time with the child) who encourages a negative attitude – perhaps in the extreme - by the child towards the other parent. At times such behaviour includes the belief in or at least expression of spurious allegations of abuse by the child. Only an experienced, astute (and it goes without saying, well trained) interviewer will know to look beyond the child's words to the possible psychopathology of the parents and their relationship in order to try to understand the pressures on the child. Resolutions which result from child inclusion in these cases risk resolving in a direction which may not be in the child's long term best interests, despite being consistent with the child's stated views.

Contra-indications involving the Parents

Contra-indications for child inclusive mediation can equally include parental issues. Some of those we consider to present a high risk of harm to children who are involved directly in a mediation process are as follows:

- There was a third party at the time of separation. This is a common separation scenario and one of the most challenging for separating families. Feelings of betrayal and rejection are always difficult to handle and revenge can be a motive for disputing children's issues. Anger disproportionate to the presenting issues is a danger sign.

- The decision to separate was one sided. If only one parent's grieving was done throughout the relationship, then the other will be "out of sync." in terms of the emotional work associated with detaching from the relationship. He /she might prefer negative intimacy to no intimacy at all and expressions of a wish to reconcile will often persist – sometimes for years. Separation counselling, time, and "sensitive

lawyering" will all help. Making major life changing decisions when in the midst of dealing with grief and loss are not indicated, so this is one time when slowing down the process might be of more benefit than facilitating a speedy decision. Delaying mediation, including child inclusive mediation, is often indicated.

- Claims of domestic violence – whether genuine or vengeful, do not augur well for an amicable resolution. Even if the children have not been direct victims, they could well have been witnesses and thereby incidental victims. Protective parents will not be looking for ways to allow them to have ongoing relationships with the abusive parent – even if this is ultimately considered to be in their best interests. As we all know, fabrications and exaggerations are also possible when it comes to domestic violence. If one parent is angry enough to lie about the other being violent, then he or she is capable of lying about anything. If the parents' accounts are markedly different, the potential exists for each parent to try to enlist the child as an ally.

- Personality disorders can thwart even the most solution oriented mediators or legal representatives. The classic “intractable family law dispute” involves one or more personality disordered parties – for example, narcissistic, paranoid, dependent or anti-social, to name but a few. Such people have difficulty seeing the world through anybody's eyes but their own. To the narcissist, even severe physical abuse of their ex-partner might have been justifiable because the other in some way offended him/her. The paranoid person – as the name suggests – expects, sees, hears and therefore often receives, the worst.

- The dependent person can hang on to the ex-partner, refusing to give up the dream of the relationship – sometimes for years after it is clear to everyone else that there is no chance of reconciliation. As for those clients who have a lengthy criminal record, history of substance abuse, string of Domestic Violence Orders against their names and who threaten everybody including their own lawyer, there is a good chance they

have an anti-social personality disorder. Advice is difficult to give in relation to all of these people, other than to say that one should watch for obvious signs and be realistic about the degree of change of which they are capable. It goes without saying that raising the hopes of the children that they will be heard and that associated change will occur is fraught with danger and often with disappointment for the children.

- Mental illness similarly creates difficulties for all concerned and, depending on the nature of the illness and whether or not it is controlled with medication, may eliminate mediation, and especially child inclusive mediation, as a means of dispute resolution. Should mediation go ahead then care would need to be taken to ensure that decisions were not made unless both parties were thinking clearly and were not stressed at the time. The risks for children involved are obvious.

- Intergenerational dysfunction – for instance the sexually abusive family, the family which is into serial litigation, or the family that makes a habit of discarding in-laws, men, women, or perhaps just anyone who does not accept their family culture as the only way to live. These families are quick to engage in what the term, "tribal warfare" depicts well. Such inter-familial conflict can escalate conflict between ex spouses enormously. Children caught in bitterness between their extended families are especially vulnerable to becoming pawns in the dispute.

- Drug and /or alcohol abuse creates conflict and is one sign which should cause real concern for children. Denial is more common than admission. It needs to be remembered that addicts have to be motivated to make changes for themselves and can go to great lengths to manipulate. Involving children in such dysfunction can be extremely destructive to their emotional development and leave them blaming themselves for the fact that things have nor worked out despite their open disclosures to a family consultant.

- New partners - Often things are amazingly amicable after separation, until one or the other or both parties re-partner. There can be realistic .or unrealistic fears of the children being abused or badly treated by the new partner, or of one or both parents being "replaced" by step parent/s. Children risk being manipulated by unscrupulous parents or their partners if involved in a mediation process. One of Denise's cases illustrates this point well. This was a case in which the father's new wife decided she would like to keep the two children, a dispute ensued and initially it was the mother who seemed to be the culprit. Before Denise became involved, whilst spending time with her father, one of the children made allegations that the mother was being abusive. She would actually quiver and curl up in a foetal position whenever brought into contact with her mother and was, based on apparently good supportive evidence, removed by the court from the mother's care and placed with the father and step mother. It was only after a very courageous decision by Justice Bell on the basis of a family report recommendation which placed her into a transitional placement with a third party – one of her former teachers – that it was possible to understand that the father and his wife had been indoctrinating the child with all sorts of fearful information. For instance, she had been encouraged to believe that when saw Denise for assessment, there were *cameras* in the ceiling which could film her every thought, the implication being that there could be dire consequences for her if she so much as thought something positive about her mother.

  Had her concerns been taken at face value and conveyed to the parents around the mediation table, she would most likely never have been reunited with her loving mother.

Ethical Dilemmas

We confess to being wary about embracing child inclusive mediation completely as a panacea which will overtake child focused methods of conflict resolution. Taking children's stated views at face value is often not advisable in the context of family law proceedings. Although children may express themselves freely and openly and without a sense of coercion, unfortunately this is too often not the case in our combined experience.

Denise has found herself on a few occasions in the situation where a child has reported behaviour by a party which is suggestive of unacceptable risk of abuse, but has pleaded, "Please don't put this in the report. Please don't tell Daddy / Mummy". Often, there is no evidence of actual abuse and so the Department of Families is reluctant to become involved – especially considering the involvement of the Family or Federal Magistrate's Courts. The ethical dilemma presented by such a disclosure to a child consultant in a child inclusive mediation process would be significant.

What of the parent/s who we now see more frequently than when mediation was a preferred option rather than a compulsory path to litigation, who have the potential to use mediators and child consultants as vehicles for their own unscrupulous behaviour or emotionally instability in sabotaging the alternative dispute resolution process as they seek their Section 60I Certificates?

Far from giving the child a voice, in situations where a parent is deliberately alienating a child against the other parent and / or hell bent on proceeding to trial for whatever reason, hearing directly from the child carries with it the risk that the child will suffer adverse emotional consequences both before and after their child inclusive mediation experience.

We suggest that if we were to indiscriminately use child inclusive mediation, we would at times further burden rather than relieve innocent children. It has been Denise's

experience that far too often she has interviewed stressed and conflicted children. Frequently, the relief on their faces has been obvious when she has told them that their views are important and will be listened to and reported, but not necessarily followed – that is, that they are kids and so they are not expected to make really important decisions about what is best for them. Sometimes, they say that they do not want to even discuss the impact on them of their parents' separation. Sometimes they simply retreat into silence when the conversation moves from general chit chat to matters of significance to the parental dispute.

CONCLUSIONS

It is our opinion that without a doubt child focused practice is where we should all be heading when it comes to disputes over children's issues and at times even over financial issues. In searching for a definition of "Child focused Practice" for family law practitioners, we have turned to a 2003 paper by Linda Kochanski in which she provides an outline of the lawyer's *"Child Focused Charter",* which reads as follows:

As a Child Focused practitioner I will:

1. Assess the individual needs and interests of the children.
2. Inform my clients about how they can support and assist their children during and after the separation process.
3. Reality test clients' proposals about arrangements for the children.

4. Negotiate with all parties in a manner that prioritises the interests and needs of the children.
5. Manage disputes in such a way that endeavours to de-escalate conflict and improve the quality of post–separation relationships between parents.
6. Consider the legal and ethical framework (in which) I work and prioritise the issues by reference to my duties, roles and responsibilities
7. Participate in systemic change to address more positive outcomes for children.
8. Operate within a multidisciplinary system that provides a range of assistance and support services for families.

We believe these are still desirable goals and that in certain instances child inclusive practice will also be desirable and effective - provided those delivering the service are highly skilled, mature and, above all, experienced professionals.

As indicated above, there are dangers in taking children's comments at face value. Use of formulaic approaches to interviewing and representing the needs of children is fraught with risk.

Practitioners working in child inclusive areas such as family counselling, family assessment and reporting and child inclusive mediation need to be amongst the most experienced practitioners in the family law field as their actions and opinions can have far reaching effects for children and families.

We see child inclusive mediation as one of a range of dispute resolution tools available to assist families through family breakdown and dispute. We warn, however, that there has never been and we believe never will be a sure and reliable means of ensuring that

the needs of children are met following their parents' separation. We believe that child inclusive mediation should be added as a useful tool, but that the already existing tools should not be prematurely discarded as they have been effective in many instances and in many case the benefits of child inclusive mediation as assessed by McIntosh, are limited.

To limit discussions of what is best in family dispute resolution to one dimension would be an error of logic as such an approach would not take into account the many variables which impact in unique combination on every separated family. We still advocate that each case be considered on its merits and dispute resolution techniques recommended as indicated for each particular family. It is never desirable for the pendulum of change to swing too far to the other side – as we believe is currently happening in relation to equal shared care.

The research into child inclusive practice to date has added to our understanding. It has a long way to go. In addition, the debate regarding inherent ethical dilemmas will go on, indefinitely refining and defining professional mediation practice.

Finally, we stress that in our well-intentioned efforts to protect their rights to self-expression, we must not forget to protect children's rights to be children.

These rights are nicely summarized in a document which came to me by rather circuitous means, its authorship being attributed to well-known Queensland magistrate and family lawyer, Barbara Tynan. It goes like this:

- A child has the right to love each parent without being subjected to the other parent's hurt or anger;

- A child has the right to develop an independent and meaningful relationship with each parent and to enjoy the uniqueness of each parent and each home;

- A child has the right to be free from involvement in parents' personal battles or being used as a spy, messenger or a bargaining chip;
- A child has the right to extended family relationships which include grandparents, aunts, uncles, cousins and others, and to appreciate the unique differences of each side of his/her family, and not have these differences referred to as "better" or "worse";
- A child has the right to be free from questions about the other parent's private life;
- A child has the right to see his/her parents treat each other in a courteous and respectful manner;
- A child has the right to develop and maintain activities and friends without fear of losing time with a parent;

These are wonderful ideals, as is the ideal of the child's right to freely express views – in mediation processes and even in court proceedings. The issue for us is the inevitable tension which exists between these ideals.

Decisions need to be made on a case-by-case basis and we should enlist each others' assistance and counsel when we feel that we are out of our depth.

Denise Britton **Michael Emerson**

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