

[Keith Sedgman: pp's 8-11 Social Spectrum Journal Vol 4 2002]

**HERE FOR, HEAR FROM: FROM THERE TO HERE**

The proposal is rendered that there is a need for the Family Court and Federal Magistrates Court to be more constructively inclusive of children, to employ more preventative interventions rather than to restrict therapeutic interventions to only parents/adults and to parties are already enjoined to Court processes rather than being available to non-Court engaged children and adults.

**Introduction**

The intention of the paper is to attempt to identify and describe rather than criticize and judge the Courts' relationship with its minor clients. It does however hold the view that children are the Courts' clients who are least emotionally and legally represented or empowered and are also the ones most impacted upon by judicial decisions. That is, they are subject to and are the subjects of the Family Court and Federal Magistrates Court's orders where a hearing is concerned with children's matters and decisions for children's post separation care are made. It is also, in my view, important that legal and welfare practitioners engaged within the Court system but not the Court institution itself reflect back to the Courts some perspectives that challenge the Family Court and the Federal Magistrates Court to consider their operational processes and content. A system that relies on its own internal reflections tends to only reconfirm itself. This is what Rosenblith refers to the entropy that results from, "...the tendency of a closed system to deteriorate or run downhill?" [1967; p74].

**Background**

The Family Court was conceived in 1975 and began its operations in 1976. It was, at its inception, embraced as a legal institution that gave consideration to its clients' emotional as well as legal needs by the provision of in-house counselling services and later, mediation. Prior to the Family Court's creation divorce, residence and contact matters were dealt with in the Supreme Courts of each Australian State. Following the passage of the Family Law Act many procedures were imported from the various Australian States judiciaries and Family Court Judges were recruited from State systems. [Glare 1995].

Some ponder whether the importation of the various State procedures and the recruitment of Judges from the State bodies compromised the degree to which the Family Court was able to be the ‘caring Court’ that it could be and perhaps even aspired to be. Some of the new Court’s more legalistic rather than caring and accessible features may have transferred across from the various State jurisdictions that the Family Court was replacing. Given that the Family Court has now undergone some more recent changes after a generation of practice in that it has taken on a new Family Law Reform Act (1995), implemented in June 1996, and has more recently been joined in managing post-separation property and children’s matters by the Federal Magistrates Court it would seem reasonable to revisit the Family Court’s relationship with its clients and to consider the Federal Magistrates Court’s relationship with its clients generally and with the children in particular. Such a clear emphasis is, in my interpretation, also invited by the Family Law Reform Act’s adoption of the judicial and welfare stance that parents do not have ‘rights’ over their children but, instead, have ‘responsibilities’ to and for them. Children are considered to hold rights. Such a view of parents’ responsibilities suggests that the Courts, as the institutional arbiters of parenting decisions where parents are unable or unwilling to make joint post-separation decisions for children, would also hold responsibilities to these children.

*They waited patiently for what seemed a very long time, stamping in the snow to keep their feet warm. At last they heard the sound of slow shuffling footsteps approaching the door from the inside. It seemed, as the Mole remarked to the Rat, like someone walking in slippers that were too large for him and down at heel; which was intelligent of Mole, because that was exactly what it was.*

*There was a noise of a bolt shot back, and the door opened a few inches, enough to show a long snout and a pair of sleepy eyes.*

*‘Now the very next time this happens’, said a gruff and suspicious voice, ‘I shall be exceedingly angry. Who is it this time, disturbing people...? Speak up!*

*‘O’ Badger’, cried the Rat, ‘let us in please. It’s me, Rat, and my friend Mole, and we’ve lost our way in the snow’. [Grahame, Wind in the Willows, 1992;pp.69-70]*

**Focus**

This paper, as suggested by the introduction and the excerpt from the timeless 'Wind in the Willows', follows a hermeneutic approach, as defined by Schwandt [1997] to the exploration and interpretation of being a child subject to proceedings in the Family and Federal Magistrates Courts. It is noted that the Family Court, in the late 1990's, formed an internal committee to formulate policy and practice guidelines as to when and why to include children in Family Court counselling. It is encouraging to see the in-house counsellors giving recognition to the consideration of the place of children in the familial and legal discussions that are so seminal in their lives. It may be a semantic observation or it may be indicative of a mind set that the committee was prescribed the task of identifying why children should be included in counselling. This is contrasted with the alternative available cognitive construct of what factors could be identified and described that would indicate that children should be excluded from participation in counselling. Regardless of the Family Court, or its counsellors', attitudinal stance in relation to the inclusion or exclusion of children there are specific figurative doors through which children can pass in order to participate in counselling and in Court processes.

**Voluntary or non-Court ordered Counselling**

From 1975 until recently the in-house counselling services of the Family Court presented themselves as offering voluntary interventions to couples considering separation, going through separation, or who had already separated. These counselling interventions were 'privileged' or 'confidential', meaning that the content of the discussions between the clients in these settings could not be disclosed to the Court by the counsellors. The aim of such interventions was to assist parents and children to retain ownership of decisions relating to their post-separation care arrangements as an alternative to Court imposed decisions, regardless of what wisdom and good sense judicial decisions could render to adult and child parties. Where for some 25 years the Family Court's in-house counselling services were fully available to adult clients and by negotiation with the children this has shifted in significant measure in the late 1990's and early 2000's. The actual physical availability of the previously available voluntary and free assistance to adult clients let alone to their children has now evaporated.

As informed by my own extensive experience as a former counsellor with the Court and now as a practitioner in private practice I am aware that the Federal and Family Courts no longer offer the free and fulsome assistance to the presenting families that they once did. Clients who are now having marital and relationship difficulties are not invited to attend pre-filing counselling and mediation but are instead actively encouraged to present themselves to non-government agencies [NGO's] such as Relationships Australia [RA] and Centacare rather than to attend the Court's in-house counselling services. In the mid 1990's meetings between Brisbane Registry Court managers and the managers of agencies such as Centacare, Lifeline and Relationships Australia took place in order to encourage the NGO's to take on some or all of the non-Court-ordered or voluntary clients. Some of these agencies have since taken up the former Family Court voluntary client caseloads after attempting to train their staff in the speciality areas of separation, relationship breakdown, loss and grief and pathological and entrenched relationship disputes. At the same time that these clients who historically presented themselves or were referred by supportive legal practitioners to the Family Court alternative dispute resolution services were being redirected to the NGO services the Court has reduced its counsellors numbers and has also number effectively removed some of its smaller registries across the country.

In past talks with senior Court administrative managers it was disclosed to me, and it may still be the case, that government funding to the Court is allocated differentially for Court ordered and non-Court ordered counselling. In this system voluntary counselling is assigned less dollar value funding than counselling interventions that are Court prescribed. It is noted that this reinforces the Court's internal systemic valuing of the conflictual, adversarial and litigious clients and devalues those clients who are more committed to seeking a preventative, mediation-assisted outcome for their separation decision-making. The Court may be in danger of being accused by those that approach it with some measure of cynicism that services directed to supporting clients and the achievement of non-legal outcomes self-determined by families are less valued than services which support and assist the Court in legal interventions and outcomes. This would be unfortunate for the public persona of the Court and more importantly for

children when it is considered that, usually, the greater children's exposure to post-separation conflict the worse the children's post-separation adjustment. [Garrity & Barris 1994 and Kelly 1993].

Along a similar theme to the withdrawal of pre-filing and voluntary counselling by the Court is the connected and concerning change in the Family Court's closure of a number of sub-Registries. Apart from the larger Registries the Court had long established sub-registries located in various towns and centres, some of which were, in fact, quite major centres. In Queensland by way of example the Court had sub-Registries in places like the Gold Coast and Rockhampton. These sub-Registries have now been abandoned with at least part of the rationale for these closures being that these sub-Registries undertook a small number of Court-ordered counselling interventions and also a low number of Family Reports and instead undertook a significant amount of voluntary and non-Court ordered counselling sessions. My contact with the former staff of some of these sub-Registries also informs my knowledge that they produced some very innovative and creative programs with a focus on preventive group counselling interventions.

Regardless of the attributions made regarding the Court's discarding of voluntary and privileged counselling and closures of sub-Registries these changes are proposed to represent a significant shift in the way in which the Court services its clients and defines itself. This speaks to the Court's relationship with the community, the Court's differential relationships with its welfare and its legal staff, the Court's self-image and *raison detre*'. That is, the abandonment of the preventative and pro-active counselling interventions that have been part of the Family Court for a generation is a fundamental shift in the philosophical roles and responsibilities of the Family Court but has taken place in a manner where the general community and those who report on the policy and practices of our significant institutions appear to be largely unaware and uninterested. Such a situation invites some level of awareness for the sake of the children whose issues the Court continues to decide but for whom the Court no longer provides services which assist them and their parents. It may be that debate about the ethics and the efficacy of the inclusion of children in voluntary counselling interventions will draw out robust

arguments for and against the practice of including children. The current situation remains however that a fundamental shift in practice seems to have taken place in a manner where the Court has not undertaken such robust scrutiny of its practice nor has it seemingly been subject to any robust external scrutiny. Where the Court has previously included children and has to some extent empowered families to resolve their post-separation parenting and care dilemmas it no longer does.

### **Court ordered confidential counselling**

The apparent absence of scrutiny and debate about the inclusion or exclusion of children from voluntary and non-Court ordered counselling and the merits or otherwise of proactive and preventative interventions takes place in the context that children continue to potentially be available or required for inclusion in formal Court-ordered counselling processes and interventions which are inadmissible to the Court. That is compulsory Court-ordered counselling which takes place following the rendering of formal applications to Court concerning the children and at any juncture of the legal process right up to, and more occasionally following, final orders. The time for a contested matter to move between the filing of an application and the final hearing and decision varies between individual Registries or sub-Registries of the Court.

It is the case that most contested hearings will take place between one or two years after the initial filing of the application. Regardless of the given timeframe the adult applicant and adult respondent, most commonly the parents, are subject to Court orders that require them to present, separately or together, for dispute resolution counselling. It can be that the attending counsellor makes recommendations to the Court, amongst other case management recommendations, that further counselling should also include the children separately from or jointly with the parents. The Court may take up the counsellor's recommendations and order the participation of the children in the parents' Court-ordered counselling or the Court might disregard the counsellor's recommendation. It can also be that parents initiate the proposal that they return for further counselling, including their children, and the counsellor undertakes this as an extension of the parents' counselling under the existing Court order.

It is suggested that the reasons for the Counsellor to either undertake or to recommend to the Court that further counselling including the children should take place may be driven by a number of factors. My experience is that these reasons can include, among other considerations, concerns or issues and in no particular order–

- The parents are very polarized and their informations so unreliable that the children are able to provide other and less entrenched sets of information and perspectives which might be reflected back to the parents or otherwise used to address the impasses in the dispute.
- The counsellor is concerned that the parental antipathy is so severe and so impactful that they need to make an impartial and objective assessment of the children’s emotional and psychological health rather than rely upon the parents’ rendered accounts of the children’s non-physical well-being.
- The children are at an age/developmental stage that their individual and or collective perspectives, wishes, attachments and needs could or should be considered by the parents [or a recommendation made to the Court for a Family Report if the parents are unable/unwilling to listen or respond to the children’s wishes, attachments or needs].
- The parents are each operating from a position informed and shaped by what the children say, separately and contrastingly, to them [in order for the children to survive or manage the parental acrimony] and the children’s fears and fantasies are not accurately known by one or other parent in order for them to then respond more appropriately and in a more child-focused instead of conflict-driven manner.

### **A focus on counselling children**

My direct experience is that, even where the resources of greater counsellor numbers and more available counselling appointments previously existed in the in-house Family Court counselling sections and at the time of the advent of Federal Magistrates Court, individual counsellors or Court managers have been reluctant to have children included in counselling. The general rationale, held or expressed, was that ‘we should try to leave the children out of this’ or ‘It’s between the parents’. There were exceptions, in my experience, where some counsellors actively sought to include children in counselling

interventions and in assisting the presenting families to listen to and speak with their children. This usually occurred after careful consideration and clear contracting with the parents as to how, when and why to include the children. Some of the questions or issues that I have found to be appropriate in contracting with parents regarding their children's participation in Family and Federal Magistrates Court related counselling include-

- What is it that you want to say to the child/n?
- What do you want/hope/expect the child/n to say?
- Is it OK for the child/n to decline to say anything?
- Are you able and willing to assure the child/n that he/she/they will not be punished or rewarded by you for anything he/she/they might say?
- Are you willing to hear what the child/n has/have to say as being his/her/their own perception(s)/experience(s) even if it is different to yours?
- Are you confident/concerned that the other parent/party will accept what the child/n has/have to say without rewarding or punishing him/her/them?
- Are you confident/concerned that the other parent will accept what the child/n has/have to say as being his/her/their own experience(s) or perception(s)?
- In the event that the child/n does/do offer(s) strong wishes or needs will you be making a decision based on those wishes? Will the ultimate decision be made by the child/n or will the decision remain a parental responsibility which considers the child/n's wishes?

I would suggest that very little consideration is given by most in-house Court counsellors or Court administrators as opposed to a smaller proportion of counselling clinicians as to the possibility of the inclusion of children in voluntary counselling interventions. This is said in light of the general reluctance by the two responsible Courts to take ongoing responsibility for voluntary counselling of adult and parent clients and by extension the subject child parties. It is also proposed from the position that the Counsellors more usually appear to share the expressed parental attitude that it is best to protect the children from formal involvement in the issues of separation while it appears to be conceded by parents and helping professionals that children are more usually at least aware of and to varying degrees involved in separation issues.

Support is offered for the position that it is, indeed, the responsibility of counsellors and parents to protect children from much or most of the factual adult discussions regarding separation. This is grounded in our experience and understanding that children are negatively emotionally and psychologically impacted upon by exposure to parental antipathy and acrimony and from being in the position of being the possible prizes and victims of emotional and psychological ‘tugs of war’ between their parents and others. Further, that some children can take responsibility for their parents’ feelings and abreact ownership or valuing of their own feelings and beliefs in their attempts to what I would refer to as ‘parenting their parents’. Some children can feel burdened and take responsibility for their siblings. Some can inappropriately reject one parent and embrace the other. Some children can be psychologically gutted by being asked to straddle two polarized, competing parentally defined realities. There are a number of other variations in possible dysfunctional or pathologically unhealthy reactions in children’s adjustment to divorce and separation apart from those briefly mentioned.

It is suggested that children are more in need of emotional information and some individually shaped and appropriate factual information at separation that is designed to be reassuring and neutral (non-blaming) in its content. These informations will need to be further modified in accordance with the child’s age, developmental and maturational level, individual personality and past psychological history and accommodation of change. It is the case that parents, individually and collectively, are likely to be functioning very poorly in all of their life roles at and around the adult relationship separation given that they are, more usually, in or going through grief and loss or trauma reactions to the relationship separation. The process of separation involves, more usually, shock and denial, anger, including attributions of fault and blame directed toward the self or toward others, sadness and depression and, hopefully over time, progressions toward adjustments and moving on.

While the children are also likely to have similar emotional reactions or adjustment tasks to those experienced by the adults they are not equipped with the cognitive capacities of their parents. That is, again depending on their age and developmental levels, children

may not be able to conceptualize what, for them, are feeling based insights and knowledge rather than cognitive insights and understanding. The additional point is made that it is important that parents and counsellors ensure that children do not form and hold cognitive constructs that connect them to or implicate them in the parents' decision to separate. This is a burden that many children assume even if through passive and covert processes rather than through more active and overt processes and influences.

Experience tells us that younger children tend in some form or another to act out the emotional and psychological reactions that they are not sufficiently well enough equipped to talk out. Some children tend to develop psychosomatic reactions with headaches, tummy pains and generalized reports of feeling sick in order for them to express their anxieties and insecurities. The underlying anxiety could be specific to separation from a parent or could be grounded in the sense that relationships are tenuous and mutable or are not founded upon unconditional love. Some children take a very literal and concrete action interpretation of their parents' separation and join one parent in being angry and blaming of the other as a way of making sense of the familial 'madness' or 'sadness'. Others tend to withdraw into daydreaming, a rich fantasy life or the world of Nintendo and Playstation, worlds of pretence as a means whereby they minimize their participation in the real and painful world associated with the familial pain and trauma. In a similar vein others might developmentally regress and return to earlier, less problematic ages and stages through play, talk, comfort seeking and dependency seeking or help inducing behaviour. These and other possible reactions for a period of time or to some degree are understandable and may even be useful in assisting a child for a period of time. It is the entrenched or stuck investment by a child in these that concern us.

### **Reportable assessments**

While the debate about the relative ethics and efficacy of the inclusion of children in either voluntary or Court-ordered counselling interventions is touched upon in this paper and to some extent incompletely located and described there is a further area of Court intervention where children are compulsorily included in counselling assessments. In contrast to the other counselling interventions of voluntary or Court ordered counselling

of children which are ‘confidential’ or ‘privileged’ the other Family Court and Federal Magistrates Court process in which children might participate is that of Family Reports. The Court has the option, where matters are proceeding to either an interim or a final hearing, to seek the input of a qualified expert to provide a report on children’s wishes, needs and attachments in order to better inform itself as to care decision options which are ‘in the children’s best interests’. Depending upon the Court’s view as to the reliability and validity or otherwise of the Family Report post-separation judicial decisions regarding the children are more usually to greater or smaller measure informed and shaped by the Report’s recommendations. The Report and the Report Writer are subject to the robust scrutiny of cross-examination whereby the parties’ legal practitioners, and very often the Court appointed children’s legal representative [Child Representative], clarify and confront elements of the Report’s assessment, opinions and recommendations.

It is reasonably correct to contend that the matters which proceed to a Family Report and final trial represent the cases which are more entrenched in disputation and which more often feature elements in the adult dispute which are concerning in relation to children’s welfare or which feature the more marked, destructive and uncontained parental antipathies and acrimony. Statistics, regardless of the very reasonable criticism that they are open to some levels of interpretation as to their possible meanings and assistance reveal that less than 5% of matters filed with the Court proceed to a final trial and decision. That is, the overwhelming majority of Court cases are able to be described as not proceeding to a final hearing while others prefer to describe these matters as having ‘settled’. Some would quite reasonably nominate that many cases are unresolved at the relational level while they may be resolved at the legal level with parties not having the financial or personal resources to sustain their initial stance and applications. This is even where cases may feature concerning welfare issues. The proposed welfare issues may relate to child abuse and child-protection, alcohol or drug misuse, domestic violence, criminality, psychiatric problems and pathological grief reactions by a parent, among other matters.

The Family Reports are referred to welfare and helping professionals [more often specialist and experienced Social Workers and Psychologists] by private solicitors, in-house Legal Aid solicitors or Court appointed Child Representative private solicitors. Reports commissioned by the parties' private solicitors are known as Private Family Reports. Reports commissioned by the in-house Legal Aid solicitors or by the legal aid funded private solicitor, appointed as the case's Child Representative, are known as Legal Aid Family Reports. Whether commissioned through Legal Aid or by private legal practitioners the 'Legal Aid Family Report' or 'Private Family Report' tend to follow the same process and offer the same analysis of individual functioning and descriptions of relationship dynamics. It is quite often the case that some matters have both a Family Report prepared for the interim hearing of the matter and an Update Family Report prepared closer to the date of the final hearing of the case. It is more often the case however, that the Court is placed in the position of making interim decisions for children's post-separation care arrangements without the additional assistance of a Family Report. This means that the Court's Judges make decisions which are likely to be in place for at least several months before they are further assessed and it is the case that these interim orders might set up a care regime which could become somewhat established by the passage of time and therefore more challenging to move away from.

The formal assessments of the individual child and adult parties and others and the identification and description of their individual functioning and the familial relationship dynamics are at the core of Family Report. It more often involves separate and joint interviews conducted in the practitioner's rooms or by way of home visits. The tools employed by various practitioners tends to vary according to the core discipline of the practitioner with some tending toward family therapy type assessments, others relying upon early attachment theory, others on psychometric testing and some on blendings of these or other theoretical tenets. Regardless of the tools employed, the core discipline of the practitioner or whether their assessments are conducted in-office or by home visits the children are at the centre of the Report process and are more usually directly engaged in interviews by themselves, with siblings, with parents, parents' new partners and others. Children are also quite often observed in interactions with others and even more often

where they are young, less articulate and more reasonably considered by their non-verbal communication.

### **Here them from here, but they're not heard from there**

The rationale for the helpfulness of the Family Report in its potential to assist the parties, the legal practitioners, the Children's Representatives and or the Courts is that the children are able to provide or the welfare practitioner is able to identify and describe the needs and wishes of the children and the contexts of these needs and wishes. This might directly assist the Courts in making decisions which are 'in the children's best interests'. This would also seem to invite the understanding that the counselling assessment process is able to be managed in such a manner that better decisions are able to be rendered for children through their inclusion in a formal assessment and for this to be undertaken in a manner that is aware of and sensitive to the children's anxieties and concerns. Based upon this rationale it would appear to be reasonable to ponder the question as to why it is not possible and perhaps even essential for more active consideration to be given to the more regular inclusion of more children in more cases in voluntary and Court ordered compulsory counselling to further assist parents to make informed decisions for their children and for children to be empowered to contribute to decisions about them.

At a time when the Family Court appears to be devolving its relationship with its adult and child clients other systems appear to be working to create greater involvement of their adult and child clients in their systems and processes. The Queensland State Government has introduced new child welfare legislation to deal with youth justice, child protection and other statutory interventions. This legislation holds at its core the value position that the parents, the subject children and other stakeholders in the formulation of decisions pertaining to these children are part of a participative process. That is, adult and child parties are consulted with and included in case managing their matter and in decision-making and review. The Queensland Children's Services Tribunal is drafting practice guidelines for the supportive inclusion and participation of children in administrative review processes which are concerned with decisions about them.

Queensland Social Worker and consultant, Yvonne Darlington, in her Doctoral studies conducted in-depth interviews of young adults who had, as children, been involved in Family Court Family Report counselling assessments. There were a range of responses offered by these young adults as to their experience of contact with the Court, including their advice to counsellors and Court decision makers. These advices included that, “children need more information about divorce and legal proceedings”; there is a “need to listen to what children are saying they want to happen”; “children need some external support”. One young woman states, “I wish that someone could actually tell kids what’s going on. That it’s mandatory that people have to explain to kids. I don’t mean parents... but someone from the Court...no one bothers to tell you what’s going on and is going to tell you the truth”. It would seem that Darlington’s then 9-16 year old Family Report participants share the same experience and needs as Kelly and Wallerstein’s US study participants in “obtaining information [as]...a good starting point”[1977 p25].

The Family Law reform Act of 1995 pronounced that ‘children have rights’ and that ‘parents have responsibilities’ but in the same time period that these fundamental principles have taken their place in the legislation designed to inform and guide Family Court and Federal Magistrate Court legal and welfare practice the availability of counselling for Court adult and child clients would seem to have been markedly reduced. Kathryn Cronin the then Australian Law Reform Commissioner in her joint paper with the Equal Opportunity Commission asserted that the agencies’ study found that children are “excluded” and “silenced” in some legal processes by a “paternalistic approach to young people”. Further, that “if children are to participate appropriately and effectively with legal processes, adult participants ...need to focus on and engage directly and respectfully with children”[Courier Mail 19 May 1997, p5].

It appears that there is some available support for the interpretation that children are actively or passively excluded from Family Court and Federal Magistrates counselling processes and that there is also a general lack of counselling support for their parents where they are not enjoined to the legal adversarial processes. While it is sensible and responsible to employ caution before including children in formal counselling with their

separated and conflictual parents it is also suggested that the option to include children in more counselling interventions should be more often actively available and considered on a case by case basis. The Family and Federal Magistrates Courts and their counsellors are uniquely placed to provide a forum and a process for children to have their say and to be listened to. Rather than leaving the children 'out there' there is perhaps a responsibility to invite the children 'in here' and to let them know that someone is here to hear.

*'What Ratty, my dear little man!' exclaimed the Badger, in a quite different voice. 'Come along in, both of you, at once. Why you must be perished. Well I never! Lost in the snow! And in the wild wood, too, and at this time of night! But come in with you'. (Grahame, Wind in the Willows, 1992;pp.69-70)*

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