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OPENING ADDRESS

by

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Introduction

Thank you for inviting me to address your Congress. It has a theme that is naturally of particular interest to me, *The Family - Psychiatry, Psychology and Law : Help or Hindrance*?

The role of psychiatry and psychology in relation to family law is a vital one and one that needs further development. One feels that all too often the respective disciplines operate in a vacuum from each other and all too often fire shots at each other from afar without developing a constructive dialogue. Even professional associations such as this one are heavily weighted in favour of one discipline or the other and there is not, in my view, enough meeting ground between us.

The problem is not confined to Australia. In the USA the same gap occurs. I have for some years been associated as a member of the Executive Committee and later as President of the quaintly named Association of Family and Conciliation Courts, based in Madison, Wisconsin. That Association is an association of Judges lawyers, mental health professionals and mediators, the main object of which is to develop better and less painful methods of resolving family disputes. It is the only cross-disciplinary association of its kind in the USA and is developing an international profile, largely as a result of its recent association with the 2nd World Congress on Family Law and the Rights of Children and Youth held in San Francisco in 1997. However even it has had great difficulty in attracting a substantial membership of lawyers as distinct from Judges and I have had similar problems attempting to establish a similar organisation in this country.

It was against this background that I was pleased to accept the invitation to speak today and to further espouse the cause of co-operation and understanding between the various professional disciplines operating in the field of family law.

The Family Court is something of a cauldron within which swirl each of the ingredients of your conference theme. In the time that has been allotted to me, I would like to speak a little about current developments that affect or have the potential to impact on your professional participation in family law proceedings, and at the same time examine some broader issues.

Law "Reform"

We live in a time of great change in relation to family law, which Government, in the way of Government of whatever political persuasion likes to describe as "reform", however regressive the measure may be.

The last lot of significant changes were made in 1996, as a result of the Family Law Reform Act 1995. There is little doubt that that Act was a genuine attempt at some reform, although a number of the changes that were made were cosmetic and designed to create the effect that there had been more reform than was in fact the case.[1]

The most significant change contained in that Act was to rename the terminology of family law so far as children were concerned. A custody order became a residence order but such an order, without more, does not carry with it any more rights of control of the child to the resident as distinct from the non resident parent. Access became contact and the whole bundle of orders affecting children became parenting orders.

The Act picked up some of the words of the United Nations Convention on the Rights of the Child when it laid emphasis on a child's right to contact with both parents unless this is determined to be contrary to the child's best interests, and

[1] See the discussion in Chisholm, R. (1996) 'Assessing the Impact of the Family Law Reform Act 1995' Vol 10 No 3 *The Australian Journal of Family Law* 177.

importantly, you might think, it made specific reference to family violence, including violence against others in the family, as a factor relevant to the making of parenting orders.[2]

The first matter, ie the change of terminology, and the emphasis on a child's right of contact, was an attempt by legislative means to produce attitudinal change.[3] The second was a substantive recognition of violence as a factor to be taken into account in making parenting orders in respect of children.[4]

In retrospect, we might question how much expert psychiatric and psychological input was taken into account by Government in introducing these measures and particularly the first one.

There is a strong body of evidence that now suggests that the perfectly laudable objects intended by Government were not only not achieved but may have been counter productive. [5]

There has been an explosion in litigation as a result, with increased numbers of fathers making contact applications or applications seeking to restrain the mother from relocating away from them. This seems to be because the Act's emphasis on the child's right to contact has created a transference of this "right" from the child to the parent and is being used and in some cases misused by parents seeking to retain a measure of control over their former partner. This in turn has more than counterbalanced the Act's increased recognition of the effects of violence upon children.

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2 See the discussion in B and B : Family Law Reform Act (1997) FLC 92-755.

3 Sub-section 60B(2) Family Law Act 1975.

4 Sub-section 68F(2) Family Law Act 1975

5 See Rhoades, H., Graycar, R. and Harrison, M. *The Family Law Reform Act : Can changing legislation change legal culture, legal practice and community expectations? Interim Report*, The University of Sydney and the Family Court of Australia, April 1999, available at http:www.familycourt.gov.au.

So far as the question of the change of terminology, is concerned the jury is still out. There seems to be some evidence that it has made the settlement of disputes about children a little easier in the early stages, but there is little evidence that this continues to be an ameliorating factor when the dispute comes to Court.

I think that the point that is worth making however, is that this was important social legislation affecting some of the most important and vulnerable people in our community, namely our children. Is this not the very sort of legislation that cries out for the input of professional like yourselves, as well as those of us from the legal profession, and how much of such input occurs?

Australian Law Reform Commission Review of the Federal Civil Justice System

While on the subject of law reform I should perhaps mention the most recent Discussion Paper of the Australian Law Reform Commission titled *Review of the Federal Civil Justice System.*[6] As some of you may have noticed, its release was accompanied by some rather vigorous criticisms of the Family Court that focussed on our case management system, claiming that it is inflexible and unwieldy, and that delays and poor compliance with directions and orders are attributable to its requirements.

The launch of the paper actually preceded the dissemination of the discussion paper by a couple of weeks, and the print media therefore focussed heavily on the ALRC's media release which was in fact more inflammatory than the final product. I strongly disagree with the views expressed but that is, however, a debate for another forum.

The relevance of this Discussion Paper for present purposes is that it seems to call into question the long held emphasis of the Court that family law litigation by judicial determination should be a matter of last resort. The paper rather questions the efficacy of counselling and conciliation of these disputes and suggests that there should be a return to an emphasis on the production of reports by professionals at an early stage prepared for the purpose of court proceedings. It thus seeks to give a greater litigation focus to the work of psychiatrists and psychologists working in this field. Again I wonder how much professional input was received by the Commission from people such as yourselves in arriving at this conclusion.

Secondly, and regrettably in my view, the Commission completely avoided the major term of reference that it had been given: to examine and recommend improvements to alleviate the worst effects of the adversary system in so far as it operates in the area of family law. This was an opportunity that should not have been missed and is one that I hope will be taken up in future. We are currently examining proposals for improved trial management directed to this end but I am sure that there is much more that could and should be done.

Disputes about children are not and ought not be treated as best determined in adversary combat between their parents and others,[7] and the whole focus should be

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[6] *Discussion Paper No. 62.*

[7] See M and M (1988) 166 CLR 69 at 78 where the High Court held:
"Proceedings for custody or access are not disputes inter partes in the ordinary sense of that expression: Reynolds v. Reynolds (1973) 47 A.L.J.R. 499; 1 A.L.R. 318; McKee v. McKee (1951) A.C. 352 at pp. 364-365. In proceedings of that kind the Court is not enforcing a parental right of custody or right to access. The Court is concerned to make such an order for custody or access which will in the opinion of the Court best promote and protect the interests of the child. In deciding what order it should make the Court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima facie in a child's interests to maintain the filial relationship with both parents: cf. J. v. Lieschke (1987) 162 C.L.R. 447 at pp. 450, 458, 462, 463-464."

redirected to that which the law pays lip service at least, namely the best interests of the child.

Family Violence

Many of our respective clients have had their own lives, and those of their children, blighted by family violence. Whilst we cannot undo the past, I see the Court's responsibility as including the protection of its clients wherever and whenever possible and as ensuring that there is nothing in its operations which may exacerbate the situation of vulnerable people, most commonly women and children.

In 1993 I implemented a family violence policy which in turn is complemented by guidelines which all staff are required to follow.

Even measures such as these cannot prevent determined perpetrators and many women are still at risk before and after they leave Court buildings. I am very much open to suggestions as to how we can improve our efforts and would be happy to hear from any of you that might have suggestions that would assist.

In a sense however, these are only band-aid measures that do nothing to address the deeper problem of family violence in our community. I do not pretend to have an answer to this problem which is one that I believe must be addressed at all levels. While there have been improvements, and most police and professionals now take this seriously, it is clear that we all have a long way to go.

Unfortunately, attempts to address the problem all too often get side-tracked in the gender debate about the proportion of offenders from each sex. We seem to forget that violence tends to beget violence and that it does not really matter what these proportions are. What we must address is why men and women feel that violence

is an acceptable part of family relationships and I suspect that this has much to do with issues such as male dominance and control.

These are very much issues for professionals like yourselves and you have a duty and a responsibility to raise community consciousness of this problem.

Litigants in Person

One of the most troublesome features about family law litigation in recent years and one which also has an impact upon other professionals working in this field is the tightening of the legal aid budget and the consequential increase in litigants in person numbers. Some 41% of contested matters in the Family Court now involve at least one unrepresented party.[8] Given current policies, this situation is unlikely to improve.

The consequences for both families and the Court are highly undesirable, for example:

- Settlement opportunities are seriously reduced;
- Trials often take far longer;
- Judges and Judicial Officers are obliged to provide advice and assistance of a procedural nature (but not legal advice);[9]
- Judges and Judicial Officers frequently have to play a more interventionist role.[10]

There are also particular impacts for practitioners preparing expert reports in such cases:

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8 See ALRC (1999) *Review of the Federal Civil Justice System - Discussion Paper No. 62*, Tables 4.6 and 4.8 and paragraph 11.160.

9 Johnson and Johnson (1997) FLC 92-764.

10 Ipp, D.A. (1995) 'Judicial Intervention in the Trial Process' Vol 69 *The Australian Law Journal* 366.

- It cannot be expected that an unrepresented party will have professional assistance in understanding the report. Additional issues therefore arise as to the expression and language used in the report; and
- Expert witnesses are open to cross-examination by a party representing him or herself. In this regard, I would take the opportunity to point out that on the one hand, Judges and Judicial Officers have a responsibility to ensure the questioning is relevant and not oppressive or discourteous to a witness; on the other hand, a margin of leeway is necessary in order to avoid creating an apprehension of bias towards or against a party. We walk something of a tightrope in such situations and hope that professionals such as you appreciate the inherent difficulties of doing so.

Interim Applications Concerning Children

A significant practical initiative of the Court has been the delegation of power in interim children's matters to a newly appointed category of Senior Registrars who will hear such matters. We have already seen reduced waiting times to trial as a result, and judges have been freed up to hear trials rather than interim matters.

Since experts such as yourselves may be called upon to provide reports in such cases, it is perhaps timely to mention that there has long been a significant distinction between the treatment of matters that come on for final hearing and matters that come on for the making of interim orders. Indeed, as the Full Court explained in C and C,[11] the interim applications are particularly numerous and impose a considerable burden upon the Court's resources. As a matter of practice and procedure, there is a discretion to permit the calling of evidence and cross-examination at interim hearings. The Full Court said, however, that as general rule

[11] (1996) FLC 92-651.

this should not be permitted and expert report-writers should therefore be mindful of this procedural norm.

The Full Court has also said that although the best interests of the child is the paramount consideration in interim hearings, those interests in such circumstances will normally best be met by ensuring stability in the life of the child pending a full hearing of all relevant issues.[12] Accordingly, as a general rule, any interim order should promote that stability, unless there are strong or overriding relevant indications relevant to the child's welfare to the contrary. Such indications would include but are not limited to convincing proof that the child's best interests would be really endangered by his/her remaining in that environment.

Program Initiatives

Of course, the Family Court is much more than what goes on inside its courtrooms. Only a small proportion of cases actually progress to the stage of a final hearing, in large part due to the conciliation and mediation work of the Court's Counselling Service and other professionals like yourselves. More recently, our well-established approaches have been augmented by some new programs.

The problems faced by parents after separation has been identified by the Court as an issue of particular importance and I am sure that an audience such this needs no persuading about this. To this end, a new single session group program - Parenting After Separation Seminars (PASS) - has been developed by Counsellors at the Melbourne Registry of the Family Court. The aim of the group session is to assist participants to focus on the needs of their children and not their dispute with their ex-partner.

The seminar is offered to clients presenting to the Court's counselling service for the first time. The major reason for targeting people at this stage was that it was believed a group could very effectively address important general issues that parents had to consider when attempting to resolve a dispute about their children when first presenting to the Court.

This approach was based on theories of crisis intervention and the notion that the potential for change was greatest the earlier the intervention. As well, there was evidence in the literature to indicate that group programs were effective for people in the early phase of their divorce and separation.

Evaluation outcomes for the pilot were pleasing in respect of objective measures (such as subsequent use of counselling, court attendances and whether matters were settled or withdrawn) and also exit surveys of participants. As a result, the program is a part of the range of services offered in Melbourne while still subject to evaluation.

We have also been piloting a more resource intensive program at the Parramatta Registry which deals with difficult cases. It is conducted over five sessions with each session lasting for two hours. They are held in the evenings during school terms and are usually run jointly by a male and female facilitator.

The intervention is based upon the intensive therapeutic group programs developed in the United States for separating families experiencing impasses. These overseas programs, pioneered by practitioners such as Janet Johnston and Linda Campbell,[13] are based upon the knowledge that certain families reach an impasse in their ability to make the psychological transition to being fully

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[12] Cowling and Cowling (1998) FLC 92-801.

separated. Many of these families continue to make use of litigation processes in the Court and are unable to resolve the manifest disputes that continue to arise concerning their children.

The sessions focus on giving parents a more in-depth understanding of children's experience of separation and empowering them to assist their children. They also address communication problems and help parents redefine the new post-separation relationship that they continue to have. The strategy is to shift parents from fighting with each other to understanding and helping their children. The program has been well-received by participants and indications from early informal evaluations have been promising.

Cases of this type, and intractable contact issues in particular, have also attracted governmental policy and legislation interest.

Last year, the Family Law Council published a report which sought to tackle the perennial problem of the enforcement of contact orders.[14] The Government responded to the Council's proposal by including in a Family Law Amendment Bill a range of preventative, remedial, and punitive measures relevant to the enforcement of all parenting orders (residence, contact and specific issues).

Three stages of response are proposed.

At the educative or first stage under the bill, parents would have the nature of their particular parenting order explained to them, would be advised that education programs are available, and would be warned of the consequences of breaching the order.

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[13] Johnson, J.R. and Campbell, L.E.G. (1998) *Impasse of Divorce: The Dynamics and Resolution of Conflict*, The Free Press, New York.

Should the order be breached, the second stage of the scheme stipulates that the Court **must** direct the person responsible for the breach to attend a remedial education program either run by the Court or a community agency.

If this intervention fails to prevent to prevent a further breach, punitive orders, including community service, bonds, fines and imprisonment may result.

Many of the Bill's provisions are concerned with attempting to explain what information should be provided and the manner in which and by whom such information is to be provided.

I agree that it is valuable to prevent parents to become locked into intractable conflicts which can be damaging for their children and their right to enjoy the benefits of the Court's orders. In my view, it is imperative that professionals with the kinds of expertise found in this audience should be closely involved in the design of the materials and programs contemplated by the first two stages of intervention within the enforcement scheme.

Looking to the third stage, the provisions still do not resolve the "hard end" problem that so troubles the Court: that punitive options such as fining or imprisoning a parent must inevitably have deleterious effects on the children by, for example, removing the primary caregiver or introducing the dynamics of blame between children and at least one of their parents.

I expect these and other provisions of the Bill will generate interest in your professional bodies as well as the community at large when it is introduced into Parliament in the near future.

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[14] Family Law Council (1998) *Child Contact Orders: Enforcement and Penalties* .

Better Management of Child Abuse Cases

The final program initiative I would like to mention is a specialist case management initiative for cases involving child abuse allegations.

Several years ago Professor Thea Brown and her colleagues at Monash University conducted research on the interface between the Victorian Children's Court and the Family Court. [15] This empirical work concluded that child protection was part of the Family Court's "core business", and raised concerns about the time taken to resolve disputes involving child abuse allegations and the number of interventions for children that was a feature of such cases.

These findings, verified by our own concerns, prompted me to establish a Melbourne committee to pilot new strategies for dealing with these troublesome and often tragic cases. This is what is known as the Magellan pilot program.[16]

The Magellan pilot involves 100 cases filed in either the Melbourne or Dandenong registries in which serious sexual or physical abuse allegations have been raised. Such cases are managed within the Court by a designated team of 2 judges, together with a registrar and two counsellors. The matters are brought on at clearly defined stages and a child representative is appointed automatically at the first mention before the judge. In each case, steps are also taken to ensure the prompt production of a thorough and informative report by the investigating child welfare authority.

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15 'Focussing on the Child', Paper presented to the Third National Family Court Conference, October 1998, Melbourne, at http://www.familycourt.gov.au/papers/fca3/BROWN3.PDF

16 The Honourable Justice Linda Dessau 'Children and the Court System', Paper presented to the Australian Institute of Criminology Conference, June 1999, Brisbane, at http://www.familycourt.gov.au/papers/html/body_dessau.html

Such special case management amounts to a 'front-loading' of resources and has involved considerable co-operation with the Commonwealth Attorney-General's Department, Victoria Legal Aid and the Victorian Department of Human Services. Early evaluation data and statistics are suggesting distinct benefits for the families involved, for the Court and for legal aid resources. Cases are resolving sooner in the case management process on the basis of better information at that earlier stage, with few proceeding to defended final hearings.

At this stage 66 cases have been settled, 11 are listed for a final hearing and 7 have gone to judgment. The pilot is drawing to a conclusion and we will await the report of the evaluation with much interest.

Conclusion

In the course of this presentation today, I have tried to give you a taste of some of the current ways in which the Family Court genuinely strives to be a help and not a hindrance to families in Australia. The participation of experts such as you is an important ingredient in fulfilling the Court's mandates in the best ways that it can.

When the Court has the benefit of an expert such as yourself involved in a case, it can make a significant difference. In considering how I would finish this address, I thought that in keeping with the congress theme, I might venture what I hope are some helpful concluding observations about how your expertise can best assist the Court.

All too often, solicitors and parties in family law litigation, particularly where children's issues are involved, endeavour to employ the expert witness as something of a "hired gun" in the same way as they do a barrister. The expert witness is expected to present as favourable a case as possible from their client's point of view, and to so far as possible, denigrate the case of the other.

This sort of approach may work with a jury trial, but before a Judge sitting alone, as is the case in the Family Court of Australia, it usually has a counterproductive effect from the point of view of the client and a demeaning effect from the point of view of the expert witness. Judges and Judicial Officers did not come down in the last shower and they can usually detect very clearly when a witness is behaving in a partisan fashion. This not only reflects upon a witness's evidence in the instant case: the performance of the witness is likely to be remembered on future occasions, with damaging effect upon his or her credibility.

In some States, a problem has developed in child abuse cases where the same group of expert witnesses representing different schools of thought as to child abuse are called time after time in every child abuse case to express the same sort of evidence. They are then cross-examined *ad nauseam*, often for days and the effect of their evidence is usually negligible because of their well-known partisan stance.

I think that sometimes parties, their lawyers and their experts lose sight of the fact that the High Court has made it clear that the duty of the Family Court is **not** to resolve in a definitive way, an allegation of abuse as would a Court which is trying a party for a criminal case. The High Court has determined that the correct test to apply is whether contact or residence would expose the child to an "unacceptable risk" of abuse.[17] In doing so, the High Court emphasised that proceedings concerning children under the Family Law Act are not to be treated as an adversarial dispute; rather, the Family Court is to make the order which, in all the circumstances, will promote the best interests of the child.

[17] M and M (1988) 166 CLR 69 at 78,

A number of Judges of the Family Court of Australia have expressed concerns to me that the credibility of reports prepared by experts at the request of the legal representative of one of the parties suffers because of the expert's particular bias toward one of the parties or the appearance of such a bias. Concerns about partisan expert evidence extend beyond the family law jurisdiction.[18]

Such criticisms may reflect some confusion by the makers of the reports about the purpose to which reports are put and the factors influencing the extent to which judges can rely on them.

Particular or alleged bias may come about for a number of reasons, some of which are difficult to avoid. Nonetheless, if some basic guidelines are followed in family law matters, the professional practice of your professions will be enhanced and, more importantly, better outcomes for the children in these disputes may result.

- Wherever possible, attempts should be made to include all relevant parties to the dispute in the assessment. This may require negotiations with the legal practitioners for both parties or the clients to see all family members as a condition of accepting the referral.

- Where the Court has appointed a child representative, it is often preferable for psychiatric or psychological examinations to be arranged through this neutral source. I suggest that in such cases, enquiries should be made as to whether such an appointment has been made, and the solicitor or party be asked why the child representative is not arranging for the examination.

[18] ALRC (1999) *Review of the Federal Civil Justice System - Discussion Paper No. 62*, chapter 13.

- If it is not possible to interview all relevant parties, the report should be restricted to those issues which can be covered as a result of the interviews carried out. Comments and assessments based only on interviews, tests or materials supplied by one of the parties should be limited to the party or parties involved.

- Where only one party is seen, care should be taken not to go beyond the evidence gained first hand through interviews, observations and tests. Any other material which is relied upon should be clearly noted as such, and it should be appreciated that, should this information be subsequently discredited during the hearing, this will reflect on the overall validity of the report or assessment.

- Where possible, the parties should share the cost of the expert examination.

The final matter which I would mention is that Order 30A of the Family Law Rules empowers the Court to require opposing experts to conference in order to identify those parts of the evidence that are in issue in the proceedings.[19] Obviously, such conferencing need not await the making of an order and, in my view, should be carried out as a matter of good professional practice.

It is also desirable from the point of view of minimising litigation or the extent of any trial of issues. From my experience, I would suggest that in many cases, expert conferencing may be a most productive means of reaching settlement or at least will narrow the areas of professional disagreement.

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[19] Order 30A also limits the number of experts a party may call and permits two or more experts to be called in relation to the same issue only with the Court's permission in special circumstances. It is also open to the Court at any stage of the proceedings to appoint an expert to inquire and report on issues. Such a Court expert is expected to be a person agreed upon by the parties, but if agreement is not possible, the Court may nominate a particular person.

Thus, for the benefit of families, I would therefore urge you as a matter of course in proceedings concerning children particularly, to raise this option when considering a referral.

I thank you for your interest and the invitation to speak and wish you well in your deliberations at this congress.

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