ABSTRACT

There have been many changes in views over the centuries, with little consensus about what is in the best interests of the child. Parent groups, children, lawyers, the judiciary, legislators, educators, and social scientists all articulate various competing views about what is best for children. The current *Family Law Act (1975 (Cth))* in Australia has a concept of cooperative parenting. It gives priority to continual involvement of both parents in children's lives after separation, while taking into consideration practical aspects of doing so, and whether or not this places children at risk.

Parental or child alienation that develops into a psychological disorder is a risk present in some high conflict cases in the Family Courts. An interdisciplinary team approach by psychologists, psychiatrists, family consultants, independent children's lawyers and lawyers representing each parent, and a review of Court processes, may assist the management and improve the outcome of these cases.

The development of a common discourse to facilitate better communications and understanding between the professionals involved would better enable teamwork toward the common goal of protecting the children of separated parents instead of making them sometimes innocent victims of the adversarial system that is still being applied in many cases.

Inclusion in DSM-V may also assist in defining the disorders and providing recognition by both the social scientist and legal professions and by the Family Courts. Potential therapy together with Court orders is also needed to ensure that the relevant parties participate in the therapy. The use of disciplinary orders should also ensure that there is more respect and compliance by the parties and relevant social science participants such as the family relationship centers. The timing of this approach is critical to its success. If assessment is not made at the beginning of court proceedings or before, both time and money could be wasted and the appropriate outcome may not be achieved. A proposal for changes in the court processes and draft orders are provided in the appendices.

CHAPTER 5

LAW AND PSYCHOLOGY - A CROSS-DISCIPLINE APPROACH

5.1 Legal Processes in High Conflict Cases

This chapter discusses legal approaches to resolving high level conflict, including parental alienation. It proposes what needs to be done to ensure that when psychologists or psychiatrists, and lawyers, are communicating about these issues, there is a common understanding of what is observed by each profession.

The role of the Family Courts and their processes are examined. The Family Court is still playing a mediatory role between the adversarial parents, while attempting to cause them to comply with what the Court expects of them as 'good parents'. Possible changes to the court processes are discussed.

Training of lawyers and psychologists to specialise in Family Law, and to be able to have a common understanding of the factors and issues involved in high conflict cases is necessary. Currently lawyers are named family law specialists after having their ability to advise clients, and refer to currently used court precedents tested briefly with a focus on litigation rather than negotiation and without any knowledge of psychological factors.

While much of this chapter is about communications, education and high levels of conflict generally, as parental alienation can be one of the high levels of conflict, all references to high levels of conflict and approaches to it, include parental alienation in all of its forms.

5.2 Conflict between Legal, Social Science and Medical Discourse

One of the reasons that law has so much difficulty in resolving all of the complex children's issues that face it is the conflict that legal discourse has with social science discourse according to Michael King and Christine Piper.[1] Their views of these problems are included in their publication and are discussed in the following pages. They also refer to Gunther Teubner.

[1] King, Michael & Piper, Christine, *How the Law Thinks About Children* (Ashgate Publishing Limited ants GU11, England & Ashgate Publishing Company Vermont 05036 USA 1995).

King and Piper reveal the limitations of the legal discourse that could be relevant to its appropriateness to promote the wellbeing of children. They refer to Teubner's definition of 'second-order auto-poiesis' where he points out that under pressure of the legal processes, the court's view of reality uses its own comparative norms which are different to the views of the community and science.[2] He writes that the community and scientific views are more likely to be closer to reality. King and Piper argue that while the court's approach may be appropriate in the court's domain, it is inappropriate for constructing a realistic view of the types of issues that affect the well being of children.[3]

Another view of the legal process by King and Piper is that the law reduces the social world to manageable concepts, which cannot be changed fundamentally, although people's accounts may change, at which time they are then constructed in a way that they fit into the pre-existing categories and classifications that law provides. In family law cases, their view is that the law places the family '*in the centre of the wheel of causality'.* They say that while there have been many attempts to replace this with a scientific approach to the welfare of the children, this is not possible while ever the law thinks about children's issues as being individualised relationships between parents and children within what they perceive as the social environment in which the culture is the value of individualism and people controlling their own fate.[4]

According to King and Piper, Teubner states that the reality constructions produced by science, politics and economics for instance, prevail over those of law, yet the law reconstructs those reality concepts so that questions generated from the pre-existing categories and classifications provided by law can be answered. They refer to Taubner as describing how law has the difficulty of having to rely on the reality constructions of other disciplines while producing an autonomous legal reality. [5]

In attempting to intervene in disputes over children between separating parents, King and Piper see the court as playing the role of arbitrator that results in determining offers and counter-offers by each parent to provide socially acceptable arrangements for the children,

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[2] Teubner Gunther (1989) *How the Law Thinks: Towards a Constructivist Epistemology of Law* (Law Society Review Vol 23 No 5 pp727-56 as referred to in King, Michael & Piper, Christine 1995, *How the Law Thinks About Children* (Ashgate Publishing Limited ants GU11, England & Ashgate Publishing Company Vermont 05036 USA).
[3] Ibid 119 in Ibid 118.
[4] Ibid 119 in Ibid 118.
[5] Ibid 119 in Ibid 118.

and at the same time attempts to minimise harm to the children. King and Piper also refer to the element of collective responsibility, community action, and sociological theories that identify social factors that affect individual lives.[6]

Reference is made by King and Piper to Teubner's description that the law has to permanently revise legal models of social reality according to the accumulation of knowledge in the social sciences. However instead of the two discourses merging into a multidimensional super discourse, an ambiguous hybrid results whereby the scientific information is reconstructed within the legal communications, giving it a different meaning to the social science meaning from where the information came, and which is then no longer in the hands of the social scientists.[7]

King and Piper identify a possible solution to this problem named *reflexive law* by Teubner, in which the law does not define or interpret what is in the best interests of the child. Instead there should be a model that incorporates sociological theories of law, and transforms them into legal constructions of social reality by changing the court's own structures and its relation to other subsystems. King and Piper use Teubner's theory of *reflexive law* to examine ways in which this may happen with regard to the welfare of children, and conclude that this opens new possibilities for the future of the law as it is related to children.[8]

According to King and Piper, it is the absence of stability and consensus as to what is good and bad for children that leaves law struggling to formulate principles in the context of legal norms without the assistance of scientific and medical concepts of what is best for children that can be applied to legal communications. The difficulty that this creates is that law may be seen to lack competence in resolving conflicts when it is promoting children's welfare because the prolific information that is being generated by the social sciences, that is available generally to the community, may result in the community viewing the law as not relating to this knowledge. This could lead the community to believe that the Courts may not have the competence to make judgments about what might be in the best interests of the child.[9]

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[6] Ibid 119 in Ibid 118.
[7] Ibid 119 in Ibid 118.
[8] Ibid 119 in Ibid 118.
[9] Ibid 118.

King and Piper write that the law needs to consider the social and psychological research that has developed information about the various forms of child abuse, and the affects of the different forms of child abuse, while accommodating it within legal communications and processes. They refer to the significant amount of research in the United Kingdom and the United States of America in the 1980's that concludes that conflict between parents, whether in a marriage, or after separation and divorce, has the most damaging effect on the development of the child. It is in the best interests of children for parents to be positive and supportive to each other, and to promote the relationship of the children with the other parent.[10] These research findings have led to legislation that incorporates that ideal in countries such as USA, Canada, UK, New Zealand and Australia. However, despite the legislation, my own experience and the research referred to in this thesis indicates that the adversarial legal system often continues, and exacerbates the conflict between the parents. The children continue to be affected by it, while ever the parents are involved in court proceedings. Sometimes it continues on to when the children are adults as described in the research by Baker.[11]

5.3 The Mediatory Role of the Family Courts

King and Piper discuss the mediatory role of the Family Court and how this impacts on making decisions about what is in the best interests of the child. They propose that although the English Family Court is concerned about the welfare and best interests of the child, in practice it still plays a mediatory role balancing the claims of each parent to control and exercise power over the children, and the rights of the children to be free of any parent who is likely to cause them harm. In doing so the law also brings pressure on the parents to accept and perform their parental responsibilities. [12] The following is their view of the mediatory and general role of the Family Courts in England.

There have been attempts by the law to substitute the mediatory role with a scientific enquiry into the child's welfare, however the law only admits psychological or psychiatric accounts of behaviour into the legal system if this will legitimise the law's search for right or wrong. The law may use psychological concepts derived from scientific research which then becomes a normative rule for parents.

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[10] Ibid 118.
[11] Ibid 2.
[12] Ibid 118.

King and Piper suggest that scientific concepts must be suitably adapted and reconstructed in order to be made sense of in legal contexts to be admitted by the law. While this may appear to subordinate the knowledge of psychologists and psychiatrists to the law, the law's authority is also diminished to some extent by the need to obtain scientific advice. While the psychological concepts are reconstructed for the law, they do not change within the scientific community, which can cause some confusion according to King and Piper who say that this can decrease the power and authority of both law and science.[13]

My observations are that there are many parents who take no notice of court orders, and even health professionals and some people in relationship centers do not abide by court orders. One example of this is where the Magistrate made orders similar to the example orders in Appendix A. The mother followed the orders and attended the courses and counseling ordered. The father did not. In this case the relationship centre where the parents were ordered to attend did not inform the Court in seven days of a parent did not attend, despite my reminder to do so. After three months with nothing happening by the father, the case came before the Magistrate again for mention. Despite the fact that the father had not obeyed the orders and the relationship center had not informed the Court, the father was given no penalty, only strict advice that he must do so, and the case was adjourned for him to do this.

This indicates to me that neither the father, nor the relationship center respected the court orders, possibly because they had heard that the Court is usually soft on parents even if they do not have the interests of the child in mind, only what suits them. In this case, if the parents had not been assumed to work together for the child's best interests, and the relationship center was not assumed to do what was asked of them, and what they were funded to provide, psychometric tests may have picked this up initially, and the time before the next mention with nothing happening by the father would not have been wasted. If the father had received a penalty for not attending, he may not have continued to disobey the orders. Instead he continued to do so and even asked for more orders with regard to a special occasion for the child to attend.

[13] Ibid 118.

The major difference between the social sciences and law, according to King and Piper is that social science procedures are always based on empirical evidence of causes and a consequence, which is opposed to the law's normative learning. The law may rule out causes that it may not be able to handle, or can only handle with difficulty through its procedures, rules of evidence, relevance, and a small number of issues that fall directly under the influence of the Judge.[14] Such causes may be financial issues, psychological issues, genetics, personalities, abnormal behaviour, psychoses, education, environmental issues, parental alienation, that are all recognised by social science as being able to affect the welfare of the child.

The legal system and processes polarise the parents into taking opposing positions, if only to defend themselves against the allegations of the other parent according to King and Piper. This in turn justifies the need for the law to take a mediatory role. This can happen in both the adversarial or inquisitorial system. The law thinks about children's issues in terms of individualised relationships between the parents and the children. Attempts to replace the law's mediatory role with scientific enquiry are not possible while ever this situation continues.

The legal decision making is framed by the offers and counter-offers of the individual parents within a framework of what society thinks is appropriate for children. This reflects the cultural belief in the individual who has some control over his/her own fate through the choices that are made. However, offers and counter offers do not address the possibility of false allegations being made, nor how such false allegations affect the children, such as in cases where there has been parental alienation. If the parental alienation is pathological, it is difficult to see how parents could come to an agreement that would be in the interests of the child.

If agreements are encouraged by lawyers without the knowledge of the causes of conflict or alienation, it seems reasonable to expect that such agreements may not always be sustained, whether there are consent orders or not. They are made during family court processes where the parents have arrived because they have not been able to reach agreement without going to court because of the high level of conflict; or because there are allegations of abuse of one form or the other. In such cases, agreements may have been made grudgingly, at least by one

[14] Ibid 118.

parent; and neither parent's position and arguments may have been properly tested at trial where the evidence is presented, and where sanctions could be placed on the behaviour. The children may remain at risk if this occurs because nothing may have been done to address and correct the causes that resulted in the conflict or alienation.

While science may not have all the answers and may need improvement in its own processes, and the administration of those processes, the literature provided by psychologists and psychiatrists referred to previously suggests some possible alternatives for the Family Courts that could decrease the burden on Judges and Magistrates. However as suggested by King and Piper, there needs to be the ability for the legal profession and the psychological profession to communicate with at least an understanding of what each profession is saying.

5.4 Training of family lawyers

In addition to discussing the problems of communication, and perception that makes communication difficult between the legal and social science professions, King and Piper continue by proposing that specialised training of family lawyers might assist such communication. They say that despite legislation attempting to introduce the inquisitorial approach and placing the focus on parental duties and responsibilities rather than rights, lawyers still talk of winning or losing cases, and fight to assert the rights of parents over their children. They contend that this is because the traditional training and professional orientation of lawyers leads them to do all in their power to secure the best outcome for their client, which overshadows what is in the interests of the child, often resulting in using the children as ammunition between the parents.[15]

In Australia there has been an attempt to reduce the adversarial system by introducing the Less Adversarial Trial ("LAT"). However in cases where there is intractable conflict and parental alienation, the representation of the opposing views of the parents by their lawyers is diametrically opposed to the attempts of the court to guide the parents into working together for the interests of the children[16]. This may result in a lot of expensive mentions during which the Judge attempts to get the parents to move forward and agree, with little progress because no attempt is made to analyse the evidence to find what is causing the conflict, and

[15] Ibid 118.
[16] Ibid 7, 22-25.

how this can be overcome, or if it can be overcome, until there is a final hearing, and even then within limitations of time and costs.

Altobelli writes that the adversarial system is at the heart of the problem, and offers the LAT as a potential solution. This system, he proposes, would assist in managing and mitigating the intense marital conflict that has existed between the parents. He refers to some parents who may have personality predispositions to narcissistic vulnerabilities that escalate under threat, and who may feel humiliated by the separation and litigation.[17].

The introduction of the LAT has been the court's way of dealing with such cases without enabling allegations of psychological disorders and other adverse behaviour being used to perpetuate the adversarial system. My observations are that this is done by warning lawyers and their clients that negative comments about the other parent will not be tolerated, and that the parents must work together to decide on issues relating to their children. However, my experience is that this does not resolve the conflict because underlying issues, including possible psychological or psychiatric disorders are not addressed, and will continue to affect future behaviour and decisions.

Unless the LAT process is used together with appropriate assessment by psychologists/psychiatrists, including psychometric tests, at an early stage of the proceedings, the conflict that is being flamed by unidentified causes will not be resolved. My view is that there is a need to identify what may be causing the conflict, followed by recommendations as to how to manage the conflict, with counselling and courses to assist with the required changes. Otherwise it seems likely that any settlement by consent orders, or judicial decision without any changes in the behaviour and attitudes that are needed will result in the orders not being sustained. This has been my experience in a number of high conflict cases that are settled without identifying the cause of the conflict that brought the parents to the court.

Altobelli describes some parents as holding an exaggerated conviction about the other parent and the child. He writes that the LAT has the potential to reduce the humiliation and threat of litigation, and can provide a safer venue where the parents' convictions can be reality tested in a constructive environment. While this may be true, there is also the issue of what should

[17] Ibid 7, 23.

be done during the LAT system to identify the issues causing conflict and order appropriate remedial treatment if it is needed. To enable this there would need to be early testing of the evidence provided to the court, and of the parents and child, by an appropriately qualified psychologist. Altobelli acknowledges this, and that it does not always follow in the current LAT system.[18]

My experience in LAT cases is that the lawyers and the parents attend a number of mentions at the Court before a Judge, during which time they are expected to try to negotiate an agreement. The Judge informs the parties that it is more beneficial to the parents and the children if the parents can reach an agreement than if a Judge has to make an order. In some cases the parties are required to attend courses, although not always. The processes are not designed to ensure that there is early identification of crucial issues underlying the conflict, together with appropriate courses, or counselling designed to address the conflicts specific to the individual cases. Often the courses are generic, and while they may have general benefit, do not necessarily overcome the barriers to agreement by the parents.

Altobelli discusses the actions of the extended families, friends and even the professionals who take sides in the dispute. He writes that allegation of parental alienation syndrome thrive in the adversarial system as it is fault finding and focuses on who is right and who is wrong. [19] He comments that Johnston et al still believe that there is necessary involvement of the court in these cases and this is seen in their discussions of designing interventions for alienated children. He provides the interventions suggested by Johnston and others as: identifying the goal of the intervention and what would be a good outcome or success; early and accurate assessment; the implementation of responses of the mental health/social sciences together with the implementation of a judicial response. [20]

Altobelli describes the interventions proposed by Johnston et al as recognising the complexity of these cases, and focusing on a systematic principled response while clearly articulating the important role of Family Law and the Family Law Courts. The interventions include early assessment or diagnosis that alienation and high levels of conflict exist and case management within the legally defined framework while family therapy is provided by a team of

[18] Ibid 7.
[19] Ibid 7.
[20] Ibid 7, 9-22.

professionals occurring in the context of interim orders. Altobelli adds that these interventions are very practical suggestions provided they are seen in the context of every child, every family and every case being different; and that these interventions should be at most a working hypothesis that is developed and modified as evidence is presented and tested.[21] It appears that the LAT system would be the most suitable system for this to occur.

While professionals of other disciplines, and their methods, are also developing with new knowledge, their contribution to the law would seem to be better facilitated if the communication between lawyers and these professionals could be improved by training both the lawyers and other professionals to have a working basic knowledge of both family law and psychological factors related to family law, while still maintaining their own expertise.

Psychologists/psychiatrists could be trained to understand the legal processes, the use of evidence and what is admissible and relevant, and possibly some knowledge of applicable cases. Lawyers could be trained to understand the developmental needs of children, family dynamics, personality issues, cultural issues, some knowledge of abnormal psychology, and of cognitive processes and perception at a basic level. They could also be given enough knowledge about psychometric tests that have been found to be appropriate by the profession in order to understand the reports provided by psychologists, without having to have the detailed knowledge of the tests that is required of psychologists who use psychometric tests.

Fines, Glesner and Madson all agree that family law has gone through significant changes in the past few years with efforts made to reduce conflict by increased use of alternate dispute resolution. Collaborative negotiation and interdisciplinary cooperation have been emphasised. Lawyers who have been challenged with the emotions of separating couples need to be skilled in understanding and managing the issues that are peculiar to family law. My own experience is that knowledge and skills in managing human emotions, and awareness of the affective and psychological aspects of family law, are also of assistance, together with competence in listening and counselling skills that might be gained by enrolling in units teaching these skill. Lawyers also need to protect themselves from the risks of vicarious trauma that affects their professional judgment. Family Law is stressful and

[21] Ibid 7, 15.

lawyers' health and well being need to be considered, as well as the effects on lawyers that the stress may have when acting in family law cases.

With the knowledge of psychometric tests and appropriate education of all professionals participating in Family Law, another alternative process might be a system where psychologists/psychiatrists who specialise in Family Law could provide family assessments in a less confronting environment for children such as at the Family Relationships Centres, or the psychologist's rooms, as soon as possible before court proceedings are started, at the time that a certificate of mediation, including whether or not it had occurred, are provided. At that time a list of psychologists/psychiatrists who use psychometric tests together with their resumes, could be provided to the parents to choose one jointly, or else for the relationship centre to recommend one if there is no agreement. There could be one initiating application made by consent similar to the draft provided in Appendix A. The psychologist/psychiatrist could file the report on the family to the Family Courts to be joined by the Court to the application by consent. Copies of the report should be provided to the lawyers. The Court could then list the matter as early as possible for directions and further appropriate orders based on the written evidence, including orders to attend courses or counselling recommended by the psychologist/psychiatrist and the submissions of the lawyers for the parents.

The psychologists or psychiatrists would need to be trained in the legal aspects of Family Law, and the appropriate psychological testing and clinical assessments. They would also need to have knowledge of the causes and consequences of high conflict cases and identification of parental alienation in all of its forms. Lawyers would benefit from having enough training to be able to interpret these reports properly, and to ask the appropriate questions of the experts. Once the psychological report is made, a full, although still interim hearing of the case could occur, with the psychologist as a witness and advisor, possibly instead of the current Family Consultant or ICL, unless they are qualified and have done the assessment.

The economic costs of doing this may be considerably less than the present system that is struggling to find ways to accommodate the continual flow of people who are affected by intractable conflict in their families, but whose lifestyles and degree of conflict can be so varied. Currently family reports may be made by family consultants employed by the Family

and Federal Magistrates Courts. The consultant is then required to be examined at different stages of the procedures as to their views of specific issues. For cases with greater intractable conflict, expert reports are made by psychiatrists or psychologists who are acknowledged as experts by the Court. Their fees are either shared by the parents, or paid by Legal Aid in some cases. My observations are that the reports can be either beneficial or not, depending on whether the consultant or expert has enough information on which to base their opinions. With the use of psychometric tests, the information could be increased in a shorter period of time.

The timing of the reports, and when they are actually referred to, and tested, can also make them unhelpful in many cases in the current system where the parents are often required to attend a conference with a Court employed family consultant at the first directions hearing. However, my experience is that little time is given to diagnose the conflict. Affidavits and other evidence provided to the Court are not read, and the consultant often plays a mediatory role while also making recommendations based on generic observations on the same day to the Judge or Magistrate.

One example of my own experience where this has occurred is when I made an application for my client for orders that the father attend sessions with a psychologist who had been referred to by the mother and child's family doctor. The child had low to average intelligence; suffered from Attention Deficit Disorder that required a special diet to keep it controlled; had asthmatic attacks and speech difficulties, and was becoming chronically ill when she had to spend time with her father. School reports also showed that the child's behaviour with other students was aggressive. The father did not acknowledge the child's difficulties and blamed the mother for causing the child to not want to spend time with him. However, the mother made every effort to have the father involved in the child's therapy so that he understood and could better manage her problems.

At the first directions hearing, the barrister for the father informed the court that there was no evidence that there was anything wrong with the child (despite the medical certificates and reports that had been provided with the mother's affidavit). The family consultant briefly interviewed the parents, then the lawyers. Prior to the interview with the lawyers, my client informed me that her interview had been rushed and that she didn't get a chance to inform the consultant of the difficulties the child had. At the conference with the lawyers, I could

understand how she felt, as I was also not able to explain these problems, particularly being blocked by the barrister whenever I tried to, but also because the consultant had already made his decision about what he would report to the Magistrate. His recommendation was that the father was to spend two alternate weekends of reduced time with the child, then for the previous orders of alternate weekends from Friday after school to Sunday evening were to resume. He also recommended that the court would organise for the parties to attend courses and dispute resolution. The recommendations made with such brief knowledge of the issues involved, seemed to be fairly standard recommendations.

When the father resumed his previously ordered time with the child, the child again reacted as she previously had. The father had not been educated how to manage this. The mother then spoke with the consultant who apologised for what had happened at the directions hearing, and agreed that a court approved psychologist should make an assessment and recommendations to the court. This could have occurred from the day of the first directions hearing, if better procedures for ascertaining relevant information were in place.

A process involving the use of psychometric tests together with clinical observations, examination of the evidence from doctors, schools, and community and other services, with recommendations for management could ensure a speedy and less expensive outcome than the multiple attendances at court, the outdating of information throughout the process, and the employment of people who may not have the appropriate qualifications for such assessments. It could also assist by reducing the risk of children being left or placed at risk until there is a hearing where the evidence is tested. The cost to the parents who are currently burdened by all of the legal costs incurred over lengthy processes could also be reduced by early identification of the issues and the causes of conflict. However, the information contributed by professionals I have referred to in this thesis, with the exception of Altobelli's more recent support, have been made over the past decade with little change occurring.

There are a number of challenges that face professionals working with the Family Court to endeavour to accomplish the allusive best interests of the child that continues to evolve and change throughout the centuries and across cultures, and which may never be identified because there is no generic formula that is in the interests of all children. This needs to be assessed in individual cases.

For changes to properly reflect updated knowledge in the social sciences as well as law, it seems that there needs to be appropriate updated education and use of scientific skills by lawyers, psychologist, psychiatrists and the judiciary such as in the use of psychometric tests. The current knowledge in the social sciences, if integrated with that of Family Law, could help to form a new family law system. This would necessitate the cooperation of the psychological sciences, the legal profession, the judiciary and the legislators.

CHAPTER 6
CONCLUSION

6.1 Summary

A history of Family Law shows that there have been many changes and developments related to the changes in society. The development of research and information has provided different views, and addressed the changing family dynamics and complexities of the social world. There has been recognition in more recent years that when parents separate there are often emotional and psychological factors that may have resulted in the separation, and from the separation, and also the court processes. There has also been a gradually increasing perception of the complexities of these psychological and developmental factors, and recognition of the greater need to find ways of identifying and addressing these complexities, particularly where there are high levels of conflict between the parents that could flow over into the social community.

While parents may want more certainty, and this may be found with the assistance of psychometric tests, it may never be possible to perfect court processes because of the complexities of all parties involved, including the legal profession, the court staff, family consultants, psychologists, psychiatrists, the judiciary and the legislators, not to mention the community groups and government departments that are responsible for changes in the legislation. However, this should not be a reason to stop endeavouring to achieve outcomes that result in children's lives being set on a path that avoids possible destruction, which the community may eventually suffer the results of, such results being seen through the media on a regular basis.....

.....In order to implement the above procedures, the current Family Court processes need to be examined and changed. King and Piper have proposed a need for a new family law

system. Although they write about the family law system in England, much of what they discuss also applies in Australia, except that Australia has introduced the Less Adversarial Trial, which Altobelli recommends as the appropriate process for managing cases where there is a high level of conflict.

Altobelli refers to the research of Johnston and Kelly, and elaborates on the complex differences in the types and levels of parental alienation. He proposes that there is a need for appropriate assessment at an early stage of family law proceedings. This proposal is also made by a number of other professionals referred to in this thesis. My conclusion is that the assessment should be made by psychologists with the use of psychometric tests, and that the psychologist who performs the psychological test and clinical observation of the causes and types of conflict and alienation, should provide the Family Courts with recommendations about strategies to manage or remedy this condition. The Judge or Magistrate can assess the reports and recommendations together with the evidence filed at court, the submissions of the lawyers, and examination of the parents and witnesses, with the knowledge that can be gained by studying some of the psychological aspects that are involved. The Court should monitor the progress of therapy and courses, making appropriate orders at different stages until a final order can be made when the family has achieved the best results possible under their circumstances.

King and Piper identify the need for better communication between the legal profession, and the psychological, psychiatric and social work professions, and also that there is a need for educating all of these professionals in order to increase their understanding of the communications of each other, and of the relevant knowledge of each profession as it relates to children caught in high conflict between their parents, as well as the causes and possible remedies for this. Willmot also proposes that similar education will result in psychologists being skilled in providing appropriate assistance to the Family Courts, and also result in less stress for the psychologists who need to take care of their own stress levels as they engage in their work. This applies to lawyers and other professionals involved in the high level conflict also.

The solutions are multifaceted and require the cooperation of the judiciary, the court personnel, lawyers, psychologists, psychiatrists, social scientists, and other therapists, the various relationship centres, the educators and the legislators. Such a major change may be

difficult but more beneficial than allowing children to be damaged psychologically and physically while valuable funding may be wasted on processes that do not meet the expectations of the community involved in such proceedings. While questions may be raised about whether the court should intervene at all in family matters, the types of cases that are heard in the Family Courts are high conflict cases that may have serious and far reaching consequences if there is no intervention according to the research referred to in this thesis. Family Law is stressful and complex, but can be made less so if there are appropriate systems and education.

6.2 Recommendations

At the time of making an initiating application to the Family or Federal Magistrates' Courts, orders similar to those in Appendix A should be applied for jointly by consent, and made in chambers for an initial psychometric assessment with clinical observation, and reference to any affidavit evidence and subpoenaed documents, and with recommendations by the psychologist/psychiatrist. Once the psychologist's/psychiatrists report has been provided to the lawyers and the Court, there should be an interim hearing during which the psychologist's/psychiatrist's report and recommendations are tested together with evidence provided to the Court, and submissions of the lawyers on behalf of the parents.

If recommendations are made for the parents to attend courses or counselling, then the Court should monitor the progress of the parents with brief reports being provided to the lawyers and the Court on a regular basis until a final settlement can be reached. Penalties should be applied if orders are not obeyed unless there are mitigating circumstances, and if the case is not progressing appropriately, leave should be granted to both lawyers the matter to be listed as soon as this is known.

Emery makes the observation that conflict itself is not bad, is sometimes inevitable, and can be constructive. However, it is how this conflict is managed by the parents with an aim to resolving the conflict, not allowing the children to become part of the conflict, and presenting a united front to the children in child raising issues that is important. He also observes that many parents try to win their children's loyalty by overindulging them with gifts, or autonomy that only causes more conflict, and affects the children. This description complies with other views of parental alienation described in this thesis. Emery warns that this type of

attitude is exacerbated by the adversary processes of court proceedings, which often creates such conflict.[22]

He proposes that if this is happening, one of the options available is for the judiciary to make orders that the child not spend any time with the alienated parent, which is not the best outcome. He also suggests that in cases of intractable hostility, that may result in inducing what he refers to as parental alienation syndrome in the child, mediation or therapy may assist, but must in some cases be accompanied by threats from the judiciary that the alienating parent will be severely punished if that parent does not cooperate and encourage the children to spend time with the other parent. Otherwise, mediation or therapy is not likely to be successful, and the children are likely to suffer short term or even more serious long term psychological damage as a result. However, he writes that currently the judiciary is reluctant to adopt punitive measures. While his comments are about the family law system in the United Kingdom, my own observations are that this also seems to apply in some cases in Australia where similar difficulties are experienced.

Emery reports that threats of fines, changing residence of the children, community service, or even prison are necessary to stop this from happening, and only the most pathological parent would not be influenced to cooperate if the threat is made realistic. This is consistent with other expert opinions that have been discussed in this thesis.

My observations after representing clients in the Family Courts for a number of years is that usually in Australia the cases that go to the Family Courts are cases where there are high levels of conflict that mediation and counselling have not been able to resolve. The evidence of this is found in the fact that there are now mandatory obligations for parents to attempt mediation before an application is made to the Court unless the mediator provides a certificate stating that the case is not suitable for mediation, usually because of the high level of conflict, or because of domestic violence, child abuse etc.

A certificate stating whether mediation has been attempted, and the outcome of mediation that is attempted, must be attached to an application to the Family Courts. If the mediation has been successful, the parents do not apply to the Court. If it has not been successful, there

[22] Ibid 107.

are issues or causes of conflict that cannot be settled by mediation. It is the issues or causes that need to be identified and managed with appropriate education of the parents. Psychometric tests are designed to provide that identification, so it would seem beneficial for all applications to the Court to commence with the assessment previously discussed.

There is generally a combination of inquisitorial and adversarial process in the Family Courts with an emphasis still being on endeavouring to encourage the parents to come to an agreement and realise the damage they are doing to their children if they don't. This seems to be based more on attempting to educate parents, who in some cases can't be educated because of underlying psychological issues that are resulting in hostility and conflict between the parties. Merely telling them that this is what should occur is not enough in many cases.

The court processes result in high cost to the parents and to the government. Despite the high costs, many parents remain entrenched in their conflict and the patterns of behaviour that has led them to the Family Courts. Magistrates and Judges emphasise the damage to the children if parents are obsessed or entrenched in their own views, however this may not be psychologically processed by the parents who may remain focused on their negative views of the other parent; or the parent may become confident about making false allegations because the Court does not impose penalties for breaking the orders. Sometimes the issues are only resolved by one parent not being able to afford to continue paying the legal fees, which does not necessarily mean that the best outcome for the children has been achieved when the parents consent to orders being made that they have had to agree to.

If there are short mentions, or directions hearings, in which there is informal communication between the lawyers and their clients followed by long delays when the Judge of Magistrate, and the lawyers attend to other cases, there seems to be the possibility of escalating conflict and more serious damage to the children. Full recall of what has happened in the specific cases may be lost during the delays between court attendances; or may be distorted by recall of the other cases, which would be difficult to avoid with all the cases that have to be heard at court. Affidavits that have been made at considerable cost may not be read during the earlier court attendances because of lack of time, then have to be updated later which incurs further time and costs.

It appears to me that the only possible advantage of this process is the possibility that some parents will resolve their conflict themselves over time, or be forced to because of the costs of continuing at court. This has the potential of resulting in outcomes that may be damaging to the children, and that may result in the parents having to go back to court because their agreement has not worked. Altobelli reports that this is often the case when there is parental alienation involved.[23]

There is still much need for change in the family law system, and it seems from my research that education and a change of processes, together with the use of appropriate assessments made by psychologists/psychiatrists, whose education is in the behaviour of humans, is needed to facilitate outcomes that are more beneficial to families and the community in general. For this to occur I believe there is also a need for lawyers to have an understanding of psychological issues and psychoses, and the results of psychometric tests and clinical observation by psychologists/psychiatrists, that is psychological discourse needs to be adopted as legal discourse.

This does not make the lawyer qualified in psychology, as this would take quite a few years more of education and supervised practice, only that the lawyers are able to understand the assessments made by the psychologist/psychiatrist. I have seen some cases where lawyers have totally misinterpreted what the expert report has included, in a manner that supports their own client, when it is eventually disclosed that this has not been what the expert has reported. Thus the training of lawyers and psychologists and accreditation as family law specialists after completing this training seems to be paramount for these changes to occur.

I have proposed a cross-discipline pilot project funded by the government to test the proposals made in this thesis.

[23] Ibid 7.

APPENDIX A

Example of Orders for high conflict cases at the Family Courts

Orders to be made at the first directions hearing or by consent in chambers.

1. The Legal Aid Commission shall appoint an Independent Children's Lawyer ("ICL") and the Lawyers representing the parents shall, immediately upon notification of the ICL's contact details, provide all documents filed in these proceedings to the appointed ICL.

2. The ICL shall organise the first available appointments for the parents and children, and any other significant person, with a psychologist or psychiatrist experienced in the family law issues involved and psychometric testing, to provide a report based on the psychometric tests and clinical observations.

Instead of an ICL being appointed this could be organised by the Judge's or Federal Magistrate's Associate. This would eliminate the costs of an ICL that could be paid for a Psychologist's report and recommendations instead.

3. The tests and clinical observation shall be focused on the following issues.

   (i) Identifying the causes of conflict between the parents and children and proposing strategies to change or manage that conflict.

   (ii) Identifying if there is parental or child alienation or rejection; what level of alienation or rejection exists; finding what the causes of the alienation or rejection are; and recommending strategies for reducing or eliminating the alienation or rejection provided there is no risk to the children.

   (iii) Identifying if there is factual evidence of risk of physical or psychological abuse to the children, or a parent; and if there is evidence then to notify the Department of Human Services and advise the Court if such notification is made by the psychologist; or any other professional or service provider to whom referral is made, as to any of the matters set out in s10(D)(4) of the Family Law Act, and if the psychologist/psychiatrist thinks it appropriate to provide the court with a copy of such notification to be admitted into evidence of the Court's own motion and subject to s69ZT(2), and proceedings shall be

relisted as a matter of urgency, and of the Court's own motion, and pursuant to s60K to determine what further interim or procedural orders should be made to:

(a) enable appropriate evidence about the allegations to be obtained as expeditiously as possible; and

(b) to protect the child, or any of the parties to the proceedings;

(c) to deal with the issues raised by the allegation.

(iv) Identifying if either of the parents, or the children have psychological disorders or psychoses that may be causing or resulting from the conflict, alienation, or rejection, and recommending strategies or treatment that may assist the children and the parents in managing this.

(v) Identifying difficulties in parenting communication and cooperation, and proposing methods to overcome these difficulties.

(vi) Identifying the parenting skills of each parent, and whether or not the parenting practices of each parent are in conflict with the other.

(vii) Identifying the developmental needs of each child, and recommending arrangements that meet and respond to his/her/their needs.

(viii) Recommending any courses or counselling that may benefit any or all family members and significant others.

(ix) Recommending how best to develop and maintain a relationship between the children and each parent, and significant others in an age and developmentally appropriate way provided there is no risk to the children.

(x) Recommending age appropriate and risk free time arrangement for the children to spend with each parent.

4. The parents shall attend at such times, dates and places and pay such fees as informed by the psychologist/psychiatrist, and shall continue to do so until that service, and any counselling or therapy, course or program that is recommended, is

completed, and the above stated purposes are achieved to the extent that the psychologist considers possible.

5. The psychologist and any other professional or service provider to whom referral is made, including the legal representatives, are requested to:

   (a) advise the court in writing when the service provision is completed or withdrawn;

   (b) advise the court in writing should either parent fail to contact the psychologist, within seven (7) days, or fail to cooperate, accept referrals, or fail to participate in any service, course or program recommended.

6. Any employee of the psychologist/psychiatrist engaging with the parent and other professionals or services to whom referral is made has leave to inspect the court file and subpoenaed material produced to the court, and for which leave has been granted to inspect by the parties, and their legal representatives.

7. In the event that the psychologist/psychiatrist determines that it would be useful or desirable for the children to be involved in any counselling, courses or programs that would be appropriate and of assistance to the child then each parent shall do all things, sign all documents and give such consents and authorities necessary to facilitate such attendance and the above provisions shall thereafter apply to the children's attendance; and noting the children's details as follows.

   Names and dates of birth

8. Any information provided to the psychologist or psychiatrist by either parent or the children shall remain confidential unless the psychologist or psychiatrist and the parties agree that it should be disclosed to the Court, or in the event that there is threat to any person or property.

9. Each parent shall within four weeks register with www.uptoparents.org (or another equivalent course) and complete the online workbook program offered by that site and will, on completion, print the workbook they have completed, and provide a copy of the workbook to all other parties and the Court.

10. Each party shall ensure that they read and retain the attached notes and can, if the matter proceeds to trial expect to be questioned as to what impediments to joint cooperative parenting they have perceived in their circumstances and the steps they have taken to remove or lessen those impediments.

11. All communications between the parties and/or their lawyers, shall as far as possible be practical, courteous, non-judgmental, non-accusatory, and focused on issues in dispute and towards finding a path forward to address those relevant issues in dispute.

12. Liberty to the parties to restore the matter to the list with seven days notice in the event of any allegations of non-compliance with any interim parenting order, any difficulties that are encountered or anticipated with respect to preparation for hearing, or in the event of fresh matters of urgency relating to the child's welfare arising, and neither party shall file any Application in a Case or for Contravention prior to having relisted the matter.

13. In the event that the above liberty is utilised by a party then they are to ensure that the other party is advised forthwith of any listing date as well as the basis on which the relisting has been sought and the orders or directions that are to be sought by them when the matter is next before the Court.

APPENDIX 'B;

CROSS-DISCIPLINE PILOT PROJECT IN FAMILY LAW

HYPOTHESIS 1: That the use of psychometric tests with clinical observation by a qualified psychologist/psychiatrist prior to court proceedings for cases that require intervention, will result in faster, less expensive and more accurate resolution of any issues that may place children at risk, physically, sexually, emotionally, and developmentally.

HYPOTHESIS 2: That training of lawyers to understand psychometric results, psychological issues and discourses will enable them to ask appropriate questions of experts and to better understand their reports, and discourse so that greater accuracy in orders in a shorter time can be achieved.

METHOD:

1. Psychometric tests that would provide identification of issues that might be causing conflict between parents, and the effects on the children should be selected by the Australian Psychological Society taking into consideration the tests that have been referred to in this thesis that have already been trialled.

2. A group of psychologists/psychiatrists trained and experience in the use and interpretation of psychometric tests at a high level, and of family dynamics, developmental processes, cognitive processes, cultural issues, perception, neurology, and abnormal psychology should be chosen and briefed about the pilot program and its processes, and about legal requirements with regard to evidence and relevance.

3. A group of Independent Children's Lawyers could be chosen by Legal Aid and briefed about the pilot program, and about the benefits of using psychometric tests together with clinical observation, and some understanding of psychological factors such as family dynamics, developmental processes, cognitive development and processes, cultural issues, perception, neurology, and abnormal psychology. Instead of ICLs being appointed, to save costs the Judge's or Federal Magistrates' Associate could organise for the appointment of

the Psychologist in each case. The costs of an ICL could then be used to pay for a Psychologist who has far more qualifications to make recommendations to the Court than ICLs.

4. A group of family lawyers who have training in and experience in providing alternate dispute resolution and/or collaborative law could be chosen and briefed as for the Independent Children's Lawyers including the same education process.

5. The training for each professional could be over a period of about six months, paid for by the government.

6. Once the training has been completed, the family lawyers could be assigned randomly to parents chosen from those where no agreement has been reached at the mandatory mediation stage; or where mediation was found to be inappropriate. They would need to be assigned prior to the parents consulting their own chosen lawyers, so the various relationship centres would also need to be informed about the pilot program so that they could recommend suitable applicants and respondents.

7. The family lawyers would inform the parents about the program, providing them with written as well as verbal information, and obtain their agreement to participate in writing. They would also obtain affidavits from the parents and their witnesses. Initiating applications and responses would be made in a similar form to the draft orders provided in Appendix A and parents would be advised to consent to the initial orders as part of their participation in the pilot project.

8. The Lawyers for each parent would subpoena any evidence that may be applicable in their cases – such as medical reports, school reports, community services, police and JIRTS reports, and provide copies of these and affidavits of the parents' and their witnesses to the psychologist/psychiatrist.

9. After reading the affidavit and subpoenaed evidence, each psychologist/psychiatrist should inform the Court, what psychometric tests

would be used without revealing anything about the details of the tests, only their approval, relevance to the particular case, and what they can identify.

10. The Court should make orders in chambers for the tests and reports by the psychologists/psychiatrist to be made with recommendations for appropriate courses, counselling or other management of the conflict between the parents, and the effects on the children. If there are other significant persons, such as new partners, or grandparents, then they should also be briefed about the pilot project, and included in the assessments.

11. After the assessments and reports have been made, there should be an interim hearing to test the affidavit material and the psychologist's/psychiatrist's report followed by orders based on the findings of the Judge or Magistrate with continuing monitoring of the progress of the parents after attending courses and counselling recommended by the psychologist/psychiatrist. When agreement has been reached as a result of the causes of the conflict being addressed and modified, final orders should be made.

12. Payment for the professionals involved should be made, by a funding source provided by the Federal Government rather than by State Legal Aid funding, or by the parents.

13. Statistical analysis of the progress, outcomes and costs to be made by an appropriately qualified and experienced Psychologist together with a lawyer supervised by a university and compared to a random selection of the same number of cases that have not been in the pilot project.

The remainder of the thesis includes the following chapters.

PARENTAL AND CHILD ALIENATION
A CROSS DISCIPLINE APPROACH

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