***U V U – YOU V ME – US V THEM***

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**Session:** ***Children's Voices: Being Heard in Post-Separation Arrangements***

**Doris Pilkington Garimara,** the star of the award-winning film *Rabbit-Proof Fence,* was removed from her parents and community at an early age. Doris was reunited with both her parents at Christmas 1962. Her father, whom she had never really known, hugged her and her four children. Her mother, with whom she had had spasmodic contact over the years, took her on a tour of the community.

*"Mum took me over to this wintamarra tree and showed me where I was born ……This is my birthplace, playground. It's a symbol of love, my mother's love, grandmother's love, father's love and care, and all those lovely warm things about family that I missed out on all those many years ago."* [1]

At the Australian Film Institute awards in December 2002, her story *Rabbit-Proof Fence* won best film. In her speech to the audience at the presentation she said: *"At the age of 24, for the first time in my life, I was able to say the two most precious words in the english language: Mum and Dad."*

It is ineffably sad that, some years after the separation of their parents, many children are unable to speak the words *Mum* and *Dad* with any degree of comfort. This is because many of them are uncomfortable with what has happened to them since their parents separated. There can be many reasons for this situation, but paramount amongst them is the failure of the *family law system* to listen to children and accurately to reflect their best interests.

## *WHAT ARE THE PROBLEMS?*

### *The Family Court fails to identify what is good for children*

### *The legal principles are confusing and contradictory*

### *Lawyers are the gateway to the adversarial family law system*

S 68 F(2) of the *Family Court Act 1975* specifies various matters which the court must take into consideration in determining what is in the child's best interests, including the wishes of the children and their relationships with their parents and others. It looks at the capacity of each parent to provide for the needs of the children.

The tricky thing is *how to determine what are the best interests of the children.* The courts seek some guidance from s 60B of the *Family Law Act.* This includes:

- Ensuring that children receive adequate and proper parenting to help them achieve their full potential.

[1] *Many Voices: Reflections on Experiences of Indigenous Child Separation* (National Library of Australia).

- Ensuring that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- Acknowledging that children have the right to know and be cared for by both their parents
- Acknowledging that children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development.

So much for principles.

***Q* How, *in practice,* does a court decide what's best for children after separation?**

***A Separate representation, Expert reports, Sworn evidence, Judicial interview.***

***Children's representatives*** are simply lawyers who have been to university. In Sydney they also receive some training from the Legal Aid Commission. This does not provide the majority with the skill, wisdom and industry required to investigate and identify which post-separation arrangements are best for children. Some do not speak to the children, much less to their parents, teachers, relatives and friends.

***The Section 30A report*** is overvalued in Family Court practice. That a court places weight on the comments of a sole counsellor, psychologist or psychiatrist, no matter how competent, appears hazardous. Where the expert's conclusions arise solely from one or two interviews, and from observations of a parent's interaction with a child in what must inevitably be an artificial situation, they can have little validity and reliability.

In many cases involving children, no attempt at all is made by the Court or the lawyers to consult the children. It appears that because of limited resources, the Court has to be persuaded that a family report and/or separate representation is required. So, in a substantial number of cases which daily come before the courts, decisions are being made on the basis of the parents' assertions and their lawyers' submissions.

The reality is that the voices of children are either not heard or not accurately heard.

***The confusion of principles*** is demonstrated in the Family Court's treatment of *relocation cases.*

An examination of the Full Court's and High Court's judgements in these cases now reveals a fairly settled approach, but an approach which leads to amazingly contrasting outcomes.

The process as stated in *A v A* [2] enjoins a court in a relocation case to identify and weigh the *competing proposals,* to examine the reasons for the move and if it impinges on the children's best interests, the latter being the *paramount* but not the sole consideration. Importantly, the Court held that neither the applicant nor the respondent bear the onus to establish that a proposed change to an existing situation or continuation of an existing situation will best promote the best interests of the child. That decision must be made having regard to the whole of the evidence relevant to the best

[2] *A v A: Relocation approach* (2000) FLC ¶93-035 at 87,552-87,553

interests of the child. The importance of a party's right to freedom of movement was specifically approved.

The High Court has affirmed this approach in *U v U* by a narrow majority[3].

Well, the High Court and the Full Court can say what it likes, but the reality is that family law proceedings are adversarial proceedings, and are lawyer-driven. To suggest that, in the conduct of such a case, a party and his/her lawyer need not be worried by an *evidentiary onus*, at the very least, is absurd. Each advocate, doing his best for his/her client, will adduce that evidence – and only that evidence – which will persuade the tribunal that his or her residential plans will best accommodate the future interests of the children.

The approach of *A v A* (supra) has two worrying features:

- The right of a party to relocate is balanced against the best interests of the children, not against continuity of relationships.
- The right of movement is specifically outlined, but not the right of children to quality contact with both parents. Indeed, although the *"right"* of children to quality contact is spelled out in s 60B of the *Family Law Act*, nowhere in the Act is it stated that quality contact and healthy relations with both parents and others is *essential* for children's wellbeing and development.

An examination of the cases on relocation underscores these deficiencies and reveal further problems:

1. ***In considering the best interests of the child, all factors in the case appear to have equal standing,*** ie the child's relationships with each parent, a parent's reasons for relocation, economic circumstances, educational opportunities, etc. The child's relationships with the parents and others in that community are not accorded the paramountcy they deserve. And although on one hand the appeal courts subordinate the right to relocate to the best interests of the children, on the other hand they consistently underscore the importance of freedom of movement and the reluctance of the courts to interfere with it.
2. ***The father's relationship and its continuity is not given the same value as the right of the mother to move and begin a new life.*** In one case the Full Court found error in a trial judge giving too much weight to the importance of future contact between father and child as against the mother's right to move.
3. ***A father must prove that he has a special relationship with the child,*** ie he as an evidentiary onus to establish the quality of that relationship. Some professionals appear to take for granted the intensity of the mother-child relationship, but need convincing evidence of that between father and child.

[3] *U v U (2002) HCA 36*

From all this there is the inescapable conclusion that the courts examine the best interests of children in terms of the plans that their parents have in mind for them, and not in terms of what *objectively* might be in their best interests. In other words, the courts are saying *what is really good for a parent is good for the children.* The courts are failing to listen to the voices of children.

***The final and gravest obstacle to the identification of children's voices is that lawyers are the gateway to the family law system.***

Apart from a small minority of lawyers, family law practitioners are simply not interested in identifying what is good for children after divorce. Rather they identify what is good for their clients. They talk immediately in terms of *residence* and *contact* and *child support*. They take instructions and write letters and make offers and list applications in court. They confirm the adversarial nature of the process. As a general rule they do not ask the ***right question***.

***A Better Way***

A better approach would be to set up *another gateway,* ie an information and resource centre which all separating parents would approach before going anywhere near a lawyer or a court. This agency would assist separating couples and their children to sort out arrangements in an intelligent fashion. The Canadians are moving towards this. The relevant report can be found at www.http://canada.justice.gc.ca/en/ps/pad/

This agency would be staffed by senior (mature) and experienced professionals who would work in teams with parents with problems. They would be trained to ask the *right question* of these parents by using non-adversarial techniques. Above all, they would be trained in relating and listening to children of all ages.

***The Right Question***

The enquiry into what is best for the children of separated parents should start with the notion of *community*. Children thrive in a community. It is their living and growing in a community that gives shape, context and meaning to their lives and development. Ideally that community will consist of loving parents, involved grandparents and relatives, caring friends, teachers and other centres of learning and playing. On the physical, visual side there are the home, the neighbourhood, the school and the suburb or town or locality.

Separation explodes a child's sense of his or her community – or it can do. Not only is the day-to-day relationship with each parent threatened, but all that is familiar, secure and solid is threatened, too. To remove a child from that *community*, if it is a healthy one, is undesirable and harmful to the child's wellbeing. It should only be done if absolutely necessary and with great care.

Therefore, on separation, and with the above in mind, the right question is not *Should I be free to move where I will be happy?* or *Shouldn't I be free to see the children whenever I like?*, but ***What are the best possible arrangements that we can make for our children bearing in mind the community in which they currently live?***

The answer to such a question will, in the majority of cases be that the separated parents should live reasonably close to one another and that the children should remain in their current neighbourhood, schools, etc. The parents have to learn to adapt their aspirations and life-styles to a situation which is truly *in the best interests of their children.* If that means that Mum has to give up the idea of going to the country to live with her mother, or if Dad has to forgo a promotion in another city, then so be it!

This standard of *kids in their community* should be promoted by the Family Court and used by courts, mediators and educators in assisting parents to solve issues such as relocation in a sensible and caring manner. More importantly, our communities should be persuaded and educated that the difficulties thrown up by divorce are essentially ***human relationship issues, not primarily legal.***

I believe that if we listened closely to the children of separated parents they would say:

*Look, we hate what you've done and we want you to help us cope with it. Please don't take us away from either of you, and don't take us away from our schools and friends and rellies.*

Which could be translated into:

*Look, when you brought us into the world you brought us into a family and a home, Mum, Dad & Us. You wrapped us in love and caring and security. When we grew a bit, we realised that you had also brought us into a community: grandfather and grandmother, uncle and aunt, our friends next door, our school and teachers, the shops and parks and places we go to. Now you have taken away our home and we hate you for it. You have betrayed us and we don't feel secure any more. We need help. We need your help to know that you both still love us and you will let us love each of you. We need to get used to two homes and to other people in our lives. But please don't take away our community. That would be too much. Leave us here, close to you and close to them. It's that community that tells us who we are, what we are and where we are. To lose our family is bad enough, but we don't want to lose our community. It will give us the security and stability we need while we all get used to our new family situation. It's what we know and remember.*

Knowing and remembering is *memory*. John Ralston Saul identifies memory as one of the essential qualities of civilised human living. Memory, he says, gives us shape and context – *"for our thoughts, our questions, our actions. For our lives.*

*Without a context there is no civilisation, no society, no profound relationships with other individuals or our families or within our communities."* [4]

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[4] John Ralston Saul: *On Equilibrium,* Penguin Books, 2001, page 213