
STRATEGIES FOR IN DIFFICULT CO

Family breakdown is usually a traumatic event for those involved and this can be exacerbated when parents are in conflict over access to their children.

CAROLE BROWN discusses new solutions for difficult contact cases including those proposed by the Australian Law Reform Commission in its paper, 'For the Sake of the Children'.

BACKGROUND

The matter of complex contact cases – or, in the old parlance, access disputes between parents after separation – represents one of the most difficult dilemmas facing Judges, Registrars, Counsellors and Mediators alike. The background to this issue goes back many years.

The parent-child contact debate

In *Beyond the Best Interests of the Child* Goldstein, Freud and Solnit (1973) urged that there should be only one custodial parent. They argued that authority over the child's life should be clearly allocated to one parent primarily because children suffer loyalty conflict if they maintain contact with two parents who are not in an harmonious relationship with each other. They further argued that this has a detrimental effect on the child and could undermine the child's relationship with the resident parent.

This brought an immediate reaction from other sources. Expressing a different viewpoint, Strauss and Strauss (1974), in their review of the Goldstein, Freud and Solnit book, agreed that loyalty conflicts may be damaging for children but questioned whether most divorces were sufficiently acrimonious to create serious risks of this kind. They argued that allowing the custodial parent full power to block contact with the other parent would foster conflict over custody by making it a winner-take-all situation.

These two points of view are reflected daily in the cases before the Family Court. Undoubtedly family breakdown is a traumatic

event for all family members. However, there are those parents who are able to continue parenting in a reasonably cooperative way and there are those who cannot and continue the conflict through their children. Similarly, there are those children who seem to adapt to their parental separation better than others.

Factors complicating post-separation contact

Research on the impact of parental separation on children and families tends to suggest an inverse relationship between the level of conflict in the family and both the adjustment of children to separation and the benefits of contact with the absent parent (Brown 1994). Where there are high levels of conflict infrequent contact is better for children, and where there are low levels of conflict the reverse is true. High levels of conflict in families, particularly if this involves physical violence, are contra-indications to a healthy and cooperative environment post-separation. Under these circumstances shared parenting arrangements can be harmful to the child. Yet where there is a collaborative relationship between the parents more equal sharing of time can be beneficial (Buchanan, Maccoby and Dornbusch 1991).

More recently, attention focused on the impact of family violence on children and the implications this has for parent-child contact. In a study looking at children's adjustment to family violence after separation Church (1984) concluded: 'The children who recovered most rapidly tended to be the children who had no further contact with their violent fathers, but a number

of couples also managed to negotiate successful access arrangements. By and large, these were cases where the children were unafraid of the father and the father was sensitive enough not to force contact in ways which either frightened the children, or further frightened the mother. The children who showed the least improvement following separation were the children who, although frightened of their father, were forced to regularly visit him regardless of their own fears' (p.80).

This study relied solely on the mothers' perceptions of children's behaviour, but a more recent study by Mereton (1995) addressed this problem by using standardised measures of children's behaviour, anxiety and depression and confirmed similar recovery in children who either had no contact with their father or were not afraid of their father. Unfortunately, all of Mereton's sample fell within these two categories, hence there was no way of testing Church's third finding regarding the poor recovery of children who were forced to have contact against their will.

Many factors play a role in children's adjustment to separation and to violence in the family. Jaffe, Wolfe and Wilson (1990) summarise children's responses to witnessing their mother being assaulted by their father as varying according to the age, sex, stage of development, and role in the family. He further notes that other factors will play a role, such as the extent and frequency of the violence, repeated separations and moves, economic and social disadvantage, and special needs that a child may have independent of the violence (for example, a special learning disability).

INTERVENTION IN CONTACT CASES

A time to re-think

It can no longer be said that it is axiomatic that continuing contact between a parent and a child is in the child's best interest. The individual child and the child's circumstances need to be taken into account. This means that making decisions or assisting parents to make decisions about who the child should live with and how often there should be contact with the other parent is complicated by a myriad of factors. Any of these factors can tip the balance between the decision being in the child's best interest and it not being in the child's best interest.

There is little doubt that progress has been made in defining factors that impact on a child's wellbeing before and after separation and that increasingly these factors are being taken into consideration in decisions about children. But the questions remain: have our services to separating families become equally sensitive to the differing needs of those families? and are there alternatives missing from the range of services offered?

PRESSURE FOR CHANGE

Before looking at some of the alternatives for intervention in difficult contact cases being tried by the Family Court of Australia, it is worthwhile noting some of the pressures for change.

Including children in the decision making process

With Australia becoming a signatory to the United Nations Convention on the Rights of the Child (signed in New York on 20 November 1989) came an increased awareness of the obligation to take the wishes of a child into consideration in any judicial or administrative proceedings, if the child is sufficiently mature to express a wish. Article 12 states:

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

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The principles enunciated in the Convention challenge the way we deal with cases involving children. In drawing conclusions about the present system, the Family Law Council (1995) summarises the shortcomings from the child's perspective as being: 'the circumstances in which we know that children's wishes are obtained and taken into account are generally limited to a small proportion of cases; children are generally powerless in relation to involvement in the processes of the court; and children will often feel excluded from decisions which will directly affect them, and this exclusion can have negative effects on the child' (p.14).

Indeed, in its Discussion Paper *Involving and Representing Children in Family Law*, the Family Law Council (1995) points to the need for greater involvement of children in any processes that have a bearing on their future and comments that 'the extent to which children are to be involved in the various processes of the court needs to be fully reviewed' (p.11).

It is well accepted that older children should be kept informed about what is happening in their family and be reassured that they are not to blame for their parents' separation. However, involving children more in the decision making process through giving them an opportunity to be heard and to have their wishes taken into consideration poses a challenge. The challenge is to involve them in the decision making without burdening them with the responsibilities for the decision. Any intervention strategies with children should have this as an underlying principle.

The search for solutions in difficult contact cases

For some years now there has been increasing pressure to find easy solutions to complex contact cases. This pressure is reflected in submissions to recent Parliamentary Committees. The Report of the Joint Select Committee on The Family Law Act 1975: (Commonwealth Parliament 1992) high-

lighted the problems raised by frustrated fathers unable to gain access to their children and recommend that 'the Family Court Counselling Service continue to place high priority on the provision of early intervention counselling in cases where it appears that access is likely to be a problem' (p. 176).

For some commentators punitive solutions to enforcement have come to be recognised as non-solutions; for others these are viewed as end of the line options. More recent trends have focused on the appropriateness of the orders made and a questioning of whether certain contact orders should have been made in the first place. This is particularly so where child abuse, domestic violence or intense conflict between the parties has been a factor. Indeed the Australian Law Reform Commission (ALRC 1995), in the paper *For the Sake of the Kids*, recommended that the Family Court should be more robust in refusing to make contact orders where it is not in the best interests of the child to order contact.

Major recommendations made in the Australian Law Reform Commission's (1995) report included: that complex and potentially complex cases should be identified early; that a range of options be available in respect of dealing with complex contact cases; that the management of complex contact cases needs to be coordinated; that a team approach be adopted in determining what response is appropriate in a particular case; that the Court explore the use of a small claims jurisdiction to deal with enforcement of minor breaches; and that the Court consider whether the services of an arbitrator would be useful as part of the range of options.

Australian Law Reform Commission's research findings

As part of the inquiry into difficult contact cases, the Australian Law Reform Commission was commissioned to conduct a research project which looked at a sample of difficult contact cases and a comparison group of randomly selected cases. The difficult contact cases were selected by staff at the Parramatta Registry of the Family Court on the basis of the litigants' repetitive contact with the Court or its Counselling Service, or their inability to comply with orders for contact.

As a result of this research the Commission suggested that four factors together

predicted, with 91 per cent accuracy, whether a case would become a difficult contact case. These were: continuing conflict; children under two at the time of separation; children allegedly refusing access; restraining application as part of the initiating application.

The Commission went on to suggest that the use of Court resources, including the length of the case, the number of days in Court and the number of meetings with Registrars, could be predicted using four variables together: hand-over problems; conflict; personality disorders; mothers applying for legal aid.

The Commission found that the use of counselling resources for privileged counselling and for the preparation of Family Reports could be predicted by using two main variables: whether there were interim hearings, and whether there was rigid adherence to contact conditions.

Although these findings are interesting, their predictive value is limited because the research is based on a small number of cases and thus far identifies factors that either only become apparent in retrospect or are demographic descriptors with less accuracy in prediction. At present, referral to an appropriate intervention program rests on the experience and skill of Judges, Judicial Registrars, Registrars, Counsellors, Mediators and lawyers in picking the potentially difficult cases.

FAMILY COURT'S SEARCH FOR SOLUTIONS

In considering the options for intervention in difficult cases it is becoming increasingly apparent that what is needed is a wide range of strategies: some preventive, some remedial, and some that merely contain the ongoing problems so that the end result is less costly to the Court and to the parties themselves.

Dispute resolution other than through litigation

Traditionally the Court has adopted short intervention, problem solving dispute resolution strategies that meet the needs of the majority of cases. This was evident in a survey of Court Counselling outcomes (Family Court of Australia 1991) in which high agreement rates were recorded for conciliation counselling – voluntary 74 per cent, pre directions hearing 73 per cent, and post directions hearing 59 per cent.

Furthermore, the majority of cases were seen on only one occasion: 61 per cent had only one counselling session; 17 per cent had two sessions; and 22 per cent had three sessions or more.

This is impressive, but the Court has continued to receive criticism for its treatment of the residual cases – that is, the ones that do not settle and use more than the average

amount of its resources. It is therefore timely to look at why individual cases do not settle and what services may be more appropriate for their needs.

Currently the pre-filing options available to clients who have disputes about children are information sessions, voluntary counselling and mediation. Once an application has been made, clients attend an information session and are ordered to attend conciliation counselling prior to the Directions Hearing. Following the Directions Hearing, if the matter has not settled, further counselling is ordered – or in a minority of cases a joint conciliation conference with a Registrar and a Court Counsellor may be held. This then is the range of options for the resolution of disputes without proceeding to a hearing.

New initiatives within the court

The Family Court is examining the way it delivers its dispute resolution services. Recently the Chief Executive Officer (Glare 1995) proposed that all of the Court's non-litigation services be integrated within a single Primary Dispute Resolution service.

The essential features of this service is that it would: 'involve a holistic approach to client's problems and [maintain] a strong client focus; have a coordinated and discriminating entry system for all cases and all clients; aim to resolve all disputes as early as practicable; allow for single or joint interventions within and between disciplines as appropriate; involve differential case management – that is, fitting service to the need [of the clients]; allow clients to move flexibly between services if the need arises' (Glare 1995:3).

The key features of this model are the early identification and careful matching of cases with appropriate services and the provision of services in a coordinated way by both the legal and social science disciplines. This has implications, first, for the range of services offered, which will need to become more diversified, and, second, for case flow management procedures, which will need to connect the Court's litigation pathways with its other dispute resolution services.

Pilot programs for intervention

Concurrent with these proposals the Family Court Counselling Service is exploring several service provision options for clients according to their readiness and ability to negotiate post-separating parenting arrangements. As indicated, conciliation counselling generally provides a satisfactory service to a majority of clients presenting to the Family Court Counselling Service and most families are assisted to move through the separation process and resolve their disputes with varying amounts of assistance from the Court.

However, conciliation counselling interventions that involve brief, problem-solving strategies with separating parents do not effectively address the needs of those cases where the dispute is entrenched, or have the

potential to become entrenched; nor do they address the needs of children to discuss their feelings and to be informed about the family upheaval.

Two intervention programs are currently being planned.

First, the *Co-Parenting Program* has a primary goal of client education. Referral to it will occur early in the dispute resolution pathway and it will have a broad intake. For some clients the primary goal of the program will be preventative and for others, where the dispute is more entrenched, it will be remedial. It is aimed at couples who, in spite of the conflict in their relationship, have the potential to negotiate cooperatively once they can come to terms with their own feeling and are able to distinguish and focus on the needs of their children as distinct from their own needs. (Greenfield 1995).

Intake into the program will usually be after some counselling has taken place but in spite of this the parties have not been able to resolve their dispute. These clients have some insights into the negotiating process but assisting them to terminate their dispute requires the provision of further information in areas such as conflict management, cooperative parenting, stress reduction, children's developmental issues and parents' and children's adjustment to the separation process. The information gained by clients increases the likelihood of their reaching agreement on parenting-related issues and better equips them to deal with problems that may arise in the future.

The Court's Information Sessions currently contain basic information on many of these issues. The Co-Parenting Group Program, however, takes this information process one step further and provides a more detailed educational approach within a small group setting so as to achieve all the advantages that a group process provides for facilitating a change in attitudes and behaviour.

The second intervention program is the *Family Conciliation Group Program*. First implemented in Brisbane Registry in 1994 (Power 1995), this program is aimed at cases further along the dispute resolution pathway. The intake is restricted to those families where the dispute has become entrenched and the decisions about the children have been unresolved for a protracted length of time. These cases will usually have had counselling and are referred to the group program by the Counsellor, a Registrar at a Directions Hearing or at a Pre Hearing Conference, or they may be referred by a Judge after a hearing.

This program is also aimed at those families that, in the opinion of the Counsellor or the legal representatives, shows signs of becoming entrenched, and in that sense it can have a preventative focus. It is based on the Group Impasse Model developed by Janet Johnston and Linda Campbell (1988) in the United States for separated clients with

highly conflictual relationships. The preliminary feedback from the Family Conciliation Group Programs that have been conducted in Brisbane has been very positive.

A significant feature of this program is the involvement of children in groups that run parallel to the parent groups. This has the advantage of broadening the Court's services to children as well as providing critical feedback to parents about the way their children feel in a way that is safe for the children.

Eventually, if the Co-Parenting and Family Group Conciliation Programs are successful, they will be run nationally as part of a strategy of increasing the range of programs to fit more adequately the needs of the Court's clients.

LOOKING TO THE FUTURE

All of these programs are aimed at helping parents move on from the debilitating impact of the separation to the point where they can make ongoing decisions about their children without the assistance of the Court. However, in spite of all these efforts there is a residual group of cases that continue to come back to the Court. These are the cases where there has been a judicial determination of the initial dispute but there are ongoing problems with contact. At present the only option in these cases is further litigation which is costly to the Court and to the litigants.

Furthermore, the lack of an affordable and less emotionally draining option in these cases leads to a sense of helplessness on the part of the litigants and contributes to the disaffection they sometimes feel towards the Family Court and the legal process. It is these cases that require special attention, and it is with these cases that the use of special arbitrators may need to be given careful consideration.

Such a model has been in operation in the United States for some time. In California, for example, such persons are known as Special Masters and their role is that of mediator and/or adjudicator, whichever role is appropriate in the circumstances. The process is informal and does not require applications to court or any documentation to be filed after the initial appointment of the Special Master has been made unless one of the parties wishes to have the decision of the Special Master reviewed by the Court.

It should be stressed at the outset that in the Californian Court the role of such persons is primarily to adjudicate rather than to mediate. In a system such as the Family Court of Australia, where there are continuous options for mediation and conciliation, it may not be necessary to fuse the two functions.

Furthermore, in this country it would be confusing to retain the title of Special Master for such a role because of its other

connotations. Hence in developing a sense of what the role of the Special Master involves, Rimmer (1995) has suggested the term 'Child's Interest Arbitrators' to distinguish this role from that of arbitrator in financial matters. She outlines some case studies to show the differing ways in which Child's Interest Arbitrators would operate in the Family Court of Australia and addresses some important issues.

These issues include: the circumstances under which it would be appropriate to appoint Child's Interest Arbitrators; the legal status of the decisions; safeguards for the parties and the children in regard to due process and the appropriateness of decisions; the follow-up work of the Child's Interest Arbitrators in explaining reasons for decisions; the types of situations in which the Child's Interest Arbitrators would mediate rather than adjudicate; the benefits to the parties in gaining timely and cheap decisions; and the benefits to the Court in terms of the use of its resources.

Most people do not ask for a review nor do they appeal the decision of a Registrar or Judicial Registrar in our current system, hence the practical benefits of having Child's Interest Arbitrators are evident. The introduction of such a system may address some of the common criticisms about the accessibility and cost of justice which have led to calls for alternatives such as tribunals.

Implications for case management

If the pilot programs outlined above are successful it may well be that the coordinating judge will have a far wider range of alternatives to choose from to assist in the settlement of the case. Whether the parties are referred to or ordered to attend a particular program is an issue that will need to be addressed in the future. In practical terms an order may not be essential to getting the parties to attend as it is highly probable that a referral would suffice. Indeed there are those who would argue that the consent of the parties is preferable to solely mandated attendance.

CONCLUSION

The pressure to change the way the Family Court of Australia responds to difficult contact cases has come from several sources. In many respects the Court has anticipated, responded to and welcomed the challenge. There are a number of initiatives that are currently being developed and others that are being considered. The climate is now right for the Court to diversify its dispute resolution services and to look wider than the traditional and well known solutions to problem cases. In being creative, however, the Family Court is also conscious of the need to evaluate carefully each initiative in terms of its appropriateness and its effectiveness.

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