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Adversarial game or access to justice?

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Recent complaints about the family law system by two expert witnesses involved in a Queensland case resulted in the court's decision to publish the original reasons for judgment. Donna Cooper* discusses the implications of publication and the questions raised about the adversarial nature of family law.

Introduction

Two expert witnesses, paediatrician, Dr David Wood and psychologist, Susan Aydon, who recently gave evidence in a Family Court parenting case on behalf of a mother, where the primary issue was an allegation of sexual abuse against the father, have spoken recently of their disillusionment with the Family Court process. They believed their evidence was ignored by the court and that the adversarial court process failed to accurately ascertain the best interests of the children.

In Tony Koch's article published on 29 August 2005 in *The Australian*, "Family Court 'putting children last'", these experts declared that they would never appear in the Family Court again. One stated, "I know a number of medical experts who have adopted this approach — that they are not prepared to be part of an adversarial game that seeks just to discredit them so the parent with the most aggressive and expensive lawyer wins."

Shortly after this article was published, the father made an application to the Family Court seeking leave to publish the original reasons for judgment or any portion of the reasons in any newspaper, periodical, radio broadcast or television program. This application was successful and Byrant CJ ordered that in the course of publication, all of the experts be named, however, that the names of the parties, children and other lay witnesses be omitted.

Generally Family Court proceedings are not laid open to such media scrutiny. When cases are published or reported it is a requirement that the names of all participants, including expert witnesses, are kept anonymous, and that identifying details, such as the parties' occupations, are omitted, primarily to protect the identities and privacy of the children who are the subject of the proceedings. In fact, s 121 of the *Family Law Act 1975* (Cth) sets out that it is an offence to identify any party, witness or anyone associated with a party to Family Court

proceedings, except in certain limited and exceptional circumstances, where court permission has been obtained. So what led a Family Court case about parenting issues to become such a high profile media case, are the concerns of these experts justified and what was the reasoning behind Chief Justice Bryant's decision to permit the proceedings to be aired in the media with the expert witnesses identified?

The parenting case

The initial case, *SS and AH* [2005] FamCA 481 (10 June 2005), concerned appropriate parenting orders for the two children of a seven-year marriage, a boy aged 11 at the time of the hearing, referred to as "J" and a girl aged 7, referred to as "K". The mother was seeking orders that the children reside with her and that the father have reduced supervised contact to protect the child K, due to the allegations of sexual abuse. The father sought that the children reside with him as he argued this was the only way in which he would be able to maintain a viable relationship with them.

At separation, both children had resided with their mother and were having regular contact with their father. However, the mother became concerned that the contact arrangements were placing undue stress upon the children and were connected to the problems that her son was experiencing at school. She commenced to seek out experts to assist with counselling and the resolution of these difficulties. These concerns escalated when the mother became concerned that her daughter had been sexually abused by the father. In the course of seeking treatment, the mother and children attended upon several experts including Dr Wood and Susan Aydon.

Although there was evidence that both parents had denigrated the other in the presence of the children, Buckley J concluded that the father's denigration of the mother was not ongoing, however, that the mother had conceded she had constantly exposed the children to her negative attitude towards their father and to her own anxieties surrounding contact arrangements.

Buckley J ultimately decided to change residence from the mother to the father, accepting the father's contention that the children would be prevented from having a meaningful relationship with him if they remained living with their mother. In the course of his judgment, Buckley J stated that the child K had not made any genuine disclosures of sexual abuse and that the allegations of abuse had not been proved. His Honour was of the view that the mother's actions in subjecting the children to the treatment of several professionals, including Dr Wood and Susan Aydon, in her quest to find professional support for her desire to reduce contact, was evidence of emotional abuse and demonstrated her inability to adequately meet the emotional needs of the children.

The evidence of the experts in question

A social worker had initially referred both children to paediatrician, Dr Wood in April 2002. In turn, Dr Wood had referred the children to psychologist Susan Aydon, in May of that same year. Both Dr Wood and Susan Aydon had given evidence in support of the mother's

allegations that the father had sexually abused K. Buckley J rejected this evidence on the basis that neither expert had received a direct disclosure of sexual abuse from K, both had relied purely on a case history that reflected only the mother's version of events, neither made any independent investigations into the abuse allegations and both experts were unaware of the children's continual exposure to the mother's negative attitudes to their father and anxieties surrounding contact.

The trial judge's rejection of the evidence of these two experts was primarily based on the observations of the Full Court of the Family Court in *Re W (Sex Abuse: Standard of Proof)* (2004) FLC 93-192. In that case the court warned of the grave dangers of relying on expert evidence as to whether sexual abuse has occurred, where the expert had not interviewed both parties and observed both parties with the children. In the present case, neither Dr Wood nor Susan Aydon had met with the father nor observed him in the presence of the children. For this reason Buckley J was of the view that their evidence could be accorded very little weight.

Father's application for publication order

As outlined above, the father subsequently made an application for publication of the judgment of Buckley J pursuant to s 121 of the *Family Law Act 1975* (Cth). This application was heard by Bryant CJ on 2 September 2005.

The Chief Justice followed the case of *F and R (No 2)* (1992) FLC 92-314 where Fogarty J set out that the court had to examine two criteria, firstly the best interests of the children and secondly whether the matter involved raised an issue of public interest. Fogarty J had pointed out that "...the welfare of the child may not be the absolute determinant of the matter, it is, nevertheless, a most critical circumstance." The Chief Justice also referred to, *Re Lowe, Herald and Weekly Times Ltd* (1995) FLC 92-592 where Nicholson CJ had said, "There is a recognized right of freedom of public discussion of matters of legitimate public concern."

Chief Justice Bryant concluded that publication of the judgment was justified as it was both in the best interests of the children in question and involved an issue of public interest. The Chief Justice was concerned that members of the public who had read the article in *The Australian* could have the perception that the order of Buckley J placed the child K into the care of a parent who had sexually abused her. It was not in the child's best interests that the public hold that perception and could also impact detrimentally on the public's confidence in the Family Court. Her Honour was therefore of the view that it was appropriate that the public have the opportunity to read the full details of the judgment in which it had been concluded that the mother's allegations of sexual abuse had no substance.

The Chief Justice said, "Public confidence in the Family Court, as in all courts, is vital in our society. In my view the publication of the judgment in this case is necessary to enable a proper understanding of the expert evidence that was given in the case, the reasons for judgment, how the trial judge dealt with the evidence and ultimately arrived at the view that it was in the best interests of these children to live with their father."

Examining the decision critically, it certainly allows the public greater access to the original judgment, with the experts named, so that a better understanding of the Judge's reasons and assessment of the expert evidence can be attained. A full reading of the judgment discloses the detailed reasons that Buckley J has offered in support of his decision, based on the principles enunciated in the *Family Law Act 1975* (Cth) which ensure that the best interests of the children are paramount. Of some concern, however, is that such an order for publication may expose the children to further media coverage. For example, the order could potentially result in this case being discussed in a media forum more accessible to the children in question and to their peers, such as on television. A further article reporting on the case was subsequently published in *The Courier Mail* on 9 September 2005.

Conclusion

Clearly the original Family Court hearing was an adversarial process and the parties were required to put forward evidence in support of their respective cases. This requires the filing of affidavits and the calling of evidence from several witnesses, some of them experts. The Family Court has recently reformed its rules in relation to expert evidence, particularly to provide for both parties to agree on the appointment of a single objective expert to give evidence to the court. However, pursuant to 15.41 of the *Family Court Rules 2004* (Cth), parties are permitted to adduce evidence from experts who have been providing treatment to a party or child to inform the court of the treatment carried out and to provide the results of investigations and observations. In this case it was then the role of the judge to decide what weight to accord such expert evidence in coming to a decision that would promote the best interests of the children.

In applying the case of *Re W (Sex Abuse: Standard of Proof)* Buckley J accorded the evidence of the two experts in question little weight, due to fact that they had not had any involvement with the father in the proceedings. In the course of the judge carrying out his role in the adversarial process, the credit of these expert witnesses was questioned and their evidence criticised. For people unaccustomed to court processes, this could certainly be a confusing outcome. Medical professionals who have been treating only one party and the children could perhaps not be expected to be objective and impartial as in their professional role they have been acting on their patients' instructions and in their best interests.

To lawyers appearing in court regularly the way in which the adversarial system operates is an accepted part of their profession. Witnesses who give evidence, both lay and expert, can be subjected to what some may view as robust, and in some cases, aggressive cross-examination. The Chief Justice stated at page 4 of her judgment that the trial judge's 'rejection of the evidence had more to do with the rejection of the mother's evidence and its underpinning of the expert's views, than the expertise of the expert witnesses themselves'. However, it is clear when reading the article in *The Australian*, that the fact that the court has totally rejected their assessment of the patients, was perceived by these experts as a rejection of their expertise. It flows from this that the outcome of the case may potentially be damaging to their professional reputations.

It appears that one of the implications of this case — the media coverage surrounding it and the order for publication — is that it may potentially lead to fewer experts being prepared to take on patients who are embroiled or may potentially become involved in family law litigation or potential litigation. It also may mean that potential expert witnesses will be more reluctant to appear in court. For lawyers preparing such cases, the value of calling expert witnesses who have only been involved with only one party must be questioned. Perhaps this case also highlights the role of the lawyer as gatekeeper to the family law system with an obligation to explain to expert witnesses the court process and the way in which expert evidence may be regarded. However, a potential benefit of the case is that professionals dealing with sexual abuse allegations may become more aware of the value of obtaining a wider picture of such serious allegations, which have the potential to impact on a child's relationship with both parents.

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