

Chief Judge Stephen Thackray Speaking Notes
Inaugural Family Law System Conference – Canberra,
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As you've heard, this morning's session concerns the challenges we all face in establishing what is in a child's best interests.

I'd suggest there is no more value laden and controversial expression than "the child's best interests", but in the 10 minutes available to me I want to make three key points about matters of general principle. I will then say a little about the strategies my Court employs in trying to advance what we perceive to be "the best interests of children".

My first key proposition is that children's best interests and parental agreement are not synonymous. I would argue that we have been inclined in the past to place too much emphasis on securing parental agreement.

The danger, in my view, of such an approach is that it can send a message to good and protective parents that they have somehow failed their children by refusing to come to an agreement with the other parent. In focusing on settlement, we also run the risk of measuring the competency of professionals by their capacity to secure agreement rather than their capacity to secure lasting and beneficial outcomes for children.

Contrary to popular belief, I would argue there is a range of cases in which judicial determination is ultimately more beneficial for children than an outcome where parents agree. It is, of course, the nature of those who would abuse their own children or assault their spouse to wish to come to an agreement, because they are used to agreements being made on their terms.

In my view, there is a community interest in exposing child abuse and domestic violence and showing the perpetrator and the community generally the consequences which can follow from such conduct. I suggest this can often be best achieved in courts rather than behind closed doors.

My second key point is that policy makers need to appreciate the vast difference between the “average” separated parent who they might meet in the course of every day life and **some** of the separated parents who end up in a contested trial before a Judge or Magistrate.

Policies and techniques designed to focus parents on the best interests of their children may work very well for the first category of separated parent but be quite useless for the second.

I would suggest that family law policy has for too long been driven by the demands of this second category of parent. And I would strongly endorse the remarks made by the Attorney General and the Chief Justice yesterday that in concentrating on the complaints of this vocal minority, we have failed to recognise that we have in Australia a fundamentally sound family law system, which every day is making improvements to ensure better outcomes for children.

The third point I would like to make concerns the legislative framework in which Courts are now required to determine what is in a child’s best interests. I will say nothing about the labyrinth which trial judges and magistrates are now expected to navigate in arriving at outcomes that are good for children. I will also say nothing about the exceedingly fertile ground this has created for costly appeals.

I want to say only how very unfortunate it is that so many parents have been led to believe that the legislation now provides some kind of **pre-ordained** outcome. This mindset, in my experience, makes it much more difficult to focus parents on the child’s best interests and instead focuses them on obtaining what many now consider to be their parental right.

I want to turn then, very briefly, to describe a few initiatives in the Family Court of Western Australia which we hope are promoting the best interests of children.

Along with the Family Court of Australia, we anticipated, supported and implemented the changes made to case management by Division 12A, which is designed to provide

a less adversarial process for resolution of disputes. We have also strongly supported the move away from confidential counselling within the court.

In **our** case management system, the parents' first interaction with the Court is a meeting with a Family Consultant who carries out a risk assessment and begins the task of focusing the parents on an outcome that is good for the children. After individual meetings and, in most cases, joint meetings with the Consultant on that first day, the matter proceeds straight into a Courtroom where the Judge or Magistrate allocated to the family receives an oral report and case management recommendations from the Consultant.

On this first day at court, the emphasis is not on securing settlement but on seeking to assess the situation and identify the underlying problems in the family, whether they be domestic violence, substance abuse or whatever.

Recommendations and orders are then made on this first day in Court for referral of the family to external agencies that have the expertise - and even sometimes the resources - needed to address these underlying problems.

Parents are also routinely referred at this very early stage of the proceedings to post separation parenting programs which are designed to focus them on the children's needs and better ways of reducing conflict and managing disputes.

Parents are also required to attend an information session delivered at the Court or on the court's behalf at a variety of community agencies. The focus of these sessions is the impact of parental conflict on children and the desirability of finding child focussed ways to resolve disputes.

Our consultants do not as a matter of course interview and observe the children who are the subject of the dispute. In each case an assessment is made by the consultant concerning the desirability of directly involving the children - with factors being taken into account such as the maturity of the child and the likelihood of the child's involvement having any impact on the ultimate decision. Our consultants also take

account of the impact on the child of the expectations that are created by being involved in the process.

Although our practice in this regard differs somewhat from the Family Court of Australia, it needs to be kept in mind we have a different clientele, as the Federal Magistrates Court does not operate in our State. We therefore deal with the whole range of family disputes – from the simplest to the most complex.

A further feature of our case management system is that parents are forbidden from filing affidavits at any stage of the proceedings without leave of the Court. They are also forbidden from making any interim application, including contravention applications, without the Court's permission.

The objective once again is to ensure that the focus of the parents is on matters that could arguably be relevant to the children and to move the focus away from the parental dispute itself. The anecdotal evidence, supported by some independent research, suggests that this approach is a distinct improvement on the previous more adversarial system.

My court also places great emphasis on information sharing with other government and community agencies which already know a lot about our clients and their children. Being a State Court, we have a unique opportunity to enter into information sharing arrangements with relevant agencies, almost all of which are State based.

Hence, we have a well established and effective protocol with the Department for Child Protection for easy exchange of information. In fact, we now have a senior officer of the Child Protection Department co-located in our counselling and consultancy service at the Court to facilitate the sharing of information and joint case planning.

We have Memoranda of Understanding with all of the major federally funded local service providers including Anglicare, Relationships Australia and Centrecare, as well as with the education department, supported by a Principal's advice line.

In addition we have a working protocol for information exchange with our children's hospital, although the written protocol is still to be negotiated.

We have routinely made use of section 69(ZW) orders to ensure that the Court has prompt access to records held by the Police, not only of convictions but also charges and details of incidents. Recently, I signed a new protocol with the State Magistrates Court, State Department of the Attorney General, Department of Corrective Services and Legal Aid to allow exchange of some information concerning common clients in the State criminal courts and domestic violence courts.

We consider our links with all of these local agencies to be the key element in an effective family law system that is focused on best outcomes for children. We have therefore invested a good deal of time in building bridges with all of the agencies, particularly the service providers. These links have been created at a personal level as well as more formal levels such as Reference Groups and Family Law Networks. Importantly, we operate on the basis that the Family Court should not be perceived as the apex of the family law system but rather as just another part of it

There are, nevertheless, some remaining barriers to exchange of information with the agencies that do therapeutic work with children who are caught by the confidentiality provisions of section 10D. Although the Court is now able to share information gathered by the Family Consultants with external agencies - and this is of great benefit - the barriers to getting information back to the Court in some cases can be an impediment to achieving best outcomes for children. I know that in my State at least some of the key agencies are anxious to be able to share some information with the Court and we are anxious to receive it.

Question 14 in our conference papers asks the question whether further work is needed on child focused and child inclusive practice. My answer to that question would be a resounding "yes". We already have an array of child focused and child inclusive practices but we need ongoing research and investigation to assist us to understand the impact of these different practices on children and the quality of decision making. Resources need to be directed towards such research, not to

mention further research into the impact of the 2006 shared parenting experiment on a whole generation of Australian children.