

## SUBMISSION ABOUT ISSUES RELATING TO FAMILY LAW

The following are problems that I have experienced while acting as a Family Lawyer and that I have heard from other Family Lawyers. While lawyers talk amongst themselves about these people, there is probably nothing done because the lawyers are likely to fear reprisal. Clients also have complaints. However, they may not be literate enough to make a complaint and would not be likely to pay a lawyer to make the complaint for them as the proceedings are likely to be costing them too much already.

### Family Law Judges and Federal Magistrates

- Family Lawyers are often treated disrespectfully by specific Judges and Federal Magistrates i.e. some Federal Magistrates stop lawyers before they know what the lawyer is going to say which results in relevant information being disregarded. Some speak to lawyers in a manner that could make the clients lose confidence in their lawyer. Lawyers generally have this experience with the same specific Federal Magistrates, not all, so this is not necessarily a problem with the lawyer as the Judge or Federal Magistrate may infer, but instead be a means of covering up incompetence of the Judge or Federal Magistrate. Such Judges and Federal Magistrates are known to many lawyers and should be investigated by the Commission.

*e.g. On an occasion when the Respondent Lawyer went to the Applicant's side of the bar and the Applicant's Lawyer could only go to the Respondents side, but didn't worry as this had happened before, the Federal Magistrate commented on this when the Applicant's lawyer informed the Federal Magistrate that she was acting for the Applicant. The Applicant's lawyer explained that the Respondent's Lawyer was on the other side of the bar and at the same time, the Respondent's Lawyer explained that she went there automatically had she had been acting for the applicant in other cases that day. Neither lawyer spoke in an argumentative manner. However the Federal Magistrate said something to the effect "There you go. You can't stop arguing." The Applicant's Lawyer had not been before that Federal Magistrate previously. The Federal Magistrate then stopped the Applicant's Lawyer from providing information that was necessary about the case, which had not been listed before that Magistrate before, but allowed the Respondent's Lawyer to say the same thing. That Federal Magistrate has a bad reputation for her attitude and perceived incompetence amongst a number of Lawyers.*

- Some Family Court Judges and Federal Magistrates listen briefly to submissions then expect the lawyers to obtain consent orders by negotiation each time the case comes before that Judge or Federal Magistrate. This can go on for a year or two with updated affidavits, subpoenas and expert reports having to be obtained along the way or before a final hearing. Most lawyers would have attempted to negotiate

agreements before applications are made to the Court, and in childrens' cases mandatory mediation would also have been completed or found to be unsuitable for mediation before an application is made. The cases that are before the Court are cases where there are high levels of conflict. When proceedings are prolonged because a Judge or Federal Magistrate is making the parties and their lawyers negotiate an agreement, the parties may eventually agree to consent orders that fail in the future, or may spend large amounts of money on legal fees etc in the hope that they will soon be given a hearing and are left financially destitute with their children not provided for, as well as obtaining orders that fail in reality. They should either be investigated by the Commission for their carelessness in allowing this to occur and not giving earlier dates for proper hearings, or the Family Law System should be changed so that this cannot happen, which is probably the better alternative.

*e.g. A significant amount of affidavit evidence had been filed at the Family Court by the Applicant's lawyer and criminal records were also subpoenaed. An expert Psychiatrist Report was made twelve months after commencement of the proceedings but mostly disregarded. After 2.5 years with the applicant spending about \$200,000 on legal fees and other costs including expert reports and the Respondent spending about \$300,000, the parties finally came to an agreement by consent on the first day of the final hearing because they could not afford to proceed into a four day trial. The Applicant's lawyer and Barrister had to forgo \$20,000 each because the Applicant had no more money to pay for final preparations for trial and negotiations to settle the case. In the meantime the eldest daughter had been alienated from the Applicant and the two other siblings were at the brink of being alienated when the agreement was made by the Applicant forgoing much of what he was asking in property settlement, and spending all what he did receive on paying well overdue legal fees. The fees were so high because of all the updating of affidavits and other evidence and all of the attendances at Court. No agreement could have been reached without judicial determination earlier because the parties were too far apart in their expectations but did not realise how much it was going to cost them as they expected earlier determinations.*

- Some Family Court Judges and Federal Magistrates rely very much on Independent Childrens' Lawyers who have only had two days training as an ICL in addition to their education as lawyers. The ICLs are usually biased; do not interview the children to obtain their views and identify any issues of abuse, neglect etc; do not organise family and expert interviews and reports at appropriate times; do not read all of the affidavit and subpoenaed material, and do not fully comprehend family and expert reports. They generally have no education about psychological or psychiatric issues. They are so poorly funded that it may not be possible for them to spend the amount

of time to do their job thoroughly and properly, leaving children in situations where they may be at risk either physically or psychologically.

*e.g. In one case the ICL disagreed with the Family Consultant's Report and the Psychiatrist's Report and the Judge accepted the ICL's opinion. This resulted in many more appearances at Court at significant cost to the parties. In another case, the ICL was biased toward the mother who was finally found to have a personality disorder by the expert Psychiatrist. The child was found to be at risk on the fourth day of the final hearing so ordered to live with the father.*

ICL's are either funded by the parents or by Legal Aid if the parent's meet the means test. Legal Aid currently pays \$18,000 to an ICL to go to a full hearing including the ICL Barrister's fees. If this money was paid to a Psychologist who is far more qualified to make assessments in a shorter period by both psychometric tests and clinical observation and can make recommendations to the Court to assist parties to overcome their conflict and work together in the interests of the children. ICLs are not qualified to do this. However, for some reason, Judges and Federal Magistrates seem to think that they have the capability of acting in the best interests of the child only because they are not acting for the parents so are meant to be unbiased by the parents. The bias toward a parent usually becomes obvious early in the proceedings and rarely changes, or else the ICL stays so uncommitted to either parent, the evidence that one parent may be causing the conflict or risk to the children is overlooked by the ICL.

- Some Family Court Judges and Federal Magistrates make orders without considering all of the evidence and in some cases their reports are full of error.

*e.g. There were so many errors of fact in a Federal Magistrate's Report that could easily have been amended by the Federal Magistrate if the documents on the file were read properly. These errors included such things as a premise that the parents had lived together when this had never occurred, that the relationship between the parents had started many years earlier when the other parent was married and had no relationship with the current parent. These assumptions led the Federal Magistrate to make orders that the child spend more time with the father because the child had, according to his report, been living with the father. The reality was that the father spent time with the child only spasmodically, and had never lived with the child.*

While it is possible to appeal against such orders, particularly if there are errors of fact, it is expensive to file an appeal and adds to the time before an appropriate order can be made. Such Judges and Federal Magistrates who would make the same errors in other cases because of carelessness or incompetence should be investigated by the Commission. However, this could only happen if the lawyers make a complaint, which they are unlikely to do because of fear of reprisal, or if a party makes a complaint, which they parties may also fear doing. The repercussions however, are that the credibility of the Family Court is undermined by such Judges and Federal Magistrates.

- Some Family Court Judges and Federal Magistrates wrongly order supervised time, or for children to be taken from a parent because of allegations by one of the parents that have not been tested or proven until at a final hearing that may be one to two years away. Until there is a full hearing the children may be placed at risk of both physical and psychological harm and the cost to the innocent parent may be more than can be afforded.

*e.g. The father in one case had been supervised for two years and had to travel three hours travelling each way to spend time with the child because the mother had relocated. The supervision occurred because of the mother's false allegations that were not tested until the final hearing even though the affidavit evidence and the evidence provided in a Psychologist's and a Psychiatrist's report, none of which had been read until the final hearing, was sufficient to show that the mother's allegations were false.*

- Liason between the staff of the Family Courts and the Judge or Magistrate, and Family and Community Services, the Juvenile Investigation Team and Family Relationships Centres is usually poor and often little respect is given to orders by many professionals in the community. Notices of Abuse or Risk of Abuse filed at the Family or Federal Magistrates Courts are often not acted on.

*e.g. In one case the Federal Magistrate made orders that the parents complete parenting skills courses and provide evidence of having done so, and that they attend counselling organised by a Family Relationship Centre. The orders included that the Relationship Centre was to inform the Court if either parent had not contacted the Relationship Centre within seven days. The father did not do what was ordered, although the mother did. The Relationship Centre did not inform the Court and some months later a further directions hearing was listed at Court. The father was not punished, but told that he had to do what had previously been ordered which added to the time before orders could be made for the children and also added to the other parent's legal costs. She had been funded by Legal Aid*

*and Legal Aid would not pay for the extra court attendances so she was left to represent herself.*

- Some Federal Magistrates make life changing orders without even a full interim hearing or proper investigation of the facts and the history. It is possible to have the matter transferred to a Judge. However in the meantime there can be extreme stress and risk to the children with excessive legal fees that parties have to find some way of paying off over time if the lawyer is able to agree to this. Most lawyers will have stories to tell about such situations.

### **Family and Federal Magistrates Court Procedures**

While there are some rules and regulations about procedures, Judges and Federal Magistrates also have a large amount of discretion about their orders and also procedural issues in their cases. The procedures are often slow and inadequate particularly for children's cases. International research shows that there are problems with this in many parts of the Western World. The following is a suggestion of how the procedures can be improved:

- Psychometric testing with clinical observation should be made as mandatory as mediation prior to the commencement of cases at Court. However, this should be managed by a Judge or Federal Magistrate so that orders are made at the first Directions Hearing for the assessments to be done and relevant documents provided to the Psychologist. The Psychologist would negate the need for an ICL. At present Legal Aid fund an ICL with \$18,000. This would more than cover any assessments and attendances at Court by the Psychologist who would be far more qualified than ICLs to assess the situation and conflict and make suggestions to the Court.
- The psychometric testing and clinical observation should be done by Psychologists approved by the Australian Psychological Society and the Family and Federal Magistrates Court who are experts in both psychometric testing and in Family Law issues and legislation.
- The Report on both the parents, the children and other significant persons should be made by one Independent Psychologist agreed between the parties and/or their lawyers who should provide the Psychologist with relevant evidence such as school reports, medical or psychological reports, criminal or community service records and information provided by each parent.
- The reports made by the above expert Psychologists should include recommendations to the Family Court Judges and Federal Magistrates about counselling, courses and possible orders and the Judge or Federal Magistrate should monitor the progress and outcomes of these procedures by way of the Least Adversarial Trial that is used in the Family Courts – i.e. where there is an ongoing trial with interim hearings of the evidence and

Psychologist's reports are examined by the Judge or Federal Magistrate and appropriate interim orders made. Such orders at the beginning of the proceedings will be made based on more information than currently occurs so are more likely to be accurate.

- If there are psychiatric issues involved then the Psychologist's report should be provided to an expert Psychiatrist approved by the Family Courts. The Psychiatrists time would be less because of having the Psychologists report as a guide. It takes a longer period of time for a Psychiatric Assessment by clinical observation than can be identified by the use of psychometric assessments with both the Psychologist's and Psychiatrist's clinical observation and the inclusion of this expertise should decrease the costs for the Court proceedings and for the lawyers while providing more appropriate outcomes in a shorter time for children.
- Currently Family Reports are made by a Family Consultant at the Family Courts. These consultants do not use psychometric assessments and are often Social Workers who are given little time to do the assessments and write reports because of funding and the numbers of cases before the Courts. Private Psychologists in the areas where the parties live either funded by the parents or Legal Aid would be more appropriate. Currently ICLs are funded by Legal Aid or by the parents. The appropriately trained and qualified Psychologists could replace the ICLs and the Court Family Consultants at a lower cost than funding the ICLs and Court Family Consultants and all of the administration required for them. Private Psychologists would include their administration costs in their fees, which would be less for the initial assessment and possibly about the same as funding an ICL to attend Court hearings as well.
- There are a number of administrative issues such as determining who the Psychologist will be, directions and dates for attendance at Court that could be better managed in chambers by the Associate to the Federal Magistrate or Judge instead of parties and their lawyers having to waste time standing in line at Court for such directions at a large cost to clients and a waste of time for lawyers.
- Country and Regional Lawyers should be allowed to attend some hearings where it is appropriate by telephone to save their clients the costs of travelling to Court and waiting around at the Court to be heard amongst a number of other cases. Such technology as Skype could also be used.
- It would give Judges and Federal Magistrates more control of their time if they allocate times for hearing by Skype or telephone and Lawyers and their clients could easily be informed by the Associate if the time needs to be changed because of unforeseen cases being negotiated by consent or delays because more time was required for some other cases. This would enable lawyers to do other work instead of wasting time waiting for their case to be heard at Court. It would also alleviate some of the stress that lawyers are faced with when having a number of cases in Court. It would also make it possible for lawyers to ensure that their cases do not have conflicting times to be heard, particularly if the cases are in different regions, such as Parramatta, Sydney and

Newcastle or Wollongong. It would also assist for Solicitors and Barristers to be able to organise their diaries so that they can be available for each of their cases. Currently agents or other Barristers not properly briefed in a case may have to appear.

### **Legal Aid Funding**

Legal Aid funding for Family Law cases is so low that most Lawyers in private practice cannot afford to do Legal Aid work, except for Lawyers who do all Legal Aid work and spend their time at Court on a number of cases so that it can be financially viable. The hourly rate is \$140 per hour compared to most lawyer's fees of well over \$350 per hour because of having to cover the expenses of running a case and being in business. However, the hourly rate does not even cover the hours required for each case. It only covers 5 hours per day for an interim or final hearing when it is often necessary to be at Court for the full day. There is only a small percentage of the total \$10,000 allocated to each stage at Court, so if the Judge or Federal Magistrate requires parties to attend Court on a number of occasions for Directions hearings, mentions or mini hearings, the Lawyer is not paid for most.

The financial criteria for Legal Aid to be funded is extremely low and if one parent is living with another parent or other children, the other parent's income is included even though each party contributes only to their own and their own children's needs and even if only one parent is working and has a low salary or works part-time.

There are many parents who are on low to middle income who lose half of their resources and have increased costs because of the family break up. There may have been valid reasons for the family break up, including domestic violence and child abuse etc. However these people are unable to afford the high cost of legal representation and lawyers cannot charge less in many cases because of the expenses they have in providing the service and the high amount of regulation and standards of the profession. In addition much of the costs result from the many attendance at Court, the length of the proceedings and the poor organisation within the Family and Federal Magistrates Courts and the other issues already referred to.

As there are nearly 50% of marriages and more of de facto relationships that fail, this poor management of families and children by our Family Law system is creating an environment throughout Australia where children are at risk and families impoverished and this has far wider implications and costs. A review of the Family Law System, complaints about the Judiciary and other professionals involved in Family Law, better education and qualifications of the professionals involved needs urgent attention or the situation will continue to only have minor changes such as changes in legislation wording, like "live with" instead of "custody" which are pretty meaningless to families suffering from the system.

The parties and children involved in Family Law proceedings are ill, financially, psychologically and often physically because of the current system. The legislation and court system are outdated, even if there have been recent changes to parts. Current technology

and scientific methods need to be utilised where appropriate. Otherwise more money will be wasted on a system too damaged to perform.