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## **How Best to Find out What a Child Really Needs and Wants**

***Hon. Peter Boshier***

*Principal Family Court Judge of New Zealand*

Custody cases in our Courts are very different than cases in other Courts. Lawyers are generally trained to represent clients and to advocate on their behalf within a system that is complex and often idiosyncratic. However, the lines are not so difficult to see in most Court cases. Whether criminal or civil, there are two parties in opposing stances. The points of view of each are put, evidence called, questioning occurs and the Judge delivers a verdict according to the arguments that appear to have the most merit.

Children's custody cases are not about the opposing sides but, of course, about children and their welfare.<sup>1</sup> So how can children's positions best be put<sup>2</sup> and a decision be made having regard to what children need and not simply what their parents want?

I pen these remarks unapologetically from a judicial perspective. Psychological medicine is a world into which I intentionally do not venture for the purpose of this article. Instead, I would like to discuss and provoke some thought about how custody cases should be handled and how we best go about achieving our objectives.

If there is one observation that I hope meets with universal approval it is that resolution of issues for children does not benefit from delay.<sup>3</sup> Cases take on a life of their own<sup>4</sup> and status quo situations are often difficult to dislodge, even if this is grossly unfair to the children or one of the parties.

It is inevitable that contested custody cases will be initiated by one of the parents filing an application for an order. For completely acceptable and understandable reasons, the orders that the court is asked to make in respect of the child's welfare are as perceived by the parent concerned. It is not unusual to have an affidavit accompanying an application, which purports to describe what the care arrangements should be—because the child concerned is said to have reported that to the initiating parent.

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<sup>1</sup> As stipulated in Care of Children Act 2004, s4

<sup>2</sup> As required by The United Nations Convention on the Rights of the Child, Article 12

<sup>3</sup> Dr Jan Pryor and Dr Fred Seymour, "Making decisions about children after parental separation" *Child and Family Law Quarterly* 8(3) (1996) 241

<sup>4</sup> Joan Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" *Virginia Journal of Social Policy and Law* 10 (2002) 131

Equally unsurprising is the likely response of the other parent, who may be feeling disempowered, cut off, disrespected and often highly offended by supporting material filed by the initiating parent.<sup>5</sup>

I think that unless early intervention occurs, the perceived needs of a child become the issues as framed by the parents and, as bitterness settles in, the children's needs and welfare interests become submerged in the parents' perceptions. My experience has been that, unless there is judicial intervention at an early stage, it becomes increasingly difficult to shift parental attitudes.<sup>6</sup>

With all of this in mind, I favor early judicial intervention in cases in order to decide whether a case lends itself to conciliation or mediation, or whether the situation is so fraught with conflict and one of the parents disempowered, that firm judicial direction is needed at an early stage.<sup>7</sup>

It is inconceivable to me that, at this stage in a case, the children's needs can be accurately assessed unless there is representation of the children and appropriate input of their views.<sup>8</sup> How is the Judge to possibly calculate this otherwise? I suppose it could be argued that Judges are worldly-wise and always know what is in the best interests of children. It could also be said that parents are best placed to represent what their children want. But I am skeptical of both arguments. Children will so often tell their parents what their parents want to hear.<sup>9</sup> Judges, also, may be excessively influenced by their own upbringing and views of parenting practice.

I accordingly favor immediate appointment of an Advocate for a child, whether that be an attorney<sup>10</sup> or another suitably qualified person such as a social worker. It need not necessarily be a psychologist. I think it essential that such a person sees the child away from influence and is able to put fairly and firmly to the Court, without fear of criticism from the parents, what the child wants.

There is, of course, a category of custody cases where discerning what a child really wants, because of what the child represents, is much more difficult. I talk of cases where children have been alienated or coached.<sup>11</sup> The courts must be constantly alive to the criticism of a parent that this may have occurred and that what the child is representing is not really the child's properly held view.

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<sup>5</sup> Ibid

<sup>6</sup> Judge Jan Doogue and Susan Blackwell, "How do we best serve children in proceedings in the Family Court" 3 BFLJ 193

<sup>7</sup> Ibid

<sup>8</sup> As contemplated by The United Nations Convention on the Rights of the Child

<sup>9</sup> Judge Jan Doogue and Susan Blackwell, "How do we best serve children in proceedings in the Family Court" 3 BFLJ 193

<sup>10</sup> In New Zealand this is governed by Care of Children Act 2004, s7 which requires that, in almost all circumstances of this nature, the Court appoint a lawyer-for-the-child

<sup>11</sup> Hugh Clarkson and Dale Clarkson, "Confusion and Controversy in Parental Alienation" *Journal of Social Welfare and Family Law* 29(3-4) (2007) 266

I favor early identification of cases where this may be an issue and a specialist report being obtained. For if there is truly alienation occurring, judicial intervention and orders may be unproductive and the case may become intractable. Therapy may be essential at this early stage.

In addition to representation of a child's needs and welfare from an Advocate and/or specialist report, there is the added option of the Judge electing to see the child personally.<sup>12</sup> There is much debate on whether this is a good idea or a bad idea.<sup>13,14</sup> In New Zealand, we have elected to obtain children's wishes directly and cautiously,<sup>15</sup> if the child wishes to convey those to the Judge. Protective and natural justice mechanisms must be put into place if this is to occur. But I do want to say that my experience of this process so far has been as the recipient of valuable information as to the child's needs. This has not necessarily been evident from Advocates or reports. It has provided an additional and enlightening dimension to judicial decision making.

The purpose of the model that I propose is to frame the issues correctly for the child at the outset, and not seek to do so much later on and especially just before trial. By then, the issues might be affected by quite different and unfair considerations. I have already mentioned status quo arguments.

I would readily accept that when a case comes on for trial, conventional judicial practice must prevail. And by that I mean that the parents must be allowed to give their points of view and be questioned and any expert evidence must be put and tested. But again, I think it quite justifiable that the issues for the children should be constantly reframed and reinforced and that issues relevant only to the parents, and plainly not very relevant to the children, should be filtered out. The role of attorney or lawyer in this respect, at a hearing, is to my mind invaluable. So often the truth is not as it appears to be and an objective advocacy on behalf of a child brings a sense of reality.

And so it is that I return to my opening observation. Custody cases have an element simply not shared by other court work. Children are effectively a party and yet, unless we are careful, a case concerning children can proceed without their issues being properly framed and without their needs and wants being firmly and clearly put. I favor a judicial system that is alive to this need, to ensure that custody cases proceed on issues and evidence that deal primarily with the children's welfare and not simply the wishes of parents.

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<sup>12</sup> Provided for by Care of Children Act 2004, s6(2)(b)

<sup>13</sup> Patrick Parkinson, Judy Cashmore and Judi Single, "Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia" *International Journal of Law, Policy and the Family* 21 (2007) 85

<sup>14</sup> Judicial consideration has also been given to the situation. For example by Judge MNE O'Dwyer in *LJG v RTP [Child Abduction]* [2006] NZFLR 589 at paragraph [88] and by Judge Neal in *Knight v Finn* [2003] NZFLR 38 at paragraph [27]

<sup>15</sup> This process is guided by the Judicial Direction "Judge's Guidelines – Discussions with Children"