

# A CULTURE OF FAMILY LAW FOR THE NEXT GENERATION:

## Law, practice and practice development

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Every revolution and every movement has a heart which is often a geographical centre. The Industrial revolution was based originally in Telford in the English Midlands (the Black Country!). The IT revolution was firmly in Silicon Valley, San Francisco.

For family law across the world in the last quarter of the twentieth century, the place has been Australia. From the 1975 reforms which brought the country originally to the attention of the world, through the continuing reforms in law and practice and the development of ADR processes and up to recent years, many foreign lawyers and jurisdictions have looked here for inspirations and ideas.

It is not a process which is stopping. The reform in 2000 allowing binding financial agreements showed the way for discretionary regimes to introduce private ordering and supplant the court's powers. Binding arbitration brought family law into mainstream civil litigation ADR. The speed of reaction of the government in late 2003 to the lacuna highlighted by the Rich case showed family law was not a neglected area of government policy.

Yet beneath the surface, is every thing right in the state of family law? Are there trends in family dispute resolution occurring elsewhere in the world and which are not being picked up here, especially in the conciliatory, less litigious aspects of the work? Collaborative law, explicit conciliatory codes, inquisitorial ousting accusatorial, "avoidance of court" philosophies, and more.

All law is vital to a society. But in a community which places such importance and responsibilities on family relationships, good family law and practice is particularly vital. And its vitality is not just for our clients as parties to the family law disputes. It involves the wider family and very many other relationships.

And most of all, it affects the children of the families involved in the disputes in which we act. Not just as children the subject of children proceedings. Not just as children who receive child support or provision via their parents for accommodation. Not just as children who witness the reactions of their parents to the family law resolution processes, on receiving our letters, on returning from court hearings etc, although this is crucial.

Perhaps the most vital aspect of the work we do as family law dispute resolution specialists is the present impact on children which shows itself when they themselves approach adult relationships and the respect they then hold for marriage and for commitments to relationships. If despite our success as litigation case work lawyers, we mess up the next generation in its own family relationships, we will have failed our community in this generation and the next. And however much we are respected around the world.

Yet to succeed in properly serving our community in these terms requires more than just doing a good job in getting the best outcome in a case for a client. In fact, the detail of the best outcome is invariably not the long term aspect which many clients remember most about their lawyer (although they remember the bad outcomes!). They recall the approach, the willingness to listen, the commitment to their case, the keenness to find a solution, an awareness of the client's wider concerns and more.

Australia, like many other western jurisdictions, is rightly proud of the fact that approx 95% of cases

settle. Settling cases is good for personal self respect and integrity, likelihood of implementation, better future relations especially in co-parenting and also cheaper in costs. Moreover arguably at least 95% of clients prefer their case to settle on reasonable terms without the aggravation and tension and costs of a final court hearing.

So if only 5% of cases go all the way to trial and only 5% of clients want to do so, why do we probably spend 95% of our time, client costs and energies in working towards what will happen in only 5% of cases? Why engage in tactics and an approach that is warranted by only 5% of cases, especially when those tactics and approaches may be specifically bad for the 95%? Which other industry would devote so many resources to such a limited market? Most of us have a good idea of those cases which cannot go the distance and/or should and/or will settle.

Instead of conducting our work with the 5% in our sights, we must concentrate on serving our primary client base, the 95% who want to and will settle. How can we do such cases differently? Do we employ different law, different tactics, different approaches, different terminologies, different time tables? How different as practitioners would we ourselves be?

So what are the crucial aspects for us as solicitors, barristers, judges, mediators, counsellors and others as family law dispute resolution specialists to help both this generation and the next? How do we work for the 95%? There is no one answer but a variety of means and measures, each playing its own small part. Just some are set out here to develop discussion.

(Just as this paper was being sent to the conference organisers, the Prime Minister on 29 July announced reforms to the family law system. In the first paragraph, he referred to (direct speech used for immediacy and fuller effect!) “a fresh approach to the family law system, putting the emphasis of reaching agreement at a much earlier stage in the separation process, rather than waiting until conflict becomes entrenched and relationships severely deteriorate”. This paper is directed to that aim.)

## THE LAW

### He said then she said: “The tyranny of direct speech”

The use of direct speech is one of the most distinctive features of family law proceedings in Australia. It is not a form which is used in other professional writings. Once taught, it is discouraged at school after Year 5. It is only used in fiction to give immediacy and to build up characterisations. It is almost unknown in some other family law jurisdictions.

Yet it is a big aspect of presentation of evidence. Indirect speech will be struck out even if in equivalent form but merely using the style of “he said that ...”. Evidence other than of conversations e.g. an observation of an event, is often adduced via direct speech – it is given credence in the form of direct speech.

If this was all in the client’s clear memory, then this may have some importance. The reality in most cases is that it is an invention. The use of direct speech is a legal fiction of which the lawyers practising in Bleak House would have been familiar. No amount of adding a precedent clause, e.g. to say it is words to the same effect as what was actually said or remembered, changes the fact that lawyers make up conversations to get in evidence. Clients express surprise at words being attributed to them. Some are alarmed that if specific words are being recreated of conversations of perhaps 20 years earlier, what else is being recreated to prove a case by the other party. Most are bemused at the process.

Of course direct speech is not just in family law but a matter of evidence across Australian litigation. But if we recognise that family law has special wider aspects of social policy not found elsewhere in litigation

then we must review the effect on the parties, the resolution of cases and on wider family relationships. It may not be easy to isolate evidence in one form of litigation from another but it may prove important as direct speech is potentially counter productive and harmful.

First, the reality is that events in family law disputes, more than any other area of law, take place in private and often with just two people present. There is not the possibility in many instances of third party corroboration of what was said. Does then putting intentions, hopes, general remembrances and promises of many years before into direct speech now give it an imprimatur of credibility? Are we testing the parties' memories? Does the use of indirect speech take away from general recollection of events or promises or statements? Do we not have confidence in our judges, at all levels, to use their common sense and experience to decide the sort of things which were said? They do not need exact words to decide if a conversation took place and what sort of things were said. Family disputes are often behind closed doors. Let the resolution process use sense and experience rather than the artificial creations of direct speeches recreated years later in lawyers' offices.

Secondly, we must look always at what is the wider impact of a law or practice. Will the use of a law or practice improve prospects of resolution and improve self respect of the parties and help long term wider family relationships? Here again direct speech fumbles (or even mumbles?!). Direct speech is direct. It is immediate. It is unequivocal in its accuracy. It is the conversations of the past brought into the present day. It is stark and blunt in its terms used. This is the reason why it is used by fiction writers. It is the reason it is not used in professional writings, reports, letters etc.

The words of direct speech used are often confrontational. Reading them in affidavits causes pain, anguish, resentment and bitterness. It creates defensiveness which turns sometimes to counter attack. In that a client knows full well (perhaps as the only other party to the conversation) that it is re-created words, it gives a message about the legal process being prepared to use fictions. Most of all, it is the brutal starkness of direct words spoken, perhaps in another context of love, passion and commitment, and coming back years later, which harms. Perhaps as lawyers raised in a tradition of direct speech we are not aware of the impact on clients. Perhaps it is only in talking to clients about the oddness of this form of evidence that one hears what clients really think. And they don't like it. And it sets back prospects of a conciliatory approach.

But it is the third reason which is most compelling. Psychologists say that only two sorts of people remember word for word the conversations of the past. The first group are those who are bitter and deeply unhappy and have harboured in their heart for year after year the words of particular conversations. They remember the day and the event and surrounding circumstances. They have revisited them so often. From the darkness of their hearts comes forth the flow of words used. A truly reliable witness of direct speech.

And the second group? Liars. They recreate conversations with minute detail, with exact words used by both sides to a conversation, with inclinations of voice and good background to time and place. The criminal courts are well used to testing this sort of evidence and must do so. But do we need to have the family courts undertake this exercise so often? And so what? One party has manufactured conversations with alarming accuracy. Does this make him a liar on other aspects e.g. disclosure? Possibly but not definitely. The mere need for direct speech may have made him a liar in this category alone.

Do we really want or need to have a form of evidence which self serves these two groups? And for the rest who do not spend their lives storing up in their hearts exact words said and who are then alarmed and offended when it is discovered the other party has apparently been doing so? Their sense of unhappiness at the family law resolution process is increased and their sense of unfairness at the outcome, because the process is flawed, is then put in place before the outcome is obtained. We are creating a sense of dissatisfaction with the outcome before we create the outcome.

Of course there are cases where direct speech is vital. Constructive trusts is a classic area where it is crucial to know what was said and relied on to detriment. When there are specific, unusual words or phrases which have resonances years later, then a short sharp burst of direct speech is necessary.

But overall, direct speech is harmful. It sets back a conciliatory approach. It is unnecessarily confrontational in a way indirect speech is not. It is the preserve of two categories of parties before the courts who are the least deserving. Family law should protest its distinctive from other areas of evidence and drop the requirement and tyranny of direct speech.

"I deduce, dear Watson, that you cannot make your own deductions"

Affidavits, the primary document setting out evidence of a person's case, should contain just that, namely evidence. No conclusions, arguments or opinions. Such will be struck out, often at court as the case starts the final hearing. But immediately we have fallen into the trap of considering the 5% whose cases go to a final hearing. It is the 95% who warrant attention and who have arguably had too little attention in the system.

The consequence of the strict law requiring only pure evidence to be included is that the consequence or conclusion or argument from a piece of evidence is not stated in the affidavit. Sometimes it is obvious. But sometimes it is not. It will be obvious at trial as the advocate will bring it out. Not as the rabbit out of the hat, as evidence of the rabbit is disclosed. But until then, the strengths, arguments and conclusions of a client's case on the evidence may well stay hidden in the hat. And so a client's negotiating position may be weakened, simply as the other side do not appreciate the strengths and conclusions based on the evidence.

Of course we must never revert to the days of affidavits of 80% submissions and rhetoric and 20% evidence – but strangely it was never the evidence which was needed to progress the case! Court rules and lawyers' practice must be aware of what should or would happen at final hearings. But if we expect 95% of our cases to settle and not go to a final trial, why weaken our clients' chances of settling by not fully setting out the position in affidavits? The primary consideration must be to settle. If that is more likely by setting out some conclusions and arguments based on the evidence in the affidavit then we should do so and be allowed to do so.

Subpoenas – taking responsibility for disclosure.

The widespread use of subpoenas is another distinctive of Australian family law. It is not found in some similar jurisdictions. It relies on the compliance of third parties to deal with them quickly for relatively little fees or costs. The general perception is that they are used, instead of asking the parties direct, because self disclosure cannot be trusted. How can the truth be gathered if not via third parties? And in some instances, this is absolutely correct. But their usage has an impact beyond the narrow confines of asking a third party to produce information or documents.

First, the emphasis should be on the parties themselves to take "ownership" of the obligation to give full, frank and complete disclosure. That disclosure should be tested by the recipient's lawyers by further enquiries of the disclosing party. Sometimes there are genuine omissions and unintentionally incorrect statements in disclosure – presuming all parties to family law proceedings are intent on deliberate gross non disclosure, as sadly some divorce lawyers seem to do, is totally unfair on the public. Such parties should be given an opportunity to correct omissions if found in their initial disclosure, before the battalions of the weapons of search and find are utilised. They should take responsibility for their duty to disclose.

Secondly, clients are quite offended when they find that the other party has, at an early stage and via

subpoenas, contacted their bank, their child's school or other third party with whom they have had close dealings, and will continue to have dealings. Their response is invariably to the effect of why was I not given an opportunity to produce this information myself? Some relationships with third parties are thereby put at risk. One common response of clients when this occurs is not to give full disclosure but let the other side continue to try and find out via third parties. A game is then created in the disclosure process.

Subpoenas have their place. Well directed and well timed, they are vital in exposing lies and gross non disclosure. But they are a tool of battle. They have a place in some cases some times. The new Rules put the emphasis on self disclosure. But lawyers are inherently conservative and the old tried and tested ways are comfortable and have worked. Changing the culture will be hard and may need well placed public court judgements and a strong lead. But it is important to give back the integrity and responsibility of the disclosure obligations onto the parties themselves.

### Contributions – the fault of financial provision

Australia is a no fault jurisdiction. It was one of the lead countries to change the law on divorce, and against much public opinion. It has been highly successful in a culture change in thinking about marriage break down. The divorce process is short and mostly painless and directed to the final result, the ending of the empty shell of the marriage. But is there a danger that fault has crept back into the family law household, and is infesting the very timbers on which the house is constructed?

In the 1970s, Australia and England parted company on criteria for financial resolution, having originally had the same roots. Whereas England became, until White, a needs based regime, looking at provision of accommodation and income needs and with contribution only a factor, Australia became a contribution regime. The ensuing years have seen debate on relative merits of income earning and home making, on equality and equity and on special contributions. In the last few years, England and Australia have been looking much more closely at lessons each can learn from the other as both countries recognise that perhaps their laws have not kept pace with social and gender expectations. That debate continues.

But contribution as the central core of the law on financial provision is likely to stay. However the detail of the use of contribution, in daily practice, needs review. As the law has developed and undoubtedly become more sophisticated, the nuances of types of contributions has been refined. Courts refer in the presence of parties to certain contributions having a value of single percentage points. Lawyers argue about events many years earlier in the relationship in creating an extra percentage point of outcome. As each point can be many tens of thousands of dollars, it is a game the clients realise quickly they must play to win. Costs are well worth throwing at a case if a couple of percentage points are thereby gathered.

So in a conciliatory regime, what should be used to change the contributions swingometer a few crucial points? Obvious ones which often fit with the public perceptions of fairness are family gifts, inheritances, pre relationship resources. Factors such as ill health, support during job loss, sacrificial commitments to parenting and home making are often accepted as past contributions which should have a bearing on outcome. The s75(2) factors are often less contentious.

It is the other contribution arguments which cause a departure from general equality which create the real contentiousness. Often the law requires the parties to impose a different form of values or morality than prevailed during the relationship. Sometimes the law requires the parties to go back through the relationship, to revisit events and then give them a different weight or significance than existed at the time. So an artificiality begins and then often cannot be stopped.

Judicial pronouncements have tried to discourage minute reference to percentage points. They have failed. They were bound to fail as it is in a client's interests to find as much as possible to argue a case.

If in an average middle class case of overall assets of \$750,000 and there is a range of perhaps 15% in outcome and with every percentage point worth \$7,500, then it is worth raising all sorts of past conduct and behaviour as contribution.

What is the answer? We need to learn from our clients in mediation. For them, the factors and values that pervaded their relationship are still important. For many, equality of status, if not of roles and financial contribution, is still of value. This is how many couples now live. This is how many women now see their commitments to the sacrifices inherent in marriage. Most couples do not expect to pick over the entrails of many years of relationship to work out present distribution of finances.

As soon as the outcome deviates from equality, save for factors which both parties (and the public at large) generally accept is fair, the law is making a judgement on the relationship and specifically on the party getting less than 50%. Why did they perform or behave or act in a way as to deserve less than half? Why are they at fault?

When a couple are trying to start their new lives post relationship break up and it is accepted as positive and healthy for them to turn away from the failure of the past relationship, arguments of contribution law explicitly focus them back on the events, recriminations and actions of the past. Some aspects of contribution law delay the ability to move on from the past until the case is all over.

The Australian public is very fortunate to have a no fault divorce situation. They have though unknowingly allowed a "fault" based system to inhabit the criteria for resolving financial matters. The answer is to preserve the need to look at any adjustments for future needs, prejudices by the relationship and other fairness and equity principles. These discretionary elements are hugely valuable in Australia e.g. in contrast to the equivalent in France. But save for certain factors, most modern couples regard themselves as equal partners in equal relationships and expect to be treated as such if it shall end. They do not expect events of many years previously to be taken up and used to give a marking system of points of contribution to the relationship. The eventual satisfaction with the outcome is then not high as they are mostly aware they are playing a game to rules that had no relevance in the relationship. Contribution remains a sound basis for fair outcomes but with a narrower definition than hitherto in practice, as there is a risk that some aspects of contribution are getting out of step of the public's own fairness perceptions and focusing unhelpfully and negatively on the past.

## THE CULTURE OF PRACTICE

"Its not what you do to me, its how you do it": getting the best outcome is not enough

A key worldwide trend in family law practice has been to the conciliatory approach, aimed at out of court settlements and alternative dispute resolutions. Australia was an early global leader, in advancing widespread reference to mediation and more recently bringing in binding arbitration. But for most clients their primary contact with the family justice system is still the lawyer. And for many clients, it is not just the outcome that matters but how they get there. Of course none want to or expect to be undersold in a settlement. But at perhaps the most emotionally painful time of their lives, they need a resolution process which respects and understands their distress and turmoil, specifically not adding to it and preferably finding ways to make it less painful in dealing with the "legal bits".

Hence the adoption in some countries of an overtly conciliatory approach, with codes of practice to enable cases to be dealt with in a way which uses "an approach which is sensitive, constructive, cost-effective and most likely to result in an agreement", "preserves people's dignity", "encourages family members to deal with each other in a civilised way, for example for parents to put their own differences aside and to agree arrangements that are best for the children." (English SFLA Code)

Even without such an explicit code, many practitioners in most parts of Australia are practising in such a method. So why, in just a few places, do some lawyers undertake, and accept and admit they undertake, the work in an aggressive, court orientated and “gladiatorial” fashion? Different reasons are given for the survival of this culture. But it often works against a conciliatory, early settlement approach and against the reforms and innovations brought in by the law and the new Rules. It does not help parties to co-parent or to communicate meaningfully or trustfully after the litigation is finally ended. Too often an overly conflictual approach by lawyers leaves the parties in conflict long after the “legal” dispute is finished.

Not all blame should be placed at the door of lawyers, either individually or as a local culture of practice. Clients can say no to an extremely aggressive approach or to over litigiousness. They must take responsibility for the actions of their lawyers on their behalf. However clients are at their weakest and most vulnerable when they instruct us. They are also often distrustful of their spouse and so quite prepared to walk along the road of using a litigious approach. So whilst clients have responsibility, they cannot alone be blamed for a particular culture. Moreover we have a responsibility to help clients at a time of relationship break down to overcome their more negative feelings and responses in order to help them move on more quickly and positively.

Changing a culture of practice is difficult. The first step is a recognition of a need for change. The second is culture alternatives that are publicly known; for local lawyers to set themselves up as presenting a clear difference in approach and allow the public to choose. The third, and quite vital, is for the alternative culture and approach to be given active, vocal and positive support, especially by the judiciary; clients must not feel they and their lawyers are at a disadvantage if adopting a conciliatory, early settlement approach. The fourth is for those in charge to endorse the culture change. The Law Society and Law Council must encourage good practice guidelines and very publicly advance protocols of approach.

One of the biggest opportunities recently for a wholesale change in culture was the new Rules. Perhaps it was a pity that some seminars concentrated on the vexed issues such as experts reports. There is a need to reflect on what the work of the family law profession will look like, and feel like, if the new Rules, in spirit as well as technical application, are fully applied.

What do clients remember of our service? The fiercely fought outcome? The strategic manoeuvrings en route to court? The keen and committed representation? The willingness to listen and to suggest particular approaches? The personal style? The reality is probably our bill! But if clients prefer a particular approach, how can we move the culture on to get the approach better?

As conciliatory lawyers, we have almost impossible tasks; one moment ultra amicable, the next against a dishonest party using every tactical step in outright war and the next against a party presenting as reasonable yet our having to convince a vulnerable client to allow us to take assertive action to discover the truth. We change roles frequently and this is very hard on us, and hard for us, as practitioners. But we do so from a standpoint of being conciliatory and resolution centred. It is in fact so much easier to have a sole standpoint of court based, aggressive and non conciliatory. Yet this is the culture which needs to change. Changing the law alone is not enough.

[“Behold, is this a rare sighting of a mediation?”](#)

What has happened to mediation? Not court based hearings which share some characteristics with mediation. Not child issues mediations. But financial issues mediation. Australia led the world with huge government grants and initiatives. Envious eyes looked down under. Still today, mediators in other parts of the world come to Australia to research and discuss. But where is it all happening? And then as a significant avenue of dispute resolution?

The sad state of affairs is that mediation in Australia in finance work, where many costs savings can be

made and where much avoidance of the court based process and timetable is much needed, is rare in our city centres. Has there been so little work that all those trained have given up? Have lawyers breathed a sigh of relief that they have “seen off” the threat of mediation, even with the new Rules?

Experience in some countries is that good, private, lawyer-supported mediation dealing with finance work takes away very little work from specialists. Instead, having access to good mediation is a vital tool for lawyers for those cases where suitable.

The reasons why mediation is not succeeding as hoped are various both here as in many other western countries. But mediation still has a vital role to play as a form of ADR to provide clients with a range of options to resolve their cases. For many clients with difficult finance issues or all issues, mediation with private, well qualified lawyer mediators is an option much favoured. Australia may have dropped the mediation baton but should pick it up and swiftly.

### The door of the court

There are good times to settle a case. Between the parties direct but after legal advice. Before proceedings are commenced. In mediation. At round table meetings. After disclosure. After the introduction of specialist counsel well in advance of the final hearing. Good times. Classic opportunities to have a settlement.

Then there is the worse time to settle a case: at the door of the court. Briefs have been delivered and most of the costs of the case incurred. The parties have been through the Terrors which is the pre final hearing anxieties. The judge is available and time allotted. The case is ready for adjudication. Offers (should) have been made well in advance and thoroughly considered and rejected. Door of the court negotiation is positional, and never principled, bargaining. It is brinkmanship and victory to the gambler.

So why do many cases settle there? Australia may have the same high settlement rate as other western countries but many settlements are close to the final hearing and many are at the door of the court, on the day itself. Why? Many reasons are given by practitioners. But the fact itself seems to be recognised. Such settlements can and should be reached earlier. Clients prefer this. How can this culture be changed?

## PRACTICE DEVELOPMENT

### Small is beautiful but not always perfectly formed

The last twenty years have seen three major shifts and trends in legal professions across the western world.

The first, in the mid 80s to mid 90s, was the decisions by large corporate law firms to end private client work, including family law. Some family lawyers are still holding on but the pressures are huge. There is now little family law work undertaken in the major law firms. Whilst there must be realism about charging rates, there were many advantages of working in family law in a corporate environment.

Secondly, from the early to mid 90s, another trend has been the rise of niche, specialist law practices. Some practices have gone further, being committed just to children work, care work, finance work or international work in the domestic context.

The third trend from the mid 90s has been the multi-disciplinary firm. This has scared law societies world wide as they have feared take overs by accountants. In fact, family law has again quietly shown what

can be done. Family law resolution cannot now be undertaken just by lawyers. Mediators, counsellors, arbitrators and others have a vital role to play. So it has made sense to combine to produce a more complete family law practice. Family law has shown law societies how multi disciplinary practices can work well.

A number of implications flow from these trends, some seen here in Australia and some seen in other jurisdictions. They are too wide for this paper but are crucial for all practice managers. However what are the effects for clients and especially for the early and conciliatory resolution of disputes?

First, most who have worked in good sized specialist practices testify to the benefit of the collegiate environment; the chance to share with other specialists doing similar work, regular in house meetings, updates on law and procedure, skills training, the passing on of the experience of partners, the sharing of ideas, visions and creativity of certain practitioners, the thoroughness and detailed application of others. Of course some practices are no more than chambers with each keeping to themselves. But generally many feel they are better lawyers and provide a better service in a collegiate atmosphere of sharing in the work. In turn, clients often receive a good service. The trend is likely to continue as many younger lawyers gravitate to specialist practices earlier in their careers. The lesson for managers is to ensure the sharing of case work, responsibilities, knowledge and skills.

Secondly, there is a huge benefit in only having to obtain text books and electronic materials for one area of work, so the practice is able to become even more specialised and resourced. Again this is better for clients.

Thirdly, having ancillary professionals in-house or in a very close relationship means more likely referrals each way, more opportunity for skills based training from ancillary professionals who are invariably better trained and better skilled in the wider aspects of the work than lawyers, more opportunity to discuss methods and ways of resolving cases outside the purely court based system. Some clients feel, at least initially, that they do not need or want to use the ancillary professionals but are more comfortable selecting a practice that has such assistance available.

Fourthly, there are some disadvantages for specialisation. A too narrow outlook can arise where practitioners do not have access to lawyers in other areas of work - a close network of other specialist firms is essential. General trends in the law and practice can be missed as practitioners become isolated in family law alone. A specialist practice can be vulnerable if the profitability of that aspect of law declines, but most good practice managers should foresee! Perhaps, for many assistants, the biggest disadvantage is that some small firms have been the worse employers, with poor pay, poor systems of work and more opportunity to a dictatorial approach from managers without any wider reference point. (The flexibility of smaller practices are often overlooked!) It is also the continued dichotomy of the excellent case worker and the hopeless manager. Many smaller firms do not have external verification of practice standards. This should change but is unlikely in the short term. Ultimately employees vote by moving firms. But this does not help clients. The challenge is to provide an environment of the standards of bigger firms yet keeping the advantages of niche practices.

Overall, family law may have suffered in ceasing to be part of the larger law firms but it has more than amply shown the way as leading in the creation of niche, specialist practices and in multi disciplinary working. Clients have been the beneficiaries. But each practice (whether specialist or general) needs continually to assess how its benefits and attributes can continue to be exploited to help practitioners and clients.

#### Skills and client awareness training

Australia is well served with continuing education training in law and procedure, including new developments in law and procedure. But like other western jurisdictions, it is less well served in skills

teaching and awareness of wider issues in family relationships. It exists but it is starkly less to the fore when the brochures for seminars arrive. Why?

Is it more difficult to persuade a managing partner to sign a cheque for skills in negotiation techniques than for the law on super sharing? Is there less interest in the dynamics of family relationships leading to an awareness of where the client may be “coming from” than there is about instructing joint experts? Should one attend a seminar on the law on AVOs or a workshop on the effects of domestic abuse on a client and their ability to take part in the resolution process?

Inevitably it is not as simple as these choices. But there is a danger if a family law profession is very good on the hard law and less good on the “soft”, client related skills and awareness of the family dynamics etc. It is the latter skills which often impact more on clients and make practitioners more successful with clients and help in getting to successful resolutions.

Into this equation is mediation training. Some lawyers in other countries who have trained as mediators, even though not practising, have found it has a profound beneficial effect on their law practice, giving a much greater awareness of the ability to find common ground to reach a settlement, listening and communications skills, how to run a round table meeting, and much more. There is a cost to such training but it is highly worthwhile for all specialist family lawyers. It adds hugely to the general approach and culture of a legal profession.

## CONCLUSION

Justice is like a river flowing through civilisation and through nations. At the source of the river – the early stages of societies - family law justice was quick, simple and unsophisticated. Perhaps an equal division of everything - presuming notions of gender equality perhaps not found in all early societies!

As the river of justice progressed through the development of societies, more elements of fairness arrived. An awareness that the primary carer needed the family home or at least a reasonable property representing more than 50% of the assets in order to house the children. Justice thus required discernment about needs, appropriate provision and how to deal with the unhappiness of the party deprived of assets for the sake of the children. The river was getting wider and deeper. It was taking longer to cross.

More sophistication arrived in the form of allocating assets based on contributions. Justice felt that it was better not to allocate fault on relationship breakdown. Justice tried to allocate time for children to spend with each parent based on needs of children, even though these varied from family to family and from year to year. The river of justice was now meandering as it found fairness and justice in different places in different situations. Crossing points remained, but now needed skilled ferrymen with significant fees.

And what of the river of family law justice in Australia in 2004. Are clients finding it easy to cross? Are they finding it difficult to access? Are they finding it pure and meeting their expectations or polluted and a different sort of justice to their own feelings of what is fair? Has family law justice become too sophisticated? Has it become too complex, in reality in practice as distinct from the outward publicity? Has it lost touch with life values and relationship expectations of the community? Specifically has it catered too much for those who seek the justice of the court room and not cared enough for those who seek the justice and fairness of the early resolution?

Civilisations move on. Technologies improve. The Arts broaden. Respect for human life and personal relationships heightens. Moralities and values often become more tolerant. And what of justice? Especially family justice?

Family justice is now more refined by embracing past and present knowledge, learning, experience and values of society. It has become more understanding of different family patterns and relationships. It has become fairer by being flexible and able to be reformed as changes demand. It has become more accessible and approachable. It has become less discriminatory. It acts as a guide, a teacher, to standards of fairness of outcomes.

But family justice always struggles with over sophistication. Purer, sophisticated justice is only found in the court room. Some find that attractive and can pay for it, in financial and non financial terms. But most seek a justice system which is fair, but also quick, clear, accessible and proportionate in cost. Most do not want to go to court. They want a justice system which ensures they do not have to go to court unless absolutely necessary.

So where is Australia in 2004 progressing in its family law justice system? Certainly the world believes it has progressed a very long way. Outwardly there is much to be proud of. But the family law justice system is now in danger of being over sophisticated, of placing too much weight on the cases which go to trial and of neglecting the methods of helping the majority who do not want nor need to go anywhere close to a final hearing. Some elements in the law need to be changed accordingly. Just as Australia has taught the world many good things in family law, so we can learn from different cultures of practice and thereby benefit not only our clients and their wider family relationships but also their children, for this generation and the next.

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