

THERAPEUTIC INTERVENTION ANALYSIS IN FAMILY LAW PARENTING MATTERS

By James Naughton¹ and Louise O'Reilly²

1. Introduction

"... conflict in itself and divorce in itself are not necessarily damaging for children in the long term. Unresolved, chronic conflict is most toxic and actions that either improve this and/or effectively buffer children against self blame and the trauma of adult conflict are essential to a child's longer term well-being..."³

1. In the context of parenting matters, therapeutic intervention has an important role to play. It is widely accepted that therapeutic intervention is not only appropriate where a person suffers from a condition which requires 'therapy' as a form of treatment, it is an essential tool that can be used to assist parties and their children to mitigate the effects of separation by providing support where needed and assisting parties to agree upon arrangements for children which are suited to them as individuals.
2. Therapeutic intervention in the context of a family law matter can include:
 - counselling or therapy facilitated by a counsellor, social worker, psychologist or psychiatrist before separation or following separation;
 - mediation (including where appropriate child inclusive mediation) as a compulsory step prior to filing an application⁴ and as a tool for resolving parenting arrangements for children;
 - court ordered therapy following parenting proceedings such as court ordered counselling, therapy, medical intervention and parenting courses (such as Triple P parenting program).
3. This paper will address:
 - when it is desirable to seek therapeutic intervention for children of families involved in a post-separation parenting dispute;
 - the obligations that parents have to consult and obtain agreement about therapeutic intervention;
 - the basis upon which reports arising from therapeutic intervention may be admitted into evidence;

¹ Director, Rice Naughton Buckley

² Associate, Rice Naughton Buckley

³ *"Child inclusive practice in family and child counselling and family and child mediation"*

<http://www.fahcsia.gov.au/sa/families/pubs/Childinclusive/Pages/exec.aspx>

⁴ Refer to Section 60I of the Family Law Act

- the circumstances in which the court is likely to order psychiatric analysis of parties or children;
- what weight will be placed on reports derived from psychiatric analysis.

2. **When is it desirable to seek therapeutic intervention for children of families involved in a post-separation parenting dispute?**

4. Therapeutic intervention is an important tool in the context of a relationship breakdown or family law proceedings, particularly where children are involved. In a paper by a leading child psychiatrist, Dr Brent Waters, he states:⁵

"It is a universal finding in family research conducted about children who reach the attention of mental health or counselling services that such children are more likely than the general population to come either from broken families or from families in which the parental relationship is poor."

5. The effects of the stress of separation on children are significant and damaging. In a Position Statement prepared for the Australian Psychological Society, the authors McIntosh, Burke, Dour and Gridley state:⁶

"Children of divorce have been found to experience substantial distress, and divorce is associated with an increased risk for a number of adjustment, achievement and relationship difficulties... Children of divorced families, compared with never divorced families are:

- *more disobedient, aggressive, non-compliant and lacking in self-regulation;*
- *more likely to have problems in social and close relationships, such as those with their mothers and fathers, authority figures, siblings and peers;*
- *more likely to associate with antisocial peers;*
- *more likely to use alcohol, cigarettes and drugs;*
- *more likely to commence sexual activity earlier, to give birth to a child as a teenager, and to have more pregnancies outside marriage than children of non-divorced parents."*

6. As solicitors we will often recommend that clients seek counselling at the outset of a matter where there is evidence it may be necessary to do so. Those situations include ones where clients appear excessively sad, depressed, needy or dangerous.

7. It is however worth considering referring clients as a matter of course because as solicitors we are not necessarily trained to identify which clients need therapeutic intervention, and even less qualified in relation to which children of clients need some form of therapeutic intervention.

⁵ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p1.

⁶ McIntosh, Burke, Dour and Gridley (2009) 'Parenting After Separation', p3

8. Therapeutic interventions may be used at any time during the course of a relationship including:
- when parents are contemplating separation;
 - once an intention to separate has been formed;
 - as part of a mediation process to reach agreement for parenting arrangements;
 - during proceedings;
 - following proceedings.

Benefit of Early interventions

9. The goals of child-focused dispute resolution are to:⁷
- create an environment that supports disputing parents in actively considering the unique needs of each of their children;
 - facilitate a parenting agreement that preserves significant relationships and supports children's psychological adjustment to the separation, including recovery from parental acrimony and protection from further conflict;
 - support parents to leave the dispute resolution forum on higher rather than diminished ground with respect to their post-separation parenting; and
 - ensure that the ongoing mediation/litigation process and the agreements or decisions reached reflect the basic psycho-developmental needs of each child, to the extent that they can be known without the involvement of the children.
10. Parenting programs have been shown to be effective in treating and preventing a wide variety of child adjustment difficulties. These interventions have focussed on psychoeducation and skills-based programs for parents, with program content based on demonstrating the links between divorce, parental behaviour and child adjustment. In such programs parents have reported increased parental cooperation, restoration of parental alliance, improved children's well-being, and a belief that early attendance at separated parenting programs will prevent or reduce enduring parental conflict.⁸
11. Research comparing collaborative forums for dispute resolution and litigation, found that parents who participated in mediation had significantly lower conflict with each other, and that both parents were generally significantly more involved in their children's lives⁹.
12. In cases with issues of domestic violence, the appropriateness of mediation needs to be considered.

⁷ Dr Jennifer McIntosh, AFRC Resource sheet No. 1, 2007 Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors

⁸ McIntosh, Burke, Dour and Gridley (2009) 'Parenting After Separation', p5

⁹ McIntosh, Burke, Dour and Gridley (2009) 'Parenting After Separation', p5

13. Such cases require careful screening for current and historical safety issues, and modified mediation practices if mediation goes ahead. It has been argued that power imbalances enhanced by domestic violence may result in mediation inherently unfair and unworkable.¹⁰

Interventions used following proceedings

14. When proceedings come to an end it is also often appropriate for the Court to make Orders which amount to a therapeutic intervention, to ensure that the Orders are adequately explained to children or to treating health professionals, and to provide ongoing assistance to children.
15. As an example, in *Irish & Michelle* (2009) Fam CA 66 his Honour Justice Benjamin made Orders which caused two children aged 9 and 7 to live with the father, which represented a reversal of previous care arrangements. Primarily his Honour's decision was centred around an inability on the mother's part to positively facilitate a meaningful relationship between the children and the father. His Honour made the following Orders dealing with the issue of communication of the Orders and related material to the children and treating health professionals:-

"15. The Independent Children's Lawyer be discharged upon completion of her obligations arising from these orders being:-

- (a) Advising the children of the nature of these orders.*
- (b) Provide to B's therapist a copy of:

 - (i) These Orders;*
 - (ii) The reasons upon which these orders are based;*
 - (iii) The expert report from Mr V;*
 - (iv) The Family Report from Ms F;"**

16. His Honour made the following Orders dealing with therapeutic intervention for one of the children following the final hearing:-

"13. The mother and father will do all acts and things to facilitate B's attendance upon a therapist for the purpose of receiving therapeutic counselling to assist with the issues arising from the conflict and her anxiety, grief and loss;

- (a) The mother and the father will share equally any costs associated with the child's counselling;*
- (b) The parties will ensure that the child is presented for such counselling as recommended by the counsellor."*

17. Where it is perceived that it is in children's interests for both the children and the parents to attend therapeutic relationship counselling in order to improve family relationships or to deal with ongoing family conflict, final Orders may be considered in terms such as the following:-

¹⁰ McIntosh, Burke, Dour and Gridley (2009) *'Parenting After Separation'*, p5

- *That the wife arrange for the attendance of the children for therapeutic relationship counselling at the premises of (insert name), (insert occupation of treating practitioner), at such times and dates as Mr/Ms (insert name of treating practitioner) may request; and*
- *That each of the parties shall participate in counselling with Mr/Ms (insert name of treating practitioner) and attend at his/her premises as Mr/Ms (insert name of treating practitioner) may request, and not otherwise.*

18. At the conclusion of some parenting proceedings the Court will perceive that it is only through achieving certain outcomes through therapeutic intervention for a parent that some time or some unsupervised time will be in the children's best interests. An example of the kind of orders that have found to be appropriate, in such a situation and which addresses risk as well as the desirability of facilitating a relationship if that is possible, is as follows:

1. *In the event that the Father wishes to spend more frequent, unsupervised or overnight time with the child the Father must provide the Mother with 4 weeks notice of his proposal, and such notice must be accompanied by:*
 - (a) *a report from his treating psychiatrist confirming that there has been significant improvement in his illicit drug use, general mental state and compliance with treatment; and*
 - (b) *a report from (insert name of provider) in relation to hair strand drug testing undertaken by the Father, which covers the 3 month period preceding the request, tests for all illicit substances, and which is negative for any illicit substances; and*
 - (c) *the Father's agreement to obtain an independent psychiatric evaluation, to occur upon the following conditions:*
 - (i) *The evaluation is to be undertaken by a suitably qualified psychiatrist agreed by the Mother;*
 - (ii) *The cost of the report is to be met by the Father;*
 - (iii) *The independent psychiatrist is to be provided with copies of the report of Dr [insert] dated [insert], and the treating psychiatrist's report and hair strand test result report referred to in Order 1(a) and (b) hereof; and*
 - (iv) *The report must contain the conclusion of the independent psychiatrist as to whether, in the opinion of that independent psychiatrist, there has been a*

significant improvement in the Father's illicit drug use, general mental state and compliance with treatment.

2. *The Father must obtain the independent psychiatric evaluation referred to in Order 1(c) hereof as soon as possible after providing notification in accordance with Order 1.*
3. *If the independent psychiatric evaluation prepared in accordance with Order 1(c) hereof confirms that there has been significant improvement in the Father's illicit drug use, general mental state and compliance with treatment, and the parents are unable to reach an agreement in relation the Father's proposal for more frequent, unsupervised or overnight time with the child, then the parties must attend upon a Family Dispute Resolution Practitioner in an attempt to resolve those issues without recourse to further litigation.*
4. *A request may be made in writing by either parent for the parties to attend upon a Family Dispute Resolution Practitioner. Such a request must be in writing and set out:*
 - (a) *The request that the other party attend dispute resolution;*
 - (b) *The place to attend upon the Family Dispute Resolution Practitioner;*
 - (c) *3 available dates and times for attendance at the proposed dispute resolution;*
 - (d) *Costs involved (with each party to bear their own costs and/or where possible to share equally the total costs).*
5. *The parent in receipt of such a request must respond within 7 days of the date of request.*
6. *Both parents must attend upon the Family Dispute Resolution Practitioner within 28 days of the parent's written request for both parents to attend upon that Family Dispute Resolution Practitioner.*
7. *Neither parent may apply to the Family Court of Australia or Federal Magistrates Court of Australia until they have attended upon the Family Dispute Resolution Practitioner pursuant to these Orders, unless in relation to an urgent issue.*

Family Consultants – A form of intervention?

19. A family consultant will often be appointed as an expert of the Court during proceedings, pursuant to s69ZS of the *Family Law Act*. The main functions are set out in s11A as follows:
- *assisting and advising people involved in proceedings;*
 - *assisting and advising courts, and giving evidence in relation to proceedings;*
 - *helping people involved in the proceedings to resolve disputes that are the subject of the proceedings;*
 - *reporting to the Court under s55A¹¹ and 62G¹²;*
 - *advising the Court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.*
20. The role of a family consultant is broad enough to continue after proceedings have ended. In *John and Chris (2007) FamCA 393* the Court made Orders concerning a four year old child where the child's mother had sought an order permitting her to relocate with the child from Hobart to Queensland. His Honour Justice Benjamin found that the mother did not encourage a relationship between father and child and also that the difficult problem of transition of the child, had become worse and worse over the 8 to 12 month period prior to trial. His Honour therefore made some parenting Orders which graduated time between the father and the child over a six week period, beyond which that time was to increase to each second weekend and for a week during each school holiday period; and made the following Order in relation to the initial six week period:-
- (a) for the purposes of spending time with set out above, the mother is to deliver the child to the office of the Family Consultants, Hobart fifteen minutes before the commencement of each such period that the child is to spend time with the father and to leave the child and leave the building as reasonably directed by a Family Consultant with a Family Consultant to facilitate the transition of the care from the mother to the father. Further that the mother accept any reasonable direction of the Family Consultant; and
- (b) that when the mother delivers the child to the family consultant she attend with the child and no-one else.

¹¹ S55A(2) provides for a family consultant to prepare a report regarding arrangements for the care, welfare and development of children, in any divorce application.

¹² S62G(2) provides that in any proceedings the care, welfare and development of a child is relevant, the court can direct a family consultant to give the court a report.

21. A family consultant however is not a therapist. The Full Court held in *Love, Miller and Miller (1986) FLC 91-751* that therapy was not part of the role of a Family Court counsellor.
22. In that case the child saw a court counsellor for mandatory counselling. The Court was satisfied that the court counsellor both told the parents that the child wished to live with the mother, and told the child that he would be doing so in a few weeks.
23. His Honour Justice Rourke considered that the counsellor had clearly exceeded her authority, in endeavouring to administer what she regarded as appropriate therapy to the child. He considered that the counsellor had a clear responsibility to confine his or her activities to counselling and to expert advice. It was no part of the counsellor's role to administer therapy of any kind to the children.
24. As Michael Foster of Counsel has noted¹³, there is no suggestion in the s11A statement of specific functions or in the Explanatory Memorandum that the Family Court consultant should have a therapeutic role. In fact it is consistent with the 2006 parenting reforms, that did away with the Family Court counsellor (who did confidential counselling and prepared family reports) and introduced the family counsellor, the family dispute resolution practitioner and the family consultant that therapy will be provided by specialists outside the court system.

Psychiatric assessments

25. Another form of intervention during proceedings is the appointment of a medical expert to investigate either a child's mental health or that of their parents, so that the impact on parenting issues of mental health is understood before recommendations are made to the Court as to what parenting arrangements may be appropriate in that parties' circumstances.
26. Parties are able to agree to jointly attend upon such an expert prior to proceedings, or to the joint appointment of such an expert during proceedings, where at least one parent or the child has a suspected or diagnosed mental condition.
27. Dr Brent Waters has cautioned against obtaining the opinion of a general psychiatrist who was trained mainly to deal with adults, or of obtaining a ringing endorsement about mental health from a treating psychiatrist. In relation to the former, the risks include opinions which do not comment on the implications of the mental disturbance to the task of parenting, or worse, ones which are centred on the benefit to the parent's mental health (eg, a recommendation that contact would be good for the parent's mental health): ones antithetical to the central tenets of child welfare.¹⁴
28. In relation to the limitations that evidence from treating psychiatrists might have, an observation of His Honour Justice Murphy concerning evidence of a child and adolescent psychiatrist who was treating children in a matter of *Rod and Bloomberg (2008) FamCA 487* is instructive:-

142. First, although the doctor himself does not place this caveat on his opinions, it seems to me important to observe that he saw the children as a therapist. That is, his task was to treat the children as they presented rather than applying appropriate scepticism to all data (including what the children say) or focussing on the veracity of that data each of which ought, in my view, inform

¹³ Michael Foster (2011) "*The Powers and Responsibilities of the Family Consultant*" Australian Family Lawyer, Vol 21 No 3, pps16-17.

¹⁴ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p5.

reports with a forensic purpose. An illustration of the distinction is given, in my view, by the report of the psychiatrist, Dr S, in respect of the mother and, in particular, the parts of that report earlier quoted.

3. What obligation does a parent have to consult and obtain agreement about therapeutic intervention?

Relevant Legislative Provisions

29. It is generally within the bounds of a parent's responsibility to be able to consent to medical treatment for and on behalf of his or her child.¹⁵
30. If proceedings are not yet on foot and no orders are in force, the effect of section 61C of the Family Law Act is that parents may exercise the duties, powers, responsibilities and authority separately or jointly, whether they were married, lived together, never lived together or separated: per the Full Court in *Goode & Goode* (2006) FLC 93-286.
31. It is probable that it is in a majority of cases in which proceedings are on foot in relation to parenting matters or in which Orders have been made, that the presumption that the parents have equal shared parental responsibility is or has been applied.
32. The effect of the presumption applying is that parents have an obligation to consult and make decisions jointly about major long-term issues in relation to the child.¹⁶ The requirement to consult and make decisions jointly is defined as one to consult in relation to the issue and to make a genuine effort to come to a joint decision about that issue.¹⁷
33. Is a decision to send a child to a psychologist or psychiatrist a decision in relation to a long term issue? The relevance of that question is that section 65DAE says that a parent spending time with a child in accordance with an Order, need not consult the other parent about issues that are not major long term issues.
34. The notes to that section give guidance that decisions about what the child eats or wears are usually not major long term issues, but that is of no practical assistance to determining the present question.
35. In *Chappell & Chappell* (2008) FLC 93-382 the Full Court posed the question, how in practice does a parent (or ultimately a Court) determine whether or not an issue of parental responsibility is a "major long term issue." The Court said:

"...the legislation contemplates a degree of elasticity in determining where the line falls between those decisions that are "major long-term" and those that are not. Such elasticity, in our view, affords proper recognition to the almost endless variety of family circumstances."¹⁸

¹⁵ Per Dessau J in *Re Jamie* (Special Medical Procedure) 2011 FamCa 248.

¹⁶ Section 65DAC(1) and (2) of the *Family Law Act*.

¹⁷ Section 65DAC(3) of the *Family Law Act*.

¹⁸ At paragraph 40

36. Intervention by a psychologist or a psychiatrist to a child is obviously not a commonplace or everyday occurrence. That is one practical signpost as to the question of whether it is a "long term issue."
37. A second one is the scheme of the parenting legislation itself. In Part VII the Objects and the Principles underlying the Objects are replete with emphasis on a preferred joint or at least inclusive approach to parenting: for example:-
38. Section 60B(A)(1) provides:

The objects of this Part are to ensure that the best interests of children are met by:

Ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child;"

39. Section 60B(2) provides:

The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

Parents jointly share duties and responsibilities concerning the care, welfare and development of their children.

Common Scenarios

40. The most common scenarios in which parents fall into dispute about the need for psychological or psychiatric intervention for children, are that in which a parent perceives that a child is not coping in the wake of a separation, or a parent perceives that an aspect of the other parents' parenting approach or personality or circumstances, is affecting the psychological or psychiatric well-being of the child.
41. In many cases there will be compelling reasons to seek agreement about and participation in the intervention by the other parent. If the aim of the intervention is therapeutic usually a joint and agreed approach and participation by each parent will heighten chances of successful intervention.
42. The more difficult issues are those involving either refusal of the other parent to agree to the intervention, and/or mental health issues in one parent which are either relevant to the intervention or relevant to that party's decision- making about the intervention.
43. That refusal often arises because the non-consenting parent:
- considers that there is no problem and therefore intervention is unnecessary;
 - considers that the intervention proposed will either exacerbate a problem that is not serious or is temporary;
 - considers that the intervention proposed will create a problem that doesn't exist;

- lacks insight sufficient to acknowledge there is a problem which justifies intervention.

Common psychiatric features in parenting matters

44. In considering what sorts of mental health problems parents in post-separation parenting disputes might have, Dr Waters found that a useful feature of distinction was one between states of mind which broadly conform to the common conception of a disease, and states of mind which seem to be more or less lifelong and represent something about the individual's makeup.¹⁹
45. Diseases, or mental illness, are conditions which have a remitting course, such as anxiety which can come and go; or have a chronic and progressive course once they have developed, such as many cases of schizophrenia. Mental illnesses cause the individual to experience a great deal of suffering.
46. States of mind which represent something about an individual's makeup are called personality disorders. They are personality styles which generally cause no great discomfort to the sufferer, but which have a major impact on those around them.
47. Personality disorders have been colloquially divided into "mad", "bad" and "sad". The "mad" include paranoid personality disorder and schizotypal personality disorder. The "bad" include antisocial personality disorder, borderline personality disorder and narcissistic personality disorder. The "sad" include dependent personality disorder and avoidant personality disorder.
48. It is these diseases which can prevent one parent from accepting that an intervention for a child is appropriate and necessary. In such circumstances, the parent who considers the intervention is necessary will sometimes act in a unilateral manner in seeking the intervention. In the absence of a court order precluding such conduct, such unilateral action by a parent may not attract criticism provided that there is a reasonable basis for seeking the intervention. That observation is subject to the caveat that an order for equal shared parental responsibility generally obliges a joint approach to this form of intervention. Also, in circumstances where final Orders have been made by the Court, the failure to consult and make such a decision with the other parent may be a contravention of the Orders.

4. **What is the basis upon which reports arising from therapeutic intervention may be admitted into evidence?**

49. Parties sometimes agree to counselling by a psychologist or a psychiatrist as being "confidential and non-reportable". Subject to exceptions such as disclosures giving rise to obligations to report conduct to welfare authorities or law enforcement agencies it is reasonable to assume that agreements of that nature will be respected and upheld by Courts.
50. The importance of explicitly agreeing as to whether the counselling is reportable, was underlined in a decision of *Wardle and Wardle*²⁰ in which His Honour Justice Lambert considered a party's objection to admission into evidence of two family reports which had been prepared by a social worker at the instigation of the children's Separate Representative. The report writer had arguably been led into error by an Order which said both that a further family report be prepared by a

¹⁹ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p3.

²⁰ *Wardle and Wardle* (1990) FLC 92-162

social worker or other person nominated by the separate representative, and also that each party attend confidential counselling with the social worker or such other person nominated by the Separate Representative. In the result the same social worker produced two reports, which included material from the counselling. His Honour Justice Lambert said:-

30. True it is that the orders were ambivalent; but they at least provided the option for the separate representative to ensure that the counselling and reporting roles were performed by different professionals.

31. The family court counselling section has traditionally separated the roles, and there is good reason, based upon grounds of public policy to do so. That policy is implemented by the provisions of section 62 of the Family Law Act to which I have referred.

32. Confidentiality is designed to protect a person's right to control the dissemination of personal information about that person. The person will entrust such information to other persons who hold themselves out as possessing special skill and expertise in advising and assisting such persons as consult them in relation to problems that arise within their particular field of expertise. In so doing, the person seeking such advice and assistance enters into a confidential relationship with the person offering it.

33. It is a common feature of confidential relationships that the quality of the advice and assistance provided will depend not only upon the standard of expertise of the person providing it, but also on the extent and integrity of the disclosure of personal information furnished by the person seeking it. Trust, then, in maintaining confidentiality is an important factor in disclosure of personal information within confidential relationships.

34. The underlying policy principles with respect to the dissemination of personal information confidentially obtained are: (1) that it should not exceed that necessary to satisfy the purpose for which it was obtained; and, (2) that disclosures which violate the individual's reasonable expectations of privacy should only be permitted where there is a significant countervailing public interest.

*35. The broad base upon which the privilege relating to attempted reconciliation and negotiations with a view to settlement of matrimonial disputes, was founded in *McTaggart v McTaggart* (1949) Probate 94 and *Rogers v Rogers* [1964] HCA 25; (1965) 114 CLR 608, suggests that it applies equally to conciliation counselling.*

36. Confidentiality can of course be waived by informed consent. I am informed by the separate representative that Mr Parker could not raise any express waiver of confidentiality with respect to the counselling conferences by either party.

37. I am also informed by counsel for the husband that the husband's instructions were that he did not understand the counselling conferences to be confidential; and by counsel for the wife, that if she had understood that everything she said at those counselling conferences could be subsequently given in evidence, she would have taken a different attitude to disclosure at them.

38. I take the view that even if the court's orders had followed the terms of the signed minutes of orders, it would be a proper exercise of the court's discretion to exclude the

reports of Mr Parker that followed the counselling conferences, from the evidence, unless there was clear evidence that both parties gave their informed consent to disclosures made by themselves at those conferences being admitted into evidence in subsequent court proceedings between them relating to the custody of their child.

39. But they are bound by the court's orders, and the counselling conferences pursuant to those orders being confidential, then the court should exercise its discretion to exclude the family reports objected to, otherwise the policy provisions of section 62 of the Act expressly preserving the confidentiality of counselling conferences the parties are compelled to attend, will be circumvented. Confidentiality can, of course, be removed by statute, as it is with respect to the provisions relating to the furnishing of family reports contained in section 62A²¹ of the Family Law Act.

51. Where there is no agreement and a parent subpoenas the records of a provider of psychological or psychiatric intervention, the records are likely to be compellable, subject to objections on bases such as relevance and privacy considerations.
52. Sometimes the records of a psychologist or psychiatrist will contain contentious, sensitive or irrelevant material.
53. In *M and D* (2003) FMCA Scarlett FM dealt with a matter in which a child and family psychiatrist who treated the wife and the child who appeared at Court to object to production of his records. He argued that it was likely that serious or probably severe harm could result from inappropriate use of documents, especially if the treatment notes were used by the average lawyer without medical assistance. The issuing party however argued that the health of the parties was relevant to parenting ability and to the behaviour patterns of the child in the past and to medical issues.
54. Scarlett FM allowed the documents regarding the child to be inspected by the legal representatives with a view to making a decision as to their relevance in the proceedings, but not by the parties themselves. He refused to release the documents concerning the wife for inspection even on a limited basis, and adjourned that aspect to the trial Judge because he considered that the Court could not determine the relevance of the documents on the material before it. His Honour took into account the fact that the parties' final affidavit material had not been filed and that the application for release of the subpoenaed material could be revisited on the morning of the hearing when the affidavit material would be available. He ordered that the documents be placed in a sealed envelope and marked "*To be opened only by order of a Federal Magistrate*".
55. Scarlett FM noted that the production of documents upon subpoena is no guarantee that the documents will be admitted into evidence.
56. His Honour also noted that it goes without saying that where documents are produced, particularly documents of a medical nature, care must be exhibited at all times in dealing with these documents, for reasons of privacy amongst others. He also said that the Court must take the view that it should rely on the responsibilities to the Court of legal practitioners in dealing with documents that concern the health of the child, where in this case the question of the behaviour of a child the subject of the proceedings was concerned.

²¹ Now section 62G(8) provides that a report given to the Court by a family consultant under s62G(2), may be received in evidence.

Single Expert Evidence

57. Where the parties agree to obtain a report by a psychologist or a psychiatrist, the Court rules relating to single experts apply and there is usually no difficulty about the basis of admission into evidence of the report.
58. Where one party has obtained a report then its admission into evidence will depend upon its acceptance as expert evidence, although it is also possible also to admit evidence of a psychologist or psychiatrist on a basis other than as expert evidence, if the evidence falls into the categories identified in Rule 15.41 of the *Family Law Rules*.
59. The categories in Rule 15.41 which psychologists and psychiatrists may fit within are:-
- Evidence from a medical practitioner or other person who has provided treatment for a party or a child if it relates to the results of an examination, investigation or observation, a description of treatment carried out or recommended or opinion about the reasons for carrying out or recommending the treatment and the consequences of the treatment including a prognosis;
 - Evidence from an expert appointed by a party for a purpose other than for the purpose of giving advice or evidence, or the preparation of a report for a case or anticipated case so far as it relates to the party, child or subject matter of the case;
 - Evidence from an expert who has been associated, involved or had contact with a party, child or subject matter of a case for a purpose for a purpose other than the giving of advice or evidence, or the preparation of a report for a case or anticipated case, being evidence about that expert's association, involvement or contact with that party, child or subject matter.
60. The effect of Rule 15.41 is that a treating health professional who may otherwise be regarded as an expert and be bound by the expert evidence rules, may give admissible factual evidence of his or her involvement with a party or a child, but must not give opinion evidence except upon the basis set out in the Rule.
61. In *D and B* (1991) FLC ¶92-226 the Family Court considered the role of psychiatrists in child sexual abuse cases. The Court questioned the value of psychiatrists making assessments of whether or not child sexual abuse has occurred. In his judgment Burton J states:

*"The role of the psychiatrist is to draw from a child by proper questioning material which is relevant to whether or not a sexual abuse has occurred. The role of the psychiatrist is not to attach weight to untested material which he has read or which is put to him by other people. It is the role of the court to make a finding based upon the whole of the evidence after it has been tested. **It is my view that when a solicitor sends a family to a psychiatrist for an interview such as the one conducted by Dr G, he or she should impress upon that psychiatrist what his true role is. He is not being invited to try the case. He is being invited to use his professional training to provide material which can be of assistance to the court in making a final decision** (emphasis added). If that includes an opinion by the psychiatrist based upon the material adduced from the child, then such an opinion may not*

be tainted by having been affected by reliance upon other untested material and could have appropriate weight attached to it. Opinion based upon a psychiatrist's evaluation of untested statements and reports merely prolongs a trial and does not assist the court."

62. Some cases may require intervention in relation to the parents themselves, as their behaviour will invariably have a significant impact on children. This can be more difficult when parents have a personality disorder and are able to 'project' the image of themselves which they wish to portray to the expert. It is also difficult where there has been an allegation of some wrong doing but it has not yet been proven.
63. In those circumstances it may be necessary to instruct the expert to assume that the Court either accepts certain evidence, or prefers certain evidence. An example of how to prepare such instructions is as follows:

*1. If it is determined by the Court that **[person]** has been **physically violent** towards young females in close relationships with him, as set out in the following evidence:*

...[insert evidence]

*is there any risk of physical abuse to the child by **[person]**:*

- (a) in the short term;
(b) in the medium term; and
(c) in the longer term?*

*2. If it is determined by the Court that **[person]** has sexually abused young females in close relationships with him, as set out in the following evidence:*

...[insert evidence]

*is there any risk of sexual abuse to the child, **[person]** by **[person]**:*

- (a) in the short term;
(b) in the medium term; and
(c) in the longer term?*

3. The evidence of the following:

*(a) that **[person]** displays aggressive, impulsive behaviour as set out in:*

...[insert evidence]

*if this evidence, once tested by the Court, is preferred by the Court, is there any risk to the psychological and emotional development of the child **[person]**:*

- (a) in the short term;
(b) in the medium term; and
(c) in the longer term?*

Further, based on this evidence being preferred, is the child's exposure to these character traits of [person] likely to have any adverse effect on her future relationships?

64. While it may be appropriate or helpful to your own client's case to instruct an adversarial expert instructed by your own client to consider and respond to questions presented in this manner, it may be problematic to instruct a single expert, an expert engaged by the other party or two adversarial experts collaborating for the purpose of a joint report in this manner. This is because the other party would be unlikely to consent to an approach to instructing experts that assumes that untested evidence will be accepted by the Court, where that evidence is potentially harmful to the other party's case.

What evidence Court can consider

65. Psychiatric and psychological evidence must be rooted in the circumstances of the parties, divined from material admitted into evidence in the proceedings. This is so notwithstanding existence of a provision in section 69ZX(3) of the *Family Law Act* which says that the court may in child-related proceedings, receive into evidence the transcript of evidence in any other proceedings before the Court or another Court or a tribunal and draw any conclusions of fact from that transcript as it thinks proper, and adopt any recommendation, finding, decision or judgment of any court, person or body of that kind.
66. It is clearly unsafe to use such a provision to adopt evidence of "core knowledge" in the area of the social sciences given in other cases. The temptation for advocates and Judges to adopt such knowledge is great: as one commentator has noted²², Judges sometimes explicitly assume that a two year old is in danger of suffering separation anxiety if that child is removed from a person with whom he or she is primarily bonded; a Judge might understand what a borderline personality disorder is and its likely effects on the dynamics of the case before him or her, having heard many cases where such evidence has been given. But unless evidence of those matters is directly given by an expert in a case before the judicial officer, care needs to be taken about assumptions being applied to a particular case from general knowledge acquired from experience or expert opinions about concepts, given in other cases.
67. The effect of improperly relying upon such knowledge was illustrated in the case of *Lamereaux & Noirot* [2008] FamCAFC 22:

57. As we have already noted, there is no suggestion that his Honour brought to the attention of parties' legal representatives at the trial his decision in A and A. The circumstances in which Dr L gave evidence in that case were not known to the parties, nor were the facts and circumstances which may have shaped or influenced his expert evidence known. Given the impact of those matters on the admissibility of such expert opinion evidence, and weight to which it may be entitled if admissible (see Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705, per Heydon JA at paragraph 85 of judgment), we struggle to understand how it could have safely been relied upon by the trial Judge, even if the parties had been afforded procedural fairness with respect to it.

58. Neither party had the opportunity to question Dr L, or to put the gist of his evidence, as set out by the trial Judge in his judgment in A and A, to the psychologist or the

²² "A Review of the Case Law 2008-2009, An Update", the Honourable Justice Garry Watts, Sydney Family Law Intensive, 14 February 2009

Family Consultant to obtain their respective opinions on the nature of the parental relationship of the child with each of the parties so far as it was relevant to the likely effect on the child from separation from either parent. We consider that this denial of procedural fairness constitutes appealable error.

59. *It is impossible for us (and more significantly, the parties) to discern what effect, if any, the evidence of Dr L given in A and A had on the trial Judge in determining this case. We are not satisfied that the trial Judge would have reached the same conclusions as he did, had he not had regard to the evidence he perceived Dr L to have given in the earlier case.*

60. *We are satisfied, having regard to the provisions of the [Evidence Act](#) relevant to judicial notice, the authorities on the use of extraneous material, and the need to afford procedural fairness to the parties, which in the circumstances of this case would have included the right to cross examine Dr L, and further cross examine the psychologist and Family Consultant, that it was inappropriate for his Honour to incorporate Dr L's evidence into his reasons for judgment, and the course adopted by him constitutes appealable error.*

5. **In what circumstances is the court likely to order psychiatric analysis of parties or children?**

Children

Early views

- 68. Early case law indicates that the Court was initially reluctant to consider psychiatric evidence obtained in relation to children.
- 69. His Honour Justice Begg considered use of psychiatric evidence in *Lynch v Lynch* (1966) 8 FLR 433 and said:

"In my view the evidence of a psychiatrist usually has little place in a contested custody application... I have noticed that a tendency is developing to employ a psychiatrist virtually to argue the applicant's case rather than to give a straightforward medical opinion about a child's nervous or mental condition and the possible effect of the strains and the stresses...It is not the province of psychiatrists to determine questions of custody on one-sided versions of disputed facts without the aid of sworn evidence which is subject to examination and cross-examination and without consideration of the legal principles upon which the court is required to adjudicate on the exacting questions of legal custody."

- 70. His Honour Justice Fogarty in *Harris and Harris* (1977) FLC 90-276 condemned the extent of psychological and psychiatric testing to which two young children were subjected. His Honour said:-

"The children were seen by two psychiatrists, two psychologists and one social worker on well over 20 occasions per child, many of those occasions lasting for several hours in addition to seeing the welfare officer several times. They were put through a variety of intellectual and behavioural tests all of which demonstrated that despite all these testings the children were decidedly normal. I protest on their behalf...The practice of parties

subjecting children to a number of tests and then presenting to the Court only such of the results as suite their particular view point and without regard to the either short term or long term welfare of the children involved is a situation which cannot in my view be allowed to continue."

A modern view develops

71. In more recent times, the Court's view has altered and the Court has been more willing to give consideration to psychiatric evidence obtained in relation to children.
72. In *Brown and Pedersen* (1988) FLC 91-967 the Full Court considered an appeal by a father who had applied for an order that he have leave to have a child psychiatrically examined by a different psychiatrist, from a psychiatrist who had been nominated by the Director of Court Counselling. The trial Judge had ruled that he did not have the power to force a child to be psychiatrically examined.
73. The Full Court found that it did have the power in question. Such power was found in section 64(1) of the *Family Law Act*, which stated as follows:-

"64(1) In proceedings in relation to the custody, guardianship or welfare of, or access to, a child... the court may make such order in respect of those matters as it considers proper, including an order until further order."

74. The Full Court considered that this gave the Court the widest possible powers to make orders intended to safeguard and advance the physical and emotional well-being and the proper education of a child and to exercise such control over a child as it deems appropriate for these purposes. The Court could direct a child to undergo examinations. If for the purposes of the resolution of an access dispute, the Court was of the opinion that it would be in the best interests of the child to undergo psychiatric or like examinations then the Court may order them; and it could make the necessary incidental or ancillary orders.

Present law

75. The present basis upon which an order might be made for a child to be psychiatrically examined appears to lie in section 64B(2)(i) of the *Family Law Act* which provides as follows:-

A parenting order may deal with one or more of the following:-

...(i) any other aspect of the care, welfare and development of the child or any other aspect of parental responsibility for a child.

Adults

76. The Court considered the basis upon which it had the power to order a parent to present herself to a psychiatrist for the purpose of being interviewed, in *Schapel and Schapel* (1991) FLC 92-240.
77. His Honour Justice Murray found that the power to do so lay in section 64(1) of the *Family Law Act*, then in the same terms as are referred to in the comments on *Brown and Pedersen* above, and in particular in the power to make orders in relation to the welfare of a child. His Honour

found that there must be some obvious connection between the proceedings and the welfare of the child.

78. In his Honour's view, if the purpose of the order was to safeguard and advance or assist in safeguarding or advancing the physical or emotional well-being of a child, it was an order in relation to the welfare of the child; and that the welfare of the child in this case, encompassed both the attitude of the wife to access by the husband and the psychiatric state of the wife's mind.
79. Further, it was held in *L v T* (1999) FLC ¶ 92-875 that while the Court has power to order that a party attend upon a psychiatrist and undergo treatment as a condition of having a child live with one parent or spend time with that parent, there is no such power to make a non-conditional order to this effect. Again there must be a link between the order and the welfare of the child.
80. A relatively common practice has emerged by which orders are made or agreement reached for both parents to attend for psychiatric analysis. While the most common rationale for this is that one parent may be alienated if he or she alone is ordered to undergo that analysis, this course may be a sound one for other reasons. If a psychiatrist sees only one party he or she does not have a real feel for the allegation of mental disturbance. Secondly there is the phenomenon known as "assortative mating". People with the broad definition of a mental health problem are more likely than expected to partner with somebody else who has a mental health problem²³. If one is concerned about the mental health of one of the parties in a parenting dispute, there is a good chance that there is cause for concern about the health of the other party. There is then a good chance that the children will get a double dose of whatever is the impact of mental health problems on parenting.

What is the impact of mental health problems on parenting?

81. Dr Brent Waters noted that there is something about parents whose affairs ultimately arrive at the door of the Family Court which is associated with an increased risk of a variety of mental health problems in the parents and in the children.²⁴
82. The persistence of a disorder and the level of disability incurred are the main factors adversely affecting parenting. Mental disorders which have an intermittent course are less likely to impair parenting than are mental disorders which have a course of continuous disability. Not many mental illnesses which affect people in the parenting age group have a course of continuous disability (although schizophrenia is one such instance). Most mental illnesses such as the various forms of anxiety and depression, and post-traumatic stress disorder, have periods of disability usually followed by longer periods of wellness.
83. Personality disorders however are more or less lifelong conditions which develop during adolescence, before the formation of relationships and persist into the senescence, although their impact on others tends to diminish once people get into their fourth or fifth decade.
84. Most people with personality disorders are intensely self-centred. Parents with such disorders put their needs before those of their children. This leads to parental responsiveness and empathic understanding of their children, being secondary to the parent's emotional needs. These parents are experienced by their children as unpredictably responsive and periodically insensitive. This

²³ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p4.

²⁴ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p1.

leads to patterns of insecure attachment. Insecure attachment significantly increases children's vulnerability to the full range of emotional as well as behavioural disorders.

85. Because most mental illnesses have an intermittent course, and the parents are less likely to be self-centred at the expense of a child, their children are more likely to be securely attached to the parent.
86. While very few mental disorders of either a mental illness or a personality type seem to predictably lead to a pattern of disturbance in their children, there are exceptions which include:
- parents with particularly pervasive and persistent anxiety disorders which are associated with extreme overprotectiveness; and
 - the frequency with which parents with delinquent or "bad" personality disorders rear children with very similar behaviour patterns.

6. What weight will be placed on reports derived from psychiatric analysis?

87. In *Bar Mordecai and Bar Mordecai* (1982) FLC 91-260 His Honour Justice Nygh considered a mother's objection to the admissibility of a report of a consultant psychiatrist in a private practice in respect of the two children of the marriage. The objection was based on two grounds:-
- that the report contained statements made to the psychiatrist by the children and the husband relating to facts not admitted by the wife and contested; and
 - that the statement contained an expression of the children's wishes that they wanted to live with the father, and constituted hearsay evidence.
88. In dealing with the first objection, His Honour found that in admitting the report into evidence he was not admitting the statements as primary evidence or corroboration of any of the facts stated by the husband and children. He was considering the statements as constituting part of the basis upon which the expert prepared her report. His Honour noted that if it turned out that the statements allegedly made were not substantiated on the other evidence, the weight of the report would be significantly reduced.
89. In dealing with the second objection, the mother argued that it was only through a court counsellor or welfare officer's report that evidence could be given of a child's wishes, and that such evidence by other witnesses constituted hearsay evidence. His Honour rejected that argument and ruled that he has a discretion to admit the statements made to the psychiatrist.
90. Dr Waters expressed an opinion that in contested family law parenting proceedings questions about mental disorder are commonly asked but rarely turn out to be a pivotal issue. This is particularly so in the case of mental illness, where the diagnosis needs to be of a profound disorder such as treatment-resistant schizophrenia or bipolar manic depression for it to be an overriding issue.²⁵

²⁵ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p5.

91. More often, according to Dr Waters is that a psychiatrist's determination of a personality disorder, or of personality traits so pronounced as to border on personality disorder, turn out to count.²⁶
92. Dr Waters considered that there was no mental illness or personality disorder which provided an absolute barrier to contact, or even residence orders.²⁷ Contact orders remained feasible for many individuals with personality disorders, and also for those with mental illness such as treatment resistant bipolar manic depression or schizophrenia. In relation to mental illnesses the feasibility was subject to the orders reflecting the principal impact of the illnesses on parenting: instability, unreliability and unpredictability.
93. The best course for providing evidence to the Court concerning psychiatric health of a party in a parenting matter is usually a single expert report, by a child psychiatrist who has been trained in general psychiatry but who can comment in a coherent way which is useful to the Court on the implications of the parents' mental disturbance for the task of parenting. That expert should have seen both parties.
94. In preparing any case in which a party will be relying upon the evidence of a psychologist or a psychiatrist who has treated or analysed a child or the parties the principles enunciated in *Makita (Australia) Pty Ltd v Sprowles* (2001) NSWCA 305 must be considered. His Honour Justice Heydon there said:-

"The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material."

95. It should also be noted that in cases where there is an allegation of parental alienation, that evidence that parties seek to rely upon should be that of an expert who has interviewed both parties, and that an attempt to rely upon the evidence of an adversarial expert who has not interviewed both parties is likely to be considered unreliable.²⁸

7. Practitioner role

96. In 1995 his Honour Justice Warnick offered advice to practitioners in "intractable access" cases which is equally apposite to cases involving questions of therapeutic intervention and analysis.
97. His Honour said practitioners have a statutory obligation to direct the parties to resolution otherwise than by ultimate court decision, have a professional duty to give complete and objective advice in a way which does not encourage or unfairly alert clients to the prospect of manipulation of circumstances to their advantage, and have the opportunity to play meaningful roles in the resolution of intractable access cases, short of court hearing.

²⁶ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p5.

²⁷ Dr Brent Waters (1999) "Parenting, Personality and the Family Court" Australian Family Lawyer, Vol 13 No. 4 p5.

²⁸ *L v T* (1999) FLC ¶ 92-875.

98. His Honour's prescription for the practitioner's role was:-
- (a) identify the problems;
 - (b) consider the full range of options for orders;
 - (c) draft orders sought to be responsive to the identified problems.