

How Children's Voices Were Heard 'Above the Din' in Family Court Proceedings in Cases Where There Were Allegations of Child Sexual Abuse: The Importance of Judicial Orientation and Professional Evidence in the Discernment of the Child's Voice

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Abstract This article examines how children's voices can be heard in Family Court hearings when there are allegations of child sexual abuse. Using a case study approach, three judgements are examined to see how judicial determination centralised the information from and about children. In these three purposively selected cases the voices of children was identified from conflicting evidence presented by professional assessors and counsellors. These three cases were selected because of the primacy given to evidence that was presented from and about children. In these cases allegations were not assumed to be artifacts of a parental dispute, instead, the Judge who heard them worked actively to discern the child's voice within the conflicting evidence. Further, these three cases were also distinguished by the range of evidence available that included family reports and assessments from professionals as a result of Court Orders, but also evidence from those who had ongoing involvement with the children in counseling roles. These counsellors were located outside the Family Court, in the child protection sector. The evidence from counsellors was preferred by the Judge as it provided a higher level of detail about the children and their allegations. The 'voice of the child' was constructed by the Judge in their interpretation of professional evidence.

Keywords Children's voices · Family law dispute · Child sexual abuse allegations · Expert evidence · Judicial 'child focus'

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1 Introduction: Background Issues in Family Law and Child Sexual Abuse

1.1 Context of Children's Cases

Children's matters in Family Court hearings are emotionally charged, as parents resort to litigation in an effort to establish arrangements for their children after separation and divorce. When child sexual abuse allegations are included in the evidence before the Court, the complexity of the cases increase. Originally set up to deal with divorce, child custody and related matters, the Family Court of Australia (FCA) now manages family violence, including child sexual abuse allegations, as one its core responsibilities (Brown et al. 2000). There have been concerns raised about the management of these cases across the State child welfare and Federal Family Law jurisdictions (NSW Law Council 2010). The Court has responded to these concerns by instigating the 'Magellan' program that coordinates these cases where there are child welfare investigations. Despite this, problems still exist in relation to children's safety issues (Higgins and Kaspiew 2011). In addition, other initiatives include the introduction of the 'Less Adversarial Trial', and the 'Child Responsive Model' that attempts to facilitate children being involved early in the litigation processes of the Court.

Despite these changes and the fact that many children want to be more directly involved in their cases, the voices of children may not be heard or considered in family law matters. Parkinson and Cashmore, for example, found that children who are involved in family law disputes want to have a say, although they do not necessarily feel the need to make the decisions (2008). In contested cases, Cashmore found that older children wanted to talk directly to the Judge, rather than rely on interpretations of their views being made through reports to the Court (2011). The three cases that are the subject of this research may provide examples of how, in cases where there are concerns about child sexual abuse allegations, children's voices can be effectively heard in the FCA, thus giving expression to Article 12, of the United Nations Convention on the Rights of the Child (UNCRC) (UN 1989) that requires children be heard and treated as citizens 'in their own right' (Fernandez 2011, 487).

1.2 The Socio/ Political Context of Allegations in the Family Court of Australia

The social and political context in which family law operates is in constant flux and change-social commentary and debate is perhaps most intense around the tensions between the two principles: of children having meaningful relationships with both parents after separation and of ensuring the safety of the children when there are allegations of domestic violence or child abuse. These two principles have proved difficult to reconcile (Rhoades 2008) with recent concerns, about mothers and children being at risk of family violence (Chisholm 2009; NSW Law Reform Commission 2010).

Child sexual abuse allegations are often raised alongside other issues such as claims of parental alienation, family violence and parental conflict (Johnston et al. 2005; Jaffe et al. 2003). The fact that subject children are often a very young age further increases the complexity of the cases (Family Law Council 2002), and the need for expert interpretation of the child's experience through a developmental lens.

How are the voices of young children heard above this cacophony of social contest and complexity? In other countries and jurisdictions, children are able

to present their own evidence directly to a Judge (Bala et al. 2010). However, in Australia, children do not appear in Family Court proceedings in person. Evidence about and from them is presented through affidavit material and oral evidence from parents, family members, and professionals. Judges order reports from experts to investigate allegations, and if other professionals are already involved with the child, for example as part of a child protection response, then their evidence may also be admitted. The child is therefore reliant on the adults around them to provide the Court with information about their lives, including their wishes and needs, and to establish if there are any risks pertaining to the allegation. In this article, 'the voice of the child' means the views of the child – their wishes and needs as identified by the Judge, using the evidence provided by these professionals.

2 Themes from the Literature

2.1 The Family Law Discourses: Parental Conflict

A dominant framing of family law litigation is that of parental conflict – parents are understood to be in conflict when they seek the assistance of the Family Court including in cases where there are allegations of child sexual abuse. In this frame, parents are at the centre, and they are locked into conflict with each other (Johnston and Campbell 1999). Research into family law cohorts has shed light on the nature of 'high conflict' litigants. Repeated returns to court are commonly associated with allegations of family violence, including child sexual abuse. It has been established that these allegations have high levels of substantiation rates (Bala and Schuman 1999).

It is also known that while allegations of sexual abuse are raised only in a small proportion of lodged cases, they are amongst the cases that are least likely to be resolved. As a result, the proportion of cases with these allegations increase as they proceed through the court process to trial (Brown et al. 2000).

There are a number of discourses that are influential in decision making about child sexual abuse allegations in family law – these contribute to creating a hostile environment for the consideration of these allegations. Firstly, there is an imperative to have fathers involved in post separation arrangements for children. The ideal of the reconstituted biological family post separation (Smart 2000; Hart and Bagshaw 2008) - is challenged when there are allegations of sexual abuse by the father. Secondly, there is deeply ingrained social denial about the occurrence and impact of incest and child sexual abuse (Herman 1992). These two factors, when added to a view that issues raised in family courts are a result of parental inability to agree, form the basis of a hegemonic discourse of 'parental conflict'. It is through this lens of parental conflict that allegations of child sexual abuse are seen as artefacts of the litigation rather than as potential indicators of abuse.

The specific family law variant of the parent conflict discourse can be traced to 1980s clinical literature in a period of renewed awareness of child sexual abuse as a social problem, and an increase in the number of allegations arising in family law cases. The clinical literature from this time reflects a belief that alleging mothers

made false allegations as a court room tactic. This position was promulgated by Psychiatrists practicing in the area of family law. Richard Gardner wrote prolifically in this area (1992) and developed a theoretical framework (the Parental Alienation Syndrome) (PAS), that proposed that 'parental alienation', where children refused contact with their fathers in the context of allegations of sexual abuse, was a phenomena instigated by mothers in '85–90% of cases' (Gardner 2001). In this frame, children were presented as making false allegations, both purposefully and as innocent pawns, as a result of family dynamics.

It is of interest that a focus on the child in this assessment schema for family law cases was not been seen as mandatory - children did not have to be interviewed in an assessment (Wakefield and Underwager 1991). This contrasts with perspectives that propose that the child interview is the most significant piece of evidence in the investigation of an allegation (Bussey 1995; Goodman and Bottoms 1993).

Robust criticisms of the PAS have been made by those aligned to a child rights perspective. It has been argued for example, that Gardner's reasoning and methods were problematic and that child sexual abuse allegations in family law disputes are likely to be a reflection of the true prevalence of child sexual abuse in the community (Faller 2005; Faller et al. 1993; Freckelton 2002; Kelly and Johnston 2001).

2.2 Alternative Assessment Frameworks: Systemic Clinical and Research Based Approaches

Alternative clinical approaches used in family law disputes are taken from a range of methods that reflect a family systems emphasis in assessing the child in the family context. This focus facilitates the investigation of the quality and nature of the parent child relationship and draws on family violence literature (Jaffe et al. 2003). Family assessment research is also used in understanding dynamics before, during and after separation as well as any allegations made (Johnston and Roseby 1997; Lee and Olesen 2001). This approach allows the experience of the child to be centralised and it shares much with child's rights and feminist positions that privilege the analysis of the abuse of power within the family in relation to child abuse and domestic violence (Herman 1992).

Furthermore, the use of PAS is seen as unhelpful and misleading (Freckelton 2002) when used as a framework in assessing family law cases. Informing this child's rights approach is an appreciation of the difficulties for children in getting their experience of abuse acknowledged, especially if they confide in their mother, who then takes the allegation to the Family Court (Humphreys 1999). This position also views children as capable of giving reliable information about their experiences of abuse (Goodman and Helgeson 1985) as well as meaningful information about their lives (Neal and Smart 1998) and contributing to family law decisions that impact on them (Parkinson and Cashmore 2008).

2.3 The Nature of Child Sexual Abuse and Incest

While the exact prevalence and incidence of child sexual abuse is difficult to establish, it is known to be a significant universal problem. Most perpetrators of child sexual abuse are adults known and trusted by the child and are frequently fathers or uncles of the child. In addition, incest is known to be the most damaging

form of sexual abuse, resulting in serious long term effects (Russell 1986). In addition, the likelihood of sexual abuse for children increases significantly after their parents separate (Wilson 2001).

Research that has provided a deeper and more precise understanding of the child victim's experience and the difficulties that children have in successfully communicating their experience of abuse (Summit 1983). The developmental stage of the child determines how they tell their experiences - very young children are likely to recall and talk about their experiences in fragments, rather than in a cohesive narrative (Ney 1995; Hewitt 1999), making it difficult to convey their experience to adults. In addition, the calculated methods used by sex perpetrators to target, groom and maintain children as victims impacts on the way in which children verbally disclose or demonstrate behavioral and emotional indicators of abuse (Salter 1994, 1988).

2.4 Views of Children in Family Law

In family law disputes, children may be viewed as derivative of their parents – as 'dependents' or 'objects of concern' (Neale and Smart 1998; Smart and Neal 2000) caught up in the parental conflict, which impairs their ability to provide independent views about their own lives.

A paradigm that allows litigation between parents and family members to overwhelm 'the voice of the child' is conceptually at odds with the principles in the UNCRC (UN 1989). In this international convention, the 'best interests of the child' is the primary consideration, with principles that include; the child's right to participation (Article 3.1) and to express their views and for these to be given weight 'in accordance with the age and maturity of the child' (Article 12.1). It is noted however that the principles' interactions with each other, can result in tensions, especially when the determination of what is thought to be in the best interests of the child does not align with their expressed wishes, or when the child's competence in holding their own views, is in question (Archard and Skivenes 2009). In cases where there are family violence issues, there will be additional concerns, because of the potential for emotional trauma to children from the process of participation when they have already been victims of coercion and the abuse of power by a parent.

In Australian Family Court trials, the child does not appear in the court room, and the Judge must therefore construct the 'voice of the child' from the evidence that is tendered before them.

3 The Study

3.1 Aim of the Research

Three cases are used as the basis of this study - in these cases children's voices were given weight in judicial decision making. This study investigates how evidence provided by professionals, can be used to enhance the participation of children and the focus on their well being that in implicit is the UNCRC (UN 1989). This article

aims to illuminate how information about and from children can be made central in a process that has primarily been oriented towards parental disputes. In these three cases the Judge evaluated competing evidence in matters where there are child sexual abuse allegations. The following characteristics will be examined: the Judge's orientation to evidence from and about children; the judicial evaluation of the professionals' evidence; and the application of a child focus in assessing future needs for a child's wellbeing.

3.2 Method

The question being investigated was: What are the characteristics of the cases in which evidence from children was centralised? This question was investigated using inductive, qualitative research methods. Three cases were used in a multiple case study approach (Yin 2009) to examine how children's evidence was used in judicial decision making. A thematic analysis of judgments was used to identify common key themes in the cases.

This research drew on findings from a larger study using 21 Family Court judgements that examined the way in which allegations of child sexual abuse were treated in Family Court hearings (Foote 2006). One of the main findings from this study was that in most cases there was minimisation of the extent of children's allegations even when fathers made partial admissions and were assessed as unreliable witnesses. In these cases, the detail of what children said was not systematically examined or analysed. This resulted, in the possible risks that might be present for children, not being fully assessed. However, in three cases the treatment of children's evidence was, by contrast, very different in that it examined the detail of the allegations that were made by children. These particular cases are the focus of this article.

The evidence about children that appears in this research is taken from Australian Family Court judgements and is derived from the professionals who interviewed the children during assessments and counselling.

3.2.1 Ethical Considerations

The research for this article was approved in 1998 by both the University of Sydney Human Ethics Committee, and the Family Court Research Committee. Unpublished judgements were accessed with the assistance of the Family Court of Australia. The ethical issues presented by the study (Australian Government 2007) were addressed in the following way: confidentiality was assured by de identifying the judgements prior to analysis with changes being made to names, place names and unusual characteristics of cases. In addition, generic descriptive titles have been used for family members and professionals. Measures were also taken to ensure that the material was kept securely.

3.3 Data Collection and Analysis

The judgements were drawn from the Family Court of Australia's electronic database – this contained all judgements submitted by Family Court Judges. The

sample period was between 1996 to 2001. Cases were selected if they had ten or more mentions of child sexual abuse or child sexual assault, and at least two professionals giving evidence who were in dispute about the allegations. There were 268 such cases in the years 1996–2001, (the data base was incomplete for 2001 at the time of the sampling). Twenty one of these cases were chosen to ensure a spread across the States and years in the sample. This purposive sampling ensured that cases used were 'information rich' (Patton 1990:169) in relation to the discussion about circumstances where there was disagreement in the evidence about the child sexual abuse allegations.

A thematic analysis (Richie and Lewis 2003) was used to draw on dominant concepts from the literature review and re occurring concepts in the judgements. This analysis of the 21 judgements formed the basis of a first study that examined the way in which allegations of child sexual abuse were treated in Family Court hearings (Foote 2006). The software program NUD*IST Vivo (Richards 1999) was used in the coding and grouping of concepts. It also enabled reports to be run using key concepts. The coding was developed after the identification of repeated concepts that were carefully checked and reviewed, for their applicability (Charmaz 2003).

The following criterion was then applied to the sample of 21—Firstly, the allegations of sexual abuse made by a child were to be given weight even when there were adult denials. Secondly, concerns about contamination of children's evidence would not dominate the consideration of the allegations. Only three of the 21 cases complied with these criteria. It was found that all three judgments were made by the one Judge. The focus of this article is on these three cases.

3.4 The Sample Profile

In the three cases two mothers and one maternal grandmother made allegations of paternal child sexual abuse. While in two cases it was the mother and father in dispute, in the third case it was the mother and the maternal grandmother. Two paternal grandparents were also involved in one of the cases. In addition, two children in one family were sexually abused by a second family member (who was at the time of the hearing serving a custodial sentence for the same). In all three cases the Judge found that there was a risk of child sexual abuse and in one case the father and grandparents were also found to have committed perjury in the previous related criminal court proceedings (Table 1).

4 Discussion of Findings

Three main findings relate to the research question: What are the characteristics of the cases in which evidence from children was centralised?

Firstly, in relation to the judicial orientation, the Judge actively searched for the 'voice of the child', sifting through evidence to find it and disentangle it from adult evidence. Secondly, there was a preference for reliable detailed evidence about the children that was collected during counselling, over evidence that was derived from Court Ordered assessments. Thirdly, the Judge maintained

Table 1 The three cases (* indicates the professionals whose evidence was relied on to make positive findings of risk in relation to child sexual abuse allegations)

Family and issues	Professionals providing evidence in the three focus cases	Allegations – as described in the evidence provided to the Court	Outcomes
<p>Case 'A'</p> <p>One boy, 9 years and one girl 11 years. Living with maternal grandmother; mother seeking residence. Father not involved in Family Court application.</p>	<p>Child Protection Unit Social worker* European Psychologist in forensic/medical setting* Child and Adolescent Counselling Social Worker * Court Ordered Psychiatrist Family Court Counsellor</p>	<p>The children described their father waiting till the mother left the house and then getting them to quickly undress, photographing them naked and getting them to redress hurriedly as the mother returned.</p>	<p>Residence of the children was to be with the maternal Grandmother, with contact to the mother- as the children wished.</p>
<p>Case 'B'</p> <p>One 5 year old girl. Mother sought residence and no contact with father; father sought residence.</p>	<p>Child Protection Officer Child Protection Unit Social Worker* Court Ordered Child and Family Psychiatrist</p>	<p>The Judgement intimidated the child had alleged that father had touched her genital area, and had tongue kissed her.</p>	<p>Residence of the children was to be with the mother, with supervised contact with her father, as she had wished.</p>
<p>Case 'C'</p> <p>Two girls, 8 and 6 years. Children living with mother. Father applying for residence and paternal grandparents to have contact.</p>	<p>Child Protection Unit Social worker* Court Ordered Child and Family Psychiatrist Private Child and Family Psychiatrist Private Counsellor for mother</p>	<p>The father fondled eldest daughter's genitals while sleeping in bed with her. There were also allegations of long term domestic violence perpetrated by the father and beginning from when the mother was pregnant with the first child. There was also alleged harassment by the father of the children and mother during the trial.</p> <p>Emotional abuse from both father and paternal grandparents</p>	<p>Residence to be with the mother. No contact with the father or the paternal grandparents due to the risks related to both sexual abuse and emotional abuse.</p>

a focus on the child in the context of high levels of alleged family conflict, violence and acrimony.

4.1 Judicial Orientation

The Judge involved in the three cases displayed a particular orientation to the task of sifting through and assessing the evidence before them. The approach they used was consistent in the three cases as they assumed that the voice of the child would be discernable despite: conflicting evidence from professionals; claims that contamination had occurred; and expert evidence from Court Ordered professionals that the allegations from the children should not be given weight. The Judge demonstrated a determination to distinguish the child's voice through a careful analysis of the evidence. This position is also consistent with the intentions of the UNCRC (UN 1989), that children's views should be heard and taken seriously, although relying on adults, in this instance the Judge, to be interpreters for them (Fernandez 2011).

In case 'A', the litigation was between the maternal grandmother and the mother. The mother had recently arrived in Australia to resume the care of her children after divorcing the father in the children's country of origin in Europe. The Judge traced the children's consistent description of abuse by their father through a detailed chronology that was developed in order to evaluate the potential for contamination.

The chronology drew on multiple sources of evidence: assessments and reports from a Psychologist in Europe, subsequent assessments during the family law process in Australia and counselling notes from the community based sexual assault Social Worker. As a result, the original assessment which concluded that the children had been sexually abused in Europe was upheld. In addition, the views of the children were identified and given prominence through the counselling notes taken by the Social Worker. Excerpts from these notes made over a number of sessions with the children were recorded in the judgements. The notes confirmed a consistent fearfulness of the children being returned to the care of their mother and consequent possible contact with their father:

...she said that... she believed that her mother had not really cared for her or her brother when they were living in Europe. She said that her mother had always had her friends and they seemed to come first. She also believed that her mother did not try to protect her from her father she said that her mother would see what was happening but would do nothing to stop it. She sees her grandmother very differently-cared for by her/safe and protected. Her main worry is that she and her brother may have to return to Europe in the future. Her relief at her mother not coming to Australia now is that she cannot take them back to Europe.

These notes were consistent with the eldest child's evidence provided in an interview with a Psychologist:

At this point in the interview (the child) again reiterated that she did not wish to see her father in the future as "he did harm to us".

And

When I asked her what the matter was she said that her father had told her if she repeated any of the things he had done to her “I would be sorry and he would punish me”.

She recalls when at her paternal grandmother’s place her father locked her in the room with him and exposed himself to her...

She went on to tell me that the grandmother had given her a tricycle she really loved and that her father took this away and gave it to another girl because she would not do what he wanted her to do ... be photographed naked. (Judgement A)

The Judge also considered the evidence provided by the Court appointed Psychiatrist – this evidence focused on the grandmother’s over reactions possibly creating contamination by creating the children’s fears:

In many respects her handling of the situation conforms to the picture that is given in the literature of mothers who make false claims of abuse.... certainly since the middle of last year, she has become so preoccupied with this that she has tended to grossly over-react to things that she has seen and heard. (Judgement A)

Importantly, the Judge managed this evidence by identifying the beginning of the grandmother’s ‘preoccupation’ and then quarantining the impact of this on the children’s evidence to a period of time after the abuses took place. This effectively untangled the children’s accounts from the grandmother’s evidence so that there were no issues about contamination relating to the children’s allegations of sexual abuse. The Judge used the detailed material that was provided by the Psychologist and the Social Worker, to develop an intimate and holistic understanding of the children, their experiences and their current needs. The narrative from the children’s counselling notes that were completed by the Social Worker and, written over 7 months, plus the Social Worker’s oral report, provided in-depth insights into the children’s world, their day to day experiences and their responses to the abuse. The Social Worker’s notes are referred to in developing this understanding of the children’s fear of their father: *‘I note in particular that the passages on pages 20 and 23 provide ample support for the view that the children have felt fearful about the father.’ (Judgement A).*

The Judge responded to the Court appointed Psychiatrist’s criticisms about the completeness of the reports that were tendered, and possible contamination, by identifying the factors that created enough certainty for them to make a positive finding that the children had been abused:

... I am less satisfied than the Psychiatrist apparently is that there is no substance in these allegations. In particular I attach weight to a point made by the psychologist in her evidence that the children’s affect during the interviews was consistent with their having been abused. I also attach weight to the strong consistency in what the children have said to people interviewing them Although the details of alleged abuse and incidents are somewhat inconsistent and are easily criticised, one thing that comes through loud and clear is that throughout the process the children have been consistent in seeing the father as having done things to them which they do not like and which caused them to be fearful [emphasis added] (Judgement A)

This Judge focused on the consistency from the children rather than on the opportunities for contamination, or the inconsistencies that appeared in some of the peripheral details of their evidence.

4.2 The Provision of Reliable evidence, Collected over Time, About Children

In cases where there are child sexual abuse allegations, Judges order reports to be written for the Court by a specialist - usually these professionals are Child and Family Psychiatrists who work in the family law area. Their reports are written after brief contact with the children, typically consisting of between 1–3 interviews and observations with children, parents and grandparents. By comparison, the Social Workers and Psychologist involved in counseling in these particular three cases had seen the children many times, for example in case 'C' the Social Worker estimated that she had seen the children between 40–50 times over 14 months.

The evidence that was preferred in the three cases was provided by three Social Workers and one Psychologist, all of whom provided counselling after undertaking their own assessment of the children and their allegations. The four professionals were located in specialist child services: these were located in child protection units in children's hospitals (or equivalent services outside Australia) or specialist child sexual assault services. These professionals are not routinely utilised as part of Family Court proceedings. In all three cases, there were Judicial comments relating to the reliability of the evidence of these professionals that was established by their demonstration of professional methods, and a lack of bias or 'openness' as to whether the alleged abuse had occurred or not.

In these three cases, Judges used the detail of the material gleaned about the children provided by the Social Workers and Psychologist because of its quality – there was a depth of information about the children that could not be matched by the brief assessment material gathered by the Court Ordered professionals.

In one case, the assessing Court appointed Psychiatrist had concluded that the mother's anxiety and her 'chaotic' thinking had created a dynamic resulting in the child making the allegations to 'please her mother', although this hypothesis that was a reflection of Gardner's PAS (1992), was offered without any evidence to support it. In other words, the Psychiatrist believed the allegation to be false. The Judge, however, took another view:

I should add that my impression of the mother is that she is chaotic and over anxious and may well have over-reacted to and misunderstood all kinds of things. However, I am reasonably satisfied that she has not, and almost certainly could not, set about a systematic task of coaching the child or persuading the child to act in certain ways when confronted with questions from social workers and others. (Judgement B)

Furthermore, the Judge identified three types of evidence in the range of material presented to them about the allegations of sexual abuse:

In my opinion there are three sorts of evidence suggesting that the child has been abused. The first consists of the child's "disclosure" statements including

her gestures accompanying such statements. These statements have been made to a variety of people including the mother. However, I propose to focus my attention primarily on the disclosures made to the Social Worker, whose evidence is of the greatest importance in this context. The second category of evidence is her expressed fear of the father and reluctance to see him. The third category of evidence is what might be called her “sexualised behaviour”. I propose to refer to the evidence that suggests sexual abuse and then consider the evidence to the contrary. (Judgement B)

These additional disclosures mentioned by the Judge, that were made by the child to the Social Worker, are consistent with a child being able to recall additional details of the abuse in a context of a supportive counselling relationship. This pattern of a gradual and incremental disclosure by children is consistent with their development, as they develop trust in the relationship that they have with their counsellor, they may recall more details of the abuse and disclose them (Ney 1995).

The Judge drew on the evidence from both the Social Worker and the Psychiatrist to interpret the child’s wishes:

The Psychiatrist states in his report that after Mary had described the sexual abuse he asked her whether if the father promised not do this it would change her feelings, and she said that “she would love him and would like to see him as long as he promised not to do this”. It seems to me, therefore, that the evidence strongly suggests that she wishes any such sexual interactions to cease and, if she is confident that they will not recur, she would like to maintain a relationship with the father. I think it is appropriate to attach at least some weight to this evidence of her wishes. (Judgement B)

The child’s voice in this case was identified by the Judge through firstly determining that sexual abuse had occurred, and not allowing the mother’s anxious presentation or her ‘chaotic thinking’ to overwhelm the child’s narrative of abuse. The Judge then built an understanding of the child’s wishes, from the evidence provided by the Social Worker and the Psychiatrist about the child and her probable desire to see her father if she was safe.

4.2.1 Achieving a Child Focus in the Context of High Levels of Alleged Conflict, Violence and Acrimony

Case ‘C’ was a ‘high conflict’ case – there was a long trial involving multiple experts – four professionals had assessed the family members and allegations included long term domestic violence, paternal child sexual abuse of the eldest daughter, and emotional abuse of the children by the father. While the father had already successfully defended charges in criminal proceedings the father and his parents were found to be unreliable witnesses by the end of the Family Court trial.

The expert evidence was split – the Court Ordered Psychiatrist believing that the eldest daughter had made up the allegation because she was angry with him and the

Social Worker who provided long term counselling to both children believed the eldest girl had been sexually abused. The Social Worker identified the child being fearful of her father because she had revealed the abuse after he had warned her not to tell anyone about it: '*... her fear is displayed in the form of nightmares "with themes of death and kidnapping"*'.

The Judge noted that the children, over the course of the case, had given contradictory wishes about whether they wanted to see their father or not. Evidence about the children's wishes was gleaned from the Court appointed Psychiatrist's report. The passages taken from the report reflect the younger child's ambivalence about her father:

She told her father about a drawing that she gave him- "sometimes I love you and sometimes I hate you and I love mama and I love papa and there is cloud around it".

Also, an excerpt from the Court Ordered Psychiatrist's report about the older child:

I asked her for her three wishes. She said she never wants to see her father again, that he won't bash her again, and that she would be able to bash him in the street...

In this case the children's emotional ambivalence particularly by the younger child and the older child's anger provide a glimpse of the emotional turbulence that the children had experienced. Their evidence is consistent with the impact of exposure to prolonged and bitter litigation.

The risks that might threaten the children's well being and safety in this case, appeared to be high. It was accepted that the father had an uncontrollable temper, as he lost his temper during cross examination. This direct experience of the father's lack of self control, plus the wife's allegations of violence together with the children's allegations, provided overwhelming evidence that the Judge used to make a finding of positive risk to the children. In this context the Judge decided that the current views of the children regarding their wishes would be given weight:

However their views and feelings are highly relevant to the question whether it would be in their interest to have face to face contact with the father and at this time. In combination with other factors, their views and feelings constitute a serious impediment to achieving contact that will be successful and in their interests. (Judgement 'C')

The Social Worker's evidence about the eldest child was used to support the Judge's conclusions that there should be no contact to the father. The Social Worker had concluded that the eldest child;

...would not be able to establish a positive relationship with their father again because of their continuing anxiety and she felt that they would probably not feel safe or strong enough within a period of one or 2 years' was given weight with Orders being made for 'no' contact.

The value of the Social Worker's evidence is its detail - the children's discussions with the Social Worker over time, provided an unfolding contextual narrative of the

children's experiences leading up to the trial. This narrative was used to interpret the child's future needs in relation to contact with her father.

5 Discussion

5.1 Judicial Orientation to Determining the Child's Experience

In all three cases the evidence about the risk of sexual abuse was established by the Judge concurring with the professionals who provided counselling from outside the Family Court system. The Judge, however, used the evidence from all the reporters, both within and outside the court system, to develop a view of the child's wishes and the level of potential risks. In the first case ('A'), the Judge pieced together the evidence to develop a detailed picture of a young girl, largely through interviews and counselling sessions. The risk of sexual abuse was established, as was her desire to see her father, but only if he did not do sexual things to her. In the second case ('B'), the Judge developed a chronology of the allegations of abuse and the development of the children's fear, (separate from their grandmother's anxieties), of being returned to their father by their mother if they were to live with her. In the third case ('C'), where there were allegations of long term family violence and litigation, the children's wishes, are understood as changing over this time as a result of the compounding effects of the abuses perpetrated by the father.

These three Judgments were unusual, in that they were chosen because of how the allegations given by children were treated. The fact that all three happened to be written by the one Judge suggests that what has been captured is an individual style rather than a common approach to children's evidence. Nevertheless, these three cases provide an example of how a child focus can be achieved. The common factors found in the cases will be explored.

Firstly, the hallmark of a child focused approach was the judicial orientation towards discovering what the child had experienced. The Judge distinguished between the parental characteristics and the information that was about the children in order to discern the detail that related to the child. In each of the cases the thread of the child's voice could have been overwhelmed if the Judge had focused on evidence about the adult, or criticism about the evidence from children, such as claims of contamination. This focus on identifying and the child's voice is consistent with the intension of the CRC (UN CRC 1989).

Secondly, the Judge was assisted in this process by having access to a number of sources of evidence. There were Court Ordered reports, plus detailed evidence from professionals from outside the court system who had long term professional relationships with the children. These professionals, once their evidence was assessed as reliable, were able to provide a view of children that went beyond the 'snapshots' of the Court Ordered reports. This facilitated the Judge moving beyond limited conceptualisations of children, such as children as 'objects of concern' (Smart and Neale 2000). There was more of a holistic view of children, capturing their individual characteristics, providing qualitative information about the child's lives, and family dynamics over time. These external professionals presented their evidence through a 'relational' lens – the professional relationship yielded consistent

evidence given by the children, observed behavioural responses, (including changed affect as they recalled the traumatic events, and reoccurring dreams and fears), age appropriate language and additional verbal disclosures of abuse. These were pieced together to form compelling evidence of risk of child sexual abuse in the three cases.

6 Conclusion

Understanding the lives and experiences of children requires a commitment to listening attentively to the evidence provided about them, and having enough qualitative evidence from reliable sources to develop a multi faceted view of the child's circumstances and experiences. This Judge's focus meant that they were not diverted by the competing 'noise' of the parental dispute. This Judge navigated a path through the detail of complex and interwoven evidence in order to distinguish the child's narrative. They were assisted particularly by the presence of external professionals who were skilled in both assessment and counselling of children in the context of child sexual abuse allegations. The Judge demonstrated the focus necessary in identifying and tracking the voice of the child in the professional evidence, thus taking it seriously. This focus ensured that the child's voice was not overshadowed by other discourses that privilege concerns about possible contamination, or seeing allegations through a parental conflict lens.

Assessing children requires specific training and a professional environment that supports this work. The professionals, who undertook the assessments and counselling from outside the Court, were located in service settings where the child was the primary client, rather than the parents. This child focus, is aligned to the child focus brought by the Judge and appears to reflect a philosophical fit between the Judge and the professionals from these services.

The detailed material yielded from the three Social Workers and the Psychologist allowed the Judge to understand the children more completely and to interpret their reported experiences, needs and wishes. The detailed knowledge of the child provided to the Judge went beyond the safety and risk considerations that are intrinsic to considerations of child sexual abuse allegations. Through this evidence the Judge was able to develop a more holistic view of the child and their well being.

Moreover, this longer duration of engagement within a therapeutic relationship provided by the counselling Social Workers and Psychologist is better matched to the developmental needs of young children (Hewitt 1999; Ney 1995) than the assessment 'snapshot' gained of the child and family from a typical Court Ordered assessment undertaken by Psychiatrists. These findings may provide a way forward in developing ways to listen to children in cases where they do not provide direct evidence to a Judge. This small sample demonstrates how Judges can ensure that the child's voice is discerned as distinct in the context of contested Family Court matters.

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