

**THE ROLE OF EXPERTS IN ASSISTING COURTS IN CHILDREN’S CASES:
A JUDICIAL VIEW**

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INTRODUCTION

Expert witnesses in children’s cases are often cross-examined on that basis that their conclusions need to be re-examined in the light of other evidence that has emerged during the trial. For example an expert witness who has expressed confidence in the ability of a parent to care for a young child might be asked: “Would you wish to reconsider your opinion if the evidence was that the parent had left the child alone in the house for five hours, and that during that time she was drinking at a hotel?”

Some experts would simply say yes and wait for the next question. But others would squirm. They would challenge or quibble about the hypothetical facts being put to them. They would look uncomfortable, as if they had been caught out. They would fight to the death to defend their opinion. They would give the impression that if they retreated in the slightest from the opinion they had expressed in their report, their reputation would be in tatters - and, for all I know, their fees unpaid. They would treat competing views or inconvenient facts like mosquitos: swat them, and quickly wipe away any remaining traces.

In my experience, such reactions characterise experts who are inexperienced or otherwise less equipped for their task than they might be. Their defensive reaction, while a natural human one, represents a rather fundamental misunderstanding of the expert’s role. This paper sprung from the idea that it might be useful to identify just what is wrong with the defensive reaction I have described. It draws to a considerable extent on my experience as a Family Court judge since 1993, and, less directly, on previously working as an academic in the area of family law, and especially children’s law.

The best way I can identify what is wrong with the defensive reaction is to treat reports as having three essential components. These are, first, a *body of information*; second, a *chain of reasoning*, leading to the third component, *the conclusions*. The conclusions follow from the reasoning applied

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to the information. It follows that any changes in either the information or the reasoning are likely to have an effect on the conclusions.

This analysis provides, I think, a simple but robust framework for considering reports to the court. Obviously it would need development if it were put forward as a full or complete account. For example, an obvious refinement is that the process of reasoning is bound up in the observations a person makes. It is naïve to imagine that the information, or data, exists in a pure form unaffected by the perceptions, assumptions and objectives of the report-writer. A fuller version would take this, and much else, into account. But I hope my simple analysis will be an adequate framework for the points I want to make.

Before returning to this analysis I should say something about the nature of the expert reports used by the Family Court of Australia in children's cases.

VARIETIES OF EXPERTS IN CHILDREN'S CASES

Family reports by court mediators

Reports to the court relating to children can take a number of forms. First, a *Family Report* is a report prepared by a mediator (formerly called "counsellor") attached to the Court itself.² Such reports are ordered by a judge or (more often) a registrar. Family reports are normally ordered in the course of pre-trial procedures, and are normally released to the parties prior to the date for hearing.

Court mediators' professional qualifications are normally in psychology or social work. Their work with the Court mainly involves them in two tasks. One is assisting the parties to resolve matters between themselves ("mediation"). The other is assisting the Court by writing reports and being available for cross-examination. In practice, mediators also attempt to help the parties resolve matters in the course of preparing the report. They often succeed. Sometimes the parties reach agreement in the course of the interviews and discussions upon which the report is based. Sometimes parties reach agreement when the report is published and available to them.

Family reports are provided for in the Family Law Act 1975. Section 62G provides that in children's cases the Court may direct a family and child mediator or welfare officer to give the court a report on "such matters relevant to the proceedings as the court thinks desirable". Such a

² There is also provision for reports to be written by appropriately qualified persons in private practice (often former Court counsellors), funded by the Court. The same principles apply to such reports. See the definition of "family and child counsellor" in s 4 of the Act, and Family Law Rules Order 25 r 5.

report “may be received in evidence in any proceedings under this Act”. This provision means, I think, that the report is admissible by virtue of the Family Law Act 1975. It follows that it is wholly admissible even if some or all of it would otherwise be inadmissible because of the ordinary rules of evidence. For example, it is common for family reports to include accounts of information provided to the mediator by school teachers. Such accounts would otherwise be inadmissible hearsay. But they would seem to be admissible by virtue of the Act.³

Family reports are often written on the basis of a series of interviews with the children and the relevant adults, such as parents and significant other family members. Often the mediator will also observe the interaction between the children and the parents in the mediator’s rooms. The mediator will also usually have access to affidavits that have been filed in the proceedings. This is the usual pattern. Occasionally the report is based on more limited material, such as a brief interview. At the other extreme, a report can be based on more extensive work, such as a home visit, although pressure on resources has made this a rarity.

Family reports have always been affected by questions of resources. Some years ago, the Family Court experimented with “short reports”, often focusing on the children’s wishes. The general view today is that they were not a success. It is typical, not exceptional, that children’s wishes need to be put in context. Children’s stated wishes may reflect pressure from a parent, or loyalty by the child to one parent, or fear of what might happen if the child said certain things.⁴ A report that tells the court only what the child said may be misleading rather than helpful.

Recently, in order to make best use of limited resources the Court has introduced “summary reports”. Despite the similarity in name, they are fundamentally different from the former “short reports”. The mediator does exactly the same preparatory work for a summary report as for a full report. The difference is that it is not so extensively written up. The summary reports are made available to the parties during the pre-trial period, in the hope that the parties might be assisted to settle the case. If the case does not settle, but goes to trial, the mediator then writes up a full report, based on the material already collected, and provides that to the court.

Family reports typically include the history of the matter as related by the participants, observations on the interaction between the children and the adults, a report on the children's wishes, and recommendations on what orders would be most likely to benefit the children. Sometimes the report

³ See Evidence Act 1995 (Cth) s 8(1) (“This Act does not affect the operation of the provisions of any other Act...”).

does not make specific recommendations, but identifies the options open to the court and the advantages and disadvantages thought to attach to each option.

In the early days of the operation of the Act, there was a difference of opinion on whether authors of family reports should be made available for cross-examination. However the matter was soon resolved (in favour of procedural fairness),⁵ and mediators, like other expert witnesses, are now routinely required for cross-examination. The Full Court said in *Marriage of Hall* (1979):⁶

Where there is proper reason for cross-examination, the court will be assisted and, we have no doubt, so will the counsellors. No expert should cavil at any questioning of his role or the foundations of his opinions. We consider that it is always a valuable opportunity for the counsellor himself to examine and test his own methods under critical investigation...

The Full Court also gave an authoritative view of the role of family reports:

- (a) *There is no magic in a family report. A judge is not bound to accept it and there should never be any suggestion that the counsellor is usurping the role of the court or that the judge is abdicating his responsibilities...*
- (b) *Family reports are meant to be, and almost invariably are, valuable and relevant material to assist a judge in forming his ultimate conclusions...*

The Full Court went on to say, in effect, that the report may or may not express a conclusion on what orders the court should make. Where it does, of course the Court may reach a different conclusion, if only because its decision will be based on all the evidence received, while the mediator's report will be based on the material available to the mediator.

The courts have emphasised that the authors of family reports have no privileged position and that they should give evidence in the ordinary way. In one High Court case, the then Chief Justice said:⁷

In the performance of this function the court counsellor becomes a potential witness — a court appointed witness who is perhaps in some respects analogous to an expert witness — but is not part of the court, and has no right to communicate with a judge in relation to a pending matter except through the medium of the report if it becomes evidence and by giving evidence if the counsellor is called as a witness.

Occasionally, a family report may contain highly sensitive information, for example that a person had attempted suicide. Sometimes, such information is unknown to a parent or family member who might be mentally ill or vulnerable, and who might be deeply distressed or even damaged by discovering the information in such a form. In such circumstances the suggestion has been made

⁴ A point made in a seminal early article by Audrey Marshall, Joyce Grant and Jill Nasser, "Children's wishes in Custody and Access Disputes" (1980) *Law Soc JI*, 49-52.

⁵ *Marriage of Hall* (1979) 5 Fam LR 609, 615.

⁶ *Id.*

⁷ *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 348 (Gibbs CJ).

that the Court might restrict the publication of the report to the legal representatives. On the other hand, unless a next friend has been appointed for the party (in which case the report could be shown to the next friend), to prevent a party to the proceedings from having access to an important piece of evidence appears to be a clear breach of procedural fairness. And how can the lawyers deal with it if they have no instructions from the clients? This problem has not been finally resolved.⁸

Reports by a Court Expert (“Order 30A reports”)

The legislation also provides for reports by a “court expert”. In children’s cases, these reports are also used quite frequently, sometimes in combination with a Family Report. The usual practice is that a child representative is appointed. The Child Representative then makes arrangements for an Order 30A expert to be engaged. The Court itself does not normally fund Court Experts. They are funded either by legal aid or by the parties.

Order 30A experts can deal with all sorts of matters, such as valuation issues in property cases. In children’s cases, the reports are commonly written by child psychiatrists, or psychologists specialising in family and children’s matters. In practice, the legal aid commissions keep an informal list of such experts who they believe to be available and suitable.

When does the Court order an Order 30A report, as distinct from a Family Report? There are two main reasons, I believe. The first is that Order 30A reports might be appropriate where the case requires specialist expertise, such as a diagnosis of mental illness in a parent, or the need to carry out particular tests that a psychologist might do. The second reason is very different. The Family Court’s funding is limited, and its capacity to provide family reports is also limited. Sometimes Order 30A reports are ordered on the basis that the parties can pay the fees of the expert. Obviously, such orders are made in cases where the parties have financial resources that make this possible.

Evidence of therapists

It is fairly common that one of the parents, or other adults involved in the case, has had some form of therapy, such as psychiatric treatment or assistance from a clinical psychologist. Sometimes the children have received such treatment. Obviously the evidence of such therapists will normally be of considerable importance. There is no privilege normally involved in these situations, and it is possible for the therapists to be required to give evidence. They cannot be required to prepare affidavits or reports, but they normally do.

⁸ See *Marriage of Mulcahy* (1978) FLC 90–425; *Re JRL*; *Ex parte C JL* (1986) 161 CLR 342.

The evidence of such therapists usually has two components. Firstly, they can give evidence about their observations of the individuals under their care. In this respect, much of their evidence is not opinion evidence they are qualified to give as experts, but evidence they can give of events within their knowledge. They can give evidence that they examined a child and saw a bruise. They can give evidence that they prescribed certain medication. They can give evidence about the appearance and demeanour, and apparent symptoms, of the person they have been treating. Much of this material, from the point of view of evidence law, is the sort of evidence any witness can give. A therapist can give evidence of a bruise on a patient's face, and so can a witness who saw the person at a social occasion.

Some of their evidence about the treatment they have given, however, may be opinion evidence. For example, a therapist might say she diagnosed the patient as suffering from depression and prescribed certain medication, and that over the next three months the patient's condition improved. Some of the ingredients of such evidence are opinions. But in such cases it may be quite clear that the therapist is entitled to give evidence about those opinions. Forming them and acting on them was an essential part of the treatment.

Much of the evidence the therapist might be able to give will often be of things the patient said. These things might range from symptoms ("I feel depressed"), to accounts of previous events ("He hit me in the mouth, and it has been sore for a week; he was angry about what I said to the children"). Although it might appear that the hearsay rule would apply to exclude much of this material, in practice it is normally accepted. The reason is, I think, that what the patients say to their therapists is usually not tendered as evidence of the truth of what is asserted, but for other reasons, for example to indicate the person's state of mind at the time. Other exceptions to the hearsay rule might also apply. Some things said will constitute admissions by a party.⁹ And things said *by children* are not rendered inadmissible by the hearsay rule, because of a special rule that applies to proceedings under the Family Law Act 1975.¹⁰

Secondly, the treating therapists are likely to be qualified to give expert evidence, and they can be asked questions about the issues canvassed in the case that are within their area of expertise.¹¹ For

⁹ Evidence Act 1995 (Cth) ss 81ff.

¹⁰ Family Law Act 1975 (Cth) s 100A. The section renders the hearsay rule inapplicable to things said by a child that are "relevant to the welfare of the child or another child".

¹¹ My topic overlaps to some extent with the large topic of expert evidence, on which I can only refer the reader to the leading text: Ian Freckleton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Law Book Co, 2nd ed 2002). In particular, the material in chapters 24-26 contain a great deal of information and advice that will be of great assistance to expert witnesses.

example, a therapist working with a child thought to be abused might well be qualified to give opinion evidence on general matters relating to abused children.

Thus, therapists may be able to give evidence of two kinds: evidence about the treatment they have given and what specific things they learned in the course of it, and evidence they might be qualified to give about general matters, based for example on their studies and experience and reading of the research literature.

Other expert evidence

The provisions for family reports and court experts' reports do not of themselves prevent the parties calling their own expert evidence, for example to challenge the view of the court expert or court mediator. However there are some rules that limit the use of expert evidence.

Where a court expert has made a report on an issue, each party may adduce evidence by *one* other expert on that issue.¹² A party cannot adduce evidence by more than one expert in relation to any particular issue, unless the court is satisfied that there are "special circumstances".¹³ The Court has power to give directions about the way expert evidence is to be received.¹⁴ Where there are competing experts in relation to any issue, the Court normally requires them to consult and prepare a statement setting out precisely where they agree and where they differ. The purpose is to avoid waste of court time and assist the parties to settle.

There is a separate rule intended to reduce excessive examination and questioning of children in connection with allegations of child abuse.¹⁵ In brief, it prevents a party from having a child examined more than once.

Evidence of experts who are neither therapists nor court experts (for convenience I will call them "reviewers") falls into two categories. The first is the expert who has had some involvement with individuals. This category would include an expert who has interviewed or assessed the child and one of the parents. This sort of evidence most commonly arises when a parent takes the child to an expert, such as a psychologist or psychiatrist, and has the expert prepare a report based on interviews and assessments of that parent and the child. It might also include an expert who has given evidence about a specific matter, such as whether the parent has a particular mental illness. It

¹² O30A r 7.

¹³ O30A r 8.

¹⁴ O 30A r 9.

¹⁵ Section 102A. See *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485; FLC 92-376 at 500-6, 509-10.

might also include an expert who has interviewed or assessed a number of the parties with the children.

Experts in this first category can of course give evidence stemming from their interviews and assessment. The weight that will be attached to such evidence depends on various factors. There are two factors in particular that might limit its usefulness. First their evidence will be called *by a party*, and that party will have paid the fee, or have promised to do so. In that sense, the expert can be seen as partisan, or potentially partisan. Of course, experts in such situations are required to use their professional judgment and be as impartial as they can. But it can be difficult for them to be entirely uninfluenced by the fact of having been engaged by one side to the dispute. Secondly, this evidence will often be based on seeing the child with one parent but not the other. The expert will not have had the chance to see the child's interaction with each parent, and will therefore not be well placed to make a comparison. To the extent that the issues in the case deal with the interaction of the child with each parent, and with the parents' relationship between themselves, such evidence may be of limited value. (Good experts will freely acknowledge such limitations). And the "history" given to the expert may be one-sided. For such reasons, where the "independent" court expert, who has seen everyone and read all the competing affidavits, expresses different conclusion from an expert engaged by one party who has been able to interview only that parent and the child, it may be difficult to persuade a court to prefer the view of the expert engaged by the party over the views of the court expert.

The other category is the expert engaged to prepare a report based only on the written material. Such experts may prepare a report that is essentially a critique of the court expert's report, or of other reports. In my experience, this kind of "armchair" evidence sometimes has limited value. It is very difficult for the armchair expert to persuasively give different interpretations of the behaviour of the child, or of others, when he or she has not seen them. Evidence that takes the form of expressions of opinion based on the papers may not make much of an impact in competition with the opinions of equally qualified witnesses, especially a court witness, who have assessed and interviewed the individuals involved. This sort of evidence, however, may be of more value if it involves a methodological critique of the other expert: for example if it showed that the other expert relied on outdated research or failed to mention a well established theory that might have suggested a different conclusion.

THE THREE COMPONENTS

The first component: information

The first component of a report is the presentation of the relevant information. What information? How should it be assembled? How should it be presented in the report?

Instructions

The expert will have been asked to carry out a task. That request may be contained in a court order, or a letter of request. It is useful for this task to be identified and stated in the report, so that everyone knows what the author intends to do in the report. It is normally appropriate to quote the key passages from the letter or other source of instructions, or attach them as an annexure. This early part of the report will tell the reader who asked the author to prepare the report, when, and what was requested.

While the reasons for this are obvious, I will mention two in particular. Firstly, anyone reading the report should be able to see at a glance the basis for the report, and say, for example, whether it is a report commissioned by one of the parties, or by an independent source, such as the Court or the children's representative. Secondly, it is desirable, in the case of a psychologist or other clinical expert, to indicate at once whether the author has been in a therapeutic relationship with the family, or has been engaged solely for the purpose of preparing the report.

The "history", or factual background

The distinction between a therapist and other expert witnesses may be important in understanding the nature of the report. It is common for therapists to accept the version of events given by a client for the purposes of therapy. For example, if a woman goes to counselling and tells the therapist that her husband subjected her to domestic violence, the therapist will normally treat that as the fact, and deal with that as the problem. The therapist will not normally challenge the version given by the client. Further, in my experience, the therapist does not usually make independent inquiries. Thus if the woman says that the children's performance at school has been affected by the domestic violence, the therapist will not normally make inquiries of the school. Nor will the therapist normally contact the allegedly violent partner to get his side of the story.

Thus, in my experience, the therapist will typically not have engaged in an *investigative* role. I imagine that there are a number of reasons for this. If the therapist were to check out the client's story with others, such as the man or the school, that would involve telling them some of the story: but such telling could well be a breach of confidentiality to the client. A second reason might be that it would undermine the client's confidence in the therapist if the therapist were to indicate

disbelief in the history given by the client. A third, perhaps, might be that the client, or some agency, is paying the therapist, and additional work of the kind I have mentioned may not be paid for.

There are some exceptional cases when the therapist might challenge, or “reality test”, the client’s version of events. For example, where the history given is bizarre or inherently improbable, or self-contradictory, the therapist might think it right to test it, or confront the client with the possibility that it is not true, but is, for example, delusional. Such cases aside, however, if a therapist is asked to write a report, he or she will normally have accepted the truth of the presenting history for the purpose of therapy.

Reviewers

The situation of a reviewer may be a little different from that of the therapist. The therapist will have previously been involved in a therapeutic exercise, usually before any legal proceedings have been initiated. By contrast, a reviewer is asked to do the work “in the shadow of the law”, knowing that there are legal proceedings and asked to prepare a report for the purpose of those proceedings. Thus a reviewer is likely to be aware from the start of the contested issues of fact, and would be on notice, so to speak, that the court will need to make findings about which version is more likely to be true.

The reviewer, therefore, unlike the therapist, might well approach the matter with a desire to assist in discovering where the truth lies. This may affect how the reviewer goes about the task. For example, in a case involving allegations of child abuse, a therapist who had previously counselled the child may well have treated the child’s history as the basis for the therapy. But the reviewer might be looking for clues about the veracity of the child’s story, and might conduct the interview in a way to help in this regard.

To return to the main point, the authors should be clear in their own minds about these matters, and, I suggest, should prepare the report so that the readers will know the extent to which the author has tested, or considered the veracity, of the facts as presented by the family members involved.

Documents

Generally, the author (the expert writing the report) will have been sent a bundle of affidavits and perhaps other material, such as earlier reports. It is elementary, but important, to set out in detail precisely what documents were available and used by the writer at the time of writing the report. It may be, too, that some further information is available to the report writer between the time of

signing the report and giving evidence in court. In this situation the writer should be in a position to tell the court precisely what additional information was available since the writing of the report.

Statements

A second type of information consists of things that people have said in the course of interviews. In practice, the most important parts of the report often consist of the process of interviewing and observing people, normally including each parent or other party, and the children. During this process, the adults will normally give the reporter considerable information about their view of the history and the issues in the case.

Children will have a chance to express their wishes. It is important for experts to keep in mind that under the Act children have a right *not* to express their wishes.¹⁶ Many prefer their “right to silence”, and do not wish to choose between their parents. In my view it is important that their right be respected.

A question arises to what extent the report should contain a verbatim account of what was said. In my view it is unnecessary and undesirable to attempt to give a full transcript of everything that is said. A selection has to be made, and some summarising has to be done. This requires judgment and discrimination. Obviously, if the first 10 minutes of an interview with a young child was spent settling the child down and discussing neutral subjects, a brief statement to this effect will suffice and the report should not be padded out with the contents of such a discussion.

More generally, the degree of specificity should correspond to the importance of the subject matter to the issue presented in the case. To take an obvious example, if the statements included apparent disclosures by the child of some form of abuse, the precise words used by the child would normally be very important and should be precisely stated. It is usually desirable to retain the language used by the family members. Thus if one parent speaks frequently of being “upset” it seems preferable to retain this word in summarising the person’s account, rather than substituting some other word, such as “distressed”. It seems particularly important not to substitute technical terms at this level of the analysis, that is, in the passages where a summary is made of what people have said.

Behaviour

The next kind of information is relevant behaviours. Obviously in many cases it is appropriate to describe behaviour and statements at the same time. An example would be a situation where a child makes an apparent disclosure of abuse. The report should normally describe whether the child

appeared to have appropriate affect when making this statement, and whether the child's behaviour gave some reason to believe or disbelieve the accuracy of what was said. Obviously in many situations the interactions among the various people is important.

In relation to behaviour, too, it is important for the report to set out precisely what was available to the writer. In particular it is important to describe with some specificity the situations in which the interviews took place (eg. whether at home or in professional rooms), the time spent with each person, the number of interviews, who was present at each interview, and so on. It may also be necessary to include other information that is clearly relevant. For example if the behaviour of a child and parents is being described, it would be normally useful to note whether the child had recently been in the care of one parent, or had not seen a parent for some considerable time.

Tests

Sometimes the expert will carry out tests. I have in mind in particular standard tests of the kind psychologists carry out, but there are other kinds, such as blood tests, to which some of the following comments might apply.

It seems generally a good idea for writers to assume that the reader will not have any expert knowledge of the test. Even a familiar test like the Bene-Anthony test may not be known by the reader. It does not follow that the writer should describe the tests in detail. The extent to which the tests should be described requires judgment. If, for example, a battery of tests was routinely applied and showed that a child was in various ways normal, it might be sufficient simply to note this rather briefly, although the tests should be identified. On the other hand if a particular test produced a result that was unexpected, particularly important, or particularly inconsistent with other material, it might well be appropriate to describe that test in some detail, and even discuss its reliability and validity, and thus help the reader to assess what weight should be attached to the test result.

Component Two: Reasoning

The second component is the reasoning. Broadly speaking the law's approach to expert witnesses is that they, unlike other witnesses, are entitled to express their opinions. Also, very broadly speaking, they do not necessarily have to spell out the precise reasoning that led to their conclusions. It is often acceptable for an expert to describe the information and then say, in effect, that as a result of that information, in the expert's professional opinion something is the case.

¹⁶ Section 68H.

It is important for witnesses to explain the basis of their expertise. I would have thought that it is always sensible to include a curriculum vitae with one's report. It may also be necessary in the course of the report to discuss one's level of competence in particular aspects of the matter.

The reasoning should, of course, make clear what factual matters are taken into account in reaching conclusions. Some are obvious, others less so. It would obviously be a poor report that set out observations and background matters and then simply concluded that the child should live with one parent or the other.

One reason for the importance of identifying the factual basis for conclusions is that the factual basis adopted by the expert may not be the same as the facts as eventually found by the court. To take a simple example, suppose in a child abuse case an expert is told that the person suspected of abusing the child, "Annette", had in fact abused another child, "Elsie", years previously in circumstances similar to those alleged. The expert expresses the conclusion that the person has abused Annette as alleged. Suppose, however, that there is now evidence before the court (that had not been available to the expert) showing that the person had *not* abused the other child, Elsie. Obviously, the expert's evidence needs to be re-assessed. It should be clear from the report whether in reaching the opinion that the child Annette was abused, the expert took into account the previous incident.

In some matters the reasoning does not need to be explained in detail. For example, if a report describes an apparent disclosure of a child and then described the relevant behaviour and explained that the child's behaviour was appropriate to the content of what was said, and that there was no evident reason to suspect that the child had been coached or was not telling the truth, that might well be sufficient. It would not necessarily be appropriate for the expert to spell out the reasoning in great detail, discussing various types of coaching that can occur and giving systematic accounts of various ways in which children's disclosures may be treated as suspect. Again, it is a matter of judgment to what extent it is appropriate to set out the reasoning.

As a general guide, I would have thought that where the conclusion would be seen as following naturally from the information it is not particularly necessary to spell out reasoning which might be taken as relatively straight forward. On the other hand where the conclusion drawn has a non-obvious or counterintuitive quality, it might be necessary to explain more precisely the chain of reasoning that led to the counter-intuitive conclusion. Again, if much of the information suggests conclusion "A", but on the basis of a particular item of information the report writer reaches

conclusion “B”, it might well be necessary to explain with some care precisely why this particular item of information should be relied on at the expense of the other information.

A simple example, perhaps, is that a child showed affection for, and clingy behaviour towards, a parent suspected of abuse, but the expert came to the conclusion that the parent had indeed abused the child. It might well be appropriate to explain that an anxious attachment by a child to a parent may be consistent with past abuse by that parent of the child. This example illustrates that the reasoning may need to be spelled out where the conclusion follows from a chain of reasoning that does not correspond very closely to “common sense”. People with limited experience with children might assume that physical affection by a young child towards an adult is open to only one (benign) interpretation. Another example of counter-intuitive behaviour is that when young children meet a parent after a period of absence, they may typically react initially with shyness or studied avoidance. It would be a mistake to take this behaviour as indicating indifference to the parent.

Another matter is that where the expert is drawing on a particular body of theory, particularly where there is a dispute within the field, it is only fair to indicate the extent to which he or she has an idiosyncratic or particular view of the area in question. An example, perhaps, is the controversial “repressed memory syndrome”,¹⁷ the view that victims of a major trauma such as sexual abuse may repress the memory, until it emerges years later, perhaps in a context where it has been “triggered” by some event, or by counselling or by drug therapy. I say this is controversial because some experts argue that the research shows that the “memories” that might be unearthed later can be factually false (although genuinely believed by the person). In my view, an expert who took the view that a subsequent memory was an example of the repressed memory syndrome should indicate that this is a controversial area, and that there are differing views.

The importance of identifying the reasoning, and where appropriate indicating that the theoretical basis is fragile or controversial, is all the greater in the case of court experts. An expert appointed to this role has a big responsibility. This is particularly so where there are no competing experts (as is often the case). In such situations, I think it is important that the Court does not get the false impression that the particular theoretical approach of the expert is the only available approach.

Component Three: the expert’s conclusions

There used to be a rule that an expert could not give evidence about the very issue the court needs to decide, for example whether the child should live with one parent or the other. This rule, the

origins and value of which were in any case rather uncertain, was abolished by the Evidence Act 1995 (Cth).¹⁸ Thus, in my view there is nothing in the law of evidence to stop an expert from giving evidence about an opinion on “the ultimate issue”, ie what the court needs to decide. I understand that my view might not be shared by every other judge, but I see no difficulty in having an expert express such a view. There is no question of “usurping the role of the court”: everybody knows who has to make the final decision! Indeed, if experts felt inhibited about doing this, they would probably write the report so that the readers, reading “between the lines” would have a good idea which way the expert was leaning. I see no advantage in such coyness: if the expert has a view on the ultimate outcome, and it is within the expert’s expertise, I for one am always keen to hear it.

Usually, the expert’s opinions on more specific things are in fact more important to the court, which of course must make up its own mind about what orders to make. Opinions about what the child’s wishes are, how the child relates to each parent, whether a person has a mental illness, and other such opinions provide, I think, the more important parts of the experts’ evidence.

Experts do not need to pretend they know everything. Good experts will have no difficulty in saying that cannot form a concluded view. For example, an expert might sensibly say that she has no final view about whether a child has been abused, and might go on to identify the matters that suggest the child has been abused and those that point the other way, explaining the factual basis and the reasoning as necessary. Such an analysis may be very helpful for the judge.

It is useful for the writer to give some idea of the degree of certainty or confidence that he or she has in the conclusion. It is useful, for example, to know whether the expert thinks that it might be marginally more likely that the child would benefit from being with one parent rather than the other, or whether the writer was firmly of that view and considers that placement with the other parent would be very dangerous indeed.

In formulating the “conclusions” part of the report, the expert will find it very helpful to have clarified the purpose of the report and the range of possible outcomes, so that any conclusions expressed are useful to the court.

I have sometimes found, in family and expert reports, that the writer strays into the field of giving advice to the litigants. For example, a recommendation might be that one parent should stop denigrating the other parent, and if that were to happen there should be certain contact. Such a

¹⁷ There is a detailed discussion of this in Ian Freckleton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Law Book Co, 2nd ed 2002, at 371ff.

recommendation may have some value, but is flawed, because it is not really addressed to the task the court has. A slight but significant adjustment would make it useful. For example, the report might say (i) that the particular pattern of contact would be appropriate if the parent stopped denigrating the other parent, and then (ii) express a view about the likelihood of this happening. That would help the court. Saying that the parent *should* not denigrate the other parent is no doubt correct, and perhaps has a place in the report, but the court must focus on what is likely to be best for the child, and this requires it to make predictions about people's behaviour. It looks to the experts for assistance in making these predictions.

CONCLUSION

I have divided reports into three components: a *body of information*, a *chain of reasoning*, and *the conclusions*. What I like about this simple structure is that it is consistent with basic scientific method. That is, it follows the pattern that there is a data basis, a rational and considered process of analysis, and a conclusion or hypothesis reached. The logic of the thing seems to me to be no different, or little different, from testing some hypothesis in a laboratory. It applies, I think, to all the types of experts I have mentioned earlier: those who prepare family reports, court experts, and other experts, including therapists, experts who have interviewed and assessed people, and "armchair" experts who have not.

A common pattern in cross-examination is for expert witnesses to be asked whether certain other facts, if true, would lead them to qualify their conclusions. Good witnesses are quite relaxed about this and give careful consideration to whether the new information should modify their conclusions, as it often does. In doing so, they show an understanding of what is happening. Their opinions are necessarily based on their information. If as a result of the evidence the judge is going to have different information, the judge will want to know the expert's view on that different information. If the result is different from the expert's original recommendation because the facts turn out to be different, there should be no embarrassment for the expert.¹⁹ It is a logical mistake to see the expert as having backed down, or having been shown to be wrong, in such situations.

I stress this because, as I said at the outset, one thing that distinguishes the better experts from the less satisfactory is whether they get locked into a position and feel impelled to defend it against all comers. If experts keep in mind the nature of what they are doing, they might be able to avoid

¹⁸ Section 80. For a detailed discussion see Freckleton and Selby, Chapter 7.

¹⁹ One expert recently said in a report, quite appropriately, that the outcome may well depend on whether the court could make a particular finding against a parent, the expert not being able to do so on the material available to him.

reacting in this way. Changing one's mind in the light of new material is often simply the logical thing to do. Reports apply reasoning to the available facts, and reach a conclusion that is necessarily provisional. It is like a scientific hypothesis, always liable to be disproved or put into doubt when the next bit of research data comes along. The best experts understand all this.

I hope that this analysis will be useful in assisting those who are less experienced feel more comfortable with their role and more willing to take on the role of expert witness. The evidence of experts in children's cases is in my experience, of great value and assistance to the court and to the parties.