Child inclusion in family mediation in the context of highly conflicted parental separation and potential alienation

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Abstract

This paper describes an extension of the research and clinical practice on child inclusion at the time of parental separation. The overwhelming support for child inclusive mediation by parents, children and mediators along with the promising results of skilful and sensitive practice, makes this an intervention of immense potential value. Irresolution about child and parent contact is already problematic for the wellbeing of children; high conflict and disrupted parent-child relationships create extreme risks of maladjustment. Resistance/refusal dynamics of child contact with parents can ossify into parental alienation with lengthy and destructive impasses, compounded by delay in the court process. In this paper I argue for a social science and judicial interlock which mandates research informed, clinical practice to address the unjustified resist/refuse behaviours, without compromising external investigations. I have termed this intervention Therapeutic Family Facilitation (TFF). The intervention is based on promising evidence that high conflict family disputes can be heard and resolved in a timely way in a judicially mandated process, in an out-of-court intervention. Resolving family impasse, by means of empirical and qualified practice, counters the damage to children and their families — which is considered by researchers and experts to be a public health issue.

Background

In 2013, mediation was made mandatory via the Family Dispute Resolution Act 2013 (NZ) (‘FDR Act’). Parties in dispute about care arrangements for their children under the Care of Children Act 2004 (NZ) were mandated to attend mediation in an effort to resolve their dispute before they could make an application to court. Exemptions included violence and mental health and addiction issues. Progressing into court was to
be by way of exemption — either parties failed to find agreement, or one party refused to attend. In explaining the reform, the Honourable Judith Collins, then Minister of Justice (2013) stated that the Government’s top priority in family law reform was to put children’s needs first. Mediation as an out of court intervention has had mixed results in many of the jurisdictions in which it has been implemented. New Zealand is no exception.

In 2018 a further review of family justice was ordered by the Minister of Justice, Hon Andrew Little, to consider the 2014 reforms as they related to assisting parents and guardians to resolve disputes about parenting arrangements or guardianship matters. Led by Rosslyn Noonan, an Expert Panel in 2019 released a document, Te Korowai Ture a-Whanau (Joined Up Services),¹ with recommendations for changes to family law policy and practice. The aim of these recommendations was to bring together both the in and out of court elements of family justice services, in an attempt to address dysfunctional silos and fragmentation in family law. The development and recommended implementation of changes was to improve the wellbeing of children and young people by enhancing access to justice for children, parents and whanau. One of the key areas discussed was that of building capability and capacity within the court to allow for children’s participation.

Amending the Care of Children Act 2004 (NZ) and the Family Dispute Resolution Act 2013 (NZ) to include child participation as a guiding principle was considered a priority in the 2019 review. The Bill before Parliament makes express reference to the United Nations’ Convention on the Rights of the Child (UNCROC) to require parents and guardians to consult children on matters that affect them.² Recommendations were made to the Ministry of Justice to stocktake appropriate models and research of child participation.

Current situation

For a number of reasons outside the scope of this paper, the process of out of court family dispute resolution (FDR) has not had a good uptake.³ It is quite possible that it will cease to be mandatory once the family justice recommendations are tabled. Nevertheless, there remains a significant opportunity to prioritise

children in the process of FDR, which can go beyond traditional agreement making and act on children’s rights to participate, be consulted or to comment.

The significant question seems to be whether the process of FDR, as an agreement forming process, is sufficient in itself to be in the best interests of the children. Are we as mediators, to paraphrase, neutral facilitators of negotiations between two parents — or are we direct advocates for the children who are the subject of the dispute? Quite what the best practice is for child participation has yet to be clearly defined.

Significantly, if evidence-based best practice for children is upheld, then consumers of family law need access to a child participation model. From a systemic point of view, we know that if children are not coping, then there is little chance that their parents will either. Two issues reside: firstly, that the parties to the dispute are already locked in high conflict, and secondly, that their children will have been (and at least indirectly will still be) exposed to conflict. Some children will be managing the transition to different structures within their family. Others will be mired within a chronic, ongoing and toxic dispute, which has been a feature of their childhood. Such chronic conflict has serious consequences for their mental health.

Given that around 95% of parenting dispute cases settle without court action, the majority of children have not had an opportunity to be heard in matters that affected them (despite the fact that NZ is a signatory to UNCROC). These children are not the subject of specialist reports, and nor do they have a lawyer appointed for them.

We know that children fare better without the delay of prolonged in court legal processes where their parents become ever more entrenched in dispute. Prioritising children who are struggling with the worst of the lingering acrimony, and its dysfunctional impact, is a paradigm shift in family law. The emphasis on primarily working with parents to resolve disputes over their children’s care has thus shifted towards involving children in the process.

Two major propositions inform the rationale for the practice of child inclusion in family law contexts. Interparental conflict is now recognised as a significant factor in causing deep distress to children and one which profoundly compromises adjustment to separation. Evidence of impacts to children’s wellbeing and mental health has caused researchers to view the degree and extent of the conflict surrounding the separation

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as a variable of grave significance. Diminished parenting capacity during the separation,7 and in the year or two following, affects parental ability to nurture and protect their children. Far from being able to help children with their worries over this time, parents can often inadvertently add to their children’s distress. If a key determinant of child wellbeing is the extent to which parents are able to cooperate and manage their conflict post mediation, then an intervention which encourages parents to think of their children, rather than focus on their own hostility and grief is positively implicated in the ongoing mental health of that child.

Secondly, a growing body of evidence indicates that children experience ongoing distress when they are not told what is happening and when adults do not take their feelings and views into account.8 The majority of children affected by parental separation yearn to make sense of their situation by being part of the negotiation process concerning the rearrangement of their family.9 They have no choice but to be involved in the actual restructuring of their family’s post separation relationships.

The child interview covers the child’s feelings about the current arrangements and their hopes for the future, without putting them in a position of having to decide or say what they want. The interview is carefully paced and signs of trauma are carefully monitored. Feedback to parents is a highly skilled conversation with parents about their child’s responses. The role is being an ally for the child and a support for the parents. This feedback to parents about their child’s self-reported position — illustrated by the ways their child reports trying to make sense of their world — can result in the underpinning of an agreement. If this agreement comes from the right place, it will carry a level of conciliation, which will enhance durability.10 This is a poignant use of motivational interviewing and one which has the potential to generate the parental atonement so urgently needed by the child.

Child inclusion in family dispute resolution constitutes a distinct discipline,11 blending knowledge of developmental psychology, attachment theory and family systems theory with skills drawn from counselling and mediation. It balances rights-based justice with an ethical mandate to protect and enhance the family in transition. Engaging children in this way not only recognises a child’s rights and agency, but also responds to the contextual needs of that child and family for skilled help through the separation and

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10 Jennifer E McIntosh, Caroline M Long and Yvonne D Wells, Children Beyond Dispute: A Four Year follow up Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution (Report, 2009).
11 Ibid 6.
parenting dispute which has arisen. A child inclusive intervention therefore involves working systemically with the family to embrace a process that prioritises the developmental health of the children affected by the dispute — it is much more than just talking with a child to hear their views. It is possible for the parties to reach an agreement by relaying the child affect via feedback to the parents.

When properly delivered by trained professionals, child inclusive practice is a targeted, short term, dispute resolution process with a therapeutic outcome for the entire family. It is not therapy per se, and its context is socio legal. Implementing a child inclusive model early in the family law process provides an opportunity to identify and deal with conflict before it gets polarised into intransigent parental positions, with consequent harmful impact on the children.

**Estrangement and alienation**

Central to the latter part of this paper is the fact that children of separated parents need to retain ongoing meaningful relationships with each parent. This is more easily realised when parents’ affective responses to their children are as sensitive and positive as possible, and each parent is able to buffer the child from the more destructive aspects of parental conflict, as described above. This model can also be applied to the later stages of the family court process — either close to court application or post order — or indeed as an application in the resist/refuse dynamic. This is variously known as alignment or alienation.

Parental alienation is inadequately summed up as a ‘tug of love’. Sadly, the experience of a child targeted by one separated parent who poisons that child’s entire relationship with the other parent is far more sinister than a ‘tug of love’. The reality is that in some cases a parent can, deliberately or unconsciously, turn the perception of a child against the other parent — where such a negative view cannot be justified by past history or by any aspect of the parent-child relationship. This unjustified, and wholly negative, view of the absent parent is profoundly harmful for that child.

To alienate children from the other parent they have loved is an abuse and needs to be understood as such. We are talking about unjustified rejection, not rejection of an abusive or dangerous parent. Fathers alienate children from mothers, and mothers from fathers. Children in these situations don’t just lose a parent, they frequently lose everyone in the rejected parents wider family as well: grandparents, cousins, aunts and uncles — and an entire cultural heritage to which it was their birth right to belong.12

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The narratives and discourse surrounding parental alienation can be mis-understood and mis-informed. Conversations may become reduced to the rights of a father or the rights of a mother. It is unequivocally about the rights of a child to have quality relationships with both parents, siblings, grandparents and extended families post-divorce or separation. Children do best when they can have a good relationship with both of their separated parents. A few parents find setting aside their adult issues harder to do than meeting their children’s needs. It only takes one parent not collaborating to result in an enduring high conflict. Even where a parent has behaved badly (excluding a situation where there is a justifiable reason for a child to avoid contact, as with family violence), children mostly still want to repair and continue their relationship with the only parents they have.

Children in the middle have to cope, but enduring high conflict is very bad for children. Adults too struggle with such gaps in communication, and children are very aware of the tense handovers from one parent to the other.

Sometimes each parent will see the tense transition as a sign that the child does not want to go to the other parent. The vast majority of children I meet professionally tell me that they do want to see their other parent. They just don’t want the transition to be so difficult. These handovers can be made easier with careful planning. Difficult situations of this type most commonly occur where once there was a loving relationship between child and parent.

One result of conflict is that children will take sides. Children resist the pain of the loyalty bind, and a pattern emerges where a child will start to resist post-separation contact with a parent. Sometimes, if they have contact with both parents, they might side with whichever parent they are with at the time. But the more alienated child will overwhelmingly side with one parent against the other. Even if contact continues, we still find that strongly resistant patterns of behaviour from the child can take place. It is a coping mechanism for the child who cannot be expected to understand why they feel compelled to reject their parent. Trying to make sense of a post separation world, where their parents appear to be at war, creates pressures which are simply too great for the child or young person. The child will split off their feelings from the previously loved parent.

Then the parent who is being rejected needs to find a way to take the rejection and to try and find a way to grow a better relationship again. Without informed therapeutic assistance, and with no communication with the other parent, finding a way through this impasse with a confused and upset child is virtually impossible
for many rejected parents. If the favoured parent is complicit in encouraging this behaviour, then the child becomes caught up in a sinister coaching exercise, and will become deeply resistant to seeing their other (rejected) parent under any circumstances.

Extreme refusal, which goes unmediated, can become overwhelmingly miserable, and is emotionally abusive for the child. Strong feelings and responses from the friends and families concerned can stoke the fire further, and the purely legal route will struggle to avoid the adversarial process. Delays and lack of nuance typically inflame an already aggravated family context. Court orders can be to no avail as the damage of delay plays a potent role. The situation is one of emotional abuse and it plays out in all combinations of gender of parents, extended family, and of the children caught in the middle. The damage is incalculable.

It is important to remember that whilst it may seem that a child’s rejection of a parent is rooted in something the rejected parent has done, it is in fact a coping mechanism. Children who are facing enduringly high conflict between their parents are likely to cope in just the way most people do — they side with one parent against the other. Finding an intervention, as parents, to work a way through this impasse is extremely important. Therapeutic mediation can definitely assist, if both parents will agree to try this route. Restoring a child’s mental health is an imperative in responsible parenting — and worth all and any effort.

Effective work in such cases can be paralysed by analysis and delay, and in New Zealand there is currently no suitable framework for dealing with such issues.

**Social science and judicial interlock**

As with all issues in the psychology of the family, there are degrees of intensity — from alignment to pure alienation, and everything in between. At the heart there is conflict and the power struggle which fuels it. Sometimes both parents are engaged in the conflict and the child takes a stance and aligns with one parent over the other in order to cope. Sometimes the alienation springs from the delusional state of one parent who completely believes that the other parent must be excluded at all costs — and a pathway of implacable hostility is entered into, with no rational basis.

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To get caught up in arguments about definition and ideology eclipses the damage being done and prolongs it. Entire academic papers and conferences are focused on this rapidly occurring virus in the lives of separated families. One size will not fit all. Parental alienation is becoming increasingly recognised globally with several countries having legislated against it, In the UK the Child and Family Court Advisory and Support Service (CAFCASS) have recently acknowledged the phenomenon and produced pathways to aid their staff who find themselves faced with parental alienation in their work.\textsuperscript{14}

In a keynote address in 2018, Lord Justice McFarlane (now President of the Family Division, High Court of Justice in England and Wales) indicated that the ongoing debate about attribution is of less importance than the ability to recognise the relevant parental behaviours. His Honour expressed the view that legal processes could more usefully:

> concentrate on the particular behaviour of the particular parent in relation to the particular child in each individual case. If that behaviour was found to be abusive, then action [needs to be] taken irrespective of whether or not a diagnosis of a particular personality or mental health condition in the parent can be made.\textsuperscript{15}

The ongoing debate about whether the resist/refuse dynamic is a syndrome of alienation or not, is far less relevant to the health of our children and families than our ability to recognise the parental behaviours which are so child adverse. It is these behaviours that need to be the focus of family law and it is these parental behaviours to which a rapid assessment for differentiation and definition of issues needs to be applied. An unjustified rejection of a once loved parent is not the same as the rejection of a dangerous or abusive parent. Screening for abuse, ill mental health and/or addiction is part of the differentiation process. Further, the sooner the trends in an individual resist/refuse family dynamic can be observed, the sooner preventive measures can be applied to inhibit a drift to an intransigent presentation.

Delay is the friend of alienation. It is profoundly harmful for children. It is of utmost urgency that a drift to estrangement is picked up as early as it is detected.

The 2019 NZ Family Justice Review still languishes as a Bill, and within that Bill is the strong recommendation that child participation is thoroughly reviewed as a central plank in family justice. The


2014 reforms were intended to be more responsive to the needs and interests of children caught up in disputes over their care or contact, yet no specific proposals were made about children’s participation in decision making. Whilst the benefits of participation to children and to decisions made about them are clear in the academic literature, they are not adequately reflected in practice.

The recommendations of the 2019 Report are that the Ministry of Justice, in conjunction with relevant experts and key stakeholders, undertake a stocktake of appropriate models of child participation, including FDR. The stocktake should also include: a consideration of key principles for children’s participation, including requiring professionals to promote children’s participation.¹⁶

The court was never designed to be a therapeutic agency. Lawyers have access to the legal process but not to a system of understanding. The separation and divorce impasse inflames an already aggravated system. Mediators and child consultants must have a systems understanding but they do not have ready access to the legal system or the power of the court. So as the 2019 review suggests, partnership is vital, and we need it to tackle the resource heavy problem of a child resisting contact with a parent post separation — a critical issue for both consumers and practitioners of family law.

Rather than therapy per se, working with families caught in a resist/refuse dynamic is dispute resolution with a therapeutic outcome. The work is best understood from a family systems perspective and needs to be brief, targeted and crafted to fit flexibly with the particular family. It is not about fixing the child (which is not only unhelpful, but is, in fact, contraindicated). It is about recognising that the resist/refuse dynamic typically originates from a multiplicity of sources in a family system. An informed understanding about how to facilitate the family around these barriers is essential.

My proposal of Therapeutic Family Facilitation (TFF) (unpublished) is an extension of child inclusion and flows into a human rights perspective. The intervention I describe is based on promising evidence that family disputes can be heard and resolved in a judicially mandated process in out of court intervention. Once heard without delay, the family system can recover and become a resilient, rearranged family. The barrier to this is the resistance of a family, typically one parent and a child, to changing the dynamic of estrangement.

¹⁶ Ministry of Justice (n 1) 7.
The model I propose uses customised psycho-educational materials, particularly using research, along with a challenge and a call to parents to change the dynamics. Appropriate and sensitively implemented child participation needs to be part of this. My proposal is that this intervention would follow the completion of attempted mediation (including a no show), and on the subsequent certificate of exemption, a triage recommendation and Settlement Conference would signal the judicially mandated process.

Years of experience suggest that the intransigent parent will frequently not participate comprehensively or voluntarily in these processes. Family justice which works for children, needs to mandate that the parents in question have an obligation to resolve the problem, and to receive proper help. To permit all therapeutic efforts (such as attendance and compliance) to be screened by confidentiality, is a further compromise of child health and resources — particularly time. If the parents have not done the work, then further consideration should be given to the parent failing to take the help offered; help which is designed to restore their child’s relationship with the other parent.

Although mediation and therapy typically takes place behind a wall of confidentiality, in these entrenched cases of unjustified rejection of a parent, the work needs to be mandated, and reported with a restrained and considered confidentiality waiver about the observed parental co-operation.

The process, facilitated by professionals trained in an understanding of resist/refuse dynamics, should be followed up by a judicial review, which focuses on the accountability of those charged with a child’s wellbeing. The vital key here is the development of a mandated relationship between the judge and the parents, attended by professionals trained in child and family work in this challenging context.

This timely and robust intervention creates an understanding/differentiation of the reasons behind a child’s rejection of a once loved parent. The work is central to the welfare and best interests of the child, and underpins the knowledge that a social science and legal interlock is significant in the production of positive outcomes, as opposed to corrosive delay.

A facilitator would need to be competent in the work required: the skill set includes understanding the differentiation in the resist/refuse alienation dynamic, understanding of family systems, cultural contexts, child psychology, attachment theory, family law and mediation skills as well as experience in child and family work. A clearer picture of the inherent dynamic will quite quickly emerge as the case goes through a programme designed to evaluate the parental capacity to support the child in attachment needs to the other parent. Domestic violence and abuse screenings are significant.
The implicit contract in the intervention makes it a requirement that the parents cooperate with joint parental meetings. Significantly they must invest in the process by facilitating the child’s presence at individual meetings with the previously rejected parent.

The intervention would be no more than 10 weeks, with a court date to be set in the event no agreements are made. Research indicates that 10 weeks is sufficient for progress to be made — if progress is not being made, then the specific parent blocking progress will typically be obvious. Further directions can then be made by the court with regard to the parent who has failed in their responsibility to engage in transparent work to build up their children’s relationship with the rejected parent. This might include consequences for the parent who has blocked progress and/or the grant of an appropriate remedy to other parties.

This style of intervention is suitable for families where there are high degrees of blame and conflict. The inherent design produces a comprehensive analysis of the capacity of each parent to recognise and change behaviours in a therapeutic setting. The parents who lack this capacity, for whatever reason, are returned to the court process. This urgent and strength-based intervention supports parents in their demonstrable responsibility to their children. The requirement for review after two months to make sure the progress has remained consistent is significant.

The arguments about the ideology of such an intervention need to be understood from an evidence-based framework, and facilitators’ must be scrupulous about screening out any abusive coercion. The child’s needs and robust mental health must be given priority.

**Conclusion**

Family law must pave the way for families to feel respected and treated fairly in a timely manner. Children and parents need to be protected from drawn out litigation. It is crucial too, that the minority of cases that unequivocally need court intervention are not held up. Our challenge now is to overview the ambit of our reforms and to sketch in the detail, so that real benefits can be achieved for families and justice, with a thorough understanding of child inclusive dispute resolution.