

**ASIA PACIFIC MEDIATION FORUM
PROPOSED PAPER**

**CHILDREN AS SOCIAL ACTORS IN THE MEDIATION OF DECISIONS
THAT DIRECTLY AFFECT IN FAMILY LAW**

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In Western society the dominant discourses surrounding children construct them as vulnerable, incompetent and passive recipients of adult care and protection. These discourses have been supported by empirical studies emerging from social institutions such as psychology, social work, medicine and education. Powerful explanations of childhood as involving a gradual development towards adulthood have resulted in a Western construction of children as unable to participate in decisions that directly affect them, and as needing protection from issues of an 'adult' nature.

An alternative paradigm positions children as actively operating on and in their environments, able to make sound decisions on a daily basis. As competent social actors, children shape their own lives and place in society, defining their sense of self through interactions with others around them.

This presentation will discuss the findings of my current research, entitled *The Voice of the Child in Family Law: Whose Right? Who's Right?* Following a short description of the research focus I shall discuss the responses of the children I have interviewed for the research. I will then describe the implications from the findings and indicate some possible challenges for us as we move towards a greater recognition of children as social actors who have an ability to fully participate in decision-making processes.

Key Words:

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Children as Social Actors in the Mediation of Decisions that Directly Affect them in Family Law

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In this paper I will argue that the best interests of the child can be most effectively addressed in family mediation when the children who are the centre of disputes around arrangements for them following parental separation are included in the mediation process. My discussion will take place in the light of current Australian approaches to 'child inclusive practice,' an initiative led by the Australian Government to centralise the voice of children in issues that directly affect them following parental separation. I will consider the concept of social constructionism, providing a very brief outline of this concept and relating it to our current understandings of the social position of children.

There are a number of debates around the inclusion of children from several perspectives. I will review these debates before looking at children's involvement in mediation and the current practices surrounding this involvement. Finally, I will pose some challenges for us in moving towards the greater involvement of children in decisions that directly affect them.

Child Inclusive Practice in Australia

In 1998 the Australian Department of Family and Children's Services, which funds family counselling and mediation services across the nation, commissioned a research project that looked at models for including children in the work with parents (Strategic Partners, 1998). This initiative was partly a response to the United Nations Convention on the Rights of the Child and partly to address the concept of the 'best interests' of children as detailed in the Australian *Family Law Reform Act 1995*.

Following publication of the research findings, Australia's service providers were encouraged to consider how to effectively include children in the work they were doing. Then, in 2000, the Government hosted a series of 'Child Inclusive Forums' throughout Australia where service providers and practitioners discussed what was happening. The results of these forums indicated various responses to the challenge to develop 'child inclusive' practices with a significant number of initiatives being undertaken (Mackay, 2001).

The forums indicated that a sharpened focus had developed on the role of children in the work. Interestingly, a distinction has arisen in Australia between 'child focused' and 'child inclusive' practice. 'Child focused' practice maintains the focus on children's needs and interests without necessarily including them in the work with parents, while 'child inclusive' practice considers ways to actively involve children when parents are discussing issues directly related to children's best interests. However, whether engaging in 'child inclusive' or 'child focused' work, the importance of gaining children's perspectives has been highlighted by the initiatives currently being followed in Australia.

Before I discuss some of these initiatives in detail, I want to introduce the concept of social constructionism and discuss how this concept works to position children in particular ways in our society. I will argue that children can be perceived in many different ways. I hope to challenge practitioners both at home and within the region to think about how we might 're-design' our perceptions of children that will facilitate their assuming more active roles in decisions that directly affect them.

The Concept of Social Constructionism

Social constructionism emerged in around the 1960s (Berger & Luckmann, 1966). Its premise is that we build a sense of self through our interactions with, and observations of, those with whom we relate on a daily basis (Gergen, 1999). The medium through which we build an understanding of our self is language, which is integral to the process (Wetherell & Maybin, 1996). The focus of social construction is on the qualities and characteristics (such as our gender, age and sexual preference) that define us within our social group. Subsequently, we define our social role.

Social constructionism is related to social, institutional and historical constructions of the group with which we identify. So, if I identify myself as an Australian professional male and a psychologist, I bring to that identity all that I know of the history of men in Australia, the profession of psychology and where those two concepts (Australian male and psychologist) fit in our society. I will then act, speak and dress in ways that reflect these constructions of myself. In presenting myself to you at this conference, for example, I have identified as 'professional' rather than 'tourist.' The way I dress to talk with you reflects this construction: I won't wear my shorts and t-shirt or hold a beer while with you. I will also talk with you in a 'professional' manner, which means that I won't give you my impressions of the Singapore zoo or the food at Ang Mo Kio. Similarly, those who construct themselves as 'lawyers' or 'teachers' will dress, act and talk in ways that reflect these constructions rather than those that don't 'fit' with our understandings of the 'normal' behaviours for people in these groups.

We can also socially construct others with whom we interact. For example, I heard that in England, a real estate salesman was showing a multi-million dollar house to prospective buyers. A person came along dressed in a T-shirt, shorts and open-toed shoes. He hadn't shaved and his hair was uncombed. The estate agent rejected this man, telling him that the house was worth some millions and this man would not ever afford it. The man walked away. Later, the estate agent discovered that the man was an internationally famous rock star who could have afforded the house ten times over! A construction of the rock star as 'down and out' lost the sale for the estate agent and facilitated a construction of him as ignorant and a snob.

So how do we construct children? First, it is argued that adults construct the concepts of children and childhood. Kendall & Wickham (1999) argued that there is a connection between what we see and what we can say about what we see. Children are seen as small in stature and as not very knowledgeable, so what we say about them needs to be consistent with these observations. In turn, children construct themselves through hearing what is said about them and reflecting it back when they later talk about themselves.

In 1962, Philippe Aries wrote his *Centuries of Childhood*. In that work he charted the different Western constructions of childhood since the Middle Ages. Aries pointed out that prior to that time, in the Western world, children were not considered very different from adults and that no distinctions were made between the groups. However, over successive centuries children were constructed as different from adults, at times being perceived as a 'blank slate' that could be moulded in any way we like, as having been born of 'original sin,' as vulnerable, or as of economic value to the family unit. Many of these constructions of children are still with us today and the history of childhood indicates that our views of children change depending on social, economic, political and 'scientific' policies and events. For example, in America, according to Hendrick (1990), play has been institutionalised as a childhood activity and child protection services have grown in almost every country in the world. There are movements to eradicate child labour regardless of whether such action would be economically viable for all families and cultures and the recruitment of child soldiers is a current issue for the United Nations (Human Rights Watch, 2002). While I neither support nor reject these moves, I wish to point out that they are being initiated by adults without reference to the children involved and without any consideration of the social, political, cultural and economic consequences for those children. The construction of children that emerges is one that keeps knowledge (and power) with adults and marginalises children, who don't have a voice.

The United Nations Convention on the Rights of the child, which was ratified by all but two of the world's nations within two years of its release, positions the best interests of children as a paramount consideration in all matters that directly affect them. It also implies a different social construction of children as social actors who actively operate on and within their worlds (James & Prout, 1990). This means that they have an opinion which should be heard and acted upon in all circumstances where their best interests are concerned. In 1995 Australia passed its *Family Law Reform Act* which also positioned children's best interests as paramount in decisions that directly affect them following parental separation. This implies that children's voices will be heard when considering arrangements for their future. However, it raises questions about how their voices will be heard and why they need to be included in the work for us to hear them. I will now turn to these questions.

Why Include Children in Mediation?

Some authors suggest that we shouldn't. One Australian author (Meggs, 1993) argued that their inclusion will damage them, putting them in the middle of a conflict that doesn't concern them. This argument constructs children as vulnerable and open to a 'no-win' situation because they do not have the skills to deal with the parental conflict. It ignores the possibility that children know about, have been exposed to, and have learned to cope with, their parents' conflict. Not including them in the work denies them a voice and the opportunity to tell the parents how it is for them.

Others suggest that decisions about children's arrangements following parental separation belong with the parents. They should accept responsibility (Haynes & Charlesworth, 1996). These authors would not include children in the work, but may engage in some 'child focused' activities described earlier.

Another argument holds that children's fears, hopes and understandings must be considered when parents discuss their future (Lansky, Swift, Manley, Elmore, & Gerety, 1996). Those who agree with this position may use either 'child focused' or 'child inclusive' approaches in their work.

Beck & Biank (1997) argued that at separation, parents experience a 'diminished capacity to parent.' They agreed with Wallerstein & Kelly (1980) that when parents are in turmoil about their own futures and emotionally stressed by the events surrounding separation and divorce, they become focused on themselves at the expense of their children. To not include children in some kind of intervention is then leaving them at risk of being themselves emotionally traumatised.

A social construction of children as independent actors in their own right, who both act on and react to their environments in ways that change the situation in which they find themselves, would agree with the demands of Article 12 of the United Nations Convention on the Rights of the Child to hear children's voices. Those who adopt this view would try to find ways to actively include children in their work.

The adoption of any of these views will significantly determine how we work with issues that directly affect children. Fortunately, we have a number of options to choose from in deciding how to proceed. A review of current practices will outline these options.

Current Child Inclusive/Child Focused Practices

'Child focused' practice is often 'symbolic.' Practitioners who use these practices maintain a close focus on 'the child,' her/his needs and interests, and how s/he is likely to react to any decisions that will directly affect him or her. Some examples of a 'child focus' are having a picture of the children on the table in front of the parents during discussions or asking 'child focused' questions such as "How do you think Mary would feel about this arrangement?" Some mediators ask parents: "Imagine that the children are in the room right now, sitting next to you, and tell them what you're thinking." They then might follow up by asking the parents to respond as the child or children.

A more direct 'child focused' approach is to invite the children to meet with the parents and mediator after all decisions have been made. At this meeting the parents and mediator would advise the children of the decisions. Children may be invited to give an opinion on the decisions, but this would be optional. In any event, the decision-making processes would remain with the parents.

A similar direct 'child focused' approach is to meet with the children early in the mediation to gain an understanding of their feelings and thoughts about the issues being discussed by the parents. In subsequent mediation sessions with parents, the mediator would act as an advocate for the child while adhering to the mediation processes, giving information about the children's feelings and thoughts at appropriate times but not going beyond this intervention.

Beck and Biank (1997) argued that both children and parents are usually traumatised by the experience of separation and divorce and require intensive therapy to come to terms with the associated changes in their lives. They would bring both children and parents into therapy while the parents were also undertaking mediation. Mediation and therapy sessions would perhaps alternate until all family members were reconciled to the post-divorce situation and the parents had agreed on how to move forward.

Some practitioners are working with children alongside the parents' mediation sessions, either in group work or individual discussions. In group work, children discuss with an experienced child therapist or facilitator the effects of separation on them, their needs and interests, how they might cope with their changed circumstances, and how they might talk with their parents about what is happening in their lives. This information may or may not be fed back to parents. If it is, the information is very general rather than reporting about what the children of specific parents have said.

In individual sessions, children may be invited to comment on the parents' discussions, either specifically or in general terms. Their comments may or may not be relayed to the parents. Alternatively, the mediator may provide the parents with a synopsis of the children's comments at the next mediation session.

During my work as CEO of a Melbourne-based mediation service, we appointed 'child interviewers' to our staff. These people were skilled child psychologists who had experience in working with children over a number of years. When parents expressed interest in hearing from the children, a child interviewer would meet with them and discuss how they were feeling, what they were experiencing and what they hoped for the future. At the next mediation session with the parents, the child interviewer would join the mediator and parents and share with them what the children had said. Parents would then be invited to negotiate around the children's needs, sometimes with the child interviewer remaining in the session to advocate for the children during discussions.

The term 'child inclusive' mediation implies that children are included directly in mediation with parents. There are a number of options available to the 'child inclusive' mediator in managing this. First, the mediator might bring the children into the room at strategic times during the parent's mediation sessions. These times would be related to discussions about the children's future: residence, contact or related matters. The mediator might simply ask for the children to talk with the parents about their hopes, fears and needs, then withdraw. Or mediators could ask children to stay and work with the parents in the issue that directly relate to them, withdrawing when the discussion has finished or agreement has been reached.

Finally, children could be included in the mediation from the beginning, as equal decision-makers with the parents. As far as I'm aware, this hasn't happened very often to date, if at all. Even if we socially construct children as competent and able to work with adults from a roughly equal power base, we must continue to be aware that adults can coerce, threaten and intimidate children. This could happen in mediation, especially when a parent has constructed his or her own social position as powerless. The full inclusion of children in mediation under these circumstances could leave them open to abuse and emotional damage.

However, I would argue that many parents who enter mediation express genuine interest and concern for the children of the family. Some journal evidence argues that hearing from the children can have a profound positive effect on the parents and their subsequent decision-making processes (McIntosh, 2000). So perhaps including children in mediation from the beginning, and working sensitively and skilfully with the entire family, can make a difference; though is doing so, we are faced with some very real challenges.

Challenges

I have suggested above that children can be vulnerable, especially when parents work to coerce, threaten and intimidate them. Similarly, our practices can place children in vulnerable positions. An insistence on working in a specific way, a lack of 'child friendly' facilities, a social construction of children as exactly like adults without considering the differences in experience and understanding, can lead to children experiencing an abusive situation. The challenge for us is in identifying and altering any practices, structures, attitudes and values that are inconsistent with a strong respect for children and their position in our world.

This includes the use of language such as 'child friendly,' which has the potential to marginalise children by implying that they require different services from those of adults. As Thomas & O'Kane (2000) have noted, the interaction with children, and the provision of a space for them to talk, is often more positive than arranging activities and facilities for them.

Having said that, I question whether mediation as we currently perceive it is 'child friendly.' We often use jargon when mediating, there is a formality that can intimidate children, it is usually a very adult-oriented 'talk-fest,' and the approach is highly rational and 'adultist.' The challenge for 'child inclusive' practitioners is to break down these barriers to invite children in and to centralise them as important contributors to the work.

There are also restrictions placed on 'child inclusive' mediators by the 'gatekeepers' in the system (as opposed to the 'door openers'). Gatekeepers can be any adult who has a stake in 'protecting' children and the ideal construction of 'childhood' as a golden age of play and carefree happiness. They include teachers, social workers and psychologists, family therapists, other family members and sometimes parents themselves. Governments can also regulate children's activities, restricting what we can do with children, for both legitimate and spurious reasons. Our challenge is to continue to advocate for children, their rights and best interests, in all our endeavours, not only in the mediation session. This can sometimes be difficult, especially when we receive strong opposition to our efforts.

Finally, 'child inclusive' mediators are faced with the challenge of re-structuring their perceptions of children. The adoption of a new social construction of childhood and of children as people who operate on their worlds and who know and can articulate their own needs and interests in an effective manner does not come easy. It challenges our own values and understandings as well as our historical notions of the place of children in society. Embracing a social construction of children as active participants in making decisions that directly affect them means changing our attitudes and belief systems. However, I would suggest that if we are able to achieve this, we will find a new respect for children and their abilities.

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