Adversarialism in the Family Court: ethics and practice

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Introduction

> *"The cost to children of unresolved parental conflict is incalculable. The adversarial nature of the system pits a child's parents against each other and this is absolutely not in the best interest of children."*
>
> Submission to Independent Family Court Review Panel 2019[1]

> *"The Family Court has the most complex of mandates, especially in relation to care of children, where the decisions deal not only with the past and the present but also the future."*
>
> Independent Family Court Review Panel Final Report[2]

Every year, New Zealanders make around 60,000 applications to the Family Court.[3] While numbers of applications do not correlate to numbers of cases, as most cases include several applications, these numbers still make it the second busiest jurisdiction in the country.[4] Although the Court deals with adult matters, such as mental health declarations and relationship property disputes or disputes over wills, the vast majority of its work directly concerns the welfare of children. More than half of applications are under the Care of Children Act 2004, covering private disputes over child custody, and the second largest body of work comes under the Oranga Tamariki Act 1989.[5]

While most — around 60 per cent — of separating parents resolving arrangements without recourse to the courts, its influence remains strong: Of those who do not go to Court, X% still take advice from or have the intervention of Family Court lawyers, who, as this and other studies suggest, tailor their advice to their understanding of what the Family Court would do, were it approached. A further phenomenon suggested by the findings of this study is that popular understandings of what the Court would do colour the decisions of those who do not seek legal advice: People who never approach lawyers or the Court make their custody arrangements based on their beliefs about the Court.

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[*] Thank you very much to Christian Poland, student and research assistant at the University of Auckland Faculty of Law, for his excellent editorial work on this report.

[1] Submission by a professional body to the Independent Panel that examined the 2014 family justice reforms: *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 6.

[2] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 14.

[3] District Court of New Zealand *Annual Report 2021* (2021) at 21.

[4] District Court of New Zealand *Annual Report 2021* (2021) at 21.

[5] District Court of New Zealand *Annual Report 2018* (2018) at 35.

Reviews of the New Zealand Family Court have repeatedly identified its adversarial legal culture as a major problem for its ability to produce child-focused outcomes.[6] Adversarial lawyering, with its narrow and oppositional focus on prioritising the client's interests above all, is said to aggravate and prolong parental hurt and resentment and cause a loss of focus on the interests of children. It is a painful irony that the avoidance of adversarial lawyering, precisely because of the way it aggravates adult hurt and denigrates from the protection of children, was a large part of the reason the new Family Court was first formed,[7] and yet somehow it has managed, in the ensuing 40 years, to colonise the system.

At the same time as we are (again) recognising the dangers of adversarial lawyering, the review of the 2014 reforms, which emphasised self-representation and restricting lawyers in court, has found that without lawyers, parties are often unable to access the legal system or to make themselves heard effectively.[8] The Independent Panel tasked with reviewing the 2014 reforms highlighted that:[9]

> Removing legal representation from the early stages of Family Court proceedings was intended to encourage parents and whānau to interact in a less adversarial manner and take responsibility for resolving their own issues about the care of children without unduly relying on lawyers.

In reality, though,[10]

> UMR found that "most parents could not contemplate navigating the family justice system without the support of a lawyer. Lawyers … help to reduce parents' fear and stress and allow them to focus on their own and their families' emotional wellbeing".

Despite identifying both the importance of lawyers and the problems we create by the way we operate, very little is being done to examine and address the adversarial nature of lawyering.[11] Lawyers are often seen as a necessary evil or Catch-22 of the Family Court.

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[6] *Strengthening the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 7–9; and *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 6 and 15. Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at [669] and [709] noted serious criticisms of adversarial lawyering from expert report writers and consumers. See also Jan Pryor *Parenting Orders in the Family Court: Final report for the Law Foundation* (Law Foundation New Zealand, 2012) at 15–19; Jan Pryor and Elizabeth Major *Review of Family Court: the Views of Family Court Professionals* (Law Foundation New Zealand, 2012) at 8, 22 and 32; and Liz Gordon *Study of grandparents in family court proceedings over their grandchildren prior to the 2014 changes to the court* (Law Foundation New Zealand, 2016) at 25–27.

[7] David Beattie and others *Report of Royal Commission on the Courts* (1978); and Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) at [31]–[32].

[8] *Strengthening the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 22–23; and *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 7–8 and 24.

[9] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [269].

[10] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [219].

[11] Note that s 9 of the Family Court (Supporting Children in Court) Legislation Act 2021, which is expected to come into force in August 2023, will amend the Care of Children Act 2004 to require lawyers in child guardianship or care disputes to take any steps they think will help enable the "dispute to be resolved as safely, fairly,

Notably, the concern about the impact of adversarialism on parties and children is shared by lawyers. Anecdotally, many Family Court lawyers are deeply aware of and troubled by the damage done by adversarial lawyering, but also see no alternative to conventional ethical frameworks when it comes to court. Some are even exploring alternative methods that avoid court, such as Collaborative Resolution.[12] Any ethical exploration about the nature of the Family Court, and in particular legal practice in the Family Court, has tended to focus on the hybrid role of Lawyer for Child, leaving the changes expected of lawyers for parties in a "less adversarial" environment untouched.

The Family Court presents and an important arena for the exploration of different legal ethical systems and their impact on clients' access to justice, and on the wellbeing of any children involved in a dispute. Family Court legal practice raises complex ethical and practical problems, presenting challenge for both Family Court policymakers and practitioners. The stakes of these challenges are high; at risk is the wellbeing and ongoing family relationships of the parties, as well as the wellbeing and welfare of any children involved. As highlighted in the opening quotations, the Family Court has an incredibly complex mandate. Legal practice in the Family Court is correspondingly no less complex.

This research project combines a review of the ethical and empirical literature on Family Court legal practice, and qualitative interviews with experienced Family Court lawyers in three cities nationally, to understand the reality and underlying ethic of family law legal practice. This includes how the statutory duty to conciliate and the paramountcy principle translates to practice, the influence of standard partisan legal ethic on practice, and the ways in which lawyers have adapted to the policy emphasis on settlement and conciliatory practice. Addressing the harm of overly adversarial lawyering requires a closer examination and understanding of lawyer's practice and the way in which they balance changing family justice policy goals, the traditional concept of partisan lawyering and duty to the client, and their own concern for parties' long-term interests and the wellbeing of any children involved. A more nuanced understanding of the reality of Family Court practice could help family justice policy avoid the fate met by the 2014 reforms and, crucially, produce better experiences and outcomes for the parties who turn to the Family Court for help, as well as their children.

Methodology

This study is comprised of two components: a literature review examining the emperical and ethical literature on Family Court lawyering across jurisdictions, and a qualitative interview

inexpensively, simply, and speedily as is consistent with justice". This broadly responds to recommendation 39 in the *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 73, which was to: "Amend the Care of Children Act 2004 to introduce an obligation on lawyers to facilitate the just resolution of disputes according to the law, as quickly, inexpensively and efficiently as possible, and with the least acrimony in order to minimise harm to children and whānau".

[12] See Collaborative Resolution NZ <www.collaborativeresolution.org.nz>. For example, there was a presentation on collaborative law at the Te Tai Tokerau Family Law Conference in April 2018 and Collaborative Resolution NZ has run training seminars to recruit members across the country.

study of 18 New Zealand lawyers in three cities nationally. Ethics approval for this project was granted by the University of Auckland Human Ethics Committee in August 2019.

Literature review

The literature review is comprised of a review of the literature on the history of the Family Court, anti-adversarial thinking and reform, as well as the emperical literature on the reality of Family Court lawyering across jurisdictions, including practical and ethical problems with Family Court lawyering.

Interviews

Participants

Potential participants were identified through the New Zealand Law Society's public website "Find a Family Lawyer".[13] When a potential participant was identified, their public profiles on their work website were reviewed to ascertain their eligibility. The criteria for eligibility for this research were:

a) approximately ten years' experience as a Family Court lawyer;
b) specialisation in Care of Children Act cases; and
c) for half of the sample, that they practice as Lawyer for Child.

Ten years' experience reflects the fact that lawyers cannot apply to be Lawyer for Child until they have at least five years' experience. Ten years thus ensured that all participants were senior Family Court professionals and Lawyer for Child participants had experience in the role. Exclusion criterion, beyond inexperience and wrong specialisation, were:

a) a close personal or professional relationship with any of the researchers; and/or
b) involvement as counsel in ongoing litigation in which any of the researchers or their firm are also counsel.

The final interview sample included 18 lawyers, 11 of whom were currently or had previously practiced as Lawyer for Child. All were family law specialists, and almost all had legal experience outside of family law. The lawyers' experience outside of family law was generally limited to their early careers, although a few maintained some limited ongoing civil or criminal practice alongside the bulk of their work in the Family Court. The average number of years of Family Court experience across the participants was approximately 20 years,[14] with the most inexperienced lawyer practising for eight years and the most experienced practicing for forty

[13] Family Law Section: New Zealand Law Society "Find a family lawyer" <www.familylaw.org.nz>. This website allows people to search for a family lawyer via locality, and provides a link to the lawyer's website and work email.
[14] Note that one lawyer had 4 years of Family Court experience (12 years experience all up) and one had 8 years of Family Court experience (8 years all up).

years. Interviews were undertaken across four regions nationally: Hamilton, Rotorua, Auckland and Christchurch. These locations were selected to give a range of larger and smaller New Zealand cities, including both urban and regional centers.

Interview procedure

After identification potential participants were approached via work email addresses. An approach via email, rather than advertisment, was deemed the most appropriate as the study is about people's professional opinions and does not relate to personally sensitive issues so that receiving an email was not likely to be distressing. Further, the aim of this study was to sample a range of opinions, accordingly direct approaches based on professional profile alone are more likely to garner a more diverse sample. A follow up email was sent within two weeks to ensure the origional email was not overlooked. It was considered that there was no power imbalance that might influence participants to participate. Potential participants were senior professionals equal to or more senior than the research team, and unlikely to be intimidated by family law Professor Mark Henaghan.

Interviews consisted of a single, one-on-one, semi-structured interview. The interview covered topics including the ambit of lawyer's ethical obligations in the Family Court, the challenges lawyers and clients face in the Family Court, the impact of the legislative duty to conciliate on practice,[15] how the paramountcy principle translates into practice, whether lawyers for adult parties in the Family Court currently have any wider duty to consider the welfare and best interests of any children involved during his or her work, and what the issues associated with a wider duty on Family Court lawyers for adults to consider the welfare of children might be. During the first portion of interviews, it became apparent that lawyers provide a wide range of quite specialist non-legal advice and support to their clients in the course of their work, including advice about children's development, optimal care arrangements, and children's welfare and best interests. In the second half of the interviews, we therefore introduced questions specifically about the basis for the advice lawyers give clients about what is in the children's best interests.

Data analysis

Interviews were digitally audio-recorded, before being transcribed and anonymised, including de-identifying any details or anecdotes participants may have given in the course of the interview. Interview transcripts and recordings were stored securely by participant number only.

During the transcription process, false starts to sentences and fillers that did not change meaning, or indicate undue uncertianty were removed (e.g. 'you know', 'I think', 'I mean', 'and'). Words in square brackets were added where a participant left the conclusion clearly implied from the context of a longer discussion (e.g 'and that was pretty...' becomes 'and that

[15] Family Court Act 1980, s 9A.

was pretty [scary]'). When quoted in the text, a simple ellipsis "..." indicates a short excision, while "[...]" indicates a longer excision from the text.

Transcripts were then coded and analysed using Thematic Analysis.[16] The themes were drawn out from a close reading and analysis of the transcript texts. The interview analysis was then reviewed by a second member of the research team to ensure accuracy and credibility of analysis.[17]

Literature review

Background: adversarialism and the Family Court

Establishment of the New Zealand Family Court

Established in October 1981, the Family Court developed in large part out of the recognition of "the harmful effects of parental conflict and adversarial legal processes on children, their parents and whānau".[18] Prior to the establishment of the Family Court, "the jurisdiction in family law was divided between the Magistrates Court and the Supreme Court".[19] The adversarial processes of these Courts made for a "bruising and harrowing experience" for parties who encountered them for family law matters.[20] The Royal Commission on the Courts, tasked with reviewing the structure of New Zealand's judicial system, stated in their 1978 report that "a Family Court is now necessary and desirable", and recommended the Family Court be formed as a division of the District Court.[21] In doing so, the Commission emphasised the "conciliative intent of the reform process", since "work in family law has an extra dimension":[22]

> Conciliation should concentrate on helping the parties rebuild some degree of relationship so that they can at least discuss rationally any matters arising out of the break-up of the marriage. In a calmer frame of mind, they may be able to work out arrangements for the welfare of the children in a way that minimizes injury to them.

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[16] Virginia Braun and Victoria Clarke "Using thematic analysis in psychology" (2006) 3 Qualitative Research in Psychology 77; and Richard E Boyatzis *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage Publications, Thousand Oaks, California, 1998).
[17] See for example Lorelli S Nowell and others "Thematic Analysis: Striving to Meet the Trustworthiness Criteria" (2017) 16 International Journal of Qualitative Methods 1.
[18] *Strengthening the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 7.
[19] Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 818.
[20] Patrick Mahony "The New Zealand Family Court at the end of a decade" (1991) 3 FLB 26 as cited in Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 818.
[21] David Beattie and others *Report of Royal Commission on the Courts* (1978) at 146 as cited in Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 819.
[22] David Beattie and others *Report of Royal Commission on the Courts* (1978) at 149–150 as cited in Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 819 (footnotes omitted).

The original vision for the Family Court was of semi-inquisitorialism. Extrajudicially, Judge Peter Boshier and others highlighted in 2011 that "a more inquisitorial style of justice has long held favor" in New Zealand's Family Court system:[23]

> … it has been felt that if our family law process continues to be inherently adversarial, case-flow management will inevitably become frustrated by lawyers and litigants who either want to remain in the system, or who are genuinely unable to find an easy pathway out. To this end, it has been suggested that by encouraging judges to dilute the importance of the adversarial model and be more proactive we might succeed in directing our cases towards more efficient and meaningful resolutions.

Alongside the emphasis on a less adversarial Court system, the aim of avoiding litigation from the outset and the encouragement of settlement has become one of the cornerstones of public policy in family law, with private agreements touted as far better for parties than court-ordered outcomes.[24]

2014 Family Justice Reforms

Taking effect in 2014, the National-led Government introduced major reforms to the family justice system, primarily focusing on Care of Children Act matters. The reforms, which were largely a cost-cutting exercise sparked by the rise in money spent on Lawyer for Child and Lawyer to Assist, were "the first significant changes to the Court since it was established in 1981".[25] The purpose of the reforms were to "ensure a modern, accessible family justice system that is responsive to children and vulnerable people, and is efficient and effective" and aimed to encourage "faster, less adversarial resolution of family disputes".[26] As identified by Megan Gollop, Nicola Taylor and Mark Henaghan in their review of the 2014 reforms, an objective underlying the reforms included "mitigat[ing] the adversarial nature of court proceedings".[27]

The emphasis of the reforms on self-representation and the restriction of lawyers in court was based on assumptions that:[28]

> Out-of-court dispute resolution provides a distinct and effective opportunity for people to resolve disputes sooner and less acrimoniously than by court proceedings. Effective pre-court processes can reduce the number of cases coming to the court by encouraging people to focus on the needs of

[23] Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 821–822.
[24] See, for example, Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237 at 237–238.
[25] Judith Collins "Family Court reforms put children first" (press release, 3 August 2012).
[26] Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note). See also Megan Gollop, Nicola Taylor and Mark Henaghan "Evaluation of the 2014 Family Law Reforms: Phase One" (Law Foundation New Zealand, February 2015) at 1.
[27] Megan Gollop, Nicola Taylor and Mark Henaghan "Evaluation of the 2014 Family Law Reforms: Phase One" (Law Foundation New Zealand, February 2015) at 3.
[28] Family Court Proceedings Reform Bill 2012 (90-1) (explanatory note).

> their children and on taking ownership of the agreement reached. This can improve outcomes for children by reducing the likelihood of heightened conflict that often results from litigation.

It is widely acknowledged that the intended aims of the 2014 reforms have not been realised.[29] Delay, increase in without notice applications, and the difficulties of navigating the family justice system without representation have proved to be of particular issue,[30] the effects felt by both the parties before the Court and their children, as well as by family justice professionals.

In 2018, then Minister of Justice, the Hon Andrew Little, announced the appointment of an Independent Panel to undertake a review of the changes made to the family justice system by the 2014 reforms.[31] Little stated:[32]

> The 2014 changes were meant to help people resolve parenting changes without having to go to court, but in fact led to the opposite as there's been a huge increase in the number of urgent 'without notice' applications which have to be put before a Family Court judge.
>
> I am concerned that families and children are losing out as a result of not receiving adequate advice and support during this distressing time.

The Independent Panel's report was released in June 2019.[33] The impact of adversarialism on parties, and in particular children, was again in the spotlight with the report emphasising that the best interests of children and young people require that decisions about their care arrangements and their lives "be made with the least conflict and without having to go to court, which is inherently adversarial".[34] Submissions to the panel highlighted that "[m]any people were concerned about the impact of family disputes on children", with one submission stating that "[t]he adversarial nature of the system pits a child's parents against each other and this is absolutely not in the best interest of children."[35] The problems created by adversarial lawyers were identified too:[36]

> … ideal attributes of lawyers in encouraging early agreement include temperament and training that prioritises ways of minimising conflict affecting children. But many parents and whānau, and some

[29] See, for example, the Minister for Justice, the Hon Andrew Little's statement that "[t]hese changes were meant to make things easier for families at a difficult time, but they have had the opposite effect.": Andrew Little "Independent Panel's Report on Family Justice System welcomed" (press release, 16 June 2019).
[30] See, for example, Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018); Anneke Smith "Wellington woman devastated urgent protection order hearing delayed after 14 months" (4 August 2021) Radio New Zealand <www.rnz.co.nz>; and Catherine Hutton "Family Court review calls for 70 changes costing up to $60m a year" (17 June 2019) Radio New Zealand <www.rnz.co.nz>.
[31] Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018).
[32] Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018).
[33] Andrew Little "Independent Panel's Report on Family Justice System welcomed" (press release, 16 June 2019).
[34] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at [151].
[35] *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 6.
[36] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 73.

> professionals, were concerned that some lawyers lack adequate skills and training and encourage adversarial behaviour.

Underpinning the development of the Family Court and subsequent reform policy has been a concerted and sustained effort to temper adversarialism in the Family Court, both in respect of Court process and lawyer's behaviour. At the same time, the 2014 reforms have highlighted the importance of access to legal advice and guidance through the family justice system for parties in dispute. In focusing on the lawyer's practice, this next section considers the reality of Family Court lawyering and the ethical implications of this reality.

The reality of Family Court legal practice: what does the research say?

> [T]he notion of what constitutes 'good' and 'bad' legal practice is itself open to question, especially if we take into account client perceptions of what they expect and value in their solicitors.[37]

Critics of Family Court lawyers say they act as normal adversarial lawyers in that they are hired guns who prioritise their client's win or obtaining advantages over the other party, cause significant delays in settlement and run up significant expense, all to the detriment of the child and the parties' joint ability to cooperate over shared parenting.[38]

There is evidence that traditional adversarial lawyering has drawbacks. There is support for the idea that adversarial lawyering does hamper the ability to negotiate a settlement. When in negotiation, Bren Neale and Carol Smart noted that the skills of the more adversarial lawyers in their sample appeared limited to the adversarial so that they tended to be "unconstructive or even inflammatory", drawing negotiations out over many months, apparently unable to shift into a more constructive way of operating.[39] One could surmise that habitual focus on a narrow interpretation of the client's interests and a lack of familiarity with the idea of shared goals or outcomes with shared benefit restricts adversarial lawyers' ability to envisage settlements that might be acceptable to the other side, while their habitual reliance on a third party to make decisions limits their recognition of the futility of increasing antipathy between the parties. Alternatively, their inexperience led them to fall back on a narrow range of tactics.

Such criticisms have had a significant impact on the attitude of successive governments towards the court and have underpinned much of Family Court reform.

This section considers the accuracy of these criticisms. We examine the empirical findings on the practice of Family Court lawyering, and the ethical implications of these findings, outlining

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[37] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 378 (citations omitted).

[38] Philip Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department, 2000) as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 7.

[39] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 390.

where the research suggests that problems arise. In doing so, we draw on the extensive body of empirical and ethical literature on Family Court lawyering across multiple jurisdictions.

As described above, the common perception is that family court lawyers exacerbate and prolong conflict, encourage litigation, adding expense and delay to the resolution of the dispute and causing parties' relationships to deteriorate further, to the real detriment of children.

In the first place, this idea needs to be tempered by recognition that most clients instruct lawyers only after one or both has made a firm decision to split,[40] and conflict is almost inevitable in a separation.[41] Family Courts are full of conflicted, angry and often dysfunctional people, regardless of lawyers' actions.

Further, in so far as lawyers do increase the conflict and anger, it can be as a result of valid and desirable inquiries or actions, such as when a lawyer helps a previously disempowered client to reject an unfair settlement offer, angering an exploitative or entitled ex-spouse, or when a lawyer seeks financial disclosure, which is often deeply resented by ex-husbands who feel that their income and assets are theirs alone.[42]

It has also been found that clients sometimes hide behind or blame lawyers for an action, raising the perception that the lawyer is exacerbating problems, when the reality is that client and lawyer have agreed beforehand that the client can blame the lawyer as a tactical ploy to protect a client too scared of their spouse's reaction to raise an issue themselves.[43] Thus, lawyers may increase tension to some degree, but they do so in order to protect their clients' rightful interests and safety.

Enforcing a disempowered client's rights against the other party, as described in the preceding paragraph, is a typical aspect of a partisan lawyer's job and has significant and obvious merit. However, while this is part of the Family Court picture, it is not a significant part. Instead, the finding that characterises research on family court lawyers is a deep commitment to reducing and avoiding conflict.

As set out in this section, the literature demonstrates that Family Court lawyers tend to be overwhelmingly conciliatory and work hard to keep clients out of court where possible.

However, this does not mean that problems do not exist within current modes of Family Court lawyering. Both zealously partisan practice and conciliatory focused practice raise complex ethical and practical problems, presenting challenge for Family Court policy makers and

[40] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 73–74.
[41] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 100.
[42] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 102.
[43] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 103; and Philip Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department, 2000) as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 7.

practitioners alike. The literature highlights a need for greater understandings of the reality of Family Court lawyering, including of the ways in which lawyers have adapted to the policy emphasis on settlement and conciliatory practice, and how this impacts client interests and children's welfare.

Settlement focus

Researchers in New Zealand, Australia, the United States and the United Kingdom have devoted considerable time to examining the realities of Family Court lawyering. The evidence from a "multitude" of studies internationally has been that, outside of the final hearing, lawyers are not litigious in the sense of pursuing court proceedings or even overly aggressive in the wider pursuit of their clients' interests.[44]

In the first place, family lawyers are generally very settlement focused and quite uninterested in pursuing litigation, unless it is for the very limited purpose of prompting engagement in settlement discussions. From the mid-1980s onwards, the many qualitative studies of United Kingdom Family Court lawyers have consistently found that they are strongly settlement-focused,[45] with a high settlement rate sometimes seen as the mark of a successful lawyer.[46] Research by Richard Ingleby in 1993, and Gwynn Davis and others in 1994 on Family Court lawyers both concluded in their studies that lawyers were strongly settlement-orientated.[47] Similarly in Michael King's 1999 study of 36 English family lawyers, none of the lawyers favoured going to court, regarding private agreements as far better than court orders.[48] In their 2000 study of United Kingdom lawyers, John Eekelaar and others found that lawyers' advice often included dissuading clients from litigating unnecessarily, such as in low-value relationship property claims.[49] Three quarters of Hunter's respondents said they would only ever go to court as a last resort if attempts to settle out of court failed.[50]

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[44] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 158.

[45] Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 22–23. See also Mavis Maclean and John Eekelaar *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, Oxford, 2016) at 53–54.

[46] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 162.

[47] Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992) at 159–161 and Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994) at 40 as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 13–14. Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 23 reviews the literature on the United States and Australia. See also Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 264–265, a study of 36 United Kingdom Family Court solicitors.

[48] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 265.

[49] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 71.

[50] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 158.

The literature reveals a remarkable degree of consistency in the research on legal culture across jurisdictions,[51] highlighting that Family Court lawyers are markedly conciliatory and focused on achieving out of court settlements.[52]

Even where lawyers do issue proceedings, the evidence is that they do not always do so with the aim of proceeding to hearing, but rather do so tactically to increase the chances of settling. This strategy, or "litigotiation" was initially identified by United States researcher Marc Galanter to describe the way civil litigators negotiated "in the shadow of the law" or using the courts strategically to promote out of court settlement.[53] Family Court lawyers too have adopted the strategy, issuing proceedings (or threatening to do so) as part of their negotiation strategy in order to bring the other side to the negotiation table and/or to access court resources to assist with achieving a settlement.[54] For example, in King's 1999 English study, none of the lawyers favoured going to court, regarding private agreements as far better than court orders. They took a "sliding scale approach" to their work, "starting with trying to get the parties to talk … then if this failed … moving on to mediation", then "negotiations between solicitors" and finally "issuing proceedings with the express purpose of bringing the parties before a court welfare officer" whom they expected to put pressure on the clients to settle.[55] It was "[o]nly if all of these failed … did they classify the case as a matter for a … judge with the genuine intention of seeking an order".[56]

Further, whereas the criticism has been that lawyers block clients from communicating, the research suggests lawyers more often improve communication, providing a conduit for parties

[51] Even a study comparing French and English Family Court lawyers' approaches to custody cases found a high degree of consistency, although they operate in quite different legal systems and cultures: Robert H George "Practitioners' approaches to child welfare after parental separation: an Anglo-French comparison" (2007) 19 CFLQ 337. See also, rather less charmingly, the consistency of views amongst continental European lawyers and their common law counterparts on issues of gender and violence: Patrizia Romito "Post-Separation Domestic Violence: What Happens to Women and Children" (2011) 29 La revue internationale de l'education familiale 87.

[52] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 488. Wright points to John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000); Gwynn Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988); Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994); Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992); Lynn Mather, Craig A McEwen and Richard J Maiman *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, Oxford, 2001); and Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995).

[53] Marc Galanter "'… A Settlement Judge, not a Trial Judge:' Judicial Mediation in the United States" (1985) 12 Journal of Law and Society 1.

[54] This was also found by Rosemary Hunter and others *Legal Services in Family Law* (Law Foundation of New South Wales, December 2000) in a study of 100 Australian lawyers as cited in Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 158: Court is a last resort when other attempts at settlement fail and/or the court's help is needed to move people to the negotiating table. See also Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 267 (to his disgust).

[55] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 264.

[56] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 264.

who are otherwise unable to communicate constructively or at all.[57] Similarly, Katherine Wright concluded that being able to leave some matters, such as property division, to arms-length negotiations through lawyers benefited rather than hurt the parties' relationship, allowing them to communicate on other matters, such as custody.[58]

Rates of settlement

Researchers have found that lawyers are not only highly settlement-focused but they are also generally highly successful in achieving settlement, with studies unanimously finding Family Court lawyers settle a very high proportion of their files.[59] For example, Ingleby in his 1992 pioneer study of 60 United Kingdom relationship property files noted that all of the cases in which proceedings were issued settled without court orders and usually at an early stage of litigation.[60] Even where Family Court lawyers issue proceedings, the statistics back up their declared intention to use the court process to achieve settlement, as very few result in hearing. Eekelaar and others pointed out in 2000 that only 4.6 per cent of United Kingdom court proceedings end in a hearing.[61] Recent Australian studies found that only three per cent of all separating couples ended up in a court hearing. Australian figures also show that of those couples who file proceedings, only a small percentage go all the way to a final hearing (7.8 per cent), with 75 per cent settling at an early stage before the pre-hearing conference.[62] The conclusion is that "[i]f people go to court with a lawyer … the overwhelming odds are that their cases will settle well before trial."[63]

In the literature on the Family Court, including in government policy, the preferred provider of advice and guidance for couples in conflict is not lawyers but professional mediators, who are believed to provide quicker, cheaper and more durable settlements.

The research, however, again undercuts assumptions. Not only do lawyers settle most of their cases, but they generally settle more cases than do mediators, albeit over a longer period. Davis and others found that 40 per cent of United Kingdom mediations resulted in a settlement. A

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[57] Philip Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department, 2000) as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 6–7.

[58] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 104 and 111.

[59] Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992) at 89 as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 13.

[60] Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992) at 159–161 as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 13.

[61] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 16.

[62] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 162.

[63] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 163.

decade later, Eekelaar and others found similar results.[64] Suzanne Reynolds and other's United States study found that mediation was even less successful with only 23.6 per cent of cases resolving.[65] Most mediation clients will therefore still have to find and pay for lawyers to conclude their cases, undermining mediation's claims to cost-effectiveness. While governments have promoted mediation services as delivering more satisfactory and long-lasting outcomes at a lower cost, in fact the results tend to suggest that overall lawyers have both a higher rate of closure and that their clients tend to be happier with their settlements.

Relationship between settlement focus and adversarialism

The research above on Family Court lawyers' strong (and successful) settlement orientation has tended to be presented as evidence of their non-adversarial culture. However, while Family Court lawyers' preference for negotiation and private settlements, and even the prevalence of "litigotiation" is non-litigious in the strict sense of not wanting to go to court, to call it evidence of a non-adversarial culture would be naïve. Negotiation may be non-litigious but it need not be non-partisan, non-threatening or non-aggressive. Negotiating lawyers can still be playing conventional adversarial "hardball," as David Luban described it.[66] For example, Fran Wasoff described Scottish clients making complex tradeoffs of property, maintenance, and child custody and contact, feeling "pressured into signing because they thought that the alternatives were worse".[67] The mention of a "worse alternative" suggests either fear of a court decision or fear of options being withdrawn and a hardened bargaining position if the offer on the table were not accepted. That negotiations also often included off-setting child custody or contact against property or other gains is also hardly evidence of a child-centred negotiation process (except in the sense that children were being used as bargaining chips).

Becky Batagol and Thea Brown's 2011 small study found that the most significant leverage in mediation, more significant even than a person's knowledge of their legal position, was their readiness to go to court.[68] In other words, the threat of court proceedings was the most effective tactic in the bargaining process. They also found that women were generally more litigation-averse than men and so more vulnerable to the threat.[69] In the United States, Mnookin and

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[64] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 16–17 noted that only 39 per cent of mediated cases settle across Family Court cases and only 19 per cent of custody cases in one study. See also discussion in Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 162.

[65] Suzanne Reynolds, Catherine T Harris and Ralph A Peeples "Back to the Future: An Empirical Study of Child Custody Outcomes" (2007) 85 NC L Rev 1629 at 1682.

[66] David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1004.

[67] Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237 at 246.

[68] Becky Batagol and Thea Brown *Bargaining in the Shadow of the Law?: The Case of Family Mediation* (Themis Press, Annandale, New South Wales, 2011) at 212–216 as cited in Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 42.

[69] Becky Batagol and Thea Brown *Bargaining in the Shadow of the Law?: The Case of Family Mediation* (Themis Press, Annandale, New South Wales, 2011) at 196–199 as cited in Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 42.

others raised concern about the high rates of women accepting joint custody agreements "at the courtroom door" (just before hearing), suggesting that the fathers had applied for sole custody strategically to force mothers to accept the joint custody they aimed at all along.

Other research suggests Family Court lawyers' commitment to fair settlements only applies to their own clients: Janet Walker describes how, while lawyers tried to protect their own clients from their guilt-ridden impulses to make overly generous offers, when the tables were turned, lawyers were quite prepared to take advantage of the other party's guilt to achieve an unfair settlement in their client's interests, even though they know that guilt is likely to be transient and, thereafter, regretted.

Reducing conflict and managing expectations

Clearly, settlement-focused lawyer can nonetheless be adversarial and partisan, and just as clearly, some are. However, further examination of the research complicates the picture.

First, one of the really significant findings from the research is that family lawyers generally work very hard not merely to dissuade clients from going to court,[70] but to de-escalate the tension between the parties and improve their relationship. They spend considerable time coaching clients to better manage their relationship with the ex-partner, to avoid conflict and communicate constructively, how to manage contact visits successfully, and even about what are considered appropriate child-raising practices.[71] They encourage clients to "cool off" and recognise that their own emotional responses are part of the separation process.[72] Family lawyers may also challenge a client's negative perceptions of their ex-spouses' behaviour,[73] for example explaining the behaviour as a passing reaction to the stress of separation.

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[70] Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 22–23. Barlow and others point to Gwynn Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988); Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994); Gwynn Davis and others *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission, London, 2000) at 137; John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000); Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992); Janet Walker "Is There a Future for Lawyers in Divorce?" (1996) 10 IJLPF 52 at 65; Katherine M Wright "The Process of Divorce: A Study of Solicitors and their Clients" (PhD Thesis, Sheffield Hallam University, 2004); Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481; Mavis Maclean and John Eekelaar *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, Oxford, 2016) at 53–54; and Lisa C Webley *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro Books, New Orleans, 2010).

[71] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 72–73 and 76.

[72] Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995) at 42–49.

[73] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 103.

Lawyers also coach clients as to what it is reasonable to expect from a settlement. As Anne Barlow and others put it, Family Court lawyers:[74]

> … have a strong preference for resolving matters without recourse to litigation. They make considerable efforts to manage clients, modify their expectations and persuade them to see reason within the parameters of legal and practical possibility (although they may also persuade clients to increase their expectations in line with legal entitlements).

So intense is the focus on coaching and managing the client, Eekelaar and others noted that far more of lawyers' time is spent negotiating with the client than with the opposition.[75]

In Australia, Rosemary Hunter's study of 100 Family Court lawyers in 2000 described a "conciliatory culture".[76] In the United States, studies have found that family court lawyers are conciliatory, collaborative (with other lawyers) and focused on encouraging parties to come to a "realistic" view of the case and to settle.[77] Wright's study in 2007 of 10 English lawyers and their 40 clients likewise found that the lawyers were so far from being partisan that only one could be said to have acted in a conventionally partisan manner.[78]

Objectivity

Possibly the most striking finding from studies of family lawyers, however, when it comes to defining what a client's settlement objectives should be, most family court lawyers take a remarkably neutral and non-partisan approach.

Perhaps the most striking proof of the extent to which family court lawyers diverge from the partisan norm is the repeated finding that they set goals in working with clients that are usually wider that their client's goals, involve promoting the interests of people other than the client, and may even conflict with the client's goals.

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[74] Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 23.
[75] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 76.
[76] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 161.
[77] Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995) at ch 5. See Suzanne Reynolds, Catherine T Harris and Ralph A Peeples "Back to the Future: An Empirical Study of Child Custody Outcomes" (2007) 85 NC L Rev 1629 at 1680–1681 in their study of lawyers and mediation. They also cite Connie JA Beck and Bruce D Sales *Family Mediation: Facts, Myths, and Future Prospects* (American Psychological Association, Washington DC, 2001) and Lynn Mather, Craig A McEwen and Richard J Maiman *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, Oxford, 2001). See also Suzanne Reynolds, Catherine T Harris and Ralph A Peeples "Back to the Future: An Empirical Study of Child Custody Outcomes" (2007) 85 NC L Rev 1629 at 1680–1681 also finds this of the lawyers in their mediation study. They also cite Connie JA Beck and Bruce D Sales *Family Mediation: Facts, Myths, and Future Prospects* (American Psychological Association, Washington DC, 2001) and Lynn Mather, Craig A McEwen and Richard J Maiman *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, Oxford, 2001).
[78] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 486.

Thus, while lawyers' reasons for pursuing settlement include it being in their client's economic interests to do so, they also pursue settlement because they believe it is in the best interests of the children and in the long-term interest of the family's relationships overall.[79] As Eekelaar and others put it:[80]

> Perhaps for lawyers in other areas of practice there is an assumption that the aim of the work is to win the case. But in family law there is no such overriding objective. The lawyer aims to do the best for his client not just at the time of divorce but with a view to the future, and with an overriding concern for the welfare of any children involved. This long-term dimension, and the concern about the interests of third parties, shapes the practice of family law.

Similarly, the reason Hunter's 100 lawyer subjects preferred settling out of court was because they saw it as in the interests of children and the future functioning of the family.[81]

Researchers frequently find that Family Court lawyers advocate for the children's interests with their clients, appealing both to the children's interests in their own right and also to the court's expectation that the adults will prioritise the children (and how it expects that to happen).[82] This occurs to the extent that some United Kingdom researchers have described Family Court lawyers as a "hybrid profession" resembling neutral mediators more than traditional partisan lawyers.[83]

Underlining this lawyerly neutrality is that the exercise of determining what is fair and what the lawyer will advocate for is often done in consultation with the other side's lawyer, rather than the client.[84]

Neale and Smart discovered many lawyers engaged in extensive collaboration with their colleagues on the other side where the two lawyers would conceive what they considered the appropriate outcome and negotiate their respective clients into it.[85] Similar observations were made by Wright some ten years later.[86]

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[79] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 159.
[80] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 69–70.
[81] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 158.
[82] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 77; and Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995) at 120.
[83] Lisa C Webley *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro Books, New Orleans, 2010) and Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 as cited in Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 23.
[84] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 485.
[85] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 391.
[86] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481.

Strong collaborative relationships with other lawyers were a major feature of their practice. As Wright put it:[87]

> [The typical view of the lawyer was that] it is the duty of the solicitors involved, having agreed between themselves a third view regarding the appropriate resolution, to persuade their client into accepting their perspective. The case may then progress towards a prospective resolution neither of the parties initially wanted.
>
> The theme of co-operation among both the solicitors involved in resolving the dispute and those working towards a settlement which was 'fair' was a common one. Notably, a 'partisan' solicitor, adopting a stance which seemed to be appreciated by clients, was much maligned by their legal peers.

Accordingly, Family Court lawyers retain a strong degree of independence from their clients in determining what is to be done and how. As Wright commented:[88]

> The support provided by the majority of solicitors in this study could more appropriately be described as support which promotes the client's interests up to a point perceived by the solicitor as objectively fair.

King also found that the lawyers he studied would only advocate for the client's position if they agreed with it:[89]

> [W]here they feel that their client is being 'sensible' and acting 'responsibly', the solicitor may assist the client-parent to persuade *the other side* to change its attitude whether through negotiation, threats of court proceedings or diversion to mediation.

Strikingly, rather than following instructions (within the bounds of the code of ethics), King's lawyers would agree to file proceedings for clients only reluctantly and only when satisfied that all other settlement avenues were closed.[90]

Managing the client to accept the lawyer's objectives

This objectivity, moral independence or lawyer's belief in their own superior judgment and that they have the "right" outcome appears to play a major part in creating the strongly managerial approach to the client described above.[91] In King's somewhat bitter description, Family Court lawyers are bent on persuading their clients to "be sensible".[92]

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[87] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 485.
[88] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 486.
[89] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 268.
[90] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 267. See also Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386–387.
[91] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386–387.
[92] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 267.

Range of work undertaken by lawyers

Some of the judgment lawyers exercise in defining what is "sensible" is based purely on legal knowledge, including extra-legal knowledge such as the temperament of a particular judge or officials with whom the client has to deal. However, as is apparent from the above, lawyers take it upon themselves to define what is "sensible" for clients on a staggeringly broad range of issues, well beyond the merely legal. Researchers have found that Family Court lawyers routinely provide a wide range of services to clients in addition to the usual understanding of legal services. Lawyers provide a large amount of emotional support, non-legal information (such as managing finances, the state of the property market), and a considerable amount of practical support for clients dealing with other professionals or agencies, helping clients access services, apply for benefits or resolve police charges or complaints, work largely only tangentially linked to the actual job for which the lawyer is instructed, but important to its chances of success. This support may be through direct negotiation (such as with police or social services) or it may be purely administrative: helping clients fill out forms or make appointments. This range of work, incidentally, points towards one of the other ways researchers say Family Court lawyers are often undervalued by policy makers: the actual range of services they provide is far wider than the remit of traditional adversarial lawyering, leading some researchers to label Family Court lawyers as more akin to social workers.[93] However, it also raises issues as to lawyers' qualifications in some of these roles, which will be discussed again later. A law degree does not include training in, for example, social work, child-rearing, child development or relationship counselling, all of which are highly specialised topics.

Conclusion: "Conciliation culture" and rise of the "good lawyer"

Without declaring the current system a winner, these findings do go a considerable way to answering the criticism that lawyers exacerbate parties' animosity and prevent reconciliation, especially when coupled with the knowledge of the high rates of success lawyers generally have in attaining settlement, at least as compared to their nearest rivals, the professional mediators or alternatively, as will be discussed, in the 2014 model, lawyer-free hearings with self-represented litigants aided only by judges and court staff. As Hunter put it, "the research evidence … falsifies every link" in the chain of government policy which blames lawyers for the system's ills.[94]

Instead, the data points to a very different culture of lawyering than that commonly believed to exist. As already discussed, the development of the Family Court was motivated by a quest to avoid adversarial lawyering and create a forum in which "conciliation" could occur. This has grown a narrative in which there are definite models of "good" and "bad" lawyering. The "bad" lawyer is one "who offers partisan representation and support to one parent alone. Such lawyers

[93] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000); and see Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 160–161.

[94] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 158.

are perceived as unduly aggressive and litigious" who "in the interests of commercial gain … exacerbate conflict and damage parental co-operation to the detriment of the children".[95] Conversely, as Neale and Smart put it, good Family Court lawyers:[96]

> … avoid litigation, offer impartial advice and are conciliatory in style. Crucially, their commitment to child welfare … is strongly evident. They support … the post-divorce family by promoting parental co-operation and the avoidance of conflict in order to ensure that both parents maintain a good relationship with their children.

The empirical literature examined above strongly supports the idea that Family Court lawyers truly have embraced the ideal of the "good" lawyer model, adopting a far less partisan approach to their work, taking on responsibility to promote settlement and conciliation, and considering the wellbeing of children and families involved.

These are important considerations for government policy makers and needs to be at the heart of decisions about the future shape and funding of the Family Court. However, as is examined later in this chapter, the "good" conciliatory model is not without its own challenges for both practitioners and clients.

Shared Care

Just as the emphasis on settlement per se has been said to cause lawyers to brush aside or bulldoze over client concerns that might get in the way of agreement, criticisms have also been raised that lawyers' ideological conviction in the benefits of equal or near-equal shared care for children leads to considerations of safety being marginalised. Safety might mean the safety of the child in a parent's care or the safety of one parent because of the ongoing exposure to the other during changeovers.[97]

Shared care is not a legislative requirement in New Zealand or the United Kingdom, although the Australian government made shared care a rebuttable presumption provided there are no safety concerns. While the legislation in each system explicitly prioritises children's safety, there is concern that in practice shared care has become the primary focus and objective, with the result that safety becomes a rebuttal argument, and a barrier to be overcome on the road to the optimal post-divorce arrangement. By way of illustration, commentators have pointed out that under a shared care paradigm, "good" parents are those who support the other parent's involvement in the child's life, with various governments have legislated some sort of preference for the "friendly parent".

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[95] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 378.
[96] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 378.
[97] Changeover is a source of risk to children, who are exposed to violence and conflict during changeover, and to women, who are sometimes directly attacked. More women killed or harmed after separation than during relationships, and this can be ongoing rather than limited to the immediate post-separation phase.

However, the consequence of this "good parent" ideal is that any attempt to limit contact is immediately prima facie "bad" parent behaviour. This doubles the burden on any parent wanting to raise safety concerns: They must not only prove the allegation but must also overcome the presumption of unfriendliness or desire to cut the child off from the parent, even though the evidence from mothers who raise abuse allegations is that they are actually supportive of fathers' ongoing relationships. In other words, a shared care paradigm encourages additional scepticism of abuse allegations.

Multiple reviews of the Australian situation describe a "de facto presumption" of shared care amongst legal professionals, leading to a tendency to minimise safety concerns in order to obtain shared care.[98] A number of United Kingdom studies have identified the same presumption,[99] one noting that Family Court professionals tend to have a "contact at all costs" attitude, favouring contact even where there has been violence, despite changes to the practice directions in the United Kingdom which emphasise the risks of IPV to children.[100]

The same observation has been made of New Zealand practitioners. Whilst not an empirical study, the New Zealand Psychologists' Association in its submission to the Family Violence Law Review in 2015 specifically criticised the Family Court's focus on shared parenting over and above child safety. Julia Tolmie and other's qualitative study of 21 New Zealand women discussing their custody cases found that almost all believed that equal shared care was the court's preferred outcome and that Family Court professionals thought that maximising the father's parenting time was the most important consideration for a child's welfare, regardless of issues such as the child's very young age, a father's lack of experience, the parents' communication difficulties or a history of IPV.[101] Eight said they were explicitly told by their lawyers, Lawyer for Child and/or a Family Court counsellor that equal shared care is the Family Court's preferred option, even for babies and pre-schoolers, and put under pressure to agree to such arrangements, while almost all the women had ingested the belief that equal shared care was the court's preferred outcome and negotiated custody "under the shadow of their understanding".[102] Consequently, some women made compromises they believed were contrary to the child's best interests, including because of IPV and because of difficult

[98] Daryl Higgins and Rae Kaspiew Child protection and family law… Joining the dots (Australian Institute of Family Studies, Melbourne, 2011) at 15–16.
[99] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 385.
[100] Jenny Birchall and Shazia Choudhry *"What about my right not to be abused?" Domestic abuse, human rights and the family courts* (Women's Aid, Bristol, United Kingdom, 2018) at 36. Birchall and Choudhry cite Adrienne Barnett "Contact at all costs? Domestic violence and children's welfare" (2014) 26 CFLQ 439. See also All-Party Parliamentary Group on Domestic Violence *Domestic Abuse, Child Contact and the Family Courts* (Women's Aid, Bristol, 2016); Ravi Thiara and Christine Harrison *Safe not sorry: Supporting the campaign for safer child contact* (Women's Aid, Bristol, 2016); and Maddy Coy and others *Picking up the pieces: domestic violence and child contact* (Rights of Women/Child and Woman Abuse Studies Unit, November 2012).
[101] Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand" (2010) 24 NZULR 136 at 143.
[102] Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand" (2010) 24 NZULR 136 at 143–144.

relationships with the ex-spouse, for fear of a worse outcome in court.[103] All of the women who ended up with equal or near-equal shared care arrangements had not wanted them and had difficult relationships with their co-parents, as a result of which their children had been exposed to ongoing adult conflict at changeover.[104]

The next section explores some of the ethical dilemmas inherent in the current conception of a "good" Family Court lawyer.

Ethical implications of the reality of Family Court legal practice

The reality of Family Court legal practice and the adjustments expected of lawyers acting for parties in the "less adversarial" environment of the Family Court give rise to a series of ethical challenges.

The field of legal ethics has tended to overlook the Family Court as an arena for ethical discussion, preferring the criminal or corporate world. In so doing, legal ethicists have hugely underestimated the Family Court's usefulness as a testing ground for ethical theories. This usefulness is two-fold: first, the Family Court provides an environment in which to observe lawyering, involving moral demands every bit, if not more challenging, than in the criminal courts. It is a high-stakes environment, one where the welfare and safety of children, the client's own safety and the maintenance of the key relationship in our society, that of parent and child, are debated every day.

Second, having been established in order to provide a forum that eschewed traditional adversarial practice, the Family Court is a laboratory for competing views of what is good lawyering. As discussed, there has been sustained pressure on the Family Court to move away from the standard partisan conception of lawyering. Shifting institutional goals have emphasised private settlement and child welfare as the objective of the court process, a shift to agreed definitions of child welfare as incorporating shared care, and a challenge to lawyers' adherence to strictly partisan objectives in advocacy. Restrictions on funding and the ability to issue proceedings or appear in court have also increased pressure on lawyers and required them to balance shifting institutional goals with client rights and advocacy. These shifts have been at least similar in magnitude to what has occurred to criminal or corporate lawyers.[105]

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[103] Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand" (2010) 24 NZULR 136 at 139 and 143.

[104] Julia Tolmie, Vivienne Elizabeth and Nicola Gavey "Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand" (2010) 24 NZULR 136 at 145.

[105] David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1016–1017 discusses challenges to corporate practice. In the criminal court, recent changes in EW in the judicial receptiveness to certain trial practices and the restrictions on legal aid designed to force compliance with new training standards on vulnerable witnesses have the potential to become significant in shifting concepts of what is ethical.

Given their generally low status in the community and the government's willingness to intervene directly and extensively in legal practice,[106] family lawyers have had to be receptive to shifts in theories of what is "good" lawyering in order to stay in the game and remain a viable profession.[107] Family Court lawyering demonstrates complex issues, both morally and structurally, making the Family Court an ideal environment in which to observe the effect of rebalancing an ethic of partisanship and to evaluate the concerns raised during the theoretical debates of the last thirty years.

Two masters: can a lawyer serve the client's and third-party interests?

The first ethical implication of the reality of Family Court practice relates to the ability of lawyers to serve their client's interests, and balance third party interests including that of any children involved and of the "post-separation family".

Balancing client and third-party interests

The current model of Family Court lawyering, which studies confirm is embraced by most practitioners around the world, requires the lawyer to pursue goals that may or may not coincide with those of the client: including the best interests of the child (as defined by law rather than the client), the need for swift, private settlements and a workable co-parenting relationship in future.

While the lawyers studied were at peace with this balancing act,[108] others are acutely aware of the potential for conflict.[109]

Critics argue that lawyers breach their role and client trust when they attempt to reshape client instructions to incorporate someone else's interests rather than just their own, or towards a more conciliatory approach.[110] There is an extent to which this criticism is unrealistic; most legal work across all fields involves explaining to the client what is legally achievable which then results in modified expectations and instructions, advice that is no more paternalistic than a builder explaining what a client can build for the money available. The question for Family

[106] Including restricting legal aid availability, the deliberate diversion of potential clients into state-mandated alternative dispute resolution and the setting of legislative goals which prioritise third parties over the client.
[107] See Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249.
[108] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 268. Contrast Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 387 where lawyers strongly entrenched in the conciliatory mode saw no conflict; others were highly aware.
[109] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 393.
[110] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 380; and Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 252. King cites Adrian L James "An Open or Shut Case? Law as an Autopoietic System" (1992) 19 Journal of Law and Society 271 and and Adrian L James and Will Hay *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, London, 1993).

Court legal ethicists is whether shifting institutional goals in the Family Court require lawyers to go beyond the standard shaping and checking of client instructions and expectations.

A number of early English studies raised concerns that in promoting these third party interests, lawyers may let down clients expecting or needing robust support.[111]

In their early and crucial study of 37 English Family Court lawyers, Neale and Smart found serious reason to be concerned as to the impact of dual objectives on the lawyers' practice. Lawyers who identified most strongly with the "good" conciliatory model let it "[override] any partisan support for the client's wishes".[112] Replacing loyalty to the client with advocating for the post-divorce family structure they perceived as optimal — inevitably the shared care model — they put considerable pressure on their clients to accept it. The main target of their advocacy became not the opposition but their own client,[113] as Eekelaar was also to notice a few years later.

Neale and Smart noted that the same level of high pressure tactics were employed even when the client raised realistic and serious safety concerns about contact, quoting one lawyer who openly described using highly unrealistic threats of imprisonment to convince his women clients to allow ex-partners contact with the children. These lawyers:[114]

> … feel no compunction about advising quite forcefully on what they perceive to be in the interests of the child, particularly where a parent does not want to allow contact: "I try to beat everybody into submission …"

Similarly, King described the lawyers he studied as actively working to thwart client intentions in order to achieve what they saw as the interests of children. These lawyers encouraged settlements in what they considered the child's best interests "even if this involved confounding the clients' expectations that they are entitled to a court order giving them" primary custody.[115]

Lawyers discussed by these authors appeared to resolve any conflict between their duty to the client and to their other goals, because they took a paternalistic view that the clients had misunderstood that their own interests encompassed the wider goals. Clients needed to learn to

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[111] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 378. They cite Mervyn Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London, 1980); and Gwynn Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988). See also Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 256; Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93; and Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481.

[112] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386.

[113] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386–387.

[114] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386.

[115] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 264.

appreciate that their real interests lie in being seen — as Neale and Smart put it — "to be "good" [friendly parents] in the eyes of the law … and in terms of their future interests as members of their post-divorce families".[116] These lawyers see their clients as misunderstanding their own interests, which they conflated with those of the children and the ideal co-parenting "post-divorce family", allowing them to reconcile any conflict between their duty to promote the client's interests and the interests the lawyers prefer to promote.[117]
Just as parents were seen as misunderstanding their own best interests, the child's expressed views were "rarely taken at face value".[118]

Similarly, King describes how the lawyers he interviewed did not see themselves as having abandoned partisan advocacy but instead "reconstruct … what is just and fair [for their clients] in terms of what is best for the children", conflating the child's and parents' interests so that "injustice" becomes not unfairness to a party but the:[119]

> … effects on children of a parent (or both parents) behaving in an unreasonable, selfish or foolish way, such as pursuing their own interests with little or no regard to the consequences for their children.

Testing the "good lawyer" model

The second implication is whether highly conciliatory lawyering is always good for all clients.

Researchers have generally been positive about lawyers' "reality checking" and de-escalating client tension, and of the outcomes for which lawyers advocate, especially in studies more focused on relationship property cases. Eekelaar and others, for example, commented that they never saw a lawyer recommend a client reject a good offer, and that they did often advise continuing negotiation if it was poor,[120] a finding replicated in Wright's later work.

Neale and Smart note just how influential a lawyers' advice is to a bewildered and frightened client, describing the courage it took one woman who had been badly battered by her ex-husband, to reject her lawyer's advice to allow contact. She subsequently obtained another lawyer and a court order banning her husband from contact.[121]

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[116] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 387.
[117] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 387.
[118] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386.
[119] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 267.
[120] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 77.
[121] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 396.

There is however reason to believe that "good" Family Court lawyers as well as protecting vulnerable parties can also endanger them.[122] Questions have been raised over whether a highly managerial style might sometimes see lawyers propel clients into agreements they will later regret,[123] and override client autonomy in pursuing a highly conciliatory approach which takes into account the interests of children and of the other parent as well as of their clients. This possibility presents a major challenge to the Family Court reformers, and to the many lawyers who have embraced their ideals.

Too settlement driven: how conciliatory is too conciliatory?

The first possibility is that "good" Family Court lawyers are sometimes too focused on conciliation and settling to protect clients. Wright, reviewing the experiences of 40 relationship property clients found both genders were generally highly motivated to avoid escalating conflict and enable a workable ongoing relationship with the ex-partner, and often settled for less than their share of property.[124] Although in many cases their lawyers had advised them to hold out for more,[125] Wright was concerned that the lawyers' focus on avoiding conflict, on remaining non-partisan and conciliatory let their more vulnerable clients down, allowing "power imbalances being reproduced into unfair agreements".[126]

Past violence as a risk to a child's future is a particular issue. The very fact that discussions are conducted on a no-fault basis and concentrate on the future tends to sideline discussion of the past, which can make it hard to justify raising relevant past events.[127] The court's message for parties "to look to the future … and to avoid adversarialism, may inhibit a party from raising the issue of violence because to do so may appear provocative or antagonistic".[128] Neale and Smart, for example, described some lawyers in their study who put women clients under considerable pressure not to raise their ex-partner's violence in order to advance settlement and improve the chances of a good ongoing relationship.[129] There are similar concerns raised about collaborative law, suggesting that its practitioners are too intent on settling to address pre-

[122] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 378.
[123] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 107. Wright later described this behaviour as "mildly partisan": Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 484.
[124] See Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 107–108.
[125] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 105.
[126] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 490. At 493, Wright cites Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994).
[127] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 381–382.
[128] Rosemary Hunter "Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us" (2006) 20 AJFL 227 at 231–232, which was cited with approval by the Hon John Fogarty, former Judge of the Appeal Division of the Family Court of Australia, in John Fogarty "Family Court of Australia – Into a Brave New World" 20(3) Australian Family Lawyer 1 at 8–10.
[129] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 396.

existing power imbalances that might complicate discussions, so that powerful male clients tend to prevail over women.[130]

Too Much Pressure: The Bulldozer Lawyer

There is also a risk that rather than being unprepared to defend their clients vigorously, lawyers may also actively undermine their clients' interests in the service of what they the lawyers believe to be the best outcome. This may be because they believe they understand their client's interests better than the client or because they believe they serve the greater good and protect the interests of children or of the wider family. Unsurprisingly, research shows that Family Court lawyers impact on their clients' perceptions, and clients will take their advice even when they do not like it.[131] Family Court clients will often be in a particularly vulnerable frame of mind when they come to lawyers, often to the point that they simply want to be told what to do.[132] Leaving a domineering or inadequate lawyer may be a very difficult task for an emotionally vulnerable or poorer client.[133]

A number of studies have found examples of clients who have felt they were pressured into agreements. Wasoff, in a retrospective study of Scottish clients' views of their lawyer-led settlements, found that while negotiations had often been heavily influenced by a desire for a settlement that would enable good ongoing relationships for the sake of the children:[134]

> In nearly all cases, respondents thought that they had paid a high price for conflict avoidance and many said that they had felt under pressure to negotiate and make compromises, which they felt were unacceptable even at the time, in order to avoid further stress or conflict.

Even the word "agreement", Wasoff said, was wrong:[135]

> … since almost all of those interviewed said that they had not willingly agreed but had felt pressured into signing because they thought that the alternatives were worse. They did not feel in control of the process or the outcome. No one felt empowered.

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[130] Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 51; and Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 494–495.

[131] Rosemary Hunter and others *Legal Services in Family Law* (Law Foundation of New South Wales, December 2000) at 185–186; and Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 387.

[132] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 387.

[133] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 396; and Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995).

[134] Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237 at 245. See also Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 493.

[135] Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237 at 247.

British researchers have come to similar conclusions. Studies of both genders often feel pressured to settle.[136] Wasoff's research on Scottish parties' views of private agreements (property and custody) after one or two years suggests that both genders often feel pressured into agreements out of fear of a worse outcome elsewhere and regret them afterwards.[137] While buyer's remorse is not an unusual sensation, these studies do raise issues about whether lawyers are abusing their influence.

Early on in the history of the Family Court, Neale and Smart's qualitative study found examples of practice which showed some lawyers applying extreme pressure to make clients comply with what they saw as the best course of action, including deliberately frightening clients with what they knew to be quite improbable consequences, such as imprisonment for contempt for refusing to allow contact.[138]

One woman who had been seriously physically abused said of her lawyer:[139]

> When I told him of the allegations, he said, 'Men who sexually abuse their children and IRA terrorists are allowed contact with their children, so if you don't [allow contact] you'll no doubt go to prison for contempt' … I was terrified so I agreed. I felt he was more *his* [the father's] solicitor than mine.

This same lawyer commented that when his clients are reluctant to allow contact: "I try to beat everybody into submission."[140]

Some researchers suggest that in taking an "objective" or an independent rather than partisan stance, lawyers may effectively refuse their clients adequate representation, likely leaving that person "in a highly vulnerable and unsupported position".[141] Moving away from this extreme, even Neale and Smart's more moderate lawyers were still manipulative:[142]

> In counselling their clients [they] …. might use a firm, unequivocal style of advice with a difficult client. Alternatively, they might use a certain amount of subterfuge to avoid appearing non-

[136] Janet Walker and others *Picking Up the Pieces: Marriage and Divorce Two Years After Information Provision* (Department of Constitutional Affairs, London, 2004) as cited in Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 25; Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93; Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481; and Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237.
[137] Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237 at 245–247.
[138] See also similar observations in Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 263–264.
[139] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 394.
[140] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386.
[141] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 394.
[142] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 388.

> supportive or over-prescriptive. Common tactics are distancing themselves from welfare ideas by presenting them as legal precepts rather than their own views; presenting these ideas in subtle ways, as pragmatic or 'common sense' suggestions rather than as legal or social imperatives; or skilfully implanting the ideas in the client's mind so that the client is led to adopt them as their own …

This mixture of tactics is consistent with the techniques other researchers have found Family Court lawyers use to persuade their clients to accept their advice.[143] Neale and Smart praised these lawyers as "flexibly" balancing client needs with "legal or social imperatives" but they do still present a risk of overwhelming the client's own agency. The risk of any lawyer dominating the client becomes more concerning if the objectives they espouse are less beneficial than sometimes thought. For example, there are longstanding concerns that the future focus of Family Court discussions and the ethos of shared care both tend to marginalise safety concerns and can endanger vulnerable parties, including children.

Extra legal advice

A further problem with the strongly paternalistic approach of Family Court lawyers is the range of help which Family Court lawyers provide clients. Legal ethics commentators often include as one aspect of a lawyers' role the giving of extra-legal advice, especially on community standards of morality. In the Family Court, studies routinely find lawyers offering a variety of non-legal advice, more akin to child welfare or "psy" professionals.[144] Neale and Smart linked the higher level of "psy" advice given by Family Court lawyers to the law's shift to incorporate child welfare as part of its decision-making process, with lawyers giving extensive advice as to the court's conception of what is in the child's best interests, namely shared care.[145] As King points out:[146]

> [Lawyers] give to clients a set of norms against which to judge not merely their chances of winning or losing a case in court, but also, much more broadly, their own and their estranged spouse's behaviour

This is in addition to parenting arrangements and plans.[147] A lawyer's approach to advising clients "would often go far beyond the giving of information and the non-directive approach

[143] See, for example, Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995).
[144] King also argues that Family Court lawyers cannot say much about what the law is or what courts will do, but this appears more a function of the state of case law at the time he was writing. Most New Zealand Family Court lawyers would say that the body of case law now accumulated is fairly comprehensive.
[145] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 385.
[146] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 254.
[147] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 256. Contrast Martha Fineman "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking" (1988) 101 Harv L Rev 727, who argued social scientists have distorted the court's perceptions.

associated with counselling and mediation".[148] The lawyers King interviewed were extremely confident in their ability to provide good quality support and advice:[149]

> If anything united the solicitors in our survey, it was a confidence that they expressed in their ability to help anxious, emotionally distressed and often, initially intransigent, clients to realise the importance of taking ownership of and resolving their own disputes. They all saw themselves as being supportive and reassuring towards their clients, even if they were, at times, highly critical of the hostile stance that some of these clients adopted towards their former partners.

King points out that lawyers however may have very little expertise in these areas and to give advice must go well beyond their knowledgebase, relying on variety of ad hoc sources from courses and papers from child welfare experts.[150] Not only might lawyers not be able to access enough information on which to give useful advice, but attempting to assimilate the knowledge of another profession can lead to distortion and misinterpretation. King is critical of "the potential for enormous confusion" in any "use [of] the logic of child welfare to legitimate a [court's] decision".[151] Scientific theories and information are likely to be re-interpreted in ways that make sense within law's perimeters and preoccupations, but which may not be entirely accurate interpretations of the science.[152] The shared care/friendly parent paradigm is one which King especially focuses on[153] and it is a good example, given the widespread concerns about whether shared care has become a de facto presumption, sometimes obscuring or distorting real concerns with child safety.

King sees the lawyers' need to be able to present themselves as child welfare experts and as mediation or negotiation experts in Foucaultian terms as a ploy to retain market dominance against mediation or counselling services.[154] He noted that in his own qualitative study of 36 lawyers while referrals to mediation were seen as a stage in the lawyers' overall strategic handling of the case, not one lawyer ever sent a client to therapy or suggested that their problems were emotional rather than legal. Lawyers were instead intent on characterising client difficulties as legal problems and in retaining control over them.[155]

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[148] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 262.
[149] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 266.
[150] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 255.
[151] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 253.
[152] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 253.
[153] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 256.
[154] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 257–261.
[155] Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 258–259.

Similarly but more broadly, Professor Tim Dare notes that while clients often consult lawyers for advice on what is "fair" (for instance in estate planning), lawyers do not have any real claim to moral expertise:[156]

> There is no particular reason to think that legal training gives people the kind of expertise which makes them a good moral adviser or counsellors (in the non-legal sense), and great care is required to ensure that clients are clear about the nature of the advice that is being given.

His position is that lawyers must make the limits of their expertise clear to their clients.

Not all legal ethicists are critical of lawyers giving of extra-legal advice. Neale and Smart for example did not see giving some advice as problematic and were critical of lawyers who simply took and enacted client instructions. However, they were also highly critical of what happens to advice giving when lawyers are in fact acting not so much for their client as for their vision of the "post-divorce family". Those lawyers give advice directed not at achieving their client's ends as much as the ends they themselves have determined, according to the court's shared-care paradigm, as appropriate.

The risk of overriding the client's autonomy

Legal ethicists have highlighted that there is risk that in seeking to advise clients of what the lawyer sees as the moral implications of their preferred course of action, the lawyer may overwhelm the client and pressure him or her into complying with the lawyer's preferred aims.[157] As Stephen Ellmann said, there is a risk that legal eloquence could "weaken, or even trample upon, the autonomy of clients".[158] Luban has argued that this risk does not arise because in fact, as paying customers, it is the clients who have the upper hand over lawyers and are not likely to be overwhelmed by them.[159] While this may be true of corporate lawyers and clients, there are a number of studies that show lawyers have great influence over poorer and weaker clients. If the lawyer skips the step of debating the morality of an option by simply not telling the client the morally dubious option exists, he or she would clearly be treating the client as less than an autonomous, fully competent human being. If lawyers then consistently advise all their clients so that none of them get told of option "x" then that will start to shape social behaviour too, and have an impact on the way the law operates.

The risk of paternalism

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[156] Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016) at 155.

[157] David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1025–1026 acknowledges that lawyers must not become "evangelical" in their approach to their moral advice.

[158] Stephen Ellmann "Lawyering for Justice in a Flawed Democracy" (1990) 90 Colum L Rev 116 at 148 as cited in David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1025.

[159] David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1036–1037.

Alongside the impact on client autonomy, a risk of paternalism can arise. A paternalistic act is one which overrides or ignores the client's views on the matter on the basis that we know best for them, and thus "treat[ing] the client as less than a moral equal". Paternalistic actions are not only those that overtly override a client's expressed wants but also those that manipulate the client into complying with our advice, including by failing to give information or by deliberate misinformation or by emotional pressure.

This is not to say that all acts we do which are beyond our client's ken are necessarily paternalistic. Some decisions, regarding the means or route chosen to reach an end - might be deputised without risk provided that the client had enough time and information to make an informed decision to surrender their agency on those matters. What is wrong is "making decisions in ways which deny clients an effective say in the process".

The risk is that our paternalism can be masked by the very fact that our mission is protective and empowering: If we are doing this for them then prima facie we are protective; If we are acting on their instructions then prima facie we are empowering them. There is an obvious temptation for the lawyer given our superior legal and technical knowledge and professional experience to see ourselves knowing better than the client what is in their interests. The risk of paternalism increases when the client is emotionally distressed or "so emotionally involved that lawyers construe their instructions or behaviour to be 'irrational' and contrary to their own interests".

The imbalance in knowledge and standing between many clients and their lawyers also increases the risk of paternalism. Low-status and poorer clients are particularly vulnerable to pressure from their lawyers. The economic pressures of acting for poorer clients can also increase the temptation to act for our clients without their full informed consent. Sheer cost may make us reluctant to discuss matters at length and lead to clients giving us considerable licence for unsupervised activity, deputising us to make decisions about the legal or technical means of achieving a client's ends with minimal or no consultation.

Partisanship

The excesses of partisan lawyering have been a prime concern of legal ethics for well over a century, and anti-adversarial thinking has been a major part of the Family Court reform argument. However, partisanship can provide benefit to clients, which should not go unexamined in discussion of the ethical implications of Family Court practice.

What is partisan lawyering?

The classic description of the partisan lawyer's duty to the client remains that of Lord Brougham in 1820.[160] The advocate, he said:[161]

> … knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons … is his first and only duty.

The justification for this style of advocacy is twofold: first, it stems from the adversarial system's underlying theory that the best way of investigating a proposition is by a debate conducted by fiercely committed advocates, one for each side, each motivated to uncover all of the evidence favourable to their side and to critique all of the evidence gathered by the opposition, the results then being evaluated by an impartial fact-finder. As Lord Denning famously declared, "truth is best discovered by powerful statements on both sides of the question".[162]

The second justification, owing mostly to the criminal trial, is that individuals need aggressive advocacy to protect them and enable them to assert their rights against a far stronger opponent. Accordingly, both the individual defendant and society at large need strongly partisan lawyers, both to protect individual's autonomy and rights and — by defending individuals — to ensure the integrity of the trial for the benefit of everyone. A whole range of subsidiary benefits, such as the ability to critique the exercise of state power and check officials who overstep their remit, flow from this.

As the English House of Lords put it, nearly two hundred years after Brougham:[163]

> The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed.

To ensure all citizens can avail themselves of the necessary legal help, lawyers are required to remain morally neutral and accept and advocate for any client who asks for their assistance, whether or not they approve of the client's actions or stance personally. It is this principle of neutrality which gives rise to the famous cab rank rule, which states that lawyers must accept any client who asks for their assistance (provided they have the requisite skills and time).[164] The corollary of the lawyers' obligation to take all comers is that they have an immunity from

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[160] Although, as is almost equally well known, Brougham's statement was less an idealistic declaration than an implied threat: In classic hard-ball fashion, Brougham was defending King George IV's estranged wife, Queen Caroline, against accusations (probably true) of adultery by threatening to disclose the King's earlier illegal marriage to a Catholic if the charges were not dropped: Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016) at 5–6.

[161] Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016) at 6.

[162] *Jones v National Coal Board* [1957] 2 QB 55 (CA) at 56. Lord Denning cites Lord Eldon LC in *Ex parte Lloyd* (1822) Mont 70 at n 72.

[163] *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120 at [51].

[164] Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016) at 8–10. Provided that lawyers have the necessary skills, experience and time.

criticism for so doing: lawyers are protected from personal accountability for assisting any client and for the actions they take on the client's behalf — otherwise known as the principle of non-accountability.[165]

Benefits of partisanship

While the investigative efficacy of the adversarial model is not necessarily clear, there are major benefits to conventional partisan lawyering for vulnerable parties. As put by Rachael Field:[166]

> … lawyer involvement has the potential to help mitigate issues such as an ignorance of the law, lack of assertiveness, lack of self-esteem and an inability to articulate persuasive and compelling arguments on the part of a party.

Field, putting the case for lawyer involvement in mediation, describes the benefits of legal representation as a combination of preparation beforehand — educating clients as to their legal position and expectations in a court case, coaching them to participate effectively[167] — and support during the process — monitoring the process to ensure the client is not overwhelmed or their perspective lost, speaking directly when the client is unable to do so and providing advice and a sounding board[168] — and also providing important emotional support.[169] Most of all, for Field, lawyers redress power imbalances:[170]

> One of the most important aspects of the lawyer advocate's presence is to contradict the dominant position of the perpetrator and redress some aspects of the inequalities in bargaining power that exist by bringing some legal protections into the mediation environment.

Similarly in the courtroom the lawyer's power to speak for clients in court and to marshal a client's evidence in affidavit form also protects less confident and less articulate clients, especially if required to speak directly to the judge, as is often the preference in the Family Court, a practice strengthened in a number of pilot programmes.[171]

Victims of IPV, who are of course common in the Family Court, are particularly likely to struggle to advocate for themselves, a point made strongly by Judge Fogarty and by Professor Hunter in their evaluations of the Australian Less Adversarial Trial model, which also puts a

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[165] Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016) at 10–11.
[166] Rachael Field "A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence" (2004) 20 Australian Feminist Law Journal 65 at 83.
[167] Rachael Field "A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence" (2004) 20 Australian Feminist Law Journal 65 at 87.
[168] Rachael Field "A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence" (2004) 20 Australian Feminist Law Journal 65 at 88.
[169] Rachael Field "A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence" (2004) 20 Australian Feminist Law Journal 65 at 89.
[170] Rachael Field "A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence" (2004) 20 Australian Feminist Law Journal 65 at 89.
[171] A number of Family Court programmes and pilots have even strengthened this practice of requiring direct communication between judge and party: See the NZ EIP and PHP models and the Australian LAT model.

premium on direct judicial communication with the parties in an informal setting, minimising lawyers' contributions as much as possible. Hunter points out that IPV victims are likely to find the presence of the abuser in the courtroom makes it very difficult to speak to the judge and in consequence are "likely to present very poorly in court – as disordered, incoherent or emotionally fragile, often in contrast to the perpetrator," who, it has been observed, are often "able to appear calm, rational, reasonable, confident and articulate".

Whereas earlier in this chapter the emphasis was on lawyers' ability to rein in and dissuade aggressive clients with poor cases, studies also show that lawyers empower and protect weaker clients with good cases. The rise in self represented litigants which occurred as a consequence of various governments restricting access to lawyers[172] has also produced research suggesting that lawyers' involvement not only stops litigants pursuing cases unnecessarily but also protects other litigants from giving up cases (or having them thrown out) unnecessarily.[173] As Hunter concluded, "self-representing litigants have a greater tendency to be overwhelmed by the court process or to take an [over-]adversarial approach rather than to engage successfully in settlement negotiations".[174]

The support of a lawyer is particularly important when a party has something unpopular but important to say. Neale and Smart note that the professional climate of opinion is likely to be against any parent seeking to prevent children having contact with the other parent, even when (some studies suggest *especially when*) allegations of abuse are raised:[175]

> The support of their solicitor may be vital because once clients are on court premises or in independent mediation they will come under increasing pressure from welfare professionals and other court personnel to give way. As a hired partisan their solicitor may be the only person who is prepared to argue their case and validate their position.

A specialist Family Court lawyer can be a powerful protective force. In Joyanna Silberg and Stephanie Dallam's United States study of 27 cases where Family Court judges disbelieved child abuse allegations which appeal courts subsequently found to be well substantiated, an important factor in turning the case around was that the appeals were led by Family Court lawyers with expertise in abuse cases, as opposed to less specialist lawyers instructed in the original hearings.[176]

This last example points to the fact that partisan advocacy can be an important safeguard for the accuracy of the fact-finding process, acting as a barrier to judges making ill-informed or

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[172] Hunter reviews the research literature in Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 168–169.
[173] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 169–170.
[174] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 171.
[175] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 393 (citations omitted).
[176] Joyanna Silberg and Stephanie Dallam "Abusers gaining custody in family courts: A case series of over turned decisions" (2019) 16 Journal of Child Custody 140 at 154–155.

premature decisions.[177] In Pauline Tapp's defence of aspects of the adversarial process in 1999, Tapp argues traditional partisan advocacy ensures judges are forced to consider all the evidence and that his or her assumptions are challenged:[178]

> Good cross-examination and professional advocacy can ensure that the judge is given a three-dimensional picture of the parents rather than the one dimension that appears from an affidavit and a brief "personal" statement made in court by each parent.

This point was made strongly by critics of the Australian Family Court programme the "Less Adversarial Trial", where judges have the power not only to determine the issues, but also the extent to which parties may respond to the evidence and the scope of cross-examination, if any.[179] Judge Fogarty emphasises that there is a particular danger in the present climate that judges will feel encouraged to overlook evidence of past abuse because of the dominance of the future-focused conciliatory shared care ethos (just as he points out there was previously an issue with the dogmatic insistence on a "no-fault" court).[180] The ethos "concentrate[s] on future proposals and discourage[s] evidence about past conduct".[181]

Both in their role of articulating the client's viewpoint and argument and in their role of seeing that relevant evidence is not overlooked or that inadmissible or weak evidence is not accepted, lawyers are important to ensuring a party's right to participation. Minimising the role of the lawyer risks the party's ability both to access justice and to participate fully and clearly in the process, as well as the accuracy of the court's determinations. As Fogarty put it, "[s]trong, fearless, but responsible advocacy is at the centre of [justice]".[182]

Not all Family Court lawyers fall into the "good" or "bad" camps. Seeing benefit in partisanship does not mean endorsing a return to the "bad old days" of fully-adversarial advocacy.[183] Neale and Smart argued instead for lawyers at either the merely partisan or the conciliation end of the spectrum to take a more nuanced and less dogmatic approach, reflecting the factual circumstances and respecting the autonomy of the individual and his or her right, when fully informed, to make a decision freely. They believed many of the lawyers they studied already took this "flexible" middle road, "steer[ing] a middle path between these two extremes, with both private negotiation and litigation brought into play as appropriate".[184] In Neale and Smart's view, flexible lawyers are firm fans of negotiation but are not afraid of litigation and prepared to use it to bring the other party to negotiation. Although they will work on clients to

[177] Pauline Tapp "Family Law" [1999] NZ Law Review 443 at 450.
[178] Pauline Tapp "Family Law" [1999] NZ Law Review 443 at 450.
[179] New Zealand Family Court judges have a similar but lesser power to refuse to allow some evidence and some cross-examination.
[180] John Fogarty "Family Court of Australia – Into a Brave New World" 20(3) Australian Family Lawyer 1 at 10, 17 and 21.
[181] John Fogarty "Family Court of Australia – Into a Brave New World" 20(3) Australian Family Lawyer 1 at 8.
[182] John Fogarty "Family Court of Australia – Into a Brave New World" 20(3) Australian Family Lawyer 1 at 22.
[183] See King's description of the "bad old days": Michael King "'Being Sensible': Images and Practices of the New Family Lawyers" (1999) 28 Journal of Social Policy 249 at 249.
[184] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 391.

educate them and try change their views, they have greater respect for their autonomy, including their right to access justice. They are prepared to abandon negotiation for litigation if the facts support a need to do so (such as safety concerns about contact) or the client is too vulnerable to negotiate safely.[185]

Not all partisans are created equal: The dangers of extreme neutrality

Of course, there is no guarantee that conventional partisan lawyering will provide the kind of active, committed advocacy that clients need: "not all partisan advocacy is created equal or in the model of the Hollywood courtroom champion".[186] Of those Family Court lawyers who are identified as behaving in conventionally adversarial or partisan ways, the willingness to implement client instructions without interference was not necessarily associated with any deep affiliation with the client's goals or better outcomes for clients. Rather than providing a strong and committed advocacy, Neale and Smart noted that amongst the lawyers they studied, those who were willing to follow instructions in a conventionally partisan manner often remained quite "indifferent" to the client, offering an "impersonal" service where they operated merely as technicians actioning instructions. [187] Nor did the level of service provided much resemble the adversarial ideal of straining every sinew to advance the client's cause. There was sometimes a superficiality or perfunctory character to the representation provided compared to the level of service and advice given to those who had more "objective" lawyers. The lawyers themselves also appeared to be less experienced or have a narrower skill base, and were less effective outside the adversarial paradigm. Settlement discussions tended to be non-constructive because of the level of aggression, causing long delays.

Moreover, research amongst lawyers also suggests that partisan lawyering as it occurs in the Family Court can tend to be quite limited in its outlook and the range of assistance offered to the client. In their nuanced account of the range of types of lawyering within the Family Court, Neale and Smart note that the lawyers in their sample who acted in a traditionally partisan way and accept client instructions without much resistance tended to be quite uninformative, providing little advice or guidance and merely rubber-stamping client decisions.[188] They acted as mere "technicians," actioning client instructions. They also often were unimaginative or possibly unaware of alternatives to straight litigation, giving limited advice on the possibility of a lawyer-led negotiated settlement, some because they were inexperienced and others because the money expected from litigation under legal aid was more important than the

[185] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 392–393.
[186] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386: "This partisanship may not be particularly supportive. It may reflect a rather indifferent or impersonal approach to the client or a pragmatic wish to get on with the client's instructions. On the other hand, it may stem from a firm commitment to the client's position".
[187] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 385–386 and 389.
[188] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 386.

outcome for the client.[189] This left clients with fewer options. Further when they did engage in settlement negotiations they were poorer at it. When in negotiation, Neale and Smart noted that the skills of the more adversarial lawyers in their sample appeared limited to the adversarial so that they tended to be "unconstructive and even inflammatory", drawing negotiations out over many months, apparently unable to shift into a more constructive way of operating.[190]

Self-Interest

In particular, issues have been raised about the quality of legal representation afforded to poorer clients, whether in the Family, criminal or civil courts.

This aligns with the observations that lawyers in other fields have a tendency to sacrifice their clients' interests or underplay their representation of their clients for reasons of their own self-interest. Studies show, for instance, criminal defence lawyers routinely pressure low-status clients into accepting plea-bargains which expedite them out of the court system with the minimum fuss and that community law centres and lawyers acting for poorer clients in respect of civil claims tend to do the same, not only for the financial benefit of a quick turnover but also to maintain crucial working relationships with legal colleagues and judges.[191]

In his influential 1967 paper, Abraham Blumberg gave a stinging critique of his erst-while colleagues at the criminal defence Bar, arguing that criminal defence lawyers were motivated not only by the need to maintain turnover but also by the need to maintain the good will of colleagues and judges on whom their working lives depend. This meant persuading clients to move through the system as efficiently as possible for the good of the system. This commentary was later strongly supported by Baldwin and McConville's work on plea-bargaining in the English criminal courts, which found that it was not hyper-zealous but low-zeal lawyers who were more characteristic of, and more of a problem in, the bulk of work in the criminal courts.

Some studies of Family Court lawyers have raised similar questions about some Family Court lawyers. Lower-paid and legal aid lawyers profit only when it is possible to churn clients through in quantity[192] and researchers have concluded that Family Court lawyers do push lower-paying clients to settle to maintain their own profitability.[193] For example, Eekelaar and

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[189] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 389.
[190] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377 at 390.
[191] Abraham S Blumberg "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession" (1967) 1 Law and Society Review 15 as cited in David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1011.
[192] David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1012.
[193] Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995). See also David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1011. Although cf Eekelaar who, although recognising that the legal aid lawyers in their sample were far more directive with their legal aid clients than their private paying clients, also noted the legal aid lawyers' care and devotion to their legal aid clients.

others noted lawyers working with legal aid clients are highly directive and managerial, whereas higher-paying private clients are given more time and more discretion in their choices.[194] Wright and Davis have both also speculated on the role of economic efficiency in lawyers' emphasis on getting clients to settlement.[195]

Further, as described above, Family Court lawyers consider close working relationships with other lawyers are crucial to a settling cases easily.[196] They also believe that other lawyers[197] (and judges)[198] see conciliation and settlement as preferable and strongly disapprove of lawyers who adopt conventionally partisan/aggressive methods.[199] It may therefore be against a lawyer's long-term self-interest and the maintenance of collegial good will to buck the system and act aggressively for a particular client.

Luban, rather than seeing this sort of lawyering as an abandonment of the ideal of partisanship, identifies it by the economists' term "satisficing", meaning a standard somewhere between "satisfying" and "sufficing", or "an agent [who] sometimes seeks less than the best …. merely what is good enough".[200] Thus, while concerned by the greater level of autonomy allowed private paying clients, Eekelaar and others also recognised that lawyers generally gave legal aid clients a high level of service, meaning that the trade-off may not have been hugely disadvantageous. However, "good enough" lawyers may still be skating the slippery slope to neglect. For example, if economic pressures encourage lawyers to cut corners in taking instructions and advising clients, so they may act on the basis of assumptions about the client's situation without proper investigation and take steps on the client's behalf without obtaining informed consent. Cost-cutting in the lawyer's own self-interest thus increases the risk of paternalism, the idea that the lawyer knows better than the client what is in his or her best interests, and should act accordingly.

Conclusion

This chapter has considered the reality of Family Court lawyering as opposed to the rhetoric that has shaped the system, and the ethical implications of the reality of Family Court lawyering.

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[194] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000).
[195] Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994) at 40 as cited in Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 493.
[196] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 485.
[197] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 485; and Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 161–162.
[198] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 162.
[199] Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 485; and Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 161–162.
[200] David Luban "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90 Colum L Rev 1004 at 1012.

What has emerged is that the narrative of the overly litigious lawyer, stoking trouble and adding expense, is misleading. Empirical studies have instead found that lawyers are in fact highly conciliatory and effective at settling cases.[201] Family Court lawyers can be seen as responding to the changes in the Family Court by adopting a less partisan approach to their work, instead taking on a responsibility to forward the interests of third parties and to promote settlement and conciliation. As highlighted by Hunter:[202]

> [H]aving legal representation does not inevitably result in court proceedings, that filing court proceedings does not inevitably result in protracted litigation and a judicial decision, and that a judicial decision is not always a bad thing. Conversely, the absence of legal representation (or the absence of legal aid for legal representation) does not always keep people out of the court system and does not necessarily result in consensual solutions, and consensual/mediated solutions are not always a good thing.

However, this is not the full picture. There is still some basis to say that some Family Court lawyers operate in a zealously partisan way (in and out of the courtroom), while at the other end of the spectrum highly conciliatory lawyers create problems of their own, potentially sacrificing their client's and their client's children's safety to their ideals of child welfare and the post-separation family.[203] As Neale and Smart observed 20 years ago, in the quote with which we began this chapter, Family Court lawyering exists on a continuum, with some at one extreme accepting all instructions without much concern and those at the other end pushing clients to comply with their personal moral standards.[204] The problems of Family Court lawyering reflect that continuum.

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[201] See, for example, Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992) as cited in John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 13; and Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 158. Further, as discussed earlier on in this chapter, from the mid-1980s onwards, many studies of Family Court lawyers have consistently found that they are strongly settlement-focused: Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 22–23. Barlow and others point to Gwynn Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988); Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994); Gwynn Davis and others *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission, London, 2000) at 137; John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000); Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992); Janet Walker "Is There a Future for Lawyers in Divorce?" (1996) 10 IJLPF 52 at 65; Katherine M Wright "The Process of Divorce: A Study of Solicitors and their Clients" (PhD Thesis, Sheffield Hallam University, 2004); Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481; Mavis Maclean and John Eekelaar *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, Oxford, 2016) at 53–54; and Lisa C Webley *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro Books, New Orleans, 2010).

[202] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 158.

[203] See, for example, Neale and Smart's discussion of the problems of overly partisan lawyering on the one hand and overly conciliatory lawyering on the other: Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377.

[204] Bren Neale and Carol Smart "'Good' and 'bad' lawyers? Struggling in the shadow of the new law" (1997) 19 Journal of Social Welfare and Family Law 377.

In short, the stereotype of the villainous lawyer may be overblown, but that the reality turns out to be more nuanced than the stereotype does not mean reality is worth settling for. Numerous studies highlight the persistent inattention of governments across jurisdictions to empirical Family Court research,[205] giving rise to a corresponding need for greater understandings of the reality of Family Court lawyering. From a legal ethics perspective, the Family Court presents and an important arena for the exploration of different legal ethical systems and their impact on clients' access to justice and third-party interests.

[205] See John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at ch 1; Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017) at 24–25; Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 100; Fran Wasoff "Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce" (2007) 27 Journal of Social Welfare and Family Law 237 at 238–239; and Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156.

Interview findings

This chapter examines the findings from our interviews with lawyers, organised here into two overarching categories: lawyer's practice and culture, and Family Court process and functioning.

Category one: lawyer's practice and culture

Overly aggressive lawyering

What is overly aggressive lawyering?

Across the interviews, almost all of the respondents considered overly aggressive lawyering to be bad practice in the Family Court.[206] The lawyers were largely in agreement as to what amounted to overly aggressive lawyering, citing accusatory tone and language in correspondence, refusing compromise in settlement discussions, contesting every point, taking unnecessary applications and filing unnecessary and irrelevant evidence. Aggressive lawyers were also described as being bullying or overbearing, and in some cases personal attacks on the lawyer or the client were listed as a component of aggressive lawyering.

> 17[24] "[A bad Family Court lawyer is] One who acts like a bully. Who files interlocutory after interlocutory to delay the standard outcome, to get their client's way on every point. Who has to get the outcome their client wants or else it's a hearing."

> 4(5)[3]) "[What is aggressive lawyering?] … I think aggression is words and tone and sort of accusatory blaming. Jumping to conclusions, making assumptions about motives, all that sort of stuff. In person threats, like threats to issue legal proceedings."

> 5(2)[15] "[A bad Family Court lawyer is one who takes] A very personal approach. A very personal attack on either me or on my client and kind of personal extraneous attacks. […]I had a lawyer a while ago who is well known to me who wrote three letters in a row where my integrity was attacked by him and I found it very distressing and also I got to the stage where I got close to reporting it..."

> 8[41] "[An example of a bad Family Court lawyer is] one person I particularly do not like dealing with: As soon as you see the name you think "this is going to be contested, this is going to be drawn out, everything is going to be argued, it's going to become abrasive, and everything will be contested." It's kind of like a civil litigation file that in terms of discovery, interrogatories, all those kinds of things…"

Notably a number of lawyers differentiated between aggression and appropriately assertive lawyering,[207] between being a "bully and being persuasive".[208] Whereas overly aggressive approaches were seen to prolong proceedings and hamper settlement, discussed further below,

[206] [1,2,3,4,5,6,7,8,12,13,14,15,16,17,18]
[207] [18]
[208] 5(2)[11]

assertiveness was seen as an appropriate part of the lawyer's toolkit in advocating for clients, to be deployed when necessary and for the right cause.

> 4(4)[7] "I think in terms of bad family lawyers, aggression is not helpful. That's different from being assertive. I think being assertive is really good but aggression is really not helpful."

> 18[43] "I would say locally, there's perhaps one lawyer who's known to be aggressive while the rest of the bar are, from time to time, can be [appropriately] aggressive in relation to a position that it's entitled to them to prosecute. And that, I've got no qualms about that."

Impact of overly aggressive lawyering

Overly aggressive lawyering was seen to prolong proceedings and impeed settlement efforts: aggressive correspondence "inflames the situation"[209] and "get[s] people's backs up",[210] advising clients to repeatedly decline settlement offers because "it's got to be their way" is "not solutions-focused"[211] and could cause settlement dicussions to become drawn-out or collapse altogether. One lawyer described the situation of recieving an affidavit with "inflammatory and unnecessary" content:

> 16[52-54] "We've all read those ones that have a whole lot of stuff in there which has no real bearing on the case but all it does is serve to antagonise and you have to send that to your client as is and you know what you're going to get back."

Six lawyers shared the view that aggression tended to breed aggression.[212] They considered that aggressive approaches were likely to provoke an equally aggressive response from the other lawyer and client, as highlighted by one lawyer:

> 5(2)[11] "… if you issue a challenge, the person has to take up the challenge. Whereas if you issue a request or a suggestion then it's easier than to respond in that way."

Lawyers were concerned that whilst an aggressive approach may in some instances produce a short-term gain for the client, it risked doing (further) damage to parties' long term relationships and interests.[213]

> 8[41] "…. Not seeing the wood for the trees sometimes has the definite potential to leave people more damaged than they were when they arrived or at best completely unresolved and if it's been contested I imagine that the ability of them to resolve it themselves later on is going to be made more difficult and sometimes impossible because ideally we're a bit like a surgeon, we're in we're out, you do a job, cauterise it, do what we need to do as quickly and efficiently as possible."

Overly aggressive lawyers could also cause their colleagues significant stress and have a disproportionate impact on their practice, particularly where the behaviour is bullying or

[209] 16[52-54]
[210] 4(4)[3]
[211] 18 [37-39].
[212] [2,5,4, 12, 16, 17]
[213] 12 [44-46], 8[41]

involved a personal attack on the opposing lawyer.[214] One lawyer described a situation acting on a protection order application where she felt "constantly bullied" by a more experienced lawyer to discontinue the application. The lawyer did not concede to the bullying, though noted that the experience "almost made me not want to [practice] law sometimes".[215]

Who is aggressive?

Aggression was seen as characteristic of some younger lawyers and of less experienced family lawyers, who were more likely to come out "guns blazing",[216] trying to "make their mark".[217] It was also seen to result from an insufficient knowledge of the law, using aggression to conceal inexperience or incompetence.[218]

> 2(4)[1]"[S]ome young barristers who've just gone on, they're constantly filing things, everything is going to court. There's one settlement letter back and forth and then it's off to court. … I don't understand. It just gets out of hand. Everything gets out of hand. Things that are so easy to be resolved. When I worked with very experienced family lawyers on the other side, they are so easily resolved [by negotiation]."

> 18[37-39] "It goes back to a lawyer who doesn't really know the law, because you would recognise some of the parts are not relevant, it's contextual. You only need to respond if you dispute. [Instead these are people who are] [j]ust getting caught up in the conflict."

Overly aggressive approaches were not however limited solely to young or inexperienced lawyers. In some instances, more experienced lawyers were identified as being overly aggressive, oftentimes by making a matter personal, and by focusing on beating the other lawyer rather than reaching sensible solutions:

> 3(17)[7]-(18)[1] "The [remaining aggressive] ones…are actually highly experienced and partners in firms … They're obviously good at their job. They just shouldn't be doing family law, they're just too fricken aggressive. I think they tend to self-clean because aggression is exhausting so they do tend to disappear from the community after a while because I guess it's not fun to be angry all the time."

> 13[28-30] "I'll give you an example [of an overly aggressive lawyer]: [I] appeared in the [X] Family Court with another very senior lawyer on the other side. He asked to speak to me after we leave the courtroom. He expresses a view about something, I try and express a contrary view, he just talks over the top of me to the point where I couldn't get a word in edge ways. I said "I think this is unproductive you're just talking over the top of me you're not listening to me and I can't continue like this and I'm going." So I started walking and he shouted at me; "You're immature!" (Laughs) It is funny at one level, maybe I am but personalising it I suppose. I suppose the big part in it [the problem] is the making it personal. To the point where all you're interested in is beating that other person rather than achieving a sensible solution."

[214] [1,2,5,13,14,17]
[215] 14[71-73]
[216] 1(6)[3]
[217] 16 [52]
[218] 18[37-39]

One lawyer highlighted that aggression could arise when the lawyers involved did not properly address personal issues triggered by difficult cases. Emotional overwhelm could cause lawyers to become "locked in" on a file, and loose the objective "big picture" view that so many emphasised as a key component of "good" Family Court lawyering.

> 7(5)[19]-(6)[2-4] "We deal with extraordinary levels of dysfunction and distress in human behaviour and experience… [O]ne of the problems we have as a profession is we don't have a really systemised way of dealing with our own stuff. […] [As a lawyer] [y]ou're getting very upset, angry, whatever kind of people to agree on stuff they just don't want to agree on. It's highly fraught. We live with that constantly… I can reflect on times where I have lost the plot on a file; become locked on where a lot of us have that kind of personality. So I have seen good people generally lose the plot of certain files, but I think that by in large this charge against us that we are adversarial is really unfounded. By and large."

Few overly aggressive lawyers

While almost all the respondents listed aggression as bad practice in the Family Court, twelve considered that very few Family Court lawyers were overly aggressive, and that those lawyers were generally well known to be overly aggressive.[219]

> 7(3)[4] "[W]e have a couple of outliers, as with any profession, but by and large I would say the share of practitioners in this locality are people who go "look this is a big sticky problem, how do we fix it and help these people get through it?" I think that criticisms of lawyers trying to milk the system and all that stuff is just no way near my experience and I think if we ever experience a lawyer like that we would call them out. We would fight it."

> 17[26-32] "I could count on one hand the lawyers that I think in [city] "ooh yuck, it's one of those." The majority are trying to help their clients, to finish things, and that's why we all get along so well. Most of us are decent people. [..] There's a small number like that, who create the problems."

A few lawyers disputed whether clients' perceptions of the process as adversarial were accurate or more a consequence of their own emotional turmoil:

> 12[132] "I don't think [overaggressive lawyering] is [an issue]. Leave aside the odd impossibly litigious lawyer, on the whole I think the bad outcomes and the intractable cases are much more a product of the parents and the adult parties involved: The family dynamics; mental health overlay."

> 8[81] "in some situations that could well be right [that there are too many over-aggressive lawyers] and it probably is, but you know again, sitting back in an objective way … I suspect that we are kind of like a lightning rod … Is it easier for people to say the bloody Family Court doing this, the bloody lawyers doing this, rather than saying actually I made some bad decisions or didn't do things I should have done which might have done this? It's that fear and upset which can easily bring out the worst in people and it's a pretty honest [person] to say "actually, I own part of this," because no one wants to think of themselves as a bad person. It's easier to think of someone else as doing something wrong."

[219] [2,3,4,6,7,8,12,14,15,16,17,18]

The impact of client emotions on the adversarial nature of proceedings is discussed in depth in the "emotions and 'difficult' clients" section.

Insight into approach

Although some lawyers discussed particular cases where on reflection they felt they had been too aggressive, only one lawyer expressed serious reservations about whether their own approach was too aggressive. For this lawyer the accusations of bullying had arisen where the lawyer felt they had simply been matching the opposition counsel's strength. One of the key concerns for this lawyer was the impact their approach had on the settlement discussions in the case, and thus for the client's interests:

> 5(3)[5] "I was in a mediation once in a very difficult one with one of the leading lights in the profession … so I am very clear that my approach has got to be as strong as hers. But in the course of the mediation, the mediator said to me that … the husband had formed such a negative view of me that that was an impediment to settlement and I needed to go and apologise to him. So I gritted my teeth … but I did [it]. […] [I]t was hard. Hard for my ego. But I will do that for my client, you know. I have stood down. I would hate to think that I am the way that I am the reason that things don't settle or don't resolve, because of me and I really am conscious of that and try not to. I am conscious of that."

Settlement, Alternative Dispute Resolution, and Conciliation

The legislative duty to promote conciliation, and possibly also the Paramountcy Principle, can be seen as direct riposte to conventional adversarial conceptions of legal practice. During interviews lawyers were asked what impact the statutory duty to promote conciliation had on their practice. This included discussion of the strengths and shortcomings of settlement-focused practice in Family Court matters, and a comparison with litigation and court-ordered outcomes.

Support for settlement-focused practice

Eleven of the lawyers interviewed strongly supported settlement-focused practice.[220] Discussing the impact of the statutory duty to promote conciliation, these lawyers described the duty to conciliate as being "front and centre"[221] to their practice and a key part of "how they work."[222] One lawyer put it: "if something can be done without the use of the court, I'm absolutely for it".[223] They agreed that their own practice was strongly settlement-focused, and saw this style of practice as being better for the client and for any children involved, emphasising the importance of attempting to resolve disputes without coming into contact with the Family Court or ending in a hearing. A few of the lawyers explicitly referenced a settlement-focused approach was part of what made a "good" Family lawyer.

[220] 1(6)[3] 1(7)[1] 2(5[5]) 2(1)[12] 3(13)[6] 4(4)[3] 12[85-89] 13[38-39] 14[19] 14[25] 15[120-21] 16[29] 16[106-108] 18[79-81]
[221] 12[82-85]
[222] 15[120-21]
[223] 16[106-108]

> 12[82-85] "I know [the duty to conciliate] is there and in fact whenever I sit down with people I'll say, "oh you know we have an obligation to promote reconciliation or promote conciliation and counselling and so on." […] [T]he duty or more so the benefit of promoting conciliation has a major impact on my practice …. At every step to be honest, it's sort of front and centre for my practice and I think it is for most good family lawyers to be honest."
>
> 15[120-21] [Duty to conciliate?] "That's how I work, I like to think I have a common-sense practical approach to things. You're not going to win all the time, don't sweat the small stuff, choose your battles. I try and resolve things…"

Support for settlement-focused practice was in some instances explicitly underlined by lawyers' concerns for the welfare and best interests of any children involved in the dispute.[224] One lawyer described the role of "good Family Court lawyers" as helping parties reach resolution without resort to hearing for the benefit of the children:

> 1(6)[3] "I expect [good Family Court lawyers] to do their damn-est to assist a family to come to a positive resolution for their children which . . . they as adults can live with, that works really well with their kids and [to] keep as far away as a courtroom as they humanly possibly can. The last thing I will ever push anyone towards is a hearing. I work extensively as a mediator . . . empowering the parents in that way. […] 1(7)[1] There are very few people who in the right circumstances are incapable of making appropriate decisions, safe, healthy nurturing decisions for their children."
>
> 14[19] "I very much enjoy resolving disputes in the family context and I really don't like the Family Court. I think it does a great job but I really don't enjoy it for family matters. Particularly if it's going to a hearing and people start ripping each other apart I just don't think that's the right place and I make every attempt to explain that so the parties can make their own decisions about their own children and without a stranger making decisions for them."

Two of the lawyers even considered that not to settle and to proceed to a final hearing was a failure.[225] As described by one: "the hearings are almost failures, there's almost a certain argument to say the cases that proceed to a final hearing are ones we've failed in our job".[226] Another was similarly of the view that "no-one wins" if a case goes to hearing.[227]

Discussing the portion of cases resolved by settlement and by hearing, most lawyers considered the majority of their cases to be resolved without resort to hearing.[228] This roughly accords with the statistics on overall rates of settlement, with about 10 per cent of cases that go to lawyers ending in defended hearings. A couple of the lawyers referred to the fact that a conciliatory approach was not financially rewarding but emphasised that this was not relevant.[229]

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[224] See 11(6)[3] and 14[19]
[225] [3(13)[6]; 14[84]]
[226] 3(13)[6]
[227] [15[121-126]]
[228] For example discussed in 18[83-88] and 16[29]
[229] [15[121-126]] 2(5[5])

> 2(5[5]) "[My initial approach is] always cooperative. My first letter, no matter how unreasonable the other side is, or whatever my client has told me, my approach is the same. Look, my client would like to resolve parenting matters, can we ask that you come and have a talk to us, propose something, or he proposes or she proposes this or he proposes that, what are your thoughts? And then they'll come back and maybe [propose] something, which has managed to get me a parenting agreement all the time. You don't make a lot of money out of that, you really don't. But you have happy clients and that I think is your job to do is at the end to reach a result with your client as inexpensively as possible."

The importance of settlement was also one reason that nine lawyers emphasised the importance of having good collegial relationships.[230]

> 17[84-89] ["How many of your cases end up in a hearing?"] "It goes through patches. A quarter. […] I'd say half to two thirds never have an application. And then the rest have an application and probably half of those settle. […] They resolve with having a good lawyer on the other side, both parties being able to reflect and accept guidance from lawyers and not hugely warring parents. No special circumstances. Just a family, angry separation and a bit of time. Often those cases involve one party who is super good at making a sacrifice and buying out of a fight and letting the other person call most of the shots. Compromise. And even an ability to take on a advice. Good lawyers involved."

Reasons for preferring settlement over litigation

Lawyers described several reasons for emphasising settlement and conciliation over litigation in their practice. These included the avoidance of steep legal costs, emotionally destructive litigation, delays in the Family Court process, and the stress associated with Family Court litigation. Notably, none of the lawyers cited the law, that is the duty to conciliate, as a reason why settlement and conciliation should be emphasised in Family Court practice. This is in contrast to lawyers' discussion about the protection and promotion of the child's welfare and best interests. In that discussion, a number of lawyers cited the law, either the underlying "ethos" of family law or the legislative framework, as a basis for their concern for the child's best interests; whether that concern was for the child's best interests in and of themselves, or indirectly as part of the legal landscape clients navigate.

Avoiding steep legal costs

A number of lawyers considered settlement to be a more cost-effective option for clients than litigation.[231] One lawyer described litigation as "financially crushing" for parties,[232] and many emphasised the importance of reaching resolution in the most inexpensive way for the client. One lawyer considered it the family lawyer's job to "reach a result with your client as inexpensively as possible".[233] Two lawyers however did caution that negotiation can become

[230] (2(4)[3]; 3(6)[7-9] 5(3)[3-13] 6(3)[13-15] 7(3)[2-4], 12[72], 13[38-40] 14[38] 16[135-37]
[231] [1(7)[1],2(5[5]), 12[82-85],13[38-40], 15[121-26], 17[97-102] cf: 5(2)[1-9],]17[93-5]]
[232] 1(7)[1]
[233] 2(5[5])

more expensive than litigation if the matter becomes long-running and the parties are "wasting money on lawyers, going back and forth and getting nowhere".[234]

Avoiding further damage to party relationships and stress

The second reason for supporting settlement-focused practice, cited by five lawyers, was to avoid doing further damage to the party relationships.[235] These lawyers considered that settlement-focused practice gave the parties a better chance at maintaining an ongoing parenting relationship, by avoiding the "antagonism"[236] and "acrimony"[237] which can arise in litigation. A number of lawyers also considered settlement to be the more preferable option because it helped parties to avoid the inherent stress of the court process.[238]

> 2(1[14] "[O]nce you go to a hearing you can't take it back, the things that come out and the things that you'll get accused of and the feelings, your clients' essentially. You'll live on as a lawyer, you'll be fine, but I think your clients especially if you're interested in repeat work or client satisfaction. You can't guarantee a result and they'll have to live with this other person who they have children with or whatever the family dynamics are."

> 16[40] "And because we're dealing with families as well so there is such a focus on trying to get it resolved without a hearing because you know where you've got parents who have this antagonism towards each other, a hearing does nothing to fix that and it's likely to increase it because it is so adversarial, which I guess is the point of what you are doing. Absolutely different. The focus is different."

> 1(7)[1] "They're incredibly stressed. It's stressful, the process is stressful, it's confusing, it's slow, it's ugly, it's crushing emotionally and financially and it destroys any relationship, any good relationship that was going, you go through a hearing, there is none of that left. So those parents are still facing each other and all of this … is stuff I have said to parents, all of this is stuff that I have sat down and said, this is what you are facing in that room."

One lawyer highlighted how settling is one example where the parties' interests also align with the child's best interests:

> 12[82-85] "[Settling] is in the interests of the child of course but it is also in the interests of adult parties as well to, you get to a point sometimes where they've got two choices, they can try and put all this behind them and start a little bit afresh from a basic beginning and the first step to that is probably some counselling, or they can spend the next three or four years in acrimonious expensive, ultimately destructive litigation."

Avoiding delays

[234] 17[93-95], 5(2)[1-9]
[235] 1(7)[1],2(1)[14],12[85],13[38-40],16[40]
[236] 16[40]
[237] 12[82-85]
[238] 1(7)[1],3(13)[7-6]

The third reason, given by four lawyers, was to avoid the delays of the Family Court process.[239] These lawyers saw settlement as providing a way to resolve disputes more quickly than the time in which they might otherwise be resolved by working through the Family Court. As one lawyer put it: "I think there is a need to resolve things more quickly. And you're not going to resolve things quickly if you're working in the Family Court."[240] Another lawyer highlighted in particular the impact Family Court delay has on the children involved. The delay this lawyer referenced included both the inherent delay of the court process, and delay caused by parties who are unrealistic in their expectations:

> 12[50] "[Cases where clients are unrealistic] take longer to resolve and in fact the biggest problem I think in the Family Court at the moment, certainly where we practice, is delay and to see inability to resolve disputes in a child centred focus."

> 12[128]" I'm worried sometimes as lawyer for child in particular that the court struggles sometimes to make decisions in a timely way, that's for sure, that's a bug bear for me absolutely."

Litigotiation

As previously discussed, number of studies have found that lawyers sometimes use litigation not in order to get to a final hearing, but to assist in reaching settlement. Termed "litigotiation", the practice sees proceedings used as part of a lawyer's negotiation strategy: to bring the other side to the negotiation table, or to access court resources to assist with achieving a settlement. During our interviews, six lawyers described using the court in this way.[241] This included some of the lawyers who strongly supported settlement-focused practice, as well as a few who did not express strong support for settlement-focused practice. None of these lawyers saw the use of litigotiation methods as being litigious behaviour. Their focus was predominantly on issuing proceedings in order to access resources only available from the court. This was especially so in relation to the appointment of Lawyer for Child, and access to Lawyer for Child lead roundtable meetings, as well as psychologist, counselling and social work reports.[242] Another commented that sometimes an interlocutory hearing is required for a ruling on a single legal issue from which settlement will then flow: once the legal point is resolved the rest of the case can revert to mediation or negotiation.[243]

> 8[93-95] "[W]hen is court a good idea? […] in an urgent situation of course it's crucial. I think in the more longer standing COCA ones well look it does give you the opportunity of first having lawyer for child involved as well if you're acting for one of the parties because, and I think the parties themselves generally, if you explain what the lawyer for child role is, they will appreciate that it adds some value. Part of the mix of course, you can only get lawyer for child by going, it's got to be a court appointment, so once you get that, acting for parties and as lawyer for child, how many cases are you able to settle. […]I don't know if [filing an application] is a tactic to [get] resources because if you get to that stage there is a fundamental disagreement which you can't solve

[239] [1(7)[1], 12[85][128],13[38-40], 17[20]]
[240] 13[38-39]
[241] [2(1)[12] 6(2)[1], 8[93-95], 14[82] 16[104] 18[48-9]
[242] 8[93-95], 16[104], 18[48-9]
[243] 8[99-101]

> in another way. So if it can't resolve itself without that [but] you definitely get some resources and there's also things like psychologist reports, social work reports, all those kinds of things."

Whilst the majority of lawyers described using litigotiation as a means to access court resources to progress towards settlement, a few lawyers did discuss issuing proceedings to exert pressure on the other party to negotiate, [244] to "force the other person to engage".[245]

> 6(2)[1] "It's not my mission [to keep people out of court]. I actually use it sometimes to actually get them to you know [engage]. […] I say if you don't make a decision now we are going to court. You know I don't have a problem about that in fact you know I think it's a really good, it brings them to their senses sometimes. Because the problem for the Family Court is that you are dealing with highly charged emotional people who really need somebody to help them. That's why they go to a lawyer."

Qualifications on settling

Twelve lawyers cautioned quite strongly against putting too much weight on achieving out of court settlement.[246] Notably, this included a number of those lawyers who had expressed strong support for settlement-focused practice. Whilst most were still committed to settling cases they considered better settled, they were of the view that lawyers need to recognise cases for which settlement is inappropriate. Often, the lawyers expressed this as an immediate qualification so that any apparent emphasis on settlement was quite strongly undercut. Even a lawyer who had called hearings "almost failures" was strenuous in qualifying their support for settling.

> 3(7)[7] "You need to be realistic about [it] all, because there are other lawyers who manage their clients because they settle every single time and people know who they are and they're not serving their clients, they're getting all the money, normally they're legal aid, and then they're settling on the morning of the hearing and often as Lawyer for Child you'll watch that happening and you'll think why are you throwing the woman under a bus, she's got a really good case, why are you settling this? So it's not a case of settle at any cost and occasionally you'll have to say to someone I'm confident, you know what's best for your son, I think in court we can do better than this, I think we have to go to court on this one. So it's not a case of just settling, settling, settling but it's a case of having that judgement. I think that's an important part of being a good Family Court lawyer."

These lawyers emphasised the role of the lawyer as advocate, explaining that clients need and deserve strong representation and advocacy and felt that clients are sometimes let down by an overly conciliatory approach. They were of the view that there may be times when it is appropriate to push back against an opposing party or lawyer who was being too aggressive. One lawyer described this in a situation where opposing counsel had filed proceedings without first making a proposal to their client:

> 2(16)[8] I'm not going to be like, "let's please [settle]." They should have never filed to begin with, they should have written to us and made a proposal first. And we were talking, we were in the midst of correspondence. So [sometimes] you need to be adversarial."

[244] For example discussed in 6(2)[1] and 14[82].
[245] 14[82]
[246] 2,3,4,5,6,7,8,9,12,14,16,18,

There were several types of cases where these lawyers considered settling to be inappropriate or bad practice:

Safety, violence and control issues

The first was when safety, violence, or control issues were evident. Eleven of the lawyers cautioned that conciliation can be impossible or inappropriate in these circumstances because of the dynamics of any potential power imbalance and control issues at play.[247] In particular, a number of lawyers referenced family violence as being cases not to settle.[248]

> 4(3)[5]-(4)[1] "I don't think there's anything wrong with adversarial per se. [T]he issue … is: Is adversarial always right for all family issues? … I think [the] adversarial approach doesn't necessarily work in family law cases when those cases that they're dealing with are better of in terms of settlement [like relationship property cases]. It works well in cases like Oranga Tamariki or domestic violence or COCA where there are really serious contested allegations. You can't have a conciliation about sexual abuse or things like that. There are certain allegations that you do need to have the adversarial process and that's what it's best for. But the sort of stuff … where husband and wife are at each other's throats over relationship property … Adversary in those things, particularly by correspondence, I just don't think it's very helpful at all."

> 2(16)[4-8] "The [bad lawyers] I remember are the adversarial ones, are unnecessarily adversarial, unnecessarily very aggressive and no that's not helpful to a situation. But you can't always take it off the table. It depends on, if you've got a really unreasonable [opposing] side and you're really trying to protect … vulnerable people, if you've been instructed by people like that who can't stand up for themselves. […] But I think there should be maybe a practice note on [it]: You can't force people to do it a certain way, but that we should all use our best endeavours to settle. Isn't that somewhere already in there?"

Lawyers were alert to the child's welfare and best interests in their assessment of the appropriateness of a case for settlement, particularly with respect to cases involving family violence. One lawyer highlighted that whilst they were mindful of the principle that a child's care and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents,[249] safety issues, such as family violence or drug use, sometimes meant realisation of this principle was "never going to happen":

> 6(5)[7-11] [Asked about criticism that the way lawyers conduct cases escalates harm through "mud-slinging" destroying possibility of ongoing relationships] "But is it mud-slinging? You know sometimes people are just drawing attention to what's actually happening. I mean some people don't deserve their children as you know. And you do go to court and you do say a lot of these things and it just destroys any hope of any sort of relationship between the parents being mindful of section 5 where they are meant to console and cooperate. Well that's never going to happen. Especially when there's domestic violence anyway or meth or whatever."

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[247] 2(16)[4-8], 3(5)[5], 3(13)[6], 4(3)[5]-(4)[1], 6(5)[5],6(5)[7-11], 7(7)[8],7(7)[4-6], 8[63]; 9[330]; 12[86]; 14[67-68, 70-71], 16[106-108],18 [48]

[248] In contrast, several lawyers suggested that relationship property cases are more appropriate for settlement: 4(3)[5]-(4)[1] 4(4)[3] 6(5)[5] 14[67-68]

[249] See Care of Children Act, s 5(c).

One lawyer described how power imbalance can also arise in situations where a party is grieving, stressed or tired. This lawyer emphasised the role of lawyers in creating a "level playing field" in such situations:

> 8[63] "I think [conciliation] is a principle which you've got to look at how it applies in each particular situation. The philosophy I see behind it is that if you're dealing with people's lives they are most likely to be make the right decisions if they can together, not particularly because it's right on some sort of mathematical level, but because it's their lives and because they've made it they will make it the right decision. Obviously there's things you've got to be aware of in terms of power imbalance and that can play out in a number of ways not just a dominant personality over a less dominant one but one that's stressed, one that's grieving, one that's tired. I think our duty is, there's got to be an evenness because if there's not a level playing field as much as possible is it really the kind of dynamic that should be there. That's the thing you need to assess as their lawyers, is that possible. And yes it is ideal and does that mean you can't do it, no it just means maybe you can't do it today or you can't do it until a few things have happened or again, every bloody situation is different."

A few times young lawyers in particular were criticised for giving in too easily, with a particular risk in family violence cases being that harm done to a party or to the child is not addressed by the Court and goes unacknowledged

> 7(6)[6] "[T]here are very, very, very few practitioners in family who will be saying to their clients, …. we are going to get him. Actually sometimes I see, particularly young lawyers, or lawyers with a certain type of disposition, that they are actually far too [ready] … to lie down and die. In domestic violence proceedings: "Oh, let's settle." Well, actually, there are times where it is important that people's story is heard and validated: That there are proper legal protections in place for people. As Lawyer for Child there are some times where I've said no, no I am not happy with that. Not because I want to have a hearing or a drama but because for those reasons. It's actually important that there is an acknowledgement at least from the court that these bad things have happened to this woman. To these children. If they come to harm again this is the place we come back to. And there [need to be] … findings from the court. … [T]here is a huge tendency for lawyers to minimise and to get people through when sometimes you actually have to go "I think a judge needs to make a call on this. I think we need to hear some evidence." We don't have to do that badly or nastily but we actually do need findings on this. We can't just gloss it over and just flick people through. I have had cases particularly with addictions …where I know that other practitioners would go "Oh he's alright," but the evidence is really clear that this person is still drinking. You think well there is that "disposal versus sometimes doing the right thing," whatever that might be."

Sacrificing client interests

The second type of situation lawyers identified as being inappropriate for settlement was where conciliation would risk sacrificing the client's interests. Here, lawyers cautioned against the mindset of settling quickly or rushing to a consent position where parties are required to "concede too much" or "give up too much".[250] That is, where reaching resolution is prioritised over, and at the expense of, client interests. This was often referenced in relation to safety concerns for either a party or the children.

[250] 18[81]

> 7(7)[8] "Sometimes yeah you have to [go to court]. And that's not adversarial. In some ways it's about defining what adversarial is. I think we lose sight because we deal in volume and we deal with high levels of dysfunction, we deal with complexity […] it's about holding a line as advocates. Whether it's for parties or for children. But fundamentally it's about children. I don't say this is as soppy Mother Teresa kind of way. I say it like actually we have to do the right thing for kids and sometimes that means being brave. There is that temptation to settle. I think that is much more. I think that is the bulk of the mindset of the bar is to get things settled for people. To get them through as quickly as we can. And if any criticism I would make is that we are sometimes — battle shy is not the right word in the context of talking about adversarial practice but sometimes we are quick to settle, run the other direction. […] And sometimes it's not the right thing to do."

> 16[106-108] "Yeah if something can be done without the use of the court I'm absolutely for it. [But there are exceptions] [W]e've got a backup fixture on a particular file and the parties are actually looking at a consent position. I said "I'll hold my breath until I get updated disclosure." I got some of it today which says well mum actually is in a potentially still in a violent relationship […] But that family harm incident also recorded the Police saying that she had obvious signs of meth use which has been an allegation which has been out there for a while. She has produced negative tests and so you know I've just dictated an email that says to the people "well look reach consent if you like but I won't endorse it. We are still going to need a safety hearing." That happens quite a bit. Or I've said to the parties "you know do an affidavit that sets it out so that we can avoid the hearing and then it's up to the Judge whether we go forward." … So safety hearings for that. That's in a context where you see you've got stuff out there that's known to be risk factors."

A Lawyer for Child described the concern they felt with "quickness to settle" and a "getting the file closed" approach in cases where safety concerns are present. This lawyer saw such an approach as potentially jeopardising the child's safety and welfare:

> 7(7)[2-6] "We have to be careful with children and sometimes and this is my new sort of … little mantra … in the context of … some huge legislative changes where people are running scared: We have to be brave for children. Sometimes we have to do things, ask questions, go through processes that are uncomfortable for us. That means we have to prepare for a hearing. And not just rock up and sign a consent memorandum."

Selling the client short

Thirdly, and closely related to the second type of case, three lawyers also cautioned against settling where it would "sell the client short" or get that client a worse outcome than one they would be entitled to in a courtroom.[251] These lawyers emphasised the importance of a good working knowledge of the law and legal process in pursuing outcomes and accessing resources for the client.[252] They also emphasised the importance of exercising good judgement[253] when it comes to advising the client on whether settlement or a hearing will produce a better outcome for the client and their child.

> 18[26-27] "Often as Lawyer for Child I find parents who're frustrated by the process but I'm sitting there thinking why hasn't this counsel escalated this and applied for this to fast track what this client

[251] 3(7)[7] 9[48] 9[50-66] 18[26-27] 18[79-81]
[252] 18[26-27]
[253] For example discussed in 3(7)[7].

> is trying to achieve? [27] So, I just go ahead and do it. I think it's really important that lawyers know the law, system and rules. So that you can deal with an urgent matter, urgently. You can get information before the court by applying by discovering other things. I think it's also important to be creative with their thinking. And that the approach to a legal problem is more than just problem solving and analysing."

Cost effectiveness

Fourthly, lawyers considered that conciliation should not be pursued past the point that it is cost effective as a process. Notably this aligns with the more settlement-focused lawyers, who, whilst considering settlement to often be a more cost-effective process then litigation, noted the limitations to this cost effectiveness where negotiation becomes long running.

> 5(2)[1-9] "I have a three letter rule. I see a lot of family lawyers who just write letters on and on and on that cause quite a lot of cost and don't actually ever get into court. There is only one way to resolve a non-agreement and that is the court process or a mediation process. Not a no-process which is the letter writing process. […] I'm not saying that it's a strict rule but that kind of my general approach. [P]eople, especially when they're paying my large fees, they've come to a specialist, and they need to have value for money and on my hourly rate that is a resolution of issues as quickly as I can humanly get them. […] I am not saying always court but there has to be some cut off point when correspondence no longer works."

Unresolvable cases

Lastly, a few lawyers also identified some cases as unresolvable, "Gordian Knot" type cases, where the only solution was to get a judge's decision. These lawyers believed that this was the main reason cases go to a final hearing.

> 6(5)[5] "I don't actually think [the Family Court] is [too adversarial]. A lot of people are saying "oh well, you should be trying to settle more" and I understand that. But sometimes I really do try my hardest to do that but sometimes [it isn't possible]. […] [W]hat you've got sometimes is acute, critical people. I mean, I find that with relationship property stuff, we do try to keep that out of the court but you know we need to go to court sometimes. […] Yeah we do [divert the ones that can be resolved]. I think we already do that."

This lawyer questioned whether litigation is always negative in such cases, where parents simply need a quick and durable decision. It was highlighted that a quick decision also prevented children being caught up in adult issues for lengthy periods, enabling children to "get on with their being a child":

> 6(6)[6] "[Taking a case to court isn't necessarily bad for kids] The parents can't decide. When the judge decides, the parents walk away and they know what's happening and that's good for the kids. I get a lot of children [who] actually don't want to know about what's going on in the adults lives. [T]hey just want a decision to be made and get on with their being a child."

This chimes with the reasoning one lawyer gave in expressing interest in arbitration as an alternative to the Family Court: the ability to give "people who can't stop being locked in

conflict, to give them a finish line".[254] Both of these responses highlight the value in a third party making a decision, ideally in a timely way, where the parties themselves cannot, with lawyers being aware of the impact delay and "limbo" has on the welfare of the children involved. Persistent bad behaviour, as opposed to dangerous behaviour, could also require court intervention rather than mediation.

> 18[45-47] "For example, where there is a parent failing to make the child available for contact; and that's occurred several times, at least 5 times. A clear breach of a parenting order that allows father to have contact. Counsel for the father should be filing for enforcement should be filing for breach. If they're not in a position to apply for day to day care, should be applying to put that child under the wardship of the court. There are a lot of options available to that counsel and the father and more importantly for the child. But often those applications are not made, and that I find wholly annoying as Lawyer for Child and you then make that application on behalf of your client because your client should see their father, but it shouldn't have to wait 5 or 6 weeks or 5 specific incidences of this occurring.

One lawyer mentioned a further concern that while possible to achieve, mediated settlements between highly conflicted people do not always "stand the test of time".[255]

Objectivity and reality checking

Across the interviews a number of lawyers discussed "reality checking" and managing clients into positions the lawyer saw as being more child-focused, realistic, and "sensible". A variety of strategies, and sometimes very strong pressure, were used to move clients towards these positions. Disputes where a lawyer was non-objective, merely "parroting" back client instructions without reality checking unrealistic expectations, were identified by lawyers as those which could become prolonged and unnecessarily aggressive.

The child's welfare and best interests formed a key component of lawyer's reality checking: in educating clients about sensible parenting arrangements for children; in attempting to curtail parent's behaviour or outcomes sought where they were not "thinking about the children"; and when employing the law and the legal standard of the child's best interests to leverage clients towards a more realistic position.

Objectivity in Family Court lawyering

'Good' objective lawyers

A number of lawyers discussed the importance of maintaining an objective overview of client expectations and objectives.[256] The emphasis on objectivity arose out of a strong sense that clients are oftentimes unwise about their own interests, or could misjudge those interests, as a result of the emotionally fraught position clients are often in, a lack of knowledge about the

[254] 17[20]
[255] 16[104]
[256] [2,3,4,8,9,12,14,15,16]

Family Court process, or a lack of parenting knowledge about what is and is not in a child's best interests. Lawyers considered that they must be conscious of this, and be able to understand where client's actual needs lie.

The emphasis on the ability to remain objective often went hand in hand with the ability to empathise. Lawyers were of the view that empathy enabled a lawyer to differentiate between the core issues requiring resolution and any extraneous emotion at play for the client. Distinguishing between the two helped lawyers to better manage their clients, and was seen as helping to avoid unnecessarily protracted and adversarial disputes.

> 16[44] "[O]ne of [the important characteristics] is the ability to not get personally involved. … [P]eople like that [who become over-involved] … makes it very difficult [because they] … believe everything their client tells them. They don't appreciate that although [the client is not] lying to you they have this perception of things which is not reflective of the actual situation. It makes it very difficult to try and reach a reasonable resolution because they're so caught up with their client's views and repeating their client's views, they can't give their client good advice." […][50] "I think [objectivity]'s the most important."

> 13[16-24] "I also think family lawyer's need to have higher degrees of empathy and people management. Because they're dealing with raw emotion […] From clients. […] You have to be able to steer them towards the issues that need to be resolved and try and separate them from their intense personal feelings about the other person. […] It leaves you in a position where you have to carefully strategise how you talk to and deal with your client."

Non-objective lawyers

Several respondents stated that lawyers who did not remain objective and who became overly involved or took client claims at face value were likely to do a poorer job for the client in the long run.[257] A couple added that overly involved lawyers could become excessively aggressive in defence of the client, impeding resolution.[258] In particular, a reluctance to exercise independent judgment and to tell clients "no" was identified as contributing to prolonged and overly confrontational hearings.[259] In a few instances the impact of non-objective lawyering on children was referenced,[260] as was the impact on parties on-going relationships,[261] and more broadly, with 'what the Family Court is all about'[262].

> 14[38] "The [opposing lawyer] … would not acknowledge her client's behavior — she'd sent 23,000 messages in three months. … If I was her lawyer I'd have said "Your behaviour's not appropriate. Think of your kids, think of your ongoing relationship. Just stop it." … But that wasn't her approach. Her approach was "My client's right" I mean last night [her client] sent my client 51 text messages."

> 16[50] "I think [objectivity]'s the most important [characteristic]. [W]here I have the most difficulty with other counsel is where they're just parroting their client's line but believing it, like actually

[257] [2,3,15,16]
[258] [2,16]
[259] [3,13,18]
[260] 14[38]
[261] 14[38]
[262] 18[38]

> taking it on board you know there's always those scenarios where the lawyer says, look I have no choice, I have to tell you this. In fact I had a conversation like that today. Than the ones that will argue with you black and blue because they believe what their client's telling them."
>
> 18[38] Another branch of that [bad lawyer] tree is the Family lawyer who doesn't take the time to filter their client's instructions. They just report the instructions without any attempt (as it appears, from the correspondence) at trying to counsel their client to a position that's close to the logistics. Kind of close to the law would be helpful. [39] That is really harmful to the client because they have unrealistic expectations, those expectations are then entrenched when a lawyer goes ahead and prosecutes that position. That's really dangerous. Counter-productive to what the Family Court's all about."

A number also highlighted that a lack of objectivity could have negative consequences for the lawyer; becoming emotionally involved or being overly trusting of the client could lead to being personally let down or embarrassed by the client, and to being unduly stressed.[263] This could negatively impact lawyers' mental health,[264] discussed in more detail under 'mental health and stress', as well as do a disservice to clients.[265] One lawyer described the inability to keep the client's problems separate as 'a sure road to disaster'.[266]

> 16[44] "[O]ne of [the important characteristics] is the ability to not get personally involved. … the ability to be detached and that's not just for your client, it's for your own mental health as well."
>
> 2(6)[1] "I'm very reluctant to file applications [where clients are on-again-off-again] because it just blows up. To be honest as an inexperienced lawyer that did blow up in my face a couple of times because you fight for them, you get sucked in, you care about your client. I will do this for you, I will file applications."
>
> 15[84-86] "I think the bad lawyer is the one that's … become too emotionally involved in their clients and they take it personally. Always we must remember that we're advocates only. I think becoming too emotionally involved you're doing a disservice to self and may potentially cause you health risks and also do a disservice to your client. […] [By] I think possibly, losing a sense of objectivity, we're an advocate only and we must continue to remind ourselves of that."[129-34] "[W]here potentially some practitioners can become unstuck […] they get all emotionally involved. [In reality there is] "He said; she said" and then there's the truth. […] and that is bad lawyering. I think we all need to educate ourselves."

This view contrasted with that lawyers took elsewhere on client autonomy and the point at which they were prepared to accept client instructions without further interference. Only one lawyer[267] put the obligation to respect client wishes at the forefront of the discussion as opposed to as a qualifier to an earlier discussion of the need to reality check.[268] The more common pattern was to qualify the need to reality test with the ultimate obligation to follow instructions:

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[263] [2,3,12,15,16]
[264] 16[44]
[265] 15[84-86], 16[44]
[266] 12[40]
[267] [9]
[268] 9[76]: "[A]ctually the biggest thing is to take your personal values and stick them in your back pocket and remember that you're acting for them, it's their family, their children, their vibe as you call it, their idea of what's parenting."

12[48-50] "[A] good lawyer will reality check clients' positions and provide feedback to them as to the reality of that and so on. … Now, to come back a little bit, at the end of the day you're an advocate and you can reality test your clients all you like and try and manoeuvre them to a more realistic and a more achievable and more child focused position but at the end of the day some of them aren't very receptive to that and their instructions are their instructions. But certainly, I think that is a big part of effective family law practice is managing clients' expectations towards something that is achievable."

17[58-61] "I think there's the discussions that go on in the consultations with the client advising them on what the court is probably most likely to do. And [you] suggest what they should be seeking and what's more realistic. […]But if I act for the father, I feel I have an obligation to say "That parenting order you want… I don't think that's best for your children." But ultimately, it's down to the client, as long as they're not asking for something completely stupid. I've got one client who I think, "Ooh I wouldn't do that if I was a parent but it's not dangerous or illegal and if it's the Family Court that he wants, he's paying me to try and get it. […] I'll try and persuade the judge that that's the outcome he should order, but inside I'll be thinking I don't think he'll get that.""

Managing clients

A number of lawyers stressed the importance of managing clients into what the lawyer considered realistic and appropriate behaviour.[269] This meant reality checking and disabusing clients of any unrealistic views or expectations: "reining the client in".[270] It also included confronting counterproductive thoughts or behaviours, with a number of lawyers stressing the harm done when clients cannot be talked out of a counter-productive course of action. The harm often envisaged here was to the child's welfare and interests, and to the parties ongoing relationships.

4(6)[7]-(7)[5] "The child does come first and what you're trying to do as [lawyer for] a parent …is to try and frame the case around that … in such a way where in some ways you're sort of talking your client around to common sense, what's in the child's best interests.

17[97-102] "Good lawyers [are what makes a case settle]. [A] Lawyer for Child that does a good job but doesn't polarise the parties; A strong lawyer that manages their client to making what is a sensible offer, and then parties willing to see that its expensive going to court and they'd be better off taking this."

8[105-107] "[Faced with a client wanting to relocate] I would probably explain the legal situation which is well you are both guardians and you've got to look back on …where the kids are living, what was the last one that both of you agreed upon. And she will say, hopefully, we lived in [town], and I will say "well, the law requires [this], and the thing is if it's the hard truth but it's the truth. You may not like it but that's what the law says and that's the starting point is going to be and that's what any, if you can't agree, and obviously you can't because otherwise you wouldn't be here, if we go in front of a judge this is what the starting point will be. Yes we can try and say that [your mental health will suffer] But we've got to focus back to this child and on the other side you need to, the devil's advocate, reality test their expectations. "I know you want this but that's not how it's going

[269] [1,2,3,4,5,6,7,8,9,12,13,14,16,17]
[270] 14[45]: "He did a good job. He was pragmatic and said he's reined his client in. It wasn't too bad actually. I'm quite happy with that."

> to be decided. It's going to be decided on this basis — 1, 2, 3, 4 5. Now let's go through each of those points" and generally most people [will accept your advice]"

One lawyer believed that because clients are at times unready to make the necessary decisions, lawyers have to take large degree of control or autonomy in the case:

> (5(1)[14-18]) "[Y]ou have got to be aware of the grief cycle on a divorce and work with that. I think you have got to be very clear about how some people are at different stages of their separation and understand that. But I think one of the downfalls in family law is too much delay. [A]nd so you can't leave the process to the client. You have to run the process as you see fit."

Another stressed the importance of going through the client's concerns in depth to ensure the client felt heard, chiming with the importance lawyers placed on empathy in family law practice.[271] One referred to using their personal stories to make an impact on clients.[272] This lawyer shared that:

> 3(12)[5-7] "… with some of them you'll say 'Look, I've been through a separation myself and I found this really difficult and I found this helped and da da da da, don't write letters at 1 in the morning, don't just get on the phone call her, don't get on the phone, go for a walk'."

It was clear across the responses that the reality-checking aspect of the work was extensive and took considerable time.

Giving "robust" advice

Lawyers described using "robust" advice to reality check clients. A "good" Family Court lawyer was described as a "strong lawyer that manages their client to making what is a sensible offer",[273] one who is "pragmatic and … reined his client in".[274] Lawyers who failed to influence unrealistic clients were identified as characteristic of cases that could get overly confrontational. Some of the language used in the advice given is very robust and powerfully phrased.

> 3(6)[7] "I think it's a bit of a myth that lawyers are the aggressive ones, actually the ones that are confrontational is where the lawyer isn't strong enough to say to the client, "stop it, we're not going to call your wife a bitch, we're not going to call her sister to cross examine about that party, no we're not going to do that because that's just dumb." And for me, the files in my life that got over confrontational and got too long, it was when I was younger and I didn't really have the experience or the bravery to say I'm just not going to do that. So I think that is a part of the role of a good COCA lawyer. It's also to be sensible."

> 3(11)[15]"[W]e do change our clients. It's also part of what a good COCA lawyer is. I think you change your clients."

[271] 8[105-7] and 8[115]
[272] 3(12)[5-7]
[273] 17[97-102]
[274] 14[45]

> 7(8)… "and in fact I use terms like "your kids going to end up a basket case if this keeps going." I am pretty robust with people. Because I know that the harm that that kind of behaviour causes for children: It's kind of life-long harm often."

> 6(8)[3] "I tell them that you know they've probably got no show. I've got people who have had you know sexual abuse allegations saying that there is no substance to all of that and I want my child 50/50. I just say look you know you have got no show and I take some steps to make sure that they understand that. […] I do try to sort of put my advice in writing and you know so that they can't come back. But I mean I am going to say "look you've got no show of getting what you want. You will get something and therefore its worth doing it but it just may be not want you want." And as I often say to people there are circumstances where you just don't get what you want in life."

One experienced Lawyer for Child, who had experience in a therapeutic context, expressed no concern as to whether their "robust" approach might intimidate some clients.

> 7(12)[1- "Now my style, I am notorious for being very robust with people. I am very blunt. Some people love that. People who don't, go. I can count on one hand the number of people who have gone because most people I have delivered very difficult messages to people over the years. I have told mothers "you are not going to get your children back. That is not going to happen." I have sat in FGCs and said that and I have said I will not allow that to ever happen. I have written in reports, "there are no circumstances in which I could ever consent to these children returning to parental care." Now those are hard, hard, hard statements but often you see abject relief in people… I will try and do it kindly. I will try and do it with compassion. I will try and do it with understanding but I will deliver things clearly. Because I think people deserve that. I will say to people "look, you know, in my experience and with my knowledge that's all I can offer you: My experience, my knowledge. This isn't going to work for you. But look if you're hell bent then the judge will have to decide." I just say "the judge will have to decide.""

At times lawyers described coupling their advice with an ultimatum that they would not accept contrary instructions.[275]

> 7(10)[10]-(11)[3] "[I will work with LA clients] - usually women because they're the ones that want the kids back the most - who are involved with CYFs, who have addiction issues … on the basis of "[L]ook, if you want to do this thing I can help you and I can pretty much help you get your kids back. […] If you don't want to do that, I can refer you to a junior lawyer.""

A few described taking a less directive approach, respecting the clients' wishes. [276] On this approach lawyers highlighted that they act as advocates for the client, and it was not their role to impose their own personal views on a client. One lawyer highlighted that:

> 9[76] "… the biggest thing is to take your personal values and stick them in your back pocket and remember that you're acting for them, it's their family, their children, their vibe as you call it, their idea of what's parenting."

[275] 3(6)[6]; 7(10[10]-(11)[3]
[276] [8,9,17]

Another described a robust approach that was nonetheless balanced by a commitment to ensure all the client's issues had been recognised, that the client felt heard, and felt like they and the lawyer had come to a plan of action together.

> 8[105-107] "[Y]you need to [be] the devil's advocate, reality test their expectations. "I know you want this but that's not how it's going to be decided. It's going to be decided on this basis — 1, 2, 3, 4 5. Now let's go through each of those points" and generally most people [will accept your advice], and I think a big part of this too is how you are as well, they want to think that they've come to someone who is knowledgeable in an area they're not, but also that has taken into account everything that's relevant including things that might not relevant to them but are relevant to the court so they'll be heard. So using a doctor analogy, if you go to the doctor and say I'm feeling all these things and they say well here's your prescription, well it might well fix what you do but did you actually hear, did you talk about what's happening for me. So they need to believe that you have really listened to what they've got to say, that you've taken weight to it and then you've applied your knowledge to their situation and together, ideally, you've come up with options and with each of those options what's required."

"Hard conversations" with clients not for the faint of heart

Several lawyers described the "courage"[277] or "bravery"[278] required to have "that hard conversation with your client".[279] Sometimes this courage was identified as accruing with age.[280] This chimes with other accounts that suggest younger and less experienced lawyers are more likely to take instructions without question.

> 13[44-46] "I think the hardest thing to do is to manage your client's expectations. And it's also really hard to bluntly say; well, I don't think that's a runner. I think this is what you should be looking at. Rather than saying; Yeah, let's go for it. I think THAT takes more courage than just doing what your client wants. […]An example of that: I have so many files I can't fit them in my cupboards, everything an issue and the other side in DV proceedings filing 120 page affidavits."

Generally, the advice envisaged was negative and discouraged clients from proceeding with their chosen course of action. Only one lawyer said that clients might "occasionally" require advice not to settle.

> 3(7[7]) "[I]t's not a case of "settle at any cost" and occasionally you'll have to say to someone: 'I'm confident you know what's best for your son, I think in court we can do better than this, I think we have to go to court on this one.' So it's not a case of just settling, settling, settling but it's a case of having that judgement. I think that's an important part of being a good Family Court lawyer."

'Manoeuvring' clients

Instead of giving strongly worded advice, other lawyers relied on influencing and manoeuvring clients around to more child focused and realistic positions. One explained that "in some ways

[277] [13]
[278] [3]
[279] 16[48]
[280] 3(6)[6]

you're sort of talking your client around to common sense, what's in the child's best interests".[281] Another considered that good Family Court lawyers "try and manoeuvre [clients] to a more realistic and a more achievable and more child focused position … managing clients' expectations towards something that is achievable".[282] A few lawyers described other strategies, including understating the client's position in the lawyer's advice to the client[283] and telling a "porky":[284]

> 4(5)[5] "I think it's a big part of the job in the sense that you do have to manage their expectations and it's much better… to really understate the success of their case and I tend to often say "look, you have to look at it from the judge's point of view because he or she is going to decide the case if you can't agree." And I often use words like "if I was the judge this is how I would deal with your case" and then put that in writing really … that's a big part of it."

> 6(9)[12-14] "[If the client refused to disclose a drug habit] well, I would tell a porky: "That would put you in a really difficult position. But the thing is its going to be known. You know eventually it's going to come out." I don't want to be accused of favouring them or harbouring them or doing anything. Because they would say "well, I told my lawyer." I can't tell anybody because of solicitor/client privilege but I would say to that person "you must do it in an affidavit" because it's their information but I don't want to act for that person if they are not prepared to disclose it. [..] [If they still won't disclose] I couldn't carry on. My career is too important to me to put my reputation on the line."

Notably, the process of reality checking continued even when the lawyer had committed to defending the client's unpalatable position in court or in mediation and settlement discussions.[285] In this, lawyers are simultaneously negotiating with clients, towards what they see as a more child focused or 'sensible' position, at the same time as they are advocating for them.

> 1(2[2-3]) "But [even as you're spinning "appalling behaviour" to the court] you've always got to say to your client, that doesn't mean you don't say to your client, look the judge is going to take a really dim view of this, you're going to get a real kicking for this and you need to, you know, we've got to think about how we explain this to a judge, how we convince a judge that actually that's now in the past. . . . What are you going to have to do to ensure that that behaviour doesn't ever reoccur?"

Issues discussed when reality checking

The robust advice lawyers were giving to clients when reality checking was partly about the law, but often about what the lawyers believed to be in the best interests of the client or, more usually, the children. At times, the law or the lawyer's knowledge of what the court was likely to do was pressed into service to persuade clients to comply with the lawyer's advice on non-legal issues, including what they deemed to be the child's welfare.

Legal realities

[281] 4(6)[7]-(7)[5]
[282] 12[48-50]
[283] 4(5)[5]
[284] 6(9)[12-14]
[285] [1,2,3]

Reality checking was often about educating the client on the legally achievable outcomes,[286] six lawyers[287] relied on leveraging the law to manage client expectations and convince clients on preferred and realistic options. The child's welfare and best interests were central to this exercise, in that they provided the legal standard and parameters around which lawyers educated clients, and managed clients' expectations and objectives. The child's best interests were thus relevant indirectly as a part of the legal standard which the client navigates. Lawyers advised clients on how a judge might view their behaviour or outcome sought, particularly where unrealistic parenting arrangement outcomes were sought. In some cases, the law was invoked to persuade a client to the "correct" moral position.[288]

> 13[54] "You tell Derek [who wants an unrealistic custodial outcome] in your experience and given your understanding of family history given my knowledge about Family Court judges and the way they work; it's extremely unlikely that you will succeed in that objective. […] I think I'm more [advising] from [a] "what a likely outcome in court is" [position than from a child welfare argument]. […] I would just deal with that in practical terms that's given the age of the child it's not something that's likely to work unless you have special skills."

> 6(7)[12] "I always say to them the law is clear that you've got to consider the best interests of the child even when I'm acting for a party so that actually helps me to get them to focus on where the courts coming from and its notwithstanding what you want. The court is going to be saying this. So I refer to that all the time. […] [B]oth [because it is the legal standard and because it is right], I suppose. Yeah I do mention it because it's the law and as I have said before I am a lawyer. Not a social worker. I am not here to counsel you. And that is what I say to people."

Children's realities

Some linked the "reality checking" not to an assessment of the client's legal chances but to what is best for the child.[289] Here, the child's welfare and best interests were oftentimes directly relevant in and of themselves. The focus was on what was best for the child out of a "human response",[290] a concern for how the child might be affected by what the client was seeking.

> 18[115-17] "… there's often a lot of time required to explain what safety means. I spend a lot of time talking to them about children's best interests because of the nature of those files. [116] [Question: You do a lot of reality checking, managing and parental education?] [117] Yeah. Yeah absolutely. That's why my heart went to, we can prevent a lot of if you just have a good sounding board and get the right people around you."

> 12[48-50] "Now where it gets tricky of course is what your client may consider to be in the child's best interests and which on a basic level might be to have no contact whatsoever with their father and what you consider a) to be much more likely to advance the child's interests, but b) also what's achievable in terms of the structure in the court and where you're likely to end up. Now a good lawyer will reality check clients' positions and provide feedback to them as to the reality of that and

[286] [1,4,6,8,13,14,17,18]
[287] [1,4,6,8,13,14]
[288] [1,6,13].
[289] [1,6,12,13,14,15,16,17,18]
[290] 7(9)[9]

> so on. A less child attentive lawyer if you like is much more likely just to get on board with whatever it is that their client is saying."

Sometimes the lawyers' focus was giving clients hard advice as to what they need to do to achieve their aims. Quite a few described giving advice on what parenting arrangements are appropriate based on the child's developmental age.[291] As one lawyer described:

> 17[62] "We talk about the child, we talk about the history, we talk about the parenting arrangements now. A good chunk, I'll talk about what the psychologists say in the Family Court, what sort of parenting arrangement is appropriate for children of that age."

A few described the need to educate clients about children's welfare and best interests in cases of serious long-term parenting issues, where the child's best interests were "foreign" to a parent. Others described giving advice about quite serious psychological issues for the children.

> 4(6[3])"just from a common sense humanistic perspective, you know, a lot of people who are in the Family Court just haven't had good enough parenting themselves…. So [thinking in terms of the child's best interests] it might be completely foreign to them. And often that comes out when you speak to them and you get a bit more background and in the psychological reports ….[S]o I personally do my best to try talk them around to it but there's only so far I could do it."

> 14[96] [What general advice given about CBI?] "Security and that can mean… Like with this relocation case I've got where my client really wants to relocate but it'll never happen because they're settled and it means taking time away from dad and just all the wrong things. One of the children is having massive anxiety issues, in the psychologist's report that we just got back says that it will be a lot better for her once this is all resolved because she doesn't know where she's going to be living. What town. I think it's not only that, it's the pulls to both parents. I think that the children don't want to be divided, and then they'll say what they want. They say what they think that parent wants to hear and then they say the same thing to the other one and then that gets thrown back at the other party. "My child wants this.." And you don't really know what the child wants. If it's a good l4c who's spending time with the children, there's some great ones. That's great. If it's one that's over committed or spends 10 minutes with them or doesn't even meet them, then not so good."

Adult personal issues

For some, reality checking was about separating the personal animosity and hurt the client felt from the issues requiring resolution. Lawyers described helping clients to recognise that their own emotional responses are a part of the relationship breakdown process, and to disentangle these in their decision making.

> 1(6)[5] "[Bad Family Court lawyers are those who are] not child focused, showing no understanding for the grief that their clients are going through, having no [motivation] to assisting their clients in the right direction to understand their own emotions with the breakup."

> 14[19] "… that's really different in family to anything else because in Debt recovery or something like that, what they want is generally what they're going to get or need or what they're entitled to going forward. Whereas in Family a party may think that they want to destroy the other person when

[291] For example discussed in 2(7)[4,8]; 17[62]; 9[154-62].

> they don't really want to do that, they just want their feelings acknowledged. Or they need to work through the grief at the loss of the relationship, there's just other things going on there."

Range of work performed by lawyers

Non-legal advice and work

When discussing reality checking and client management with interview participants, it was clear that lawyers work often included advising clients on non-legal issues in the course of their legal advice.[292] In many cases the issues involved serious and intense emotional problems,[293] and the advice described often related both to what was appropriate social behavior and what was "sensible", as well as what was legally appropriate for that client. Many of the lawyers were conscious that their role often extends beyond the purely legal, as one lawyer stated: "dare I say it, we're glorified social workers".[294]

> 3(13)[8-10] "I suppose you're writing nasty affidavits on each other but again you manage your clients, don't you? They come around and they want to talk about their sex life and stuff like that and I'm just not doing that, I'm not writing that. I'm not putting this text out there […] [Because it makes] you look like a dick. And in some ways … the court process in some ways is actually helping them because they're hearing what a stranger thinks about them. And so you can say that's a stupid letter and I know your mother says that your ex-wife's a bitch: … your mother's wrong, she's too close etc."

A few lawyers described having blunt conversations about drug or alcohol addictions, steering the client into treatment.[295] A large number of lawyers explained making it a practice to refer clients for outside therapeutic help.[296] Several lawyers[297] described a regular part of their practice as providing a comprehensive assessment and advice service for their clients, from their therapeutic to their social support structures and health issues, with the necessary referrals then made, to assist them to make better legal decisions.

> 8[55] "I think one of the things that's very important is that we know our limitations, we're not psychologists, we're not counsellors, we're not best friends […] there's a limit to what we can do. I think it's helpful to be able to say to people, to have good networks of counsellors, psychologists, to make sure if they're having trouble sleeping, which is very common, have you been to see the GP. I need you to be in a good position to help, because you need to make the decisions, I'm not making the decisions you are. I advise you make decisions. We need to put you in the best spot to make the best decisions and one of those will be that you're sleeping. If you're anxious I can't help you with those but you need to talk about that."

> 9[84] "[A]nd you've got to see what it is. Like at the moment I've got a woman who is got a drinking problem. …[My secretary] said she turned up, she'd leaned across the door here and she said "oh

[292] [2,5,7,8,9,18]
[293] The types of issues are discussed in more detail in the "emotions and difficult clients" theme.
[294] 15[62]
[295] For example discussed in 9[84] and 7(10)[10].
[296] [5,6,7,8,12,14,16,17,18]
[297] [7,8,9,18]

> my god I could smell the alcohol on her breath." It was like 1.30 and that's awful and that [means] steering that person to CADS and saying "you can't hide from this, people are on to this."

Others addressed serious safety situations in which they undertook either non-legal work, or gave non-legal advice, to help the client:

> 2(6)[13-15] "I was so worried for my client's children's safety, when we found out I spent that day maybe two or three hours just trying to see what options were available to us that I can go back to my client. Now this isn't legal work. Anyone could've done this. He could've given it to his PA at work to say, but I spent about 2 or 3 hours, this is billable though, but still, I said we need to find an answer to how we can stop this, this is very serious, and he agreed, he said I'm very worried that my kids are going to hurt themselves, or this particular kid and I'm not Lawyer for Child so I got on the phone with Lawyer for Child, I say this is what's going on, this is what's happened, this is how serious, he's very worried, we need to do something. And we took steps. We got in touch with the right support people, contacted CYFS, contacted whoever, everyone. […] There were no social workers involved, CYFS wasn't involved, the only person we had was Lawyer for Child. She wasn't interested in doing anything further. I was, so I did it for my client."

> 5(7)[8-10]" I gave her a big pep talk about that, the dangers of that, the problems about it and trying to get her some counselling about it. […] [A major aspect of the role is] I try and get them help and try and talk to them about the dangers of it and what it means and how they can find some help or books to read."

Some advice related more to the less fraught practicalities of coping with a Family Court dispute. One lawyer termed this the "Dutch Uncle" approach:

> 9[154-62] "I said "you know what I mean by a Dutch uncle?" he says "yeah," I said "great I'm going to be one. You need to look after your current relationship," …. How's she feeling? Insecure? We'll need to know when it ends." Because that's something you pick up over time and it's not a gender thing, not always women, not always men but they will actively make life as hard as possible and cause trouble. I said "you look after what you've got going on now, because this must be putting huge stress on that." … And so I find that really useful. I'm working for a guy at the moment who's really lovely guy….he's left his wife after many many years, ….and he absolutely wanted all the peripheral stuff: "how does this all work, what do I look out for?" Not without specifically inviting it in a way, but you could just see that he needed, it was like "oh, yep yep that's really helpful" and the feedback, you get an email back 'that was such a helpful meeting, thank you so much'. So I see that as part of the package and the advantage of seeing an older, more expensive lawyer really. If you just [stick to the] legislation there's just all the stuff on each side of it that's just not covered."

Maintaining boundaries between the legal role and non-legal role

There was however a level of discomfort with the pseudo-social worker trope. One lawyer explained: "I'm never entirely comfortable with this, but you have a quasi-therapeutic role: You've got to settle your client down."[298] Others evidenced a stronger concern to maintain the boundary between lawyering, and a therapeutic or social work role and the provision of non-legal advice.[299]

[298] 13[44]
[299] [6,7,8]

> 6(7)[12] "I am a lawyer. Not a social worker. I am not here to counsel you. And that is what I say to people."
>
> 7(10)[2] [asked about line between lawyering and social work] "I think that we have a moral obligation to help people generally. I've had people come and talk to me about a very seriously [disturbed person] … and my focus in that consultation was very much diverted away from the legal process [into] securing crisis management for him because he was going to kill himself. It was pretty clear. So I just abandoned that [lawyer role]. [T]hat happens once every ten years. But different practitioners have different approaches. I think because I have done a lot of actual counselling with people … I am probably less likely to go in that direction because I am tired of it. I retrained as a lawyer to get away from talking crap with people. But there are people who become social workers, counsellors to their clients and they take that too far. They are very unhelpful to their clients, I think. … You need to have some boundary around your role. […] [W]here it goes wrong [is where you have no clinical supervision and unresolved personal issues]. Let's just remember we're just here for this bit [of a case]. [W]e can't control all these other things. This is our bit. And of course you can send people, you can refer."
>
> 15[129-34] "At the end of the day, we have to, take it back to what the law says. That's what we are, not social worker or counsellors: We're there to tell them what the law is. That's our job. And I think that's where potentially some practitioners can become unstuck."

However, the picture was complicated. Some of the same lawyers[300] who expressed strong concerns about maintaining boundaries also described doing extensive work persuading clients to undertake various referrals. Lawyers were juggling what was and was not in their remit.

> 7(10)[10] "… Now I have occasionally done the referral to Odessey House. But not frequently. I will say "now, this is the number. Ring them."[…] [T]here are occasions where I become desperate to see that step being made and I have made the referral and I have reflected on that and thought was that the right thing to do. […] But I do know people who will sit for hours in their office talking with people and are effectively entering into a therapeutic kind of relationship with their client. Always from good motives but not the right thing to do."
>
> 8[109] "[If the client will not see reason] all I think we can do in that situation is to say "look this is what the law in your situation is going to be. The decisions you make are yours to make but you need to aware of what the likely consequences are going to be." I suppose the other thing you could sort of say is, is digging into the reason why this is held, I mean if there's something that seems objectively speaking to be fairly defined what's the issue that's stopping the client from seeing this. Again, is this something [where you might say] "is there a counsellor you could talk to which may help you deal with the situation?"

Child's best interests

In New Zealand, the duty to conciliate is the only additional duty placed on lawyers in COCA proceedings. Whilst the child's welfare and bests interests are paramount, Parliament has not reinforced the paramountcy principle with any legislative duty to the child. During interviews, lawyers were asked whether they believe that a lawyer for an adult party has any duty to consider the welfare and best interests of children involved during his or her work, as well as

[300] [7,8]

whether they believe they have any duty to consider the child's welfare and best interests separate to their client's interests. Additionally, lawyer's views were sought on what the issues associated with a direct duty to consider the welfare and best interests of the children would be, and what impact this would have on their practice. These questions were probed using hypothetical harmful scenarios where an adult client was acting against the child's best interests, or where an adult client was likely to obtain significant care of the child, and unbeknownst to anyone but the lawyer, had a dangerous methamphetamine habit, or a dangerous new partner. In the interviews, the idea of a duty to the child was not defined beyond it being a duty to consider the welfare and best interests of the child, owed by lawyers for adult parties to the child or children involved. This was to leave the idea of any such duty open to the interviewees in terms of what it may include, and how it might work.

The status quo: lawyer's consideration of the child's welfare and best interests

All most all of the lawyers interviewed discussed an immediate, powerful, and personal concern to protect children's welfare and best interests during his or her work with an adult client. This concern was particularly evident in respect of a child's safety, and was described by the lawyers even without discussion of the hypothetical harmful scenarios outlined above.

> 2(6)[11-15] "Yes absolutely [there's a direct duty on the parties' lawyers to consider the children]. …[I]f you file applications that jeopardise the safety of the children, who is going to be held responsible? …Who do you hold [responsible], if something had happened? Who would have been responsible? You tell me."

> 4(6)[7]-(7)[5] "I do, I think there is [a duty on the parties' lawyers to consider the child]. …The child does come first and what you're trying to do as [lawyer for] a parent …is to try and frame the case around that … in such a way where in some ways you're sort of talking your client around to common sense, what's in the child's best interests."

> 3(9)[1-3]"I think I have a responsibility to stop my client doing stupid things or clearly hurt the child." ["Why?"] "Because I wanna sleep at night."

> 14[97-99] [I do not consider I have a direct duty to the child], Not in a legal sense. I think as a human being I do: Thinking of the children.

Two key bases for lawyer's concerns for the child's welfare and best interests were apparent across the interviews. The first was out of an innate concern for the child, where lawyers described the child's interests as being a "primary nature" and innate to their practice,[301] and a part of "who they are" as a person.[302] These descriptions were characterised by a personal moral conviction, and in some instances, a sense of personal responsibility, to avoid harm to the child, and to build stronger families. These lawyers described concern for the child's best interests as occurring 'in tandem' with their client's interests, rather than an entirely separate concern.

[301] 8[65]
[302] 18[104-106]

> 18[104-106] "[The child's best interests are] [p]aramount, paramount, because it's paramount in the legislation. [Q: Is it because it's in the legislation or is it because it's in you?] Both. When I spoke about who I am as a person, I don't require a section telling me that I should try and have a conciliatory approach. That's a part of what I'm trying to do in terms of building stronger and thriving families. In acting for a parent, I cannot move away from the fact that if I act in a way that is harmful to a child it is going to undermine my parent or my client's interests. I think it's tandem."

> 8[65] "[P]erhaps it's hard for me to conceptualise [the idea of a duty to the child] in a way because it's just become morphed into the same way I remember to put my shoes on in the morning. I don't consciously think about it but it's just an innate central part of everything we do. It'd kind of one of those things you usually do if you need to, the sort of exercise we're doing, or in court and you need to justify it professionally or, heaven forbid, I've never been in front of a complaint but there by the grace of god go all of us on that particular day. In terms of how what you did was in line with what is required of you under the Acts, under the professional standards, law society, under lawyer for child practice minutes but I guess and I don't think they're necessarily independent or different to each other, they are interwoven in a way that they're coming up with the same effect in terms of what we're supposed to do. It's an interesting exercise you're asking me to do because it becomes, it's second nature, it is nature, it's not second nature it's primary."

This lawyer compared the approach of putting the child first in their practice to the ethical imperative on doctors to "do no harm":

> 8[65] "Positions we take with clients, with the court, we will have to, there is always potential we will have to say why that was done and I guess if you look at those bloody venn diagrams we used to study, but the essential focus of all those ones in terms of accounting for approaches, steps taken, decisions made, there is a centrality and theme there that is, thinking about it my brother is a doctor, that one they have, do no … harm."

A focus on the child's interests was so much part of some lawyers' conception of their role that five described it as one of the differences between a "good" Family Court lawyer and a "bad" Family Court lawyer, or between Family Court lawyers generally and lawyers in other fields.[303] Evident in these responses was an obligation the lawyers felt to consider the "big picture" or take a "wide view"[304] of the dispute. This included being able to balance a "child-centred focus" or "child attentive" approach with client instructions, and have a view to the longer term implications of the dispute for the family.[305]

> 16[130] "Well I think we probably do [anyway consider the child's best interests] anyway. [W]ell, it depends on the lawyer, actually. … [B]ad family lawyers … will advocate for their client and what their client wants irrespective of what that means for the child because they think that's their job. And to be fair you know an adversarial system it is their job but I think when you are dealing with children you've got to take a wider look at it … I think good lawyers do it anyway."

> 1(6[3]"I expect [good Family Court lawyers] to do their damndest to assist a family to come to a positive resolution for their children which . . . they as adults can live with, that works really well with their kids and [to] keep as far away as a courtroom as they humanly possibly can… .That stuff is huge and anyone who has that understanding works in a different way. […] [It's] about parents

[303] [1(6[3], 7(9)[9] 12[48-50],13[16], 16[48]]
[304] 16[130]
[305] 12[48-50]; 13[16]

> looking at what their children need, not what's fair to them in terms of "let's cut this trial up like a cake so that everyone gets their slice."
>
> 13[16] "I think family lawyers do require skills that other lawyers might not necessarily have because there's the ongoing tension between being an advocate and particularly in cases involving children to focus on what's in their best interests."

One lawyer described the need for Family Court lawyers to be able to employ their humanity in the focus on the child's needs in the context of Family Court litigation:

> 7(9)[9] "I wonder if it is because I am a Lawyer for Child primarily, … or whether we [as Family Court lawyers] are all kind of focused more on the children's needs, … but I think we are generally quite good people. … [I]t would be such a rare event for someone to do or say or procure something in the context of litigation just to win. I think that you're going to get people … even just as a human response, [saying to clients] 'that's just not a good thing to do with kids. Just don't do that again'. […] I think we have to bring our humanity to this work and people who struggle with that just can't do this work because they can't understand."

The law provided the second key basis for lawyers' consideration of the child's best interests. This was both in respect of a general underlying "ethos" of family law, as well as the legislative framework lawyers help their clients navigate.

Two lawyers considered that the underlying ethos of family law creates a direct duty on lawyers to prioritise children's welfare.[306] This was somewhat similar to the views expressed by lawyers who saw putting children first as part of what makes a "good" Family Court lawyer. These lawyers described the child's welfare and best interests as a "golden thread … [t]hat runs through the legislation"[307] and "starting point"[308] of family law:

> 8[49-51] "The welfare and best interests of the children are absolutely paramount. […] [M]y obligation as a lawyer is that I've got to be conscious of the welfare and best interests of the children and actually that's one of the more neater dove tails … because ultimately if you can't sort it out that's what it's going to be [the court will decide on the basis of the child's interests] so actually for a simple person like me it makes it easy to process because that's what it comes down to. Anything else beyond that, any question that arises, the starting point is back there at the inception, what is, this child, these children, what are their welfare and best interests. Because human dynamics being what they are it's easy to complicate, it's easy to lose that so that's why I think you're redirected back to that."

The majority of lawyers saw themselves as having a duty to discuss the child's best interests with clients on the simpler basis that it is the standard by which the court decides cases in the Family Court, and clients therefore need to understand this standard in order to make decisions. That is, the child's best interests form part of the legal landscape the lawyer helps the client negotiate, and are thus relevant, albeit indirectly, as part of the Family Court legislative framework.

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[306] 7(8), 8[49-51]
[307] 7(8)
[308] 8[49-51]

> 5(6)[11] "[As party lawyer you must consider the child's interests] because if you are going to go to court on a child related issue then the judge is going to take into account the best interests of the child. So acting for a party you would be mad to say to that party oh you can just do whatever you like and not worry about the child because then you are not giving good advice. So to that extent I am acting for a client I am always considering and advising them to look at it in the point of view of the child. [But not for the child's sake] I am doing it for the client."

> 12[56] "you get a lot of people who, their Family Court dealings are their first and only dealings with the justice system and really haven't got any idea that the law is structured around the best interests of the child. So I certainly don't think there's anything wrong and I see that as really important around saying that to them, and in fact, as I say, if you put back to the advocacy focus, it's got to be effectively advocacy and advice to them to tell them that because that is the prism around which, within which they're going to achieve whatever it is that they want. There's no point telling them they can achieve stuff which simply isn't going to be achievable."

Notably, very few lawyers were solely concerned with the child's best interests as a part of the legal landscape.[309] Most described multiple justifications for their interest in the child's best interests. One lawyer described the "mixed motives" nature of this:[310]

> 7(9)[3-11] [Asked about reason for advising client on child's interests: legal or moral?] "I guess you are talking about mixed motives in its core sense. I think we all approach things with mixed motives and I think that, well let me give you an example so you have got a client who is going to see a psychologist. Now you get to know your client a bit and you know how they operate. So you're going to be telling them 'don't bag mum. Talk about what's best for the child not what's best for you. Don't rake up lots of old ground.' Now the question will be why are you saying that. The reality, if we're honest, is we know that psychological reports are highly persuasive. […] [So] you're trying to get your client to perform as best as they possibly can with the limited facilities they have, often. […] [It's] [s]o that you get the best result in terms of your s 133 or 178 report, isn't it?"

A direct duty to the child: lawyers' perspectives

Whilst all most all lawyers expressed concern to consider or protect the child's best interests in their work with adult parties, many rejected the idea of a direct duty to the child. A few of the lawyers began by saying they agreed with the idea, with one lawyer identifying that such a duty might help to improve the behaviour of "hired gun" lawyers by constraining their ability to "tell their clients what they want to hear".[311] However discussing the idea of duty to the child further, lawyers were clear that their client's interests and instructions prevail, and that they ultimately act in accordance with their client's instructions whatever their personal views. Accordingly, most were concerned that an additional duty to the child could give rise to a serious potential conflict with their duty to the client. This potential for conflict was the key basis upon which the majority of the lawyers rejected the idea of any increased duty to the child.

[309] [3(9)[10]) 6(7)[12] 7(9)[3-11] 8[65] 12[48-50] 14[90], 16[124-26], 18[104-106]
[310] 7(9)[3-11]
[311] 16[131]

> 1(13)[4] "It's really difficult [to impose a duty to the child] with that . . . I mean we've had this conversation for the close to 40 years that I've been doing this, I mean, you've got a client and we're always told as lawyers that we have to put our client's agenda. But yeah, you always have to always be aware of the child. You always have to be aware of the children."
>
> 12[54] "That's where it does get really difficult. I mean I think you would like to think always but it is largely within that prism of what is achievable and what is achievable because of the way the law is set up, should be within what's in a child's best interests. I think you do have to be really careful in advocating for parties, well you have to keep front and centre that you are their advocate, the primary obligation on you is to advance their case to the best of your abilities and the child focus I think is largely comes in, in educating them towards what is achievable which will hopefully be, should be if the law's applied correctly, what's in a child's best interests. A separate obligation over and above that, I don't know. You'd sort of like to think so but I'm not sure sometimes, I think with all your ethical obligations to your client, you've got to be really careful, of course you need to be advising them and you're not able to withhold anything from them which will be relevant information for them to advance their case so that's got to be your primary obligation."
>
> 12[58-60] "What I don't know about that is how then do you balance [a separate duty to the child] against the primacy of your obligation to your client? With your basic role as an advocate? […] Well I suspect it's a blimmen' [hard]. I think you can work around to it through that [reality checking role] … and sort of maybe get to the same place but if you're saying it's a separate stand-alone obligation which may come into conflict with your obligations to your client, well which has primacy and how do you balance that up? I don't think that's easy."

These lawyers emphasised their role as advocates for the client, which requires them to follow client instructions, regardless of whether the instructions were ultimately, in the lawyer's view, in the best interests of the child.[312]

> 12[48-50] "[A]t the end of the day you're an advocate and you can reality test your clients all you like and try and manoeuvre them to a more realistic and a more achievable and more child focused position but at the end of the day some of them aren't very receptive to that and their instructions are their instructions."
>
> 4(6)[7]-(7)[5] "…But what I'm also saying is that at some point the client's going to…want you to advance a case that's plainly not in the child's best interests and welfare. […] You just have to do it. You just have to do it. I mean that's where, you know, the limits of an advocate really. […] No in the end, if a client wants me to present a case which I know I know I know is not in the best interests of the child, before we even get to the point on my feet in court I would have explained that to them and put that in writing. But often you're here with the code of conduct now, really, this is the code of conduct and it may be the client disagrees with you as to what the welfare and best interests of the child are and disagrees with the experts and disagrees with everybody else, but your duty's not actually to say oh hold on a second I'm going to judge you now, client, I'm going to prevent you from winning that case, no your duty as the advocate is to put that forward and if the judge invariably disagrees with it then that's what you predicted. But that goes to the heart of being an advocate really, because you're not a participant in the cause, you're the mouthpiece for that client."

[312] [1(3)[4],2(9)6,3(10), 3(9), *4(6)[7],5(6)[5] 5(?),* 6(10)[1],7(8), 7(9)11,8[133],9[40-44],12[48][54][58-60],13,14,16[135]]

Some lawyers highlighted that it is the role of the judge, not the parties' lawyers, to determine what is or is not in the child's best interests. One lawyer also noted the role of Oranga Tamariki in "watching over" parents.[313] In considering the idea of a duty to the child these lawyers questioned the basis upon which lawyers acting for adult parties would be able to make decisions about the best interests of the child, an inherently value driven judgement, especially given their partisan starting point.

> 3(10)[11]"…Those judgements about what's best for the child they're asking that lawyer to make are going to be snap, untested, largely guided by my prejudices and doesn't make sense. I think it's really dangerous to start going down that track and we have judges, that's what the judges are for. There's a limitation on my abilities on without notice, I've got to sign certifications, I have no problem with that, but in terms of court I'm not doing anything, I'm just chucking stuff in front of a decision maker, I don't take the child away."

> 3(9)[4] "Beyond [conventional limits such as reporting immanent harm] I don't think you've got a duty to advance an outcome that I [personally] think it is a good outcome. It's not for me to make that call. And also I think you have to back up the bus. COCA is different to OT so within COCA it's a private dispute between two parents who the court I'm assuming is regarding as competent and capable, good enough parents, otherwise OT would be involved. So yeah in theory. So in COCA I take that it's not for me to come in over the top with that and in OT, OT is there watching over them. It's not my job. I think you've got to be very careful about getting too pompous about what you think is best for the child."

> 5(6)[15] "[If lawyers had a greater responsibility to consider the child's interests it would be] [d]angerous. […] Because they would have a slanted view already from their client's point of view…No I do not agree with [party lawyers having a direct duty to the child]. You have got to be advising your client on what is going to be the court's response which is going to be based on what is in the best interests of the child anyway but you have got to remember that you are only seeing it from your client's point of view."

A few lawyers were categorical in rejecting a duty to the child. Whereas some referred to feeling the need to 'balance' the duty to the client and the child's best interests, these lawyers took a stricter view of the primacy of the duty to the client.[314] Notably, these lawyers elsewhere admitted that this approach caused them strain personally.

> 9[40-44] "I'm, for better or worse, of the view that my responsibility is to do a really good job for my client. And so I probably am perceived as being a little bit more aggressive than some. Certainly proactive, because that's what I think I get paid for. I'll be blunt. I get paid to win. I don't get paid to do anything but win. […] Well the thing I struggle with is doing the best thing for the children and doing the best, for me the enquiry that I have, I hope regularly, is is what my client's wanting me to do and what I can do the best thing for the client in the big picture. […] [F]or me the big picture is that person having the best possible relationship with their children and the children the best possible relationship with the parent. So I totally get that ideally all of these relationships are, at worst preserved and at best enhanced. Sometimes I wonder if that's exactly what we're achieving here if you've basically slam dunked someone on something."

[313] *3(9)[4]*
[314] 9[40-44], 9[48].

Only a couple of the lawyers said that they consider they have a direct duty to the child, or that they were prepared to act against the client's interests outside the narrow conventional exceptions discussed below.[315] This arose out of the strong moral conviction the lawyers felt to protect the welfare and best interests of the child. For example, one lawyer, agreeing that lawyers have a duty to the child as well as to the adult party, described themselves as being "very pro children. They're the innocent victims … You've got to look after this child."[316]

Reconciling tension between the child's best interests and duty to the client

Discussing the potential for conflict between the duty to the client and any prospective duty to the child, a number of lawyers also spoke about the existing potential for tension between the paramountcy principle and the duty to the client. This arises in situations where the lawyer feels that the client's instructions are not in the child's best interests:

> 16[135] "I think that there would be a real problem for any of us acting for a party if we got to a point where we knew that what we had to submit on behalf of our client went against the paramountcy principles that we were obligated to follow even if we were acting for a party, because you've also got the … rules of conduct that we have to abide by and so we are bound to follow our client's instructions, that's what we do. There are limits to our ability, you know if a client insists on staying with you, there are limits on our ability to actually sack them as clients….there becomes a conflict between your obligations to your client under the professional rules and the obligations in court under the Family Court legislation. I think there is potential for real conflict there. Where do you draw the line? I think we all have ways of phrasing things so that it is very clear that we are doing what our client wants but not what we think is best. You know you can pick up a letter and read it and especially we've got a really collegial bar here … so most of us are able to just ring up the other counsel and say look, have a frank discussion, knowing that it's not going to go any further than that."

However, lawyers described several strategies they employ to reconcile the tension between the duty to the client and paramountcy principle if and when it arises. The predominant strategy employed was to persuade the client to instruct the lawyer to act in ways the lawyer considered benefited the child. In this, the lawyers used reality checking or strong advice as to what was appropriate, both legally and morally.[317] A number of lawyers considered that reality checking in this way fulfilled a vital ethical duty to protect the child, helping to "dovetail" client instructions and the child's best interests.

> 16[137] "Rather than … [introducing a] legislative [duty] … I think most of the any-good family lawyers [are] having that conversation with their client because they're having to, to advise their client of the ramifications of what they're doing."

> 17[58-61] "I think there's the discussions that go on in the consultations with the client advising them on what the court is probably most likely to do. And [you] suggest what they should be seeking and what's more realistic. […] But if I act for the father, I feel I have an obligation to say "That

[315] [15[139-40] ,16[135]]
[316] 15[139-40]
[317] [3(10),(9), 7(8),7(9)[11],9[40-44]12[48,[54][5-60] 16[137] *17[58-61]*]

> parenting order you want… I don't think that's best for your children." But ultimately, it's down to the client, as long as they're not asking for something completely stupid."
>
> 4(6)[7]-(7)[5] "I do, I think there is [a duty on the parties' lawyers to consider the child]. …The child does come first and what you're trying to do as [lawyer for] a parent …is to try and frame the case around that … in such a way where in some ways you're sort of talking your client around to common sense, what's in the child's best interests."

Some lawyers justified reality checking the client around to a more child-friendly position on the basis that the lawyer knows better than the client about what is in his or her longer term or real interest. This was described in respect of both the general good of better parent/child relationships and the reality of what case is likelier to win in court.[318]

Several accepted the ultimate duty to the client but took the view that this duty is fulfilled by a lawyer who understands better than the client where his or her interests lie.[319] One lawyer reframed "fighting fearlessly" *for* the client with "fighting fearlessly" *with* the client for the child. In essence, this lawyer was justifying turning the lawyer's fight on the client themselves. It highlights the way in which Family Court lawyers frequently advocate for the child's interests with their clients; appealing both to the children's interests in their own right as well as to the court's expectation that the children will be prioritised.[320]

> 7(8) "Well I mean I think [the child's interests] is a golden thread, isn't it. That runs through the legislation and I guess by implication as a practitioner exercising their duties under that legislation or advising people under that legislation. [I]t's always going to be a dichotomy for a practitioner because you know certainly when I was called to the bar the wording was that you would fight fearlessly for the interest of your client again all odds. … [B]ut what I have often said to people [is that] …fighting fearlessly looks different in different contexts. So fighting fearlessly in the Family Court in the children's law arena is not about being aggressive … [it is about] helping your client to continually focus on the needs of the child."

This lawyer also felt that there was no intrinsic conflict between advocating for the child's interests and advocating for the client because the law requires that the child's best interests are paramount. They were of the view that there is thus no conflict between what personal morality dictates is good for the child and what is objectively good for the client in the legal sense of making their case more plausible or winnable. Similarly, a couple of lawyers reframed children's interests as being in the wider interests of the client, and therefore part of the client's own interests even if they appeared to conflict in the short-term.[321]

Privilege and confidentiality

[318] [3(10),(9), 7(8),7(9)[11],9[40-44]]
[319] [3(9)10, 7(8), 9[40-44]]
[320] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000) at 77; and Austin Sarat and William LF Felstiner Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process (Oxford University Press, New York, 1995) at 120.
[321] [9[40-44], 7(8)]

Several lawyers also raised legal professional privilege and confidentiality as a reason to avoid any incursion into the primacy of the duty to the client.[322] These lawyers considered that an additional duty on lawyers to the child could encroach on lawyer-client privilege. Emphasis was placed on the importance of privilege in COCA matters in enabling lawyers to have "genuine conversations" with their clients, oftentimes about sensitive material. This is of course a key intention of privilege more widely: to enable clients to be able to fully discuss and "disclose all relevant matters to their lawyer safe in the knowledge that these communications cannot be disclosed or compelled".[323]

> 3(11)[13-16] "Because the other complexity is that the more you put those rules in, the more our relationship with our client becomes more and more like their relationship with their social worker […] which kind of limits our functionality: Limits our ability to change our clients and have genuine conversations with them. Because we do change our clients [for the better]. It's also part of what a good COCA lawyer is: I think you change your clients. […] [I]t also alters people. It's not just a game."

In respect of lawyers' consideration of the child's best interests (separate to the idea of duty to the child), lawyers were of the view that the duty to the client had to remain their priority over and above the concern they felt to protect or consider the child' interests.[324] This meant that lawyer's concern for the child's best interests did not override client confidentiality. There were however two quite clear, and conventional, exceptions to this. The first was that lawyers would breach confidentiality against instructions if there was an immanent risk of harm to the child or to the client.[325] This was an entirely conventional response and conversant with standard ethics. It also aligns with the concern all most all lawyers expressed to consider or protect children's welfare and safety, set out in the beginning of this chapter.

> 3(11)[5] "I suppose you come back to that privilege rule, don't you? That if you believe there's imminent harm about to come, yeah I know I'll think it through. I think P is a good example, if your client is on methamphetamine and she's not doing anything about it and then I suppose I have to then, you're sliding into that area again. I'm having to make a judgement about things I don't know about [and being paternalistic]."

> 4(8)[1] "So there are limits on [lawyer/client privilege], I definitely agree with that. The other one I've had [was] where … [during a conversation …the client was threatening to commit suicide and I said "well, okay, I'm going to hang up now and call the ambulance." So it's those type of things where I think you can breach the privilege thing. I've got no qualms doing that."

Breaching confidentiality was described as a last resort, requiring a very serious risk to the child or third part. Lawyers also described first attempting to persuade their clients to disclose the harm:

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[322] [3(11)[5] *4(7)[9-],6(9)[6-14] 6(10)[1] 8[53-55],* 12[66]*]*
[323] New Zealand Law Society "Privilege, confidentiality and reporting suspicious activities" (21 July 2020) <www.lawsociety.org.nz>.
[324] [3(11)[5] 4(7)[9-],6(9)[6-14] 6(10)[1] 8[53-55], 12[66]].
[325] 3(11)[5], 4(7)[9-], 12[66]

> 12[66] "I think it's the last resort but I have gone there a couple of times, is the provisions under the rules that talk about where you consider there is a serious risk to the health and safety of somebody, then you're able to breach privilege. And I have actually had people in domestic violence situations that, I consider that there is an obligation on me to disclose to the police. And that usually can lead to a discussion, well at the times, the rare occasions that is has happened, that has led to a discussion which has led to that disclosure occurring, which is what I wanted … by consent, which is what I wanted to get to in the first place. Mental health is another one. I've acted for a woman who was clearly psychotic, towards the end of last year actually, who dragged along to our meeting her 14 year old son and I was concerned about that kid in terms of self-harming and I had a discussion with her, saying 'look, I think I need to inform [someone]' and fortunately I'd acted for her for a while and she said 'okay fine', but if they absolutely say 'well, no' what do you do? If you've come to that point you're actually obliged to disclose."

The second exception was where clients were intent on deceiving the court.[326] In this instance lawyers described actual or hypothetical situations where their overriding duty as officer of the court has, or would, come into conflict with their duty to the client, and taken precedence. This approach is again conversant with standard legal ethical constraints.

> 4(7)[9]-(8)[1] "I've had that experience before […] [I]t wasn't actually [fun] but I did learn a lot from it. … [W]here the client gave evidence in the witness box which I knew to be untrue and so when they came out of the witness box I had to say to them, "look, you either need to go back in there now and correct what you've messed up or I have to make an application to withdraw from the case straightaway." … [S]he really didn't want to do that but in the end she agreed to do that. And it didn't actually make much difference to her, I just said to the judge "I'm having to recall the witness because there's an issue under professional conduct." I didn't say what it was of course I just put the question but I've come across that before where you just have to intervene and say "look, I can't," because you are an officer of the court first and foremost so you just need to tell the client. And because I've been through that situation twice now I'm really more circumspect about that, I'm really on the look out for if anything happens like that, you just need to put them in the witness box or apply to withdraw because it's not worth it. But they try and do this all the time, by the way. They say "da da da da and obviously I haven't told you" and I say "well, you've told me now and I can't do anything to suggest otherwise. [O]therwise you've got to get another lawyer." So there are limits on it, I definitely agree with that."

> 3(11)[5] "Years ago I once had a case where my client was accused of a very very serious crime and I don't know why the fuck it didn't come up, Lawyer for Child didn't do the criminal search, I just don't know. We just sat there on egg shells for four days and that was the same conversation - I said "if you are asked you must answer honestly. If you do not I will pack up my suitcase and I am walking" and he said "I'll take that risk." So I suppose that, I don't know the answer to that. No, [I do know the answer]: we are lawyers, we are lawyers. It's a question of lying. If he's lying in his affidavits, no you can't do that."

One lawyer highlighted the importance of their reputation and of their career in hypothetically needing to breach lawyer-client privilege where a client was intent on deceiving the court:

> 6(9)[6-14] "[P case example] I would put it [to the Court] because I think it's really essential for the court to know [in my role] as an agent of the court. If it's serious like that I would put it to the court. I would make sure that the court was aware of it. […] But I would actually do it in an affidavit. You

[326] [3(11)[5] *4(7)[9-],6(9)[6-14] 6(10)[1]]*

> know have that client do it. Like there's, for example doing domestic violence affidavits, we always have a duty in that to put any evidence, everything, both sides to the court […] [If the client refused to disclose] well I would tell a porky: "That would put you in a really difficult position. But the thing is its going to be known. You know eventually it's going to come out." I don't want to be accused of favouring them or harbouring them or doing anything. Because they would say "well, I told my lawyer. " I can't tell anybody because of solicitor, client privilege but I would say to that person "you must do it in an affidavit" because it's their information but I don't want to act for that person if they are not prepared to disclose it. [..] [If they still won't disclose] I couldn't carry on. My career is too important to me to put my reputation on the line."

Again, several lawyers discussed how rather than an outright breach of confidentiality, they would first try to persuade the client into declaring the issue themselves. This was so even after a client had already lied to the judge in open court. The extent of the pressure used to persuade a client was suggested by the lawyer who described how he would "tell a porky" (that the truth would inevitably come out) to encourage the client to be honest. In any case, several other lawyers were prepared to tell clients the same thing without seeing that as a lie.

Only one lawyer held out against any exceptions, feeling the relationship of confidence was too important to compromise.[327] As highlighted earlier the importance of the client being able to "talk to you about everything", and "disclose everything" was emphasised:

> 2(10)[2-17]-(11)[2] On the importance of confidentiality to client relationship to enable advice and change: "I'm just picturing myself sitting across the room from a client who would do that. Obviously the first thing I would say is "you need to stop it because if the court ever found out - not because of her welfare - if the court ever find out your children will be taken off you, CYFS will take them off you," so it will be that approach. But, again, it's the conflicting with confidentiality and privilege isn't it? […] [Y]our client needs to feel that they can talk to you about everything and be able to disclose everything. And I have found that to be a real tool to get things out of my client sometimes, they're reluctant to disclose to me dodgy things that they've done and I say to them, "look, I am only acting in your best interests and whatever you tell me, it's better I hear it from you than the other side and it doesn't go any further than this. […] I would have to have a real think about it. …[T]he last thing I would think about doing — [even] after saying, yeah, the children's safety is paramount [and] contradicting myself — the last thing I would do is to say "I need to report this" […] [and] betray my client."

Lawyer's knowledge base for child's best interest advice

During the first portion of interviews, it became apparent that lawyers provide a wide range of quite specialist non-legal advice and support to their clients in the course of their work, including advice about children's development, optimal care arrangements, and children's welfare and best interests. In the second half of the interviews, we therefore introduced questions specifically about the basis for the advice lawyers give clients about what is in the children's best interests. No-one pointed to specific training in the legal profession beyond the NZLS Lawyer for Child course, a three-day training course for lawyers who seek listing as

[327] 2(10)[2-17]-(11)[2]

lawyer for child.[328] Only two of the lawyers interviewed had any background training or experience in mental health or psychology outside the role of lawyer. One other had a long-term practice on the mental health roster.[329] Instead, most lawyers drew on common sense experiential wisdom. In some instances, lawyers drew on their own experiences of parenthood. One lawyer highlighted that "no-one teaches anyone this stuff", "if you just [used] legislation, I mean there's just all the stuff on each side of it that's just not covered".[330]

> 14[109] "I think [I get my understanding from] my age. And I'm a grandmother now and I'm a commonsense [person]. [I]t's my personality. … [W]hen I started practicing, day two I had to do something that was a court matter, and then a couple of days later; I'd just got my practicing cert. This was something else where it was a round-table and it was about a baby. I didn't have a supervising partner, I had no idea. [14[114]] It was nothing to do with the law, it was to do with having had children and understanding babies and it just worked…I had quite a few like that, following that. Similar situations where maturity, life experience, commonsense comes."

> 2(7)[4, 8] "[When I think my client's doing the wrong thing for the children] I tell them. Well I don't say, as a mother, I say as a lawyer, the cases I've seen."

A few of the lawyers relied on previous psychologists' reports that they had encountered in the course of their work. In particular, these lawyers drew on psychologist reports for continued and updated understandings of recommended care arrangements for children at different ages of their development.

> 17[62-66] "… It's not hard putting yourself in the shoes of the kids. Psychologists write good reports for the court that we all learn from as we go. […] No [I have no training]. It's just experience, dealing with lots of psychologists and reading lots of reports and being relatively empathetic."

> 2(7)[4, 8] "… I've had access to a couple of papers … [and a psychologist's report] It was a vague psychological opinion and she states that I have not met any of the children, not assessed the situation, but my recommendations for a child of ages 1 to blah, this is what would suit. … I held onto it and I cite that unless I hear otherwise that for the age group of the three groups and this is what's the best child care arrangement and unless you can prove otherwise, why this shouldn't be..."

A few of the lawyers referenced outside reading or courses relating to the non-legal issues lawyers encounter in the course of their practice. Only one lawyer mentioned a need for increased education on these issues, citing a need for information on addiction and mental health issues, as well as the most recent research on shared care and custody arrangements. This lawyer's view, set out below, reflected also the struggle described by a number of lawyers in maintaining a line between what is and is not within lawyers' ambit when providing non-legal advice and support to clients:

[328] During the three day lawyer for child course, some information is provided on developmental issues. There is no requirement to attend further specific training, although an Advanced Lawyer for Child course is sometimes available.
[329] The roster of legal aid providers for mental health proceedings.
[330] 9[162]

> 15[136-37] "[F]or children and more parents we need to be very mindful about mental health and addiction and we need to learn more. … I think our professional development's great but I think we could, rather than just learn about the law have some psychology or … maybe it's not our job and maybe I'm taking it too far. I just have an interest in that. I think that it's good for us to be well aware. [15[143]] [S]ometimes it's just about education and knowledge and that's what you have to do and it's important that we are up to date in terms of what the view is about shared care and contact and things like that. So, I think it would be good for us at our conferences to know what the up to date play is in terms of research."

In contrast, one lawyer dismissed the need for further education on non-legal issues:

> 17[45] "As lawyers I think we do [know enough about the psychological aspects]. We're a pretty in tune bunch, we learn as we go and we're not the psychologists or the social workers. […] I don't have any complaints."

Most of the lawyers were highly confident in the skills and knowledge base of the Family Court judges in dealing with issues relating to mental health and addiction and to children's development and best interests.

Shared care

The idea of near-equal shared care as the optimal arrangement for children has a strong hold over the legal imagination in comprarable jurisdictions. It has attracted considerable concern from academics who see it as an over-simplification of the realities of children's relationships with parents, and a dangerous assumption given the prevalence of family violence and dysfunction, especially in cases coming before the courts. A few of the lawyers commented that the idea of shared care has filtered out into the community and has influenced separating parents to make shared care arrangements. Several of the lawyers were actively concerned that shared care has too great a hold over the legal imagination and has become the default care arrangement option.[331] The default assumption that shared care is in children's best interests was criticised by a number of lawyers who emphasised that shared care is not always suitable in every situation.[332]

> 3[168] "[S]hared care … became a big social drive …even though it wasn't actually happening in every case it got out in the community that it was …I think the punters got it in their head that's what the courts were doing and so lots of people in the community began putting in place shared care because they thought that was the outcome from court anyway and then the court began awarding more shared care because it got the idea that it's what people are doing out in the real world but they were doing it in the real world because they thought that's what they were giving in the court."

> 15[126] "[O]ften I put that to people [that the criterion is what's best for the child not for them], and they go "Oh, right! I never thought about that. We thought 50/50….week on week off." [I ask them] "Ok so how do you think that is for your 5 year old, who's not going to see either of you for a week? How would that feel for them?" "Oh my god, that would be terrible." And I'm saying "Exactly.

[331] 3[164-170]; *14[118]; 15[126]*
[332] 2(7)[4, 8]; 3[164-170]; *14[118]; 15[126]*

> So… what is right for your 5 year old?" "Oh, but it's easier for my work." "But that's not what the court looks at, and your 5 year old, they're the innocent victim."

> 14[118] "I think it [the shared care assumption] ignores in some cases the best interests for the children. … [An arrangement where kids] get off the bus one week to her and one week to dad on the Monday. And I remember thinking my god, that doesn't seem right. I'm not saying that necessarily has to be the mother. Just that would be so unstable for the children and over the years, the courts favoured it and because it's the norm I've tended to push my clients towards it because that's what the courts like. But I'm not 100 per cent comfortable, in myself, with that. I don't know that it's better for the children, and I think in some cases it's not."

Several lawyers referred to the age of the children as a reason to avoid shared care.[333] Most examples given were of parents' own choices, but one described judges and lawyers as having gone through a period of preferring shared care several years ago.

> 2(7)[4, 8] "[I tell clients that shared care] is what's the best child care arrangement and unless you can prove otherwise, why this shouldn't be. [But] especially for little babies, you can't have two homes, you can't send a one month old here and there, and you can't have a shared care arrangement ... But children who are well over the age of 7, 8, there's no reason why they can't have shared care arrangement."

> 3[170] "[T]he most nuts ones are the ones the punters have done themselves, so they'll turn up and their kid's 4 and they've been in shared care for 3 years. I had one years ago where the mother was in [a town] and the dad was up here [an hour and a half away]. It was nuts and this little kid [was suffering]. And you often get this bizarre situation, and this is quite common, where the shared care breaks down when they start school because you can't do that [while living far apart]. But it's nuts and it's the opposite of what you think and normally you'd expect that shared care would start about 8, 9, 10 if it's all going well. But, no, the shared care's happening at 12 months, 18 months"

Another had a related concern about the double burden created for parents wanting to limit contact for cause, since they must show themselves "friendly" to the other parent at the same time as arguing that the other parent should not have as much contact because of parenting deficits.

> 14[120-21] "I've got that with this relocation case because the father, she believes he doesn't do as good a job, looking after the children. They'll go to school, not washed properly and not had breakfast and all that. … But in order for them to relocate she needs to show that she is supporting the dad's relationship, which just is not going to happen … once she moves 4 hours away […] I'm between a rock and a hard place. On the back of her relocation application he's going for shared care. So as much as she supports his relationship with the kids, and needs to be doing that, for the relocation part, she's doing herself no favours for the shared care part."

'Difficult' clients and emotion

Across the interviews, many lawyers discussed regularly encountering intense, non-legal matters in the course of their family law work, both those acting for parties and as Lawyer for Child. This included dealing with entrenched adult conflict, 'intense hatred' held by one or

[333] [2(7)[4, 8] 3[164-66] 3[170] 15[126]]

both parties, as well as high levels of emotion, particularly grief and anger. It also included working with parties with (sometimes undiagnosed) mental health issues, addiction, and personality disorders. A number of lawyers saw these client-based factors as influencing the level of adversarialism and aggression encountered in family disputes, and as major factors in cases which end in hearing.

Client based emotion and mental health issues encountered in Family disputes

Over half of the lawyers described many of their clients as suffering serious emotional difficulties; [334] as being "really acute, critical people",[335] sometimes in "absolute crisis".[336] As one commented, clients who end up in proceedings are often "highly charged emotional people who really need somebody to help them. That's why they go to a lawyer."[337] Lawyers spoke about "of the moment" emotions, particularly anger and grief resulting from relationship breakdown, with a few also referencing intense hatred, held by one or both parties, beyond what might ordinarily be expected in a relationship breakdown.[338]

> 8[29] "Very few people come to see us because things are going well so it's generally dealing with people in stress circumstances at best, sometimes in absolute crisis. Children being uplifted the night before or death and we've got to look after estates and that type of thing. I hope I'm not being arrogant but I would be surprised if there was another area of practice that dealt with so many different people in so many different ways."

> 16[40] "[I]n the Family Court …you are dealing with people that are going through emotional trauma and so what seems reasonable to us as people that aren't dealing with the emotion of it, people don't see because they are caught up with the stress of a relationship ending, they're caught up with whatever antagonistic feelings they have about their partners. All of that makes a difference."

> [8[83] "[T]hey're in crisis. There are egocentric sociopaths out there but thankfully they are bloody rare. Most people want to be good and most people are good but most people are very human and I'm in the same thing. I've been through a relationship. Have I tried bloody hard to do the right thing by my ex-partner, my ex-wife, and by our son? But I'm sure even if just in my body language or my tone he could pick up actually I'm "aaaaarghh," and that's with years and years of dealing with people in the same situation and dealing with people under stress. We deal with people in strange situations."

Anger and grief

Anger, and in particular grief, were key client emotions regularly encountered by the lawyers in the course of family law work.[339] Lawyers specifically highlighted the need to have an

[334] [1,3,4,5,7,8,12,14,15,16,17]
[335] 6[5](9)
[336] 8[29]
[337] 6(2)[1]
[338] [5,6,8,14,16,]
[339] [1,5,8,14,17]

awareness of how grief can "play out" for parties in a dispute, and the importance of having an "understanding of human nature".[340]

> 14[19] "[I]n Family [matters] a party may think that they want to destroy the other person when they don't really want to do that, they just want their feelings acknowledged. Or they need to work through the grief at the loss of the relationship."

> (5(1)[14-18]) "[Y]ou have got to be aware of the grief cycle on a divorce and work with that. I think you have got to be very clear about how some people are at different stages of their separation and understand that."

> 8[55] "[I]t's a situation where they're uncomfortable and uncertain and scared, of course fear plays out anger as well, because they're upset and that's the big set and all the subsets are anger, grief."

One experienced Lawyer for Child gave the specific example of how grief can affect grandparents trying to maintain a relationship with grandchildren where the parent's relationship has broken down.[341] This lawyer explained the importance of being able to take a "quieter approach" in such a situation, highlighting how having an awareness of parties' grief allows lawyers to tailor their approach:

> 5(8)[2-6] "Grandparents, this is my experience, that grandparents take on the grief of their children more so than the parents themselves and so they are grief-stricken from the breakdown of the relationship …[T]hose are hard cases because I think you need to tread so carefully… [T]hey are just tragic cases and so I try and not kind of go boots and all trying to resolve it you know in a more quieter way and try and make other suggestions and roads in terms of seeing the kids or providing presents or indirect stuff to try and resolve the relationship."

Mental health, personality disorders and addiction

Others described cases where mental health issues or personality disorders were a factor as characteristic of those which end up before the court.[342] Addiction was also mentioned a few times. One lawyer emphasised that "for children and more parents we need to be very mindful about mental health and addiction and we need to learn more".[343]

> 12[88] [Which cases go to hearing?] "There's the odd one that there's an interesting legal point in it but on the whole it's a lot to do with intractable personalities. Often to be honest I think either diagnosed or undiagnosed mental health issues sometimes."

> 7(3)[6-8] "We're helping people who are actually usually very vulnerable to get through a difficult and very slow process. [7(5)[19]] We deal with extraordinary levels of dysfunction and distress in human behaviour and experience. Much more so I think than [even in acute psychiatric care]."

"Difficult" clients

[340] 1(6[5])
[341] 5(8)[2-6]
[342] [4,6,7,12, 16,17]
[343] 15[136-37]

Some lawyers used fairly generalised language to describe "difficult" clients who are not "functional" and thus incapable of resolving problems, ending up in protracted Family Court hearings.[344]

> 4(3)[1-3] **"**Well, my theory is that [more Family Court cases go to hearing because] the Family Court deals with the worst of the worst. Most people that go through separation or have troubles don't come anywhere near the Family Court, so by the time you get to the Family Court you're dealing with people, there's a serious issue to be heard, whether it's because of personalities or mental health or something effectively has been going on like domestic violence and all that sort of stuff [...]"

> 12[24-26] "[T]he more senior that you get with Lawyer for Child work you tend to have less and less files but they're more and more difficult and you end up with the rump of ones that simply never resolve […] [u]sually because they're difficult people. […] which doesn't actually make for hugely [rewarding work]. I've really enjoyed doing lawyer for child work back in the day when you're dealing with potentially functional people and kids and it's resolvable but some of that really really hard stuff is pretty hard work actually and you do, you end up getting more of that, which is fair enough I suppose if you get more senior, but some of it's pretty hard work."

Aggression and antagonism

Some lawyers expressed the view that the level of aggression in proceedings was often the result of the clients' entrenched antagonism, rather than that of the behaviour of lawyers, or of the Family Court process. Another argued that client stress during separation rather than simply aggression contributed to cases which failed to settle neatly or in good time:

> 4(2)[6-8] "You're dealing with clients who are under a lot of stress who aren't operating that well really so it's no surprises that when the case comes to court it's not going to be all nicely put together like a commercial case."

> 18[18] "Part of [the reason the Family Court is a conflictual environment] is they're coming to the Family Court to resolve a conflict. They're right in the mix of the conflict so there's an inability to have an impartial view."

> 3(12)[11]-(13)[2] "Of course it's fucking adversarial. Ever separate a couple before? […] What do you think we deal with"

> 3(13)[4]"I don't think there's much you can do [to reduce party aggression]. As I said it's one of those things, it does happen but it's sufficiently rare that again, like I said before, I think the harm of trying to solve it will outweigh the good you're trying to achieve. I don't think it's necessarily that adversarial, I think that's just not true, but what we said before, we're dealing with people who hate each other. For most people it's their most emotionally difficult period of their lives. It's hardly surprising they come out of that process feeling .. if they'd sat down in a counselling session with their ex it would have felt adversarial. If they'd bumped into them in the supermarket it would've felt adversarial so that's the first thing. I don't quite see how adversarial it is. It's also by definition adversarial because what you're dealing with is immensely personal. I've never been through it, it must be horrific, absolutely horrific… So I think you've gotta mix up, people conflate the idea of

[344] (12)

> adversarial with fraught and I think they're different concepts and I think it's naturally fraught. And also, an old cliche, most of them don't get to court."

Cases which end in a hearing

Many lawyers highlighted that the clients who go to court were at the extreme end of the spectrum,[345] with the majority of cases settling without recourse to hearing. Of the cases that go to hearing, the reasons the lawyers saw them as doing so correlated closely to their assessments of the emotional and mental health issues encountered. When it came to the sort of cases that cannot be settled and end in a hearing, some lawyers were strongly of the view that the motivating force was inherent to the clients and their level of dysfunction, to the point where they had no ability to settle voluntarily and required a decision from a judge. Others described irrational clients who were determined to fight at any cost, and clients who for whatever reason were simply incapable of resolving the issues. This included clients who were seen as reacting through the courts.[346]

> 3(13)[8] "And not just of the lawyers, also the clients. Sometimes the clients are just fucking incapable of after 3 years getting a resolution and in some ways the outcome is often irrelevant really. It's just a way of finishing the file and until that point it's not really adversarial."

> 4(5[5])"I'm just suggesting [to one client] "can we please just try and find some middle ground here" … where the client is saying "I don't care if it takes that long, I don't care." That's what she's saying, the position she's adopted, no matter what my advice is, she has taken a position that she doesn't care how long this takes. So …you just have to make peace with that. I think that's the thing where I often remind myself it's actually their decision. You give them the advice but it's their decision what they want to do."

"Intractable personalities"[347] and clients with "completely unrealistic" expectations[348] were highlighted as prolonging disputes and ending in hearings. Some described cases about "disgraceful parenting" and people "cannot put their children first" as those which end in a hearing.[349]

> 12[86] "[Y]ou often get people who are their second or third lawyer, the thing is a disaster, they're not getting what they want. Often that is because what they want is completely unrealistic so those tools are often that reality testing and then having a big discussion with them about, what about a reset, you've sort of seen which way it can go for the last two years, spent a fortune and things have got worse and you haven't really got anywhere, what about trying something a bit different, how about sitting down?"

> 12[88] [Which cases go to hearing?] "There's the odd one that there's an interesting legal point in it but on the whole it's a lot to do with intractable personalities. Often to be honest I think [the reason is] either diagnosed or undiagnosed mental health issues sometimes. Sometimes a legacy just of a really destructive relationship and ones used to get his or her way the whole way and one eventually

[345] [4,5,12,14,16,17]
[346] 14[122]
[347] 12[88]
[348] 12[86]
[349] 1(1)[10]

> says "no, enough." But what ends up in court in COCA stuff being argued, I think at least half of them have got a hell of a lot to do with the intractable personalities of the adults that are involved. The balance, some of them are tricky relocations. Sometimes you do need judges to decide things, which school are the kids going to go to. Sometimes, I just wish they could be decided more quickly sometimes. But a lot of the other stuff, everyone knows what the answer's going to be, or should know what it's going to be but the personalities make achieving that, in that rump of cases, just impossible."

Some of the lawyers acknowledged poor lawyering as a factor which could contribute to a case ending in a hearing, though this was less frequently referenced than client-based issues.

> 4(4)[3] "[Failure to settle is not always the lawyer's fault] It's not as if all lawyers are created equal. There's going to be varying abilities … But then again [what] it comes back to: These [clients] are the worst of the worst."(4[3])

> 14[84] "For me the [reason for] failure [of ending in court] would be two things; for me personally, that I didn't understand or could've encouraged them or understand where they were coming from, I mean I've only got one of the parties. Sometimes it's hard with the other party. Or maybe, could I have communicated better with the other lawyer or could the other lawyer have done more? I just think, could we have done more? And then the other side of it is for the client, particularly if it's a children matter. The whole hearing, cross examination, the witnesses and all of that. How can you ever have a decent co-parenting relationship after that? When you've done that? When you've ripped the other person apart, or let a lawyer do it? How can you ever effectively co-parent? You have no trust for each other."

A number of lawyers described working extremely hard, and being quite anguished, to dissuade clients from litigation and uncooperative approaches.[350]

> 2(4)[7] " [T]he other side were very cooperative. … But then my client said … 'if they don't give [additional information] within 10 days … file proceedings'. I said, 'But why, we're cooperating really well, they're coming back to us really quickly with everything, I don't think it's unreasonable at all', and she said, 'No I've waited so long.' I said, 'Okay I understand that but it was no one's fault,' … So she goes, 'No, this is what I want, I want you to say you've got 10 days to give me this information or we're filing.' So I explained to her I don't feel that's reasonable but she said to do it. And we talked about it maybe during three phone calls, the same conversation, but after the third phone call she said 'I still want you to do it.' So I did. And it derailed everything. … But she didn't care. My client didn't care. She's like 'I don't care. I'm taking this to court if I don't get this information'."

Though several took a slightly fatalistic attitude that nothing can be done to stop certain clients ending in a defended hearing.[351] One lawyer commented:

> 3(14)[1-5] "I don't know that I agree [the court is] adversarial. […] It's the nature of all clients and in particular the nature of clients who end up in 4 day hearings. […] There's nothing you can do: One of those things."

[350] Lawyers described using a variety of strategies to dissuade clients, examined in the "objectivity and reality checking" theme.
[351] 3(14)[1-5], 4(3)[1-3], 5(4)[4]

Safety issues and violence

Whether a case raised issues of child safety distinguished the resolvable from the court-bound in the eyes of a few lawyers. One lawyer described cases involving "domestic violence or meth or whatever"[352] as requiring court intervention and making any aspiration to cooperate or conciliate unrealistic.

> 18[99-100] "When I teach my staff to triage new clients we're really looking at if it's division of time or if there's safety elements to it. If it's purely division of time and a disagreement of parenting styles: wholly settleable. Well within that basket of guys we should be able to make this work. If there's elements of safety, drug use, wellness, violence, neglect, substance abuse then that's when its going to require more than just mediation. As I said before there are some things you can reach agreement on for instance you may not agree for the need for supervision, but you may agree to a supervisor. Or you may agree to the need for supervision but agree to an alternative means instead of just going to a hearing, for instance, lets get a parenting assessment, or a social workers or psychologists report. [100] Safety is what differentiates in my view, or when we can reach agreement… or when you can't."

Another also described parental alienation cases as being court-bound.

> 18[102] "Absolutely [parental alienation is something I see]. That's what I would also classify and should have mentioned it under the safety box. That would come under violence, psychological abuse, that would also be in the difficult category of files and very difficult to reach resolution or agreement."

Lawyer's stress and mental health in Family Court practice

An important theme that arose during interviews was the impact of Family law practice on lawyers mental health. Almost every lawyer described the work of a Family Court lawyer as being often intensely stressful or destressing.[353] Working with intensely difficult or untrustworthy clients, and the emotional weight of cases was frequently cited as a cause of stress and of exhaustion, described as "burn-out kind of stuff".[354] Abusive behaviour from colleagues or senior practicioners was also noted by some as causing or contributing to stress. A few lawyers described experiencing intense anxiety and depression during their Family Court practice.

> 8[169] "A colleague said to me the other day when we were talking about depression which is, mental health stress is a real thing for all of us and she just said I don't think there's a family lawyer I know that isn't depressed. And there is something to that."

> 17[116-19] "[My stress levels] are much better now. Six months ago they weren't that great. We've got to look after ourselves. I saw an email from the Law Society offering 3 free counselling or psychology sessions if you're finding things tough. I thought that's good but we've got to do other

[352] 6(5)[7-11]
[353] [1-9, 12-18]: only exceptions, [10] and [11].
[354] 13[104-106]

things, like publicity to make people feel ok to go to see someone for stress a month. […] We've got a lot of learning to do about workload and stress."

7(13)[4-6]-(14)[7] "[Working for difficult or untrustworthy clients is] a very big raw nerve in this area of law and in this professional generally. [A]s a clinician if I had a patient who was causing me the level of distress that some of my legal clients caused me, I would be verging on being disciplined for continuing to work with them clinically. Yet we go on for years sometimes with people who cause us significant distress and in fact the best solution is for that person to go to another lawyer. I think that is a healthy thing and I think that is a good thing…[Family Court lawyers] deal with probably the biggest concentration of personality disordered people in any (other than mental health services) other."

One lawyer described a particularly challenging day, which involved supporting colleagues struggling with the emotional weight of Family Court work, and two difficult matters in the Family Court that day, "[all] before lunchtime":

8[153-55] "It's tough. […] My Friday, thankfully all days aren't like this, but I started the day off with a junior lawyer who had had the party on the other side [self-harmed] and she was devastated and so I took her out for a cup of coffee along with colleagues just to sort of say, "yep, it is shit, but we've got to get on and this is hard and it's okay for it to be hard and it's okay for you to feel the way you're feeling, it's completely good," and it just becomes left foot, right foot. And then I was dealing with another senior colleague, friend this time and she was feeling upset [about a terrible act committed by her client] …Then I went to court to deal with two matters. One was boys I act for …[who have suffered] amongst the most extreme child abuse I've seen …. and so dealing with an extreme situation and frustration that I didn't see that Oranga Tamariki was doing all it could do to fix the situation and I was concerned that delay was leading to the situation worsening which it subsequently did. I found out that same day. And then also dealing with another matter where there was a large number of children had been uplifted … and taken from one caregiver where they had been abused physically and emotionally and trying to orchestrate that situation and that was before lunchtime."

Family law is of course not without enjoyment. One lawyer highlighted the joy of Family Court work, in achieving good outcomes for clients and children.[355] The "good stories and the good outcomes", and the ability to make a positive difference in peoples lives were identified as a "huge driver" for Family Court lawyers. Stress and overwhelm however could jeaporadise the enjoyment of family law:

7(15)[2] "… we are in this trickle [of stress] environment. I have I don't know how many Lawyer for Child files, probably about 50 … [and] about 70 or 80 files in total with different things and of course they are not all active but all of those files represent little pockets of significant human dysfunction. That takes its toll on you. […] [W]orkload is a huge problem within this area … because of the human dimension. It's not counting the beans or whatever:.. [T]hese are people who are relying on you; the decisions that are being made are important. … I am never going to file submissions or a report which is dross. I mean I can't do it. I think most of us are like that. We just can't do it… I was told by a judge recently is that you just lose your joy for it. Because there is a lot of joy in this work which we haven't talked a lot about but there is a lot of joy. It's good to see people graduate from programmes and do well. Maybe not as well as you like but they're doing okay and they're still there and you get these good stories and these good outcomes. There are things

[355] 7(15)[2]

> that you walk away from and you know that if it wasn't for me Oranga Tamariki would have just swiped that under and that kid would just be left or whatever it is. I know that I have contributed and I think that's a huge driver for us a family law bar. That we are people who want to make a difference in people's lives. Some people overestimate their place in that."

Stress management

Many lawyers relied on supportive colleagues as their major stress management strategy.[356] Often times colleagues provided emotional support or a sounding board, being someone to "vent" or "offload" to. A couple of lawyers particulary mentioned relying on colleagues for legal or ethical advice rather than emotional support. However, it was clear that this legal or ethical advice was of great comfort to them, suggesting that these were problems which impacted them significantly emotionally.

> 5(11)[1] "I think it's quite hard actually. I think it's tough. I see my friends looking exhausted. The cases seem to be getting harder and more intense. They go for longer, there is more delay. …I think you have got to be very careful of your own mental health…. I get a lot of support from my family law friends and I think that's really critical. [I]t is really hard doing this sort of work. I would [talk] every day with [my two chambers partners]: Every single day, three times a day, four times a day. I wouldn't be able to do this job without them. I think that people do need to realise that this is actually an incredibly hard job and it's just things like checking a judgment, keeping yourself going."

> 6(12)[6] "… Luckily here [in chambers] I have got other barristers and you know yesterday I just had a barrister in here because I've got one of those Lawyer for Child cases and Oranga Tamariki won't do their job and I just had to vent and anyway so they all came in in the end you know and everyone sort of said we do this or whatever. […] And you need that. Whatever level you are at. And that is actually an important thing. It's not written anywhere. It's not recognised at all. But I think it is really important."

One warned however that whilst collegial social support was important, it was not systematic, reflective, or done in a controlled way, and was thus not necessarily sufficient as a stress management technique in and of itself.[357]

A number of lawyers identified maintaining a balance of Family Court cases with other civil or criminal cases, or even with just more straight forward family law files, as a major stress management technique.[358] One also suggested regular holidays assist,[359] and two discussed work-life balance as an important part of maintaining mental health. Across the interviews many shared the view that family law was a difficult area of practice, and lawyers needed to be mindful of their mental health.

> 15[68] "… this is not an easy job if you're going to do it well. You've got to look after yourself. I work on, some days I do it better than others, balance…. it's not easy. If you're not careful it can take a toll on you, some of my colleagues are overweight, some of them drink too much, some of

[356] 5(11)[1]; 6(12)[6]; 7(3)[2]; 8[121]; 8[153-55],[157],[173-75] 17[116-19]
[357] 7(5)[19]-(6)[2-4]
[358] 8[5-7] 12[34-36], [24-26]; 14[100] 15[49-55] 18[5-8]
[359] 5(11)[1]

> them spend, they have their own … you know you've got to look after yourself, you've got to know who you are and what you need. Take your breaks and look after yourself because it's not easy. It's not for the faint hearted if you're doing it well."

Professional supervision and mentoring

Only a few lawyers stated that they currently receive some form of professional supervision,[360] though a number acknowledged a need for professional supervision and a desire to get it.[361] Four more felt that a requirement for family lawyers to receive professional supervision would be beneficial.[362]

> 7(20) "[Supervision] should be a requirement of getting a practicing certificate actually. […] You can't be a nurse without it. You can't be a doctor without it. […] And it doesn't have to be onerous: I mean, it could be a senior lawyer. […] [S]ocial workers have them. They have external people who do it. But there needs to be resource around that. […] [I]f you're in practice and you can't afford $100 to $150 I think every month then you're doing something wrong. We may not command the greatest fees in the legal world but we still make good money. Come on. We make good money."

Another dismissed the idea of external supervision, but did suggest that a peer review or buddy system should be part of lawyers Continuing Professional Development requirements. This lawyer placed emphasis on the need for peer learning and education, particularly around the different situations encountered in family law practice: the practical aspects of practice. Additionally, four lawyers considered that mentorship or supervision of young lawyers by more senior lawyers would be beneficial in providing learning and support to young lawyers.

> 18[139-42] "As a starting point, education is important for those who are actually practising in family law. Not education in terms of understanding the systems, but about approaches to different types of scenarios. … [140] One specific suggestion about improving collegiality and a partnership approach. … I suggested peer review of files would assist with collegiality and also should be counted towards CPD. And also, would assist with approaches in the Family Court and in practise. … [142] Not supervisions: I also suggested making it mandatory for all practitioners in the Family Court to buddy up once a year, and switch one file. And that person reviews and you meet up over coffee, and discuss it. Ask questions, create greater discussion, upskills everybody and could be for CPD."

> 6(12)[1-3] "[A]ctually, I'll tell you what, in my former life before I became a barrister I used to be a partner at [a major city firm] and I had a team of people and we … did a lot of training, we did a lot of working with the youngsters so that when they went to court they didn't make a complete you know. […] [N]ow I feel as though that's going. And it's very, very hard with the newbies for them to learn anything. I have actually had quite a few people, one or two years out, phone me and they have said "[C]an we do coffee because I am really unhappy? I spend most of my day crying in my office." Because they're not getting assistance or you know when they try to do something they don't know what they're doing and then they get abused by their partner or whatever. That sort of behaviour is still happening."

[360] 4(10)[3];7(5)[19]-(6)[2-4]; 8[159]
[361] 6(12)[6]; 8[159] , 14[125] 15[70] 17[121]
[362] 6(12)[6]; 7(5)[19]-(6)[2-4]; 8[177-85]; 15[70]; (18[139-42])

Category two: Family Court process and functioning

Family Court issues

A strong sentiment running throughout the interviews was that the Family Court has some significant problems, which create challenges both for lawyers practice and for families who encounter the Family Court.

Delay

The most common and serious problem the lawyers identified was delay in the Family Court, particularly in getting to a hearing. Twelve of the lawyers considered that delay was the most significant issue with the Family Court.[363] A number highlighted that delay is especially damaging in the Family Court because the issues requiring resolution are evolving, rather than already completed as in the case of criminal and many civil proceedings, as highlighted by one lawyer "delay is more damaging in family [courts] because of what we're dealing with".[364] Further, Family Court disputes involving children occur in the context of a child's growth and development, meaning that delay occurs at a critical time for children.

> 12[154] "To be honest delay is the biggest issue for me and that in itself makes, stretches the description of [the court as] "fit for purpose". When you're filing COCA applications and they're not going to be heard from go to woe [for] the best part of two years, you are not doing justice in a child sensitive time. And in fact things are becoming more entrenched over that time. So that's the biggest worry I think."

> 5(11)[3]-(12)[8] "I have great confidence when we get into Court. My concern is we can't get into Court. [In one case] …we had the psych report in July last year. It's over a year and everything's changed. … Now there is a whole new issue … and it's just an absolute disaster and it's got worse. … So I have got big faith in the system it's just getting there."

The impact of delay on any children involved was a source of major concern and frustration for these lawyers. Delay in getting to court and of resolution of parents conflict meant that children grew up in the midst of parents conflict, risking further harm to the children.[365] Delay could also allow a poor status quo, sometimes created by an interim order, to cement.[366]

> 8[41] "the delays caused primarily by lack of funding for the Family Court: It staggers me that children are growing up with this background of conflict which, once you're in the system, is just a part of, the analogy I often use is that children can smell their parents' emotions. Within half a second my children will know whether I'm happy, grumpy, tired, stressed and even with the best will in the world we can't hide that from them and the impact on kids because they are so much more vulnerable and through the egocentric view they take of the world they take in terms of

[363] 1(7)[1],(11)[7]; *3(2)[2-4];* 5(11)[3]-(12)[8]; 7(3)[8]-(15)[4]; 8[41]; 9[334]; 12[50]; 13[110-12]; 14[82]; 15[147-50];17[39, 113-14]; 18[20]
[364] 3(2)[2-4]
[365] *3(2)[2-4];* 5(11)[3]-(12)[8]; 7(3)[8]-(15)[4]; 8[41]; 9[334]; 12[50]; 13[110-12]; 14[82]; 15[147-50];17[39, 113-14]; 18[20]
[366] 7(3)[8], 9[334],

immediate people, it's just that much harder and while they are involved in that process I am certain there is a level of impact and the impact is unlikely to be a positive one."

9[334] "[If] you're waiting for a 133 report to come in they won't set it down even though you know it's going to come in 3 months and we wouldn't have the hearing for 6 anyway, but they won't set it down. So then you wait the 3 and then the hearing's in 6 [months more] so 9 months have gone past. And if you've got some pretty BS interim order then you've got a status quo argument that's, again, not welfare and best interests focussed, it's just actually a consequence of the inefficiency in the system."

Availability of report writers

A second problem highlighted by five of the lawyers was the lack of availability of report writers.[367] The lack of report writers could contribute to delay in proceedings, and where an order for a specialist report it was seen by some as impeding the ability of the lawyers or of the court to get the heart of the issues underlying the parenting problems. Two saw the lack of availability of report writers as a clear budgetary or resourcing issue, where judges are dissuaded from ordering reports due to cost.[368] Three lawyers were of the view that psychologists avoid the Family Court because their reports get 'pulled apart' in proceedings, the unpleasant cross-examination experience, and the risk of outside complaints.[369]

7(4)[4] "I think one huge problem that we have is there is some legislative difficulties in the court getting reports that it needs for example. Not being able to get a psychological assessment of a party is just crazy. Because you are often fundamentally left with this problem - … in a very un-clinical way — what's wrong with this person? Why are they behaving this way? And yes of course there is the more important issue is the effect of that behaviour upon the child. […] But …[w]hat's the matter with you so we can help you? Or … so that we can protect the child or whatever the question is…I was at a recent seminar with the psychological association [where the speaker] … actually made the statement quite crudely and bluntly that if people are in litigation for 2, 3, 4, 5 years, one or both have a personality disorder or a mental illness. And that bears itself out time and time again. And I think that's where the courts often sitting there going actually you know what do I do here. Because I don't know what's wrong with this guy."

16[68-70] [T]he information [in 133 report] is always helpful … [but] the Judges are saying to us, we'll look it's a last resort if you can't get the information in any other way. […] Judges will actually say to us here any way is, what's the psychological evidence that this report is going to provide and it's been quite good because you know I think there may have been a trend of getting them too often which does cause delays. But most definitely a useful tool where there is alienation, potential psychological harm, you know anything like that. Undue pressure from one parent which I guess is basically alienation."

Lawyer's "wish list" for the Family Court

Restoring counselling and counselling co-ordinators

[367] (1(8)[1];6(12)[11]; 7(4)[4],(15)[4]; 12[154-56]; 16[68-70])
[368] (1(8)[1]; 16[68-70])
[369] (1(12)[3];6(12)[11]; 12[154-56])

Bringing back and expanding access to counselling was the priority reform for seven lawyers.[370] These lawyers were adamant that easy, early access to adequate counselling hugely reduces the numbers of cases coming to court, and would help avoid parties becoming locked in intractable conflict. Lawyers highlighted that counselling too has long term benefits for the parties beyond the particular dispute, teaching them how to co-parent and communicate for the length of their parenting relationship.

> 1(6)[3]) "[D]ecent counselling [is] number one [on the list of needed reform]: . . . [R]eally proactive parent counselling about communication, about children's needs, about the fact that they're going to be mum and dad until the day they tumble off the twig. That stuff is huge."

> 7(15)[4-6]-(16)[4] "[P]eople need therapeutic help. […] [T]he law could certainly provide [more access to therapeutic services]. [W]e have s46G counselling which hardly touches what we need. I think there are a range of therapeutic models out there. Family functional therapy which could almost invariably assist those cases that have become intractable…"

Two lawyers specifically asked for the return of experienced local counselling coordinators, because early and appropriate referrals with a good "fit" between client and counselor help to increase early settlement.[371]

> 1(9)[13]-10[1] "We had fantastic, hugely experienced counselling coordinators who were out there in the community publicising the counselling, the mediation, just doing all this work so that people understood what the court did, they could understand that you approached the court and you filled out your section 9 application and … I mean people used to come to us as lawyers, from the very beginning, used to come to us. You fill out the counselling request and you immediately rang one of the counselling coordinators and you said, I'll fax this through to you, it just had everybody's names and bits and pieces, this is what's happened with this family. Okay these are the issues, who have we got, who's available with experience working with criminal families or experience working with addiction, you know. Who have we got that's free at the moment that's really good. "Okay I'll pop these notes on the bottom of that and I'll send it through to you now" and those people would be in counselling within the week."

Specialist registry staff

Five lawyers wanted to see better resourcing in their local registries, with a number calling for the return of the previous system of specialist registry staff in their local family courts.[372] They felt that this would reduce delays in urgent matters because local lawyers would be able to work with local staff to prioritise cases correctly, and would help avoid applications being lost after filing.

> 3(16)[12]-(17)[1] "[G]et the resourcing at the registry level, not fancy-pantsy lawyers … just good old fashioned pay the damn registrars."

[370] (1(6)[3], 1(11)[13],(11)[15]-(12)[1], (12),(13)[2]; 5(10)[5]; 6(11)[4-8]; 7(15)[4-6]-(16)[4];12[158];14[88]; 17[108])
[371] (1(9)13; 5(10)5)
[372] (1(9)13;2(15)[11];3(16)[12];5(9)[12],(10)5);7(15)[4])

> 2(15)[11-15] "It's a slack court. Anything goes. We need to build our confidence amongst not only just our legal world [colleagues in other courts] but with clients as well. . . . I file applications, I get them back 4 months later. There is no tice. Justice delayed is justice denied. It's getting really ridiculous. I've had family courts lose applications, or [make mistakes about the applicable fees]."

Improved case management

Five lawyers sought improvements in case management systems,[373] with three suggesting reversing the current centralisation of the Registry, on the basis that the local knowledge of local court staff helps greatly to streamline case management. [374]

> 5(9)[12] "I would get rid of centralisation. [With] one exception I suppose: I do think long causes are going well. … But everything else ought to be put back into their individual Courts. Have you filing in the Court where you live. I would get those Registrars back who should have been there and never gotten rid of. […] (10)[5] I would immediately get rid of centralisation. I would have everyone get their work back in their own Courts. I think we have got great Judges and the Courts in [city] I think are run really well. I would get it all back to where they should be. Get it out of this ridiculous routine where you file and they lose it. It just drives me insane."

> 4(11)[11]-(12)[1] "[We need] a much more robust case management system like the High court has, but then again they're a much better resourced court."

Resourcing

There was a strong feeling amongst eight lawyers that many of the issues with the Family Court are not its process but under-resourcing to carry out its process.[375] A couple commented they did not want more major reforms, other than removal of restrictions on lawyers acting and the return of counselling, just the resourcing of the current system.[376]

> 17[51-54] "I think it becomes a [resourcing] issue too. Because the lists are busy. The judges only have that time. They've got to have that pragmatic streak. They're expected to work miracles, but they've only got 45 minutes to do it. I don't have any complaints about the process, it just needs to be better resourced."

> 7(19)[12] "The reality is … in the Family Court we have got so few resources and we are not valued. Boohoo. But we are not valued. We've been systematically told that we are the problem, we make things worse for people and we just want money and we just want to cause fights with people. You look at the court renovation over the road…Go down to the criminal suites. Massive. Marble. Huge technology things everywhere. [Y]ou go down to [smaller] courts and [the technology is so bad] … counsel are dialling in and you end up half the time using your cell phone. It degrades the dignity of the court and it's just not fit for purpose."

[373] (1(9)[13];2(15)[11]; 3(16)[12]; 4(11)[1];5(9)[12],(10)[5])
[374] (1(9)[13];3(16)[12];5(9)[12],(10)[5])
[375] (1(8)[1];3(16)[12]-(17)[1],(19)[11]; 5(11)[3]-(12)[8]; 6(12)[11];7(19)[12];13[70]; 14[55];17[51-54]17[108-11])
[376] (3(16)[12]-(17)[1]; 17[51-54]17[108-11])

Discussion

Just as a large focus of family justice policy has aimed to aimelorate the damaging impact of adversarialism and overly adversarial lawyers on parties and children in the Family Court, as this study has found so too many Family Court lawyers are deeply aware of and are troubled by the damage done by adversarial lawyering. On the other side of the same coin, lawyers in this study were also deeply aware of the danger an overly conciliatory approach can pose for clients in need of advocacy, support and guidance during family disputes. This section discusses the key observations arising from the interviews with Family Court lawyers. These observations highlight the need for deeper understandings of the reality of Family Court practice and engagement with the ethical frameworks which underpin current modes of practice as shapped by family justice policy. Also evident is the need for greater understandings — by both policy makers and lawyers — of the range and nature of mental health, addiction, and entrenched personality issues encountered in the Family Court; for the sake of both adult parties and children, as well as for lawyers' own mental health and sustainable practice.

The status quo in Family Court lawyering: settlement-focused practice and the child's best interests

The public policy and legislative emphasis in family law on the avoidance of litigation and encouragement of settlement has seen the promotion of private agreements over court-ordered outcomes as the far better option for parties. Perhaps unsurprisingly then, a number of overseas Family Court studies have found that lawyers have adopted a considerably less partisan approach to their work in response to Family Court reforms, taking on a responsibility to promote settlement and conciliation, and are strongly committed to settling cases as often as possible. Notably, the commitment to settle cases as often as possible was not necessarily the case amongst the New Zealand lawyers interviewed in our study.

Many of the lawyers in our study believed strongly in conciliatory and settlement-focused practice. They saw settlement as a means to avoid the steep costs of litigation, as well as the stress, delay, and emotional destructiveness of litigation. However, the emphasis so many lawyers placed on not settling too easily was striking. The lawyers were concerned to qualify their support for conciliatory practice and to emphasise reasons lawyers should be cautious about settling at all costs. This seemed to be reflective of a feeling that some Family Court lawyers were too conciliatory, which risked letting down, or endangering, their clients who were in need of protection and advocacy at a difficult point in their lives. Lawyers identified types of cases where they saw settlement to be inappropriate and bad practice. These typically included cases where violence, abuse, or power imbalance issues were present, or where settlement, particularly a rush to settle, would risk sacrificing the clients' interests. "Unresolvable" cases, where the parties need a decision to be made by a third party, were also seen as requiring a hearing. Further, a part of the reason some lawyers wanted to caution against overly settlement-focused practice appeared to be that they were concerned that too many lawyers are too conciliatory, underselling their clients. The qualification on settlement-focused practice, and the less committed approach to conciliation at all costs would appear to accord

with the way in which many of the lawyers described their role: as strong advocates for clients at difficult periods of their lives. To be too conciliatory, at the expense of the client's interests, would fall short of this view lawyers have of their role.

Lawyers' responses evidenced an attention to the child's welfare and best interests in their assessment of the costs and benefits of settlement-focused practice, and the types of cases for which settlement is appropriate or not. Notably this attention was evident both in lawyers' support of settlement, and in the justifications of those who qualified support or were less committed to settlement. With respect to those who supported settlement-focused practice, attention to the child's best interests arose in relation to lawyer's sense that "no-one wins" if a case goes to hearing, and in lawyers' assessment of "good Family Court lawyers" being those which assist parties reach resolution without resort to hearing for both the benefit of the parties' long-term relationships and the children. For those who were less committed to conciliation, a key concern was that a rush to settlement could risk overlooking or ignoring safety issues, thereby jeopardising the child's safety and welfare. The finality of a court ordered outcome was also recognised as being able to provide parties a "finish line", ending any involvement of children in adult issues during the course of the dispute.

In some instances, lawyer's concern for the child's welfare and best interests was made explicit. Alongside this explicit concern was a strong focus many had on "getting it right" — that is, to determine where and when settlement was appropriate or not. An interpretation of this is an implicit concern lawyers have for the children's welfare and best interests and the future functioning of the family beyond "settling for the sake of settling". In this way, lawyer's attention to the long-term dimension of the dispute and concern for the children involved can be seen as shaping lawyers' aspirations for settlement, or their advice to pursue a court ordered outcome, rather than simply stemming from litigious, adversarial behavior on the part of the lawyer and desire to prioritise their client's win, as critics have leveled at Family Court lawyers.[377]

Recognition must also be given to the reality that ending in a court hearing is not always a failure of the legal system, that some cases are not suitable for private settlement and need state intervention. The cases that do proceed to final hearing make up a small percentage of Family Court applications, let alone clients approaching lawyers for family law help. As discussed further below, the cases that make it to a hearing are oftentimes characterised by allegations of violence, abuse, addiction, mental health issues and entrenched adult conflict over how those issues should be resolved.[378] When such cases are diverted into mediation or negotiation, the

[377] See for example, Philip Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department, 2000) as cited in John Eekelaar, Mavis Maclean and Sarah Beinart Family Lawyers: The Divorce Work of Solicitors (Hart Publishing, Oxford, 2000) at 6–7.

[378] Daryl Higgins and Rae Kaspiew *Child protection and family law… Joining the dots* (Australian Institute of Family Studies, Melbourne, 2011) at 1; and Daryl Higgins and Rae Kaspiew *Child protection and family law… Joining the dots* (Australian Institute of Family Studies, Melbourne, 2011) at 1–2 and 12 who conduct a wider review of the literature.

research shows that the focus on conciliation and agreement can lead to serious safety issues being marginalised or ignored.[379]

Concern for child's best interests

Lawyers responses across the interviews demonstrated an already strong commitment to child's welfare and best interests in their work with adult parties, despite no direct legislative duty owed to the child. Some lawyers saw themselves as having a direct de facto duty to the child, arising more out of moral concern for the well-being of any children involved. For the most part however, whilst almost all lawyers expressed concern to consider and protect the child in their work with adult parties, the commitment to the child's best interests was based on the fact that the child's interests form part of the legal landscape on which lawyers are advising clients. That is, advising clients on the law makes the child's best interests a determinative factor. A number of lawyers felt that the child's best interests are already addressed through a dovetailing with the client's interests, in that the child's best interests are the standard by which the court decides cases in the Family Court. Thus whilst the child's best interests are relevant to lawyers practice, for the most part they are indirectly relevant as part of the client's interests.

Most lawyers ultimately rejected the idea of any direct duty to the child. One of the key problems expressed about such a duty was the potential for conflict between the lawyer's existing duty to the client and any additional duty to the child, as well as the potential encroachment a duty to the child could make to lawyer-client privilege. Lawyers were clear that their concern for the child's best interests did not mean that they would override client confidentiality to protect or pursue the child's best interest. There were two clear exceptions to this: where there was an imminent harm to the child or the client, or where the client was intent on deceiving the court. This accords with the way in which the lawyer's consideration of the child in proceedings independent of the child's interests focuses predominantly on their safety and welfare, beyond which lawyer's roles as advocates for the client and duty to the client ultimately take precedence.

Lawyers described using a variety of strategies to prioritise the child's welfare and best interests, and to reconcile any tension which may arise with the lawyer's duty to the client. Throughout the interviews the use of reality checking, strong advice, and "educating clients" were described as enabling lawyers to help clients better understand what is in the best interests of the child, and accordingly the clients' own interests, both in respect of the "strength" of their case and potentially their longer-term parenting relationships. These strategies provide lawyers the ability to balance competing duties and interests, as well as for some, their own moral and ethical convictions to protect the child in disputes between adult parties. The use of reality checking and client management does however raise questions about the basis upon which

[379] Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 166; and Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992) as cited in Anne Thacker "Solicitors and Divorce" (1992) 17 Alternative Law Journal 305.

lawyers decide and define what is and is not in a child's welfare and best interests, and the level of influence this has on client instructions and agency, considered in more detail below.

Managing clients: doing a good job?

Researchers and policymakers have generally taken a positive view of lawyers "reality checking" client objectives and expectations, though questions have been raised about the degree of influence lawyers exert on clients when doing so.[380] Across our interviews lawyers described employing a number of reality checking strategies to navigate their clients towards realistic and child focused positions. Reality checking and client management were viewed as helping to avoid prolonged and unnecessarily aggresive disputes. It was also seen as helping avoid harm to the client's legal prospects, the client's long-term parenting relationships, as well as to the child's welfare and best interests. Objectivity and reality checking were thus viewed as an important component of the "good" family lawyer. In many instances, lawyer's responses evidenced an inward-facing ongoing process of reality checking client instructions with the client, alongside the lawyer's outward-facing role advocating for the client.

It was observed that lawyers sometimes described deploying very strong pressure to manoeuvre clients towards what they saw as a more child focused and realistic position. In some instances, this included coupling their advice with an ultimatum that they would not accept contrary instructions. Whilst most lawyers say that "at the end of the day" they are advocates for the client and will abide by client instructions, the pressure exerted in some instances raises a question over the extent to which clients are able to obtain autonomy in the lawyer-client relationship where client expectations come head-to-head with a lawyer's own views on the client's interests, interpreted as being the promotion of child welfare and a good long-term parental relationship. Clients were sometimes seen as not always able to understand their own interests, and lawyers saw their role as educating and refocusing their clients on this wider or longer-term view of what their interests were. In many cases this provided valuable advice to clients, helping de-escalate disputes, as one lawyer described "we can prevent a lot if [clients] just have a good sounding board and get the right people around [them]". However, there is risk that this approach risks overbearing the client and their autonomy. This risk becomes more concerning if the objectives the lawyer espouses are less beneficial than sometimes thought.

Provision of advice on child's best interests and extra-legal advice

The second observation is that lawyers are oftentimes performing a much wider role than just that usually understood of legal services in other areas of practice. The lawyers interviewed provided advice about children's development, optimal care arrangements, and children's welfare and best interests. Reality checking, in particular, oftentimes required the lawyer to advise the client about what was in the child's best interests, where the client had been

[380] Katherine Wright "The divorce process: a view from the other side of the desk" (2006) 18 CFLQ 93 at 107. Wright later described this behaviour as "mildly partisan": Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481 at 484.

intending to act in a way or give instructions which would not have been in the child's best interests. Many of the lawyers were strongly committed to promoting child welfare in their discussion with adult clients. Whilst this may help to protect and promote the child's welfare and interests, or at least is certainly the aim, it does raise a question about the basis from which lawyers advise clients about what is in a particular child's welfare and best interests, which can come to have a strong bearing on clients through the reality checking process. Lawyers currently define the best interests of the child through their own eyes and "from a partisan starting point" as described by one lawyer. Just as some lawyers raised questions about the basis upon which lawyers would decide what was in the best interests of the child if a duty to the child were to exist, a similar question could be raised about the basis upon which lawyers currently make the judgements they do in advising clients about the child's best interests as a part of the legislative framework the client navigates.

Alongside advice about children's welfare and best interests' lawyers also provide advice on parenting matters, mental health, addiction and other health issues, social support structures, with some making referrals where necessary. This range of work points towards one of the other ways researchers say Family Court lawyers are often undervalued by policy makers: the actual range of services they provide is far wider than the remit of traditional adversarial lawyering.[381] Lawyers were conscious that their role often extends strictly beyond providing legal advice, of which a number felt discomfort about. Many of the responses evidenced a juggling act performed by lawyers: trying to maintain a clear distinction between their role as a lawyer, and that of a social worker or counsellor. Notably lawyer's advice related not only to what was legally appropriate for clients, but also about what was socially appropriate or "sensible". As highlighted by the Royal Commission in the development of the Family Court, "work in family law has an extra dimension".[382]

The provision of advice relating to children's welfare and best interests and extra-legal advice highlights two areas for further examination. The first is in relation to the level of education currently provided to or required of lawyers about children's development and optimal care arrangements. Outside of the lawyer for child training, none of the lawyers pointed to education around these issues. As one lawyer highlighted: "no-one teaches anyone this stuff". As the nature of the issues encountered in the Family Court are becoming more complex, the education-gap around these issues becomes more and more evident.

The second is the extent to which lawyers are qualified to provide more moral based advice about what is "fair" and "sensible". Legal ethicists have been divided over whether lawyers provision of moral advice is a good thing or not. Dare for example highlighted that lawyers do not have any real claim to moral expertise, there being "no particular reason to think that legal

[381] John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000); and see Rosemary Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 Journal of Law and Society 156 at 160–161.
[382] David Beattie and others *Report of Royal Commission on the Courts* (1978) at 150–151 as cited in Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 818.

training gives people the kind of expertise which makes them a good moral adviser or counsellors (in the non-legal sense)".[383] Neale and Smart in contrast did not see the provision of some extra-legal advice as problematic, and were in fact critical of lawyers who simply took and enacted instructions. The issue was where lawyers gave advice directed not at achieving their client's ends as much as the ends they themselves have determined, according to the court's shared-care paradigm, as appropriate. The idea that lawyers are entitled to give moral advice to their clients and to seek to persuade them to act morally chimes with roles lawyers already play in their interactions with clients. Lawyers are not only advocates and legal technicians, but also advisors and the advisor role goes much more widely than mere legal advice. The question is whether lawyers *should* provide extra legal advice about what is "fair" and "sensible", how right they are in their interpretation of what is fair, and whether lawyers are able to monitor their approach towards clients in respect of client autonomy.

Complexity of the nature of Family Court lawyering

One of the key issues seen as causing conflict and increasing aggression in the Family Court was the difficulty of the problems with which clients present. Across the interviews lawyers described the small percentage of cases which end in hearing as being characterised by high levels of client-based conflict and dysfunction, and highlighted the wide variety of issues Family Court lawyers deal with in the course of their work. High levels of emotion, intractable personalities, entrenched adult conflict, and mental health and addiction issues were identified as key factors influencing the level of aggression in a dispute, as well as whether or not a case was capable of being settled without resort to hearing. It was also highlighted that a certain amount of conflict is almost inevitable in a relationship breakdown or family dispute. As put by one lawyer: even if the parties had "bumped into [each other] in the supermarket it would've felt adversarial".[384] High levels of client dysfunction were recognised as impacting the well-being of the children involved, particularly where it prolonged the dispute or raised safety issues. Lawyers described clients who are unable to "put the child first", where entrenchment of adult issues and intractable personalities meant that resolution via settlement was not possible. One lawyer highlighted that learning more about mental health and addiction issues would enable lawyers to better assist parties and any children involved.

These findings chime with those of the Independent Panel, which highlighted that people resolving disputes about the care of children are "dealing with the normal challenges of everyday life as well as more complex family circumstances including family violence, mental health, addiction and poverty",[385] and that family disputes are becoming increasingly complex:[386]

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[383] Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016) at 155.
[384] 3(13)[4].
[385] *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 8.
[386] *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 8.

> Family lawyers and judges have seen an increasing prevalence of factors including methamphetamine and other drug use, family violence, neglect of children and mental health issues, and the pressures on under-resourced non-government organisations to meet the needs of families and children at risk. Such factors not only impact on the parties' ability to resolve matters themselves, it increases the time and cost required for the court to determine matters. There need to be adequately resourced services to assist these parties and children. This has the potential to reduce costs not only fiscally but also in terms of the human cost in the future.

The recognition of the challenging issues which Family Court clients, especially those who end in entrenched litigation, can present go some of the way to refuting the criticism that lawyers exacerbate parties' animosity and increase the adversarial nature of a dispute. It highlights the need for education of and support for lawyers who encounter and navigate these issues on a daily basis.

Supporting lawyers

Lastly, it is noted that an unexpected, but not unforseable finding of this project was the degree to which Family Court practice can impact on lawyer's mental health. Almost every lawyer in the project described the work of a Family Court lawyer as being often intensely stressful or destressing. In particular, working with intensely difficult or untrustworthy clients, and the emotional weight of cases was frequently cited as a cause of stress and of exhaustion, described as "burn-out kind of stuff".[387] It is noted that all of the lawyers in the study were experienced family lawyers, with some lawyers having over 30 years Family Court experience.

As the 2014 reforms have highlighted, legal representation is critical to parties' ability to access justice, and navigate the family justice system, with people finding the "court system daunting and unbalanced without a lawyer".[388] Submissions to the Independent Review panel saw "[p]eople overwhelmingly recommended that the right to have legal representation be reinstated for all care of children proceedings".[389] Given the importance of lawyers to the family justice system it is highlighted that greater recognition of and support for lawyers' mental health is required; at risk, on one level, is the retention of experienced Family Court legal professionals. This is critical given that the lack of necessary skill and experience has been identified as a factor in adversarial lawyering, both in this study and in the Indepenedent Review.[390] Moreover, overly aggressive approaches were seen as characteristic of some younger or inexperienced lawyers, and lawyers highlighted that those who were too emotionally involved or had become overwhelmned by a case could become "locked in" on a file and be overly aggressive as a consequence.

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[387] 13[104-106].
[388] *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 22.
[389] *Submissions Summary: Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, January 2019) at 24.
[390] The Independent Panel found that "many parents and whānau, and some professionals, were concerned that some lawyers lack adequate skills and training and encourage adversarial behaviour": *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 73.

Recognition of and support for lawyers mental health is also of particular importance as an ends in and of itself. Research has highlighted poor mental health and high levels of anxiety and depression for lawyers across practice areas and jurisdictions compared to other professions and the community. Recently, professional bodies in the United Kingdom, Australia and New Zealand have taken note, instituting programmes designed to help individuals in need and firms improve their professional cultures.[391] However it is evident there is still work to be done, particularly in the area of family law practice. Lawyer's responses were generally receptive to some form of support, whether that was professional supervision, mentorship, or more peer-review/buddy system style of support. As was highlighted by one lawyer "there is a lot of joy in this work", ensuring practice is sustainable and manageable for lawyers is important.

Summary

The interviews identified that there is little reason to be concerned that Family Court lawyers *deliberately* exacerbate conflict, many being focused on the welfare and best interests of children and on settlement where possible and safe for the parties. Whilst there are a few "bad apples", lawyer's views were that they were the minority, and tended to be younger or less experienced lawyers, or those who were non-Family Court specialists. Lawyers were seen to be juggling the policy emphasis on settlement and conciliation, their own "human instinct" concerns for the parties long term interests and the wellbeing of any children involved, and the traditional concept of partisan lawyering and the duty to the client. As acknowledged by the Independent Panel in the quotations with which this report began:[392]

> The Family Court has the most complex of mandates, especially in relation to care of children, where the decisions deal not only with the past and the present but also the future.

The ethical and practical challenges which Family Court lawyers encounter are correspondingly complex. To address the recognised damage overly adversarial lawyering can cause, a closer and more nuanced examination of the practical and ethical legal landscape is required: something the blunt tool of the 2014 reforms restriction on access to lawyers failed to do. At stake is the safety and wellbeing of families who turn to the family justice system for help resolving disputes, as well as the health of Family Court lawyers acting for those parties.

[391] Neil Graffin and others "The legal profession has a mental health problem – which is an issue for everyone" (19 April 2019) The Conversation <www.theconversation.com>; Max Walters "Profession facing talent drain as mental health problems surge" (27 April 2018) The Law Society Gazette <www.lawgazette.co.uk>.
[392] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 14.

Participant overview data

Interviewee	Experience	Gender	FC Experience	L4C	FC Work	Other Exp	MH trained	Mediation practice	Prof supervision
1	37yrs	F	37yrs	Solely L4C		?		A lot p.6[3, 5]	Yes p.7[9]
2	10yrs	F	10yrs	NA		Minor GP exp as young barrister.			
3	33yrs	M	As part of GP until 20 yrs ago when specialised	20yrs		GP & criminal with FC until specialised 20 yrs ago			
4	17yrs	M	17yrs	NA		GP specialising in FC			Yes p.8[15]
5	1981 30+yrs	F	30+yrs	"Snr" L4C		Minor GP exp as young lawyer.			
6	1988 30 yrs	F	30 yrs	L4C	COCA 50%; OT 10% (L4C only); RP = 40%	Minor GP exp as young lawyer.			
7	15 yrs	M	15yrs (incl E)	L4C	Mostly L4C, some OT party work. No RP.	Minor GP exp as young lawyer.	Psychiatric nurse. Worked in A&D rehab.		Yes: (6)[2]
8	26 yrs	M	26yrs	L4C 17yrs		Historically did general litigation crim/civil.			
9	40 yrs	M		L4C 35yrs. Stopped.		Some crim historically, long term on mental health roster; no civil	long term on mental health roster		
12	25+		25+	LaC 15 yrs 20%	20% L4C; some general commercial/conveyancing	Historically some civil, some crime, some general conveyancing			

						commercial work; continues with some general commercial/conveyancing			
13	40 yrs	M	40yrs	Yes 40yrs	Also has mediation practice	100%FC But 20 yrs 50/50 civil & FC		Mediation trained (and practises as)	No.
14	8 yrs	F	8 yrs	No		Current employment practice, ex-civil		Mediation trained	No (13)14
15 [needs 2nd half]	20 yrs	F	20 yrs		50% COCA; 10% crim	Ex-conveyancing; current criminal	Psych Degree		
16	25yrs	F	20 yrs	Yes	100% FC – but a lot of estate work and RP; COCA is almost all L4C	Started in commercial property; low level civil.	No	Does RTMs as L4C but No med training	
17	25yrs	F	25 yrs	20yrs	RP 30%; private COCA 30%; L4C COCA 30%; OT 10%. Stopped LA when changes came in.	Historic GP civil litigation and a small amount of crim		Mediation trained, not doing any now.	
18	12yrs	F	4yrs		60/40 or 70/30 private COCA/L4C – most are c&p emergency cases	Small amt of civil and crim at outset			

Ethics attachments

EMAIL TO POTENTIAL PARTICIPANTS

Sent to the potential participant's work email address

Dear Ms [ ],

Adversarial lawyering in the Family Court: Is there another way to act?
Professor Mark Henaghan and I would like to invite you to participate in our study of the ethical systems available to Family Court lawyers. This study considers whether a wider view of our ethical responsibilities (say, taking into account the interests of children) is feasible.
As you will be aware as a Family Court practitioner, recent and past reviews of the Family Court have expressed criticism of the Bar's adversarial nature. In particular, reviewers have criticised adversarial lawyering as a problem for achieving good outcomes for children. Many Family Court lawyers share these concerns.
The study involves interviews with experienced Family Court lawyers in three main centres nationally on their views of their ethical responsibilities and whether changes are possible and/or needed.
We would like to invite you to participate in an interview.
Interviews (digitally recorded for transcription) take about an hour and are conducted at a place and time convenient to you. I will be conducting all interviews.
Your participation would be entirely confidential. Any quotations or information taken from your interview would be anonymised, and you would have the opportunity to check any quotations were accurate and sufficiently de-identified before publication.
This project is funded by the New Zealand Law Foundation and the Borrin Foundation.
To discuss this proposal further or to set up an interview, please contact us at emilyhenderson@xtra.co.nz or mark.henaghan@auckland.ac.nz.
The Participant Information Sheet is **attached** to this email.
We think this is an important project and we would be very grateful if you would consider participating in it.
Regards,
Emily Henderson & Mark Henaghan.

This project was approved by the University of Auckland Human Participants Ethics Committee on …… for three years. The reference number is ……..

FOLLOW-UP EMAIL TO POTENTIAL PARTICIPANTS

Dear Ms [ ],

Adversarial lawyering in the Family Court: Is there another way to act?
On [DATE] I emailed you on behalf of myself and Professor Mark Henaghan with an invitation to be interviewed for the above study. A copy of our original email appears below. If you have already considered and rejected this invitation, please disregard this email. If, however, you would like to participate, we would be delighted to hear from you.
To discuss this proposal further or to set up an interview, please contact us at emilyhenderson@xtra.co.nz or mark.henaghan@auckland.ac.nz.
Regards,
Dr Emily Henderson and Professor Mark Henaghan.

INTERVIEWEE PARTICIPANT INFORMATION SHEET

Project title: Adversarial lawyering in the Family Court: Is there another way to act?

This information sheet is intended to give you, as a potential participant, information about this study so that you can make an informed decision as to whether or not to participate in the above research project as an interviewee.

Principal Investigator and Research Team: Professor Mark Henaghan & Dr Emily Henderson

Researcher introduction
Professor Mark Henaghan is the Professor of Family Law at Auckland University.
Dr Henderson a freelance academic researcher and commentator and a practising lawyer at Henderson Reeves in Whangarei.

Project description and invitation
We invite you to be interviewed for this study.
This is a research project on the use of adversarial ethics in Family Court litigation and potential changes to Family Court lawyers' ethical obligations.
It involves a review of the academic literature on legal ethics, a review of legal ethical systems pertaining to Family Courts in comparable jurisdictions, and a qualitative study involving interviews with 20-30 experienced Family Court lawyers discussing their views of their ethical obligations in the Family Court, and what changes are needed and/or possible.
The project commenced on 1st June 2019 and is due to be completed by December 2020.
You have been selected as an experienced Family Court lawyer identified through the NZ Law Society website "Find a Family Lawyer".

Project Procedures
You are being asked to take part in a single, one-on-one interview with Dr Henderson.
The interview will take approximately an hour and will be conducted at a location and time convenient to you.
To ensure accuracy, all interviews will be digitally audio-recorded before transcription for analysis.
You have the option of receiving a copy of your interview transcript and interview recording at any time up until the completion of the final draft report.
Drafts of the report and major academic article referred to above will be sent to you for review and comment.

Publication
The main products of this study will be first, a report to the NZ Law Foundation and Borrin Foundation which will appear on their website, and second, an academic article for a peer-

reviewed international legal journal. Third, there will be shorter publications in practitioner journals and as conference presentations.
You will also be sent an electronic copy of the final report and main article.

Right to Withdraw from Participation
You have the right to withdraw from participation at any time without giving a reason, and the right to withdraw your data from the research up to the completion of the final report. This is because when the report is finalised the participant ID numbers will be removed from the draft and it will not be reasonably possible to separate your data from that of others in the study.

Anonymity and Confidentiality
We will keep your identity and the fact that you take part in this study completely confidential and de-identify any information or quotation taken from your interview.
To that end we will:

(a) Assign you a number at the interview, which will be used to identify your transcript and any quotations from it during the analysis process and for the purpose of allowing you to identify where you are quoted in the draft report and main article (numbers will be removed from the final publications);
(b) Ensure that the transcriber we employ signs a confidentiality agreement preventing him or her from revealing any identifying information;
(c) Ensure any information about you and quotations taken from your transcript and used in any publication are anonymised;
(d) Only identify individuals in the study by role and, if relevant, seniority (e.g.: "In the words of one very experienced Lawyer for Child, ". . .", whereas a more junior colleague stated " . . ."");
(e) Give you the opportunity to go through the draft report and main article to check that all information from or regarding you is sufficiently anonymised;
(f) During the research process, the Master List of participant names and numbers will be kept separately from the recordings and transcripts and will only be available to/in the possession of Dr Henderson. After the research is complete all data will be securely stored as described below.

Benefits and risks
Because this study is only of your professional opinions and experiences and because your confidentiality will be preserved, we do not consider that this study poses risks to your physical or psychological wellbeing.
Benefits could include the satisfaction of contributing to an important discussion at a significant time in the development of the Family Court.

Data Storage and Destruction
Hard copies and originals of all Consent Forms, PIS, confidentiality agreements with the transcriber and all interview transcripts will be preserved for at least six years. They will be held in locked cabinets by Professor Henaghan on UoA property. The Consent Forms, PIS

and Master List of participant names and numbers will be stored separately and securely at the same location. At the end of that period, all hard copies and originals will be shredded and securely disposed of.
Electronic copies of all the above (including scanned copies of PIS and CF) will be backed up to the UoA server.
During the research process, interview recordings will be stored securely by Dr Henderson on her computer system (by participant number only) until participants have had the opportunity to review and comment on the draft report and main article. At that point, all the recordings will be deleted.

Funding
This project is funded by the NZ Law Foundation and the Borrin Foundation.

Contact Details
Feel free to contact the researchers about any aspect of this study. Dr Henderson can be contacted on emilyhenderson@xtra.co.nz or at Henderson Reeves on [omitted]. Professor Henaghan can be contacted on mark.henaghan@auckland.ac.nz and at [omitted].
The Dean of the Law Faculty can also be contacted on [omitted].

Ethics Approval
The study was approved by the University of Auckland Human Participants Ethics Committee on …… for three years. The reference number is …….
For any concerns regarding ethical issues you may contact the Chair, the University of Auckland Human Participants Ethics Committee, at the University of Auckland Research Office, Private Bag 92019, Auckland 1142. Telephone 09 373-7599 ext. 83711. Email: ro-ethics@auckland.ac.nz Approved by the University of Auckland Human Participants Ethics Committee on …… for three years. Reference Number …….

CONSENT FORM FOR INTERVIEWEES

THIS FORM WILL BE HELD FOR A PERIOD OF 6 YEARS

Project title: **Adversarial lawyering in the Family Court: Is there another way to act?**

Principal Investigator and Research Team: Professor Mark Henaghan & Dr Emily Henderson

I have read the Participant Information Sheet, have understood the nature of the research and why I have been selected. I have had the opportunity to ask questions and have had them answered to my satisfaction.
I agree to take part in this research.
I understand that I am free to withdraw my participation at any time, without giving a reason, and to withdraw any data traceable to me up to the completion of the draft research report.
I agree to be audio recorded.
I understand that the recording of my interview will be transcribed by a professional transcriber who will sign a confidentiality agreement.
I wish/do not wish to receive a copy of the recording of my interview.
I wish/do not wish to receive a transcript of my interview.
I wish / do not wish to receive the summary of findings.
Name: _____
Signature: _____
Date: _____
Approved by the University of Auckland Human Participants Ethics Committee on …… for three years. Reference Number …….

TRANSCRIBER CONFIDENTIALITY AGREEMENT

Project title: **Adversarial lawyering in the Family Court: Is there another way to act?**
Principal Investigator and Research Team: Professor Mark Henaghan & Dr Emily Henderson
Transcriber:
I agree to transcribe the audio-recordings for the above research project. I understand that the information contained within them is confidential and that I must not disclose or discuss it with anyone other than the researcher and his/her supervisor(s). I shall delete any copies that I may have made as part of the transcription process.
Name: _____
Signature: _____
Date: _____

INTERVIEW TOPICS

These are semi-structured interviews to be conducted with a view to covering the following topics:

Mode of Investigation: Inquisitorial, Semi-inquisitorial or Adversarial?
Is the Family Court primarily inquisitorial or adversarial or something else?
What is understood by "inquisitorial" and "adversarial"? How do those modes differ?
What is meant by "semi-inquisitorial"?
What are the advantages and disadvantages of each mode?
How does the Family Court's model of investigation differ from that of other civil courts?
How does it differ from the criminal court?
Do you agree with criticism that the Family Court has "become too adversarial"?
Has the Family Court's mode of operation changed or developed over its history?
If it has changed, why is that? What factors have influenced its development?
Is the Family Court achieving its stated aim of a therapeutic and child centred mode of investigation?
How would you like to see the mode of investigation develop in future? What options do you see?

Ambit of Ethical Obligations
When you are acting for adult parties in the Family Court, are your ethical duties any different from your duties in other civil courts or the criminal court?
How do they differ?
In your Family Court practice, what is the impact, if any, of the statutory duty to conciliate (s.9A Family Courts Act 1980) on your practice?
Do you consider that a lawyer for an adult party in the Family Court currently has any wider duty to consider the welfare and best interests of any children involved during his or her work?
What would be the issues associated with a wider duty on Family Court lawyers for adults to consider the welfare of children? What impact would it have on practice?

REFERENCES

A Cases

1 United Kingdom

Ex parte Lloyd (1822) Mont. 70.

Jones v National Coal Board [1957] 2 QB 55 (CA).

Medcalf v Mardell [2002] UKHL 27, [2003] 1 AC 120.

B Legislation

1 New Zealand

Care of Children Act 2004.

Family Court Act 1980.

Family Court (Supporting Children in Court) Legislation Act 2021.

Family Court Proceedings Reform Bill 2012 (90-1).

C Books and Chapters in Books

Anne Barlow and others *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave, London, 2017).

Becky Batagol and Thea Brown *Bargaining in the Shadow of the Law?: The Case of Family Mediation* (Themis Press, Annandale, New South Wales, 2011).

Connie JA Beck and Bruce D Sales *Family Mediation: Facts, Myths, and Future Prospects* (American Psychological Association, Washington DC, 2001).

Richard E Boyatzis *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage Publications, Thousand Oaks, California, 1998).

Tim Dare *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Routledge, London, 2016).

Gwynn Davis *Partisans and Mediators: The Resolution of Divorce Disputes* (Clarendon Press, Oxford, 1988).

Gwynn Davis, Stephen Cretney and Jean Collins *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994).

John Eekelaar, Mavis Maclean and Sarah Beinart *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, Oxford, 2000).

Richard Ingleby *Solicitors and Divorce* (Clarendon Press, Oxford, 1992).

Adrian L James and Will Hay *Court Welfare in Action: Practice and Theory* (Harvester Wheatsheaf, London, 1993).

Mavis Maclean and John Eekelaar *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, Oxford, 2016).

Lynn Mather, Craig A McEwen and Richard J Maiman *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press, Oxford, 2001).

Mervyn Murch *Justice and Welfare in Divorce* (Sweet & Maxwell, London, 1980).

Austin Sarat and William LF Felstiner *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995).

Lisa C Webley *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro Books, New Orleans, 2010).

D Journal Articles

Adrienne Barnett "Contact at all costs? Domestic violence and children's welfare" (2014) 26 CFLQ 439.

Abraham S Blumberg "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession" (1967) 1 Law and Society Review 15.

Peter Boshier, Nicola Taylor and Fred Seymour "Early Intervention in New Zealand Family Court Cases" (2011) 49 Family Court Review 818 at 818.

Virginia Braun and Victoria Clarke "Using thematic analysis in psychology" (2006) 3 Qualitative Research in Psychology 77.

Stephen Ellmann "Lawyering for Justice in a Flawed Democracy" (1990) 90 Colum L Rev 116.

Rachael Field "A Feminist Model of Mediation that Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence" (2004) 20 Australian Feminist Law Journal 65.

Martha Fineman "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking" (1988) 101 Harv L Rev 727.

John Fogarty "Family Court of Australia – Into a Brave New World" 20(3) Australian Family Lawyer 1.

Marc Galanter "'… A Settlement Judge, not a Trial Judge:' Judicial Mediation in the United States" (1985) 12 Journal of Law and Society 1.

Robert H George “Practitioners’ approaches to child welfare after parental separation: an Anglo-French comparison” (2007) 19 CFLQ 337.

Rosemary Hunter “Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law” (2003) 30 Journal of Law and Society 156.

Rosemary Hunter “Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us” (2006) 20 AJFL 227.

Adrian L James “An Open or Shut Case? Law as an Autopoietic System” (1992) 19 Journal of Law and Society 271.

Michael King “‘Being Sensible’: Images and Practices of the New Family Lawyers” (1999) 28 Journal of Social Policy 249.

David Luban “Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann” (1990) 90 Colum L Rev 1004.

Patrick Mahony “The New Zealand Family Court at the end of a decade” (1991) 3 FLB 26.

Bren Neale and Carol Smart “‘Good’ and ‘bad’ lawyers? Struggling in the shadow of the new law” (1997) 19 Journal of Social Welfare and Family Law 377.

Lorelli S Nowell and others “Thematic Analysis: Striving to Meet the Trustworthiness Criteria” (2017) 16 International Journal of Qualitative Methods 1.

Suzanne Reynolds, Catherine T Harris and Ralph A Peeples “Back to the Future: An Empirical Study of Child Custody Outcomes” (2007) 85 NC L Rev 1629.

Patrizia Romito “Post-Separation Domestic Violence: What Happens to Women and Children” (2011) 29 La revue internationale de l’education familiale 87.

Joyanna Silberg and Stephanie Dallam “Abusers gaining custody in family courts: A case series of over turned decisions” (2019) 16 Journal of Child Custody 140

Pauline Tapp “Family Law” [1999] NZ Law Review 443.

Anne Thacker “Solicitors and Divorce” (1992) 17 Alternative Law Journal 305.

Julia Tolmie, Vivienne Elizabeth and Nicola Gavey “Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand” (2010) 24 NZULR 136.

Janet Walker “Is There a Future for Lawyers in Divorce?” (1996) 10 IJLPF 52.

Fran Wasoff “Mutual Consent: Separation Agreements and the Outcomes of Private Ordering in Divorce” (2007) 27 Journal of Social Welfare and Family Law 237.

Katherine Wright “The divorce process: a view from the other side of the desk” (2006) 18 CFLQ 93 at 103.

Katherine Wright "The role of solicitors in divorce: a note of caution" (2007) 19 CFLQ 481.

E Parliamentary and Government Materials

David Beattie and others *Report of Royal Commission on the Courts* (1978).

Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003).

Strengthening the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms (Ministry of Justice, January 2019).

Submissions Summary: Independent Panel examining the 2014 family justice reforms (Ministry of Justice, January 2019).

Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms (Ministry of Justice, May 2019).

F Reports

All-Party Parliamentary Group on Domestic Violence *Domestic Abuse, Child Contact and the Family Courts* (Women's Aid, Bristol, 2016).

Jenny Birchall and Shazia Choudhry *"What about my right not to be abused?" Domestic abuse, human rights and the family courts* (Women's Aid, Bristol, United Kingdom, 2018).

Maddy Coy and others *Picking up the pieces: domestic violence and child contact* (Rights of Women/Child and Woman Abuse Studies Unit, November 2012).

Gwynn Davis and others *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission* (Legal Services Commission, London, 2000).

Megan Gollop, Nicola Taylor and Mark Henaghan "Evaluation of the 2014 Family Law Reforms: Phase One" (Law Foundation New Zealand, February 2015).

Liz Gordon *Study of grandparents in family court proceedings over their grandchildren prior to the 2014 changes to the court* (Law Foundation New Zealand, 2016).

Daryl Higgins and Rae Kaspiew *Child protection and family law… Joining the dots* (Australian Institute of Family Studies, Melbourne, 2011).

Rosemary Hunter and others *Legal Services in Family Law* (Law Foundation of New South Wales, December 2000).

Philip Lewis *Assumptions about Lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department, 2000).

Jan Pryor *Parenting Orders in the Family Court: Final report for the Law Foundation* (Law Foundation New Zealand, 2012).

Jan Pryor and Elizabeth Major *Review of Family Court: the Views of Family Court Professionals* (Law Foundation New Zealand, 2012).

Ravi Thiara and Christine Harrison *Safe not sorry: Supporting the campaign for safer child contact* (Women's Aid, Bristol, 2016).

Janet Walker and others *Picking Up the Pieces: Marriage and Divorce Two Years After Information Provision* (Department of Constitutional Affairs, London, 2004).

G Dissertations

Katherine M Wright "The Process of Divorce: A Study of Solicitors and their Clients" (PhD Thesis, Sheffield Hallam University, 2004).

H Internet Resources

Collaborative Resolution NZ <www.collaborativeresolution.org.nz>.

Family Law Section: New Zealand Law Society "Find a family lawyer" <www.familylaw.org.nz>.

Neil Graffin and others "The legal profession has a mental health problem – which is an issue for everyone" (19 April 2019) The Conversation <www.theconversation.com>.

Catherine Hutton "Family Court review calls for 70 changes costing up to $60m a year" (17 June 2019) Radio New Zealand <www.rnz.co.nz>.

New Zealand Law Society "Privilege, confidentiality and reporting suspicious activities" (21 July 2020) <www.lawsociety.org.nz>.

Anneke Smith "Wellington woman devastated urgent protection order hearing delayed after 14 months" (4 August 2021) Radio New Zealand <www.rnz.co.nz>.

Max Walters "Profession facing talent drain as mental health problems surge" (27 April 2018) The Law Society Gazette <www.lawgazette.co.uk>.

I Other Resources

Judith Collins "Family Court reforms put children first" (press release, 3 August 2012).

Andrew Little "Panel appointed to re-write 2014 Family Court reforms" (press release, 1 August 2018).

Andrew Little "Independent Panel's Report on Family Justice System welcomed" (press release, 16 June 2019).

BIBLIOGRAPHY

Deborah Mackenzie, Ruth Herbert and Neville Robertson "'It's Not OK', but 'It' never happened: parental alienation accusations undermine children's safety in the New Zealand Family Court" (2020) 42 Journal of Social Welfare and Family Law 106.

Nicola Taylor "Child Participation: Overcoming Disparity between New Zealand's Family Court and Out-of-court Dispute Resolution Processes" (2017) 25 International Journal of Children's Rights 658.

Michael King and others *Non-Adversarial Justice* (2nd ed, Federation Press, Sydney, 2014).

Paul Staindl, Clancy and Triado "Ethics for Family Lawyers" (August 2005) Television Education Network <www.tved.net.au>.

Patrick Fitzgerald and Michelle Fernando "Has the Less Adversarial Trial process abolished the Rules of Evidence?" (2009) 20(3) Australian Family Lawyer 25.

Jennifer K Robbennolt and Jean R Sternlight "Behavioral Legal Ethics" (2013) 45 Ariz St LJ 1107.

Nahum Mushin "Ethics in Family Law – Beyond Legal Principles and into Value Judgments" (2018) 30 SAcLJ 427.

Deanne Sowter "Professionalism and Ethics in Family Law: The Other 90%" (2016) 6 Journal of Arbitration and Mediation 167.

Deanne M Sowter "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor Y B Access Just 401.

John Caldwell "Family Proceedings Concerning Children: The Nature of Natural Justice" (2010) 12 Otago Law Review 345.

Craig A McEwen, Richard J Maiman and Lynn Mather "Lawyers, Mediation, and the Management of Divorce Practice" (1994) 28 L& Soc'y Rev 149.

Michael King "Child Welfare Within Law: The Emergence of a Hybrid Discourse" (1991) 18 Journal of Law and Society 303.

Gunther Teubner "How the Law Thinks: Toward a Constructivist Epistemology of Law" (1989) 23 L& Soc'y Rev 727.

Noam Peleg "Developing the Right to Development" (2017) 25 International Journal of Children's Rights 380.

Patrick Parkinson "Keeping in contact: the role of family relationship centres in Australia" (2006) 18 CFLQ 157.

Jennifer E McIntosh and Caroline Long *The Child Responsive Program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes* (Family Transitions, July 2007).

Jennifer E McIntosh, Diana Bryant and Kristen Murray "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2008) 46 Family Court Review 125.

Helen Rhoades *Enhancing inter-professional relationships in a changing family law system* (University of Melbourne, May 2008).

Tamara Walsh and Heather Douglas "Lawyers' Views of Decision-Making in Child Protection Matters: The Tension Between Adversarialism and Collaborative Approaches" (2012) 38(2) Mon LR 181.

Judith G McMullen and Debra Oswald "Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases" (2010) 12 Journal of Law & Family Studies 57

Margaret F Brinig "Empirical Work in Family Law" [2002] U Ill L Rev 1083.

Rae Kaspiew and others *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies, October 2015).

Wendy L Foote "Responses to Allegations of Child Sexual Abuse in Family Court Hearings" (2010) 9 Women in Welfare Education 63.

Patrick Parkinson, Judy Cashmore and Judi Single "Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia" (2007) 21 IJLPF 84.

Trish Knaggs and Anne Harland *The Parenting Hearings Programme Pilot: Evaluation Report* (Ministry of Justice, September 2009).

Berry Zondag "Procedural Innovation in the New Zealand Family Courts: The Parenting Hearings Programme" (PhD Thesis, University of Auckland, 2009).

Bruce M Smyth and Lawrence J Moloney "Post-Separation Parenting Disputes and the Many Faces of High Conflict: Theory and Research" (2019) 40 Australian and New Zealand Journal of Family Therapy 74.

Helena Barwick, Alison Gray and Roger Macky *Characteristics associated with the early identification of complex Family Court custody cases* (Department for Courts, September 2003).

Jennifer E McIntosh and Caroline M Long *Children Beyond Dispute: A Prospective Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution* (Family Transitions, October 2006).

Becky Batagol "Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution" (2008) 8 QUTLJ 24.

Joan B Kelly "Parents with Enduring Child Disputes: Multiple Pathways to Enduring Disputes" (2003) 9 Journal of Family Studies 37.

Peter Boshier "Government review of the Family Court — some room for change" (2011) 7 NZFLJ 53.

John Faulks "A Natural Selection? The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia" (2010) 35 UWAL Rev 185.

Robert H George "Principles relevant to child's welfare and best interests" (2011) 7 NZFLJ 26.

Michelle Ferdando "Express Recognition of the UN Convention on the Rights of the Child in the *Family Law Act*: What Impact for Children's Participation?" (2013) 36 UNSWLJ 88.

John Eekelaar "Uncovering Social Obligations: Family Law and the Responsible Citizen" in Mavis Maclean (ed) *Making Law for Families* (Hart Publishing, Oxford, 2000) 9.