

Practice Guideline 3

Guidelines For Psychiatrists In Relation To Family Court Proceedings – Australian Family Court



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GUIDELINES FOR PSYCHIATRISTS IN RELATION TO FAMILY COURT PROCEEDINGS – AUSTRALIAN FAMILY COURT

1. GENERAL PRINCIPLES

- 1.1 An overarching principle in the Family Court is that the emotional and physical welfare of any child involved is paramount, ensuring that assessments and recommendations are made in the best interests of the child.
- 1.2 When assessing the welfare of the child, in relation to both parental responsibility and time spent, psychiatrists should consider the following:
 - 1.2.1 The welfare of the child is generally best served when provision is made for consistent care by an adult or adults with whom the child has a safe and secure attachment. If the adults to whom the child appears to be attached have seriously maltreated the child, then continued care by those adults may no longer serve the welfare of the child.
 - 1.2.2 It is recognised that the biological parents are most often the persons with the strongest commitment to and relationship with the child. However, a biological parent status does not guarantee that this relationship is positive or in the child's best interests. Under certain circumstances, other family members or biologically unrelated adults may have developed a safe and nurturing relationship with the child, which is reciprocated and needs to be preserved.
 - 1.2.3 When several children in a family are involved, their welfare is usually best served if the siblings are kept together, rather than divided between the parents.
 - 1.2.4 There is no clear evidence to suggest that, on the basis of gender alone, one parent or the other is the more appropriate custodian.
 - 1.2.4.1 This principle may not apply in infancy, given the importance of the mother-infant attachment bond. There is some legal precedence where the breast-feeding mother was given priority; see *H & D* [2003] FMCAfam 290 (18 July 2003) and *SDW & JCJ* [2005] FMCAfam 210 (6 May 2005).
 - 1.2.5 Procedures that diminish the adversarial process and shorten litigation will generally promote the welfare of the child. In the case of young children, it is desirable that the

development of an attachment relationship to a parent figure should not be jeopardised by delays or reversed decisions.

1.2.6 Any wishes expressed by the child in relation to parental responsibility, guardianship, time spent or other relevant matters, should be conveyed to the Court, with appropriate qualifications regarding the child's ability to make a responsible and considered assessment either of the relevant factors or of the significance of the decision.

1.3 Psychiatrists treating children involved in parental responsibility disputes should ascertain the legal guardianship and other arrangements in place. Reasonable efforts should be made to involve all parties in consent to treatment. Caution is justified in assuming that statements of one party in an adversarial matter represent the full facts of the situation.

2. POSSIBLE ROLES OF THE PSYCHIATRIST

2.1 As an expert on the psychological and emotional welfare of the child, usually appointed by the Court or the Independent Children's Representative.

2.2 As an expert on the psychiatric state of one or more parties (child, parent or carer).

2.3 As an expert on other pertinent matters, such as the testimony or records of psychiatrists or other health practitioners or other specialist opinion for the Court.

2.4 As an expert providing a second opinion in respect of any of the above.

2.5 To provide a report regarding the psychiatric treatment of one or more parties.

3. THE PSYCHIATRIST AS EXPERT WITNESS

3.1 Part 15.5 of the *Family Law Rules 2004* sets out the role of expert witnesses. Under the Family Law Rules, psychiatrists who are expert witnesses have a duty to help the Court with matters that are within their knowledge and capabilities. The duty of expert witnesses to the Court prevails over any other obligations of expert witnesses to the people instructing them or paying their fees and expenses.

3.2 Under the Family Law Rules, the duty of expert witnesses to the Court means that they must:

- give an objective and unbiased opinion that is also independent and impartial on matters that are within their knowledge and capabilities
- conduct their expert witness functions in a timely way
- avoid acting on an instruction or request to withhold or avoid an agreement when attending a conference of experts
- consider all material facts, including those that may detract from their opinions
- tell the Court if a particular question or issue falls outside their expertise
- produce a written report that complies with the Family Law Rules and advise the Court if this report may be incomplete or inaccurate in any way.

- 3.3 Brent (1982) and Friston (2005) summarise the role of medical expert witnesses, indicating that they should:
- be aware of the legal and ethical implications of their testimony
 - be aware of the basic elements of the law and relevant legal procedures
 - never assume the role of an advocate
 - state the facts or assumptions on which their opinion is based.
- 3.4 Psychiatrists may give expert evidence as a single expert ordered by the Court or agreed on by the parties. In regards to children’s matters, the usual practice is to employ single experts. In some circumstances, more than one expert may be involved in the case. In this situation, the Court utilises an experts’ conference. More information about this is available at 4.6.
- 3.5 The expert witness, in contrast to the non-expert witness, is expected to render an opinion based upon relevant data. This includes rendering an opinion based on his or her observations and examinations, as well as an opinion about hypothetical cases posed in examination or cross-examination in Court.
- 3.6 Expert opinion testimony is admissible where the psychiatrist's specialised knowledge will assist the Court to understand the evidence or to determine a fact in issue. The psychiatrist may be qualified before the Court as an expert by knowledge, skill, experience, training and/or education. Psychiatrists need adequate facts or information concerning the case and instructions from the referring lawyer and/or the Court.

4. PROCEDURAL GUIDELINES

4.1 Referral

The psychiatrist should exercise his/her right to a formal written request for a report from the lawyer or the Court. The request should include the specific questions that the psychiatrist is asked to address. It may clarify points of law. The psychiatrist should ensure adequate time is provided for assessment and sufficient notice is given before Court attendance.

4.2 Role

The psychiatrist's principal role is to alert the Court to factors that will promote the welfare and wellbeing of the child, and to describe the relevant adults’ capacities for parenting. In certain instances, highly specialised information may be required, such as the effect of a parent’s mental illness upon his/her children. The psychiatrist must recognise that reports are regarded as opinions. They will be placed alongside the evidence and opinions of others, in a process that seeks to arrive at decisions that are in the best interests of the child.

4.3 Reporting responsibility

The psychiatrist must be prepared to furnish reports relating to the child and / or the child’s parents or carers when so requested. Generally, these will be requested by one or more parties or possibly by direct order of the Court.

4.4 Evaluation

4.4.1 When a psychiatrist is going to be called as an expert witness, it is critical that complete documentation is undertaken. The psychiatrist's record must contain all the information gathered and should indicate the sources of this information.

4.4.2 The psychiatric evaluation should be as comprehensive as possible. Circumstances such as the unavailability of the parties, concern about possible harmful consequences for a party from participation in the process or requests of opinion on narrow aspects of the matter may limit the scope of the evaluation.

4.4.3 Where possible, the psychiatrist should ascertain from each party his or her understanding of the assessment and the reasons for it.

4.4.4 The framework used by an individual clinician will depend on his or her judgement about the most effective approach to take in each case. It may be necessary to explain to the court the rationale for the approach taken.

4.4.5 Where the psychiatrist considers that the evaluation would be enhanced by an assessment by another expert, appropriate referral should be made, and these assessments should be included in the final report.

4.5 Psychiatric report

4.5.1 The psychiatric report should be prepared in accordance with RANZCP Professional Practice Guideline: Developing reports and conducting independent medical examinations in medico-legal settings and the Family Court Rules.

4.5.2 It is important that the psychiatrist receives instructions for the preparation of the psychiatric report in writing and that the person or agency seeking the report has provided all relevant information. Psychiatrists should also expect written communication setting out who is responsible for the payment of fees and when they are to be paid.

4.5.3 Under the Family Court Rules, the expert witness' report must:

- be addressed to the Court and the party instructing the expert witness
- have attached to it a summary of the instructions given to the expert witness and a list of any documents relied on in preparing the report
- be verified by an affidavit of the expert witness set out in the form required by the Family Court Rules. The affidavit requires expert witnesses to state that they have read and understood the relevant Family Law Rules and used their best endeavours to comply with them, made all necessary and appropriate inquiries; expressed independent, impartial and factual opinions in the report, understood their duty to the court and complied with it; and complied with the requirements of their relevant professional code/s of conduct.

4.6 Experts' conference

4.6.1 If two or more persons in a Court case intend to tender an expert report or produce evidence from an expert witness about the same or similar questions, then the parties must arrange for the expert witnesses to convene an experts' conference. The purpose of the experts' conference is to assist the parties and the Court to achieve a just, quick and cost effective disposal of the case and help avoid or reduce the need for experts to attend court to give evidence.

4.6.2 At the conference, the experts must reach a conclusion on the evidence and produce a joint statement, setting out the result of the conference. This statement must identify the issues that are agreed and not agreed between the experts; identify the reason for disagreement on any issue and identify what action – if any - may be taken to resolve any outstanding issues. The statement must be signed by all participating experts immediately at the conclusion of the conference or as soon as practicable.

4.7 Notice

It is appropriate for the psychiatrist to inform the lawyer or Court who has "called" him/her that they will need a sufficient period of notice prior to the Court attendance. The psychiatrist should always inform the lawyer and/or Court of any time limitations in his/her anticipated schedule.

4.8 Testifying in court

4.8.1 The expert's role in Court is to provide and interpret information for the Court, which will evaluate that information, and, with consideration of the other evidence at trial, make the final decision. Expert testimony occurs when the lawyer who originally called the expert witness, other parties' lawyers or the Judge questions the expert.

4.8.2 The demeanour of the witness should remain the same regardless of which counsel is questioning. An expert whose recommendation was not followed has not "failed" and should not assume that his or her expertise was disregarded.

4.9 Immunity

Expert witnesses who appear before the Court have the traditional legal witness immunity in respect of their evidence, which must be tested and dealt with in hearings before the Court. This immunity also applies to the contents of family or other reports prepared for a Court hearing.

4.10 Confidentiality

During cross-examination, if a question is put to the psychiatrist that he or she believes is not pertinent to the welfare of the child, may cause undue distress to a party or have a detrimental effect on a therapeutic relationship with a patient who is party to the proceedings, he/she may appeal to the Judge to exercise his or her discretionary powers in relation to the question, which may include taking a personal confidential answer

4.11 Communication style

Psychiatric terminology should be used with care and defined in simple terms when utilised. Reports and testimony should be succinct. Confusing terminology and excessive verbosity may diminish the impact of psychiatric evidence.

4.12 Payment

4.12.1 The psychiatrist should expect a letter from a lawyer or other party (including the Court) setting out who is responsible for the payment of fees and how they are to be paid. The psychiatrist has the right to request prepayment, and also payment in the event that a party fails to attend an appointment.

4.12.2 Matters that may be itemised and charged in the account include:

- Discussion with lawyers or others concerned with the client.
- Review of records (medical files, affidavits, scientific literature, etc).
- Interview of clients and others.
- Preparation of report (including writing, dictating and editing).
- Travel time and expenses.
- Waiting at court.
- Appearing in court.
- Other expenses.

5. SUGGESTED READING

Azar ST & Cote LR. (2002) Sociocultural issues in the evaluation of the needs of children in custody decision-making: What do our current frameworks for evaluating parenting practices have to offer? *International Journal of Law and Psychiatry*, vol. 25, pp. 193-217.

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Donald T & Jureidini J. (2004) 'Parenting Capacity', *Child abuse Review*, vol. 13, no. 1, pp. 5-17.

Family Law Rules 2004 (Cth) – Part 15.5 Expert Evidence

Friston M. (2005) Roles and responsibilities of medical expert witnesses. *BMJ* 331: 305-306.

Law Council of Australia (2010) Best Practice Guidelines for lawyers doing family law work (2nd edition).

Reder P, Duncan S & Lucey C. (eds) (2003) 'What principles guide parenting assessments?' in, *Studies in the Assessment of Parenting*, Brunner Routledge, UK, ch. 1, pp. 3-26.

White A. (2005) *Assessment of parenting capacity: Literature review*. NSW Department of Community Services. Sydney: Centre for Parenting and Research.

Disclaimer

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