Family Law:  
Assessable Reflective Piece

This reflective piece concerns an experience I had during my visit to the Federal Circuit Court.

The hearing I attended concerned a parenting matter between two parents. I did not understand fully the law applied in the hearing, but as far as I could gather at the time, it concerned an application by the father for contravention orders against the mother. At one point, he claimed that she had breached parenting orders by disallowing their son phone contact with him.

During this part of the hearing, it became clear that there was great animosity between the litigants. Neither of them used names when referring to the other. The most frequent form of words used was 'that man' or 'that woman'. Responding to the matter before her, the judge expressed strong frustration with the litigants, noting that they seemed to find it impossible agree in the best interests of their son. Concerning the issue of phone contact, her Honour expressed great dissatisfaction with phone contact orders in general. Her Honour's opinion was that where parents do not have a reasonably good relationship, such orders are almost impossible to enforce, and merely give the parents another opportunity to argue. Of great concern to her Honour was that such arguments would often occur in the presence or knowledge of the child. Her Honour (quite forcefully) reminded the litigants that her primary concern was not for their quarrel, but for the welfare of their child, and that their (often quite nasty) arguments about matters concerning the phone contact order likely had a negative impact on him. Ultimately, her Honour refused to enforce phone contact, and in fact deleted it from the parenting order. Speaking in clipped, forceful sentences, her Honour said: 'Parents often don't think so, but kids are smart. They can tell from your tone of voice. They can tell from the way your eyes move when you talk about each other. They know when their parents are fighting, and it hurts them.'

Hearing those words, I imagined what it might have been like to be a child whose parents were engaged in a dispute such as that before the Court, and it saddened me. It occurred to me that were I in such a situation, I would have known that my parents hated each other, and that my calling one of them was a trigger for their arguments (though depending on my age, I may not have understood why). I may thus have avoided making the calls altogether, in the hope that some of the arguing might stop. But what struck me the most about the experience was that the judge had been so forceful with the litigants, and had actively advocated for their child, making orders of a form which had not been suggested in arguments advanced by either of them.

During the Family Law course, although I had learnt that the Court will take the best interests of the child as the paramount consideration in parenting disputes, I had (probably quite cynically) assumed that this consideration would simply form the framework for parents to resolve *their* disputes, in an adversarial way. It was thus surprising (and more than a little encouraging) to see a judge actively reject arguments from *both* litigants, and instead to bring forward a completely different decision, with the perspective of the child firmly in mind.

Reflecting upon the orders her Honour ultimately made in that case, it seems to me that they were quite sensible. If parents have developed a pattern of nasty arguments as a result of an order for phone contact (which I feel would probably seem quite artificial contact to a young child in any event), it seems that the child's best interests would be served by removing the order, and thus the cause of the arguments.

As to the surprise I experienced at the judge's active advocacy for the litigants' child, I suppose I shouldn't have been so cynical about the operation of the Family Court system in parenting disputes. The Family Law course had emphasised the discretion judges have in making orders in the best interests of children. That said, on an intuitive level, and as a result of the fact that there is such broad discretion given to judges in parenting matters, I cannot imagine that divergent decisions made by different judges on similar facts would be especially uncommon. Indeed, while they may be aware of the basic principle that Family Courts will frame their orders according to the best interests of children, I think many people with no experience of the system would be surprised to discover the true extent of judicial discretion (including the discretion to include in orders matters not advanced by the parties) in this field.

For me, the experience has certainly highlighted the breadth of this discretion in a quite powerful way. As a result, I believe I have become more acutely aware of the importance of ensuring that judges have adequate training in fields of social science relevant to parenting matters, so that their discretion might be appropriately exercised. In this sense, the experience reinforces what I learnt while researching for the parliamentary inquiry submission assessment piece, as one major focus of my group's submission was the difficulties associated with judicial misunderstanding of social science research, in the context of the broad judicial discretion in parenting matters.