



FAMILY COURT
OF AUSTRALIA

Less Adversarial Trial Handbook



A companion to the less adversarial trial
(parenting cases) DVD

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Family Court of Australia June 2009

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Foreword

The Honourable Diana Bryant, Chief Justice

I would like to acknowledge the pioneering work of the former Chief Justice, the Honourable Alistair Nicholson, and Justice Stephen O’Ryan, whose vision and commitment made the less adversarial trial (LAT) a reality. This LAT handbook is intended to assist judicial officers and members of the legal profession in developing a deeper understanding of the Family Court of Australia’s LAT process. It is a timely and important document, which complements the LAT DVD and the previously published report *Finding a Better Way*, the Family Court’s account of a new approach to hearing children’s cases.



Both the LAT and the pilot program that preceded it (the Children’s Cases Program) are highly significant departures from the traditional adversarial trial. They represent a novel reform of the trial process familiar to those working in the common law arena. Ensuring children’s ‘best interests’ is at the heart of the LAT, which, as I have said on many occasions, should be seen as evolutionary rather than revolutionary.

Appropriately, the LAT handbook begins with Dr Jennifer McIntosh’s discussion of the research evidence about the effect of parental disputation on children. From that evidence it is abundantly clear that ongoing parental conflict has serious, long-term developmental impacts. Social scientists have found a correlation between it and the increased risk of poor psychological, social, health and academic outcomes in children. We know that adversarial legal processes play a part in exacerbating parental conflict and inhibiting the development of parenting capacity. This knowledge provided the impetus for the Family Court to look at a new way of hearing and determining parenting disputes.

For judges, the LAT process means taking an active role in the proceedings from the first day of trial to the last, engaging with the parties, their legal representatives and with family consultants to ascertain the issues that are really in dispute and the evidence that will lead the judge to the best decision in respect of those issues. Judges do not have voluminous affidavit evidence before them on the first day—in fact, no affidavits will have been filed—and the judge often has to tease out the real issues in dispute. The judge, and not the parties or their representatives, directs the proceedings. All this must be achieved without compromising the authority and status of the Court. The LAT requires a level and type of verbal interaction that judges have not usually had to employ.

For lawyers, including independent children's lawyers, the LAT process involves leading their client to focus on their children's future rather than on their past grievances, as well as stepping back so that their clients can take ownership of the litigation process.

For the parties, the LAT process means having the courage to reflect honestly on their relationships with their children and their ex-partner and telling the judge, openly and frankly, what the difficulties in those relationships are.

The LAT is very much a collaborative process. Everyone involved has a vested interest in arriving at the best possible outcome in a way that strengthens parental capacity and child wellbeing. Necessarily, in the intervening years since a less adversarial approach was first trialled through the Children's Cases Program, different practices have developed to give effect to that objective. The passage of time has also seen the Family Court dealing with more and more of the difficult and dysfunctional families. Concern was expressed that this process was not well suited to those cases. I think you will observe from the LAT DVD that cases with excruciatingly difficult issues also benefit from this approach.

One of the attractive features of the LAT handbook is that it captures judges' experiences in the form of practice examples at each stage of the LAT process, from pre-trial preparation to adjudication and orders. The handbook demonstrates the flexibility inherent in the LAT process and the way in which individual judges give effect to the principles for the conduct of child-related proceedings (Division 12A of the Family Law Act).

Joanna Kalowski's chapter 'Communication techniques to support a less adversarial trial' is invaluable. It touches on different communication styles, how to involve parties in the proceedings, how to reduce anxiety and the role of communication in identifying issues. The importance of meaningful communication in the courtroom is often overlooked and I am delighted that the handbook concludes on this topic.

It is my hope that the LAT DVD and companion handbook will stimulate further contemplation and discussion of the value of less adversarial proceedings, both in children's cases and in civil litigation generally. There has been an enormous amount of interest from many common law countries in this new way of hearing children's cases and the DVD and handbook should provide other jurisdictions with greater insight into the benefits of, and opportunities presented by, the LAT.

I would like to thank the authors and contributors to the handbook who have given generously of their wisdom and experience to produce what I am sure will prove to be an immensely valuable resource for both judicial officers and members of the legal profession.



The Honourable Diana Bryant



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Background to the less adversarial trial

Justice O’Ryan

Under the *Family Law Act 1975* (Cth), which commenced in January 1976, the Family Court adopted a system for hearing children’s cases modelled on the manner in which civil disputes were adjudicated upon in other superior courts—an adversarial system.



Since its enactment in 1975, the Family Law Act has been the subject of extensive amendment for a variety of reasons. In addition, the Family Court has made a number of significant changes to the procedures for both parenting and financial cases. Some of the changes have reflected in part a search by the Court to try and find the most appropriate way to adjudicate disputes in matrimonial cases and, in particular, children’s cases. It has long been a matter of concern to the Court and stakeholders in the family law system that the structure of adversarial procedure may get in the way of decision-making that is in the best interests of children.

In 2003, the then Chief Justice of the Family Court, the Honourable Alistair Nicholson AO RFD QC, expressed the view that rather than continue to ‘tinker with the engine’ the Court should think about a new engine. Based on his experience, he sought to examine the system adopted in Continental Europe, which is referred to sometimes as the inquisitorial system for adjudicating disputes.

In 2003, the Family Court undertook a detailed study of less adversarial approaches in Continental Europe. The inquisitorial nature of children’s proceedings, particularly in France and Germany, provided a stark contrast to proceedings in the Family Court despite the Court’s efforts to reduce the adversarial nature of our processes.

The European experience made it clear that the adversarial system for adjudicating disputes in children’s cases did not recognise the fundamental difference between the nature of ordinary litigation, where the parties whose interests are affected by what is happening are present during proceedings, and children’s cases, where a judge is being asked to adjudicate upon the interests of someone who is not present and not participating, namely the child. The Family Court recognised that it needed a procedure that best recognised the interests of the person who it was making a decision about, i.e. the child.

The Family Court realised that it had to significantly change its approach to the adjudication of children's cases and thus it set about establishing a model that merged less adversarial procedures from other legal systems with the structure provided by the Family Law Act. However, in considering how the system might be improved the Family Court was very aware that merely 'grafting on' another system would not necessarily solve the problems and, in fact, may exacerbate existing problems.

After much deliberation the Court developed a new less adversarial model, which was trialled as the Children's Cases Pilot (CCP) in the Sydney and Parramatta registries. In 2006, after the success of the pilot and extensive evaluation to ensure a workable model and no unintended consequences, the less adversarial trial (LAT) was adopted into legislation and implemented across the Family Court.

In the new model, in contrast to the adversarial system, the judge has far greater control and responsibility for what is happening and for determining what is required to resolve issues in the best interests of the child. The judge is no longer simply required to accept what he or she is given by the parents and what they contend to be the issues. The overriding control of the judge includes control of the evidence that is provided to the Court and what questions, if any, are asked of any witness. The judge actively participates in the trial process by identifying issues, deciding what material is required to resolve issues and generally directing the proceedings, rather than simply acting as an umpire.

As a result, the LAT represents for judges and practitioners an important departure from the way things were done in the past. Historically a lawyer's training, background and experience was based in the adversarial system of adjudicating disputes and this new approach challenges lawyers to work in a way they have not done before.

Judges now derive satisfaction from looking at and considering what they think is necessary to determine what is in the best interests of the child rather than simply adjudicating upon what has been provided by the parents. Consequently, although the LAT process is more challenging, it is far more rewarding.



The less adversarial approach and children's best interests

Jennifer McIntosh, PhD

The serious, long-term developmental impacts of ongoing parental conflict on children have emerged with clarity in the past decade.¹ The research evidence tells us:²

- By age 18, nearly 40 per cent of children experience the dissolution of their parents' partnership.
- Acrimonious divorces with ongoing levels of uncontained conflict between parents constitute about one-third of these separations.
- The restructuring of family life necessitated by divorce involves multiple and complex adjustments for children, including transitions of home and school, changes in parental and extended family contact, economic strain, periods of diminished parenting, parental conflict, sadness and grief.
- Ongoing parenting conflict after divorce significantly adds to the existing developmental risk for children of divorce.
- Adversarial legal processes are implicated in increased parental conflict after separation, increased likelihood of poor parenting and poorer outcomes for children.³

The above factors combine to elevate risks of poor psychological, social, health and academic outcomes for children of divorce, reaching through to adulthood, with increased risk of diminished emotional, economic and educational attainment.

This research has created new impetus internationally to review adversarial approaches to family law, its impacts on families after separation, and to examine other possibilities. The less adversarial reforms in Australia represent an acceptance by the Family Court of Australia of its role in upholding the best interests of the child through its own role in minimising processes that further damage parenting capacity, co-parenting relationships and the associated wellbeing of children. The move to reduce harmful aspects of the adversarial process is a significant step toward legal pathways that contain, rather than exacerbate, the psychological vulnerabilities inherent in divorce.⁴ The Court's challenge has been to make a decision in the best interests of the child, ensuring where possible, the return of parents to their children, unharmed by their 'day in court'.

The research evidence

Does the less adversarial trial (LAT) achieve this? Definitive research does not yet exist, but first insights have emerged from an in-depth qualitative study of the less adversarial trial pilot (then called the Children's Cases Project) in the registries of Sydney and Parramatta throughout 2004–2005 (McIntosh, 2006). The aim of the study was to compare the experiences of parents who had recently completed a LAT with those who had completed a more traditional court process, and to explore their subsequent ability to manage their conflict and support the adjustment and wellbeing of their children (n=79 parents, 169 children). Parents were interviewed three months after their court hearing, covering three areas:

- How did they, as parents, experience the two different court streams?
- What influence did they consider each court process had on their capacities to parent and to manage conflict with their former spouse?
- How did they perceive the impacts of the court processes on their children?

Six major areas of difference

Despite similarities in the broad characteristics of the two groups (pre-court living arrangements, nature of the application, complexity of the disputes, manner of determination), strong differences were identified between the LAT and traditional trial groups on a number of variables. The two groups were interviewed three months after court. The six major areas of difference are set out below.

1 Contact

- Both mothers and fathers from the LAT group reported significantly greater satisfaction with contact arrangements than those from the traditional trial group, irrespective of whether they had 'won' or 'lost' their case.
- LAT parents reported significantly higher levels of contentment in their children with the contact and care arrangements, post-court.⁵

2 Conflict

- Taking into account pre-separation conflict levels, the LAT parents reported significantly lower levels of psychological hostility in their relationship with their ex-partner than the traditional trial group, including less frequent derogation of, or by, the other parent, and less verbal conflict.
- LAT parents showed significantly greater awareness of the impacts of conflict on their children. They frequently made reference to specific input and advice given to them by the judge and the family consultant about the importance of sheltering the children more effectively from their conflict.

3 Impact of court on 'me as a parent'

Seventy-two per cent of LAT parents reported an overall positive impact of the court process on them as a parent:

I found the whole thing less stressful than I thought it would be and the way it was handled was very good. I can't think of a better way it could be done. I could see who this sort of thing was about: the kids. The Court could make you think about your children.

(Mother in the LAT group)

The process taught us to let go and not to make children exposed to adult issues.

(Father in the LAT group)

The majority view in the traditional trial group directly contradicted those of the LAT group, who reported almost no positive impacts of the court process on them as parents. Only one traditional trial parent identified any positive impact of the court process. The following was representative of the majority view:

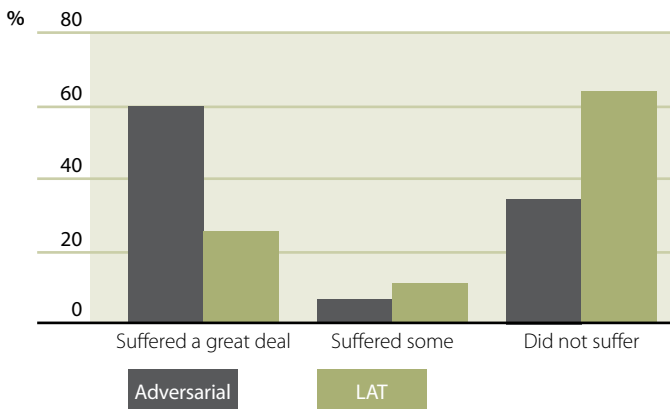
Court and all that is involved with it, has had massive, devastating impacts on me as a parent. My health has deteriorated through the strain of constant court battles—four years now. Nothing at all about this process has made me feel supported as a parent, nothing.

(Father in the traditional trial group)

4 Impact of court on the co-parenting relationship

Traditional trial parents were far more likely to report their parenting relationship had 'suffered a great deal' through the court process (60 per cent of the traditional trial group, 25 per cent of LAT). These parents presented a picture of further damage done to an already precarious parenting relationship. The graph below shows a near-opposite image of results between the two groups.

Figure 1 Did your parenting relationship suffer as a result of the court process?



5 Parents' relationship with their children post-court

Significantly more parents in the traditional trial group reported that their relationship with their child also suffered substantially as a result of the court process.⁶ Many of these parents spoke of the strain of lengthy and expensive legal battles and of feeling unable to protect their children adequately from their stress. In contrast, 30 per cent of the LAT pilot parents said there had been harm done, while half attributed improvements in their relationship with their children to the LAT process:

The court bit was handled very well, so I don't think it really touched my child or my relationship with him. The court process really looked after the parent.

(Father in the LAT group)

6 Perceptions of children's emotional wellbeing, post-court

Parents in the LAT group felt spared from lengthy trial processes and that they received direct, supportive input around their children's needs. In keeping with LAT parents' greater sense of competence and control post-court, they reported their children were faring significantly better than the traditional trial group on four key symptoms (1) fewer worries (2) less tearful, unhappy or downhearted (3) less fearful and (4) less anxious.

Some parents drew a link between the LAT and outcomes for their children:

It (LAT) confirmed to me the things I was doing were the right things and it made me more aware that I was a good father because you really start to doubt yourself ... They are okay now, but if LAT was in place four years ago the children would not have had the problems they did.

(Father in the LAT)

Children's emotional wellbeing was significantly worse across both groups when parental acrimony after court remained high.

Specific characteristics of the LAT that support parent and child wellbeing

This study examined and described participants' experiences of how change occurred. The following features of the LAT were highlighted as the most influential for the LAT group:

1 The deliberate educative component of the LAT

Education about post-separation conflict and parenting started with the family consultant at the beginning of the court process and continued during the trial in partnership with the judge:

It hurts kids, scars them for life. It hurts them to see their parents fight in front of them. It affects them a lot. I didn't know it at the time but do now, since court.

I heard what they all said, the judge and the lady. I don't know what else to say.

(Father in the LAT group)

2 The courtroom process

In the interview, parents were asked, 'What or who specifically had the biggest effect on you as a parent?'. Responses included: (1) features of the LAT courtroom, including seating of all parties at a large table across from each other instead of the traditional partitioned long bench (2) respectful treatment and (3) direct conversation with an interested, empathic judge:

In regards to Mother, instead of impulsively reacting to me, she listens now. I think she was listened to there, so she could listen to me too.

(Father in the LAT group)

She (ex) is more at peace I think. It was handled well in the Court and with respect.

(Father in the LAT group)

His new partner took an AVO against me, saying I'd done x, y, and z. Then in court, she had to look at me, and listen, and she realised I hadn't done anything, and it got us to talk. Now we can say, 'Hi', and talk about the kids. It's led to my ex talking more civil.

(Mother in the LAT group)

3 The conduct of the judge and family consultant

The family consultant, who accompanied the matter through the LAT process, was frequently described as having a positive impact on the parents.

In the traditional trial group, 92 per cent of parents reported a predominantly negative experience of the judges with this cluster of descriptors: 'biased, unduly critical/harsh, unfair, naïve, ignoring, omnipotent, inconsistent'. In contrast, only eight per cent of traditional trial parents made any kind of positive comment about their judge being 'supportive'. Irrespective of whether their case was 'won' or 'lost', 69 per cent of LAT parents reported positive experiences of their judge: 'excellent, fair, supportive, correct, observant, wise, powerful, strong, helpful, eased the confusion, very nice, listened, open, amazing, wonderful, encouraging, very polite, respectful':

I'd like to say that Judge [name deleted] ... Brilliant. Very fair. And I felt like even though I didn't have representation, I felt like I was treated evenly in court and I

was listened to. Definitely. It was excellent. You could tell she'd been around the block (in a good way). As a mother it's extremely stressful. This is your child, the love of your life, but the judge was guiding me, made it a lot easier.

(Mother in the LAT group)

The significance of the judge's impact points to the importance of his or her role in sustaining an educative stance and a higher level of personal connection than has traditionally been the case.

Children's wellbeing and less adversarial processes

Collective research literature suggests family law interventions that positively impact children's wellbeing are those that facilitate:

- improved understanding by parents of their children's needs and their capacity to respond to those needs
- increased cooperation in the co-parenting relationship
- timely, durable agreements
- decreased conflict between parents and improved conflict management and
- preservation of effective relationships for the child with both parents.

Research shows these outcomes can be facilitated by child-inclusive dispute resolution processes. These processes involve assessment of children's perspectives on the family situation, particularly the experience of their parents' conflict, followed by conversation with parents about the children's needs.

In the context of the LAT, this is now achieved through the Child Responsive Program (CRP) and has become an important addition to the new court pathway.

- In a study of 77 parents who attended the CRP, 96 per cent reported a positive experience and outcome for their children from their safe inclusion in the process.
- These parents reported a striking increase in their willingness to attempt to cooperate with the other parent after hearing from the family consultant about their children's experience of their conflict.⁷

Elsewhere, mediation with high-conflict parents that actively focused on the formation of a parental alliance around the needs of the children, as expressed by the children, led to gains over the long term. Four years after their parent's mediation, children reported significantly less conflict between their parents and felt far more protected from it than children whose parents participated in mainstream mediation:⁸

Like the less adversarial trial, these interventions are designed for high-conflict and/or complex cases and not for the 'worried well'.⁹ Children who have experienced extreme or protracted conflict, violence or maltreatment have an even higher need to be heard than those in less problematic matters. Their parents have an even higher need for specialist levels of support and motivation to build some semblance of a workable co-parenting partnership.¹⁰

The less adversarial process: a collaborative future

Evidence outlined in this chapter demonstrates that, at least in the short term, parents conduct themselves differently after a LAT and CRP-derived resolution, resulting in demonstrable advantage to their children's wellbeing.

Questions for the future include the long-term effects of less adversarial processes on children's wellbeing and consideration of what other elements might improve their recovery and growth.

While single, brief interventions can have powerful effects on individuals, the context of that intervention is all important.¹¹ The timing of the intervention and the conduct of all the players along the way undoubtedly combine to influence outcomes. For children to have maximum benefit, their parents need to hear a consistent, less adversarial message. They need:

- support from their lawyers to disengage from damaging adversarial processes
- facilitation from family consultants to help them understand the developmental issues for their children and
- when necessary, to come before a judge who pauses, listens and supports focused consideration by all of the children's needs.

No one piece on its own is likely to create the same overall outcome.

Collectively, the components of the less adversarial pathway, now including the CRP, show enormous potential to better serve the children of high-conflict, contesting parents. Whatever its legal success, findings show that the traditional, more adversarial pathway struggled, and some may say failed, at a level crucial to children's best interests: the prevention of damage to their parents' abilities to parent and to cooperate after court. In contrast, the data firmly suggest that the less adversarial and child responsive pathway moves beyond prevention of damage. It has the capacity to motivate high-conflict parents toward some level of repair, supporting them to recast their co-parenting behaviours and attitudes in light of their children's needs.



Legislative underpinnings

Background

The Family Court of Australia is a superior court of record. It was established by the Australian Parliament in 1975 under Chapter 3 of the Australian Constitution. Its source of jurisdiction is the *Family Law Act 1975*¹² and the *Commonwealth Evidence Act 1995*¹³ applies to cases.


Recent history

In December 2003, a House of Representatives Committee investigated possible reforms to family law processes. The committee found that although the adversarial system had been modified in family law, the adversarial structure of litigation remained and 'the dynamics and emotions of family separation made adversarial litigation inappropriate'. The committee went on to make proposals about reshaping the system so that '... cooperation and agreement replace confrontation, decision-making in a legal context is non-adversarial and litigation is avoided as much as is possible'.¹⁴


The committee proposed an approach based on:


- non-adversarial deliberation of relevant matters
- modified rules of evidence
- minimising forms and affidavits
- an investigative approach where the Court decides what information it needs to make a decision
- a hearing process that avoids undue formality and
- a simplified, speedier and lower-cost process for making decisions.¹⁵

For more a more detailed history of the introduction of the LAT see:

 *Finding a better way* by Margaret Harrison.

For the results of the evaluation of CCP see:

 *Evaluation of the children's cases pilot program: A report to the Family Court of Australia* by Prof. Rosemary Hunter.

 *The children's cases pilot project: An exploratory study of impacts on parenting and child wellbeing* by Jennifer E. McIntosh, PhD.

Concurrently, the Family Court of Australia was testing a new, less adversarial approach for the hearing of children's cases in Sydney and Parramatta. This new approach focused on the future and best interests of the child rather than on the past history of the parties' relationship.¹⁶ For clients, participation in the Children's Cases Program (CCP) required informed consent from both parties and extended to consenting to participate in non-privileged mediation. The new approach also included changes to evidence rules, enabling the judge to identify issues through questionnaires and discussion with the parties and to take 'much greater control of the proceeding than under the traditional, adversarial approach'.

The confluence between the House of Representative's proposed approach and that of the CCP led the government to enact the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which enshrined a less adversarial approach in legislation.

The new legislation and rules

The inclusion of Division 12A of Part VII in the Family Law Act mandates a less adversarial approach to trials in child-related proceedings and in financial matters by consent.

The *Family Law Rules 2004* provide for the practice and procedure to be followed by the Family Court in relation to the LAT (as amended by the *Family Law Amendment Rules 2009* (No 1)). On 1 March 2009, the *Family Law Rules 2004* were amended in a number of respects to include amendments to support the LAT (*Family Law Amendment Rules 2009* (No 1) Schedule 1).

The Act and Rules form the legislative framework for all less adversarial proceedings in the Family Court of Australia.

The less adversarial trial DVD focuses on three less adversarial trials conducted in children's cases. Consistent with the focus of the LAT DVD and this companion, the following discussion is limited to legislation and rules as they apply to child-related proceedings.

The legislation in more detail

Division 12A of Part VII of the Family Law Act 1975

The following, drawn almost entirely from a paper given by Justice Collier at the 13th National Family Law Conference,¹⁷ provides an explanation of some of the sections within the legislation and what they set out to achieve.

Division 12A, section 69ZN, sets out five principles that are the focus of the LAT.

The principles may be summarised as:

Principle 1	The Court is to consider the needs of the child concerned, and the impact that the conduct of the proceedings may have on the child, in determining the conduct of the proceedings.
Principle 2	The Court is to actively direct, control and manage the conduct of the proceedings.
Principle 3	The proceedings are to be conducted in a way that will safeguard: <ol style="list-style-type: none"> (a) the child concerned against family violence, child abuse and child neglect and (b) the parties to the proceedings against family violence.
Principle 4	The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
Principle 5	The proceedings are to be conducted without undue delay and with as little formality as possible.

Section ZQ deals with the Court's general duties and gives effect to the principles in s69ZN. The section states in terms of direction that the Court must:

- decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily
- decide the order in which the issues are to be decided
- give directions or make orders about the timing of steps that are to be taken in the proceedings, and in deciding whether a particular step is to be taken, consider whether the likely benefits of taking the step justify the costs of taking it
- make appropriate use of technology

- if appropriate, encourage the parties to use family dispute resolution, deal with as many aspects of the matter as it can on a single occasion and deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

Section 69ZR makes it possible to make findings of fact to determine a matter, or to make an order at any time during the proceedings.

Section 69ZS deals with designation of a family consultant in relation to the proceedings at any time.

Section 69ZT deals with rules of evidence. The rules of evidence do not apply to child-related proceedings¹⁸ except in exceptional circumstances as mentioned in s69ZT(3).

Section 69ZU Sets out that the Court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.

Section 69ZV deals with the evidence of children made about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible. The weight given to such evidence is as the Court thinks appropriate.

Section 69ZW refers to the Court's general duties and powers relating to evidence. The powers may be summarised as follows:

- (a) giving directions as to the presentation of evidence
- (b) giving directions as to who is to give evidence
- (c) giving directions as to how evidence is to be given and
- (d) giving directions in relation to an expert as to the matters to be dealt with, the number of experts and how the evidence is to be given.

Subsection (2) indicates the Court may make directions or make orders: about the use and length of written submissions; limiting the time for oral argument and the giving of evidence; that particular evidence is to be given orally or by affidavit; that evidence in relation to a particular matter or of a particular kind not be presented by a party; limiting, or not allowing, cross examination of a particular witness; or limiting the number of witnesses who are to give evidence in the proceedings.

The rules explained

The rules from the *Family Law Rules 2004*, as amended by the *Family Law Amendment Rules 2009* (No 1), prescribe the practice and procedure in relation to the LAT in children's cases conducted in the Family Court. They are largely contained in Chapter 16 and deal with the application of the part and trials to which Division 12A of Part VII applies.

The rules cover areas such as:

- The judge presiding over the entirety of the trial (rule 16.08 (1))
- The purpose of the first day (rule 16.08 (3))
 - including to discuss and identify the orders sought and issues of the case with the parties and their legal representatives; to hear and determine any interlocutory issues or interim applications that are outstanding on the first day of trial; to receive evidence, including from the family consultant in the case; to consider and determine a plan for the remainder of the trial.
- Continuation of trial (rule 16.09)
 - including to further identify the issues for which evidence is required; to make procedural orders about filing and exchange of all remaining evidence; and allocating dates for the continuation of the trial
- The final stage of the trial (rule 16.10).

Other applicable rules for a LAT in parenting cases include:

- Part 16.2 Proceedings before the Judge—general
 - Rule 16.04 trial management
 - Rule 16.07 parties' participation
- Part 16.4 and 16.5 provide for financial cases where Division 12A of Part VII of the Act does not apply and combined parenting and financial cases
- Part 16A Consent for Division 12A of Part VII of the Act to apply to a case—provides for the procedures by which parties may consent to the application of Division 12A.

Chapter 12 of the rules provides for court events that are registrar managed.



A comparison with the traditional system

For further information refer to the *Family Law Rules 2004*.

The difference between the traditional and less adversarial systems has been variously described. McDowell and Webb,¹⁹ describe it below:

In the common law tradition, Judges act as umpire to ensure that the rules are adhered to while the parties conduct a legal battle to determine the issue. This system is known as adversarial, and is prevalent in most (though not all) judicial bodies in our own legal system. By contrast, Judges in the Romano-Germanic tradition are generally far more participative in the trial process. They act as inquisitors in the process. The role of the Judge is that of fact-finder more than an umpire.

The adversarial system of law relies on two opposing parties representing their positions to a referee who determines the outcome of the debate. Both parties present evidence and argument that they believe best supports their position. The referee, usually the judge, decides the case on the basis of the evidence and argument put forward.

'It is sometimes said that the adversarial system is not really a search for the truth, only for the better of the two stories presented to the court', observes the Honourable Richard Chisholm,²⁰ and

[b]ecause the judge does not conduct any independent inquiry or investigation, the Court is indeed limited to hearing the stories the parties tell and, while its task is to assess the plausibility of these stories, it has no way of knowing whether either is true: the Court will never know whether there might have been other evidence, not called by either party, that would have led to a more accurate result.

In contrast, in the inquisitorial system, the judge is able to direct, control and manage the conduct of proceedings actively, including directing what evidence is needed to make decisions. The judge may conduct an independent inquiry and investigation in search of the truth.

Table 1 on page 16, *The Family Court's shift to a less adversarial approach: Children's cases*, compares and contrasts the Family Court's traditional adversarial system with the current less adversarial, and more inquisitorial, approach.

Table 1 The Family Court's shift to a less adversarial approach: Children's cases

Feature	Family Court's traditional adversarial system	Family Court's less adversarial system (parenting cases)
Case management	Administrative case management	Intensive case management Judicial control of trial management and listing events after first day before judge
Attendance at court	Parties required to attend court in person or via electronic means	Greater opportunity to attend events via alternative mechanisms such as telephone link, in-chamber events, etc.
Control of proceedings	Party driven	Judicial management
Trial type	Single trial	Discontinuous trial—may be heard over a series of court events in a parenting case
Formality of proceedings	Formal courtroom setup, judge appearance is formal, legal technicalities are a prominent feature	Proceedings are, as far as possible, conducted with as little formality, legal technicality and form as possible
Judge engagement with parties	Party engagement is generally through lawyers	The judge may speak directly with parties
Issues	Parties determine the issues in contention	The judge, with the assistance of lawyers and parties, identifies non-contentious background facts, contentious facts and list of issues
Evidence	Parties decide what evidence they want to present Traditional rules of evidence apply Emphasis on written evidence	The judge decides what evidence is needed— rules of evidence, such as the hearsay rule, do not apply except in exceptional circumstances Emphasis on oral evidence, particularly in the early stages of the trial
Involvement of family consultants	Family consultant (formerly court counsellor) undertakes privileged counselling Second family consultant conducts interviews and writes a Family report	All meetings with the family consultant are admissible as evidence A family consultant gives evidence and provides social science expertise
The voice of the child	The child is heard by way of family consultants, appointed expert, and/or independent children's lawyer at final hearing through reports	The child's voice is heard early in the proceedings by way of family consultants, and subsequently by way of appointed expert, independent children's lawyer and/or judicial interview

The table is based on the:

- *Family Law Act 1975* (Cth) Division 12A s69ZN(7) and
- *Family Law Rules 2004* (Cth).

It is also drawn from papers by the Honourable Justices O'Ryan²¹ and Collier²² and the Honourable Richard Chisholm.²³

It is worth noting that prior to the introduction of the LAT the family law system was not strictly adversarial. The Honourable Justice O’Ryan²⁴ observes that it was 'adversarial with slight elements of inquisitorial procedure' and that it has shifted to a 'significantly less adversarial procedure with significant elements of inquisitorial procedure'.

Control of proceedings

The LAT is conducted under strong judicial management.

In less adversarial proceedings the judge:

- identifies and clarifies any contentious issues that require a decision and material non-contentious facts. This is achieved through the use of questionnaires, a children and parent’s issues assessment and by speaking directly with all parties (including the independent children’s lawyer and family consultant)
- determines and clarifies with the parties (including the independent children’s lawyer) the issues that are material to the proposals of each party
- makes orders that prescribe the conduct of the trial
- directs the parties to make inquiries and obtain evidence on any issues the judge determines is relevant
- determines what evidence is to be given, the method of receiving evidence and the manner in which it is to be given
- decides what witnesses are to be called and the issues about which a witness will give evidence. In fact, the judge will prevent the parties from calling evidence that he or she considers to be unhelpful and
- determines the sequence and manner of questioning by the parties.

During the trial, the judge is free to speak with and direct questions to the parties, whether they are legally represented or not.

Family Law Act 1975 (Cth) Division 12A, s69ZN (7)

Principle 2

The Court is to actively direct, control and manage the conduct of the proceedings.

The discontinuous trial

The LAT is discontinuous. It comprises a succession of intermittent events over the course of which, facts and issues are defined, progressed and determinations are made. The trial in a parenting case commences when a matter first comes before the judge and is completed at the last event, whenever that occurs.

Sections 69ZR (1) and (2) of the Family Law Act state that a judge may make a finding of fact, determine a matter or make an order at any time after the commencement of the trial.

The Honourable Richard Chisholm contrasts this with the traditional system where

*[t]raditionally there is a single trial, or hearing, in which the evidence and arguments are presented, at the end of which the judge makes orders that dispose of the case and delivers a judgement that makes the necessary determinations of fact and applies the relevant rules of law, and thus contains the reasons for the orders.*²⁵

During the LAT, unlike a traditional trial, determination on an issue prior to completion of the trial will not of itself disqualify the judge from continuing on the grounds of bias. This is clearly set out in Division 12A of Part VII of the *Family Law Act 1975* (Cth) at s69ZR(3):

[T]o avoid doubt, a judge, Judicial Registrar, Registrar, Federal Magistrate or magistrate who exercised a power under subsection (1) in relation to proceedings is not, merely because of having exercised the power, required to disqualify himself or herself from a further hearing of the proceedings.

Formality of proceedings

Under the Family Law Act proceedings are to be conducted without undue delay and with as little formality, legal technicality and form as possible.

Rosemary Hunter,²⁶ in her evaluation of the CCP, identifies the challenge in striking the balance between sufficient formality to enable the judge to perform his or her judicial decision-making function and sufficient informality to allow parties to feel free to participate.

There are a range of mechanisms available to judges to minimise the formality and legal technicality of proceedings.

Family Law Rules 2004 (Cth) Rule 16.08

Commencement of trial

A trial is taken to have commenced when it first comes before the trial judge.

Family Law Act 1975 (Cth) s69ZN(7)

Principle 5

The proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

Firstly, the judge uses his or her discretion to create a court layout that best meets the needs of the case. This often includes lawyers sitting next to parties and support persons sitting next to self-represented litigants.

The LAT courtroom

In the Canberra registry, a new state-of-the-art, less adversarial courtroom is in use. The courtroom was specifically designed in an octagonal shape to balance inclusion and reconciliation with a layout where clients are not forced to face each other.

The judge sits slightly elevated at the head of the octagon, creating a sense of control over proceedings. The judges inclusion in the octagon creates a less intimidating environment than a traditional courtroom.

The courtroom is supported by the latest technology including plasma screens, a touch-screen control panel, a document camera and a built-in sound system.



Secondly, the judge creates a climate conducive to participation and reduces formality by drawing on a range of techniques that may include:

- speaking directly to parties using accessible yet not simplistic language
- explaining proceedings in easy-to-understand terms
- paraphrasing
- explaining common legal expressions
- identifying technical terminology and ensuring meaning is clarified and
- removing his or her wig.

Hearing the parties

During the LAT, parties are able to speak directly to the judge. The Honourable Justice O’Ryan explains that ‘each party has an obligation to make a full and frank disclosure of all issues relevant to the child and their best interests’ and ‘the judge may speak with and address questions to the parties, whether they are legally represented or not’. The Honourable Justice Collier observes:²⁷

Represented parties may, so far as I am concerned, elect whether or not to speak to me directly. My observation however is that even though parties are initially too shy or embarrassed to speak directly with me, within a very short time they want to take over from their legal representative and tell me what they want me to hear.

Identifying issues

On the first day of trial, the judge usually identifies and clarifies undisputed facts, disputed facts and unresolved issues in the case. These are embodied in the court record. This is in contrast to a traditional trial where the parties define the issues in dispute. The first day is spent, according to the Honourable Justice Collier,²⁸ 'teasing out what the issues really are and reaching some idea of what is required to take the matter forward!'

Evidence

The use of evidence in the LAT differs from a traditional trial in a range of areas:

- the application of the rules of evidence
- determination of what evidence is put forward and
- who provides evidence.

The Honourable Justice O'Ryan²⁹ describes LAT proceedings as a 'process of ongoing inquiry and investigation rather than interlocutory preparation for a single trial event'. Further, the 'proceedings are less technically rule-governed' and 'the judge has wide latitude to adduce evidence both in respect of the material and witnesses introduced by the parties and also in the gathering of evidence'.

The rules of evidence

Section 69ZT (Division 12A of Part VII) of the *Family Law Act 1975* (Cth) sets out matters relating to evidence. Specifically, it states that most of the traditional rules of evidence do not apply (except in exceptional circumstances at the discretion of the Court).³⁰ The most significant difference is the admissibility of hearsay evidence during the LAT. This is particularly important given the emphasis on oral evidence in the LAT.

Parties are sworn in on the first day of the trial in parenting cases, making everything said from that point onwards under oath. This allows the judge to make binding rulings on particular issues at any time after the commencement of the trial. This is in contrast to the adversarial system where all rulings are made at the trial's conclusion.

Determination of what evidence is put forward

During the LAT, the judge controls and determines what evidence is to be provided and its treatment. This is one of the most significant changes from the adversarial system where the judge was presented with evidence prior to the trial and was unable to prevent the provision of unhelpful evidence or identify additional evidence required. The judge is able to prevent the parties from calling evidence that is considered by the judge as unhelpful.

In discussion about the difficulty of cases heard under traditional rules of evidence, Margaret Harrison observes:³¹

The critical difficulty with cases heard pursuant to the 'traditional' rules of evidence was that their technical nature frequently obscured the matters that were really relevant to the case (i.e. the best interests of the children) and provided opportunities for objections to be made, thereby adding unnecessary cost and complexity. Affidavits were drafted in a formal and artificial way, and frequently the 'real' voice of the parties was obscured and distorted.

On the first day of the LAT, the judge decides how the case will proceed and works out with the parties the evidence that would most assist the trial. No party is to file or serve any document without first obtaining leave from the judge.³² Affidavits will only be filed if the judge deems it appropriate.³³

Who provides evidence?

On the first day of the LAT, in a parenting case, evidence is usually provided by those present including the parties, their legal representatives, the independent children's lawyer and the family consultant.

On determining the evidence required, the judge determines the witnesses to be called and the issues about which witnesses will give evidence (including, where applicable, any expert reports that have been obtained prior to the first day before the judge by an independent children's lawyer). The judge may decide not to accept certain witnesses proposed by the parties for subsequent days.

Involvement of family consultants

Family consultants are employed by the Court to provide social science expertise. They are qualified psychologists or social workers experienced in working with children and families.

Traditionally, the family consultant—previously known as a counsellor or mediator—undertook privileged counselling with parties prior to their trial.

In contrast, in a significant shift from the traditional approach, anything said in the company of a family consultant by parties (and sometimes the children) in early assessment and intervention is now admissible as evidence unless specified by the judge.³⁴ During the trial itself, the judge may draw on the family consultant to provide evidence based on the children and parents' issues assessment and to provide a broader social science perspective on the issues raised by the parties and their lawyers.³⁵

At the commencement of the trial of a parenting case, the family consultant is sworn in. During the trial, as expressed by the Honourable Justice Collier,³⁶ the judge may draw on the family consultant to 'give the judge an insight into the parties and the problems that beset them'.

The family consultant's role in the LAT is explained by Margaret Harrison.³⁷ It is 'to provide a neutral, conceptual and evidence-based commentary on the social science perspectives of the issues raised by the parties and their lawyers' and:

- to provide a mediation input and social science perspective, balancing the legal perspective of the judge
- to support the less adversarial dynamic in the courtroom, promoting a collaborative approach to hearing the dispute and thus a positive role model for the disputing parties and
- to facilitate reference to community-based organisations when parties required ongoing support or confidential counselling.

The voice of the child

The Court takes a protective stance toward children and does not usually call them to give evidence in parenting proceedings.³⁸ Patrick Parkinson and Judy Cashmore³⁹ assert that a protective stance does not preclude children's voices from being heard:

This protective stance towards children does not, of course, mean that their voices cannot be heard in the process for decision-making nor that their wishes are unimportant. Children's wishes have typically been one of the factors that courts have been required to consider in many jurisdictions in making determinations about children's welfare. The protective approach does, however, mean that children are shielded as far as possible from being drawn into the conflict.

The ways in which children's voices may be heard during a LAT, without direct participation in the trial, are:

- through oral evidence and reports prepared by the family consultant. Reports may include a children and parents' issues assessment and a family report
- through the appointment of a separate legal representative, an independent children's lawyer⁴⁰
- through evidence given by expert witnesses representing the voice of the child. Orders for expert witnesses are usually given on the first day of a LAT by the judge. Experts may include psychiatrists and medical practitioners.
- through judicial interviewing.

While the voice of the child is represented through the same participants as in a traditional trial, the child's voice is represented earlier. In many instances, the judge will 'hear' the child's voice through the children and parents' issues assessment received prior the trial. Further, the voice of the child will be heard on the first day of the LAT.

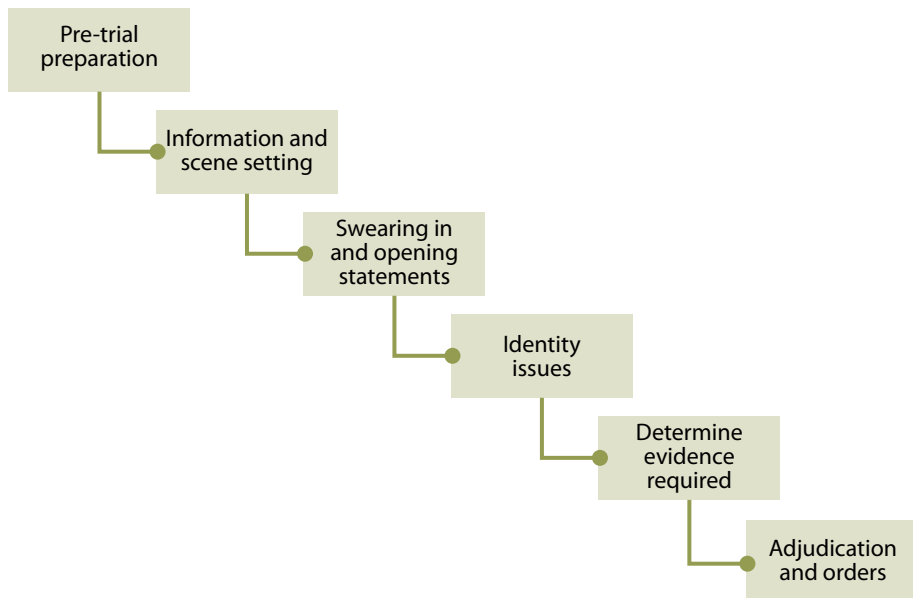
The early hearing of the child's voice has the advantage of allowing the judge to use information about the child's wishes to determine future evidentiary requirements and to help define the issues.



The less adversarial trial step-by-step (parenting cases)

The following provides an overview of the key components comprising the first day of trial in parenting cases.

Figure 2 Components of a first day LAT: Parenting case



The components depicted above are an indication of the components of the LAT and the range of options available to the judge to consider and employ. They are not intended to be prescriptive or in an exact order. Within the LAT framework, it is critical that the judge retains maximum flexibility and judicial discretion to tailor the trial to the needs of a particular case while remaining consistent with the LAT principles.⁴¹

The continuation and final stages of the LAT are also briefly discussed here.

COMPONENT 1 Pre-trial preparation

The judge considers a range of factors when deciding on the most appropriate approach for each trial event. The judge may consider cost, time, a client's capacity (e.g. health issues) and safety during pre-trial preparation.

The layout of the courtroom is determined by the judge who considers the needs of each case. The judge considers and balances:

- cultural and family violence issues
- the need for a support person to sit next to parties who do not have legal representation
- whether an interpreter is required by one or more parties
- conducting proceedings with as little formality as possible and
- where represented parties and lawyers should each sit in the courtroom (in the LAT there is no formal requirement as to where each should sit; however, represented parties are generally required by judges to sit next to their lawyers at the bar table).

The court setting includes conducting the hearing via telephone, video link, in chambers or a courtroom.

Judges may change the physical layout of a courtroom to suit their requirements.



PRACTICE EXAMPLE Setting up a courtroom

JUSTICE LE POERTRENCH: I've set my courtroom up in a manner where I have a square. I just broke the long bar table in half and moved the halves together ... I did that because I wanted to have a less legalised type appearance in the courtroom.

HIS HONOUR: (When the parties) face each other they can choose whether they actually look at each other or not. Frequently they start off not wanting to look at each other at all and by the time we finish the session they're talking to each other across the table ... I wanted a more collaborative type approach. I wanted them to understand that this was a joint effort, that the problem in relation to the children is their problem, not my problem. I want them to start, at the conclusion of that first session, understanding that they've really got to work on this together. I think the way in which you set up your courtroom does add to that dimension and starts to draw them in together working cooperatively.

(The Honourable Justice Le Poer Trench, Interview , 23 November 2008)



The square courtroom set up can be viewed on the LAT DVD (Justice Le Poer Trench).

The judge conducts proceedings with as little formality as possible while having regard for the needs of the case. For some judges, this may involve removing their wigs.



PRACTICE EXAMPLE Reducing formality

JUSTICE STEVENSON: It's as a result of this process that I've stopped wearing a wig, by the way. I felt that people, when they've been through this first day, they tend to develop a bit of a rapport with you, feel comfortable with you. There was one particular case where I first took the wig off ... I discovered that you could physically sense that the parties were more comfortable when no one was wearing wigs. So, from that day, no one in my courtroom has ever worn a wig and that was about three years ago.

HER HONOUR: I still wear my robe and I still wear the rest of the trappings. And I still like to keep a bit of distance, like I will always call them Mr Smith and Miss Jones or whatever. I won't let people get too familiar. And having said all of that, I wouldn't rule out putting the wig back on in an appropriate case. If you've got a particularly violent person, for example, or people who are going to abuse each other, it can be a useful tool. So I could imagine a situation where I'd do that. I haven't had to yet, which I find interesting in itself.

(The Honourable Justice Stevenson, Interview with Stuart Scowcroft, 3 July 2008)

For others, it is achieved through the use of less formal language or simply through the act of talking directly to parties:

I find that by staying on the bench and by staying wigged and gowned, that still leaves me with a measure of traditional control ... [enabling] me to be fairly relaxed in the questions and the way I let people answer.

(The Honourable Justice Collier, Interview with Stuart Scowcroft, 20 November 2008)

In preparation for the first day of trial, the judge may also write to the parties to inform them of what they can expect and what the judge expects of them.

Judges may also prepare for the LAT by reading available material on the matter such as:

- the court file including applications, responses and documents relating to the case
- a children and parents' issues assessment⁴² prepared by the family consultant and
- questionnaires completed by each of the parties covering their circumstances, any safety issues, current parenting arrangements and future parenting proposals.

Family Violence

In recognition and understanding of the devastating effects of family violence and abuse on victims, the Family Court of Australia has developed best practice principles for use in parenting disputes when family violence or abuse is alleged.

The principles acknowledge the adverse effects of violence on parties and the children who experience or witness violence. The matters the Court considers include:

- how such cases should proceed to keep parties safe and able to fully participate in the trial (this may involve a person being heard by video or teleconference)
- the evidence needed to make a decision in cases where there is alleged family violence and/or child abuse, including the most appropriate expert evidence and
- the wide range of risk factors and social science information available in relation to the cause, nature and effects of family violence and/or child abuse. These are considered when making orders in cases where there is, or where there is a risk of, family violence.

COMPONENT 2 Information and scene setting

At the commencement of the trial, the judge provides information about the trial process, the role of trial participants and sets the scene with the objectives of:

- putting the parties at ease
- helping the parties to understand the steps of the LAT and the roles of the participants
- focusing the parties on the best and future interests of the child and
- setting the tone of the proceedings.

There are a number of preliminary steps available to the judge:

- A Reminding parties of the importance of focusing on the best interests of the child



PRACTICE EXAMPLE Refocusing parties

DEPUTY CHIEF JUSTICE FAULKS: The children are the principal focus of what's going on and the purpose of today is that I want to hear from each of you ... about what you see as being the appropriate thing for the best interests of the children and in this case there are four, so there are different things for each child. And I want to hear from each of you what part you think that the others ... ought to play in the children's lives.

(The Honourable Deputy Chief Justice Faulks, *Smith & Murray*, 15 August 2008)

- B** Outlining for the parties the steps involved in the hearing and the aims



PRACTICE EXAMPLE **Outlining the steps in the hearing**

DEPUTY CHIEF JUSTICE FAULKS: It may take a little longer this morning in this case because there are four individuals who have different requirements, quite possibly, five and so I want to listen to that. I assume, given that you have been in conflict for some time, that at the end of that process it is unlikely that there will be any clear solution to the future and what I would then want to do is, in conjunction with the independent children's lawyer ... work together to work out what lawyers describe as the issues, which are really the matters that need to be decided.

HIS HONOUR: At the end of that time we will then work out what evidence, what matters I need to have in front of me to enable me to make that decision because in the end, while it's desirable that the four of you should make the decisions, if you can't make them then I have to, that's my job. So we'll then adjourn the proceedings so that all those steps can be taken. I will check along the way on a day. It may be necessary for you to come to court, it may not, depending upon a few things that happen and to make sure everything's ready and then if we're still in dispute on the matters that are left, I should be certain that I've got what I need to make the decision and we'll then set some days aside on which we can deal with the matter finally.

(The Honourable Deputy Chief Justice Faulks, *Smith & Murray*, 15 August 2008)

- C** Introducing the people present in the courtroom and explaining their roles, including the case coordinator and family consultant



PRACTICE EXAMPLE **Explaining roles**

DEPUTY CHIEF JUSTICE FAULKS: Now, helping us, helping you along the way from the day this matter came to this court it has been assigned to a family consultant who is a person attached to the Family Court who has expertise in child development and social skills and psychology. In your case it's Ms Helen Willetts, who's sitting in the witness box. Have you all met Ms Willetts before?

(The Honourable Deputy Chief Justice Faulks, *Smith & Murray*, 15 August 2008)

D Setting ground rules, or rules of engagement, to help set the tone of proceedings and to make it easier to manage someone who transgresses. Example rules from practice include:

- no derogation of others
- common courtesies need to be observed
- parties are not to talk over each other or interrupt each other
- if a party needs time to compose themselves that will be provided and
- stay focused on the best interests of the child.



PRACTICE EXAMPLE Ground rules

JUSTICE DESSAU: There are a couple of ground rules; they're not going to surprise you. I expect that everybody will act politely. I expect everyone to have a say, but one person at a time. You will probably have the impression that I am listening to the other parent very intently when they're speaking, let me assure I'll be listening to you just as intently when it's your turn.

(The Honourable Justice Dessau, *Lamb & Truong*, 30 October 2008)



This example can be viewed on the LAT DVD.

E Making procedural orders for the ongoing conduct of the LAT

Importance of introducing trial participants

I introduce everyone in the courtroom at the start of the hearing because I think it's very easy for us to forget what it's like to walk into such a strange setting. I always say to young lawyers, or even new judges, when I'm talking about this, I think we all need to picture ourselves being wheeled into an operating theatre. And we know how nerve-racking that is and whilst the doctors and nurses seem to be chatting about their next holiday or what they're doing next weekend, you don't know who everybody is, you're in a heightened state of anxiety and it would be, I think, very calming or reassuring if they all stopped chatting for a moment and said, 'I look after this, I'll look after this, I'll look after your anaesthetic'.

(The Honourable Justice Dessau, Interview with Stuart Scowcroft, 30 October 2008)

Many judges also outline their knowledge of a particular case early in proceedings, helping demonstrate that each case is treated by the Family Court of Australia as unique and with seriousness and care. Among other things, the judge may:

- use the children's names, ages and other information during the introduction
- state what they know about the case or
- outline to the Court any pre-reading they have done.

Justice Le Poer Trench integrates his knowledge of the case into the introduction: 'If they know that I've got a grounding fact-wise in what's happening with their children then I think perhaps it helps them trust me a bit more in what they might divulge in the time when they come to speak to me but otherwise they might be a bit reluctant to talk about!'⁴³



PRACTICE EXAMPLE Preparation

JUSTICE DESSAU: I have read your parenting questionnaires and I have read Mr Evan's preliminary observations. I am very conscious that you both adore the girls. It is very clear to me that they both adore you.

(The Honourable Justice Dessau, *Lamb & Truong*, 30 October 2008)



This and other examples of pre-trial preparation, information and scene setting can be viewed on the LAT DVD.

COMPONENT 3 Swearing in and opening statements

Swearing in

The parties and the family consultant are sworn in. If there are witnesses called on the first day, they are also sworn in. Everything said by those sworn in from this point and during the course of the LAT is evidence in the case.



PRACTICE EXAMPLE Swearing in

JUSTICE LE POER TRENCH: Shortly I am going to ask each of you take an oath to tell the truth and after that from that time until we finish the case whenever I talk to you, either in court or it might be on the phone, I will understand that you are speaking to me on your oath to tell the truth, and what you say to me I will use to determine the case ultimately if that's what I have to do.

(The Honourable Justice Le Poer Trench, *Townsend & Lord*, 13 December 2007)

Opening statements

Next, the judge speaks directly to the parties. Directing each of the parties to focus on the parenting arrangements that would be in the best interests of the child, the judge usually invites an opening statement from both sides. These are often limited to ten minutes. Some judges engage directly with the parties, leading them through a series of questions or discussion.

The judge gives parties an equal opportunity to present their proposals for the children. Speaking directly to the parties, the judge:

- allows parties to touch on aspects of their case that are of interest to them but may not be relevant to the determination of the legal issues and
- focuses parties on identifying solutions that are in the best interests of the child in the immediate future and in the longer term.

Some judges ask a question similar to, 'What part do you want the other parent to play in the child's life?' to reinforce the importance of both parents being involved in parenting.



PRACTICE EXAMPLE Focusing parties on the best interests of the child

JUSTICE STEVENSON: I would like you to try, if you can, to focus on what you really believe to be in your children's best interests. That may be the same as what you want to happen but there may well be a difference. I don't know as yet. So can you try and focus on what you think is really genuinely best for the children when you talk to me?

(The Honourable Justice Stevenson, *Walton & Walton*, 3 July 2008)

The Honourable Justice Stevenson identifies the value of talking directly to parties:⁴⁴ 'They [the parties] respond very positively to being able to speak directly to the person who is going to make the decision about their children. In a traditional trial, especially one in which you had two lawyers for each person, a solicitor and a barrister, there were two people between them and the judge and I think that they felt, often, marginalised by the process itself'. She continues:

I had this guy, he was a loveable rogue this man, he was a professional woodchopper. He was a real character and he didn't like some of the things that his own barrister was saying. He looked at me and he said, 'Judge can I say something to you?' I said, 'Of course you can'. He said, 'I don't know what he's talking about. I don't know what he's on about. But I can fix this up. I'll promise you that I won't do what she's saying she's worried about. Is that ok?'

'Sure. Thank you very much,' I said. 'That's the end of that issue, thank you Mr. So-and-so. Please move on.'

You can summarise it by saying that the parents feel much more involved and in my experience, much more relaxed.

(The Honourable Justice Stevenson, Interview with Stuart Scowcroft, 3 July 2008)

Judges, at their discretion, may use a range of techniques to manage and control the opening statements including setting time frames, refocusing parties, standing the case down for a short adjournment to allow parties to recompose themselves or have further discussion with their counsel.



PRACTICE EXAMPLE **Allowing parties to compose themselves**

JUSTICE COLLIER: Is this putting strain on you?

MS KING: Yes.

JUSTICE COLLIER: You're sure if you're up to it?

MS KING: Mmmm.

JUSTICE COLLIER: Just take your time. Take it easy. When you're ready.

Ms King spoke with her lawyer before continuing

MS KING: Okay. I want the children to come back and ...

(The Honourable Justice Collier, *King & Smithers*, 20 November 2008)



Examples of opening statements can be viewed on the LAT DVD.

During the opening statements and throughout the trial, the judge is often required to refocus the parties on the best interests of the child and how their proposals for the child's future best meet those interests, as well as discourage parties from focusing on the past history of the relationship.



PRACTICE EXAMPLE **Keeping parties on track**

PARTY: So I gave her more access, as [name deleted] can tell you, than she even asked for but she wasn't happy with that, so four days in a row she rang me up and she abused me over the phone until I had my - her number taken off.

HIS HONOUR: Can I just interrupt you? What you are doing is exactly what I asked you [not to do] ... What I'd like you to concentrate on is what you think is going to be best for these children in the future, because I can't do anything about the past but the orders I [make] may affect the future.

(The Honourable Deputy Chief Justice Faulks, *Smith & Murray*, 15 August 2008)



Examples of keeping parties on track can be viewed on the LAT DVD.

COMPONENT 4 **Identifying issues**

The approach taken by a judge to identify issues is flexible and based on the nature of the case. On the first day of the hearing, the judge usually identifies:

- areas of agreement and
- issues in dispute.

This sifting process assists the judge with directing, managing and controlling the case.

The question and answer process between the judge and the parties, as articulated by the Honourable Justice Dessau, 'has a place in the process as well because it helps to start breaking down some of the differences in their versions, looking at allegations, counter-allegations'.⁴⁵

Areas of agreement

The judge, in conjunction with the parties, family consultant and legal representatives, will try to establish areas of agreement (undisputed facts). 'In short', clarifies the Honourable Justice O'Ryan,⁴⁶ these may be 'anything which is relevant to the child and the parties and not in dispute'. He continues:

These facts [and issues] can include matters such as period of cohabitation, date of separation, existing care arrangements, whether residence is disputed, agreement that the child is securely attached to each parent, relationships with wide family members, schooling arrangements or medical treatment.

Issues in dispute

During the hearing, some issues in dispute may be clarified and resolved. However, those issues that cannot be resolved and remain in dispute will be determined by the judge during this hearing, at the continuation or at the final stage of trial.

The judge may:

- prepare a written list of agreed facts, non-contentious issues and issues to be determined or
- provide the above list orally with copies provided to the parties shortly after the hearing.

The list may be amended, particularly if new issues emerge or if they are narrowed by agreement or expert report. The Honourable Justice O’Ryan clarifies 'although the issues are generally identified on the first day of the hearing, further issues can be added to the list if relevant at a later time'.



Examples of judges identifying issues through discussion with parties, the family consultant and legal representatives can be viewed on the LAT DVD.

COMPONENT 5 Identifying evidence needs

The judge determines the evidence needed to resolve issues in dispute and the weight given to evidence, and makes rulings on whether evidence is relevant or reliable. As such, most evidence is conditionally admitted unless the judge determines otherwise (for example, see subsection 69ZT(2)).

During the LAT the judge usually explores, in discussion with the parties, the lawyers, the independent children’s lawyer and the family consultant, the following:

- the evidence required to inform and resolve the issues in dispute
- the witnesses required (the judge may decide not to accept certain witnesses proposed by the parties) and
- the manner in which the evidence is to be presented (options include affidavits, which are usually kept to a minimum, a family report and an expert report).

The judge determines who, by way of witnesses, will be called to give evidence and the method by which evidence is to be presented. The judge may direct the parties, or another appropriate person, to make inquiries and obtain evidence on any issue the judge determines is relevant.

The judge may discuss with the parties the possibility of interviewing the children.

The information gained through exploration of evidentiary requirements with the parties, lawyers and family consultant, assists the judge’s decision about what further evidence will be required.



PRACTICE EXAMPLE **Discussing evidentiary needs with parties**

HIS HONOUR: Now, what about your parents? Are they a large part of the children's lives?

MS KING: Yes.

HIS HONOUR: Both your mother and father are alive?

MS KING: Yes.

HIS HONOUR: Should they be involved, do you think?

MS KING: Definitely.

HIS HONOUR: Very good.

MS KING: They've been great support

HIS HONOUR: What about on your side, Sir?

MRS SMITHERS: Yes, my - my stepfather and mother are big parts of the children's lives.

HIS HONOUR: Well, I can certainly make orders for the preparation of a report so that the attachments with everyone can be looked at, the nature of the relationships and the children's views.

(The Honourable Justice Collier, *King & Smithers*, 20 November 2008)



Examples of the judge identifying evidentiary needs can be viewed on the LAT DVD.

COMPONENT 6 **Adjudication and orders**

The orders made by the judge may include:

- future conduct of the trial (including listing on a subsequent date, ongoing role of registrar, family consultant etc.)
- gathering of evidence (including family and/or expert reports, subpoenas)
- interim or trial parenting arrangements (these may be as a result of negotiation by the parties during the trial)
- final orders on some issues
- attendance by a party/parties at courses such as anger management, parenting, external counselling
- appointment of an independent children's lawyer (if not already appointed) and
- external family counselling, mediation or dispute resolution prior to a continuation, particularly if the judge thinks one or multiple issues could be resolved outside the Court.

The less adversarial trial step-by-step (parenting cases)

Table 2 Example orders

Type of order	Example
Future trial conduct	<p>I otherwise restrain each of the parties from issuing any subpoenas in the matter which have not been approved by me.⁴⁷ Approval may be obtained by sending an email to my associate, specifying the identity of the person to whom the subpoena is to be addressed and a brief description of the category of documents that will be sought.</p> <p>(From orders made by the Honourable Justice Le Poer Trench, <i>Beecham & Cassar</i>, 27 November 2008)</p>
Ordering a family report	<p>Order a family report addressing the following matters*:</p> <ol style="list-style-type: none"> (a) the relationship between the father, mother, maternal grandmother (b) the relationship between Jason and each of mother, father, maternal grandmother, Cleo, Samantha, Max, Sharon and Kate (c) an assessment of the developmental stage reached by Joshua (d) an assessment of Jason's attachments (e) an assessment of parenting capacity of father, maternal grandmother and mother (f) a report on any other matter that the family consultant considers would be helpful for the Court to know and (g) any recommendation the family consultant may wish to make in relation to the future care of Jason. <p>(From orders made by the Honourable Justice Le Poer Trench, <i>Somers, Hamilton & Brown</i>, 27 November 2008)</p>
Interim parenting arrangements as a result of negotiation by the parties during the trial	<ol style="list-style-type: none"> 1. By consent and pending further order, the current orders in relation to the time that Jason spends with his father are varied to provide that Joshua spend from 10 am to 4 pm each Wednesday with his father, with the mother to deliver Joshua to the paternal grandfather's property at [address deleted] at 10 am and collect him from that place at 4 pm. 2. The father is restrained from attending at [address deleted] prior to 10 minutes past 10 am each Wednesday and the father is to remove himself from that property no later than 3.50 pm on that day. The purpose of the order is to avoid contact between the mother and the father and both parties are ordered to do all things necessary to ensure that that purpose is achieved. <p>(From orders made by the Honourable Justice Le Poer Trench, <i>Somers, Hamilton & Brown</i>, 27 November 2008)</p>
Gathering of evidence	<p>The mother shall, as a matter of urgency, take all steps and execute all authorities and undergo all procedures necessary to have a hair sample taken and analysed to determine the presence or indication of any illicit drugs that may have been consumed or ingested by the mother.</p> <p>(From orders made by the Honourable Justice Collier, <i>King & Smithers</i>, 20 November 2008)</p>

The orders may incorporate a list of issues identified during the trial.

* Pseudonyms have been used

The judge reads the orders to the parties and then takes steps to ensure the parties understand both the orders and what happens next.

The judge may achieve this by:

- rephrasing any complex orders or legal terms in simple English
- asking the parties directly if they understood
- telling the parties who they can contact if they have questions and
- letting them know the next steps.



PRACTICE EXAMPLE Explaining next steps

JUSTICE LE POER TRENCH: Right. Now, can I just speak to Ms Beecham and to Mr Cassar again just so you know what's going to from this point because your lawyers understand the shorthand that we've been using, but I just want to make sure you do. The plan is that Mr Bell is going to ask the Legal Aid Office to fund an expert's report in respect of your family.

HIS HONOUR: And when we meet again I'll want to discuss the recommendations that are in that report, whether or not it's possible to reach an agreement based on those recommendations, or whether we need to then have a further hearing. If we need to have a further hearing, I'll make directions for each of you to give your evidence either in an affidavit form or orally. That just means that you come along to this court and you tell me your story directly.

HIS HONOUR: And we'll move towards, as quickly as we can, getting to a point where a decision is made, either by you or by me. So that's - that's what my plan is for the case. Ms Beecham, do you have any questions you want to ask me about that process?

MS BEECHAM: No.

HIS HONOUR: Right. Thank you. And Mr Cassar, do you have any questions you want to ask me?

(The Honourable Justice Le Poer Trench, *Beecham & Cassar*, 27 November 2008)

Judges may also give parties clear instructions about what to do if interim arrangements became unworkable or there is any change in circumstances.



PRACTICE EXAMPLE Instructions for re-listing if an urgent issue arises

JUSTICE COLLIER: Now, Ms King, Ms Smithers, the reason for that last order is, if something happens that needs urgent attention you don't have to file fresh applications and affidavits. You have to get in touch with the Court and your lawyers will be the persons to do that for you as you are both represented, and then by arrangement with my Associate the matter can be re-listed at a convenient date. Usually I would deal with any first such re-listing as that by telephone to see what's going on, and if the matter required it I would then list it in court as quickly as I could. So, if something is happening that you say is not in the best interests of the children, don't wait. And certainly, please, do not resort to filing contravention applications against each other for purported breaches of orders. Bring the matter back...

(The Honourable Justice Collier, *King & Smithers*, 20 November 2008)



Examples of judges explaining orders and next steps can be viewed on the LAT DVD.

The continuation of trial

The parties, their lawyers and the independent children's lawyer (if any) may be required to attend a continuation of trial, which may be conducted as a hearing via telephone, video link, in chambers or a courtroom. The judge will determine the amount of time allocated to each continuation event if any are required.

The judge explores and resolves matters in discussion with the parties, their lawyers and the independent children's lawyer. The judge:

- considers any expert report prepared
- reviews the issues in contention (dispute) identified on the first day of trial
- addresses any further issues with the parties and lawyers
- further investigates the possibility of any resolution or re-defining of issues
- determines whether further expert reports are needed and who should prepare them
- decides what affidavits should be filed
- makes directions to obtain further evidence

- makes orders on: agreed issues, interim orders, including for the filing of subpoenas, and the involvement of the family consultant, and
- lists to the next continuation of trial or to the final stage of trial.

The examination of witnesses is entirely at the discretion of the judge, who 'may ask the parties to indicate their reasons for wanting to cross-examine a witness, and demonstrate the probative value of the cross-examination proposed. The judge will consider what approach is most appropriate to the child's best interests and to maintaining a fair process. The judge will then inform the parties in advance of this part of the hearing of the format that is proposed!' (*Finding a better way* by Margaret Harrison, April 2007 p. 74.)

The final stage of trial

Throughout the LAT process the judge directs the process to keep matters moving towards resolution. And while the focus of all LAT trial events is on resolving issues in dispute through agreement, not all issues in dispute can be resolved this way. The final stage of a trial will determine all outstanding issues, on the evidence, as directed by the judge.

Rule 16.10 of the *Family Law Amendment Rules 2009* sets out that:

(2) At the final stage of the trial the judge will hear the remainder of the evidence and receive submissions.

For those issues still in dispute, the majority of evidence is often heard at the final stage of trial.

The judge may use any or all of the following strategies to manage the final day in a less adversarial manner. These strategies, set out in *Finding a better way*,⁴⁸ are designed to avoid some of the confrontational aspects of more traditional systems:

- Ask questions of clarification (not cross-examination) first.
- Request that the independent children's lawyer ask questions first.
- Indicate which issues are to be examined first.
- Interrupt cross-examination to explore an issue with another witness or part before proceedings (this facilitates the capacity to examine and determine issues separately as the case proceeds).
- Terminate a cross-examination that is overly adversarial, aggressive or appears to be irrelevant to the issue in dispute.

The finality of the final stage of trial is important as the judge is trying to avoid disputes coming back to the Court repeatedly, or dragging out proceedings indefinitely:

It's more focused on what is best in the interests of the child rather than focusing on the interests of the parents. In turn that has a number of other benefits. It has a benefit of in fact the parties confining themselves to what's in the best interests of the child rather than scoring points or making complaints about the parental behaviour of the other. It also ought to have benefits in the saving of costs, because rather than a lengthy affidavit—a large part of which deals with matters that ultimately are of no interest whatsoever to a judge—the evidence is confined to what the judge believes is necessary to enable him or her to make a decision. Importantly, also we believe that it is less conflictual and that in turn is important in respect of the ongoing relationship between the parents.

(The Honourable Justice O'Ryan, Interview with Stuart Scowcroft, 20 November 2008)



Communication techniques to support a less adversarial trial

Joanna Kalowski

Communication in courts is a strange hybrid: formal, artificial, constrained and rule bound. It is unique in that it takes place in a highly structured environment few have previously experienced. It is very different from the usual settings in which people communicate important messages to one another, yet is one in which the outcomes will profoundly affect participants' lives.

In the traditional courtroom, the people central to the purpose of the Court (the parties) are required to speak in a limited and formalised way and often speak least of all. The lawyers who speak on their behalf are in far more direct communication with the judge than the parties are, a situation many find frustrating, even when prepared for it—and most are ill-prepared. Lawyers may know the applicable law, but it is the parties who feel they know the fact situation better than anyone else and can be puzzled and irritated by the omission of details they regard as essential features of their story (case). This type of mediated communication is unusual and is normally reserved for people needing the services of an interpreter. Nothing is quite as irritating for native or otherwise fluent speakers of a language as having someone speak on their behalf when they are present and perfectly able to speak for themselves.

The reverse, however, can be worse, especially in court. Unrepresented litigants do speak for themselves but may find they say things inappropriately, either at the wrong moment or in the wrong way. They soon discover there are unwritten assumptions and processes around courtroom communication. Without this knowledge, unrepresented litigants can feel stumbling and incompetent.

Bumbling, incompetent, puzzled, frustrated, irritated: these are hardly descriptions of the state in which people do their best, and adults in court can often be reduced to feeling like children. Add to this the shame adults feel when they are out of their depth and it becomes obvious why comprehension declines in direct proportion to the rise of feelings of inadequacy.

In the traditional courtroom setting, judges have to gauge levels of understanding without being able to resort to the full range of human communication tools; eye contact, direct interaction and questioning are all limited by legal convention. At best, judges can ask if all is clear, but which adult is happy to admit aloud, in the presence of others who seem at ease with what is happening, that they fail to understand a process that is ostensibly about them?

The Family Court of Australia's LAT process is designed to conduct litigation in a new way, both to alleviate some of the problems and costs associated with traditional systems for determining a dispute and to accommodate the needs of litigants; in this case, parents grappling with the concept of 'the best interests of the child' in the highly charged context of separation and divorce.

Balancing formality

The question for judges is how far that accommodation can and should go, and which communication techniques will help to achieve the LAT's desired ends without reducing the authority and status of the Court?

In the LAT, it is the judge who controls and directs the proceedings and defines the issues. Judges can communicate directly with the parties and the parties are given the opportunity to speak directly to the judge, who is also at liberty to change the configuration of the courtroom to create an atmosphere more suitable to the case. Parties do not have to be in the witness box to answer questions, although for various reasons they may still do so, depending on what the judge decides is best in the circumstances of a particular case. The mere fact that parties to a LAT are invited at the outset to put their views to the judge in their own words—however gratifying—calls for a level of communication skill and control judges have not traditionally had to deploy.

The first of the many questions judges have asked themselves in the LAT process is how formal it should be? They rightly balk at creating an atmosphere of outright informality but then wonder what else is possible and how to achieve it. The LAT may be less adversarial but it remains a trial. Parties may want to speak more freely, participate more actively, but they still look to the judge to make decisions they have found it impossible to reach without judicial assistance.

Parties to litigation will have goals that are seen as inconsistent; parties are also likely to have goals that are in fact quite compatible. They want input into their matter, to be heard and taken seriously, and they want someone in a position of authority to take responsibility for resolving their problem.

The court setting itself has a certain ceremonial quality, something of a novelty in Australian society, which has done away with almost all ceremony, with a few notable exceptions. The formality and seriousness of a courtroom are rare and therefore strange. When people find themselves standing, sitting or remaining silent in court, they are participating in a drama that sends a serious and useful message if the litigant understands what is going on and what purpose it serves: 'The climate here is serious and I will be taken seriously'.

Different communication styles

Feedback to judges during the Children's Cases Project Pilot, begun in 2004, indicated parties had high levels of satisfaction with the judges conducting a LAT, all of them with their own very different individual styles. Those interviewed⁴⁹ pointed to a suite of common features: attentiveness to parties' words, focus on the parties and their needs, knowledge of the particular facts of each case, understanding of the tensions between parents and a deep understanding of the difficulties inherent in the process of separation and divorce. Judges were described by participants in the pilot as 'supportive, correct, observant ... wise, helpful' ... 'eased the confusion, listened, encouraging, very polite, respectful'.

One judge, giving his own feedback, described success in terms of changes he had made:

'When it's a party who speaks in my court, I don't take notes; I watch and I listen. No one moves. No one goes in or out, rustles papers or talks in asides to someone else ... This atmosphere of respect and courtesy is established early in the proceeding ...'

A blend of influence, authority and power ensures that a respectful atmosphere is established. Analysis reveals that while active listening is the technique, and parties feel they have been heard in the truest sense of the word, it is the fact that they have been heard by a person of high status that is so vital.

This may be the one of the best reasons why merely dismantling the formalities of a courtroom is unhelpful. Making what is said in the Court more accessible and the process more understandable to the parties is by far a more important focus for judges. It creates a high level of comfort for parties, helping them to understand what is unfolding around them despite its unfamiliarity and the fact that it takes place when they, as parents, are often at their most emotional (and least rational).

Many issues beyond the control or knowledge of the judge—and often the parties—can tip the balance in court from receptive to hostile and back again. In a LAT, judges report they are in a better position to plan for an effective hearing and to react to problems as they arise.

Parties feeling involved

The LAT process has the potential to provide parties with satisfaction at all three levels: procedural, psychological and substantive. Judges have reported that they have been surprised by parties' reactions, even when they did not achieve exactly what they expected in court, and some report parties actually said 'Thank you!' Counter-intuitive it may be, but people often feel better about a decision if they feel involved and properly heard in the process. At any rate, not everyone can possibly have substantive satisfaction, so the procedural and psychological sources of satisfaction warrant proper attention.

Satisfaction or dissatisfaction: these are at the heart of a cycle that predisposes litigants to be more or less difficult to deal with in future hearings, an issue of particular relevance to the LAT where the same judge deals with the same parents well into the future, and where the success or failure of the first court event could well set the tone for the next.

Lowering anxiety

Judicial interventions aimed at reducing anxiety will lower the level of litigants' defensiveness and helplessness at the outset and raise their capacity to 'participate', even where participation is not active.

The most effective interventions include introducing the court event with a description of what is to happen on this occasion and a summary of what happened previously, if appropriate. Many judges begin a LAT by describing the roles of court staff who may be present throughout the hearing or who have some other role related to the conduct of the case.

Another effective judicial intervention is to attend to, and alter if possible, the physical setting in the Court, at the very least so that litigants can sit beside their representatives instead of behind them.

Judges' use of language is also crucial in ensuring litigants understand the various stages in the hearing and also keeps tension in the courtroom low.

It is apparent that one vital aspect of judicial authority and leadership lies in judges' ability to model the kind of communication that assists both the Court and parties.

The capacity to speak simply and clearly, using accessible, yet not simplistic, language is a daunting task for judges in a setting where technical legal language is the norm and is regularly used as if everyone, rather than simply the lawyers, readily understand

it. It requires judges to be able to paraphrase and explain common legal expressions and to propose others in court do so for the benefit of the parties, for instance, when they fail to understand questions from counsel.

Communication has also been shown to improve if judges use active rather than passive voice and avoid double negatives, multi-layered questions and talking over parties or lawyers. Judges report they also solve communication problems in court by listening to how a question is put, not just to the question itself.

English has a rich heritage, influenced by many other languages, but its primary influences are German and Latin. The difference between a 'hearty welcome' or a 'cordial reception' is that the former derives from the Germanic, the language of the many, and creates a tone that the latter, in the language of the few, cannot understand. Only the clergy and the judiciary knew Latin, and they used it in ways that reserved meaning and high purpose for a select group.

It is possible to retreat into unnecessary formality under pressure, because almost everything in English can be said in two ways, two 'languages'. There is a place for the use of formal language, but it is unhelpful if the goal is to increase the parties' sense of participation and understanding, as is the case in a LAT. When motor registry staff use 'vehicle' in conversation with customers who are saying 'car', it is merely comical; when judges describe something parties are having trouble understanding as 'a simple proposition', parties may feel shame.

As a stress management tool, effective communication is of unparalleled benefit to judges too.

Communication and opening statements

It has become commonplace for judges early in a LAT to invite each of the parties to say, in their own words, what they believe this case is about and what they expect the judge to decide (usually limited to about ten minutes). Judges use a variety of questions to introduce this stage, many of which sound more like an invitation than an actual question. Judges were initially concerned that the parties would not be able to be stopped, but this is only very rarely the case. Ten minutes is a long time to speak. They were also concerned that parties would travel back in time and wondered what to do if parties focused mainly on the past. Instead, most judges have found that while parties may refer to past events, they rarely remain there. If they do, judges gently intervene, asking parties not to forget how important it is to describe the present situation and the future as they wish it to be.

Feedback and observation indicate that being invited to speak is another critical moment for parties and affords them the psychological satisfaction of being heard and of expressing emotions like anger and frustration, without having to act them out. Judges usually thank parties for speaking and many have reported that the unsolicited information they derive from listening at this early stage in the LAT helps them to understand both the situation and the parties better. This in turn helps judges to manage parties more effectively by referring to what parties themselves said—or said they wished for—in their own opening remarks.

Communication and identifying issues

Judges conducting a LAT identify the issues in dispute, typically on the first day of the hearing. This can include reframing difficult concepts into everyday English as well as explaining a point to a party without creating the impression that the need to do so reflects poorly on the party or indeed, on the judge. In many instances, parties' respect for judges has actually grown in circumstances where judges have gone to some lengths to ensure parties understand and can follow what is at issue and why.

The issue identification phase is also valuable because it allows judges to involve lawyers at an early stage in the LAT proceedings. Issue identification often sounds like a kind of sifting process, usually conducted in two-way exchanges between judge and lawyer or judge and party, and serves two purposes. It both clarifies the issues the judge is likely to determine and helps identify the evidence required to resolve the issues in dispute. Nothing so clearly differentiates the LAT from the traditional trial as this stage, where judges create an environment in which parties actually feel it is their special case, their unique circumstances, which the judge will consider. Even if this is the case in traditional hearings, in the LAT people actually experience it and their satisfaction derives in large part from this fact.

However effective the early stages of the LAT may be, later events both in court and outside may change parties' perceptions and, as in all matters involving separation, divorce, children and property, emotions will at times run high. Judges find themselves dealing with anger, sadness, disappointment and resentment; the whole gamut of emotions. Judicial interventions aimed at returning parties to the state in which they can best participate—rational rather than emotional—are likely to succeed where interventions designed to shut down the emotion or warn the party will not.

Attending to a party's emotional state

It seems counter-intuitive that attending to a party's emotional state, when it is that which is impairing their capacity to participate, will actually lower emotion and raise the level of cognition. Many judges say that they ignore emotion in the hope that it will go away; others report that a range of interventions, from offering or calling a short adjournment to asking parties whether they feel able to proceed, assists parties to 'pull themselves together' and function more appropriately from that point on.

After researching persistent litigants, Lester⁵⁰ observed that more often than warranted, judges jumped to the conclusion that parties behaving aggressively were querulents in the psychiatric sense. More often than not, they were merely difficult. Taking time after a tense session in court to reflect on what happened can help judges to identify whether difficult litigants were, and possibly remained, confused and to reconsider the techniques used to manage them.

Parties appreciate interventions that restore their dignity and confidence and the judge's status is enhanced. Saving face is not only a cross-cultural phenomenon, it is a human one.

Reviews of the LAT indicate that earlier and greater involvement of parties (and their lawyers) is the key to parties' sense of ownership in the outcome of their hearing, increasing the chance of orders being adhered to, and may lessen conflict between the parents in the future. As one father stated:

*In regards to Mother, instead of impulsively reacting to me, she listens now. I think she was listened to there (court), so she could listen to me too...*⁵¹

If the LAT fulfils this promise, it will be due in large part to the effectiveness of judges, their communication skills and their adaptability.



Endnotes

- 1 J McIntosh, 'Enduring conflict in parental separation: pathways of impact on child development', *Journal of Family Studies*, vol. 9, no. 1, 2003, pp. 63–80.
- 2 J McIntosh, *Children's responses to divorce and parental conflict: a brief guide for family lawyers*, Family Law Education Reform Project, AFCC and the Center for Children, Families and the Law at Hofstra Law School, New York, 2009.
- 3 RE Emery, L Laumann-Billings, M Waldron, DA Sbarra & P Dillon, 'Child custody mediation and litigation: custody, contact, and co-parenting 12 years after initial dispute resolution', *Journal of Consulting and Clinical Psychology*, vol. 69, 2001, pp. 323–332.

J Wallerstein, JM Lewis & S Blakeslee, *The unexpected legacy of divorce*, New York, Hyperion, 2000.

AJ Cherlin, PL Chase-Landsdale & C McRae, 'Effects of parental divorce on mental health throughout the life course', *American Sociological Review*, vol. 63, 1998, pp. 239–249.

P R Amato and A Booth, *A generation at risk*, Cambridge, MA, Harvard University Press, 1997.
- 4 M Harrison, *Finding a better way: a bold departure from the traditional common law approach to the conduct of legal proceedings*, Family Court of Australia, 2007.
- 5 Acrimony Scale, Shaw and Emery, 1987 ($t = -2.1$, 2 tailed, $p = .03$)
- 6 Parent-child relationship suffered badly ($t = -2.92$, 2 tailed, $p = .005$)
- 7 J McIntosh & C Long, *The child responsive program operating within the less adversarial trial: a follow up study of parent and child outcomes*, Report to the Family Court of Australia, 2007.
- 8 JE McIntosh, CM Long & YD Wells, *Children beyond dispute: a four year follow up study of outcomes from child focused and child inclusive post-separation family dispute resolution*, Australian Government Attorney-General's Department, 2009.
- 9 The 'worried well' are parents who are functioning well but are simply a little worried about their children.
- 10 J Cashmore & P Parkinson, 'Children's and parents' perceptions of children's participation in decision making after parental separation and divorce', *Family Court Review*, vol. 46, no.1, January 2008.

JE McIntosh, Special Issue: Including children in family law proceedings—international perspectives. Introduction by special guest editor, *Family Court Review*, vol. 46, no.1, January, 2008, pp. 37-38.

- 11 See Emery et al., op. cit. and McIntosh et al., op. cit.
- 12 *Family Law Act 1974* (Cth)
- 13 *Evidence Act 1995* (Cth)
- 14 House of Representatives, Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the inquiry of child custody arrangements in the event of family separation*, Canberra, Commonwealth of Australia, 2003, paragraph 4.5.
- 15 *ibid.*, paragraph 4.121.
- 16 J McIntosh, *The children's cases pilot project: an exploratory study of impacts on parenting capacity and child wellbeing*, Final report to the Family Court of Australia, Victoria, 2006, p5.
- 17 Justice David Collier, 'Preparing a children's matter for trial—a less adversarial approach', paper given at the 13th National Family Law Conference, Adelaide, April 2008, Family Law Section of the Law Council of Australia.
- 18 'Child-related proceedings' is a term of art introduced into the Act through Division 12A to describe any proceedings to which Division 12A applies—s69ZM(4)—for example, proceedings for financial orders where parties have consented to the application of Division 12A.
- 19 M McDowell & D Webb, *The New Zealand system, structure, process and legal theory*, Wellington, Butterworths, 2nd edn, 1998, quoted in *Family Court of Australia. A significantly less adversarial approach: the Family Court of Australia's children's cases program*, Report by Justice Stephen O'Ryan, 2004.
- 20 Justice Richard Chisholm, 'Less adversarial proceedings in children's cases in family matters' (2007) 77, *AIFS*, p. 28.
- 21 Justice Stephen O'Ryan, *A significantly less adversarial approach: the Family Court of Australia's children's cases program*, 2004, p. 10.
- 22 Justice David Collier, op. cit.
- 23 Justice Richard Chisholm, op. cit.
- 24 Justice Stephen O'Ryan, *A significantly less adversarial approach: the Family Court of Australia's children's cases program*, 2004, p. 8.
- 25 *ibid.*
- 26 Hunter, Rosemary, *Evaluation of the children's cases pilot program*, Socio-Legal Research Centre, Griffith University, 2006.
- 27 Justice David Collier, op. cit. p. 386.
- 28 *ibid.*, p. 385.

- 29 Justice Stephen O’Ryan, *op. cit.*, p.10.
- 30 In parenting cases, see section ZT(1), (2) and (3) and for all cases see rule 15.05.
- 31 M Harrison, *op. cit.*, p.54.
- 32 Justice Richard Chisholm, *op. cit.*, p. 29.
- 33 Affidavits with updating material on identified issues prepared for interim hearings may be admitted if appropriate and with permission from the judge. This is done with the intention of saving time and costs. See Justice Stephen O’Ryan, *op. cit.*, p. 20.
- 34 Section 11C *Family Law Act 1975*. Mediation, particularly privileged mediation and counselling (now described as family dispute resolution and family counselling), has shifted from within the court system to external organisations.
- 35 M Harrison, *op. cit.*, p. 51.
- 36 The Hon. Justice David Collier, *op. cit.*, p. 383.
- 37 M Harrison, *op. cit.*, pp. 51-52.
- 38 The court has a broad discretion to grant leave to allow evidence to be given by a child. Factors relevant in the exercise of discretion include: (a) the nature and degree of cogency of the evidence sought to be adduced through the child (b) whether that evidence is reasonably available from an alternative source (c) the maturity of the child (d) the nature of the proceedings, and the relationship of the child to persons affected by the proceedings: *Foley* (1978) FLC 90-511; 4 FamLR 430.
- 39 P Parkinson & J Cashmore , *The voice of a child in family law disputes*, Oxford University Press, 2008, p. 2.
- 40 Whether a child’s voice is actually heard through an independent children’s lawyer depends on whether the ICL has actually met with the child(ren).
- 41 LAT principles are set out in Division 12A, Part VII of the *Family Law Act 1975*—s69ZN
- 42 A children and parents’ issues assessment is prepared by the family consultant following the child and family meeting. It provides a summary of the main issues identified in relation to the child(ren) and parents. The assessment will be made available to the parents, the legal representatives and the Court.
- 43 Justice Mark Le Poer Trench, interview with David Collins, 27 November 2008.
- 44 Justice Janine Stevenson, interview with Stuart Scowcroft, 3 July 2008.
- 45 Justice Linda Dessau, interview with Stuart Scowcroft, 30 October 2008.
- 46 Justice Stephen O’Ryan, *op. cit.*, p. 20.

- 47 From 1 March 2009, Rule 15.17 of the *Family Law Rules 2004* provides that subpoenas 'may only be issued where the party has requested the court for permission and the court has granted permission. Such requests for permission may be made orally or in writing, can be made without notice to other parties and may be determined in chambers in the absence of the other parties.' (Explanatory Statement to *Family Law Amendment Rules 2009 (No 1)* p 21).
- 48 M Harrison, *op. cit.*, pp. 74-75.
- 49 J McIntosh, *op. cit.*, 2006.
- 50 G Lester, B Wilson, L Griffin & PE Mullen, 'Unusually persistent complainants', *British Journal of Psychiatry*, vol. 184, April, 2004, pp. 352–356.
- 51 Jennifer E. McIntosh, PhD, *The Children's Cases Pilot Project: An exploratory study of impacts on parenting capacity and child wellbeing*, 2006, p24.

