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Précis Paper

Children's Right to Culture

A discussion of children's right to culture in the context of Family Dispute Resolution, and the findings of research conducted in the area by Dr Armstrong and Dr Dababneh

Discussion Includes

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Video Title

1. In this edition of BenchTV, Dr Bethaina Dababneh (Principal Solicitor, The Parks Legal Lawyers, Sydney) and Dr Susan Armstrong (Adjunct Professor, University of Western Sydney, Sydney) discuss children's right to culture in the context of Family Dispute Resolution (FDR), and the findings of their respective research conducted in the area.

Overview of respective research carried out by Dr Armstrong and Dr Dababneh

2. Dr Armstrong is an adjunct professor of law at the University of Western Sydney, and an FDR practitioner, having done substantial research in this field. In particular, she has looked at how culture is addressed in FDR, how to ensure that it is accessible, and how practitioners can best assist clients who are not from culturally dominant backgrounds.

3. Dr Dababneh's motivation in conducting her research into a child's right to culture is two-fold. Firstly, through her personal experience, she has learnt the importance and value of staying connected with one's cultural background. Secondly, through previous research, she has learnt of the detrimental effect on a child of loss or deprivation of culture.

4. Dr Dababneh has also been involved in many FDR conferences where a parent has expressed a desire for their child to have no connection to their former partner's culture, yet was met with lack of opposition from the FDR practitioner, who failed to assert that the child had a legal right to be connected to the other parent's culture.

5. A desire to obtain an overview of the views of practitioners on the impact of these FDR conferences on a child's right to culture prompted Dr Dababneh to conduct her research in this area.

History and overview of Family Dispute Resolution (FDR)

6. FDR was introduced in Australia in 2006. Family law has always placed a strong emphasis on alternative dispute resolution. It has done this through encouraging and supporting parents, as the people best placed to make decisions concerning their children, to make their own decisions about how their children should be cared for.

7. In FDR, an independent and impartial practitioner assists the parties involved to hear what is important to each of them, identify what they really want for their children, and explore options regarding what is best for them. The purpose of FDR is to enable parents to have a

facilitated discussion to help them make decisions about their children's care that are in their children's best interests.

8. Children's welfare and children's best interests has long been, and still is, the determining factor in family law in reaching decisions concerning children. As such, it is the responsibility of family law mediators to encourage parents to reach decisions that are in their children's best interests.

9. Relevant family law legislation sets out the factors that must be considered by a court when making a decision that is in a child's best interests. Mediators must also be mindful of these factors when helping parents reach such decisions.

10. Most of the overarching principles concerning the best interests of children come from the United Nations Convention on the Rights of the Child (UNCROC).

A child's right to culture

11. In 2006, the UNCROC was amended to include a provision concerned with children's right to culture. Section 60(2)(e)/s 62E of the Family Law Act provides that a child has a right to know their culture and to know their culture with others of that culture.

12. Understanding the laws concerning children's culture and incorporating them into discussions surrounding FDR is very relevant in contemporary Australian society. This is particularly so given Australia's indigenous history (see s 60C(3)/60(c)(3) of the Family Law Act, specifically concerned with Aboriginal children) and large populations of refugees and children with parents from different cultures, especially minority cultures.

13. The lack of implementation by practitioners in FDR conferences of these statutory provisions protecting children's right to culture was one of the motivating factors for Dr Dababneh in conducting her research in this field.

The importance of culture to children

14. Culture may be defined as the embedding of generationally-handed down values, norms, language, religion, food, dress, customs, traditions, lifestyle, and reasoning processes.

15. Culture is so important for a child because it goes towards making the child's identity. In an FDR context, a parent's assertion that they do not want their child to be part of their former partner's culture, is detrimental to a child's development and sense of self.

16. A loss of culture is also experienced where:
    i. in an FDR context, there are children who have been adopted into a family that is not of their cultural background; and
    ii. children have migrated to a different country.

Discussion of Dr Armstrong's research

17. In 2008, Dr Armstrong was a research consultant for two family relationship centres in Parramatta and Bankstown. As these were areas of significant diversity, the centres wanted to develop a culturally responsive model of FDR.

18. Dr Armstrong interviewed FDR practitioners and community-based organisations to find out what they thought would encourage members of their community to come to family relationship centres, which are government funded organisations established mostly to help separated families reach agreement through FDR.

19. Dr Armstrong's early statistical research indicated that culturally and linguistically diverse communities were under-represented in the clientele of family relationship centres. Through her research, Dr Armstrong sought to find out why this was the case, in order to be able to work out how to encourage more people to attend family relationship centres.

20. Through her research, Dr Armstrong found that the reluctance of people from culturally diverse communities to attend family relationship centres was due to:
    i. a sense of privacy regarding their relationship breakdown;
    ii. a sense of shame;
    iii. not wanting to come;
    iv. not being aware of the existence of family relationship centres;
    v. feeling vulnerable;
    vi. fear of being judged;
    vii. fear of the unfamiliar; and
    viii. a preference for seeking assistance from those in their community.

21. A way to encourage people from minority communities to use family relationship centres is to work with their communities to build capacity, knowledge, and understanding. This learning between family relationship centres and communities goes both ways.

22. Given the number of cultural communities and backgrounds in Australia, it is difficult to develop a culturally responsive model of FDR that will suit each particular community. So Dr Armstrong has developed general principles on how FDR practitioners should work with clients of minority cultural backgrounds.

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23. There are 3 things that mediators should remember when working with people different to themselves:
    i. Reflection - practitioners must be self-aware;
    ii. Respect - practitioners should not make assumptions about their client, and should listen to and be receptive of their needs; and
    iii. Responsiveness - practitioners should ask the client what would best support them.

24. Reflection, respect, and responsiveness also form the broader framework of how practitioners should be responding to cultural difference in FDR.

The absence of children from FDR proceedings

25. Although many mediations are about children, children are very rarely present.

26. A child specialist can speak with the child and bring the child's voice into the mediation by sharing the child's experience with the parents However, children very rarely are there, and an FDR practitioner must encourage parents to reach decisions and make agreements that are in their children's best interests.

Discussion of Dr Dababneh's research

27. When speaking with FDR practitioners, Dr Dababneh found that they were very knowledgeable, responsive, and sensitive about culture.

28. However, although practitioners understood the importance of culture to children, at the end of the day they felt that it was not their role to bring culture into the discussion, but that of the parents. Every FDR practitioner interviewed by Dr Dababneh in her research rested on the legal definition of an FDR practitioner as someone whose role it is to help the parents resolve their problems. Many FDR practitioners believed that speaking about culture would intensify the dispute between the parents, particularly where the parents were from different cultural backgrounds. As they were reluctant to bring up anything that would further entrench the parents in their dispute, they would leave the topic of culture to one side.

29. Many practitioners expressed that if they were able to get reasonable time for the parent from the different culture to spend with their child, that would equate to the parent potentially using that time to support the child's identity. However, this did not occur in the FDR conferences attended by Dr Dababneh.

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30. In summary, the FDR practitioners Dr Dababneh interviewed were very knowledgeable and supportive of culture, they did not see it as their responsibility to raise it as an issue if the parents had not raised it themselves. They assumed that if the parents were talking about time in the FDR conference, that time would include important cultural events. The premise therefore was that culture was supported by working out time arrangements with the parents.

31. Why was there not a facilitation of culture by the FDR practitioners in the FDR process? Many practitioners answered this question by reference to the time restrictions of FDR sessions - they only had 3–4 hours maximum.

32. In response to this, it is suggested that it would perhaps be preferable to have several FDR sessions, instead of just one session in which everything in the parenting agreement had to be discussed.

33. Another response offered by practitioners for the lack of facilitation of culture was that many cultural practices were not acceptable in Australia. Indeed, more than half of the practitioners Dr Dababneh interviewed were very wary of the negative implications of culture. Many of them expressed the view that many parents who migrate to Australia from other countries bring their culture with them and try to instill this culture in their children, however, often this may be quite opposing to the Australian culture.

34. Many practitioners were wary that this could stagnate the child's development and ability to assimilate into the Australian culture.

35. In summary, practitioners interviewed had a general support for a child's right to enjoy his or her culture, however, they were reluctant to discuss culture in FDR sessions because they thought this might compromise their impartiality, and they were also somewhat cautious about the good of culture, feeling that it might have negative implications for children.

36. Some practitioners interviewed who were not of an Australian cultural background were initially very supportive of a child's right to culture and socialising with others of that culture. However, more than half of the practitioners interviewed were against this socialisation. One particular practitioner stated that some parents put their children in a bubble of culture, almost like a "twilight zone", the result being that children become so entrenched in that culture that they are not able to assimilate properly into the Australian culture.

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37. By omitting to suggest that culture should be discussed in FDR conferences, practitioners were making judgments about the appropriateness of supporting the child's cultural identity. The general opinion of the practitioners was that in a general sense, culture is a good idea, but in a specific sense, they were reluctant to encourage it. Quite a few practitioners expressed the view that it would be preferable for the child to assimilate into the Australian culture.

38. In summary, some of the factors that inhibited practitioners from including culture in FDR conferences were:
    i. a feeling that it was not their role to do so and that it would compromise their impartiality;
    ii. the shortness of time available in FDR conferences;
    iii. a degree of caution about the real value of culture to children; and
    iv. a feeling of lack of competence to address culture, founded on a lack of knowledge of the culture.

39. Many practitioners preferred to stick to a "script" for the FDR conference, where they would discuss with the parents the issues of time, communication, and events (mostly sporting events).

40. There was also a bit of unease amongst the practitioners interviewed about how children's rights, such as the right to culture, sat with children's best interests. Many practitioners believed that culture should not be a right of children. This was because a right needs someone to enforce it, yet children could not enforce their rights; it is their parents who usually do this.

41. Many practitioners demonstrated a lack of awareness of the laws enshrining children's rights, namely, the Preamble and Arts 20 and 30 of the *UNCROC*, and the *Family Law Act 1975* (Cth).

42. There is a tension in the professional backgrounds of FDR practitioners. About half of the practitioners have a legal background, while others have a social science background. All practitioners have a legal obligation to encourage parents to reach decisions in their children's best interests, however, many practitioners have different views on what those best interests are. The general view, particularly from FDR practitioners with a social science background, is that what is conceived of as being in a child's best interests needs to appropriate to the child's age and development.

43. Although, the statutory definition is not very different from this, many of the FDR practitioners interviewed did not see development of cultural identity as something that was important from a child developmental perspective.

44. Many practitioners also expressed the view that parents are better placed than the practitioners to know what is best for their children.

45. A positive finding of Dr Dababneh's research was that many practitioners had a good idea of what culture was, however, they subsumed the child's rights within the parent's right to make decisions for their children.

46. FDR practitioners need to be more culturally aware and competent. However, it is difficult to acquire a level of knowledge about different cultures to develop the competence needed to raise culture as an argument in an FDR conference. As there are so many different cultural backgrounds, practitioners cannot know everything about culture, but there should be an obligation on practitioners to learn some things about a culture so that they know what questions to ask in an FDR conference.

47. Some practitioners felt that a database of sorts setting out information on the client they would be assisting in the FDR conference, and the client's culture, would be helpful. A problem with this is that it takes a black and white approach to culture, rather than treating culture as being a different experience for each person, and as a living, changing thing. However, there would be some value in FDR practitioners asking organisations what they might need to know about a particular culture in order to support a couple of that culture that they will be assisting.

48. Legal Aid NSW currently provides clients the option of requesting a practitioner from their own cultural background. Though this can be helpful, it may also be problematic, as some clients might not want a practitioner from their own background due to the possibility of the practitioner knowing someone from the client's family, and the potential risk to the client's confidentiality.

49. It is important to train and develop practitioners from different communities so that they can bring their knowledge and understanding into the broader system, as well as sometimes specifically assist clients who come from a common background. For example, it has been very powerful when practitioners have been able to conduct FDR conferences in a common language. This helps the clients develop trust and confidence in the practitioner, and the practitioner better able to support the clients to make good decisions.

50. Another attitude expressed by many practitioners interviewed was that if it was not important to the parents to introduce the subject of culture into the FDR conference, why should they?

51. English family law academic John Eekelaar has written about the concept of "dynamic self-determinism". He describes this as the process of, when making decisions about children, or assisting people to do so, adults should "leave the gate open" for the child to make the kind of decisions which will support their capacity to make their own choices in the future. The idea is that if the child has many resources open to them, they will be able to make those decisions if and when they choose to.

52. In an FDR context, this involves listening to what is important to the child, so practitioners are advised to speak to children, or at least get a sense of what is important to them from their parents. It also involves protecting the personal ties that are really significant to the child.

53. In summary, practitioners should aim to support parents in FDR conferences to "leave the gate open" so as to build a child's capacity to make their own decisions about culture at some stage in the future. To support children's self-determination, FDR practitioners must ask parents, or encourage them to consider, what it would mean for their child's development if they did not support their child's connection with their culture.

54. In Dr Dababneh's view, FDR practitioners have an obligation to support a child's right to culture much more strongly.

How can the voice of children be included in FDR proceedings?

55. The Australian Law Reform Commission's (ALRC) current inquiry into family law is considering this very question. It is not only concerned with how to include the voice of children in family law proceedings, but how do practitioners hear children, and how do children understand what is going on. Further, the inquiry is looking at whether there anything different or more that practitioners should do in relation to children from different or minority cultural backgrounds, who may have no other opportunity to have their voice and what is important to them heard. As there are many different things that could be done in this respect, as such it will be interesting to see the recommendations of the ALRC.

Summary

56. Many practitioners Dr Dababneh spoke with expressed a strong awareness of the loss of culture for Aboriginal children, however, this awareness did not extend to other minority

cultures. It is suggested that this awareness and sensitivity should be broadened to include children of minority cultures.

57. Practitioners are encouraged to try to raise the issue of culture in an FDR conference in a more subtle manner. A way to do this could be to ask parents at the beginning of the conference if there is something important to them that they would like to discuss in the conference. Where practitioners can sense that there is something important to a parent, they are advised to allow more time to properly explore the issue.

58. It is important for practitioners to understand what culture means from a child's perspective.

59. Ultimately, practitioners' responsibility is to help parents make decisions about their children which will really support the child's capacity to make their own choices in the future. Including a consideration of culture is a very important part of this process.

BIOGRAPHY

Dr Bethaina Dababneh

Principal Solicitor, The Parks Legal Lawyers, Sydney

Bethaina was admitted to the Supreme Court and High Court in 2002, attained her Masters in Dispute Resolution in 2009, and her PhD in 2015. Prior to establishing The Parks Legal Lawyers in 2005, she worked for the Government's Legal Aid Office, working with the local community in areas of Civil Litigation and Family Law. Bethaina went on to teach at the University of Technology, Sydney, in Business Law and Ethics, Biomedical Law, Foundations of Law, Medicine and Law, and Torts in 2017. She was invited to speak at the World Congress of Children's Rights at Dublin, Ireland, on her work and findings in Family Law.

Dr Susan Armstrong

Adjunct Professor, University of Western Sydney, Sydney

Susan is a Family Dispute Resolution Practitioner, Mediator, Lawyer, and Collaborative Professional. She is an Adjunct Professor at the University of Western Sydney Law School and has presented and published widely. Susan is a founding member of the Australian Dispute Resolution Research Network and a committee member of the Family Dispute Resolution Special Interest Group of the Resolution Institute NSW.

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