

# OUT OF THE MOUTHS OF BABES: INFORMATION GATHERED FROM CHILDREN IN FAMILY LAW PROCEEDINGS

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## 1. Introduction

Children as reporters of fact pose a difficult problem for the legal system, as the system is fundamentally designed to test the evidence of adults. Children may give information which can be flawed, or highly influenced by conscious or unconscious parental pressure. Alternatively, children may give evidence which is a valuable and an accurate portrayal of family circumstances. It is often difficult to know the difference. However, in family law proceedings where abuse against a child has been alleged, the child is often the only witness to the abuse and their story is pivotal to the Court’s determination of fact. In family law proceedings, whilst children are very rarely called to the courtroom to give evidence, their disclosures often form the basis of evidence presented by parents, medical professionals and other witnesses, and can be important in guiding the recommendations made by family report writers.

This article will examine the available methods of providing the court with information from children in family law matters. It will explore the difficulties posed by such information, and will discuss issues pertaining to the assessment of information provided by children. This article aims to provide lawyers with a greater understanding of the context in which information obtained from children can be valuable, and where it should be treated with caution.

## 2. The Use of Information Obtained from Children in Family Law Matters

Pursuant to s60CC(3)(a) of the *Family Law Act 1975* (Cth) (‘the Act’), the Court must consider “any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child’s views.

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Section 60CD(2) of the Act states that the Court can consider the views expressed by a child via the following methods:

- (i) Family Report: Section 62G(3A) of the Act requires that a family report writer determine the child's views and include the views in the report (although, pursuant to section 60CE of the Act, a child cannot be compelled to express his or her views);
- (j) Independent Children's Lawyer ('ICL'): the Court can appoint an ICL under s68L of the Act. The ICL independently represents the child's interests in the proceedings. Section 68LA(5)(b) requires the ICL to ensure that the child's views are expressed to the Court; and
- (k) By such other means as the Court deems appropriate. This can include hearsay evidence from a party or third party (see s69ZV of the Act), the child being interviewed by the judge, and having the child give evidence in the court room through closed circuit television or electronic means or via affidavit (although, in practice, these latter two options are rarely considered to be appropriate).

Section 100B(1) of the Act provides that a child must not swear an affidavit (unless seeking to become a party to the proceedings) for the purposes of the proceedings unless the Court makes an order allowing the child to do so. Further, s100B(2) of the Act states that a child must not be called as a witness in, or be present during, proceedings in the Family or Federal Circuit Courts unless a court makes an order allowing the child to be called as a witness or to be present.

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*The Court found that the hearsay rule was not a valid basis to object to evidence when the subject of the evidence is relevant to the welfare of a child.*

The Court in *Barnett and Hocking* (1983)<sup>1</sup> (which predated the enactment of section 69ZT of the Act) entertained an application by a mother to use hearsay evidence from her child in family law proceedings. The Court found that the hearsay rule was not a valid basis to object to evidence when the subject of the evidence is relevant to the welfare of a child. The Court held that there is discretion to hear evidence as to what a child has said in regard to any matter relevant to the child's welfare. However, the judge must ensure that allegations against a particular parent are not solely established by the uncorroborated evidence of a child when that evidence is being given as hearsay from the other parent. The Court in this matter also discussed the difficulties associated with having children give evidence in the courtroom. To allow this to occur, the Court would have to be satisfied that the child understood the purpose for which their evidence would be used and would also have to be satisfied that the child understood the oath. The Court also discussed the undesirability of having a child cross examined.

In *Dylan and Dylan* (2007)<sup>2</sup> the Court discussed the benefits of hearing children's evidence firsthand via interview with a judge in circumstances where there has been no disclosure to the family report writer, or if a substantial period of time has passed between the trial and the family report interviews. Further the Court discussed potential therapeutic benefits to children in being able to express their wishes in a meaningful way. However, the Court also noted that giving evidence firsthand may cause children anxiety, may make them feel as if they are being disloyal to one or both of their parents, or may cause damage to family relationships.

In *Ahmad v Ahmad* (1979)<sup>3</sup> the trial judge interviewed three children in the courtroom in the presence of counsel for both parties and the parties themselves. On appeal, the Full Court held that it is undesirable to require children to express their wishes in Court in front of their parents as it would have put the children in a highly uncomfortable position and may result in damaging the relationship between the children and parents.

<sup>1</sup> 8 Fam LR 1042

<sup>2</sup> FamCA 842

<sup>3</sup> 5 FamLR 15.

In *Foley and Foley* (1978)<sup>4</sup> the Father filed an affidavit (without leave from the Court) sworn by his child from a previous marriage. The trial judge refused to read the affidavit or allow the child to be called as a witness. The Father argued that s100B of the Act only applied to a 'child of the marriage' which the Court rejected. The Court outlined the relevant factors for consideration in determining whether to allow a party to adduce evidence from a child as being:

- (a) The nature and degree of weight of the evidence which is sought to be adduced;
- (b) Whether such evidence would be available from an alternative source;
- (c) The maturity of the child; and
- (d) The nature of the proceedings and the relationship of the child to the parties to the proceedings.

The Court also held that the value of the evidence in reaching a determination of the dispute between the parties must be weighed against the possible detriment to the child in being a witness in the proceedings.

Once a child's views are in evidence, the Court will make a judgment regarding the weight that should be given to those views. In *H v W* (1995)<sup>5</sup> the Full Court overturned a trial judge's decision for inter alia failing to give adequate consideration to the children's views. In this case, the children were aged 7 and 8, and expressed a desire to live with their father after disclosing abuse by the mother's new de facto partner. The Full Court held that the courts should attach weight to a child's views depending on the strength and duration of the child's wishes, the basis of the child's wishes and the maturity of the child including the degree to which the child appreciates the issues before the court and their long term implications. Further the Full Court held that where a court chooses to make an order against the wishes of the child, there should be clear reasons for making such an order. In *R and R (Children's wishes)* (2000)<sup>6</sup> the Court found that it is not necessary for a finding to be made that

the wishes of the children were unsound, based on inappropriate considerations or influenced by third parties in order to depart from the child's wishes.

In *Dylan and Dylan* (2007)<sup>7</sup>, the Court stated that the weight to be given to a child's views is dependent on a range of factors including the child's age and maturity, the need to protect the child, the view of siblings (if provided) and the fact that it is desirable to promote a long term relationship between a child and both parents even where a child may have a negative view about a parent at a particular point in time. The Court held that it is important to distinguish between views which truly represent the child's wishes and views which are intended to please one of the child's parents. The Court also noted that children's views cannot be a decisive factor. They are, by virtue of the Act, an additional consideration to inform the paramount consideration which is the determination of the child's best interests.

In *Bondelmonte and Bondelmonte & Anor* (2017)<sup>8</sup>, the High Court considered whether the trial judge had given appropriate weight to children's wishes. In this case, two children, aged 15 and 17, informed the family consultant that, among other things, they wished to live in New York with their father. The trial judge nonetheless made an interim order providing for the children's return to Australia pending the final determination of the proceeding. The father appealed the trial judge's and, later, the Full Court's decision, contending that the trial judge was required to give "proper, genuine and realistic" consideration to the views of the children.<sup>9</sup> The High Court held that children's wishes did not hold a "decisive status" and that children's wishes are one of a number of considerations to be taken into account when determining a child's best interests.<sup>10</sup>

Ultimately, the Court may limit or restrict a parent's time with the child if the Court is satisfied that spending time with that parent may expose the child to an unacceptable risk of sexual abuse<sup>11</sup>.

4 FLC ¶90-511

5 FamCA 30

6 FamCA 43

7 FamCA 842

8 FLC93-763

9 Ibid, [29].

10 Ibid, [34].

11 *M v M* (1988) 166 CLR 69.

### 3. Issues with Information Obtained from Children

Information obtained from children has the potential to be problematic as reporting from a child often occurs during a sensitive period of their cognitive development.<sup>12</sup> This creates a number of differing issues such as susceptibility to grooming, the child being pressured into telling a particular story, the reluctance of the child to report sensitive allegations such as abuse and the child's limited ability to re-tell their story in a way that can be particularised in evidence if required at a trial.<sup>13</sup> Other issues include children being coached and the frequency of police, parental and/or medical questioning.<sup>14</sup>

It has been suggested that as many as 35% of child sex abuse allegations are later proven to be false.<sup>15</sup> Within the family law context, the rate of false reports has been suggested to be higher with some studies suggesting that false allegations of sexual abuse could be as high as 50% in contested family law hearings.<sup>16</sup> The majority of the allegations are directed at fathers.<sup>17</sup>

Malicious false reporting by children is thought to be comparatively rare and in the range of 6% – 8.5% of all false allegations of sexual abuse.<sup>18</sup> A common explanation for high rates of false allegations in family law matters is that some children may be encouraged or coached by a parent or other significant person to make a false report. This is especially common if there is high conflict in the family law context.<sup>19</sup>

Aside from overt coaching, children can be influenced to make inaccurate reports by “*selective reinforcement of the desired response, guided visualization of the fictitious event and repeated suggestions from parents.*”<sup>20</sup> Another explanation is that children may be exposed to the emotional transfusion from a highly anxious parent with a fixed narrative and belief who is unable to consider any other possibility other than abuse has occurred. Even though the majority of false allegations may be unintentionally false<sup>21</sup>, for the child, they may still come to believe that the abuse is real, that the report is accurate.<sup>22</sup>

In these complex investigations, enormous emphasis is placed upon the spoken narrative and recall of the child. However, children's memories of an event can be influenced by the child's exposure to misleading information. Children are more suggestible when they are more emotional, and false memories more easily constructed by erroneously suggestive, leading questions and repeated interviewing.<sup>23</sup> Once false memories have been constructed they can be almost impossible to differentiate from accurate recall, and if only that narrative is relied upon, the risk of false-positive errors increases significantly.

12 Christine Eastwood, 'Child Sexual Abuse and the Criminal Justice System: What Educators Need to Know' (2003) 8 (2) *Australia and New Zealand Journal of Law and Education* 111, 111.

13 Stacia N Stoelzenberg and Thomas D Lyon, 'How Attorneys Question Children About the Dynamics of Sexual Abuse and Disclosure in Criminal Trials' (2014) 20 (1) *Psychology, Public Policy and Law* 19, 19.

14 *Ibid.*

15 Jacquin, K.M & Masila A.G 'Evaluating allegations of child sexual abuse in custody disputes' (2016) *Handbook of Child Custody*, Spring International Publishing, Switzerland.

16 Bala, Mitnick, Trocmé & Houston, 'Sexual abuse allegations of parental separation: smoke screen or fire?' *Journal of Family Studies* (2007) 13 (1) 25 - 56 ; Anthony & Watkeys, 'False allegations of child sexual abuse: the pattern of referral in an area where reporting is not mandatory' (1991) 5 (2) *Children in Society*, 111 – 122. Other studies have found that false allegations of child sexual abuse fall within the range of 5% to 20%. Please see Hume, M 'Child Sexual Abuse Allegations and the Family Court' (1996) Thesis for Masters of Social Science (Research), University of South Australia, 118 – 131, Brown, T et al 'The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia: A Report to the Criminology Research Council' (1997) *Family Violence and Family Court Research Program*, Monash University and Australian Catholic University, 15, 21 – 22.

17 Thoennes & Tjaden, 'The extent, nature and validity of sexual abuse allegations in custody/visitation disputes' (1990) 14 (2) *Child Abuse and Neglect*, 151 – 163.

18 Anthony & Watkeys, above n 13; Thoennes & Tjaden, above n 14.

19 Saini, Black, Fallon & Marshall, 'Child custody disputes within the context child protection investigations: Secondary analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect' (2013) 92(1) *Child Welfare*, 115-137.

20 Stoelzenberg and Lyon, above n 10, 20-21.

21 Ornstein, Ceci, & Loftus, 'Adult recollections of childhood abuse: cognitive and developmental perspectives' (1998) 4(4) *Psychology, Public Policy and Law* 1025-1051.

22 Ceci & Bruck, 'Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony' (1995) *American Psychological Association*, Washington DC.

23 *Ibid.*





Research shows that children are suggestible. Children of all ages have been shown, if frequently asked questions, to answer the questions in the direction of the suggestion.<sup>24</sup> Suggestibility can happen in very subtle ways even when not intended.<sup>25</sup> Even with relatively few suggestions, it is easy to develop a pseudo-memory for an event that never happened<sup>26</sup> resulting in a child potentially making a false report of abuse without knowing the source of the memory, the suggestion or the reality.<sup>27</sup> Memories of stressful events, such as child sexual abuse, are particularly susceptible to modification by suggestion.<sup>28</sup> Once a child has developed a pseudo-memory based on suggestion, they will typically maintain the inaccurate reporting of these events and circumstances over long periods of time regardless of efforts to correct their beliefs.<sup>29</sup>

By the time child sex abuse allegations reach the court, it is common for the child to have been formally and informally interviewed by a number of individuals, including parents, doctors, child protection workers, police and then family report writers. Repeated interviewing increases the likelihood of inaccurate recall in as little as three interviews, and so particular attention needs to be paid to skilled interview early in the investigative process.<sup>30</sup> Further, while repeated questioning is a common occurrence in the family law system, this may implicitly suggest to children that they are being asked to change their story. Research

has found that repeated questioning may indicate to children that their original answer to the question was wrong, so they change their responses in a misguided attempt to appease the questioner.<sup>31</sup>

The introduction of false information can occur even if the child has been abused, making this distinction between true and false elements almost impossible to distinguish. The more the child is interviewed, including by well-intentioned parents, the greater the risk of inaccurate information subsequently emerging at later forensic interview.<sup>32</sup>

Children's spontaneous disclosures of inappropriate touching have a reasonable probability of being accurate, however, disclosures that occur after leading or suggestive questions are more likely to contain false elements or be completely false altogether.

More closed ended, leading and direct questions produce less accurate results, including incorrect information.<sup>33</sup> Interviewers who tend to reinforce answers that are consistent with abuse and not those inconsistent with abuse, if coupled with leading questions, dramatically increase the incidence of false reports.<sup>34</sup> Repeating questions also increases the risk of false reports,<sup>35</sup> so does pushing children to answer questions when they are uncertain.<sup>36</sup> The asking of questions that require a yes or no response also increases the risk of false reports.<sup>37</sup>

24 Finnila, Mahlberg, Santtila, Sandnabba, & Niemi, 'Validity of a test of children's suggestibility for predicting responses to two interview situations differing in their degree of suggestiveness' (2003) 85 *Journal of Experimental Child Psychology*, 32 – 49.

25 Ceci & Bruck, above n 19.

26 Loftus & Pickrell, 'The formation of false memories' (1995) 25 *Psychiatric Annals* 720 – 725.

27 Ceci, Loftus, Leichtman & Bruck, 'The possible role of source misattributions in the creation of false beliefs among pre-schoolers.' (1994) 42 *International Journal of Clinical and Experimental Hypnosis*, 304-320.

28 Loftus & Pickrell, above n 23; Hyman, Husband & Billings, 'False Memories of Childhood Experiences.' (1995) 9 *Applied Cognitive Psychology*, 181 – 197.

29 Bruck & Ceci, 'Expert testimony in a child sex abuse case: Translating memory development research' (2013) 21(5) *Memory*, 556 - 565; Bruck, Ceci, & Hembrooke, 'Reliability and credibility of young children's reports from research policy and practice' (1998) 53(2) *American Psychologist*, 136 - 151; Leichtman, & Ceci, 'The Effects of Stereotypes and Suggestions on Pre-schooler's Reports' (1995) 31(4) *Developmental Psychology*, 568 – 578.

30 Ibid.

31 Victorian Law Reform Commission, *Sexual Offences*, Report No 78, 2004 313; Paul Byrne "Children as Witnesses – Legal Aspects" in Julian Vernon (ed), *Children as Witnesses* (Australian Institute of Criminology, 1991), 3, 5.

32 Poole & Lindsay, 'Assessing the accuracy of young children's reports: lessons from the investigation of child sexual abuse' (1998) 7 *Journal of Applied and Preventative Psychology*, 1 – 26.

33 Cassel & Bjorklund, 'Developmental patterns of eyewitness memory and suggestibility: an ecologically based short-term longitudinal study' (1995) 19 (5) *Law and Human Behaviour*, 507 – 532.

34 Ibid.

35 Bruck, Ceci, & Melnyk, 'External and internal sources of variation in the creation of false reports on children.' (1997) 9(4) *Learning and Individual Differences*, 289 – 336.

36 Ibid.

37 Laimon, & Poole, 'Adults usually believe young children: the influence of eliciting questions and suggestibility presentations on perceptions of children's disclosures' (2008) 32 *Law and Human Behaviour* 489 - 501; Peterson & Briggs, 'Interviewing children about trauma: problems with 'specific' questions' (1997) 10 *Journal of Trauma Stress*, 279 – 290.

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Best practices are not onerous and should be able to be followed, provided that agents within the family law system are trained accordingly. Training is extremely important to ensure that children are giving the best and most accurate information possible. Researchers have found that there are two instances that most commonly cause interviewers to deviate from the proper interviewing procedure.<sup>38</sup> The first situation was when children did not begin to discuss the intended topic after the first question.<sup>39</sup> The second situation was when children did not discuss the precise act that constituted the cause for concern.<sup>40</sup>

#### 4. Assessment of Information Obtained from Children

It can be difficult to distinguish between true and false allegations, and so, following best practices is essential. Good assessment of allegations made by children requires not only identification of the problem but an understanding of the allegation, and in what context the allegation has been raised (for example a family law dispute), how it came to be made (a spontaneous disclosure made by the child or an allegation emanating from an adult), how it was reported, as well as consideration of whether there have been previous allegations, if these allegations were investigated, who investigated, what techniques were applied to the investigative process and what was the outcome.

There must be a distinction between the strength of an allegation and the weight of that allegation, with the focus of investigation not on whether abuse did, or did not occur, but rather, upon the probability of abuse having occurred. It is usually more helpful to think less about the true-false dichotomy, and more about the quality of relationships, the balance of probabilities, and information obtained from other sources. Rather than focus on the truth and lies of an allegation, it may be more helpful to focus on the consistency and clarity of statements, with particular emphasis on the understanding of conflicting detail and contradictions in the available information; conflicting information probably provides the most valuable source of data around truthfulness. A false-positive allegation of abuse, for example does not necessarily equate to a child consciously and deliberately making false statements, but such statements if made, when explored, may provide valuable understanding as to the origin of the allegation.

Best practices demand an understanding of the relevant research, and maintaining a level of equal curiosity to all reasonable hypotheses that could explain every aspect of the allegation. It is important to have a developmental context in which to place the assessment, including some understanding of the child’s cognitive age, stage, language skills and interpersonal style. It is also important to understand the child’s knowledge of sexual behaviour and whether it is or is not age-appropriate, and the context in which the allegation has been raised, and the nature of the allegation. It is important to gather information from multiple sources.

Most mental health professionals, child protection workers and legal professionals, including judges believe that when a child makes an allegation of abuse that they must be telling the truth.<sup>41</sup> Despite this, error rates among mental health professionals who believe that they can differentiate true from false allegations have been reported to be between 24%, and in the

38 Carolyn Hughes-Scholes and Martine Powell, “Techniques used by Investigative Interviewers to Elicit Disclosures of Abuse from Child Witnesses: A Critique” (2012) 14 (1) *Police Practice and Research* 45, 51.

39 Ibid.

40 Ibid.

41 Bruck ‘Effects of suggestions on the reliability and credibility of children’s reports.’ (2003) Invited address at the 15th annual American Psychological Society Convention, Atlanta Georgia, in Jacquin & Masila, above n 12.

case of individual practitioners, as high as 75%<sup>42</sup>. A lack of neutrality, fixed beliefs about prevalence, and an erroneously leading and suggestive interviewing style in the direction of confirmation bias, all increase the likelihood of false positive reports.

Given the importance placed on the content of family report interviews, it may be surprising that many family consultants have little background in child development, child psychopathology, or specific training in child interview skills.<sup>43</sup> The usefulness of these interviewers is to a large extent, dependent upon the skill and experience of the person undertaking the interview. As a consequence, some family report writers may fail to consider the age, gender, or developmental stage of the child when conducting interviews, with a completely different skill set needed when interviewing adolescents, and special populations such as children who are developmentally delayed, fall at the lower end of cognitive functioning, have language and communication difficulties, or fall on the autism spectrum.

There are no definitive symptoms that substantiate that child sexual abuse has occurred. The behaviour of the child is often what prompts referral to a medical or mental health practitioner, and then in turn, on to protective services and police for further investigation. Symptoms such as nightmares, tantrums, problems with impulse control, masturbation, or an interest in sex or sexuality, are common in children, are developmentally more common at certain stages, but even when not, they may be suggestive of another stress in the child's life, and not pathognomonic with abuse having occurred. It is important to not conclude that just because a set of symptoms is common in children who have been sexually abused, that that set of symptoms is proof of abuse. Confusion around the implications of these behaviours provides an explanation for the over representation of false positive allegations of child sexual abuse.<sup>44</sup> It is an erroneous conclusion that a child who talks about sex or who describes a sexual act must have been abused; for the purpose of good assessment, multiple alternative considerations must

be considered, including that the child has witnessed sexual activity, that the child has been told about sex, or that an adult has misinterpreted what the child has said and has superimposed a suspicious adult interpretation on behaviour that was otherwise developmentally normal. Open-ended, non-leading, narrative based questioning, that invites from the child, a spontaneous account helps to distinguish that which is plausible, less plausible, imagined, based on second-hand knowledge, has been encouraged by erroneously suggestive, leading questions, and that which may actually have occurred. It is important to understand these behaviours against their relevant developmental norms.

It is necessary to consider the plausibility of the alleged abuse having occurred in the manner, and in the context that was described. Forensic rigour around tracking how the disclosure was made, what was said, what happened before and after the alleged event, whether others were present, and who would or would not have noticed what was alleged to have happened, are all important considerations. Particular attention needs to be paid to the risk of confirmation bias, and consideration and investigation of only that information that fits with the interviewer's beliefs. An investigator who only works from the presumption that what the child is saying is true and correct, or who believes that certain behaviours are indicative of abuse not only loses neutrality but may run the risk of confirmation bias, the exploring of avenues and beliefs only consistent with their own beliefs, and not consider reasonable plausible, alternative explanations for that same behaviour.<sup>45</sup>

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*It is more normal for there to be a match between the child's emotional state when discussing the abuse and emotional state of the child in general related to the abuser.*

42 Herman, 'Improving decision making in forensic child sexual abuse evaluations' (2005) 29 Law and Human Behaviour 87-120.; Herman and Freitas, 'Error rates in forensic child sexual abuse evaluations' (2010) 3(2) Psychological Injury and Law 133-147.

43 Goldstein, Handbook of Child Custody, (2016) Springer Publishing, Switzerland.

44 Herman, above n 39.

45 Kuehnle & Kirkpatrick, 'Evaluating allegations of sexual abuse within complex child custody cases' (2005) 2(3) Journal of Child Custody, 3-39.

It is important to consider whether the child is making consistent statements in relation to the abuse, as well as having an appreciation of what is, and is not, normal for a child when describing events. A child who uses exactly the same words to describe the same event each time that they are interviewed, may be less believable than a child whose description of events changes slightly, who does not use exactly the same words, or who does not present in exactly the same manner.<sup>46</sup> Whilst more truthful children have been found not to use exactly the same words to describe a particular event, it is not normal for them to change the factual elements, or to substitute important pieces of information from interview to interview. Whilst emotional congruence is important to consider, the lack of emotionality is not in and of itself not supportive of the abuse, and especially so for the younger child who may not have recognised that what happened to them was wrong, and especially so, if the abuse was more gentle than invasive. It is more normal for there to be a match between the child's emotional state when discussing the abuse and emotional state of the child in general related to the abuser.<sup>47</sup>

Evaluation of information obtained from children should not only consider the consistency or the inconsistency in the child's emotional presentation and statements, but also the child's memory for details about the abuse compared to what would be expected given the developmental level of the child. Generally, older children recall more details accurately<sup>48</sup> however, reports made by younger children can maintain accuracy and stability over time, and so conclusions should not be drawn about the accuracy of the report based solely on the passage of time between the event and the disclosure.<sup>49</sup> True events are remembered more clearly and with more detail than imaginary events,<sup>50</sup> including with more sensory detail such as sound, smell and taste, and can be conveyed with more detail about what happened before and after the event, the location of the event, and other idiosyncratic qualities. Memory,

however, is particularly vulnerable to erroneous, suggestive and leading questioning.

Good assessment requires reliance on more than just the content of the interviews, but reflection upon the interview process, rigour around interview style, a broad understanding of child development, the aetiology of child psychopathology, attention to the systemic observation of parent and child behaviour and the consideration of collateral information.

More forensically informed assessment should be generally conducted in two phases; the first being an explorative phase during which information is collected from multiple sources and hypotheses generated based on that information, and a second phase involving the evaluation and validation of information obtained.<sup>51</sup>

In the second phase, the hypotheses generated during the explorative phase are tested; information obtained from other family members, medical records, protective services, school records, medical notes, class teachers, and other professionals, are all important sources of information.

46 Bruck & Ceci, above n 26.

47 Kuenhle & Kirkpatrick, above n 42.

48 Battin, Ceci & Lust, 'Do children really mean what they say? The forensic implications of pre-schoolers linguistic referencing' (2012) 33 *Journal of Applied Developmental Psychology* 167 – 174.

49 Bruck & Ceci, above n 26.

50 Roberts & Lamb, 'Reality-monitoring characteristics in confirmed and doubtful allegations of child sexual abuse' (2010) 24(8) *Applied Cognitive Psychology* 1049 – 1079.

51 Lobel 'Uses of collateral sources of information in forensic child custody.' (2016) in above n 40.





Consideration of testable fact patterns such as a parent's past mental health, drug history, criminal convictions, including considerations around family violence, relevant medical conditions, previous unsubstantiated allegations and observed patterns of interaction between the parents and children also provide important information. The behaviour of parents towards each other, towards the child in the presence of the other parent, and by the child toward the parent when the other parent is and is not present, as observed by neutral third parties can provide tremendously valuable information and especially so in cases where there are allegations of alienation and abuse. Non-partisan comment on parent-child interactions, including the capacity to set limits, discipline, parenting style, including rigidity and flexibility, and some comment regarding the parents' ability to support and recognise the importance to the child of a relationship with the other parent may be crucial considerations when considering overall welfare matters. These observations by third party, non-partisan observers, when matched and cross-referenced to parental reports provide an important adjunct to the overall assessment. Tracking around an allegation, obtaining a clear chronology of who said what to whom and when, and focusing on testable fact patterns, and not being persuaded by emotional facts and confirmation bias is important.

It also is important to interview other professional persons involved with the family, and especially if those persons have a history of contact. An appreciation of that professional person's relationship with the family members is also important, as it is often the case that schools and class teachers want to maintain a safe place for the child and neutrality in relation to both parents. Testable fact patterns about the teacher's observation of the child, the behaviour of parents, attendance records, and observations around parent interaction are valuable sources of information. Mental health practitioners with a history of involvement can provide important contextual detail but it is also important to understand that their role is primarily therapeutic, and that they are not likely to apply the same forensic rigour to the interviewing of the client as a forensic investigation might entail. Notwithstanding that many treating mental health specialists are not neutral, that is that they are aligned to their clients, it is a mistake not to seek out their input and especially so if they are to be involved in ongoing treatment.

Consideration of non-interview collateral data, including medical records, school reports, emails, social media and recordings can also be a wealth of information. The material needs to be reviewed carefully for reliability and validity, but the general value to an overall forensic process should not be ignored.

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## Conclusion

In many cases it is essential to put information obtained from children before the court in family law proceedings. Especially when children are older, their views and wishes are highly relevant to the determinations to be made by the courts. However, information obtained from children of all ages needs to be treated with caution, particularly where there are serious issues at stake, such as allegations of sexual abuse. This article has examined the ways in which the courts can inform themselves of views of children, and the inherent difficulties in the information which is obtained from children. Further, this article has discussed methods and theories in regard to mitigating these difficulties so that valuable information received from children is considered and given the appropriate weight while information which may be inaccurate is considered in light of its potential contamination.