ISSUES PAPER

Section 133(14) Care of Children Act 2006

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on behalf of the New Zealand Psychological Society, the New Zealand College of Clinical Psychologists, and the New Zealand Psychologists' Board[1]

Background

[1] The writing of this paper arose from a meeting between The Principal Family Court Judge, Judge Laurence Ryan, Mr Steve Osborne (CEO, The New Zealand Psychologists' Board), Ms Anne Goodhead (Psychology Advisor, New Zealand Psychologists' Board), Dr Pamela Hyde (Executive Director of the New Zealand Psychological Society), Ms Jo Leech (Clinical Psychologist, representing the College of Clinical Psychologists) and the writer, Dr Suzanne Blackwell, (Clinical Psychologist, representing the New Zealand Psychological Society).

[2] The meeting had been convened to discuss recent developments in the Family Court wherein counsel for a party had, on two separate occasions, sought to have the notes of the Court-appointed psychologist made available to a psychologist instructed by them for the purposes of assisting that counsel with cross examination.[2] [3] While, in the past, protocols allowed for the notes of the Court-appointed psychologist to be shown to another psychologist for the purposes of a critique, when psychologists assisted counsel with cross examination they did so on the basis of viewing the report, and did not have access to notes or raw data of the Court-appointed psychologist. As will be discussed, a recent amendment to the Care of Children Act has given Family Court judges the discretion to permit release of notes for the purposes of cross-examination.

[3] This paper was written at the suggestion of the Principal Family Court Judge so that it could form part of representations made to the Ministry of Justice by The Psychologists' Board and the New Zealand Psychological Society and, in the interim, could also be made available to Family Court judges to inform them of the relevant issues in the context that further similar applications by counsel and parties are reportedly in train.

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1 However, this paper does not necessarily reflect the views of the New Zealand Psychological Society, the New Zealand College of Clinical Psychologists or the New Zealand Psychologists' Board. I am indebted to Professor Fred Seymour, Dr Sarah Calvert, Ms Dianne Cameron, Mr Antony Mahon, Ms Jo Leech, Mr Peter Coleman, Ms Anne Goodhead and Mr Steve Osborne for their helpful comments on a draft of this paper.

2 *Lindberg v Lindberg* FAM-2012-004-001850 [2014] NZFC 898 Reserved Judgment of Judge J H Walker [Practice Note 4 - Specialist Report Writers Section 133 Care of Children Act 2004, Section 6(7) Family Courts Act 1980]

3 *B H v M L*- FAM - 2012-004-003253 (26 May 2014)

[4] In the first case (*Lindberg v Lindberg*) counsel for the father did not seek a critique, nor did he seek that the report of the Court-appointed psychologist be released to another psychologist for the purposes of assisting in cross examination, but rather counsel sought the notes as follows: *'The purpose of the application is simple: the applicant seeks that the notes and materials used by Ms Taylor for the purpose of preparing her report dated 28 March 2013 be released to the applicant's counsel for onward release to [psychologist] Clinical Psychologist for the purpose of permitting [psychologist] to assist counsel in preparing cross-examination of Ms Taylor on the contents of her report."* [4]

[5] Counsel's submissions were that "*At heart of the applicant's case is that he cannot fairly or properly respond to the issues raised and conclusions reached by the Court appointed Psychologist without having the opportunity to review the materials and notes prepared by her and thus have an understanding (albeit an understanding that may need to be elaborated upon under cross-examination) of the process by which she reached her conclusions and the extent and nature of information upon which she relied in reaching those conclusions."* [5]

[6] Further at paragraph [36] of Her Honour's Judgment, she cited counsel's submissions that the application for the notes was "... *to avoid the potential that either of the litigants, in this case it is the father who's raising the concern, is going to be ambushed, not deliberately by the witness, but in effect the result of being ambushed by information they have not had prior to trial and yet forms a crucial role in one of the, the evidence of one of the major witnesses in the trial so there's, it limits the risk of being surprised as to the reasons behind or the data that has been collected by the report writer..."*

[7] Counsel for the mother relied on the Family Court Practice Note (4) in relation to specialist reports as follows;

9.4 Generally disclosure of notes and materials to counsel in order to aid them to prepare their case will not be permitted. However on application to the Family Court, counsel may be granted access to notes and materials relating to their own clients, but not any other person.

9.5 The Court may release notes and materials after proceedings have been conducted or where no proceedings are pending. Any such release is at the discretion of the Court and, in the exercise of its discretion, the Court will take account of the fact that the most appropriate time to test the report is during the hearing before the Family Court.

9.6 While the Court will consider the interests of justice, the welfare and best interests of the child shall be the paramount consideration in deciding whether or not to release the notes and materials.

9.7 The Court may attach any condition it sees fit to the release of notes and materials.

[8] Counsel for the mother submitted that those consulted as to the Practice Note, included those noted in the "background section" –being the Ministry of Justice, the Family Law Section of the New Zealand Law Society, the New Zealand Psychologists' Board, the New Zealand Psychological Society and the New Zealand College of Clinical Psychologists.

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4 Reserved Judgment of Judge Walker FAM-2012-004-001850 [2014] NZFC at paragraph [20]

5 Reserved Judgment of Judge Walker FAM-2012-004-001850 [2014] NZFC at paragraph [35]

[9] It was further submitted by counsel for the mother that the matter should have some representation of these stakeholders before the Court, as it would have a far reaching impact if there was a departure from the Practice Note. Counsel referred to the fact that she had raised with the Court that the Court may wish to give consideration to the s 133 report writer being represented, and on that basis Counsel to Assist had been appointed. Counsel referred to the fact that in *LG v LG* the Court had considered this specific issue and had sought input from the New Zealand Psychological Society, and that the full High Court decision of *K v K* [6] which held that the obligations of expert witnesses are set out in Schedule 4 of the High Court Rules which are relevant to specialist report writers.

[10] Counsel to Assist *"...was critical of the process in that [psychologist] would be an expert bound by expert evidence Codes of Conduct and saw the application as a "half baked critique" without the full and open process which a critique provides."* [7]

[11] Her Honour dismissed the application and awarded costs to the respondent mother finding at [99] *"The application appears to be completely ill-founded. There is no information before the Court that counsel for Mr Lindberg has at any stage sought consent for a copy of Ms Taylor's s 133 report be made available directly to [psychologist] to assist counsel with any cross-examination."* Her Honour further found at [101] *"The Court is at a loss to know what use in any event notes and materials would be to [psychologist] without the benefit of having available to her the completed s 133 report."* This case was decided before the amendments to the Care of Children Act came into law on 1st April 2014.

[12] On 1st April 2014 some changes to the Care of Children Act 2006 came into law. Accordingly, in making a similar application, counsel referred to changes to the Care of Children Act permitting that the notes could be made available for cross examination purposes. The specific addition for discussion in this paper relates to Section 133 (14) and (15). This section comes under the heading of Reports from other persons (s 133) and subheading Second Opinions (subsections 10-15). The relevant sections are as follows; Second opinions:

(10) The approval of the court must be obtained before a second opinion may be prepared and presented.
(11) The court may give approval only if there are exceptional circumstances.
(12) A party who obtains the approval of the court for the preparation and presentation of a second opinion is liable for the costs of that opinion.
(13) If the court gives approval, it may permit disclosure of the materials to the psychologist preparing the second opinion.
(14) **If the court declines to give approval to a party, or if a party does not seek approval, the court may permit disclosure of the materials to a psychologist who is employed by the party and who is not the report writer.**[8]
(15) The court may permit disclosure under subsection (14) only if the court is satisfied that the psychologist requires the materials to assist the party to prepare the party's cross-examination.

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6 *K v K* [2005] NZFLR 28

7 Reserved Judgment of Judge Walker FAM-2012-004-001850 [2014] NZFC at [84]

8 My emphasis. For definition Materials means—(a) the psychological report; and (b) the report writer's notes; and (c) other materials the report writer used in preparing the psychological report.

[13] The second application for the notes of the s 133 report writer was made subsequent to the 1st of April 2014. However the application was ultimately dismissed on the basis that the report had been prepared in 2013 [9] and, therefore, the Court-appointed psychologist had not informed the parties that the notes might be provided for the purposes of cross-examination.

What was the consultation process for s 133(14)?

[14] The inclusion of s 133(14) appeared in the Bill before Parliament without prior notice either in the Family Court consultation paper [10] or in any of the documentation put to the Expert Reference Group appointed by the Minister of Justice. I was a member of the Expert Reference Group and, as such, I have access to all documentation considered and generated by the reference group.

[15] The only reference to second opinions or critiques in the public consultation paper was at paragraph [241] which noted *that "It has also become increasingly common for a party to obtain another psychological report to critique the report of the Court-appointed psychologist. This adds to delay and extends the hearing time." The question asked of stakeholders was "Should a critique of a court-appointed psychologist's report be allowed or should parties be limited to cross-examination of the report writer?"* There was nothing at all about notes of psychologists being made available for the purposes of cross-examination.

[16] The issues put to the Reference Group about specialist reports related to a perception that judges might in future be able to direct such reports only in extraordinary circumstances. When the Reference Group considered the issue of psychologists' reports and critiques or second opinions the following comments were reflected in the notes generated *"In relation to the assertion that psychological reports are contributing to delay, it was indicated that there was often a delay in the psychologist being appointed and them receiving the documents from the court and this could stretch into weeks and months. It was suggested that the court needs to send the documents to the psychologist immediately and that the brief needs to be organised immediately in relation to critiques which, again, were a factor in delay. It was suggested that judges needed to tighten up on the criteria for the situation about critiques. It was suggested that critiques seemed to be a factor of Auckland Family Court and were not frequently used in other centres. It was suggested that, in relation to tightening up critiques, the Judges might require that the critique writer must be an approved specialist report writer. The brief must be registered at the time of judicial approval and that strict time guidelines were needed and they needed to request this at the outset, as soon as the other report was received."* [11] The Reference Group did not support prohibition of critiques.

9 *B H v M L-* FAM - 2012-004-003253 (26 May 2014)

10 Reviewing the Family Court; A public consultation paper 20 September 2011

11 Expert reference group notes, 19th December 2011

[17] It was never put to the Reference Group that there might be any intention to change the legislation to provide for psychologists' notes (raw data) to be provided to another psychologist to assist counsel for one of the parties in cross examination. Had this been the case, this would have been addressed fully in the report of the Reference Group to the Minister. In relation to expert reports, the Reference Group report to the Minister discussed issues related to the interface of the specialist report writer and the Lawyer for Child; clearer criteria for judicial directions to deem it "necessary" that a specialist report be obtained; and a recommendation that a new section be incorporated into the Care of Children Act to enable assessments to be made of parents as is the case in relation to assessments pursuant to the Children Young Persons and Their Families' Act 1989. [12]

[18] In the Ministry report summarising responses by the public to the initial Family Court Review paper, it was noted that *"....26 submitters commented on whether a critique of a court-appointed psychologist's report should be allowed, or if parties should be limited to cross-examination of the report writer. 16 submitters supported critiques, often because they thought multiple viewpoints were helpful.* The paper continued *"Currently there is a robust protocol which the Family Court follows. We support this practice especially in respect of protection of the children from multiple or invested interviews. – Non-governmental organisation. Four submitters favoured cross-examination only, seeing multiple reports as an unnecessary delay or a tactical ploy by parties. It is now not uncommon for there to be a trial within a trial as each party tries to discredit the views of one of the specialist report writers. –Lawyer."* [13] There was no mention of the possibility of psychologists' notes being made to a psychologist instructed by counsel for one of the parties for the purposes of cross examination.

[19] In her Cabinet paper to Parliament "Family Court Review – Proposals for Reform", the Minister noted at paragraph [80] *"Agree to amend the Care of Children Act to prohibit parties obtaining another specialist report to critique the report of the Court-appointed specialist."* Further at paragraph [121.4] "*Removing parties' ability to obtain a critique of a specialist's report so that parties may only question a specialist's methodology or conclusions through cross-examination."* There was no mention of the possibility of psychologists' notes being made to a psychologist instructed by counsel for one of the parties for the purposes of cross examination.

[20] When some members of the Reference Group made submissions to the Select Committee in response to the Family Court Proceedings Reform Bill; we made no comment about Section 133(14). We simply did not notice the amendment, being most concerned with issues related to legal representation for children, and the proposed parties, and the costs to parties of dispute resolution. [14]

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12 Expert reference group report at pages 39-41 (paragraphs 7.1 - 7.12)

13 Summary of submissions in response to Reviewing the Family Court: A public consultation paper at page 38

14 Submission to the Select Committee on The Family Court Proceedings Reform Bill; F. Seymour, S. Blackwell, A. Cooke, A. Mahon and S. Otene

[21] Similarly, the submission by the New Zealand Psychological Society by Dr Pamela Hyde and Mr Peter Coleman did not reference the amendment. [15] There are no documents available to me that foreshadow this amendment. It can only be surmised that someone decided to insert s 133(14) as way of obtaining some professional access to the raw data, given that the obtaining of critiques was to be made more difficult.

Critiques and cross examination

[22] In contrast to the criminal courts, the Family Court has an inquisitorial focus, and is said to operate as far as possible in a non-adversarial way with the best interests of the child as the paramount consideration. For this reason, psychologists are Court-appointed, as opposed to other jurisdictions where a psychologist/expert witness is usually instructed by one or other of the parties to the proceedings. However, in the Family Court arena, parties to the proceedings have in the past had a right to challenge the reports provided by court appointed psychologists, and the court has permitted the admission of what have been previously termed "second opinions" but are now referred to as "critiques." [16]

[23] There have been three categories of involvement by psychologists assisting lawyers for parties. The first is the actual critique or review of the report and raw data of the court appointed psychologist by a psychologist instructed by one of the parties. This has required a judicial ruling in each individual case. The second area relates to where a psychologist may advise and assist the lawyer for one of the parties. If this involves reading of reports and court documentation, then judicial authorisation is required for release of the report to the psychologist instructed by the lawyer. This has not in the past involved access to notes of the Court-appointed psychologist. The third area relates to counsel obtaining assistance from a psychologist specifically in relation to cross examination of the Court-appointed psychologist. In the past, this has most commonly involved reading of the report written by the Court-appointed psychologist as well as reading of other court documentation and has, therefore, required judicial authorisation.

15 Supplementary Submission to Justice And Electoral Select Committee Family Court Proceedings Bill 7 March 2013 Dr P Hyde and Mr P Coleman

16 While the term "critique" has been used in the Family Court Review documentation, the term "second opinion" is used in the amendment. The guidelines for specialist reports and critiques are published in Seymour, F., Blackwell, S., & Thorburn, J. (Eds.) (2011). *Psychology and the Law in Aotearoa New Zealand.* Wellington: New Zealand Psychological Society. In a discussion of Critiques it is noted *"In medical and general psychological practice, the term "second opinion" usually refers to a situation where a practitioner undertakes a complete reassessment including re-interview and re-examination. This is uncommon in the Family Court, and where it does occur it is conducted as a fresh referral to another psychologist, managed in the usual way. The term "critique" came to be used as an alternative, although some practitioners have indicated that this term has negative connotations, and implies that there is, by definition, something to criticise. Others have suggested the term "review". We have chosen to use the term critique reflecting the most common practice."* (Page 78).

[24] Similarly, in the past this has not involved access to base data held by the Court-appointed psychologist. The court has found that such assistance with cross examination can occur without the need for access to base data. In *M v J* the court noted that counsel could engage a second psychologist to assist that counsel *"In framing of questions to be put to the report writer .... This can be achieved without that psychologist requiring to see the report writer's notes."*[17]

[25] There are published protocols for the ethical conduct of Court-appointed psychologists and critiquing psychologists during the critique process. These are attached at Appendix A. While these are guidelines, rather than being enshrined in legislation, it is common practice for judges to direct that there will be compliance with the guidelines.

[26] There have also been conventions around the behaviour of psychologists who are assisting counsel with reports and cross-examination. As noted in *Psychology and the Law in Aotearoa New Zealand* in relation to assisting and advising counsel or assisting with cross examination *"Court-appointed psychologists may be unaware that other psychologists are involved, although, as will be discussed, it is commonly accepted that professional courtesy dictates that the other psychologist contacts them to inform them of this involvement. Psychologists receiving instructions from lawyers should inform them of this collegial convention prior to acceptance of those instructions."*[18]

The notes taken by psychologists during s 133 assessments

[27] It is stressed that notes made by psychologists in Family Court proceedings do not constitute a verbatim record of their interviews and observations, and some clarification by their writer would be necessary to provide detail and context. There is potential for there to be serious misunderstandings and errors if notes are made available without reference to the note taker or without context. Hence a meeting between the report writer and the critique writer is usually necessary to avoid this.

[28] As Professor Fred Seymour, clinical psychologist deposed in his affidavit provided for *Lindberg v Lindberg*, at paragraph [12] *"Notes are taken in the course of preparation of a report which are not verbatim records of all transactions, but rather serve as an aid to the production of the final report. That is, notes are taken as a prompt to memory. Detailed notes are taken of particularly significant interactions. Especially with children, excess note taking can create a barrier to rapport between the interviewer and interviewee. As such notes commonly need elaboration and/or interpretation in order to be fully understandable to another reader."*

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17 *M v J* (unreported) Family Court, Whanganui, FP083/315/00 Judge Callinicos 15 July 2003 N. 4 at 15.

18 Seymour, F., & Blackwell, S. (2011). Psychologists working within the Family Court. In F. Seymour, S. Blackwell, & J. Thorburn (Eds.), *Psychology and the Law in Aotearoa New Zealand.* Wellington: New Zealand Psychological Society. Guidelines at page *78*

[29] However, it is in the guidelines, and it is generally accepted that any meeting between the Court-appointed psychologist and the critique writer is not an opportunity for the critique writer to conduct cross examination of the report writer, on behalf of instructing counsel about their methodology or any other matters. The guidelines also contain advice about ensuring the security of the notes: *"However, if you do release a photocopy of your notes to the critique writer, obtain a written undertaking from them that they will return the copies, and that they will not show these notes to anyone, including the instructing lawyer."*

Might an application under s 133(14) constitute a "fishing expedition"?

[30] One aspect of the guidelines for "critiques" is that there must be a brief set for the "critiquing" psychologist. This is to avoid "fishing expeditions." [19] As Chilwell J noted in AMP [1986] in relation to "fishing", *'It is clear that the Court will not order discovery or allow interrogatories where the applicant is doing no more than "fishing". The meaning of the term "fishing" in this context has been discussed in a number of cases. Barker J. collected several of them in Securitibank Ltd v Rutherford (No. 31) /unreported; A.355/81, Auckland; 14 August 1984) 6-7. In my view, the description of "fishing" in the authorities cited by Barker J. and in other authorities cited by counsel come to this: an applicant is fishing when he seeks to obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or in order to discover circumstances which may or may not support a baseless or speculative cause of action."* [20]

[31] It might be said that because the Family Court can be seen as having a more inquisitorial function than do other courts, that some "fishing" might be permissible. However, countervailing this consideration is the specialist nature of the Family Court with the inherent obligation to be attuned to the need for sensitivity in dealing with the lives of vulnerable children and their parents.

Section 133(14) and unintended consequences

[32] One of the expressed intentions of the reforms to the Family Court was to make the Family Court less adversarial and to reduce delays and save costs both for the court and the parties. It is true that previously critiques did cause delays; especially if they were actioned some considerable time after the Court-appointed s 133 report had been tendered to the Court. It is suggested here that s 133(14) is likely to have the effect of making proceedings more adversarial and lengthy than the reverse.

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19 Black's Law Dictionary 532 (8th ed. 2005) (defining a fishing expedition as: "An attempt, through broad discovery requests or random questions, to elicit information from another party in hope that something relevant might be found; esp., such an attempt that exceeds the scope of discovery allowed by procedural rules.")

20 *AMP* [1986] NZLR 190; *Australian Mutual Provident Society and Architectural Windows Limited and AHI Aluminium Limited* C.P. No. 1373/85 Judgment of Chilwell J.

[33] It has already been the case that attempts on the part of counsel to obtain psychologists' notes have been time consuming and costly to the Court and, arguably, to the parties. For example, in *Lindberg v Lindberg* [21] the s 133 report was dated 28 March 2013. The applicant, through counsel, made an interlocutory without notice application to the Court on 14 May 2013 for a direction granting access to the notes and materials of the Court-appointed psychologist. After considering the application, His Honour Judge Neal directed in a Minute dated 20 May 2013 that the matter proceed "on notice". A notice of defence was filed by the respondent, who opposed the application. On 15 August 2013 His Honour Judge Druce allocated a one-hour fixture to determine the matter. A hearing set down for 15 October 2013 was adjourned and a new date was allocated.

[34] Subsequently, on 14 November 2013, Judge Fleming made an appointment of Counsel to Assist. The matter came before Judge Walker on 17 December 2013 for hearing and her Reserved Judgment was delivered on 20th February 2014. It is noted that this was an interlocutory hearing, not a substantive one, but that the effluxion of time from the receipt of the Section 133 report, and the application by counsel for the notes in May 2013 through to the hearing and final judgment in 2014 was considerable. In the second case, there was an interlocutory hearing and the Court bore the cost of appointing Counsel to Assist and both parties bore their legal costs occasioned by the application. [22]

[35] In making application for the psychologist's notes to assist in cross examination, counsel invoked "natural justice" as a reason that the Court should grant the application. Judge Walker noted at [106] *'The question raised by myself initially .....was that natural justice would then mean that data would have to be released to all parties and counsel. This cannot be seen to be conducive to the hearing process. Section 133 of itself envisages a limitation on distribution of the s 133 report."* The extension of this concern is that if all counsel had access to the notes, because they form un-interpreted data and are made in haste and, therefore, may be at least partially indecipherable, then their use may increase the length of court proceedings.

The potential for misinterpretation of the notes

[36] The issue of access to psychologists' notes in the Family Court context has surfaced intermittently irrespective of legislative changes. Applications have been made intermittently over the years with judges almost invariably declining to make them available to counsel in Family Court cases. [23]

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21 *Lindberg v Lindberg* FAM-2012-004-001850 [2014] NZFC 898 Reserved Judgment of Judge J H Walker [Practice Note 4 - Specialist Report Writers Section 133 Care of Children Act 2004, Section 6(7) Family Courts Act 1980]

22 *B H v M L-* FAM - 2012-004-003253 (26 May 2014)

23 For example; *Re RSR* NZSLR 1997 737-747 and *LG v LG* (1991) NZFLR 481 High Court, Thorp J

[37] Over 20 years ago, in *LG v LG* [24] Professor Seymour provided an affidavit to the Court in which he noted *"Psychologists have always felt reluctance at being involved in a process which involves excessive or inappropriate picking over of rough clinical notes and jottings which are often the only available means of recording the course of an assessment. Since the process of assessment often involves the working through of alternative hypotheses which are later discarded as the process continues there is an inherent unreliability in subjecting them to excessive reinterpretation. The New Zealand Psychological Society would therefore prefer, if the Court decides that such material should necessarily be available for inspection, that that inspection should be only by their own discipline to minimise the risk of incorrect interpretation. Incorrect interpretation is also minimised by providing an opportunity for the first report writer to discuss his or her raw data with any other person making reassessment."*

[38] Section 133(14) is silent on the behaviour of both instructing counsel and the psychologist assisting them with cross examination. It is not clear as to whether it is intended that instructing counsel actually see the notes. It is not clear whether there are any constraints on the psychologist making the notes available to instructing counsel. There are no professional guidelines that might inform this process.

[39] One implication of s 133(14) is that the Court-appointed psychologist would not have the opportunity to meet with the "assisting with cross examination" psychologist in order to explain and/or interpret their notes. As already discussed, notes taken in the course of preparation of a report are not verbatim records of all interactions or observations, but rather serve as an aid to the production of the final report. An associated implication of s 133(14) is that there is no opportunity for the Court-appointed psychologist to respond to any misunderstandings on the part of counsel or the "assisting with cross examination" psychologist about the notes as is normally the case in the "critique" process.

[40] According to the Code of Ethics,[25] psychologists have a responsibility to protect access to their notes and raw data by keeping that material secure and in their custody. During the "critique" process typically the critiquing psychologist would review the materials in the offices of the s 133 psychologist (see Guidelines at 2.1.5), and no copies are made, unless directed by the Court. This protection of access to notes and raw data is not required to protect the psychologist, but rather to ensure that the parties and their vulnerable children are protected from the misrepresentation and/or misuse of raw un-interpreted data in relation to sensitive issues that may inevitably occur in the Family Court context.

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24 *LG v LG* (1991) NZFLR 481 High Court, Thorp J

25 Code of Ethics for Psychologists Working in Aotearoa/New Zealand, 2002; Prepared by the Code of Ethics Review Group, a joint working party of the NZ Psychological Society, the NZ College of Clinical Psychologists and the NZ Psychologists Board. Adopted by Members of the New Zealand Psychological Society, and Members of the NZ College of Clinical Psychologists at their respective 2002 Annual General Meetings. The Psychologists Board resolved to formally adopt the Code for registered psychologists on 6 December 2002.

[41] It is evident that s 133(14) anticipates that the Court appointed psychologist should make their notes and other data available to the "assisting with cross examination" psychologist by photocopying these and delivering them to the lawyer for the party requesting the material, who will then provide them to the psychologist for examination. This does not appear to meet the obligation the court appointed psychologist has to protect access to notes and other raw data as mandated by the Psychologists' Code of Ethics.

Do psychologists report all data in s 133 reports?

[42] Clearly they do not. Reports would be inordinately long and be reduced to he said/she said type documents. What is required of a specialist report writer is that they collect data and synthesise and interpret them in the totality of the assessment. Some data collected are deliberately not reported. For example, if a parent reported aspects of a previous intimate relationship or they had divulged some other irrelevant but private information, this might not be reported by the psychologist.

[43] Parties who are in the throes of separation and Family Court proceedings often exercise uncharacteristically poor judgment and, if during the court process they become privy to such sensitive information through their counsel's access to the psychologist's notes by way of the "assisting with cross-examination psychologist", they may repeat this to vulnerable children, or to others who are not entitled to know such evidence. If such material, however irrelevant, is then used as a point scorer or weapon in court proceedings, then this has the potential to be damaging to children, and also damaging to what is left of a relationship between the parties who are still faced with having to co-parent their children in the future.

[44] Psychologists do not withhold information in reports to "ambush" either the parties or their counsel. They may withhold reporting data that have the potential to inflame a situation further but which are not relevant to the case at point. One of the aims of a report is to provide an assessment written in such a way as to assist the parties to settle. Reporting all information gathered, some of which may be salacious and irrelevant, is likely to be counterproductive to such a process.

[45] In addition, it is possible that older children may see reports or, in some cases, be inappropriately shown reports by parents and, therefore, there is potential for damage to be caused by including such sensitive material in reports. If a psychologist who views the data for an instructing counsel sees such data without context, they may report this information, thereby increasing the adversarial nature of the proceedings. Section 133(14) is silent as to whether the psychologist assisting counsel with cross examination must be experienced in Family Court work. If they are not, this may further complicate proceedings because of lack of appropriate expertise that may lead to misunderstandings.

The potential impact on parties' willingness to cooperate

[46] Notwithstanding that the Court may direct that a section 133 report be obtained, psychologists undertaking such assessments are obliged under their Code of Ethics to seek and obtain informed consent from the parties prior to commencement of the assessment. This is because the psychologist (following the Code of Ethics) does not regard the party as being obliged to participate and, therefore, they are asked to consent to interview and observation of themselves and interview and observation of their children.

[47] In obtaining consent, the Court-appointed psychologist must fully disclose the limitations of confidentiality and their obligations as a neutral expert assessor with a primary duty to the Court. This is to ensure that any consent given by the parties is truly informed consent. This includes an explanation that what a party may say (or do) during an interview or observation may be included and commented on in the report to the Court and, that during any Court hearing, the psychologist may be required to read verbatim from interview notes, or notes taken during observations.

[48] The guidelines for Family Court reports indicate that parties are also told that it is possible that a critique of the report may sought by either of the parties and that this could involve a second psychologist viewing the notes and writing a critique report following protocols represented in the Practice Note [26] and the Guidelines.[27] Therefore, parties consenting to the s 133 assessment process have been given to believe that no-one has access to notes and raw data of the psychologist except during the critique process and that the critiquing psychologist is also bound by the Guidelines and the Code of Ethics.

[49] This preliminary discussion with the parties about their rights and obligations in the process and the limits of confidentiality is mandated by the Code of Ethics and is an essential step in building trust with the party. It is also important in ensuring that they feel free to report relevant information to the psychologist, while at the same time understanding the Court process. Whether persons would speak as freely if they understood that the psychologists' notes from their interviews would be made available to opposing counsel and a second psychologist specifically for cross examination purposes is unknown, although a predictable consequence for some parties is that that they could be more reluctant to participate at all, or could be more guarded in what they are prepared to disclose during an assessment.

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26 http://www.justice.govt.nz/family-justice/about-us/info-for-providers/documents/practice-notes/specialist-report-writers.pdf

27 Seymour, F., & Blackwell, S. (2011). Psychologists working within the Family Court. In F. Seymour, S. Blackwell, & J. Thorburn (Eds.), *Psychology and the Law in Aotearoa New Zealand.* Wellington: New Zealand Psychological Society.

What are the implications for psychologists?

Ethical issues

[50] In July 2014, the CEO of the Psychologists' Board issued the following statement *"**Significant Change to the Care of Children Act** – The Board has heard from psychologists working in the Family Court who are concerned about some important (and very unfortunate) changes to the Care of Children Act (**CoCA**). The changes give the court discretion to allow a second psychologist access to a report writer's notes when a lawyer is preparing for cross-examination, which goes well beyond what is currently covered in the Family Court's Practice Note. This has clear implications for psychologists, who will now need to include an appropriate caution re this limit to confidentiality when seeking informed consent. Representatives of the Board, NZPsS, and NZCCP met with Principal Family Court Judge Laurence Ryan on June 26th to discuss these concerns. The Judge clearly appreciated the ramifications of these changes, which are likely to include increased costs, process delays, more challenges and complaints, increased risk of harm to children and family relationships, and further disincentives for practitioners to work in this important area. A background paper will now be prepared to inform other key officials (including the Minister of Justice) of our concerns and to request a change to the legislation. Until a change to the CoCA is achieved, however, **practitioners should bolster their informed consent processes and should also carefully consider the ethics and implications of taking on assignments that require them to receive and review another psychologist's notes.**[28] We anticipate that the Court will continue to consider the welfare and best interests of the children involved to be the paramount consideration in deciding whether or not to release a psychologist's notes, and/or to attach clear and protective conditions to the release. Further updates will be posted here over the coming months."*

[51] Here the Psychologists' Board CEO was flagging the ethical issues inherent for any psychologist accepting an instruction from counsel for one of the parties to view the notes and assist counsel with cross examination. The "assisting with cross examination psychologist" might have difficulty reconciling the role required here with their obligations under the High Court Code of Conduct for Expert Witnesses, in particular, their ability to meet the primary obligation to be a witness to the Court rather than to the party that engaged them.

[52] As Professor Seymour noted at paragraph [23] in his affidavit prepared for *Lindberg v Lindberg "For example, they* (the instructed psychologist) *do not produce a report that is then available to all parties, and in particular the presiding Judge. They are not likely to appear as a witness for cross-examination. Consequently, it is likely that psychologists would find the role demanded in these circumstances to be incompatible with required practice standards of the profession."*

28 Emphasis as in the original statement by the Psychologists' Board

Will psychologists continue to be willing to work in the Family Court?

[53] There is also the issue as to whether, under the circumstances that may be occasioned by successful applications pursuant to s 133(14), psychologists will be prepared to continue to make themselves available as specialist report writers for the Family Court. Anecdotal reports indicate that if this situation continues, the already small pool of psychologists doing this work may further diminish, simply because some psychologists may have decided they can no longer tolerate the increasingly adversarial nature of Family Court work.

[54] The Court has already, in past proceedings, recognised this possibility, as well as the ethical issues faced by psychologists providing reports for the Family Court. In 1997, in the Family Court at Hastings, Judge Moss noted "*This Court has respect for the expertise of the people approved for assessment of children in guardianship situations. The process of assessment is a technical one, now regulated by ethical standards, promulgated by the professional bodies for the assessing professionals. The base data is the collection of material noted by the assessors during the interviewing process, before being refined by the process of analysis and thought, educated by professional training. It is not in my view appropriate to extend the access to that base data as a more general rule, for counsel to work through the handwritten notes of an assessor undertaking a technical assessment process different in all respects from that undertaken by lawyers in the preparation of litigation, and thereby for the Court to permit counsel to prepare their cross-examination of the Court's retained expert.*" [29]

[55] As Mr Antony Mahon, Counsel to Assist in *Lindberg v Lindberg* submitted to the Court "*In M v J (unreported) Family Court, Whanganui, FP083/315/00 Judge Callinicos 15 July 2003 at [41] Judge Callincos emphasised the vital role played by psychologists in Family Court cases and the need to avoid "any temptation to derive short-term gain by being overly zealous in cross-examination of a psychologist, should be carefully weighed against the long term loss to the Family Court of the experienced report writers.*"[30]

Summary

[56] The reforms of the Family Court were intended, inter alia, to render the Court less adversarial, to reduce delays and to reduce costs. Regrettably the existence of s 133(14) in the Care of Children Act has the real potential to increase adversarial behaviour of both the parties and their counsel, to increase delays and to incur further costs to the Court and to the parties. In addition, its existence has the potential to reduce what is already a relatively small pool of appropriately qualified and experienced psychologists available to prepare specialist psychological reports for the Family Court.

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29 *Russell v Russell* 19.2.97 Judge Moss FC Hastings FP.020/166/87

30 *M v J* (unreported) Family Court, Whanganui, FP083/315/00 Judge Callinicos 15 July 2003 at [41]

Appendix A

GUIDELINES FOR CRITIQUES OF FAMILY COURT REPORTS (2011)

Professor Fred Seymour and Dr Suzanne Blackwell (Reproduced from *Psychology and the Law in Aotearoa New Zealand* with permission from the New Zealand Psychological Society) [31]

1.0 For critique writers

1.1 Before accepting an instruction to critique a report pursuant to s 133 Care of Children Act 2004 or s 178 Children, Young Person and Their Families Act 1989, there are a number of preliminary matters to be considered by the psychologist. These include the following:

1.1.1 Ensure that the instructing lawyer has obtained an authority from the court that a critique may be obtained before you read any documentation, including the report of the court appointed psychologist. Insist on having a copy of this authorisation, as you will need this to provide a copy to the court appointed psychologist before they will permit you to view their data and meet with you.

1.1.2 Ensure that this work is within your area of professional expertise. If you do not have experience in writing reports for the Family Court (as a court appointed psychologist) then your expertise may be challenged by the court appointed psychologist, or by other lawyers involved in the case. The Code of Ethics and the Code of Conduct for Expert Witnesses are relevant here.

1.1.3 It is unwise to accept instructions direct from parties to the proceedings, and, therefore, these should come directly from their lawyer. It is usual practice that there is no contact between the parties and the critique writer, and no interviews of either party or any children. The court will be most critical of any critiquing psychologist who attempts to interview or observe a child without the authority of the court. A critique is conducted entirely on the documentation available.

1.1.4 It is usual to quote an agreed fee for your services (see also 1.1.9) and to have the instructing lawyer obtain funds from their client (or have legal aid approval) before the commencement of the critique. In the former situation, these funds are usually retained in a solicitor's trust account, and will be paid to you upon completion of the critique report. This will render you less vulnerable to allegations that your report is influenced by partisan interests.

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31 Seymour, F., & Blackwell, S. (2011). Psychologists working within the Family Court. In F. Seymour, S. Blackwell, & J. Thorburn (Eds.), *Psychology and the Law in Aotearoa New Zealand.* Wellington: New Zealand Psychological Society. Guidelines at Pages 86-88

1.1.5 It is imperative that at the outset instructing lawyers are made aware of your ethical responsibilities and your obligations to the court, and that the critique report may, or may not, suit their purposes.

1.1.6 Check the names of the parties before accepting instructions to ensure that there is no conflict of interest, for example, past therapeutic relationships, social relationships, etc.

1.1.7 Always obtain a clear brief (or terms of reference) from the instructing lawyer before you read any documentation. "Fishing expeditions" are not permitted. Normally, questions would focus on aspects of the original brief and report, and should not include matters or questions that have not already been covered. You will need to provide a copy of this brief to the court appointed psychologist at the outset.

1.1.8 Take heed of the set time frames for both yourself and the court appointed psychologist. Set realistic time frames giving the court appointed psychologist ample time to co-operate with you. Discuss these timeframes with the court appointed psychologist before you formally accept the instruction. They may be out of the country, or, for other reasons, be unable to accommodate the set timeframes. Contacting them at the outset will give you guidance as to whether the critique can be completed in the timeframe requested by the instructing lawyer. Do not be railroaded by instructing counsel into placing unrealistic time expectations on yourself or the court appointed psychologist.

1.1.9 Funding considerations. The critique estimate should include an allowance to pay the court appointed psychologist for their time in co-operating. The amount of time should be agreed upon between the two psychologists prior to the work proceeding. The court appointed psychologist should be paid immediately after the consultation process with the critique writer, and this can be claimed by the critique writer as a disbursement to the invoice to the instructing lawyer. It is not acceptable for the court appointed psychologist to have to wait until the critique writer is paid.

1.1.10 As part of the critique process it is usual that the notes (raw data) of the court appointed psychologist will need to be viewed. These will normally be viewed at their office. It is not normally expected that practitioners will photocopy their notes, or provide their files other than at their own premises. If the instruction comes from a lawyer in a different centre, then critique writers should factor in travel expenses to visit the court appointed psychologist and view their notes. It is stressed that notes made by psychologists in Family Court proceedings do not constitute a verbatim record of their interviews and observations, and some clarification by their writer is required to provide detail and context. In this regard, notes may be viewed by the critique writer who may take their own notes of such review. If it is argued that it is not possible for the two psychologists to meet, then

the critique writer should provide evidence for this departure from best practice in the judge's orders. Note, release of reports and psychologist's data that inform the report are both at the discretion of the court, not individual psychologists. In such a case the copying and delivery of notes should be at the critique writer's expense, and agreement should be reached as to how the two psychologists will discuss the reports and data by phone call, before the work is commenced.

1.1.11 As indicated above, there will inevitably need to be clarification by the note taker about aspects of the notes, and hence a meeting between the report writer and the critique writer will be necessary. However, this meeting is not an opportunity for the critique writer to conduct an interrogation of the report writer about their methodology or any other matters. This would not, however, preclude discussion of conclusions with the report writer prior to completion of the critique report so as to ensure clarity of conclusions, as well as identifying agreements and explanations for differences in opinion.

1.1.12 Once the critique report is completed, a draft is forwarded to the court appointed psychologist, and thereafter an arrangement for a telephone conversation to discuss this. They may comment on errors of fact, and any differences of opinion may be noted in your final report, or alternatively, the psychologist may elect to provide their own supplementary response to your report. Note that some report writers may decline to have discussions about the draft, preferring to manage this by supplementary report or during their viva voce evidence in court.

1.1.13 The critique report may then be finalised and sent to the instructing lawyer.

2.0 For court appointed psychologists

2.1 It is important the court-appointed psychologists co-operate with the critique process. However this co-operation will be subject to the following provisions.

2.1.1 Ensure that the critiquing psychologist has the authority of the court before engaging with them. Ask for a copy of the judge's authorisation to be sent/emailed to you at the outset.

2.1.2 Ascertain whether the proposed critique writer has experience as a specialist report writer for the Family Court. In the past, critiques on reports by court appointed psychologists by professionals from other disciplines (e.g., psychiatry and psychotherapy) have been allowed by the court. In practice, the presiding judge approves (or not) the critique writer, after consultation with all counsel. However, if you are of the view that the proposed critique writer does not have the relevant expertise to conduct the critique, make your objection known to the court, although if the judge nevertheless approves their instruction as a critique writer, you will ultimately be obliged to co-operate with them.

2.1.3 Ensure there is a written and specific brief and that this has been authorised or approved by the presiding judge. Ask for a copy of this to be sent/ emailed to you at the outset.

2.1.4 Co-operate with time frames as much as you are able. However, if the critique writer expects you to conform to unrealistic and onerous time frames, indicate this to them. There should be at least four days for you to consider the report before being expected to respond. Likewise it would be courteous for you to have at least two weeks' notice before being expected to meet with the critique writer to disclose and clarify your notes/raw data.

2.1.5 Co-operate with the critique writer in arranging a time for them to come to your office in order to view your notes and to meet with you about these. You are not obliged to photocopy your notes or any other documentation, or send your notes or photocopies of them to critique writers including those who may be practising outside of your geographical area, unless of course there is an order to do so by a judge. However, if you do release a photocopy of your notes to the critique writer, obtain a written undertaking from them that they will return the copies, and that they will not show these notes to anyone, including the instructing lawyer. They may take notes from your notes. You must make yourself available to them to decipher notes and answer questions about the notes. There is potential for there to be serious misunderstandings and errors if notes are made available without reference to the note taker or without context. Insist on seeing the draft report before it is released, and on having time to consider this and respond. It is reasonable to expect at least two working days for this. Do not feel obliged to respond to the report if you would prefer to write a response to the court, or to respond by viva voce evidence at the hearing. However bear in mind that, where possible, a joint effort aimed at resolving the case may be in the best interests of the child and the parties involved.