

WHEN PARENTAL CONFLICT RISKS CHILDREN'S HEALTH: MANAGING MEDICAL ISSUES IN HIGH CONFLICT CASES

Pacifica Congress Conference, Brisbane

8 July, 2022

Justice Tom Altobelli

Lyn R. Greenberg, PhD, ABPP

**For handouts, go to <https://www.lyngreenbergphd.com/> and click on
"Pacifica conference 2022"

1

What to Expect From this Workshop

- ▶ Covid-19 vax cases as a prism to explore high conflict
- ▶ Not about "special medical procedures"
- ▶ High conflict - not family violence
- ▶ Sharing of knowledge and experience
- ▶ Interdisciplinary

2

Who is here today?

1. Are you?
2. A lawyer?
3. A judge?
4. A mental health professional?
5. Report writer?
6. Therapist?
7. Mediator?
8. Community intervention worker?
9. Parenting Coordinator?
10. Someone I left out?

3

LGA0

Impacts of Covid-19 on families

- ▶ Normal support networks (formal and informal) disrupted
- ▶ Physical environments changed (physical to virtual)
- ▶ Increased stress, anxiety, fatigue and insecurity due to pervasive change: household, social, educational, economic, physical
- ▶ Barriers to accessing help to cope with that stress, anxiety and insecurity
- ▶ Barriers to access traditional protective institutions e.g. school, child welfare, shelters, courts, medical and mental health services
- ▶ Super-vulnerability of children and youth, isolated, pre-existing mental health sufferers, victims of violence and control, socially disadvantaged
- ▶ Co-parenting much more difficult

4

Slide 4

LGPAO Tom, somewhere we need a comment on social consequences of vaccination

Lyn Greenberg, Ph.D., ABPP, 2022-07-06T03:26:38.521

Survey of Covid-19 vax cases in Australia

- ▶ As we look at the summaries of these cases, what do they tell us about:
 - ▶ Trends in outcomes
 - ▶ Nature of the conflict
 - ▶ Patterns of conflict
 - ▶ Rationale for decisions
 - ▶ What works well
 - ▶ Implications for practice
 - ▶ Need for reform?
 - ▶ Anything else?

5

Relevant case: *Covington & Covington* (2021) FLC 94-014; [2021] FamCAFC 52

- ▶ Full Court decision in case about general immunisation of child
- ▶ [42] The Family Court of Australia has the jurisdiction to make an order providing for a child to be vaccinated (*Mains & Redden* [2011] FamCAFC 184, and if necessary see *Re Kelvin* (2017) FLC 93-809).
- ▶ [43] That jurisdiction is not dependent on whether or not the parties consent.
- ▶ [44] In this case, consent was given and the order was made on that basis. The fact that the mother sought to subsequently withdraw her consent does not in any way invalidate the order, or change its binding effect. The order stands as an order of the Court for which it had the jurisdiction to make.
- ▶ Special leave to appeal to High Court refused

6

Cranston & Persson (No 2) [2022] FedCFamC1F 187 - McClelland DCJ

Background	Outcome	Power
Injunction against vaccination sought in Initiating Application as part of broader parenting application	Vaccination allowed	<u>Parental Responsibility</u> SPR allocated to the respondent mother in respect to the question of whether the children should be vaccinated, in circumstances where no parental responsibility order had yet been made, and in circumstances where the parties had consulted with each other (as required by s 65DAE) and failed to resolve the matter.

7

Fontain & Pretre [2022] FedCFamC1F 198 - Altobelli J

Background	Outcome	Power
Self-represented applicant. Vaccination application seeking injunction against vaccination filed during ongoing parenting proceedings	Vaccination allowed	<u>Welfare powers</u> Best interests of the child considered, vaccination seen as consistent with the primary consideration to protect the children from physical harm and from being subjected to neglect (s 60CC(2)(b)).

8

Trott & Brenton [2022] FedCFamC1F 366 - Smith J

Background	Outcome	Power
Vaccination application seeking to vaccinate child against COVID-19 filed in ongoing parenting proceedings	Vaccination allowed	<u>Court's power to make parenting order/parental responsibility</u> Child's treating GP provided evidence by way of a report and cross-examination. SPR allocated to the applicant mother in respect of vaccination against COVID-19.

9

Ingate & Swinton [2022] FedCFamC1F 222 - Strum J

Background	Outcome	Power
Vaccination application seeking to vaccinate the child filed in ongoing parenting proceedings	Vaccination allowed	<u>Court's power to make parenting order</u> Reliance upon <i>Covington & Covington</i> [2021] FLC 94-014 and <i>Dacombe & Paddison</i> [2021] FedCFamC1A 103 (in relation to interpretation of s 51(xxiiiA) of the Constitution).

10

Kopic & Britt [2022] FedCFamC2F 515 - Judge Kirton

Background	Outcome	Power
Vaccination application seeking to vaccinate child filed in ongoing parenting proceedings	Vaccination allowed (if GP recommends it is medically safe to do so)	<u>Parental responsibility</u> Order made as follows: that in the event the parents do not agree, "this Order shall provide the Mother alone with authority" to have the child vaccinated against COVID-19. Decision made by reference to Part VII of the Family Law Act, specifically by reference to the child's best interests (s 60CC), the welfare of the child (s 43 and s 67ZC) and parental responsibility (ss 61B, 61D and 64B).

11

Palange & Kalhoun [2022] FedCFamC2F 149 - Judge B Smith

Background	Outcome	Power
Discrete issue Initiating Application in which the order seeking vaccination of the child was the only order sought	Vaccination allowed	<u>Court's power to make parenting order</u> Relied upon the Full Court decision of <i>Covington & Covington</i> [2021] FamCAFC 52, where at [42] the Full Court stated "The Family Court of Australia has the jurisdiction to make an order providing for a child to be vaccinated". The Full Court goes on to explain at [43] at the jurisdiction is not dependent on whether or not the parties consent, as the Court has the power to "make such parenting order as it thinks proper".

12

Rusena & Rusena [2022] FedCFamC2F 472 - Judge Beckhouse

Background	Outcome	Power
Final orders made by consent in 2019. Application to reopen proceedings filed, with order seeking injunction against vaccination being the only order sought	Vaccination allowed (Orders currently stayed pending appeal)	<u>Court's power to make parenting order/parental responsibility</u> Relied upon decision of <i>Cranston & Persson (No 2)</i> [2022] FedCFamC1F 187. SPR allocated to respondent father on issue of vaccination against COVID-19.

13

Kafler & Magnan [2022] FedCFamC2F 198 - Judge Howe

Background	Outcome	Power
Both parties self-represented. Vaccination application seeking vaccination of child filed in ongoing parenting proceedings	Vaccination allowed	<u>Court's power to make parenting order/parental responsibility</u> Judicial notice of advice given by Victoria Government and Victoria Health. Consideration of s 60CC. SPR to the applicant mother on issue of vaccination against COVID-19.

14

Karcher & Lacoss [2022] FedCFamC2F 281 - Judge O'Shannessy

Background	Outcome	Power
Vaccination application seeking vaccination of the child filed in ongoing parenting proceedings	Vaccination allowed	<u>Parental responsibility</u> Judicial notice taken of health advice. Applicant father produced GP recommendation that child be vaccinated against COVID-19. SPR to father on the issue of vaccination against COVID-19 and other vaccinations.

15

LGAO

Lamos & Radin (No 2) [2022] FedCFamC2F 167 - Judge Hughes

Background	Outcome	Power
Self-represented respondent. Vaccination application seeking vaccination of child filed in protracted parenting proceedings and heard shortly after final parenting orders made	Vaccination allowed on condition that the 16 year old child consents	<u>Court's power to make parenting order</u> Held that it was best interests of the child that he be vaccinated, but noting his age (16), his views are important. No order changing ESPR, but order made authorising the father to arrange for vaccination of child on the condition that the child himself consents. Did not determine issue of vaccination in relation to a second child, as the father already had SPR for that child.

16

LGPAO Psychological issue regarding "child consent" in protracted proceedings

Lyn Greenberg, Ph.D., ABPP, 2022-07-06T03:25:35.823

Garza & Hammill [2022] FedCFamC2F 485 - Judge Beckhouse

Background	Outcome	Power
Final orders made by consent in 2019. Self-represented applicant filed application to reopen proceedings, with the only substantive order sought being a restraint against vaccination	Court dismissed <i>Rice & Asplund</i> application	No vaccination order made. The present application was a <i>Rice & Asplund</i> application made by the father seeking that he have SPR in relation to issue of COVID-19 vaccination. Child had already received two doses of a COVID-19 vaccine and the dispute was surrounding the booster shot. Changes in circumstance not enough to warrant rehearing of discrete issue. Cited <i>Lamos & Radin (No 2)</i> , where Judge Hughes declined to decide issue of vaccination for a child where SPR order had already been made.

17

A & B [2022] FedCFamC2F 364 - Judge Spelleken

Background	Outcome	Power
Both parties self-represented. Vaccination application seeking vaccination of children filed in ongoing parenting proceedings	Vaccination allowed	<u>Court's power to make parenting order</u> Order allowing vaccination made after consideration of Court's power to make interim parenting orders, and consideration of s 60CC.

18

B & C [2022] FedCFamC2F 698 - Judge Eldershaw

Background	Outcome	Power
Vaccination application seeking vaccination of child sought as part of Initiating Application in broader parenting proceedings	Vaccination allowed	<u>Court's power to make parenting order/parental responsibility</u> Undefended hearing. Reliance on Full Court decision of <i>Covington & Covington</i> . Expert evidence considered, discussion of best interests (including child's wish to be vaccinated), judicial notice of health advice. SPR to applicant mother on issue of vaccination against COVID-19.

19

D & E [2022] FedCFamC2F 747 - Judge Kirton

Background	Outcome	Power
Final orders made by consent in 2021. Application to reopen proceedings filed solely seeking an order that the children be vaccinated	Vaccination allowed	<u>Parental responsibility/welfare powers</u> SPR allocated under s 61D to the applicant father in respect of the specific issue of vaccination the children against COVID-19 following consideration of the need to protect the rights of children and to promote their welfare (s 43). Court refused mother's application for a stay pending determination of Federal Court proceedings between Australian Vaccination Risks Network Inc and the Secretary, Department of Health.

20

F & G [2022] FedCFamC2F 600 - Judge Spelleken

Background	Outcome	Power
Vaccination application seeking vaccination of children filed in ongoing parenting proceedings	Mother to consult with GP and obtain recommendation	<u>No firm vaccination order made</u> No medical evidence before the Court, considered that it would "likely" be in child's best interests, in light of the recommendations of ATAGI. Order made for mother to consult with GP and to obtain recommendations. Once recommendations obtained, applicant mother to file affidavit and notify chambers. Court to issue order from chambers thereafter allowing mother to vaccinate children.

21

H & I [2022] FedCFamC2F 507 - Judge Symons

Background	Outcome	Power
Both parties self-represented. Vaccination application seeking to vaccinate children filed in protracted parenting proceedings	Vaccination allowed	<u>Court's power to make parenting order/parental responsibility</u> Relied upon Full Court decision of <i>Covington</i> restating position that Court can make order for child to be vaccinated. SPR to applicant father on issue of vaccination against COVID-19.

22

Dacombe & Paddison [2021] FedCFamC1A 103 - Austin J (Appeal)

Background	Outcome	Power
Both parties self-represented. Orders for vaccination against COVID-19 made by consent before a Division 2 judge	Appeal against order authorising vaccination summarily dismissed	<u>Appeal dismissed on basis that orders were made by consent</u> Discussion of s 51(xxiiiA) Constitution which gives power to Parliament to make laws with respect to "medical and dental services (but not so as to authorise any form of civil conscription)". S 51(xxiiiA) considered not applicable to legislative power to make orders for vaccination of children (<i>Covington v Covington & Anor</i> , 12 April 2021 per Steward J)

23

Clay & Dallas [2022] FCWA 18 - Sutherland CJ (Family Court of WA)

Outcome	Power
Vaccination allowed	<u>Court's power to make parenting order</u> Reliance on s 89 of the <i>Family Court Act 1997</i> (WA) (equivalent of s 65D FLA) and the Full Court decision of <i>Covington</i> . Judicial notice taken of the significant increase in COVID-19 case numbers, hospitalisations, ICU admissions and deaths reported by other state governments in Aus since the opening of their borders. Judicial notice taken of WA government announcement to reopen borders and introduce public health measures including mandatory vaccination for certain industries, and imposing restrictions on unvaccinated individuals. 15 year old child's wish to be vaccinated taken into account.

24

What do these cases tell us about:

- ▶ Trends in outcomes
- ▶ Nature of the conflict
- ▶ Patterns of conflict
- ▶ Rationale for decisions
- ▶ What works well
- ▶ Implications for practice
- ▶ Need for reform?
- ▶ Anything else?

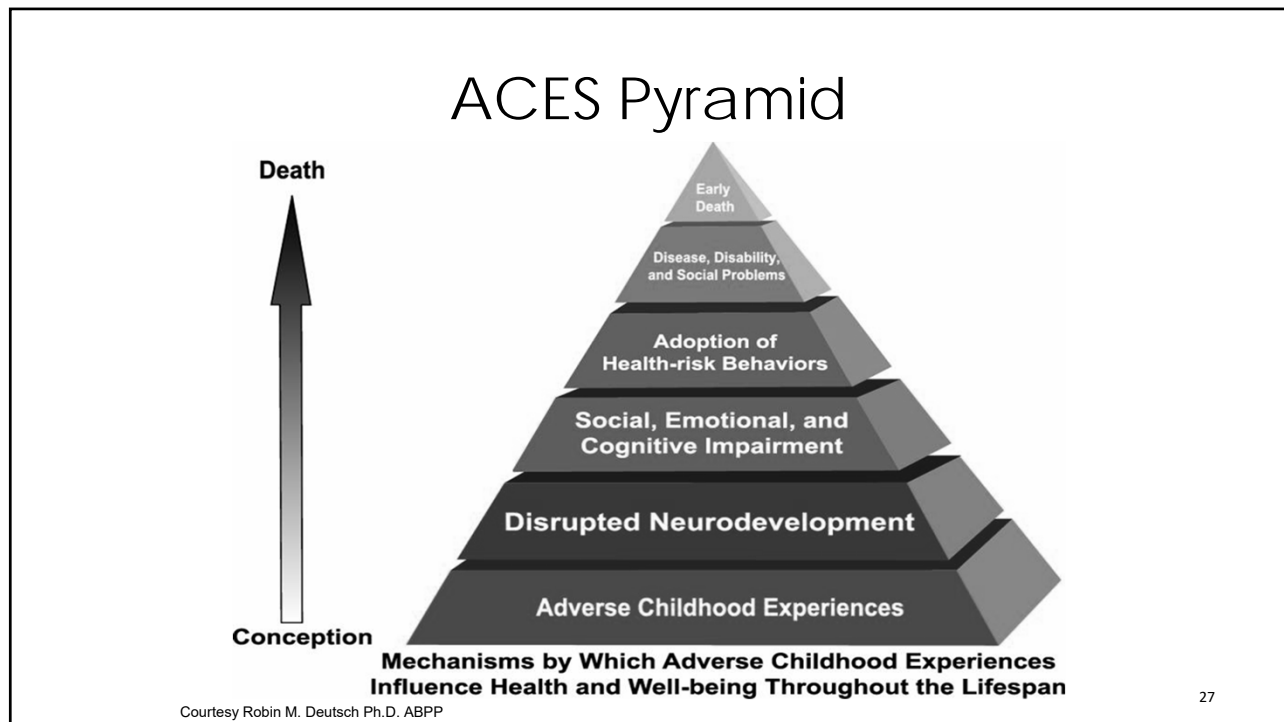
25

Possible underlying drivers of medical disputes relating to children

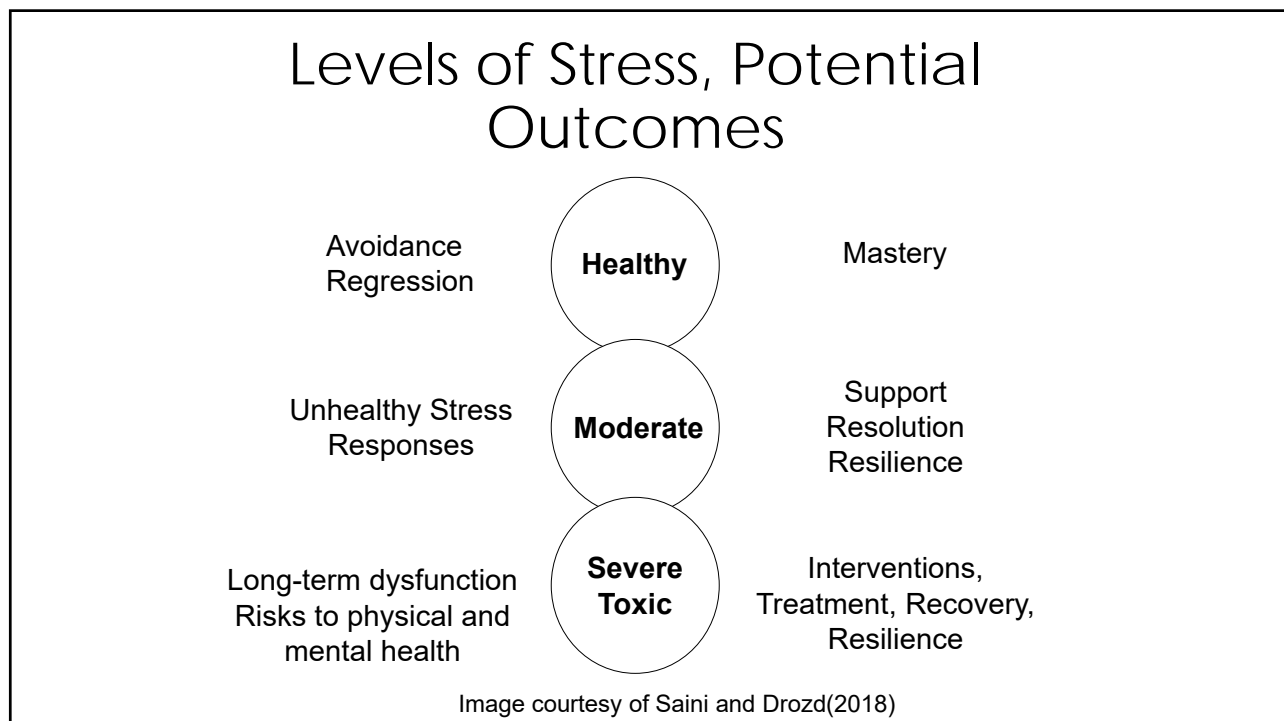
- Clashing values
- Continuation of existing unhealthy behavioural patterns e.g. control
- Case-specific concerns
- Live for the conflict
- Other - Specific issues related to the medical concern and “child consent”

26

26



27



28

Conflict is a Frequent Component

- Observed
- Experienced
- Internalized
- Frequently Unresolved
- Interactions with the Legal System

29

29

Implications

- Child continues to suffer from untreated or poorly managed condition
- Child learns to rely on condition or physical complaints to avoid normal stress
- Blame focus rather than resolving problems
- Professionals skip basic steps
- *Severe, longlasting effects on children*

30

30

Conflicts about medical and educational needs may arise from:

- Pre-existing condition that:
 - Worsened after the parents' separation
 - Contributed to the parents' separation
 - Is overwhelming one or both parents
 - Is being weaponized
- Newly diagnosed or recognized condition interacting with underlying conflict

31

31

More causes of conflict

- Poor coping skills in one or both parents
- Child presenting differently in the two households
- Blame and defensiveness
- Poor coordination among providers

32

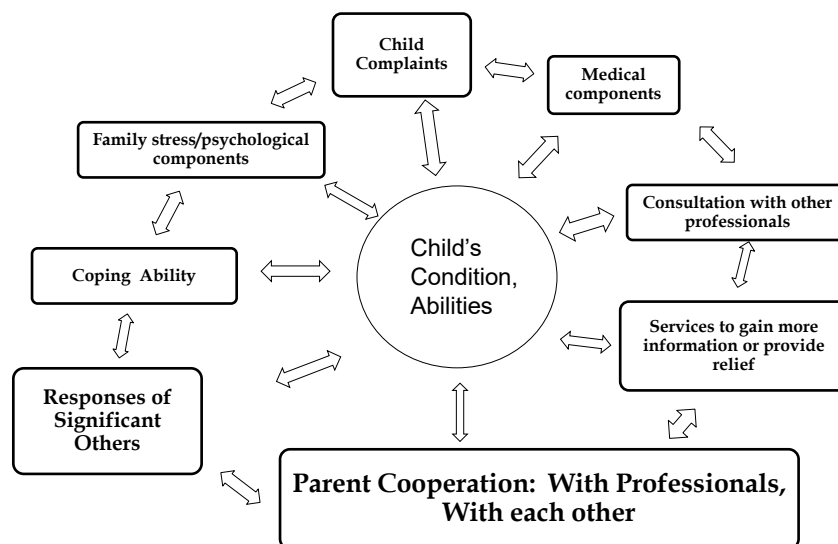
32

Key Questions to Ask

- If this case wasn't in court, what would the next step be?
- How much detail do I have/need?
- Who do I need to talk to?
- What do I need to know about other professionals' involvement?

33

33



34

34

Case Example

■ Karen and Brett married in 2013 and have 2 children, a boy Trent now aged 6 and a girl Bindi now aged 4. The parental relationship rapidly deteriorated after the birth of Trent. There were frequent arguments, sometimes in front of the children. Each party raised their voices at the other, used derogatory names and swore at each other. Household items were thrown around the house during the worst of the arguments, but never at or in the direction of each other. Each has admitted to the other that they are stubborn and can get hot-headed very quickly.

35

35

Case example cont.

The parents separated in 2018. Karen left the children with Brett in the family home. They both quickly turned to lawyers for advice. Karen moved interstate leaving the children in Brett's care for 3 months, but then returned and spent regular time with the children. They negotiated consent orders in 2019 which provided: equal shared parental responsibility; The children live with Brett and spend time with Karen 6/14 nights.

36

36

Case Example cont.

In December 2021 Brett told Karen he proposed to have the children vaccinated against Covid-19 as soon as that became possible, which he expected would be 10 January 2022. Karen had her lawyers write to him on 29 December 2021 asking for his undertaking that he would not do this without her express written consent. When he did not respond within 7 days she commenced proceedings in the FCFCOA seeking an injunction restraining the vaccination. The father sought an order for sole parental responsibility in relation to the Covid-19 vaccinations.

37

37

Case Example cont.

Mother has produced an affidavit from an lecturer who is sceptical of the value of vaccination. She also states that Bindi had a bad reaction to a previous childhood vaccination and is thus especially vulnerable. Father produces an affidavit from the children's physician stating that vaccination is necessary to protect them from Covid-19 and is also best for their safety. The physician states that while Bindi was reported by Mother to have had some distress following a DPT vaccination, the reported symptoms were not highly abnormal or cause for concern about how Bindi would respond to a Covid-19 vaccination. Father also produces evidence that Bindi will be excluded from her preschool and Brett from after-school athletics if they are unvaccinated.

38

38

Case example cont.

Assume both parents genuinely believe there are risks to the children if they are/are not vaccinated.

The children's views have not been sought. They are aware of the parental conflict but not about the specific issues relating to vaccination. They have an awareness about Covid-19 which is consistent with that of Australian children their age.

39

39

Key points to remember..

40

40

Bypassing the pediatrician is usually a mistake

- Medically standard protocol
- Continuing influence
- Proper procedure for accurate diagnosis
- Solution focused
- Valuable data
- They have information we don't

41

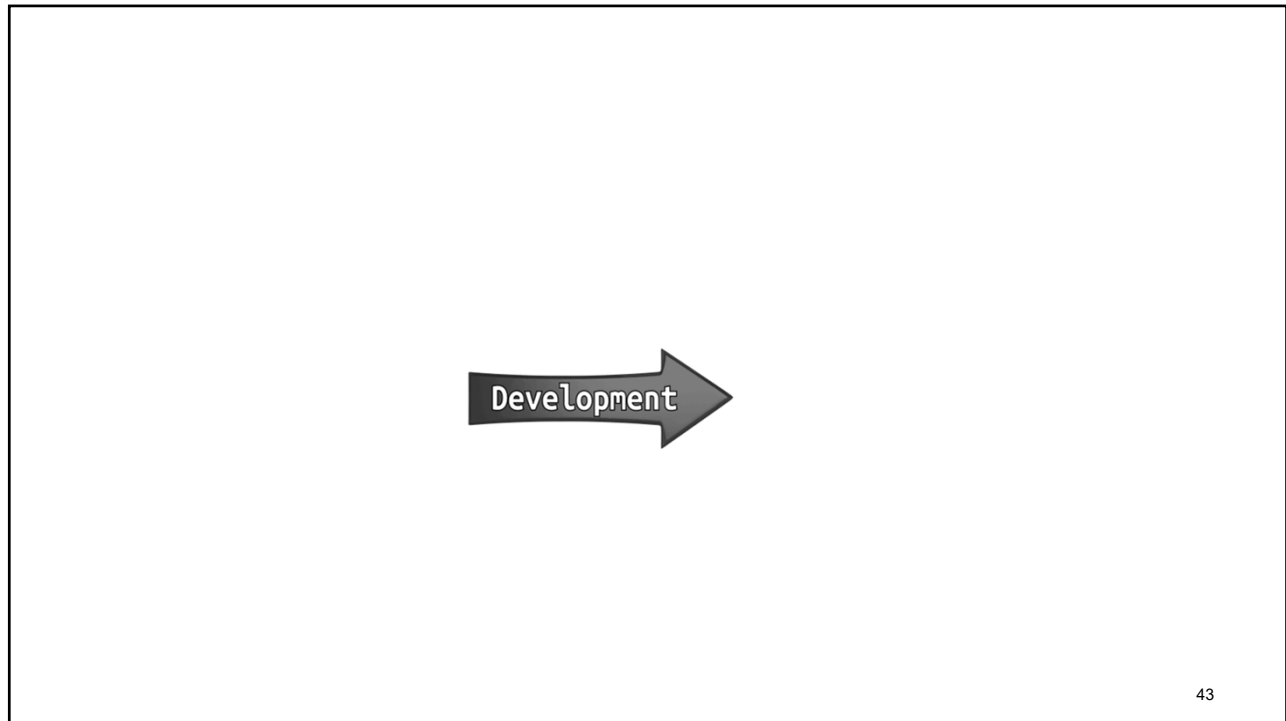
41

If you're doing this, you're missing something



42

42



43

The child's "job" is to ...

- *Grow up healthy*
- *Mastering developmental tasks along the way*
- *Learn to have successful relationships with others*
- *Learn to solve problems constructively*
- *Manage stress*
- *Learn emotional control...*

44

44

The parent's "job" is..

- To provide the tools and environment that helps the child reach those goals
- Engage with surrounding systems
- Get necessary help and support
- Support autonomy and development

45

45

Watch What Happens When...

- Someone suggests a solution
- The parents are asked to do something different
- The child is asked to do something different
- Another professional (pediatrician, teacher, etc.) requests cooperation

46

46

Interdisciplinary cooperation is key..

- The information generated can be extremely powerful
- We each know something that others don't
- Professionals who made initial mistakes can often become valuable team members
- Teaching tool..

47

47

Role of the Court?

- Be available; timeliness; fast-track
- Partnership with parents, lawyers, ICLs, medical and mental health professionals, evaluators, therapists
- Docket system enhances accountability
- Journey with the parents and children

48

48

Role of the Court?

- Be available; timeliness; fast-track
- Partnership with parents, lawyers, ICLs, medical and mental health professionals, evaluators, therapists
- Docket system enhances accountability
- Journey with the parents and children

49

49

Role of the Court?

- Set expectations as to compliance and accountability
- Explain consequences of non-compliance
- Offer hope, encouragement, normalise, chastise, educate
- Other? What would you like court to do?

50

50

Role of Lawyers?

- Focus on child (duty to the court)
- Set realistic client expectations
- Communicate
- Participate
- Draft orders and agreements

51

51

Drafting principles in these cases

- Anticipation & prevention of foreseeable problems
- Planning for the unforeseen: a safety net?
- Maintain child-focus
- Be realistic in terms of desired outcomes

52

52

Drafting principles in these cases

- Highly prescriptive, not descriptive, orders (fine brush, not broad)
- Expect compliance and accountability
- Build-in incentives/disincentives/escalator provisions?
- Collaborative approach to drafting?
- Other?

53

53



54

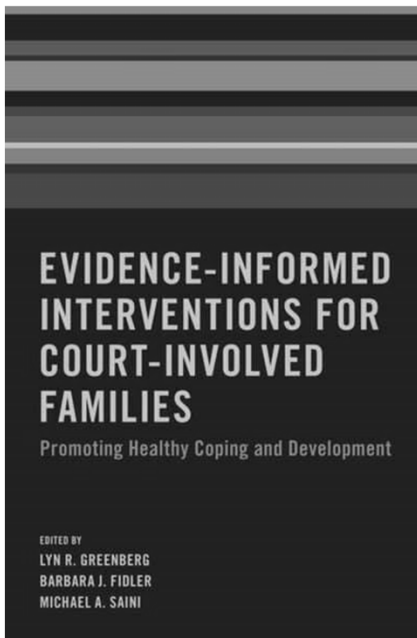
54

The Good News..

- Effective intervention is possible
- When services are provided soon enough, child's condition may improve significantly

55

55



56

56

Presenter Contact Information

Lyn R. Greenberg, Ph.D., ABPP
Board Certified, Couple and Family Psychology
10801 National Blvd., Ste. 220, Los Angeles, CA 90064
lyn@lyngreenbergphd.com
<http://www.lyngreenbergphd.com/>

Hon. Tom Altobelli
Federal Court of Australia
Associate.JusticeAltobelli@fcfcoa.gov.au

57