

ASSESSING THE ROLE OF FAMILY CONSULTANTS WHEN PROVIDING EVIDENCE IN PARENTING DISPUTES

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One role of family consultants is to provide expert evidence to the court on what is in a child's best interests when making parenting orders. Yet deciding a child's best interests is a complex and value-laden determination, on which legislation provides considerable guidance. Rational Choice Theory may be used to disaggregate the best interests question into four stages: outlining the options of the court, determining possible outcomes for a child within these options, determining the likelihood these outcomes will occur and placing value on these outcomes. The last stage in this process involves a subjective value judgement as to what is 'best' for a child, which family consultants have no expertise in addressing.

The author argues that family consultants should cease the practice of making recommendations to the court on what orders are in a child's best interests, as such recommendations exceed the boundaries of their knowledge base, misrepresent their knowledge base, engender a likely conflict with the legislation and lead to the possibility of institutionalising expert biases within the court system. Despite this, a considerable amount of evidence should continue to be provided by family consultants. Guidelines are suggested to help ensure the quality of this evidence.

I INTRODUCTION

The appropriate role of experts who provide evidence when courts make parenting orders is a matter of significant controversy.¹ Indeed, it has been claimed that 'there is probably no forensic question on which overreaching by mental health professionals has been so

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¹ Timothy M. Tippins, and Jeffrey P. Wittman, 'Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance' (2005) 43 *Family Court Review* 193; Gary B. Melton et al, *Psychological Evaluations for the Courts* (Guildford Press, London, 1987) 331; Daniel Krauss and Bruce Sales, 'Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases' (2000) 6 *Psychology, Public Policy, and Law* 843, 866; Jonathan W. Gould and David A. Martindale, 'A Second Call for Clinical Humility and Judicial Vigilance: Comments on Tippins and Wittman' (2005) 43 *Family Court Review* 253, 253.

common and so egregious.² Notwithstanding this, the ‘family consultant’ has numerous roles in child-related proceedings under the *Family Law Act*, including the provision of advice to the court on ‘such matters relevant to the proceedings as the court thinks desirable.’³ These court appointees claim expertise in the social and behavioural sciences.⁴ Courts frequently take into account the evidence of family consultants, on a wide range of matters, including in the form of recommendations on what is in the best interests of the child and what orders should be made.⁵

This article will limit its scope to discussion of the use of family consultants when making ‘parenting orders’, which are orders of the court,⁶ as opposed to ‘parenting plans’, which are written agreements developed by parties in child-related disputes.⁷ The vast majority of the rules of evidence do not apply in such situations, unless ‘circumstances are exceptional’ and the court has considered certain matters.⁸ In light of this discretion and claims that they provide ‘neutral, conceptual and evidence-based commentary’ on child-related disputes,⁹ efforts should be made to ensure this evidence is appropriate in both substance and form.

Part 1 of the article outlines the knowledge required to make a determination of what is in the best interests of a child, which is the paramount consideration when making parenting orders.¹⁰ Rational Choice Theory provides a useful framework to achieve that objective.¹¹ This theory disaggregates the determination of what is in the best interests of the child into four stages. It is argued that the first stage, discovering the options available to the court,¹² requires knowledge of the facts of the case, including the intentions of parties. The second and third stages, determining possible outcomes for a child and the likelihood they will occur,¹³ require knowledge of the facts of the case and good predictive abilities.

² Melton et al, above n 1, 330.

³ *Family Law Act 1975* (Cth) (FLA) s 62G(2).

⁴ Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Family Court of Australia, 2007) 51.

⁵ Donald M. Thomson and Susan E. Molloy, ‘Assessing the Best Interests of the Child’ (2001) 18 *The Australian Educational and Developmental Psychologist* 5, 12; *Fournier & Noelle* [2007] FamCA 875 (23 August 2007) [91]; *Peters & March* [2010] FamCA 151 (16 February 2010) [64]; *Tomas and Anor & Murray* [2011] FamCA 641 (17 August 2011) [78]-[96].

⁶ FLA ss 64B, 65D.

⁷ FLA s 63C. Many of the observations made in this thesis will also be relevant to other experts’ evidence. However, considering the difficulties of enforcing some of these recommendations upon other experts, without changing the rules of evidence, and some additional problems of bias with party-supplied experts, this paper focuses purely on family consultants.

⁸ FLA s 69ZT. The court must take into account ‘the importance of the evidence in proceedings’, ‘the nature of the subject matter of the proceedings’, ‘the probative value of the evidence’, and ‘the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to evidence’: FLA s 69ZT(3).

⁹ A Family Court publication describes family consultants’ evidence in this fashion: Harrison, above n 4, 51.

¹⁰ FLA s 60CA.

¹¹ Robert H. Mnookin, ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 225, 256-7; Jon Elster, ‘Solomonic Judgements: Against the Best Interests of the Child’ in Jon Elster (ed), *Solomonic Judgements: Studies in the Limitations of Rationality* (Cambridge University Press, 1982) 123, 134.

¹² Elster, above n 11, 134.

¹³ *Ibid.*

Meanwhile, the fourth stage, placing ‘value’ on these predicted outcomes,¹⁴ involves a subjective value judgment as to what is ‘best’. It is argued that any attempts to circumvent the complex and subjective questions that this fourth stage raises are bound to be unsuccessful.

Part 2 examines whether family consultants have abilities to assist the court in each stage of Rational Choice Theory. Family consultants have the ability to elicit information from people, perform fact-finding tasks, explain research data to the court, perform evaluations of people, relationships and environments, and make certain predictions, all of which may be useful in the first three stages of Rational Choice Theory. However, when family consultants provide an opinion in the fourth stage of Rational Choice Theory, that is, when they place value on predicted outcomes, or state what outcomes are ‘best’ for a child, they add nothing but another subjective opinion to the court.

In conclusion, Part 3 provides guidelines to improve, partly through refinement, the evidence that family consultants provide. These guidelines seek to ensure that the evidence of family consultants is as ‘neutral, conceptual and evidence-based’¹⁵ as possible, pays due regard to the legislation and reduces judicial confusion surrounding it. Most significantly, it is argued that family consultants should cease to give recommendations to the court on what orders should be made. Such recommendations require them to address the fourth stage of Rational Choice Theory, by placing value on outcomes. As a subjective value judgment, this falls beyond their expertise. Furthermore, the *Family Law Act* itself provides complex and controversial guidance on how to make these value judgments, which means these recommendations, if motivated by family consultants’ values, may conflict with legislative directions. They also risk institutionalising the value biases of these ‘experts’ within the court system. Guidelines are proposed to confine family consultants’ evidence to fact-finding, explaining research data, performing ‘evaluations’ of people, relationships and environments, and making predictions. Guidelines are also provided to improve these forms of evidence.

II KNOWLEDGE NEEDED TO DETERMINE A CHILD’S BEST INTERESTS

A *Rational Choice Theory and the Child’s ‘Best Interests’*

Rational Choice Theory disaggregates the ‘best interests question’ into four stages. The theory is used in numerous fields of study, and describes a ‘rational’ decision-making process, utilised when people have the opportunity to weigh the costs and benefits of a decision.¹⁶ Using this theory, Robert H. Mnookin argued that, to make a rational decision on what is in the best interests of the child, one must (i) discover the various options for the child, (ii) specify the likely outcomes for each option, (iii) assess the probability of these outcomes occurring, and (iv) place a value on alternative outcomes.¹⁷

¹⁴ Ibid.

¹⁵ Harrison, above n 4, 51.

¹⁶ John Scott, ‘Rational Choice Theory’ in G. Browning, A. Alcli, and F. Webster (eds), *Understanding Contemporary Society: Theories of the Present* (Sage Publications, 2000) 126, 126.

¹⁷ Mnookin, above n 11, 256-7.

The structure of Rational Choice Theory is useful for our purposes. Whilst Mnookin used this theory to argue that the ‘best interests standard’ is so indeterminate that it should be abandoned, this standard remains dominant worldwide.¹⁸ This theory has been used by numerous authors since, to critically evaluate the best interests question.¹⁹ It is useful for our purposes because, by examining the types of knowledge required in each of the stages, it can then be assessed whether actors have the requisite abilities to provide this knowledge.

The first stage of Rational Choice Theory, discovering the court’s options, requires considerable knowledge of the facts, including knowledge of people’s intentions. Under the *Family Law Act*, by which judges have discretion to make complex ‘parenting orders’ which may address ‘any aspect of the care, welfare, or development of the child’,²⁰ the ‘options’ available for a court seem endless. Considerable knowledge of the facts of a case is required to ascertain what options are available to the court. For instance, people’s work habits and people’s willingness to move locations will limit the orders available to the court. Knowledge of what parties are *actually* willing to do is critical at this stage. There are times when it is in a party’s interests to mislead the court into thinking they are *not* willing to do something.²¹ For example, in *MRR v GR* a mother initially misled the court by saying she was not willing to move locations to be with a child, in the hope that the court would not then order that she must move with the child to be near the father.²² Discovery of her intentions was important, as it opened up another ‘option’ to the court, being an order that the mother move with the child, to be near the father. In this way, knowledge of the facts, including the actual intentions of parties, is necessary to discover the options available to the court.

The next two stages of Rational Choice Theory, outlining possible outcomes and deciding the probability that those outcomes will occur, requires, firstly, considerable knowledge about the facts of the case, upon which to base predictions. One of the acknowledged problems of Rational Choice Theory is that it requires ‘considerable knowledge’ to make predictions of what will happen to a child.²³ Courts may make countless predictions about what will occur if particular orders are made, including when a child will achieve ‘developmental tasks’,²⁴ if a household is likely to provide a ‘set routine’,²⁵ and the likely effects of religious practices,²⁶ to name a few. Information that a court may require upon which to base such predictions includes knowledge that a person has a certain personality trait (e.g. narcissistic),²⁷ that a relationship falls into a certain category (e.g. according to Bowlby’s attachment styles),²⁸ or that an environment has certain characteristics (e.g.

¹⁸ Mnookin, above n 11, 230.

¹⁹ Elster, above n 11, 134; Thomson and Molloy, above n 5, 12.

²⁰ FLA s 64B(2)(i).

²¹ Patrick Parkinson, Judy Cashmore and Judi Single, ‘The Need for Reality Testing in Relocation Cases’ (2010) 44 *Family Law Quarterly* 1, 16-18.

²² *MRR v GR* (2010) 42 FamLR 531, 531.

²³ Mnookin, above n 11, 257.

²⁴ *Parker & Brown* [2010] FMCAfam 911 (23 March 2010) [78].

²⁵ *Ibid* [77].

²⁶ *Peter v Elspeth* [2009] FamCA 551 (25 June 2009) [16]; *Mendez v Mendez*, 527 So. 2d 820, 840 (Fla. Dist. Ct. App. 1987); Carolyn Wah, ‘Mental Health and Minority Religions: The Latest Weapon in Custody Battles’ 17 *International Journal of Law and Psychiatry* 331, 335.

²⁷ *Peters & March* [2010] FamCA 151 (16 February 2010) [134].

²⁸ *Hazan & Elias* [2011] FamCA 376 (24 May 2011) [106]; Bowlby, J., ‘Attachment and Loss:

according to Bronfenbrenner's 'Ecological Systems Theory').²⁹ This kind of detailed knowledge of the facts of a case is needed to enable courts to predict what will occur to a child in particular circumstances.

Such predictions, secondly, require good predictive abilities. Even if the decision-maker has total knowledge of the facts of the case, they then need to exercise their 'predictive abilities' to decide what outcomes are likely in the circumstances.³⁰

The last stage of Rational Choice Theory requires answers to extremely difficult questions relating to the 'value' of outcomes. Mnookin described the difficulties that this stage introduces:

[D]eciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be concerned primarily with happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic "productivity" of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security more desirable than intellectual stimulation? These questions could be elaborated endlessly.³¹

As this quote makes clear, every time one states what is 'best' for a child, they are implicitly stating that one set of outcomes is more valuable to a child than another set of outcomes. Even if one had perfect predictive abilities, this would not by itself enable one to answer these extremely difficult and subjective questions, which this last stage of Rational Choice Theory poses.

B *Trying to 'Answer' or Circumvent this Last Stage*

Neither examination of the legislation, nor examination of society's values, provides a sufficient 'answer' to this last stage of Rational Choice Theory. By firstly examining society's values, it is clear that we live in a pluralist and secular society, where questions such as the importance of formal education, religion, self-esteem, self-discipline, autonomy, duty and other matters may provoke divisive opinions.³² Secondly, whilst there is considerable guidance on what is 'best' for a child in the *Family Law Act*,³³ it is hardly sufficient to address the list of questions that Mnookin provides, or other similar questions. Therefore, neither of these methods can solve the problems that this last stage of Rational Choice Theory presents.

Any philosophical attempt to circumvent the subjectivity of the questions involved in the last stage of Rational Choice Theory is also in vain. John Eekelaar promoted the idea of 'dynamic self-determinism' as a means of minimizing the problems this last stage

Retrospect and Prospect' (1982) 52 *American Journal of Orthopsychiatry* 664; Jude Cassidy and Philip R. Shaver (eds), *Handbook of Attachment: Theory Research and Clinical Applications* (The Guildford Press, 2nd ed, 2008).

²⁹ Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press, 1979) 17- 42.

³⁰ Mnookin, above n 11, 257.

³¹ Ibid 260.

³² David G. Myers, *Social Psychology* (McGraw Hill, 9th ed, 2008) 153-64.

³³ E.g. FLA s 60CC.

poses.³⁴ Using dynamic self-determinism, a child is exposed to a wide range of influences, and then forms its own 'goals', which are used to determine their parenting arrangements.³⁵ However, even Eekelaar admits that this concept is not able to exist without some 'imposition of a moral code'.³⁶ At times the values of parents and society must influence a child's parenting arrangements, as children's own 'goals' may not be in line with society's reasonable expectations.³⁷ Thus, Eekelaar does not provide a complete 'answer' to this final stage, as definitions of 'reasonable expectations' and 'morality' are still required. Another more significant problem for the use of dynamic self-determinism is that it has philosophical foundations that do not unite Australian society. The liberal theory that children are the right persons to decide their own 'goals' is unlikely to appeal to collectivist cultures, which are characterized by 'giving priority to the goals of one's groups'.³⁸ Indeed, any philosophical framework for deciding what is *best* for a child will have its own values, making it impossible to avoid the inherent subjective value judgments required when addressing the final stage of Rational Choice Theory.

III FAMILY CONSULTANTS' ABILITY TO IMPROVE COURTS' KNOWLEDGE

This Part determines what abilities family consultants have that enable them to provide the knowledge required by courts to determine a child's best interests. Family consultants claim expertise in the social and behavioural sciences, which rely heavily upon empirical research.³⁹ Psychology is currently defined as the 'scientific study of behaviour and mental processes'.⁴⁰ 'Social science' refers to 'those disciplines, or parts thereof, that purport to describe or explain social life'.⁴¹ Drawing on the framework set out in Part 1, the following types of evidence are examined, as means by which family consultants may attempt to assist the court: discovering options for the court, fact-finding, informing the court of relevant research, performing evaluations, making predictions and deciding how much value to attach to an order. As will be discussed in this Part, family consultants can validly contribute to each of these areas, with the exception of deciding how much value to attach to an order.

A *Discovering Options for the Court*

By eliciting information from people, family consultants have the ability to assist the court to determine what options are available to them. Timothy Tippins and Jeffrey Wittman argue that, by creating a clinical environment, mental health professionals, such as psychologists, may be the best people to 'maximise self-disclosure about issues that may be disputed'.⁴² By eliciting information from people, the facts, including people's

³⁴ John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Aston, *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994) 42, 47-8.

³⁵ Ibid 51.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Myers, above n 32, 41.

³⁹ Harrison, above n 4, 51; Myers, above n 32, 1-10.

⁴⁰ Ronald Roesch, Stephen D. Hart, and James R.P. Ogloff, *Psychology and Law: The State of the Discipline* (Plenum Publishers, 1999) 2.

⁴¹ Malcolm Williams, *Science and Social Science: An Introduction* (Routledge, 2000) 7.

⁴² Tippins and Wittman, above n 1, 195.

actual intentions, may become clearer, enabling the court to better assess its options.⁴³ Indeed, Dessau J explains that family consultants' reports (family reports) often mention the various alternative arrangements that are available to the court.⁴⁴

1 *Fact-Finding*

Communications by a family consultant about out-of-court experiences may be valuable, as a form of 'fact-finding', which assists the court to gather the knowledge required to make predictions. Again, the ability of experts to elicit information from parties has led some authors to emphasise this fact-finding role as one of the most useful functions of experts.⁴⁵ This ability is particularly useful when dealing with children, as courts have noted that children are often uncomfortable giving evidence in a courtroom environment, particularly if that evidence negatively portrays a parent.⁴⁶ Indeed, many family reports devote a large amount of space to simply communicating directly what relevant people said and did in their presence, such as people's expressed attitudes in interviews,⁴⁷ how happy children report they currently are,⁴⁸ any allegations people have made against other people,⁴⁹ parents' reported feelings towards other parents,⁵⁰ and the child's stated wishes⁵¹ amongst other things. Such information may be helpful to the court when they try to predict outcomes for a child.

This fact-finding ability of experts does not mean that experts are more able than the court to decide the truth of disputed facts. Studies suggest that it is doubtful whether any profession, let alone psychologists or social scientists, are experts in lie-detecting.⁵² They are certainly not usually trained in this role. Nor are they trained to determine the truth of events on available facts. Information they provide may, however, *inform* the court in deciding the truth of disputed facts. For example, in one case a family consultant elicited information from a child, but described how the child spoke in a 'rote' and 'rehearsed' manner, which assisted the court in considering the truth of the child's statements.⁵³ Hence, whilst family consultants may inform the court's judgment on the truth of disputed facts, there is no reason to believe their abilities enable them to provide a better opinion of the truth of disputed facts than the court can make itself.

⁴³ Parkinson, Cashmore and Single, above n 21, 16-18.

⁴⁴ Linda Dessau, 'A Short Commentary on Timothy M. Tippins and Jeffrey P. Wittman's "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance"' (2005) 43 *Family Court Review* 266, 267.

⁴⁵ Melton et al, above n 1, 331.

⁴⁶ Tippins and Wittman, above n 1, 196.

⁴⁷ *Marriage of Borzak* (1979) 5 Fam LR 571, 575.

⁴⁸ *Claringbold & James* [2011] FamCA 211 (18 February 2011) [54].

⁴⁹ *Ibid* [49].

⁵⁰ *Vinkov & Mertiglio (No 2)* [2010] FamCA 916 (12 October 2010) [82]-[87].

⁵¹ *Peters & March* [2010] FamCA 151 (16 February 2010) [120].

⁵² *SS & AH* [2010] FamCAFC 13 (5 February 2010) [85].

⁵³ Samantha Mann, Alvert Vrij and Ray Bull, 'Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies' (2004) 89 *Journal of Applied Psychology* 137, 137-139.

⁵⁴ *Vinkov v Mertiglio (No. 2)* [2010] FamCA 916 (12 October 2010) [124], [156]-[159].

2 Informing the Court of Research Findings

Family consultants may assist the court to predict outcomes for a child by informing the court of research findings. There is a growing amount of research on the efficacy of different types of post-divorce parenting arrangements.⁵⁴ For example, a considerable amount of research suggests that ‘children of parents who exhibit an extreme degree of hostility post-divorce and during the divorce process do not usually benefit from continued contact between their parents post-divorce.’⁵⁵ Of course, the family consultant would need to explain what is meant by ‘benefit’, which in this case involves measures concerning the child’s ‘emotional distress, shown in anxiety, sadness, clinginess, psychosomatic and anti-social symptoms’.⁵⁶ Such research findings may persuade a court that an order for shared parenting is likely to result in a child suffering some of these effects in a case where there is considerable animosity between parents.

3 Evaluations

Expert evaluations of people, relationships and environments are another way family consultants may provide useful knowledge to the court, because they help provide information upon which to base predictions. Melton et al emphasised this role for experts in determining a child’s best interests.⁵⁷ Evaluations may assess:

... psychopathology, basic and discrete parenting skills and skills-deficits, intellectual/cognitive functioning, developmental status, developmental variables ... child temperament variables, substance abuse tendencies, attachment constructs (e.g. “primary psychological parent”), interpersonal style, criminality, domestic violence tendencies ... available social support, impulse control and family level constructs.⁵⁸

Such evaluations of people, relationships and environments would ideally be made against pre-determined and objective criteria. A vast amount of research is performed annually on such constructs, and psychologists and social scientists are trained to evaluate people accordingly.⁵⁹ These are likely to influence courts’ predictions. The court may, for instance, predict that a child is more likely to be exposed to violence, if they live with a person with domestic violence tendencies, or that a child is likely to excel academically, if the parent is intelligent and has a ‘child-focused’ parenting style. Therefore, these evaluations may assist courts when they make predictions about a child.

⁵⁴ Parkinson, Cashmore, and Single, above n 21; Joan Kelly and Robert Emery, ‘Children’s Adjustment Following Divorce: Risk and Resilience Perspectives’ (2003) 52 *Family Relations* 352; Jennifer McIntosh and Richard Chisholm, ‘Shared Care and Children’s Best Interests in Conflicted Separation: A Cautionary Tale from Current Research’ (2008) 20 *Australian Family Lawyer* 3.

⁵⁵ Krauss and Sales, above n 1, 872. Also see McIntosh and Chisholm, above n 54.

⁵⁶ McIntosh and Chisholm, above n 54, 5.

⁵⁷ Melton, above n 1, 330 - 331.

⁵⁸ Tippins and Wittman, above n 1, 196.

⁵⁹ For example, see *The Journal of Consulting and Clinical Psychology*. One of this journal’s goals is ‘the development, validity, and use of techniques of diagnosis and treatment of disordered behaviour’: Arthur M. Nezu, *Journal of Consulting and Clinical Psychology – Description* (30 June 2011) American Psychological Association <<http://www.apa.org/pubs/journals/ccp/index.aspx>> at 12 July 2012.

4 Actually Making Predictions

There is good reason to doubt the ability of family consultants to add to the court's knowledge by predicting outcomes themselves. Krauss and Sales argue that '[i]t is well-noted that psychologists as a group are particularly inaccurate in making future behavioural predictions and may even be more inaccurate than lay persons are'.⁶⁰ This is supported, for example, by the fact that 'clinical predictions of an individual's future dangerousness have been demonstrated to be inaccurate 67% of the time'.⁶¹ Additionally, the significant variation between different psychological and social scientific theories and opinions on the effects of different variables on child-related outcomes evidences a lack of certainty in this field.⁶² Courts should therefore be cautious in assuming that family consultants' predictions add to the court's knowledge, as it is doubtful that they are any better than those of courts themselves.

Nonetheless, if family consultants sufficiently justify their predictions, by drawing upon their expertise, these may provide useful knowledge to the court. For example, studies on John Bowlby's 'attachment styles' of parents with their children have repeatedly shown that these attachment styles are strong predictors of children's later attachment styles with friends and future partners.⁶³ Therefore a family consultant may within their expertise suggest it is likely that a child will develop a certain attachment style as he or she grows up if the child is placed with a parent with this attachment style. Such an empirically and rationally justified prediction may properly influence a court's opinion on what outcomes are likely to occur under certain arrangements.

5 Placing Value on Outcomes

By fleshing out the ramifications of certain outcomes, the evidence of family consultants may 'inform' the court of what value to attach to them. For example, studies that suggest a better education for most children leads to lower incarceration rates, lower truancy rates, and higher self-efficacy⁶⁴ may convince courts to attach more weight to a child's education when determining what is in their best interests. Such research does not *make* a value judgment for a court, but may influence how much value they attach to an outcome.

A family consultant does not, however, add anything more than another subjective opinion, based on their own values, when they attempt to address Rational Choice

⁶⁰ Krauss and Sales, above n 1, 866.

⁶¹ Ibid.

⁶² Elster, above n 11, 138. Theories include psychoanalytic, cognitive, cognitive-behavioural, child-developmental or humanistic theories: Robert N. Solland, John P. Wilson, and Christopher F. Monte, *Beneath the Mask: An Introduction to Theories of Personality* (John Wiley & Sons Inc., 8th ed, 2008) 7-9. To demonstrate the diversity of opinion in this area, consider the argument by Judith Harris that parents have *no lasting effect on child outcomes*: J.W. Harris, 'Socialisation, Personality Development, and the Child's Environments: Comment on Vandell' (2000) 36 *Development Psychology* 711, 711.

⁶³ Bowlby, above n 28; Cassidy and Shaver, above n 28.

⁶⁴ Melissa K. Hunt, Derek R. Hopko, 'Predicting High School Truancy Among Students in the Appalachian South' (2009) 30 *Journal of Primary Prevention* 549, 549; Laurie Francis, Barry Weiss, Janet Senf, Kim Heist and Rie Hargraves, 'Does Literacy Education Improve Symptoms of Depression and Self-Efficacy in Individuals with Low Literacy and Depressive Symptoms? A Preliminary Investigation' (2007) 20 *Journal of the American Board of Family Medicine* 23, 23.

Theory's fourth stage, which relates to placing value on outcomes. Neither the scientific knowledge of behaviour and mental processes (psychology)⁶⁵ nor an ability to describe or explain social life (social science)⁶⁶ qualifies someone to 'answer' the fourth stage in Rational Choice Theory. Tippins and Wittman recognise this when they argue that the best interests standard is a 'legal and a socio-moral construct'.⁶⁷ Indeed, no empirical knowledge can determine an objectively 'right' answer to this stage, since it concerns subjective opinions of individuals. In the case of *Painter v Bannister*, the Iowa Supreme Court had to decide between placing a child in a household it predicted would provide 'a stable, dependable, conventional, middle-class, middle western background and opportunity for college education',⁶⁸ or a household with a 'bohemian' father, who was 'very much influenced by Zen Buddhism', and which the court predicted would allow 'freedom of conduct and thought with an opportunity to develop his individual talents'.⁶⁹ The court recognised the differences in these households derived from different 'philosophies of life'.⁷⁰ Family consultants possess no special training or expertise that would enable them to value one 'philosophy of life' over another. If a family consultant were to provide an opinion on what value should be attached to particular outcomes, they would simply be providing their own subjective opinion on what is best for a child.

IV CEASING TO MAKE RECOMMENDATIONS AND IMPROVING OTHER EVIDENCE

A *Ceasing to Make Recommendations*

It is argued that family consultants should cease to provide recommendations regarding what orders should be made or what arrangement will be 'best' for a child. This article assumes that the legislation requires parenting orders to be based solely upon a child's best interest. But if, in fact, the legislation requires some 'weighing' of interests, then this gives further reason to stop these recommendations because family consultants have no particular expertise in such 'weighing' of interests. Recommendations go beyond the expertise of family consultants, implicitly misrepresent their knowledge base, are likely to clash with legislative directions and risk institutionalising family consultants' value biases within the court system. The purported advantages of providing such recommendations, in spite of family consultants' lack of expertise,⁷¹ are not significant within the Australian context.

1 *The Significance of the Best Interests of the Child*

Whilst there is controversy about whether the best interests of the child are the *only* consideration when determining a parenting order, it is unnecessary to answer this question for the purposes of this article. Numerous commentators have noted the tendency of Australian courts to treat the best interests of the child as the only

⁶⁵ Roesch, Hart and Ogloff, above n 40, 2.

⁶⁶ Williams, above n 41, 7.

⁶⁷ Tippins and Wittman, above n 1, 215.

⁶⁸ *Painter v Bannister*, 140 N.W. 2d 152, 170 (Iowa Sup. Ct., 1966).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Nicholas Bala, 'Tippins and Wittman Asked the Wrong Question: Evaluators May Not be "Experts", but They Can Express Best Interests Opinions' (2005) 43 *Family Court Review* 554, 557.

consideration, and one that ‘overrides all other relevant considerations or interests.’⁷² References to others’ interests, on this interpretation, are only relevant to the extent that they impact upon the child’s interests. There have been suggestions, however, that the High Court’s decision in *MRR v GR* involved a departure from this ‘strong’ conception of the best interests principle, at least in some circumstances.⁷³ If the legislation does, in fact, demand that the interests of a child must be ‘weighed’ against others’ interests, through some legal test, then family consultants would surely be incompetent to provide ‘recommendations’ to the court on what orders they should make, as their expertise is not in weighing these different interests through legal criteria. However, courts still, at least in the vast majority of cases, state that their decision has been determined by what is in a child’s best interests. Considering this practice, and that there are sufficient reasons to stop recommendations by family consultants even if courts do base their decisions solely upon a child’s best interests, this paper continues on the assumption that the best interests of the child determines parenting orders.

2 Family Consultants Exceed the Boundaries of their Knowledge Base

Providing recommendations necessarily involves addressing the fourth stage of Rational Choice Theory. In this respect, however, family consultants ‘exceed the boundaries of their knowledge base’ when they provide these recommendations to courts.⁷⁴ The inability to develop an objective ‘answer’, or to circumvent this stage, means that a subjective judgment is always being made when one decides what is ‘best’ for a child. As argued in Part 2, the fact that family consultants have no special knowledge in developing an answer to this stage of Rational Choice Theory means that their recommendations for what is ‘best’ for a child should be of no more use than any other subjective opinion.

(a) Misrepresenting their Knowledge Base

Highlighting the inappropriateness of these recommendations is the fact that family consultants ‘implicitly misrepresent the limits of [their] knowledge base’,⁷⁵ when they give such recommendations. Indeed, Carolyn Wah expressed concern that such ‘value-laden testimony’ is given credence only because it is made by an ‘expert’.⁷⁶ The implicit misrepresentation derives from the fact that these experts are providing such subjectively-based recommendations within their professional capacity. The fact that judges often note family consultants’ recommendations in their reasons is testament to the fact that they are treated as being more worthy than any other subjective opinion of what is best for a child.⁷⁷

⁷² Jonathan Crowe and Lisa Toohey, ‘From Good Intentions to Ethical Outcomes: The Paramountcy of Children’s Interests in the *Family Law Act*’ (2009) *Melbourne University Law Review* 391, 395; Richard Chisholm, ‘The Paramount Consideration’: Children’s Interests in Family Law’ (2002) 16 *Australian Journal of Family Law* 87, 121.

⁷³ Anthony Dickey Q.C., ‘Reflections on *MRR v GR*’ (2010) 84 *Australian Law Journal* 296, 296. However, Dickey goes on to argue that ‘practicalities’ have always undermined the principle that the ‘best interests of the child’ is the overriding consideration.

⁷⁴ Tippins and Wittman, above n 1, 214.

⁷⁵ Ibid.

⁷⁶ Wah, above n 26, 335.

⁷⁷ *Peters & March* [2010] FamCA 151 (16 February 2010) [134], [193]; *Fournier & Noelle* [2007] FamCA 875 (23 August 2007) [91]; *Tomas and Anor & Murray* [2011] FamCA 641 (17 August 2011) [78]-[96].

(b) *Conflicts with the Legislative Guidance*

Further adding to the inappropriateness of recommendations being made by family consultants is the fact that the values underlying their recommendations may conflict with legislative directions. The *Family Law Act* provides significant guidance on what is 'valuable' to a child. Section 60CC is entitled '[h]ow a court determines what is in a child's best interests', and lists two 'primary' and thirteen 'additional' considerations, which the court *must* consider. There is also a 'presumption' in favour of 'shared parental responsibility',⁷⁸ which has been interpreted as displaying a 'legislative intent' in favour of 'substantial involvement of both parents in their children's lives'.⁷⁹ Adding to the confusion is the constitutional restriction on taking into account matters relating to religion, unless the religious practices involve a high degree of 'harm' to children.⁸⁰ As Patrick Parkinson argues, the legislation involves deliberate attempts to influence the orders that courts make, and 'the judicial role requires deference to community values as expressed in the enactments of parliament even when these differ from the judge's own values and sympathies.'⁸¹ Family consultants, not having legal expertise, may unknowingly place their values ahead of the aims of the legislation and make recommendations that may conflict with the orders that the legislative provisions support.

The potential for recommendations to conflict with the legislation is particularly acute in Australia, due to the complexity of the legislation. The Chief Justice of the Family Court, Diana Bryant CJ, stated that the parenting provisions of the *Family Law Act* 'have been described as labyrinthine.'⁸² Both Richard Chisholm, a former judge, and Zoe Rathus have also criticised the complexity of the Act.⁸³ A particularly complex 'primary consideration' emphasises the 'benefit' to a child of having a meaningful relationship with both parents.⁸⁴ Courts have, overwhelmingly, interpreted this in an 'evaluative' manner, whereby the court has to establish whether there is some 'benefit' that would be achieved by both parents having meaningful relationships with the child.⁸⁵ Once it is established that there is *some* benefit to the child in having a meaningful relationship with both parents, this benefit is given more weight than other considerations because it is a primary consideration.⁸⁶ It is unlikely that an expert, without legal training, would go through this same process when deciding what is best for a child. Nor would they be likely to go through the process of 'presuming' that equal shared parental responsibility is

⁷⁸ FLA s 61DA(1).

⁷⁹ *Goode and Goode* [2006] FamCA 1346 (15 December 2006) [72].

⁸⁰ See Constitution s 116; *In the Marriage of Paisio (No. 2)* (1978) Fam LR 283, 284; Louise Thornwaite, 'Separatist Religious Sects, The Family Law Act and Shared Parenting: An Examination of Cases Involving the Exclusive Brethren' (2011) 25 *Australian Journal of Family Law* 54, 67-68.

⁸¹ Patrick Parkinson, 'The Values of Parliament and the Best Interests of Children – A Response to Professor Chisholm' 21 *Australian Journal of Family Law* 213, 213.

⁸² Diana Bryant, 'Foreword' in Robert Glade-Wright, *The Family Law Book* (Family Law Book Pty Ltd., 2009) i, i.

⁸³ Richard Chisholm, 'Simplifying the Family Law Act: Saying Less, and Saying it Better' (2011) 21 *Australian Family Lawyer* 11, 11; Zoe Rathus, 'How Judicial Officers are Applying New Part VII of the Family Law Act' (2008) 20 *Australian Family Lawyer* 5, 5.

⁸⁴ FLA s 60CC(2)(a).

⁸⁵ *McCall & Clarke* [2009] FamCA 92 (29 May 2009) [117]; *Cave v Cave* [2007] FamCA 860 (23 August 2007) [101]; *Champess v Hanson* [2009] FamCAFC (3 June 2009) [103].

⁸⁶ *Marsden v Winch (No 3)* [2007] FamCA 1364 (21 November 2007) [78].

in a child's best interests,⁸⁷ considering all the s 60CC considerations, or considering the constitutional limitation on the consideration of certain religious matters.⁸⁸ However, if they do not undertake such a process, their recommendations on what is 'best' for a child are likely to differ from those intended by the legislation. Hence, the complexity of the legislation makes it particularly likely that its directions will conflict with recommendations by family consultants.

The level of opposition to certain legislative provisions, especially within expert communities, further increases the likelihood that these recommendations will conflict with the legislation. In particular, the emphasis on shared parental responsibility⁸⁹ and on the benefit of having a meaningful relationship with both parents,⁹⁰ has provoked considerable acrimony.⁹¹ Both Zoe Rathus and Betty Batagol have strongly criticised the legislative presumption in favour of shared parental responsibility as 'opposing' research.⁹² Additionally, the emphasis on the 'benefits' flowing from having a meaningful relationship with both parents opposes the recommendations of high profile psychologists. For instance, Joseph Goldstein, Anna Freud and Albert Solnit argued that, usually, a court should simply choose the parent who is the 'psychological parent' and give sole custody to them.⁹³ By emphasising the role of both parents in a child's upbringing, the legislation opposes this approach. Recommendations from experts who espouse these views are, therefore, likely to conflict with the orders that the values implicit in the legislation support. Therefore, the level of opposition to the legislation increases the likelihood that recommendations by family consultants will conflict with the legislation.

(c) *Institutionalising Expert Biases*

A final and related disadvantage of recommendations is that they risk institutionalising the biases of expert communities within the court system. One likely bias is that in favour of 'normality'.⁹⁴ Concern that psychologists impose their own ideas of 'normality' upon society has been voiced by numerous commentators.⁹⁵ The emphasis on normality has, in the past, led to the labelling of homosexuality as a 'sociopathic personality disturbance'.⁹⁶

⁸⁷ FLA s 61DA(1).

⁸⁸ Constitution s 116.

⁸⁹ FLA s 61DA.

⁹⁰ FLA s 60CC(2)(a).

⁹¹ See Zoe Rathus, 'Social Science or 'Lego-Science'? Presumptions, Politics and Parenting and the New Family Law' (2010) 10 *Queensland University of Technology Law and Justice Journal* 164, 179; Betty Batagol, 'A Rebuttable Presumption of Joint Custody: Research vs Ideology in the Battle over our Children' (2003) 28 *Alternative Law Journal* 230; Gavin Howard, 'Shared Parenting at Work – the Reality' (2009) 20 *Australian Family Lawyer* 37.

⁹² Zoe Rathus, above n 91, 165; Batagol, above n 91, 231.

⁹³ Joseph Goldstein, Anna Freud and Albert Solnit, *Beyond the Best Interests of the Child* (The Free Press, 1972) 51-3.

⁹⁴ Lawrence H. Diller, *The Last Normal Child* (Praeger Publishers, 2006) 3; Allan V. Horwitz and Jerome C. Wakefield, *The Loss of Sadness: How Psychiatry Transformed Normal Sorrow into Depressive Disorder* (Oxford University Press, 2007); Christopher Lane, *Shyness: How Normal Behaviour Became a Sickness* (Yale University Press, 2007).

⁹⁵ *Ibid.*

⁹⁶ John Z. Sadler, 'Introduction' in John Z. Sadler (ed), *Descriptions and Prescriptions: Values, Mental Disorders, and the DSMs* (John Hopkins University Press, 2002) 3, 4.

Some claim it has also led to the gradual expansion of classified disorders.⁹⁷ Indeed, a bias in favour of ‘normality’ has been witnessed in cases in the United States on issues of religion. In the case of *Mendez v Mendez*, in the United States, a psychologist gave the following evidence, ‘[L]iving in a society, she needs to adapt to the mainstream of culture ... I believe that being raised as a Jehovah’s Witness would not be in the best interests of the child, given the fact that the principles, the way I understand them, *do not fit in the western way of life in this society*.’⁹⁸ As Wah argues, the values of this expert are clear: it is desirable to be part of the mainstream and undesirable to deviate from the norm.⁹⁹ Whilst such blatantly biased statements may be rare, the emphasis on normality within expert communities makes it likely that such thought processes may underline their recommendations. There are also conflicting concerns about bias within expert communities with respect to ‘gender’. Some theorists suggest that experts are likely to accept the ‘nurture assumption’, by which children are best placed with women, and others suggest that experts are more likely to promote ‘shared parenting’.¹⁰⁰ The provision of recommendations engenders the risk that these biases may become institutionalised within the court system.

Whilst biases also exist within the judicial community, such biases are less concerning because they should be informed by the legislation and they do not appear in the guise of expert opinion. The examples given above regarding religion, and biases in favour of shared parenting, are matters about which the legislation provides guidance.¹⁰¹ Therefore, the ‘bias’ that judges have towards a particular result should be influenced by this legislation. Even so, the legislation clearly does not provide answers for all the value judgments necessary when making a determination for what is best for a child. In such situations judges should clearly state in their reasons what has motivated their decision. In doing so, judges do not misleadingly present their reasons in the guise of ‘expert opinion’. In this way, judicial biases are less concerning than family consultants’ biases, as judge’s values should be informed, at least partly, by the legislation and they are not misrepresented as expert opinions.

(d) Purported Advantages of Family Consultant Recommendations

One purported advantage of the recommendations of experts, that they promote negotiated outcomes, is not likely to be significant within the Australian context. Nicholas Bala, whilst accepting that experts’ recommendations do exceed the boundaries of their expertise, argues that these recommendations, when performed by independent court-appointed experts (such as family consultants), may ‘help procure a settlement’.¹⁰² Bala argues that parties may accept this evaluation and voluntarily turn them into orders, thus

⁹⁷ Lane, above n 94.

⁹⁸ *Mendez v Mendez*, 527 So. 2d 820 (Fla. Dist. Ct. App. 1987), see Record at 9, (No. 84-34049) (emphasis added).

⁹⁹ Wah, above n 26, 335.

¹⁰⁰ Sheldene K. Simola, ‘Differences Among Sexist, Nonsexist, and Feminist Therapies’ (1992) 23 *Professional Psychology: Research and Practice* 397; Martha Fineman, ‘Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making’ (1988) 101 *Harvard Law Review* 727, 70.

¹⁰¹ *Constitution* s 116; *FLA* s 61DA.

¹⁰² Nicholas Bala, ‘Tippins and Wittman Asked the Wrong Question: Evaluators May Not be “Experts”, but They Can Express Best Interests Opinions’ (2005) 43 *Family Court Review* 554, 557.

reducing court costs and delay.¹⁰³ However, this is unlikely to be significant in the Australian context. Firstly, unless certain exceptions apply, parties are already required to undergo family dispute resolution before proceeding to the court.¹⁰⁴ Secondly, family consultants themselves have responsibilities to assist parties in resolving disputes¹⁰⁵ and in ‘assisting and advising people involved in proceedings’.¹⁰⁶ Considering these other ways to promote negotiated outcomes, recommendations by family consultants are unlikely to significantly increase such outcomes.

Meanwhile, the argument that an absence of recommendations will result in judges having less material upon which to base their decisions¹⁰⁷ is overstated and not necessarily undesirable. Another reason Bala argues in favour of court-appointed experts providing recommendations is that if too high a bar is set for expert evidence it will simply leave the court with less evidence, leaving a greater role for the values and opinions of judges.¹⁰⁸ However, this article will argue that there is still a significant amount of evidence that may satisfactorily be provided by family consultants. Moreover, the fact that less evidence is available is not necessarily a bad thing. Rather, it needs to be decided whether it is desirable that the evidence is provided at all. Considering that such recommendations are beyond family consultants’ expertise and implicitly misrepresent the boundaries of their knowledge base, are likely to conflict with the legislation’s values, and institutionalise experts’ biases within the court system, this paper has argued that they should not be provided.

B *Other Forms of Evidence*

It is argued here that these same disadvantages do not apply to evidence provided by family consultants on facts discovered from out-of-court experiences, explanations of research findings, results of evaluations and predicted outcomes by family consultants. These forms of evidence should continue to be provided by family consultants. It should be noted that guidelines are provided to improve these kinds of evidence, including through the provision of detailed judicial directions to family consultants, the provision of clear and conceptual explanations of evidence, the provision of statements by family consultants on the relative confidence they hold in their opinions and through the standardisation of procedures.

1 This Evidence does not Suffer from the Same Weaknesses as Recommendations

Unlike recommendations, evidence of out-of-court experiences, explanations of research findings, evaluations and predictions do not *necessarily* go beyond family consultants’ expertise. As argued in Part 2, these forms of evidence are areas in which family

¹⁰³ Ibid.

¹⁰⁴ The exceptions regard situations involving child abuse or family violence, where a family dispute practitioner thinks it would ‘not be appropriate’, or where parties have already come to an agreement as to parenting arrangements: FLA 60I.

¹⁰⁵ FLA s 11A(c).

¹⁰⁶ FLA s 11A(a).

¹⁰⁷ Bala, above n 102, 565; Lorraine Martin, ‘To Recommend or not to Recommend: That is Not the Question, A Response to Tippins and Wittman’s Article “Empirical and Ethical Problems with Custody Recommendations: a call for Clinical Humility and Judicial Vigilance”’ (2005) 43 *Family Court Review* 246, 250.

¹⁰⁸ Bala, above n 102, 562.

consultants' expertise may assist courts. Unlike recommendations, these forms of evidence do not address the last stage of Rational Choice Theory, which would necessarily place this kind of evidence beyond their expertise.

Nor does this evidence suffer from the same likelihood of conflict with legislative directions as recommendations do. These forms of evidence, when brought together, are designed to enable predictions to be made. A court has a duty to make the best predictions it can so that it may properly make a determination as to what is in the best interests of a child. The legislation does not make predictions for the court that are unable to be rebutted by the type of evidence family consultants may supply.¹⁰⁹ Rather, the legislation is primarily involved in deciding how much value should be attached to outcomes and ensuring the court 'considers' certain matters. For example, there is an emphasis on the 'benefit' of having a meaningful relationship with both parents under the *Family Law Act*,¹¹⁰ so that the court must have special regard for any such 'benefit'. However, the legislation does not prevent the court making a prediction that a child may experience numerous 'positive' outcomes from having close contact with only one parent. Indeed, it does not prevent, or conclusively make, any prediction about what will happen to a child in certain circumstances. This means a prediction, without a statement about the value of the outcome, should not 'contradict' the legislation. Evidence that assists the court in making predictions does not therefore suffer from the same likely conflict with the legislation as recommendations do.

Providing these types of evidence is also not subject to the same risk of institutionalising biases within the court system as is the case with recommendations. The other types of evidence discussed regard objective facts and do not involve making value judgments. For example, predicting that a parent will be violent to a child does not, by itself, make a value judgment as to the importance of this. Since such predictions do not themselves place value on outcomes, they do not engender the same risk of bias stemming from value judgments. This is not to say that other types of bias may not emerge in other evidence given by family consultants. Rather, it is argued that bias may emerge in such evidence and appropriate steps should be taken to address this.

2 Improving the Other Forms of Evidence

Detailed judicial directions may be used to effectively combat anthropic bias arising in these other forms of evidence. Anthropic bias occurs when 'evidence is biased by observation effects'.¹¹¹ Such bias may occur through certain facts being presented without revealing other facts, only performing evaluations on certain people, only presenting certain research findings or only making certain predictions known to the court. An example of anthropic bias is where a family consultant inquires into whether Parent A, but not Parent B, was ever violent towards a child. Courts are still likely to consider it desirable to direct family consultants to report on 'any other matter which the family consultant considers relevant', so as to allow family consultants to note anything the

¹⁰⁹ Whilst there is a 'presumption' under s 61DA(1) of the *Family Law Act*, this is a rebuttable presumption, so evidence can be brought to contradict it.

¹¹⁰ FLA s 60CC(2)(a).

¹¹¹ Nick Bostrom, *Anthropic Bias: Observation Selection Effects in Science and Philosophy* (Routledge, 2001) xiii.

judge may have overlooked.¹¹² Nonetheless, by providing detailed directions to family consultants on what matters family consultants should inquire into, on what areas of research are likely to be useful, what evaluations should be performed, and what predictions may be useful, judges may reduce any anthropic bias by ensuring that certain matters are not ignored.

Clear and conceptual explanations of this evidence are also required, particularly regarding research findings, evaluations and the bases of predictions, in order to reduce judicial confusion surrounding these areas and to allow the judiciary to properly attach weight to evidence. There is a long history of misunderstanding of psychological and other scientific concepts by the judiciary, at times reported by judges themselves.¹¹³ Such misunderstandings are likely to occur without coherent and conceptual explanations of evidence. For instance, the difference between ‘authoritative’ and ‘authoritarian’ parents is highly significant in psychology, but will mean little to judges without a proper explanation of these concepts.¹¹⁴ Transparent and conceptual descriptions of the meaning of research findings, of what evaluations actually measure and of the bases for predictions should be provided to reduce any such confusion. Such transparency also has the advantage of allowing evidence to be critically analysed so that judges may determine the appropriate weight to attach to them.

To further reduce judicial confusion regarding evaluations, there should be some standardisation of procedures used. This would not require that the same evaluations are used in every case, but that evaluations come from a normal set of credible procedures. In the case of *Peters & March*, the court was placed in the awkward position of deciding what weight to attach to a rather novel evaluation, a ‘family sculpture exercise’, where the child drew a picture of their heart and how close family members were to it.¹¹⁵ Considering judges’ lack of knowledge of psychological and experimental constructs,¹¹⁶ it is undesirable that they should assess what weight to attach to this novel experiment. Standardised procedures would enable judges to become more familiar with the set of evaluations and their significance, making it easier for them to know what significance to attach to such evaluations.

Lastly, family consultants should always provide evidence of the relative confidence they have in their evaluations and predictions. In the case of *Parker & Brown* the family consultant admitted that some predictions she made were relatively weak, partly because the tests she administered had certain weaknesses in them.¹¹⁷ By expressing her lack of confidence in such predictions, the consultant better enabled the court to attach weight to them.

¹¹² *Peters & March* [2010] FamCA 151 (16 February 2010) [83].

¹¹³ Andreas Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge University Press, 3rd ed, 2010) 239; Rosemary Sheehan, *Magistrates’ Decision-Making in Child Protection Cases* (Ashgate, 2001) 92; Gatowski, S. I. et al, ‘Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* world’ (2001) 25 *Law and Human Behavior* 433, 440.

¹¹⁴ Bowlby, above n 28; Cassidy and Shaver, above n 28.

¹¹⁵ *Peters & March* [2010] FamCA 151 [193].

¹¹⁶ Sheehan, above n 113, 92.

¹¹⁷ *Parker v Brown* [2010] FMCAfam 911 (23 March 2010), [76].

V CONCLUSIONS

The structure of Rational Choice Theory may be used to assess what forms of knowledge are required to make a decision in a child's best interests, and to assess the abilities of family consultants to provide this knowledge. The first three stages of Rational Choice Theory, discovering the court's options, determining possible outcomes and determining the probability they will occur raise many difficult questions, which family consultants may, nonetheless, assist in answering. Meanwhile, the fourth stage involves a subjective value judgment as to what is best, and is not something family consultants have any special ability in answering.

Guidelines for courts and family consultants may help improve and refine family consultants' evidence. The guidelines in this article seek to ensure that the evidence is as neutral, conceptual and evidence-based as possible, that judicial confusion surrounding it is minimised and that due regard is paid to the role of the legislation. Family consultants should cease to provide recommendations to the court on what orders should be made. Such recommendations are beyond their expertise, implicitly misrepresent the limits of their knowledge, are likely to conflict with legislative directions and threaten to institutionalise the values of expert communities within the court system. Evidence should be limited to fact-finding, explaining research results to the court, performing evaluations and making predictions. Such evidence can be improved by various means, including through the provision of detailed judicial directions, provision of clear and conceptual explanations, standardisation of procedures and expressions of relative confidence in opinions. These guidelines should ensure that experts contribute to the functioning of the court, in a manner befitting their expertise, while showing proper regard to the role of the court in giving effect to the legislation.